

ADDENDUM

Ex. A

Order Denying Government's Stay Motion, Dkt. No. 187 (Nov. 30, 2018)

Ex. B

Memorandum Opinion, Dkt. No. 157 (August 6, 2018)
(as reproduced in Joint Appendix at JA64-97)

Ex. C

Order, Dkt. No. 156 (August 6, 2018)
(as reproduced in Joint Appendix at JA98)

EXHIBIT A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JANE DOE 2, *et al.*,

Plaintiffs

v.

JAMES MATTIS, *et al.*,

Defendants

Civil Action No. 17-1597 (CKK)

ORDER

(November 30, 2018)

Before the Court is Defendants' Motion to Stay the Preliminary Injunction Pending Appeal. Defendants request a stay of the Court's October 30, 2017, preliminary injunction, which prevents Defendants from enforcing a ban on transgender individuals serving in the military. Defendants ask that the stay be granted pending any potential, future proceedings in the United States Supreme Court. Alternatively, at a minimum, Defendants request a stay of the nationwide scope of the injunction pending the outcome of their appeal to the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), in which oral argument will be heard on December 10, 2018. Plaintiffs oppose Defendants' motion on various grounds.

Upon consideration of the pleadings,¹ the relevant legal authorities, and the record as it currently stands, the Court concludes that a stay is not warranted. Defendants have not proven that they are likely to succeed on the merits of their appeal, that they face irreparable harm, that

¹ The Court's consideration has focused on the following documents: Defs.' Mot. to Stay the Preliminary Injunction Pending Appeal [Defs.' Mot.], ECF No. 183; and Pls.' Opp'n to Defs.' Mot. to Stay [Pls.'Opp'n], ECF No. 186. In light of their request for an expedited ruling, Defendants decided to forgo filing a reply brief. Defs.' Mot., ECF No. 183, 12 n.5.

In an exercise of its discretion, the Court finds that holding oral argument in this action would not be of assistance in rendering a decision. *See* LCvR 7(f).

Plaintiffs would not be harmed by a stay, or that public interest favors a stay. Accordingly, Defendants' [183] Motion is DENIED.

I. Background

This is not the first, or even the second, attempt by Defendants to either stay or dissolve the Court's preliminary injunction. On October 30, 2017, the Court granted Plaintiffs a preliminary injunction against the enforcement of a 2017 Presidential Memorandum prohibiting transgender individuals from serving in the military. As is relevant here, the effect of the Court's preliminary injunction was "to revert to the *status quo* with regard to accession and retention that existed before the issuance of the Presidential Memorandum—that is, the retention and accession policies established in a June 30, 2016 Directive-type Memorandum and later modified by Secretary of Defense James Mattis on June 30, 2017." *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 177 (D.D.C. 2017). The policies that Defendants were required to follow allowed for the accession and retention of transgender individuals in the military beginning on January 1, 2018.

Following the Court's issuance of the preliminary injunction, Defendants moved for a partial stay of the preliminary injunction pending appeal. *See* Defs.' Mot. for Partial Stay of Preliminary Injunction Pending Appeal, ECF No. 73. Specifically, Defendants asked the Court to stay the portion of the preliminary injunction which prevented Defendants from indefinitely extending a prohibition against transgender individuals entering the military. The Court refused to grant a stay, finding that the factual record had not changed in any material way since the Court issued the preliminary injunction and that a stay was not otherwise justified. *See generally Doe 1 v. Trump*, No. 17-1597, 2017 WL 6816476 (D.D.C. Dec. 11, 2017).

Defendants next made an emergency motion to the D.C. Circuit for an administrative stay and a partial stay of the preliminary injunction pending appeal. But, Defendants' motion was

denied as the Circuit Court concluded that Defendants had not demonstrated that they had a strong likelihood of success on appeal, that they would face irreparable harm, that the stay would not harm other parties to the proceeding, or that public interest warranted a stay. *See generally Doe I v. Trump*, No. 17-5267, 2017 WL 6553389 (D.C. Cir. Dec. 22, 2017). The Circuit Court reminded Defendants “that all Plaintiffs seek during this litigation is to serve their Nation with honor and dignity, volunteering to face extreme hardships, to endure lengthy deployments and separation from family and friends, and to willingly make the ultimate sacrifice of their lives if necessary to protect the Nation, the people of the United States, and the Constitution against all who would attack them.” *Id.* at *3. Following the decision by the D.C. Circuit, Defendants voluntarily dismissed their appeal of this Court’s preliminary injunction issued on October 30, 2017. *See* USCA Order, ECF No. 79-1.

With the preliminary injunction still in place, the case moved forward with discovery. But, despite Court orders mandating discovery, that discovery remained unfinished in early 2018 because Defendants asserted privileges over a large portion of the documents and information requested by Plaintiffs. In March of 2018, the President issued another Presidential Memorandum revoking his 2017 Presidential Memorandum and any other directives involving transgender military service. Defs.’ Notice, 2018 Presidential Memorandum, ECF No. 95-1, 1. The 2018 memorandum ordered that “[t]he Secretary of Defense, and the Secretary of Homeland Security, with respect to the U.S. Coast Guard, may exercise their authority to implement any appropriate policies concerning military service by transgender individuals.” *Id.* The “appropriate policies” had already been developed and proposed to the President in the form of the Mattis Implementation Plan.

In summary form, the Mattis Implementation Plan implements the 2017 Presidential Memorandum banning transgender individuals from serving in the military. Unlike the 2017 memorandum, the Mattis Implementation Plan purports not to ban all transgender individuals from serving in the military. But, as the Court has previously explained, “the plan effectively implements such a ban by targeting proxies of transgender status, such as ‘gender dysphoria’ and ‘gender transition,’ and by requiring all service members to serve ‘in their biological sex.’” *Doe 2 v. Trump*, 315 F. Supp. 3d 474, 482 (D.D.C. 2018).

Following the development of the Mattis Implementation Plan, Defendants asked that this Court dissolve its preliminary injunction as the implementation plan represented a new policy which did not harm Plaintiffs. *See generally* Defs.’ Mot. to Dissolve the Preliminary Injunction, ECF No. 116. The Court denied Defendants’ motion to dissolve the preliminary injunction. *Doe 2*, 315 F. Supp. 3d at 496-98. The Court found that, although the Mattis Implementation Plan was longer and more detailed, it was not materially different from the 2017 Presidential Memorandum that preceded it in that it effectively prevents military service by transgender individuals. *Id.* at 496-97. Most relevantly, the Mattis Implementation Plan prohibits military service by those with “gender dysphoria” and those who have undergone or require “gender transition,” both of which function as euphemisms for transgender status. *Id.* at 482-83. The plan does allow transgender individuals to serve in the military if they do so in their biological sex. But, given that, by definition, transgender individuals do not identify or live in accord with their biological sex, the Court concluded that “[t]olerating a person with a certain characteristic only on the condition that they renounce that characteristic is the same as not tolerating them at all.” *Id.* at 495. Because the Mattis Implementation Plan fundamentally implemented the 2017

Presidential Memorandum banning transgender military service, the Court concluded that the need for the preliminary injunction remained unchanged.²

After the Court's denial of Defendants' motion to dissolve the preliminary injunction, the parties continued with discovery. The parties' discovery has been consistently plagued by disputes and delays. Plaintiffs completed briefing their motion to compel discovery and Defendants their motions for protective orders on November 13, 2018. Eight days later, Defendants filed this motion, again attempting to stay the Court's preliminary injunction.

Despite the lack of material changes to the factual record, Defendants are again attempting to rid themselves of the Court's preliminary injunction. And, the Court cannot help but question why Defendants have, again, decided to challenge the Court's preliminary injunction at this point in the litigation. The preliminary injunction has been in place for more than a year. Yet, Defendants present no evidence that the Court's preliminary injunction maintaining the status quo of allowing transgender individuals to serve in the military has harmed military readiness. Accordingly, the Court fails to understand why Defendants' need for relief from the Court's preliminary injunction has suddenly become urgent, requiring an expedited ruling. The only apparent justification for Defendants' choice to bring this motion at this time is that Defendants have recently filed a petition for a writ of certiorari in the Supreme Court, asking the Supreme Court to review this Court's preliminary injunction before the D.C. Circuit has had the opportunity to issue a judgment. *See generally* Defs.' Notice of Filing Pet. for Writ of Cert. before Judgment, ECF No. 184. But, that petition would seem to have no bearing on Defendants' decision to file this motion, which is, after all, their third bite at the apple in this

² In a separate Opinion issued that same day, the Court dissolved the preliminary injunction only as to President Trump and dismissed him as a party from the suit. *See Doe 2 v. Trump*, 319 F. Supp. 3d 539, 540 (D.D.C. 2018).

Court. If Defendants are eager to rid themselves of the Court's preliminary injunction, Defendants should note that motions such as this one serve to slow litigation and only increase the time which Defendants must wait for the Court's final decision on the merits.

II. Legal Standard

Upon careful consideration of Defendants' arguments, the Court concludes that a stay of the Court's preliminary injunction is not warranted. "In the D.C. Circuit, a court assesses four factors when considering a motion to stay an injunction pending appeal: (1) the moving party's likelihood of success on the merits of its appeal, (2) whether the moving party will suffer irreparable injury, (3) whether issuance of the stay would substantially harm other parties in the proceeding, and (4) the public interest." *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 12 (D.D.C. 2014) (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). The Court concludes that none of these factors justifies staying the Court's preliminary injunction. Accordingly, Defendants' motion is DENIED.

III. Likelihood of Success on the Merits

The Court begins with the main focus of Defendants' motion: that they are likely to succeed on the merits of their appeal. Defendants have two main arguments as to why they are likely to succeed on appeal. First, Defendants argue that Plaintiffs' constitutional challenges lack merit. Second, Defendants contend that the nationwide scope of the Court's preliminary injunction is improper. The Court concludes that neither argument is persuasive.

A. Constitutional Merit of Plaintiffs' Claims

First, Defendants claim that they are likely to succeed on the merits of their appeal because Plaintiffs' constitutional challenges lack merit. Specifically, Defendants contend that the

Mattis Implementation Plan turns on a medical condition, gender dysphoria, and its treatment, gender transition, not on any suspect classification such as transgender status or gender.

Accordingly, Defendants argue that rational basis review applies, and the policy satisfies that deferential review because it reflects the military's reasoned judgment. *See* Defs.' Mot., ECF No. 183, 5.

Unsurprisingly, the Court does not agree with Defendants that Plaintiffs' constitutional challenges lack merit. As the Court has previously found, the Mattis Implementation Plan, like the 2017 Presidential Memorandum which preceded it, functionally prevents transgender individuals from serving in the military. *See Doe 2*, 315 F. Supp. 3d at 492-96. Because the Mattis Implementation Plan functions as a class-wide ban based on a protected status, the Court's initial conclusion that Plaintiffs are likely to succeed on their Fifth Amendment claims remains unchanged by the development of the Mattis Implementation Plan. *See Doe 1*, 275 F. Supp. 3d at 208-211 (explaining that the ban discriminates on the basis of transgender status, which is likely a quasi-suspect classification, and gender, which is subject to intermediate scrutiny).

The Court concludes for three reasons that the Mattis Implementation Plan does not change the Court's initial assessment that Plaintiffs are likely to succeed on their constitutional claims. First, the 2017 Presidential Memorandum ordered that a plan to implement a policy prohibiting transgender military service be submitted by February 2018. Second, in the months following the issuance of the 2017 Presidential Memorandum, Department of Defense officials repeatedly stated that they were preparing such an implementation plan based on the President's policy directive. And third, the Mattis Implementation Plan was provided to the President in February 2018, and it in fact prohibits transgender military service.

The 2017 Presidential Memorandum directed the Department of Defense to submit, by February 2018, a plan to *implement* the President’s policy directive banning transgender individuals from serving in the military. The 2017 Presidential Memorandum ordered the Secretary of Defense to prepare an “implementation plan” that was circumscribed to suggestions about how to “implement a policy under which transgender accession is *prohibited*, and discharge of transgender service members is *authorized*.” *Doe 1*, 275 F. Supp. 3d at 195; *see also* 2017 Presidential Memorandum, ECF No. 34-1 (instructing the Secretaries of Defense and Homeland Security to “submit to [the President] a plan for implementing both the general policy ... and the specific directives set forth in ... this memorandum”). The memorandum did not ask for the submission of a new policy on transgender service. And the memorandum did not ask for an independent reexamination of whether or not transgender military service should be permitted. *See Karnoski v. Trump*, No. C17-1297, 2018 WL 1784464, at *6 (W.D. Wash. Apr. 13, 2018) (“The 2017 Memorandum did not direct Secretary Mattis to determine *whether* or not the directives should be implemented, but instead ordered the directives to be implemented by specific dates and requested a plan for *how* to do so.” (emphasis in original)). The 2017 Presidential Memorandum simply asked the Department of Defense to submit an implementation plan for carrying out a predetermined objective—banning transgender individuals from serving or joining the military.

Second, the actions and statements of Secretary Mattis, and the Department of Defense generally, preceding the Mattis Implementation Plan indicate that the plan was being developed to *implement* President Trump’s 2017 policy directives, not to examine, question, or possibly amend those directives. On August 29, 2017, Secretary Mattis issued a statement on “Military Service by Transgender Individuals.” Milgroom Decl., ECF No. 128, Ex U. It is clear from the

title of the statement that it pertained to service by transgender individuals, not just those with gender dysphoria or those who had undergone or planned to undergo gender transition. In the statement, Secretary Mattis made clear that the Department of Defense had “received the [2017] Presidential Memorandum” and would “carry out the president’s policy direction.” *Id.* He further stated that he would establish a panel of experts not to decide whether or not transgender individuals should be permitted to serve, but instead simply “to provide advice and recommendations on the *implementation of the president’s direction.*” *Id.* (emphasis added). Following the panel report and consultation with the Department of Homeland Security, Secretary Mattis indicated that he would “provide [his] advice to the president concerning *implementation of his policy direction.*” *Id.* (emphasis added); *see also Doe 1*, 2017 WL 6553389, at *2 (noting that “the Secretary’s August 29, 2017 statement makes clear that his actions are being undertaken to ‘carry out the president’s policy direction’”).

Secretary Mattis made similar statements in a September 14, 2017 memorandum entitled, “Military Service by Transgender Individuals – Interim Guidance.” Milgroom Decl., ECF No. 128, Ex W. Again, by its very name, this memorandum concerned transgender military service, not just service by those with gender dysphoria or those who had undergone or planned to undergo gender transition. In the memorandum, Secretary Mattis again stated that he would present the President with a “plan to *implement the policy and directives* in the [2017] Presidential Memorandum.” *Id.* at 1 (emphasis added). The Interim Guidance also explained that the Department of Defense would “*carry out the President’s policy and directives*” and would “*comply with the [2017] Presidential Memorandum.*” *Id.* (emphasis added). A separate document issued that same day directing the implementation process stated that Secretary Mattis had convened a panel to “develop[] an Implementation Plan on military service by transgender

individuals, *to effect the policy and directives of the [2017] Presidential Memorandum.*”

Milgroom Decl., ECF No. 128, Ex. X, at 1 (emphasis added). That document further acknowledged that the Department was required to “return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016,” that is, the general prohibition on transgender military service. *Id.* at 2. Because the Department had been “direct[ed]” by the 2017 Presidential Memorandum to prohibit accession by transgender individuals, Secretary Mattis asked the panel of experts merely to recommend “guidelines” which would “reflect currently accepted medical terminology.” *Id.*

Third, and most importantly, the Mattis Implementation Plan in fact prohibits transgender military service—just as was ordered in the 2017 Presidential Memorandum. While the plan takes a slightly less direct approach to accomplishing this goal than the 2017 Presidential Memorandum, the result is the same. Instead of expressly banning all transgender individuals from military service as did the 2017 memorandum, the Mattis Implementation Plan works by absolutely disqualifying individuals who require or have undergone gender transition, generally disqualifying individuals with a history or diagnosis of gender dysphoria, and, to the extent that there are any individuals who identify as “transgender” but do not fall under the first two categories, only allowing them to serve “in their biological sex.” This means that openly transgender persons are generally not allowed to serve in conformance with their gender identity. *See Karnoski*, 2018 WL 1784464, at *6 (“Requiring transgender people to serve in their ‘biological sex’ does not constitute ‘open’ service in any meaningful way, and cannot reasonably be considered an ‘exception’ to the Ban. Rather, it would force transgender service members to suppress the very characteristic that defines them as transgender in the first place.”).

For the reasons discussed above, the Court’s original analysis concluding that Plaintiffs are entitled to a preliminary injunction as they are likely to succeed on the merits of their constitutional claims remains unchanged by the Mattis Implementation Plan. As the Court has previously explained, the ban on military service by transgender individuals likely violates Plaintiffs’ Fifth Amendment rights based on a number of factors, “including the sheer breadth of the exclusion . . . , the unusual circumstances surrounding the President’s announcement of [the exclusion], the fact that the reasons given for [the exclusion] do not appear to be supported by any facts, and the recent rejection of those reasons by the military itself.” *Doe I*, 275 F. Supp. 3d at 176. Accordingly, the Court is not persuaded by Defendants’ claim that they are likely to succeed on the merits of their appeal because Plaintiffs’ constitutional challenges lack merit.

B. Nationwide Scope of the Preliminary Injunction

The Court next turns to Defendants’ second argument as to why they are likely to succeed on the merits of their appeal—the nationwide scope of the preliminary injunction is improper. Defendants argue that the scope of the Court’s nationwide preliminary injunction transgresses both equitable principles and Article III standing principles by granting broader relief than is necessary to redress Plaintiffs’ injuries. For the reasons discussed below, neither argument convinces the Court that a more limited injunction is appropriate given the circumstances of this case.

In *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), the D.C. Circuit upheld the use of systemwide injunctions when the circumstances warrant them. The D.C. Circuit explained that “[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that the application to the individual petitioners is proscribed.” *Nat’l Mining*

Ass'n, 145 F.3d at 1409 (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)). The Court went on to explain that in circumstances where a plaintiff is injured by a rule of broad applicability, “a single plaintiff, so long as he is injured by the rule, may obtain ‘programmatic’ relief that affects the rights of parties not before the court.” *Id.* (quoting *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 913 (1990) (Blackmun, J., dissenting)). Here, Plaintiffs were injured by a rule of broad applicability, so the Court acted properly in granting systemwide relief, even if that relief has the consequence of protecting the rights of other transgender individuals not before the Court.

In addition to the D.C. Circuit, the Supreme Court has also explained that “if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is ‘proper.’” *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 333 (2010)). Here, the arguments and the evidence have shown that Plaintiffs are likely to succeed on the merits of their claim that Defendants’ plan is unconstitutional on its face. Accordingly, a preliminary injunction prohibiting its enforcement “across the board” is proper. *Id.* In other words, under Defendants’ plan, transgender individuals are barred from military service based on their inclusion in a certain class, regardless of whether or not a particular transgender individual exhibits combat-readiness, thus creating a “systemwide impact.” *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 420 (1977). In these circumstances, a “systemwide remedy” is the appropriate remedy. *Id.*

Accordingly, there is support from both the D.C. Circuit and the Supreme Court for systemwide injunctions when appropriate. And, these systemwide remedies play an important role in modern litigation. The D.C. Circuit has explained that systemwide injunctions can prevent

a “flood of duplicative litigation” by allowing similarly situated non-party individuals to benefit from an injunction rather than filing separate actions for similar relief. *Nat’l Mining Assoc.*, 145 F.3d at 1409. Contrary to Defendants’ argument, nationwide injunctions do not “deprive[] other courts ... of [offering] different perspectives on important questions.” Defs.’ Mot., ECF No. 183, 10. Other courts are not bound by this Court’s grant of injunctive relief as is shown by the fact that there are multiple challenges to Defendants’ plan independently percolating in multiple courts in multiple circuits across the country. *But see United States v. Mendoza*, 464 U.S. 154, 158 (1984) (explaining how nonmutual issue preclusion can limit the development of the law because the decision is “conclusive in a subsequent suit”). The Court also notes that Defendants’ argument that nationwide injunctions undercut class actions is unpersuasive as nationwide injunctions are proper, and sometimes necessary, in circumstances where class certification may be impossible. As such, it is not for this Court to question whether or not systemwide injunctions are a modern aberration unmoored to the principles of equity, as Defendants argue. This Court is not persuaded to go out on a legal limb and condemn the use of a remedy that has been sanctioned by the D.C. Circuit as well as the Supreme Court.

Despite the cases discussed above, Defendants argue that the Court’s nationwide preliminary injunction violates the rules of equity by granting relief broader than that necessary to prevent harm to Plaintiffs. Defendants cite *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), for the proposition that Plaintiffs cannot seek an injunction to prevent harm to others. Defs.’ Mot., ECF No. 183, 9. In *Monsanto*, the district court had granted a nationwide injunction preventing the future planting of genetically altered alfalfa plants. 561 U.S. at 144. The Supreme Court decided that such broad injunctive relief was improper because the plaintiffs had not shown that they, as opposed to other farmers, would be injured if the genetically altered

crops were planted at sufficient distances from the plaintiffs' farms. *Id.* at 163-64. The Court concluded that the potential injury to other farmers, whose farms may be closer to the genetically altered crops, could not support the breadth of the injunction. *Id.*

The *Monsanto* case is easily distinguishable from the case before the Court. Here, Plaintiffs sought to enjoin Defendants' ban on transgender individuals serving in the military on the grounds that the ban would injure them. The fact that the preliminary injunction also benefits other transgender individuals who are not a party to this suit does not render the scope of the preliminary injunction improper. The "scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Here, Plaintiffs have established a likelihood of success on their claim that Defendants' plan constitutes a systemwide violation of their rights. Accordingly, the systemwide scope of the Court's preliminary injunction is appropriate.

Continuing with their argument that systemwide relief is not appropriate, Defendants also cite *United States Department of Defense v. Meinhold*, 510 U.S. 939 (1993). Defs.' Mot., ECF No. 183, 1. In *Meinhold*, the Supreme Court stayed a nationwide injunction against another military policy to the extent that it swept beyond the parties to the case. 510 U.S. at 939. But, the entirety of the *Meinhold* opinion is four sentences. And, while the Supreme Court did stay the district court's injunction insofar as it granted relief to persons other than the plaintiff, the Court provided no reasoning for granting the stay which would apply to this case. *Id.*

Moreover, the facts of *Meinhold*, as explained in greater detail by the Ninth Circuit, lead the Court to conclude that a stay would be improper here. In *Meinhold*, a gay man challenged his discharge from the military, and the challenge turned on the particular facts of his case. *See Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1479 (9th Cir. 1994) (discussing the "effect of the

regulation as applied in Meinhold’s case”). The plaintiff had been discharged from the military after he stated on television that he was gay. He sued the Department of Defense, arguing that it was unlawful to dismiss him based on his statement alone without any evidence that he had actually engaged in homosexual conduct. *Id.* at 1437. Because the plaintiff “sought only to have his discharge voided and to be reinstated,” an injunction applying only to him was sufficient. *Id.* at 1480.

That is not the case here. Plaintiffs are clearly making a facial challenge to the Mattis Implementation Plan. Plaintiffs argue that Defendants’ plan is constitutionally infirm regardless of how it is applied. Accordingly, an injunction as applied to only Plaintiffs would not provide Plaintiffs with effective relief.

In fact, a nationwide preliminary injunction is the only way to address fully Plaintiffs’ constitutional injury. As will be discussed further below, if the Mattis Implementation Plan goes into effect, Plaintiffs will be injured even if the plan remains enjoined as to them and they are permitted to continue their service. *See Infra* Part V. For, if the plan goes into effect with its application enjoined only as to Plaintiffs, Plaintiffs would be singled out as an inherently inferior class of service members, allowed to continue serving only by the Court’s limited order and despite the claimed vociferous objections of the military itself. Accordingly, an injunction limited to Plaintiffs would not address the core class-based injury that the ban inflicts on Plaintiffs, nor would it afford them complete relief. *See Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (explaining that equitable principles support an injunction “necessary to provide complete relief to the plaintiff” (quoting *Califano*, 442 U.S. at 702)).

Moving on from their equitable arguments, Defendants also argue that the Court’s injunction is improper because it infringes on standing principles by affording relief which is not

necessary to prevent injury to the Plaintiffs. Defendants do not argue that Plaintiffs lack standing for an injunction as applied to them. Instead, Defendants argue that Plaintiffs' standing in this case does not entitle them to a systemwide injunction. Defendants primarily rely on three cases for the proposition that Plaintiffs' standing in this suit does not warrant a systemwide injunction. But, the Court concludes that Defendants' reliance on these three cases is misplaced.

First, Defendants cite *Lewis v. Casey*, 518 U.S. 343 (1996), for the proposition that an injunction is invalid if it affords relief that is unnecessary to prevent cognizable injury to the plaintiff himself. Defs.' Mot., ECF No. 183, 6-7. In *Casey*, the district court granted injunctive relief mandating detailed, systemwide changes to the Arizona Department of Corrections' prison law libraries and legal assistance programs. The Supreme Court concluded that the district court had erred in granting such broad relief. *Casey*, 518 U.S. at 346-49. Defendants use *Casey* to argue that this Court has also erred by granting broad, systemwide relief.

But, the Court finds that *Casey* is easily distinguishable from this case. In *Casey*, the district court found actual injury on the part of only one plaintiff and the cause of that injury was one facility's failure to provide special legal services in light of that plaintiff's illiteracy. *Id.* at 358. Despite this limited injury, the district court ordered sweeping, systemwide changes to all facilities controlled by the Arizona Department of Corrections. *Id.* at 347. In reviewing the scope of the injunctive relief, the Court asked: "[w]as that inadequacy widespread enough to justify systemwide relief?" *Id.* at 359. The Court concluded that the inadequacy was not widespread enough as the district court had made no finding that, in general, "in Arizona prisons illiterate prisoners cannot obtain the minimal help necessary to file particular claims that they wish to bring before the courts." *Id.* at 360.

If this Court were to ask itself the question posed in *Casey*—“[w]as that [claimed violation] widespread enough to justify systemwide relief?”— the answer is clearly yes. *Id.* at 359. This is not a case where one transgender individual was prevented from serving in the military based on the decision of a military person of a higher rank or a single superior officer. Instead, the Court is presented with a systemwide policy banning nearly all transgender individuals from serving in the military in any capacity. As the Supreme Court has explained, “only if there has been a systemwide impact may there be a systemwide remedy.” *Brinkman*, 433 U.S. at 420. Given the systemwide impact of Defendants’ plan, a systemwide remedy in the form of the Court’s nationwide preliminary injunction is appropriate.

Defendants next cite two Supreme Court cases for the principle that “where a plaintiff faces actual or imminent injury at the outset of a suit but that injury is subsequently redressed or otherwise becomes moot, the plaintiff no longer can seek injunctive relief to redress alleged harms to anyone else.” Defs.’ Mot., ECF No. 183, 7. In *Alvarez v. Smith*, 558 U.S. 87 (2009), the Court held that the plaintiffs could no longer seek declaratory or injunctive relief against the State’s procedure for seizing vehicles and money after the State had returned some of the property and the plaintiffs forfeited their claim to the rest of it. 558 U.S. at 92-93. After all claims had been settled, the plaintiffs could not continue to dispute the lawfulness of the State’s procedure because “the dispute [was] no longer embedded in any actual controversy about the plaintiffs’ particular legal rights.” *Id.* at 93. Similarly, in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), the Supreme Court held that a plaintiff lacked standing to enjoin certain Forest Service regulations after the parties had settled their dispute regarding the application of those regulations to the specific project that had caused the plaintiff’s injuries. 555 U.S. at 494-97. The Court concluded that once the plaintiff had settled the claim which caused his specific harm, that

plaintiff no longer had standing to challenge the basis for the original disputed action. *Id.* at 496-97.

Based on these two cases, Defendants argue that Plaintiffs' only injury, being banned from military service, has been remedied by the Court's preliminary injunction barring implementation of the challenged policy. Because Plaintiffs' injury has been relieved, Defendants contend that Plaintiffs lack standing to support a nationwide preliminary injunction.

The Court is far from convinced by Defendants' argument. In both *Alvarez* and *Summers*, the plaintiffs lost standing once they had permanently settled their original disputes, thus providing a remedy for their claimed injuries. That is not the case here. Defendants do not claim that they have decided to permit Plaintiffs to serve in the military as transgender service members. Accordingly, unlike in *Alvarez* and *Summers*, Plaintiffs' claimed injury has not been permanently remedied. Plaintiffs have received a temporary reprieve from their injury, but only because the Court granted Plaintiffs' motion for a preliminary injunction in this case. And, Defendants have been unceasing in their attempts to lift this Court's preliminary injunction so that they can move forward with the Mattis Implementation Plan.

Moreover, Defendants' argument is circular. Defendants contend that Plaintiffs lack standing because they are no longer being injured due to the Court's preliminary injunction. Accordingly, the preliminary injunction should be lifted. At which point, Plaintiffs will again face a cognizable injury, have standing, and be entitled to a preliminary injunction. That Plaintiffs are not being harmed so long as the Court's preliminary injunction is in place, of course, does not deprive Plaintiffs of their standing. To assess Plaintiffs' standing, the Court considers whether Plaintiffs would be harmed if the preliminary injunction were lifted and Defendants' plan allowed to go into effect. And, the Court has already determined that such a

sequence of events would harm Plaintiffs. *See Doe 2*, 315 F. Supp. 3d at 485-92. Accordingly, Plaintiffs have standing to support the Court's preliminary injunction.

The Court stresses that Plaintiffs' standing supports not only a preliminary injunction as to Plaintiffs, but also a systemwide preliminary injunction. If the Court were to stay the nationwide scope of its preliminary injunction, Plaintiffs would be injured even if they were permitted to continue serving in the military. Defendants' plan injures Plaintiffs not just by prohibiting their military service, but, as importantly, it also injures Plaintiffs by stigmatizing them as an inferior class of service member whose military service is not condoned by the military and is only begrudgingly permitted by force of court order. Staying the nationwide scope of the Court's preliminary injunction would sanction the stigma created by the ban, thus injuring Plaintiffs even if the preliminary injunction were still in effect as to them. *See Infra* Part V. Accordingly, the class-based injury that Defendants' plan inflicts on Plaintiffs gives Plaintiffs standing to support a systemwide preliminary injunction.

The Court finds that Defendants have not shown a likelihood that they will succeed on the merits of their appeal. Plaintiffs' constitutional challenges have merit as the Mattis Implementation Plan functions as a ban on transgender individuals serving in the military. Additionally, the systemwide scope of the Court's preliminary injunction is proper as the alleged violation is also systemwide. Accordingly, this factor does not weigh in favor of staying the Court's preliminary injunction.

IV. Irreparable Harm

Defendants also argue that they will be irreparably harmed if the Court's preliminary injunction remains in place. Specifically, Defendants argue that the Court's nationwide injunction forces the Department of Defense to maintain a policy of allowing military service by

transgender individuals that it has determined poses “substantial risks” and threatens to “undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.” Defs.’ Mot., ECF No. 138, 10-11 (quoting Memorandum for the President, ECF No. 96-1, 2).

Defendants previously made the same argument to the Court when asking the Court to dissolve its preliminary injunction. Defendants have provided no new support for their conclusory statements, and there have been no changes to the factual record. The Court finds the lack of support especially concerning given that the preliminary injunction has been in place for over a year. If the preliminary injunction were causing the military irreparable harm, the Court assumes that Defendants would have presented the Court with evidence of such harm by now.

For many of the reasons that have previously been given, the Court is not convinced that Defendants will be irreparably harmed in the absence of a stay. Defendants fail to acknowledge the considerable amount of time they spent preparing for the safe and orderly accession and retention of transgender individuals in the military. The directive from the Secretary of Defense requiring the military to prepare to begin allowing the accession and retention of transgender individuals was issued on June 30, 2016—nearly two and a half years ago. For more than a year preceding the summer of 2017, it was the policy and intention of the military that transgender individuals would openly serve in the military. Moreover, this Court issued its preliminary injunction over one year ago, and since then transgender individuals have been permitted to openly serve in the military.

Additionally, Plaintiffs have previously provided the Court with evidence of the considerable work done by the military to ensure that openly transgender individuals would be able to serve successfully in the military. Plaintiffs previously submitted the declaration of Dr.

George Richard Brown, who was part of the military's training program for the implementation of its policy allowing transgender individuals to openly serve. Dr. Brown stated that he "trained approximately 250 medical personnel working in Military Entrance Processing Stations (MEPS) throughout the military." Decl. of George Richard Brown, MD, DFAPA, ECF No. 74-1, ¶ 5. Plaintiffs also submitted the declaration of former Secretary of the Navy Raymond Edwin Mabus, Jr., who stated that nearly two years ago "the Services had already completed almost all of the necessary preparation for lifting the accession ban." *See* Decl. of Raymond Edwin Mabus, Jr., ECF No. 74-2, ¶ 3. The record also shows that the Acting Under Secretary of Defense for Personnel and Readiness, Peter Levine, published an "implementation handbook" in 2016 entitled "Transgender Service in the U.S. Military." Decl. of Raymond Edwin Mabus, Jr., ECF No. 13-10, Ex. F. That document is a lengthy, exhaustive "handbook [] designed to assist our transgender Service members in their gender transition, help commanders with their duties and responsibilities, and help all Service members understand new policies enabling the open service of transgender Service members." *Id.* at 8.

It is also important to note that, under the Court's preliminary injunction, while transgender individuals are permitted to serve in the military, they are "subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability, and retention." Decl. of Raymond Edwin Mabus, Jr., ECF No. 13-10, Ex. C. Only those transgender individuals who meet the combat-readiness standards that all non-transgender service members must meet will be permitted to serve in the military. Accordingly, the Court's preliminary injunction simply prohibits the military from refusing to allow an otherwise combat-ready individual to serve based on that individual's transgender status.

Considering the amount of forethought, research, and planning that went into preparing for the accession and retention of transgender individuals, the Court concludes that Defendants will not face irreparable harm by following a plan that was developed by the military itself. The apparent lack of harm that Defendants have faced from the Court's preliminary injunction maintaining the status quo over the last year buttresses the Court's conclusion that Defendants are unlikely to face irreparable harm if the status quo continues until the Court has reached a final decision on the merits.

In fact, the Court finds that Defendants could potentially face greater harm if the stay was granted. Prior to the 2017 Presidential Memorandum, the military intended to allow transgender individuals to serve in the military. And, under the Court's preliminary injunction, transgender individuals have been openly serving in the military for the past year. If the Court's preliminary injunction was stayed, Defendants would likely move forward with their plan to prohibit transgender individuals from serving in the military. But, if Defendants' plan were later found unconstitutional on the merits, the military would be forced, again, to allow transgender individuals to serve. Such volatility and instability in the makeup of the military cannot benefit Defendants. The Court finds that the need for security and stasis in the composition of the military is especially salient given that our country is facing an extended period of war and requires the service of a great number of men and women who will volunteer to make the sacrifices required to serve their country.

Finally, Defendants argue that "this case and others involving constitutional challenges to [the Department of Defense's] new policy illustrate the distinct harms to the Government from nationwide injunctions." Defs.' Mot., ECF No. 183, 11. Defendants complain that they are currently subject to four different nationwide preliminary injunctions, meaning that even if this

Court were to stay its preliminary injunction, Defendants would have to continue their legal battle in three other district courts. *See Karnoski v. Trump*, No. 18-35347 (Western District of Washington); *Stockman v. Trump*, No. 18-56539 (Central District of California); *Stone v. Trump*, No. 17-2459 (District of Maryland). The Court interprets this deluge of nationwide preliminary injunctions differently than Defendants. Rather than proving that nationwide injunctions irreparably harm Defendants, the fact that multiple courts have independently determined that Plaintiffs are entitled to a preliminary injunction only makes the Court more confident in its original assessment that a nationwide preliminary injunction is proper and warranted in these circumstances.

In sum, having carefully considered all of the evidence before it, the Court is not persuaded that Defendants will be irreparably harmed by the Court's preliminary injunction maintaining the status quo, pending a decision on the merits of this case.

V. Harm to Plaintiffs

Defendants make no new argument regarding whether or not Plaintiffs would be harmed by staying the Court's preliminary injunction. The only mention of harm to Plaintiffs in Defendants' motion states: "[g]iven this severe harm to the federal government—which far outweighs Plaintiffs' speculative claims of injury—this Court should stay the injunction in its entirety." Defs.' Mot., ECF No. 183, 11. Defendants' cursory assessment that Plaintiffs' harm is "speculative" and outweighed by Defendants' harm is not persuasive to the Court.

As the Court has previously explained, if the Mattis Implementation Plan were allowed to go into effect, "individuals who require or have undergone gender transition would be absolutely disqualified from military service, individuals with a history or diagnosis of gender dysphoria would be largely disqualified from military service, and, to the extent that there are any

individuals who identify as ‘transgender’ but do not fall under the first two categories, they would be allowed [to] serve, but only ‘in their biological sex’ (which means that openly transgender persons would generally not be allowed to serve in conformance with their identity).” *Doe 2*, 315 F. Supp. 3d at 486. Accordingly, Plaintiffs, who include current service members with diagnoses of gender dysphoria who have either transitioned or have begun to transition, prospective service members who have undergone transition, and a current service member who does not yet have a diagnosis of gender dysphoria, would be harmed by the implementation of this plan.

For purposes of this opinion, the Court can assume that some of the Plaintiffs would fall under the protection of the plan’s “grandfather provision” which allows continued service by service members diagnosed with gender dysphoria after the previous administration’s policy allowing service by transgender individuals took effect but prior to the implementation of Defendants’ plan. But, the Court concludes that even those Plaintiffs who fall under the protection of the grandfather provision would be harmed by the implementation of the plan. The Mattis Implementation Plan singles out transgender service members “from all other service members and marks them as categorically unfit for military service. ... It sends the message to their fellow service members and superiors that they cannot function in their respective positions. That they are mentally unstable. That their presence in the military is incompatible with military readiness, unit cohesion, good order, and discipline. In sum, it is an express statement that these individuals’ very presence makes the military weaker and less combat-ready.” *Id.* at 486. By singling out and stigmatizing transgender service members as inherently different and inferior, the Mattis Implementation Plan harms even those transgender service members who may be allowed to continue serving their country. *See Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (“If

protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.”).

For this same reason, Plaintiffs would be harmed if the Court were to stay the nationwide scope of the preliminary injunction but leave the injunction in effect only as to Plaintiffs. Defendants’ plan stigmatizes transgender service members as an inferior class of service member. If the plan goes into effect, this stigmatic injury would harm Plaintiffs even if they were permitted to continue serving their country.

Accordingly, the Court finds that Plaintiffs would face a grave harm if the Court stayed its preliminary injunction.

VI. Public Interest

Finally, Defendants argue that “[e]very day that these injunctions remain in effect causes harm to the Government and the public.” Defs.’ Mot., ECF No. 183, 12. Defendants’ one-sentence argument about the “public” echoes their argument regarding irreparable harm based on the military’s need for combat-readiness. That argument has already been rejected above. *See Supra* Part IV.

The Court concludes that the public interest favors preliminary injunctive relief in this case. Without supporting evidence, Defendants’ bare assertion that the Court’s injunction poses a threat to military readiness is insufficient to overcome the public interest in ensuring that the government does not engage in unconstitutional and discriminatory conduct. *See Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (noting that “enforcement of an unconstitutional law is always contrary to the public interest”). After all, “it must be remembered that all Plaintiffs seek during this litigation is to serve their nation with honor and dignity, volunteering to face

EXHIBIT B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JANE DOE 2, *et al.*,

Plaintiffs

v.

DONALD J. TRUMP, *et al.*,

Defendants

Civil Action No. 17-1597 (CKK)

MEMORANDUM OPINION

(August 6, 2018)

On July 26, 2017, President Donald J. Trump issued a statement via Twitter announcing that “the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military.” A formal Presidential Memorandum followed on August 25, 2017. Before the 2017 Presidential Memorandum, the Department of Defense had announced that openly transgender individuals would be allowed to enlist in the military, effective January 1, 2018, and had prohibited the discharge of service members based solely on their gender identities. The 2017 Presidential Memorandum reversed these policies. It indefinitely extended the prohibition against transgender individuals entering the military (a process formally referred to as “accession”), and required the military to authorize the discharge of transgender service members. The President ordered Secretary of Defense James N. Mattis to submit a plan for implementing the policy directives of the 2017 Presidential Memorandum by February 2018. Plaintiffs filed suit and sought preliminary injunctive relief, which the Court granted.

Currently pending before the Court are Defendants’ [115] Motion to Dismiss Plaintiffs’ Second Amended Complaint, or, in the Alternative, Defendants’ Motion for Summary Judgment, and Defendants’ [116] Motion to Dissolve the Preliminary Injunction. Upon consideration of the

pleadings,¹ the relevant legal authorities, and the record as a whole, the Court DENIES Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, and DENIES Defendants' Motion to Dissolve the Preliminary Injunction.² Both of these motions are based on the same fundamental premise: that Defendants have recently proposed a "new policy" that will now allow transgender individuals to serve in the military. Based on this premise, Defendants argue in these motions that Plaintiffs no longer have standing, that their claims are moot, and that there is no longer any need for this Court's preliminary injunction. For reasons discussed in more detail below, the Court is not persuaded by these arguments. This case shall proceed, and the Court's preliminary injunction shall continue to maintain the *status quo ante*.

¹ The Court's consideration has focused on the following documents:

- Defs.' Mem. in Supp. of Mot. to Dismiss Pls.' 2d Am. Compl., or, in the Alternative, Defs.' Mot. for Summ. J., ECF No. 115 ("Defs.' Mem.");
- Defs.' Mot. to Dissolve the Prelim. Inj., ECF No. 116;
- Pls.' Opp'n to Defs.' Mot. to Dismiss and to Dissolve the Prelim. Inj., ECF No. 130 ("Pls.' Opp'n");
- Defs.' Reply in Supp. of their Mot. to Dismiss Pls.' 2d Am. Compl., or, in the Alternative, for Summ. J., and Opp'n to Pls.' Cross-Mot. for Summ. J., ECF No. 138 ("Defs.' Reply"); and
- Defs.' Reply in Support of their Mot. to Dissolve the Prelim. Inj., ECF No. 140.

In an exercise of its discretion, the Court finds that holding oral argument in this action would not be of assistance in rendering a decision. *See* LCvR 7(f).

² Although the parties' briefing mixes arguments about dismissal for lack of jurisdiction and summary judgment, the Court has exercised its discretion to first consider their arguments in the context of Defendants' motion to dismiss for lack of jurisdiction. Because those arguments largely resolve the issues raised in Defendants' Motion to Dissolve the Preliminary Injunction, the Court also addresses that motion in this Memorandum Opinion. However, this Opinion does *not* address the summary judgment aspects of Defendants' [115] Motion, nor does it address Plaintiffs' [131] Cross-Motion for Summary Judgment. Those motions will be dealt with separately. In addition, this Opinion does not address Defendants' argument that Plaintiffs do not have standing to press their claims against the President. This argument is moot because the Court has issued a separate Memorandum Opinion and Order today which dismisses the President as a party from this case.

I. BACKGROUND

Plaintiffs are current and aspiring transgender service members. Many have years of experience in the military. Some have decades. They have been deployed on active duty in Iraq and Afghanistan. They have and continue to serve with distinction. All fear that the directives of the 2017 Presidential Memorandum will have devastating impacts on their careers and their families. Accordingly, they filed this lawsuit challenging those directives and moved this Court to enjoin the implementation of the 2017 Presidential Memorandum. They claimed that the President's directives violate the fundamental guarantees of due process afforded by the Fifth Amendment to the United States Constitution.

On October 30, 2017, the Court issued a preliminary injunction in this case. As particularly relevant here, the Court found that Plaintiffs had standing and were likely to succeed on their Fifth Amendment claim. The Court concluded that, as a form of government action that classifies people based on their gender identity, and disfavors a class of historically persecuted and politically powerless individuals, the President's directives were subject to heightened scrutiny. Plaintiffs claimed that the President's directives could not survive such scrutiny because they were not genuinely based on legitimate concerns regarding military effectiveness or budget constraints, but were instead driven by a desire to express disapproval of transgender people generally. The Court found that a number of factors—including the breadth of the exclusion ordered by the directives, the unusual circumstances surrounding the President's announcement of them, the fact that the reasons given for them did not appear to be supported by any facts, and the recent rejection of those reasons by the military itself—strongly suggested that Plaintiffs' Fifth Amendment claim was meritorious. Accordingly, the Court enjoined Defendants from enforcing the President's directives. The effect of the Court's preliminary

injunction was to revert to the *status quo ante* with regard to accession and retention that existed before the issuance of the 2017 Presidential Memorandum.

Defendants appealed, *see* Defs.’ Notice of Appeal, ECF No. 66, and moved this Court to stay the portion of its preliminary injunction that required Defendants to begin accepting transgender individuals into the military on January 1, 2018, *see* Defs.’ Mot. for Partial Stay of Prelim. Inj. Pending Appeal, ECF No. 73. On December 11, 2017, the Court denied Defendants’ motion to stay. *See* Dec. 11, 2017 Order, ECF No. 75.

Defendants then sought the same relief from the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”). On December 22, 2017, the D.C. Circuit denied Defendants’ motion to stay this Court’s preliminary injunction. *See Doe 1 v. Trump*, No. 17-5267, 2017 WL 6553389 (D.C. Cir. Dec. 22, 2017). The D.C. Circuit concluded that Defendants had not demonstrated that they had a strong likelihood of success on appeal, that they would be irreparably harmed absent a stay, or that the stay would not harm the other parties to the proceeding. *Id.* It held that “given that the enjoined accession ban would directly impair and injure the ongoing educational and professional plans of transgender individuals and would deprive the military of skilled and talented troops, allowing it to take effect would be counter to the public interest.” *Id.* at *3. The D.C. Circuit also explained that “in the balancing of equities, it must be remembered that all Plaintiffs seek during this litigation is to serve their Nation with honor and dignity, volunteering to face extreme hardships, to endure lengthy deployments and separation from family and friends, and to willingly make the ultimate sacrifice of their lives if necessary to protect the Nation, the people of the United States, and the Constitution against all who would attack them.” *Id.* After the D.C. Circuit’s opinion was issued, Defendants

voluntarily dismissed their appeal of this Court's preliminary injunction. The military began permitting openly transgender individuals to accede on January 1, 2018.

This case then moved forward into the discovery stage. Defendants strenuously resisted engaging in discovery. As noted above, the 2017 Presidential Memorandum had called for the Secretary of Defense to submit a plan to implement the President's policy directives by February 2018. Defendants repeatedly argued that discovery should be halted until that plan was submitted. Defendants even argued at one point that Plaintiffs were not entitled to discovery in this case at all. The Court repeatedly rejected Defendants' arguments and ordered Defendants to cooperate with discovery so that this case could move forward efficiently toward an ultimate resolution on the merits. Despite the Court's orders, discovery remains unfinished because Defendants have asserted that a substantial portion of the documents and information sought by Plaintiffs are privileged (pursuant to the deliberative process privilege and the presidential communications privilege), and the parties' disputes about these assertions of privilege remain outstanding.³

In February 2018, as ordered by the 2017 Presidential Memorandum, Secretary of Defense Mattis presented a memorandum to the President that proposed a policy to effectively prevent transgender military service. *See* Defs.' Mot. to Dissolve the Preliminary Injunction, Ex. 1, ECF No. 96-1 (hereinafter, the "Mattis Implementation Plan"). The Mattis Implementation Plan, unlike the President's 2017 tweet and memorandum, purports not to be a blanket ban on all "transgender individuals." However, the plan effectively implements such a ban by targeting proxies of transgender status, such as "gender dysphoria" and "gender transition," and by

³ The Court is aware that the court in *Karnoski v. Trump*, No. C17-1297-MJP (W.D. Wash.), has recently ordered Defendants to produce materials that they have withheld on the basis of privilege and that Defendants have sought appellate review of that order.

requiring all service members to serve “in their biological sex.” Based on the conclusion “that there are substantial risks associated with allowing the accession and retention of individuals with a history or diagnosis of gender dysphoria and require, or have already undertaken, a course of treatment to change their gender,” Mattis Implementation Plan at 2, the Mattis Implementation Plan proposes the following policies:

- Transgender persons with a history or diagnosis of gender dysphoria are disqualified from military service, except under the following limited circumstances: (1) if they have been stable for 36 consecutive months in their biological sex prior to accession; (2) Service members diagnosed with gender dysphoria after entering into service may be retained if they do not require a change of gender and remain deployable within applicable retention standards; and (3) currently serving Service members who have been diagnosed with gender dysphoria since the previous administration’s policy took effect and prior to the effective date of this new policy, may continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria.
- Transgender persons who require or have undergone gender transition are disqualified from military service.
- Transgender persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other Service members, in their biological sex.

Id. at 2-3.

To summarize: under the Mattis Implementation Plan, individuals who require or have undergone gender transition are absolutely disqualified from military service; individuals with a history or diagnosis of gender dysphoria are largely disqualified from military service; and, to the extent that there are any individuals who identify as “transgender” but do not fall under the first two categories, they may serve, but only “in their biological sex.” By definition, transgender persons do not identify or live in accord with their biological sex, which means that the result of the Mattis Implementation Plan is that transgender individuals are generally not

allowed to serve openly in the military. There is only one narrow class of transgender individuals who are allowed to serve as openly transgender under the Mattis Implementation Plan. Pursuant to a “grandfather provision,” those “currently serving Service members who have been diagnosed with gender dysphoria since the previous administration’s policy took effect and prior to the effective date of” the policy set forth in the Mattis Implementation Plan, may continue to serve in their preferred gender.

The reasoning underlying the Mattis Implementation Plan is spelled out in a second memorandum that was sent from the Department of Defense to the President in February 2018. *See* Defs.’ Mot. to Dissolve the Preliminary Injunction, Ex. 2, ECF No. 96-2 (hereinafter, the “Panel Report”). Like the Mattis Implementation Plan, the Panel Report carefully avoids categorical language banning all transgender individuals. Instead, the document speaks in terms of individuals with “gender dysphoria” and those who have undergone or will require “gender transition” (both of which, again, are proxies for transgender status). Generally speaking, the Panel Report concludes that individuals with gender dysphoria or who have undergone or will require gender transition undermine the military. According to the report, these service members are fundamentally incompatible with the military’s mental health standards, physical health standards, and sex-based standards. The report suggests that they are a detriment to military readiness and unit cohesion. It likens gender dysphoria to conditions such as “bipolar disorder, personality disorder, obsessive-compulsive disorder, suicidal behavior, and even body dysmorphic disorder.” Panel Report at 20. It concludes that individuals with gender dysphoria or who have undergone or will require gender transition are more likely to have other mental health conditions and substance abuse problems, and to commit suicide. *Id.* at 21. The Panel Report also states that these individuals impose “disproportionate costs” on the military. *Id.* at

41. For the most part, in lieu of affirmative evidence, the Panel Report repeatedly cites “uncertainty” in the medical field about these individuals as a reason to urge that the military “proceed with caution.” *Id.* at 6. Although not necessary to the outcome of this particular Memorandum Opinion, it is worth noting that these conclusions were immediately denounced by the American Psychological Association and the American Medical Association. *See* Decl. of Lauren Godles Milgroom, ECF No. 128 (“Milgroom Decl.”), Exs. GG, HH.

On March 23, 2018, Defendants filed a Notice informing the Court that President Trump had issued a second memorandum on military service by transgender individuals. *See* Defs.’ Notice, ECF No. 95. In the 2018 Presidential Memorandum, the President stated that he “revokes” his 2017 Presidential Memorandum, “and any other directive [he] may have made with respect to military service by transgender individuals.” *Id.* at 1. The President ordered that “[t]he Secretary of Defense, and the Secretary of Homeland Security, with respect to the U.S. Coast Guard, may exercise their authority to implement any appropriate policies concerning military service by transgender individuals.” *Id.* To be clear, as has just been laid out, the “appropriate policies” that the Secretaries intended to implement had already been developed and proposed to the President at the time he issued this memorandum.

The events described above have sparked a great debate between the parties as to the future of this case, and prompted the filing of numerous motions. As relevant to this Memorandum Opinion, pending before the Court are Defendants’ Motion to Dismiss Plaintiffs’ Second Amended Complaint, or, in the Alternative, Defendants’ Motion for Summary Judgment, and Defendants’ Motion to Dissolve the Preliminary Injunction. Defendants argue that the Mattis Implementation Plan represents a “new policy” divorced and distinct from the President’s 2017 policy directives that were previously enjoined by this Court. They also contend that the

Mattis Implementation Plan does not harm the Plaintiffs in this case. Accordingly, Defendants seek the dismissal of Plaintiffs' recently filed Second Amended Complaint for lack of jurisdiction because Plaintiffs lack standing and because their claims are now moot. For largely the same reasons, Defendants also argue that the Court's preliminary injunction should be dissolved. In sum, it is Defendants' view that they have preempted this lawsuit by drafting and issuing the Panel Report, the Mattis Implementation Plan, and the 2018 Presidential Memorandum. The Court disagrees.

Summary: This Memorandum Opinion sets forth the Court's reasoning for denying Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint and Defendants' Motion to Dissolve the Preliminary Injunction. The Court first concludes that Plaintiffs have standing because they would all be harmed if the Mattis Implementation Plan were allowed to take effect. The Court next concludes that the Mattis Implementation Plan has not mooted Plaintiffs' claims because that plan is not a "new policy" that is meaningfully distinct from the President's 2017 directives that were originally challenged in this case. Instead, at a fundamental level, the Mattis Implementation Plan is just that—a plan that *implements* the President's directive that transgender people be excluded from the military. For largely the same reasons, the rationale for the Court's preliminary injunction maintaining the *status quo ante* until the final resolution of this case remains intact. Nothing in this Memorandum Opinion represents a final adjudication of whether Defendants' actions were constitutional. The Court merely holds that whatever legal relevance the Mattis Implementation Plan might have, it has not fundamentally changed the circumstances of this lawsuit such that Plaintiffs' claims should be dismissed for lack of jurisdiction, or that the need for the Court's preliminary injunction has dissipated.

II. LEGAL STANDARD

When a motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(1) is filed, a federal court is required to ensure that it has “the ‘statutory or constitutional power to adjudicate [the] case[.]’” *Morrow v. United States*, 723 F. Supp. 2d 71, 77 (D.D.C. 2010) (emphasis omitted) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998)). “Federal courts are courts of limited jurisdiction” and can adjudicate only those cases or controversies entrusted to them by the Constitution or an Act of Congress. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). In determining whether there is jurisdiction on a motion to dismiss, the Court may “consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003) (citations omitted). “Although a court must accept as true all factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1),” the factual allegations in the complaint “will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim.” *Wright v. Foreign Serv. Grievance Bd.*, 503 F. Supp. 2d 163, 170 (D.D.C. 2007) (citations omitted).

III. DISCUSSION

The Court begins this Memorandum Opinion with an assessment of its jurisdiction. Article III of the Constitution limits the jurisdiction of this Court to the adjudication of “Cases” and “Controversies.” U.S. Const., Art. III, § 2. “In an attempt to give meaning to Article III’s case-or-controversy requirement, the courts have developed a series of principles termed ‘justiciability doctrines,’ among which are standing [and] mootness.” *Nat’l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (citing *Allen v. Wright*, 468 U.S.

737, 750 (1984)). Defendants argue that the issuance of the 2018 Presidential Memorandum, the Mattis Implementation Plan, and the Panel Report have rendered this case moot and have deprived all Plaintiffs of standing. They contend that the Court must therefore dismiss the case for lack of jurisdiction. Defendants are wrong. In addition, for largely the same reasons that the Court continues to have jurisdiction over Plaintiffs' claims, Defendants have not satisfied their burden of demonstrating that the Court's preliminary injunction should be dissolved.

1. Standing

Standing is an element of the Court's subject-matter jurisdiction, and requires, in essence, that a plaintiff have "a personal stake in the outcome of the controversy." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). A plaintiff cannot be a mere bystander or interested third-party, or a self-appointed representative of the public interest; he or she must show that the defendant's conduct has affected them in a "personal and individual way." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). Consequently, the standing analysis is "especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). "[A] plaintiff must demonstrate standing for each claim he seeks to press" and for each form of relief sought, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006), but "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 (2006).

The familiar requirements of Article III standing are:

(1) that the plaintiff have suffered an “injury in fact”—an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 167 (1997) (citing *Lujan*, 504 U.S. at 560–61); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). With respect to the “injury in fact” requirement, which is predominantly at issue in this case, “future injury may suffice if the threatened injury is ‘certainly impending,’ or there is a ‘substantial risk that the harm will occur.’” *Susan B. Anthony List*, 134 S. Ct. at 2341 (quoting *Clapper*, 568 U.S. at 409, 414 n.5).

The Court rejects Defendants’ argument that Plaintiffs no longer have standing because they are not harmed by the Mattis Implementation Plan. In its October 30, 2017 Memorandum Opinion, the Court explained in detail why the Plaintiffs in this case had standing. *See Doe I v. Trump*, 275 F. Supp. 3d 167, 192-203 (D.D.C. 2017). The Court will assume familiarity with that discussion and will not repeat it here (although it does expressly incorporate that discussion into this Memorandum Opinion as though stated in full). With the principles set forth in that earlier Opinion as a baseline, in this Opinion the Court focuses more narrowly on Defendants’ arguments about why the Mattis Implementation Plan has nullified Plaintiffs’ standing. As explained above, the effect of that plan would be that individuals who require or have undergone gender transition would be absolutely disqualified from military service, individuals with a history or diagnosis of gender dysphoria would be largely disqualified from military service, and, to the extent that there are any individuals who identify as “transgender” but do not fall under the first two categories, they would be allowed serve, but only “in their biological sex” (which

means that openly transgender persons would generally not be allowed to serve in conformance with their identity).

i. Current Service Members With Diagnoses of Gender Dysphoria Who Either Have Transitioned or Have Begun to Transition

Plaintiffs Regan Kibby, Jane Does 2 through 5, and John Doe 1 are current service members who have been diagnosed with gender dysphoria.⁴ The Mattis Implementation Plan generally bans individuals who have been diagnosed with gender dysphoria from military service on the grounds that they are mentally unstable and that their presence in the military disrupts unit cohesion, prevents good order and discipline, and is generally incompatible with military readiness and lethality. However, the Mattis Implementation Plan contains a limited exception from this ban for current service members who, like Plaintiffs Regan Kibby, Jane Does 2 through 5, and John Doe 1, were “diagnosed with gender dysphoria since the previous administration’s policy took effect and prior to the effective date of this new policy.” Mattis Implementation Plan at 2. This “grandfather provision” purports to be based on the military’s prior “commitment to these Service members” and “the substantial investment it has made in them.” Panel Report at 43. Defendants argue that the existence of this grandfather provision means that the Mattis Implementation Plan does not harm these Plaintiffs.

Defendants are wrong. The Mattis Implementation Plan clearly harms all current service members with gender dysphoria—even those who are allowed to remain in the military as a result of a narrow grandfather provision. It singles them out from all other service members and marks them as categorically unfit for military service. *See generally* Panel Report. It sends the message to their fellow service members and superiors that they cannot function in their

⁴ Plaintiff Regan Kibby is a midshipman at the U.S. Naval Academy. The parties agree that for the purposes of the Court’s standing analysis, he should be treated as a current service member.

respective positions. That they are mentally unstable. That their presence in the military is incompatible with military readiness, unit cohesion, good order, and discipline. In sum, it is an express statement that these individuals' very presence makes the military weaker and less combat-ready.

By singling these Plaintiffs out and stigmatizing them as members of an inherently inferior class of service members, the Mattis Implementation Plan causes Plaintiffs grave non-economic injuries that are alone sufficient to confer standing. *See Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (“[D]iscrimination itself, by perpetuating ‘archaic and stereotypic notions’ or by stigmatizing members of the disfavored group as ‘innately inferior’ and therefore as less worthy participants in the political community, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.”) (internal citation omitted).

Defendants disagree that this “stigmatic” injury alone is sufficient to confer standing. They claim that “an alleged injury arising from discrimination ‘accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct.’” Defs.’ Reply at 11 (quoting *Allen*, 468 U.S. at 755). But the principal case Defendants cite in support of this argument, *Allen v. Wright*, is readily distinguishable. The plaintiffs in *Allen* were the parents of African American public school children. *Allen*, 468 U.S. at 739. They challenged the Internal Revenue Service’s grant of tax-exempt status to racially segregated private schools. *Id.* at 744-45. The *Allen* Court rejected the plaintiffs’ claim of standing based on the “stigmatic injury, or denigration” that is “suffered by all members of a racial group when the Government discriminates on the basis of race.” *Id.* at 754. The Supreme Court held that “[t]here can be no doubt that this sort of noneconomic injury is one of the most

serious consequences of discriminatory government action and is sufficient in some circumstances to support standing.” *Id.* at 755. However, it concluded that such stigmatic injury did not support standing for the particular plaintiffs in *Allen* because their children had never applied to any of the private schools at issue, and therefore they had not been “personally denied equal treatment.” *Id.* Instead, they had merely alleged an “abstract stigmatic injury” that would be equally applicable to “all members” of an entire racial group, nationwide. *Id.* at 756.

The situation here is fundamentally different. Plaintiffs are not merely concerned members of the public or bystanders presenting a generalized grievance. They are members of the precisely defined group that the Mattis Implementation Plan discriminates against by labelling as unsuited for military service. The Mattis Implementation Plan sends a blatantly stigmatizing message to all members of the military hierarchy that has a unique and damaging effect on a narrow and identifiable set of individuals, of which Plaintiffs are members. Moreover, unlike the alleged injury in *Allen*, the stigmatic injury alleged by Plaintiffs is caused by their receiving unequal treatment under the Mattis Implementation Plan. Under that plan, Plaintiffs would be allowed to remain in the military but, unlike any other service members, only pursuant to an exception to a policy that explicitly marks them as unfit for service. No other service members are so afflicted. These Plaintiffs are denied equal treatment because they will be the only service members who are allowed to serve only based on a technicality; as an exception to a policy that generally paints them as unfit. In their words, “[w]hile other service members will enjoy the security and status of serving as honored, respected, and equal members of the Armed Forces,” Plaintiffs “will serve only on conditional sufferance and therefore on objectively unequal terms.” Pls.’ Reply in Support of their Cross-Mot. for Summary Judgment,

ECF No. 149, at 23.⁵ Because their stigmatic injury derives from this unequal treatment, it is sufficient to confer standing.

Regardless, even assuming that the “stigmatic” aspects of Plaintiffs’ injuries were not alone sufficient to confer standing, the Mattis Implementation Plan does more than just stigmatize Plaintiffs. It creates a substantial risk that Plaintiffs will suffer concrete harms to their careers in the near future. There is a substantial risk that the plan will harm Plaintiffs’ career development in the form of reduced opportunities for assignments, promotion, training, and deployment. These harms are an additional basis for Plaintiffs’ standing.

Defendants argue that these alleged harms are too “speculative,” but the Court disagrees. The Secretary of Defense has personally issued a policy, with a lengthy supporting memorandum, that, in effect, instructs the entire armed forces that Plaintiffs’ service is harmful to the military. There is nothing speculative about the proposition that, having been so instructed by the very top of the military hierarchy, Plaintiffs’ supervisors will place less trust in Plaintiffs and be less likely to give Plaintiffs quality assignments and opportunities. The very nature of such a pronouncement from the Secretary of Defense creates a non-speculative and substantial risk that Plaintiffs’ experience, career development, and growth in the military will be hampered. To pretend otherwise is fanciful. This fairly obvious conclusion is buttressed by evidence of the effects of prior negative proclamations about transgender service. For instance, Jane Doe 2 declares that she received an unfavorable work detail to keep her “separated from the rest of [her] unit because [she is] transgender and because of the President’s ban, as [she] never had any

⁵ *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008) is also distinguishable. Unlike in that case, Plaintiffs here do not merely take offense to a message that can be *interpreted* from government action. Plaintiffs assert that they are directly injured by an *explicit government message* about their suitability as service members.

problems with this kind of treatment in [her] old unit and [does] not know of any other reason [why] she would be treated this way.” Decl. of Jane Doe 2, ECF No. 40-2, at ¶ 15. The detail requires Jane Doe 2 to “driv[e] far away from my base all day every day” and despite the fact that she is “supposed to be in charge of four or five other soldiers, [she has] yet to meet them.” *Id.* The conclusion is also supported by the declarations of the former United States Secretaries of the Army and Navy, and a Professor Emeritus at the Naval Postgraduate School in Monterey, California. *See, e.g.*, Supp. Decl. of Raymond E. Mabus, Jr., ECF No. 51-1, at ¶ 7 (“transgender service members are losing opportunities for assignments that they are capable of doing”); Supp. Decl. of Eric K. Fanning, ECF No. 51-3, at ¶ 6 (transgender service members’ “advancement and promotion opportunities in the military” are being substantially limited); Decl. of Mark J. Eitelberg, ECF No. 51-4, at ¶ 11 (directives “instruct[ing] commanders and other service members that transgender individuals are detrimental to the military . . . erode[] the value that members serving with them place on their contributions or performance” which “harm[s] and restrict[s] artificially” their ability to serve).⁶

The grandfather provision of the Mattis Implementation Plan does not alleviate these harms. That provision does not state, nor does it appear to be based on, a conclusion that those who will be allowed to remain in the military like Regan Kibby, Jane Does 2 through 5, and John Doe 1 are somehow more fit to serve than those who will be banned. Instead, the provision is based—purportedly—on a conclusion that discharging these particular individuals would be

⁶ Defendants argue that the statements of these individuals are all irrelevant because they predate the Mattis Implementation Plan, Defs.’ Reply at 13-14, but that argument assumes what the Court rejects in the latter portions of this Opinion: that the Mattis Implementation Plan is a “new policy” separate and distinct from the President’s 2017 directives. The Mattis Implementation Plan merely implements the basic policy directives in the President’s 2017 tweet and memorandum. Evidence about the effects of the 2017 directives is therefore relevant to assessing the impact of the Mattis Implementation Plan.

unfair because they relied on the military’s prior policy pronouncements, and also inefficient because the military has already invested time and money into their training. Accordingly, the message of the policy—that, under general circumstances, these Plaintiffs should not be in the military—remains intact. That message is substantially likely to harm Plaintiffs’ careers in very real ways. Accordingly, the Court finds that Plaintiffs Regan Kibby, Jane Does 2 through 5, and John Doe 1 have standing.

ii. Prospective Service Members Who Have Undergone Gender Transition

Jane Doe 7 and John Doe 2 are prospective service members who have already undergone, or are currently undergoing, gender transition, and are also actively taking steps toward enlistment. *See* Decl. of Jane Doe 7, at ¶ 1 (attesting that she “went through the process of gender transition seven years ago” and has “been trying to enlist in the Coast Guard”); Decl. of John Doe 2, at ¶¶ 8-13 (attesting that he has “completed transition” and been “actively working with [his] recruiter to enlist in the Army”). If the Mattis Implementation Plan takes effect, these individuals will be barred from military service because they have undergone gender transition. Being barred from service is clearly an “injury in fact” sufficient to give these Plaintiffs standing. *See Doe 1*, 275 F. Supp. 3d at 203 (explaining in Court’s prior Opinion that Plaintiffs have standing due to the “substantial risk that they will be denied accession or discharged from the military due to their transgender status”).

Defendants argue that the Mattis Implementation Plan deprives these Plaintiffs of standing because (if they rush to enlist) they can still join the military while this Court’s preliminary injunction is in effect and the Mattis Implementation Plan is not allowed to be implemented. *See* Defs.’ Mem. at 12-13. Distilled to its essence, Defendants’ argument is that because transgender service members who enlist before the Mattis Implementation Plan goes into effect will be allowed to remain in the military under the plan’s grandfather provision, Plaintiffs can and

should enlist now to avoid any harm. *Id.* If Plaintiffs do not enlist right now while the preliminary injunction is in effect and take advantage of the grandfather provision, their harm is self-inflicted. *Id.* Defendants argue that Plaintiffs cannot manufacture standing based on “self-inflicted” harm. *Id.*

This argument is based on a misunderstanding of the Court’s standing analysis. Plaintiffs challenge the constitutionality of the policies realized in the Mattis Implementation Plan, which Defendants are prepared to implement. Those policies, and that plan in particular, are not yet in effect, *but only because the Court granted Plaintiffs’ Motion for a Preliminary Injunction in this case*, not because Defendants have decided to allow Plaintiffs to enlist as transgender military personnel during this period. All indications suggest that the Defendants have every intention of enforcing the plan as soon as they are no longer enjoined from doing so and, in fact, Defendants have moved this Court and other courts to dissolve injunctions so that they can accomplish that goal. That the plan does not harm Plaintiffs so long as the preliminary injunction is in force, of course, does not mean that Plaintiffs lack standing. To assess whether Plaintiffs have standing, the Court must determine whether that plan would harm them if the Court *lifted* its injunction and allowed the plan to go into effect. There is no dispute that if the Court did so, Jane Doe 7 and John Doe 2 would be barred from military service by the Mattis Implementation Plan. Accordingly, they have standing.⁷

Moreover, even if these Plaintiffs did rush to enlist in the military while this Court’s injunction was in place and therefore fell into the Mattis Implementation Plan’s grandfather

⁷ Moreover, the very fact that these Plaintiffs are required to enlist in the military immediately, while the Court’s preliminary injunction remains in effect, or be forever banned, is a sufficient injury to confer standing. These Plaintiffs are harmed by such a “now-or-never” requirement because it subjects them to a barrier on their entry into the military that their competitors are not subject to.

provision, they would still be subject to the same stigmatic and career-damaging injuries that afflict those Plaintiffs who are current service members who have been diagnosed with gender dysphoria.

Finally, Defendants argue that, even assuming that the Mattis Implementation Plan has taken effect, and thus Jane Doe 7 and John Doe 2 are barred from military service, there would still be no injury because these Plaintiffs “would not be personally denied equal treatment.” Defs.’ Reply at 15. This is so, Defendants argue, because Plaintiffs “have not shown that they would be treated differently than any other individual who seeks to join the military with a preexisting medical condition.” *Id.* This argument “concerns the merits rather than the justiciability of plaintiffs’ claims.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018). It has no relevance to the Court’s assessment of standing. When assessing standing, the Court assumes that the challenged policies in fact violate equal protection. *Schnitzler v. United States*, 761 F.3d 33, 40 (D.C. Cir. 2014) (“[T]he Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume arguendo the merits of his or her legal claim.” (internal quotation marks omitted)).⁸

iii. Current Service Member Without a Diagnosis of Gender Dysphoria

Jane Doe 6 is a current service member who does not yet have a diagnosis of gender dysphoria. Jane Doe 6 had made a behavioral health appointment to obtain a transition plan and begin her gender transition, but—for obvious reasons—aborted that effort when President Trump tweeted that transgender individuals would not be permitted to serve. After that, Jane Doe 6 has

⁸ Defendants also argue that Plaintiffs who are prospective service members lack standing because, even though they are generally prohibited from acceding under the Mattis Implementation Plan, they may seek waivers from the policy. *See* Defs.’ Mem. at 12 n.4. The Court already explained in its October 30, 2017 Memorandum Opinion why the hypothetical potential for waivers does not divest Plaintiffs of standing. *See Doe 1*, 275 F. Supp. 3d at 201.

not disclosed her transgender identity and has not received a military diagnosis of gender dysphoria because she is afraid that she will be discharged. Because she has not yet received a diagnosis of gender dysphoria, Jane Doe 6 would face discharge under the Mattis Implementation Plan if she sought such a diagnosis after the plan took effect.

As with Jane Doe 7 and John Doe 2, Defendants argue that the Mattis Implementation Plan has alleviated any harm Jane Doe 6 might have suffered under the President's 2017 directives. Defendants claim that if Jane Doe 6 seeks a diagnosis of gender dysphoria from a military doctor while this Court's preliminary injunction is still in place and the Mattis Implementation Plan has not yet gone into effect, she will be able to continue to serve under the plan's grandfather provision. Defs.' Reply at 14-15. Again, the Court rejects the logic of this argument. The Court asks whether the Mattis Implementation Plan, if allowed to go into effect, would harm Jane Doe 6. The answer is clear: it would. It would subject her to discharge if she sought a diagnosis of gender dysphoria and gender transition therapy.

Moreover, even if Jane Doe 6 were to obtain a diagnosis prior to the implementation of the plan and therefore fall within the grandfather provision, she would still be subject to the same stigmatic and career-damaging injuries that afflict those Plaintiffs who are current service members who have been diagnosed with gender dysphoria. Jane Doe 6 does not lack standing simply because she has the option of either remaining in the military and disavowing her identity as a transgender person, or coming out and serving as a member of an officially branded inferior class of service members. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (holding that where a plaintiff "eliminated the imminent threat of harm by simply not doing what he claimed the right to do," the court still had "subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced").

iv. Dylan Kohere

Finally, Plaintiff Dylan Kohere—who is transgender and has begun working with medical professionals on a treatment plan for transition—has standing. Kohere is barred from joining his university’s ROTC program and ultimately will not be allowed to accede into the military. As the D.C. Circuit has already acknowledged, Kohere is injured by a policy that prevents him from acceding if for no other reason than because “inability to accede in the future . . . disqualifies [him] from educational opportunities now.” *Doe I*, 2017 WL 6553389, at *3.

Defendants argue that Kohere now lacks standing because “since DoD’s policy was announced in March 2018, Mr. Kohere has failed to respond to any of the cadre’s multiple requests to discuss his enrollment in ROTC and did not register for any ROTC classes in the upcoming fall semester,” nor did he apply for a scholarship. Defs.’ Reply at 17. In other words, Defendants appear to be implying that Kohere lacks standing because he is no longer interested in pursuing a military career. The Court is not convinced. Kohere has attested that his goal is “to spend [his] entire career in the military.” Decl. of Dylan Kohere, ECF No. 13-15, ¶ 2. The Mattis Implementation Plan would prevent him from doing so and deprive him of educational opportunities. This is enough to establish his standing.⁹

Finally, Defendants also argue that “[f]ar from being ‘categorically barred because he is transgender’ . . . under the new policy, Mr. Kohere would be allowed to serve in his biological sex.” Defs.’ Reply at 16. This argument misses the point. Mr. Kohere is *transgender*. That means that he *does not identify with his biological sex*. To serve in his biological sex would be to suppress his identity. To do so would be a harm in and of itself, sufficient to confer standing.

⁹ As with the Plaintiffs discussed above, the fact that Kohere could fall within the Mattis Implementation Plan’s grandfather provision does not change this analysis.

The fact that a plaintiff can avoid the effect of a discriminatory policy by renouncing the characteristic that leads to the discrimination in the first place does not mean that the plaintiff lacks standing.

* * *

In sum, each Plaintiff that remains in this case continues to have standing, despite the issuance of the 2018 Presidential Memorandum, the Mattis Implementation Plan, and the Panel Report. Defendants' motion to dismiss for lack of standing will be denied.

2. Mootness

Defendants also argue that Plaintiffs' claims should be dismissed as moot. Defendants' mootness argument reduces to the following points: Plaintiffs' lawsuit challenges President Trump's 2017 policy of banning transgender military service. The Mattis Implementation Plan does not completely ban transgender military service. It is instead a "new policy" that is distinct from the policy directives announced by President Trump in 2017. Because Defendants are no longer attempting to implement the challenged policy, Plaintiffs' suit is now moot.

The Supreme Court has commanded that a party asserting mootness through cessation of challenged conduct carries a "heavy burden." *Hardaway v. D.C. Hous. Auth.*, 843 F.3d 973, 980 (D.C. Cir. 2016) (citing *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Defendants have not satisfied their burden here.

The Court begins by noting that even if it were to accept Defendants' argument that Plaintiffs' challenge to the President's 2017 directives is moot, Plaintiffs' lawsuit would not be dismissed in its entirety. Plaintiffs have recently amended their complaint to challenge the Mattis Implementation Plan, and that challenge is clearly still live. "[W]hen a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the

amended complaint to determine jurisdiction.” *Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 473-74 (2007). Plaintiffs’ Second Amended Complaint alleges that the Mattis Implementation Plan “expressly targets transgender individuals,” “prevents transgender individuals from serving consistent with their gender identity,” and violates the Fifth Amendment. Pls.’ 2d Am. Compl., ECF No. 106, at ¶¶ 86, 87, 92, 97. Accordingly, even if the Court were to accept Defendants’ arguments regarding claims focused on the President’s 2017 directives, Plaintiffs’ lawsuit would not be moot to the extent that it challenges the Mattis Implementation Plan.

Regardless, the Court *does not* accept Defendants’ argument that Plaintiffs’ challenge to the President’s 2017 directives is moot. This argument attempts to draw artificial and unwarranted boundaries between the various policy pronouncements in this case. As explained above, Defendants’ mootness argument is based upon the premise that the Mattis Implementation Plan is a new and different policy than the one announced by President Trump in 2017. But Defendants have not demonstrated that this is the case in any meaningful way. To the contrary, the Mattis Implementation Plan appears to be just that—an implementation plan. The plan *implements* the President’s 2017 directives that the military not allow transgender individuals to serve in the military.

The Court reaches this conclusion for three basic reasons. First, a plan to implement a policy prohibiting transgender military service is precisely what the President ordered be submitted to him by February 2018 in his 2017 Presidential Memorandum. Second, over the months following the issuance of the 2017 Presidential Memorandum, Department of Defense officials repeatedly stated that they were preparing such an implementation plan. And third, the

Mattis Implementation Plan was provided to the President in February 2018, and it in fact prohibits transgender military service.

First, the 2017 Presidential Memorandum directed the Department of Defense to submit, by February 2018, a plan to *implement* the President’s directives that transgender service be prohibited. It did not ask for the submission of a “new policy” on transgender service. In the 2017 Presidential Memorandum, the President directed the military to return to a policy under which: (i) transgender individuals are generally prohibited from accession and (ii) the military is authorized to discharge individuals who are transgender. The 2017 Presidential Memorandum ordered the Secretary of Defense to prepare an “implementation plan” that was circumscribed to suggestions about how to “implement a policy under which transgender accession is *prohibited*, and discharge of transgender service members is *authorized*.” *Doe 1*, 275 F. Supp. 3d at 195. It is clear from the 2017 Presidential Memorandum that the “implementation plan” requested by the President was required to “prohibit transgender accession and authorize the discharge of transgender service members.” *Id.* The plan was not intended to be a proposal for a “new policy” that *allowed* transgender service. *See Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *6 (W.D. Wash. Apr. 13, 2018) (“The 2017 Memorandum did not direct Secretary Mattis to determine *whether* or not the directives should be implemented, but instead ordered the directives to be implemented by specific dates and requested a plan for *how* to do so.”) (emphasis in original).

Second, the actions and statements of Secretary Mattis, and the Department of Defense generally, during the time between the issuance of the 2017 Presidential Memorandum and the Mattis Implementation Plan indicate that the plan being developed was not a “new one” to propose to President Trump, but instead simply one to *implement* President Trump’s 2017 policy

directives. In an August 29, 2017 Statement, Secretary Mattis stated that the Department of Defense had “received the [2017] Presidential Memorandum” and would “carry out the president’s policy direction.” Milgroom Decl., Ex. U. He further stated that he would establish a panel of experts not to consider “new policies,” but instead simply “to provide advice and recommendations on the *implementation of the president’s direction*.” *Id.* (emphasis added). After the “panel reports its recommendations and following . . . consultation with the secretary of Homeland Security,” Secretary Mattis stated that he would “provide [his] advice to the president concerning *implementation of his policy direction*.” *Id.* (emphasis added); *see also Doe 1*, 2017 WL 6553389, at *2 (noting that “the Secretary’s August 29, 2017 statement makes clear that his actions are being undertaken to ‘carry out the president’s policy direction’”).

In a September 14, 2017 document entitled “Military Service by Transgender Individuals – Interim Guidance,” Secretary Mattis again stated that he would present the President with a “plan *to implement the policy and directives* in the [2017] Presidential Memorandum.” Milgroom Decl., Ex. W, at 1 (emphasis added). The Interim Guidance further stated that the Department of Defense would “*carry out the President’s policy and directives*” and would “*comply with the [2017] Presidential Memorandum*.” *Id.* (emphasis added). A separate document issued to direct the implementation process stated that Secretary Mattis had convened a panel to “develop[] an Implementation Plan on military service by transgender individuals, *to effect the policy and directives of the Presidential Memorandum*.” Milgroom Decl., Ex. X, at 1 (emphasis added). That document further acknowledges that the Department was required to “return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016,” that is, the general prohibition on transgender service. *Id.* at 2. It stated that the Department had been “direct[ed]” to prohibit accession by transgender

individuals and asked the panel of experts merely how the “guidelines” for such a policy should be updated “to reflect currently accepted medical terminology.” *Id.* Acting Under Secretary of Defense for Personnel and Readiness, Anthony M. Kurta, also issued a memorandum in September 2017 that stated that the Department had convened a panel of experts “to support the . . . development of an Implementation Plan on military service by transgender individuals.” Milgroom Decl., Ex. Y.¹⁰

Third, and most importantly, the Mattis Implementation Plan *in fact prohibits transgender military service*—just as President Trump’s 2017 directives ordered. It is true that the plan takes a slightly less direct approach to accomplishing this goal than the President’s 2017 tweet and memorandum. Instead of expressly banning all “transgender individuals” from military service, the Mattis Implementation Plan works by absolutely disqualifying individuals who require or have undergone gender transition, generally disqualifying individuals with a history or diagnosis of gender dysphoria, and, to the extent that there are any individuals who identify as “transgender” but do not fall under the first two categories, only allowing them to serve “in their biological sex” (which means that openly transgender persons are generally not allowed to serve in conformance with their identity).

But it is not at all surprising that an implementation plan, crafted over the course of months (clearly with assistance from lawyers and an eye to pending litigation) is a longer, more nuanced expression of the President’s policy direction than the brief, blanket assertions made by the President himself in 2017. To determine whether Plaintiffs’ claims are moot, the Court must

¹⁰ Defendants cite statements from Secretary Mattis about the “independence” of the process that led to the creation of the Mattis Implementation Plan, but the context suggests that such “independence” related to *how*, not *whether*, to implement the President’s policy directives.

look past these surface-level differences and ask whether, in effect, the Mattis Implementation Plan accomplishes the President’s policy that is challenged in this case.

The Court concludes that the Mattis Implementation Plan does just that: it prevents service by transgender individuals. The plan succeeds at doing so in part by prohibiting individuals with traits associated with being transgender: those with “gender dysphoria” and who have undergone or require “gender transition.” In addition, although the plan purports to allow some transgender individuals (those without a diagnosis of gender dysphoria or who have not undergone or require gender transition) to serve in the military under certain narrow circumstances, even this purported allowance is illusory. Under the Mattis Implementation Plan, those transgender persons who are not summarily banned are only allowed in the military if they serve *in their biological sex*. But by definition—at least the definition relevant to Plaintiffs’ claims in this lawsuit—transgender persons *do not identify or live in accord with their biological sex*. Accordingly, the Mattis Implementation Plan effectively translates into a ban on transgender persons in the military. Tolerating a person with a certain characteristic only on the condition that they renounce that characteristic is the same as not tolerating them at all.¹¹ As Plaintiffs correctly argue, “[j]ust as a policy allowing Muslims to serve in the military if they

¹¹ Defendants argue that forcing all transgender service members to live in accordance with their biological sex is not the same as a ban on transgender service members because not all transgender individuals choose to come out as such and “live and work in accordance with [their] identity.” Defs.’ Reply at 21. That this would be the case is not at all surprising, and certainly does not demonstrate that Defendants’ policy is not a ban on transgender service members. Decisions about whether and when to admit one’s transgender identity and initiate the process of gender transition are presumably affected by many factors, including career considerations, medical considerations, and fear of discrimination. Service members in particular might reasonably choose to delay due to upcoming deployments or other opportunities. That not all transgender service members have openly admitted to their status as such and sought to live in accordance with their gender identities by personal choice does not mean that an official policy forbidding them from doing so is not discriminatory.

renounce their Muslim faith would be a ban of military service by Muslims, a policy requiring transgender individuals to serve in their birth sex *is* a ban on transgender service.” Pls.’ Opp’n at 10 (emphasis in original); *see also Karnoski*, 2018 WL 1784464, at *6 (“Requiring transgender people to serve in their ‘biological sex’ does not constitute ‘open’ service in any meaningful way, and cannot reasonably be considered an ‘exception’ to the Ban. Rather, it would force transgender service members to suppress the very characteristic that defines them as transgender in the first place.”). Accordingly, despite superficial differences between it and the President’s 2017 directives, the Mattis Implementation Plan essentially effectuates the policy announced by President Trump in 2017: the banning of military service by transgender individuals. It accordingly does not moot Plaintiffs’ claims. *See Glob. Tel*Link v. Fed. Commc’ns Comm’n*, 866 F.3d 397, 413-14 (D.C. Cir. 2017) (“replacing the challenged law ‘with one that differs only in some insignificant respect’ and ‘disadvantages [petitioners] in the same fundamental way’ does not moot the underlying challenge”) (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993)).¹²

Finally, Defendants repeatedly argue that the 2017 Presidential Memorandum has been “revoked.” Even if the Court were to favor form over substance and accept this as an accurate description of what has genuinely occurred, it would not alone be enough to warrant a finding of mootness. As Defendants argue, “[w]hen a law is repealed and replaced, the relevant question is ‘whether the new [policy] is sufficiently similar to the repealed [one] that it is permissible to say

¹² Defendants argue that the Mattis Implementation Plan is similar to the currently operative policy on transgender service. *See, e.g.*, Defs.’ Reply at 1. The Court disagrees. Any similarities Defendants are able to find between the policies are red herrings. The policies are *fundamentally* different because one allows transgender individuals to serve in accordance with their gender identity, and the other does not (with the exception of a small group of individuals who will be allowed to remain in the armed forces under a grandfather provision).

that the challenged conduct continues,’ or, put differently, whether the policy ‘has been sufficiently altered so as to present a substantially different controversy from the one . . . originally decided.’” Defs.’ Mot. at 4 (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am.*, 508 U.S. at 662 n.3). Even assuming that the 2017 Presidential Memorandum has been “revoked,” and the Mattis Implementation Plan could be viewed as a “new policy,” at the very least, the new plan is sufficiently “similar” to the President’s 2017 directives that Plaintiffs’ claims are not moot. As already discussed, like the 2017 Presidential Memorandum, the Mattis Implementation Plan generally bars service by transgender individuals.¹³

* * *

In sum, whatever legal relevance the Mattis Implementation Plan and associated documents might have, they are not sufficiently divorced from, or different than, the President’s 2017 directives such that Plaintiffs’ claims are now moot.¹⁴

¹³ Defendants argue that the voluntary cessation doctrine does not apply to them. Defs.’ Mem. at 3. This argument does not survive scrutiny for two reasons. First, because the Court finds that the Mattis Implementation Plan is simply a plan that implements the Presidential directives that were already at issue in this case, the challenged conduct simply has not ceased, and the Court need not rely on the voluntary cessation doctrine. Second, the Court is not persuaded that the Defendants in this case—various Executive Branch departments and officials—are all immune from the doctrine. In a separate Memorandum Opinion and Order issued today, the Court has dismissed the President as a party from this case. Accordingly, at most, the Court would be applying the voluntarily cessation doctrine to lower Executive Branch officials. Defendants have not brought to the Court’s attention any cases that hold that the voluntary cessation doctrine does not apply to such defendants. *See* Defs.’ Mem. at 3 (citing only *Clarke v. United States*, 915 F.2d 699 (D.C. Cir. 1990), which relates to Congress, not Executive Branch departments or officials). As indicated by the facts of this very case, the Executive Branch is able to change military policies back and forth with relative ease and speed, giving rise to the concerns that animate the voluntary cessation doctrine.

¹⁴ To the extent Defendants revive their motion to dismiss for failure to state a claim in this case, that motion is DENIED. The Court already explained in detail why Plaintiffs’ claims were likely meritorious in its October 30, 2017 Memorandum Opinion, and thus not subject to dismissal on the pleadings. *See Doe 1*, 275 F. Supp. 3d at 205, 207-215. For the same reasons that the Mattis

3. Motion to Dissolve the Preliminary Injunction

Finally, as the discussion above has likely already made clear, the Court will not dissolve its preliminary injunction. It is true that a preliminary injunction “may be dissolved where, for instance, changed circumstances eviscerate the justification therefor.” *S.E.C. v. Vision Commc’ns, Inc.*, No. CIV. A. 94-0615 CRR, 1995 WL 109037, at *2 (D.D.C. Mar. 6, 1995). However, the party seeking relief from an injunction bears the burden of establishing that changed circumstances warrant relief. *See Am. Council of the Blind v. Mnuchin*, 878 F.3d 360, 366 (D.C. Cir. 2017). The Court is not persuaded that the circumstances of this case have in fact genuinely changed in such a way that the Court’s preliminary injunction is no longer warranted.¹⁵

Like Defendants’ mootness argument, the basic premise of Defendants’ argument in support of dissolving the preliminary injunction is that the Mattis Implementation Plan is a “new policy” that does not implement the 2017 directives that were preliminarily enjoined by this Court. For the reasons already set forth above, Defendants have not persuaded the Court that this is the case. Instead, the Court finds that the Mattis Implementation Plan effectively implements the policy directives that were already at issue when the Court’s preliminary injunction was ordered. Accordingly, Plaintiffs’ challenge to those directives is not moot, and the need remains intact for the Court’s preliminary injunction maintaining the *status quo ante* until the final resolution of this case on the merits.

Implementation Plan does not moot Plaintiffs’ claims, it also does not mean that their allegations now fail to state a claim.

¹⁵ Defendants argue, yet again, that the Court’s injunction should be dissolved insofar as it applies to anyone other than the Plaintiffs in this case. The Court has already rejected this argument, *see* Dec. 11, 2017 Order, ECF No. 75, at 7, and rejects it now for the same reasons.

The only material development that has occurred since the Court's preliminary injunction was issued is that the Defendants have prepared a plan to implement the enjoined directives, and a report that purportedly provides support for that plan. These developments do not change the Court's conclusion on any of the preliminary injunction factors.

On the merits, the Mattis Implementation Plan still accomplishes an extremely broad prohibition on military service by transgender individuals that appears to be divorced from any transgender individual's actual ability to serve. In the absence of the challenged policy, transgender individuals are subject to all of the same standards and requirements for accession and retention as any other service member. The Mattis Implementation Plan establishes a special *additional* exclusionary rule that precludes individuals who would otherwise satisfy the demanding standards applicable to all service members simply because they have certain traits that are associated with being transgender. Moreover, because the plan fundamentally implements the policy directives set forth by the President in 2017, the unusual factors associated with the issuance of the 2017 directives are still relevant. For example, the Court is still concerned that, immediately prior to the announcement of the 2017 Presidential directives, the military had studied the issue and found no reason to exclude transgender service members. The Court is likewise still concerned that the President's 2017 directives constituted an abrupt reversal in policy, and a *revocation* of rights, announced without any of the formality, deliberative process, or factual support usually associated with such a significant action. Although it makes no final ruling on the merits in this Memorandum Opinion, the Court is not convinced at this stage that the processes implemented by Defendants *after* President Trump's 2017 Presidential Memorandum, and the memoranda that they have issued since that time, resolve the constitutional issues that persuaded the Court that a preliminary injunction was

warranted in the first place. Based on the record before the Court, these *post hoc* processes and rationales appear to have been constrained by, and not truly independent from, the President's initial policy decisions.

With regard to irreparable injury, Defendants argue again that the Mattis Implementation Plan protects Plaintiffs from any injury. The Court has already rejected those arguments. If the Court were to dissolve its injunction and allow the Mattis Implementation Plan to go into effect, Plaintiffs would suffer very real harms. Defendants also argue that Plaintiffs will not be irreparably injured if the Court dissolves its preliminary injunction because other courts have since issued injunctions that are still in place. The Court rejects this argument as well. The fact that other courts¹⁶ have similarly concluded that Defendants' policy is likely unconstitutional and warrants being preliminarily enjoined is no reason for this Court to lift its own injunction. This is especially so given that Defendants have moved to dissolve those preliminary injunctions, and have appealed the decision of the first court to deny such a motion. Finally, the Court's assessment of the balance of equities and public interest in its preliminary injunction Opinion still stands. It should not be forgotten that the United States military remains engaged in numerous armed conflicts throughout the world, and service members are still being injured and killed in those conflicts. The public interest and equities lie with allowing young men and women who are qualified and willing to serve our Nation to do so.

In short, because the Mattis Implementation Plan would effectively implement the very policies preliminarily enjoined by the Court, the development of that plan is not a reason to dissolve that injunction. To avoid any possible need for clarification, the Court states expressly:

¹⁶ See *Karnoski v. Trump*, No. 17-cv-1297-MJP (W.D. Wash.); *Stone v. Trump*, No. 17-cv-2459-GLR (D. Md.); *Stockman v. Trump*, 17-cv-1799-JGB (C.D. Cal).

EXHIBIT C

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2018, I filed the foregoing addendum with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Counsel for parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Tara Morrissey
Tara Morrissey