EXHIBIT 6

From: Neller Gen Robert B
To: Dunford Gen Joseph F
Subject: RE: Transgender policy message (UNCLASSIFIED)
Date: Thursday, July 27, 2017 11:07:00 AM

Can you talk today?

-----Original Message-----
From: Dunford, Joseph F Jr Gen USMC JS (US) (b)(6)
Sent: Thursday, July 27, 2017 10:57 AM
To: Milley, Mark A GEN USARMY HQDA CSA (US); Richardson ADM John M; Neller Gen Robert B; Goldfein, David L Gen USAF AF-CC (US); Lengyel, Joseph L Gen USAF NG NGB (US)
Subject: RE: Transgender policy message (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

P.S. When asked, I will state that I was not consulted ... expect that question will come NLT than my September hearing.

VR
Joe

-----Original Message-----
From: Dunford, Joseph F Jr Gen USMC JS (US)
Sent: Thursday, July 27, 2017 7:55 AM
To: Milley, Mark A GEN USARMY HQDA CSA (US) (b)(6) 'Richardson, John M ADM CNO' (b)(6) 'Neller Gen Robert B' (b)(6) Goldfein, David L Gen USAF AF-CC (US) (b)(6) Lengyel, Joseph L Gen USAF NG NGB (US) (b)(6)
Subject: Transgender policy message (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Chiefs,

I know yesterday's announcement was unexpected. The message below is provided in advance of an official letterhead memo from me. It's as much as we can say right now. I'd ask that you ensure widest dissemination ...

VR
Joe

From: CJCS
To: Service Chiefs, Commanders and Senior Enlisted Leaders

I know there are questions about yesterday's announcement on the transgender policy by the President. There will be no modifications to the current policy until the President's direction has been received by the Secretary of Defense and the Secretary has issued implementation guidance.

In the meantime, we will continue to treat all of our personnel with respect. As importantly, given the current fight and the challenges we face, we will all remain focused on accomplishing our assigned missions.

CLASSIFICATION: UNCLASSIFIED
CLASSIFICATION: UNCLASSIFIED

From:	Neller Gen Robert B
To:	Dunford, Joseph F Jr Gen USMC JS (US); Milley, Mark A GEN USARMY HQDA CSA (US); Richardson ADM John M; Goldfein, David L Gen USAF AF-CC (US); Lengyel, Joseph L Gen USAF NG NGB (US)
Cc:	Walters LtGen Glenn M (b)(6) Laster LtGen James B; Brilakis LtGen Mark A; Ewers MajGen John R; Hogue SES Robert D (b)(6) Wissler LtGen John E; Berger LtGen David H (b)(6) McMillian LtGen Rex C (b)(6) Kennedy BGen Paul J (b)(6) Renforth BGen Austin E; Jurney BGen William M
Subject:	RE: Transgender policy message (UNCLASSIFIED)
Date:	Thursday, July 27, 2017 8:59:00 AM

Roger over.
V/R Neller

-----Original Message-----
From: Dunford, Joseph F Jr Gen USMC JS (US) (b)(6)
Sent: Thursday, July 27, 2017 7:55 AM
To: Milley, Mark A GEN USARMY HQDA CSA (US); Richardson ADM John M; Neller Gen Robert B; Goldfein, David L Gen USAF AF-CC (US); Lengyel, Joseph L Gen USAF NG NGB (US)
Subject: Transgender policy message (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Chiefs,

I know yesterday's announcement was unexpected. The message below is provided in advance of an official letterhead memo from me. It's as much as we can say right now. I'd ask that you ensure widest dissemination ...

VR
Joe

From: CJCS
To: Service Chiefs, Commanders and Senior Enlisted Leaders

I know there are questions about yesterday's announcement on the transgender policy by the President. There will be no modifications to the current policy until the President's direction has been received by the Secretary of Defense and the Secretary has issued implementation guidance.

In the meantime, we will continue to treat all of our personnel with respect. As importantly, given the current fight and the challenges we face, we will all remain focused on accomplishing our assigned missions.

CLASSIFICATION: UNCLASSIFIED

From: **Herrington, Mark H CIV OSD OGC (US)** mark.h.herrington2.civ@mail.mil
Subject: Final Release Regarding "Tweet FOIA" 17-2707 (D.D.C.)
Date: September 14, 2018 at 9:52 AM
To: cerissa.cafasso@americanoversight.org
Cc: Kahn, Matthew (USADC) Matthew.Kahn@usdoj.gov

Cerissa,

Please find attached the combined final response to the tweet FOIA from OSD/JS and the service branches. Some redactions have been taken pursuant to b(5), for deliberative process and attorney / client privileges. All b(5) redactions are marked. All other redactions were taken under b(6), some of which are marked. The others are in similar areas, such as email to/from sections and signature blocks. Exemption 6, 5 U.S.C. § 552(b)(6), permits the Government to withhold information about individuals when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." DoD has a practice to withhold personally identifying information of those members of DoD who are at the military rank of Colonel or below and at the rank of GS-15 or below. See O'Keefe v. DoD, 463 F. Supp. 2d 317, (E.D.N.Y. 2006) (holding that "the probative value of this personally identifying information is nominal and does not overcome the privacy interest of the employees involved. The employees who conducted the investigation are of relatively low rank"). An exception to this rule allows the names of those personnel who routinely deal with the press to be released. The rationale for this practice is that disclosing the names of the individuals involved could subject such individuals to annoyance or harassment in their private lives. Thus, this policy protects significant personal privacy interests. Moreover, release of these low-level individuals' names would not serve the "core purpose" of the FOIA, as it would not show "what the government is up to." As these individuals were not the decision makers who are typically held accountable by the public, their identities are not typically relevant or of interest to the public. Thus, there is no public interest outweighing the significant personal privacy interests involved. DoD attempted to consistently redact any personally identifying information of those members of DoD who do not routinely deal with the press and who were not senior level employees, as well as the contact information for all employees. These redactions included email addresses, signature blocks, names within emails, phone numbers, and office locations.

Please let Matt Kahn know if you have any questions.

Sincerely,

Mark

Mark Herrington
Associate Deputy General Counsel (Litigation Counsel)
U.S. Department of Defense Office of General Counsel
1600 Defense Pentagon, Room 3B688
Washington, D.C. 20301-1600
703-571-0799
mark.h.herrington2.civ@mail.mil
mark.h.herrington2.civ@mail.smil.mil

Tweet FOIA respon...ted.pdf

From: Kremer, Kyle J Brig Gen USAF JS J1 (US)
To: Dunford, Joseph F Jr Gen USMC JS (US); Selva, Paul J Gen USAF JS OCJCS (US)
Cc: JS Pentagon DoM List JDir Directors; JS Pentagon DoM List JDir Vice Directors; Dumont, Michael J (Mike) RADM USN JS ODJS (US); Hicks, Gregory L CAPT USN JS OCJCS (US)
Subject: RE: POTUS Tweet on Transgender (UNCLASSIFIED)
Date: Wednesday, July 26, 2017 9:42:00 AM

CLASSIFICATION: UNCLASSIFIED

Chairman/Vice Chairman,

We are working with OSD (P&R) on the issue. Everyone was caught flat-footed. More to follow.

V/R
Kyle

KYLE J. KREMER, Brig Gen, USAF
Director for Manpower & Personnel
The Joint Staff, J-1
Pentagon, Room (b) (6)
Comm (b) (6) DSN

-----Original Message-----
From: Hicks, Gregory L CAPT USN JS OCJCS (US)
Sent: Wednesday, July 26, 2017 9:16 AM
To: Dunford, Joseph F Jr Gen USMC JS (US) >; Selva, Paul J Gen USAF JS OCJCS (US) <
Cc: JS Pentagon DoM List JDir Directors <(b) (6) >; JS Pentagon DoM List JDir Vice Directors >; Dumont, Michael J (Mike) RADM USN JS ODJS (US) <
Subject: POTUS Tweet on Transgender (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Sirs - POTUS has tweeted the below on Transgenders not being able to serve in the military in any capacity. The total message is three different tweets just before 0900. CNN is covering live and the Pentagon Press Corps is looking for comment from OSD PA. We will defer all press to OSD PA.

Donald J. Trump
@realDonaldTrump 18 minutes ago
After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow.....

....Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming.....

....victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you

VR/ CAPT Greg Hicks
Special Assistant for Public Affairs
To the Chairman of the Joint Chiefs of Staff Room The Pentagon Washington, DC 20318-9999
www.jcs.mil Gregory.l.hicks18.mil@mail.mil
(b) (6)
Cell:

From: Kurta, Anthony M SES OSD OUSD P-R (US)
To: [redacted] CIV (US)
Cc: "Penrod, Vee S SES OSD PR"; (b) (6) [redacted] MILLER, Stephanie P SES OSD OUSD P-R (US); Hebert, Lernes J SES OSD OUSD P-R (US); [redacted]) CDR USN OSD OUSD P-R (US); Penrod, Virginia S SES OSD OUSD P-R (US); [redacted] CIV OSD OUSD P-R (US); [redacted] LCDR USN OSD OUSD P-R (US)
Subject: RE: Trump bans transgender individuals from U.S. military service (UNCLASSIFIED)
Date: Wednesday, July 26, 2017 11:11:00 AM

CLASSIFICATION: UNCLASSIFIED

[redacted]
Thanks and very helpful.
Tony

-----Original Message-----
From: Thomas, James A Jr CIV (US)
Sent: Wednesday, July 26, 2017 11:08 AM
To: Kurta, Anthony M SES OSD OUSD P-R (US) (b) (6) [redacted] l>
Cc: 'Penrod, Vee S SES OSD PR' (b) (6) [redacted] >
Subject: RE: Trump bans transgender individuals from U.S. military service (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Hope you're enjoying some much deserved time away from DC. In case you haven't seen this, below is the statement we are using with the Hill regarding the President's tweet. If you have any questions please let me know.

"We refer all questions about the President's statements to the White House. We will continue to work closely with the White House to address the new guidance provided by the Commander-in-Chief on transgender individuals serving the military. We will provide revised guidance to the Department in the near future."

Jeff A. Davis
Captain, U.S. Navy
Director of Defense Press Operations

(b) [redacted]
(6)

[redacted]
Special Assistant
P&R Team Chief
Office of the Assistant Secretary of Defense
Legislative Affairs
Pentagon, Room (b) [redacted]
(b) (6) [redacted]

-----Original Message-----
From: Greene, Craig [mailto:Craig.Greene@mail house.gov]
Sent: Wednesday, July 26, 2017 10:06 AM
To: Kurta, Anthony M SES OSD OUSD P-R (US) < [redacted] >
Cc: Sennott, Daniel <Daniel.Sennott@mail.house.gov>; 'Penrod, Vee S SES OSD PR' < [redacted] l>; [redacted] CIV (US) < [redacted] >
Subject: [Non-DoD Source] RE: Trump bans transgender individuals from U.S. military service (UNCLASSIFIED)

Sorry to bother you on Leave. Enjoy and turn you BB off.

Vee anything you can share would be helpful

craig

Craig Greene
Professional Staff Member
Armed Services Committee
U.S. House of Representatives
(202) 225-5540

-----Original Message-----
From: Kurta, Anthony M SES OSD OUSD P-R (US) [mailto:(b) (6)]
Sent: Wednesday, July 26, 2017 9:59 AM
To: Greene, Craig <Craig.Greene@mail.house.gov>
Cc: Sennott, Daniel <Daniel.Sennott@mail.house.gov>; 'Penrod, Vee S SES OSD PR' < >
Subject: RE: Trump bans transgender individuals from U.S. military service (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Craig
I am on leave in MT! Thanks for the congrats.
I know you will be asked many questions, but we don't have any further info at this point. That is all I have for now.
Tony

-----Original Message-----
From: Greene, Craig [mailto:Craig.Greene@mail house.gov]
Sent: Wednesday, July 26, 2017 9:43 AM
To: Kurta, Anthony M SES OSD OUSD P-R (US) l>
Cc: Sennott, Daniel <Daniel.Sennott@mail.house.gov>; 'Penrod, Vee S SES OSD PR' >
Subject: [Non-DoD Source] Trump bans transgender individuals from U.S. military service

Tony,

I'm going to get pummeled by offices today, can you shed some light on this?

Oh by the way congratulations on your nomination. I don't have time to go thru Will Cooper.

Craig

The U.S. military will no longer allow transgender individuals to serve "in any capacity," President Donald Trump announced on Twitter this morning.

"After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military," Trump wrote online, breaking his message up into multiple posts. "Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you."

The announcement represents a reversal of an Obama-era policy established last June by former Defense Secretary Ash Carter, who shifted Pentagon policy to allow transgender troops to serve openly. Last month, Defense Secretary James Mattis announced that the Pentagon would delay his predecessor's order through the remainder of 2017 in order to review the impact of the shift.

Craig Greene

Professional Staff Member

Armed Services Committee

U.S. House of Representatives

[redacted]

CLASSIFICATION: UNCLASSIFIED

CLASSIFICATION: UNCLASSIFIED
CLASSIFICATION: UNCLASSIFIED

EXHIBIT 7

Presidential Documents

Memorandum of August 25, 2017

Military Service by Transgender Individuals

Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security

Section 1. *Policy.* (a) Until June 2016, the Department of Defense (DoD) and the Department of Homeland Security (DHS) (collectively, the Departments) generally prohibited openly transgender individuals from accession into the United States military and authorized the discharge of such individuals. Shortly before President Obama left office, however, his Administration dismantled the Departments' established framework by permitting transgender individuals to serve openly in the military, authorizing the use of the Departments' resources to fund sex-reassignment surgical procedures, and permitting accession of such individuals after July 1, 2017. The Secretary of Defense and the Secretary of Homeland Security have since extended the deadline to alter the currently effective accession policy to January 1, 2018, while the Departments continue to study the issue.

In my judgment, the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources, and there remain meaningful concerns that further study is needed to ensure that continued implementation of last year's policy change would not have those negative effects.

(b) Accordingly, by the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States under the Constitution and the laws of the United States of America, including Article II of the Constitution, I am directing the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have the negative effects discussed above. The Secretary of Defense, after consulting with the Secretary of Homeland Security, may advise me at any time, in writing, that a change to this policy is warranted.

Sec. 2. *Directives.* The Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, shall:

(a) maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary that I find convincing; and

(b) halt all use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex.

Sec. 3. *Effective Dates and Implementation.* Section 2(a) of this memorandum shall take effect on January 1, 2018. Sections 1(b) and 2(b) of this memorandum shall take effect on March 23, 2018. By February 21, 2018, the Secretary of Defense, in consultation with the Secretary of Homeland Security, shall submit to me a plan for implementing both the general policy set forth in section 1(b) of this memorandum and the specific directives

set forth in section 2 of this memorandum. The implementation plan shall adhere to the determinations of the Secretary of Defense, made in consultation with the Secretary of Homeland Security, as to what steps are appropriate and consistent with military effectiveness and lethality, budgetary constraints, and applicable law. As part of the implementation plan, the Secretary of Defense, in consultation with the Secretary of Homeland Security, shall determine how to address transgender individuals currently serving in the United States military. Until the Secretary has made that determination, no action may be taken against such individuals under the policy set forth in section 1(b) of this memorandum.

Sec. 4. *Severability.* If any provision of this memorandum, or the application of any provision of this memorandum, is held to be invalid, the remainder of this memorandum and other dissimilar applications of the provision shall not be affected.

Sec. 5. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

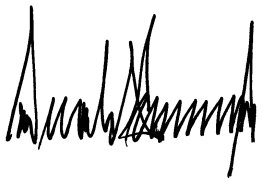
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of Defense is authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, August 25, 2017

[FR Doc. 2017–18544
Filed 8–29–17; 11:15 am]
Billing code 5001–06–P

EXHIBIT 8

IMMEDIATE RELEASE

Statement by Secretary of Defense Jim Mattis on Military Service by Transgender Individuals

Press Operations

Release No: NR-312-17

Aug. 29, 2017

The Department of Defense has received the Presidential Memorandum, dated August 25, 2017, entitled “Military Service by Transgender Individuals.” The department will carry out the president’s policy direction, in consultation with the Department of Homeland Security. As directed, we will develop a study and implementation plan, which will contain the steps that will promote military readiness, lethality, and unit cohesion, with due regard for budgetary constraints and consistent with applicable law. The soon arriving senior civilian leadership of DOD will play an important role in this effort. The implementation plan will address accessions of transgender individuals and transgender individuals currently serving in the United States military.

Our focus must always be on what is best for the military’s combat effectiveness leading to victory on the battlefield. To that end, I will establish a panel of experts serving within the Departments of Defense and Homeland Security to provide advice and recommendations on the implementation of the president’s direction. Panel members will bring mature experience, most notably in combat and deployed operations, and seasoned judgment to this task. The panel will assemble and thoroughly analyze all pertinent data, quantifiable and non-quantifiable. Further information on the panel will be forthcoming.

Once the panel reports its recommendations and following my consultation with the secretary of Homeland Security, I will provide my advice to the president concerning implementation of his policy direction. In the interim, current policy with respect to currently serving members will remain in place. I expect to issue interim guidance to the force concerning the president's direction, including any necessary interim adjustments to procedures, to ensure the continued combat readiness of the force until our final policy on this subject is issued.

News
Press Advisories
News Releases
Transcripts
Speeches
Publications

EXHIBIT 9

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

9/14/17

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDANT, U.S. COAST GUARD
DEPUTY CHIEF MANAGEMENT OFFICER
CHIEF, NATIONAL GUARD BUREAU
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF COST ASSESSMENT AND PROGRAM EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF OPERATIONAL TEST AND EVALUATION
CHIEF INFORMATION OFFICER OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE AFFAIRS
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS
DIRECTOR OF NET ASSESSMENT
DIRECTOR, STRATEGIC CAPABILITIES OFFICE
DIRECTORS OF DEFENSE AGENCIES
DIRECTORS OF DOD FIELD ACTIVITIES

SUBJECT: Military Service by Transgender Individuals - Interim Guidance

The Department of Defense ("DoD") has received the Presidential Memorandum, *Military Service by Transgender Individuals*, dated August 25, 2017 ("Presidential Memorandum"). DoD will carry out the President's policy and directives in consultation with the Department of Homeland Security ("DHS") with respect to the U.S. Coast Guard. Not later than February 21, 2018, I will present the President with a plan to implement the policy and directives in the Presidential Memorandum. Consistent with military effectiveness and lethality, budgetary constraints, and applicable law, the implementation plan will establish the policy, standards and procedures for transgender individuals serving in the military. The Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff, supported by a panel of experts ("Panel"), shall propose for my consideration recommendations supported by appropriate evidence and information.

To comply with the Presidential Memorandum, ensure the continued combat readiness of the force, and maximize flexibility in the development of the implementation plan, the attached Interim Guidance takes effect immediately and will remain in effect until I promulgate DoD's final policy in this matter. By agreement with the Acting Secretary of Homeland Security, this Interim Guidance also applies to the U.S. Coast Guard.

Attachment:
As stated

cc:
Secretary of Homeland Security

Interim Guidance

First and foremost, we will continue to treat every Service member with dignity and respect.

Accessions: The procedures set forth in Department of Defense Instruction (DoDI) 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services*, dated April 28, 2010 (Change 1), which generally prohibit the accession of transgender individuals into the Military Services, remain in effect because current or history of gender dysphoria or gender transition does not meet medical standards, subject to the normal waiver process.

Medical Care and Treatment: Service members who receive a gender dysphoria diagnosis from a military medical provider will be provided treatment for the diagnosed medical condition. As directed by the Memorandum, no new sex reassignment surgical procedures for military personnel will be permitted after March 22, 2018, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex.

In-Service Transition for Transgender Service Members: The policies and procedures set forth in DoDI 1300.28, *In-Service Transition for Transgender Service Members*, dated July 1, 2016, remain in effect until I promulgate DoD's final guidance in this matter.

Separation and Retention of Transgender Service members:

Service members who have completed their gender transition process and whose gender marker has been changed in DEERS will continue to serve in their preferred gender while this Interim Guidance remains in effect.

An otherwise qualified transgender Service member whose term of service expires while this Interim Guidance remains in effect, *may*, at the Service member's request, be re-enlisted in service under existing procedures.

As directed by the Memorandum, no action may be taken to involuntarily separate or discharge an otherwise qualified Service member solely on the basis of a gender dysphoria diagnosis or transgender status. Transgender Service members are subject to the same standards as any other Service member of the same gender; they may be separated or discharged under existing bases and processes, but not on the basis of a gender dysphoria diagnosis or transgender status.

Reestablishment of the Office of the Under Secretary of Defense for Personnel and Readiness (OUSD(P&R)) Central Coordination Cell: The OUSD(P&R) will reestablish the Central Coordination Cell (CCC) to provide expert advice and assistance to the Military Departments and Services and to commanders with regard to this Interim Guidance. The CCC may be reached at https://ra.sp.pentagon.mil/DoDCCC/SitePages/HomePage.aspx.

EXHIBIT 10

SECRETARY OF DEFENSE
WASHINGTON, DC 20301-1000

9/14/17

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDANT, U.S. COAST GUARD
DEPUTY CHIEF MANAGEMENT OFFICER
CHIEF, NATIONAL GUARD BUREAU
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF COST ASSESSMENT AND PROGRAM EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF OPERATIONAL TEST AND EVALUATION
CHIEF INFORMATION OFFICER OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE AFFAIRS
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS
DIRECTOR OF NET ASSESSMENT
DIRECTOR, STRATEGIC CAPABILITIES OFFICE
DIRECTORS OF DEFENSE AGENCIES
DIRECTORS OF DOD FIELD ACTIVITIES

SUBJECT: Terms of Reference - Implementation of Presidential Memorandum on Military Service by Transgender Individuals

Reference: Military Service by Transgender Individuals – Interim Guidance

I direct the Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff to lead the Department of Defense (DoD) in developing an Implementation Plan on military service by transgender individuals, to effect the policy and directives in Presidential Memorandum, *Military Service by Transgender Individuals*, dated August 25, 2017 ("Presidential Memorandum"). The implementation plan will establish the policy, standards and procedures for service by transgender individuals in the military, consistent with military readiness, lethality, deployability, budgetary constraints, and applicable law.

The Deputy Secretary and the Vice Chairman, supported by a panel of experts drawn from DoD and the Department of Homeland Security (DHS) ("Panel"), shall propose for my consideration recommendations supported by appropriate evidence and information, not later than January 15, 2018. The Deputy Secretary and the Vice Chairman will be supported by the Panel, which will be comprised of the Military Department Under Secretaries, Service Vice Chiefs, and Service Senior Enlisted Advisors. The Deputy Secretary and Vice Chairman shall

designate personnel to support the Panel's work to ensure Panel recommendations reflect senior civilian experience, combat experience, and expertise in military operational effectiveness. The Panel and designated support personnel shall bring a comprehensive, holistic, and objective approach to study military service by transgender individuals, focusing on military readiness, lethality, and unit cohesion, with due regard for budgetary constraints and consistent with applicable law. The Panel will be chaired by the Under Secretary of Defense for Personnel and Readiness and will report to the Deputy Secretary and the Vice Chairman at least every 30 days and address, at a minimum, the following three areas:

Accessions: The Presidential Memorandum directs DoD to maintain the policy currently in effect, which generally prohibits accession of transgender individuals into military service. The Panel will recommend updated accession policy guidelines to reflect currently accepted medical terminology.

Medical Care: The Presidential Memorandum halts the use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel, effective March 23, 2018, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex. The implementation plan will enumerate the specific surgical procedures associated with sex reassignment treatment that shall be prohibited from DoD or DHS resourcing unless necessary to protect the health of the Service member.

Transgender Members Serving in the Armed Forces: The Presidential Memorandum directs that the Department return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016. The Presidential Memorandum also allows the Secretary to determine how to address transgender individuals currently serving in the Armed Forces. The Panel will set forth, in a single policy document, the standards and procedures applicable to military service by transgender persons, with specific attention to addressing transgender persons currently serving. The Panel will develop a universal retention standard that promotes military readiness, lethality, deployability, and unit cohesion.

To support its efforts, the Panel will conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members. The study will be planned and executed to inform the Implementation Plan. The independent multi-disciplinary review and study will address aspects of medical care and treatment, personnel management, general policies and practices, and other matters, including the effects of the service of transgender persons on military readiness, lethality, deployability, and unit cohesion.

The Panel may obtain advice from outside experts on an individual basis. The recommendations of the Deputy Secretary and the Vice Chairman will be coordinated with senior civilian officials, the Military Departments, and the Joint Staff.

All DoD Components will cooperate fully in, and will support the Deputy Secretary and the Vice Chairman in their efforts, by making personnel and resources available upon request in support of their efforts.

cc:
Secretary of Homeland Security

EXHIBIT 11

THE WHITE HOUSE

WASHINGTON

March 23, 2018

MEMORANDUM FOR THE SECRETARY OF DEFENSE
THE SECRETARY OF HOMELAND SECURITY

SUBJECT: Military Service by Transgender Individuals

Pursuant to my memorandum of August 25, 2017, "Military Service by Transgender Individuals," the Secretary of Defense, in consultation with the Secretary of Homeland Security, submitted to me a memorandum and report concerning military service by transgender individuals.

These documents set forth the policies on this issue that the Secretary of Defense, in the exercise of his independent judgment, has concluded should be adopted by the Department of Defense. The Secretary of Homeland Security concurs with these policies with respect to the U.S. Coast Guard.

Among other things, the policies set forth by the Secretary of Defense state that transgender persons with a history or diagnosis of gender dysphoria -- individuals who the policies state may require substantial medical treatment, including medications and surgery -- are disqualified from military service except under certain limited circumstances.

By the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby order as follows:

Section 1. I hereby revoke my memorandum of August 25, 2017, "Military Service by Transgender Individuals," and any other directive I may have made with respect to military service by transgender individuals.

Sec. 2. The 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.

Sec. 3. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of Defense is authorized and directed to publish this memorandum in the *Federal Register*.

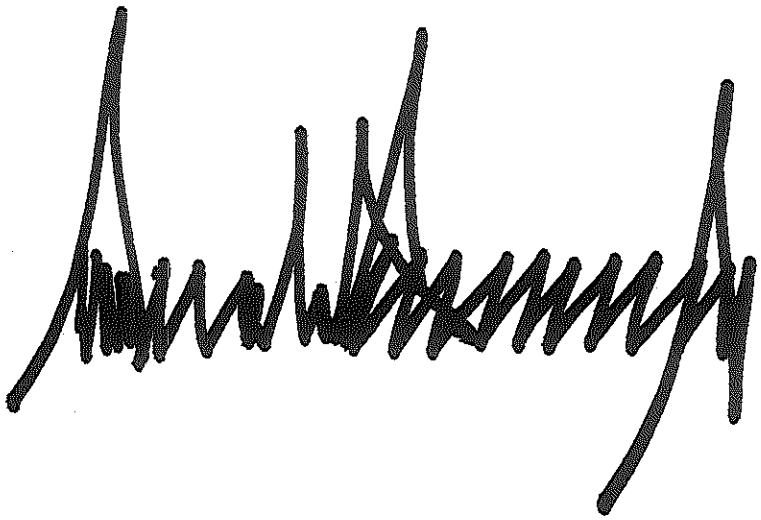


EXHIBIT 12

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EXHIBIT 13

Malloy, Emily N.

From: Powers, James R. (CIV) <James.R.Powers@usdoj.gov>
Sent: Friday, January 31, 2020 3:19 PM
To: Heinz, Jordan M.
Cc: Barsanti, Vanessa; Ikard, Sam; *prenn@lambdalegal.org; *tborelli@lambdalegal.org; *Rachel@newmanlaw.com; Siegfried, Daniel I.; Stallings-Ala'ilima, Chalia (ATG); *colleen.melody@atg.wa.gov; *jason@newmanlaw.com; Rosenberg, Michael E.; Carmichael, Andrew E. (CIV); Enlow, Courtney D. (CIV); Skurnik, Matthew (CIV); Norway, Robert M. (CIV); Gerardi, Michael J. (CIV)
Subject: [EXT] RE: Karnoski, et al. v. Trump, et al.

Jordan,
I have provided responses to your requests in red below.

Thanks,
Jim

From: Heinz, Jordan M. <jheinz@kirkland.com>
Sent: Tuesday, January 28, 2020 2:38 PM
To: Powers, James R. (CIV) <jpowers@CIV.USDOJ.GOV>; Gerardi, Michael J. (CIV) <mgerardi@CIV.USDOJ.GOV>; Skurnik, Matthew (CIV) <maskurni@CIV.USDOJ.GOV>; Carmichael, Andrew E. (CIV) <ancarmic@CIV.USDOJ.GOV>; Enlow, Courtney D. (CIV) <cenlow@CIV.USDOJ.GOV>
Cc: Barsanti, Vanessa <vanessa.barsanti@kirkland.com>; Ikard, Sam <sam.ikard@kirkland.com>; *prenn@lambdalegal.org <prenn@lambdalegal.org>; *tborelli@lambdalegal.org <tborelli@lambdalegal.org>; *Rachel@newmanlaw.com <Rachel@newmanlaw.com>; Siegfried, Daniel I. <daniel.siegfried@kirkland.com>; Stallings-Ala'ilima, Chalia (ATG) <Chalia.SA@atg.wa.gov>; *colleen.melody@atg.wa.gov <colleen.melody@atg.wa.gov>; *jason@newmanlaw.com <jason@newmanlaw.com>; Rosenberg, Michael E. <michael.rosenberg@kirkland.com>
Subject: Karnoski, et al. v. Trump, et al.

> Drew,
>
> During the December 10, 2019 conference with the Court, Defendants represented that there were nine Panel of Experts meetings. *See* Hr. Tr. 6:15-18. Plaintiffs have received the meeting minutes for these first nine meetings through December 7, 2017. However, based on a review of the produced documents, it appears that there were four additional Panel meetings: December 13, 2017; December 22, 2017; January 4, 2018; and January 11, 2018. Plaintiffs have not received meeting minutes for these final four meetings. Please promptly produce the meeting minutes for these final four meetings or confirm that no such meeting minutes exist.

I have been advised there were not meeting minutes for these 4 meetings.

> Defendants also implied during the December 10, 2019 conference that the Panel "briefed Secretary Mattis" in January 2018, "[a]nd the briefings we've given over to plaintiffs." Hr. Tr. 26:25 & 26:1-9. Plaintiffs have been unable to identify these briefings. Please identify these briefings by bates number.

The documents presented to Secretary Mattis were the Action Memo from former Under Secretary Wilkie (AR_003059-AR_003067) and its accompanying materials included in the AR.

> Additionally, Defendants claim to have now fully produced all documents responsive to RFP No. 36, which seeks all "complaints arising from or attributed to open service by transgender service members, accessions by

transgender individuals, or the Carter Policy," because the Defendants have now produced the two Equal Opportunity complaints referenced in DoD's Report and Recommendation. Within the incident description for one of these complaints, USDOE00076582, it states "Anonymous complainant alleges that the BnCO and SgtMaj have been fostering, condoning, and failing to correct, a hostile working [sic] which discriminates and segregates the transgendered Marine. ***See attachment for the detailed complaint provided to the EOA by the anonymous complainant***." (emphasis added). Plaintiffs have been unable to identify the referenced attachment. Please identify the referenced attachment or else please promptly produce this attachment; until then, Plaintiffs do not consider Defendants to have fully complied with RFP 36.

Defendants have identified and collected the attachment you appear to be referring to. We will produce it shortly.

Regards,

Jordan

Jordan M. Heinz

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F +1 312 862 2200

jordan.heinz@kirkland.com

EXHIBIT 14

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EXHIBIT 15

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EXHIBIT 16

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,	C17-01297-MJP
Plaintiffs, and	SEATTLE, WASHINGTON
STATE OF WASHINGTON;	February 3, 2020
Plaintiff-Intervenor,	9:00 a.m.
v.	Status Hearing
DONALD J. TRUMP, in his official capacity as President of the United States, et al.,	
Defendants.	

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

APPEARANCES:

For the Plaintiff Karnoski:

Jordan Heinz
Daniel I. Siegfried
Kirkland & Ellis
300 North Lasalle
Chicago, IL 60654

Jason Sykes
Newman & DuWors LLP
2101 Fourth Avenue
Suite 1500
Seattle, WA 98121

Your Honor. And what that is, is during the course of meeting and conferring with the plaintiffs about the court's most recent order, the position that they've taken is that the order requires the government to produce all documents referring or relating to the Department of Defense's report and recommendation. That's the language they use in their RFP 29.

As we stated in the declaration of Mr. Easton, that's approximately 22,000 deliberative documents. So I just want to make sure that -- clarify whether it's that entire universe of documents -- essentially, every deliberative document from September 2017 to February 22, 2018 -- or if there's a more narrow universe that the court is ordering us to produce at this time.

THE COURT: Okay. Well, we already went through other categories that I said that the deliberative process is overcome. This is the one where we're talking about the working groups and the data that was collected.

I just told you -- or I told you in December that collecting data and doing research is not a deliberative process. So your privilege doesn't apply at all to the collection of data.

So I'm not understanding these 22,000 deliberative documents that you think you've got that you still haven't turned over. Who produced those documents? I mean, who are

they from?

MR. SKURNIK: It varies, Your Honor. So one group of them would be communications at the working-group level, say someone in a working group says: Hey, what if we tried Idea X, I think that would be a good idea. Someone else says: Oh, maybe that's not such a good idea. And that never makes it up to the panel.

Similarly at the services. Someone, say, in the Army says: Oh, what if we tried Idea X, I think that would be a good idea. Someone else in the Army says: Oh, yeah, that is or maybe that isn't a good idea. But that was never passed up to the panel.

THE COURT: That's exactly what they're looking for.

MR. SKURNIK: And at this time, that encompasses approximately 22,000 documents. And the way we've come up with that number is that plaintiffs have interpreted the order to cover all documents responsive to RFP 29, which is an incredibly broad RFP that encompasses essentially every deliberative document from September 2017 until February 22, 2018.

Now, if that's what the court is ordering, that's fine. I just want to make sure we understand exactly what the court is ordering so we don't have another clarification problem.

THE COURT: Well, then I think in December, I told you what you had to turn over. The working groups are data

gatherers. They are researchers. The conversations between them is part of gathering that data.

I want you to turn over who they are and the communications between them, the data that they reviewed and did not pass on, in addition to the data that they did. I mean, I'll say it again. So I don't know why 22,000 is some magic number. What are you trying to tell me there, that it's too much?

MR. SKURNIK: What I'm trying to do, Your Honor, is clarify exactly what documents we're talking about here. And the reason is is that plaintiffs, their interpretation of the order encompasses not just the working groups, but a much broader universe of deliberative documents, including, for instance, documents at the service level from folks who weren't even on working groups. And I guess as far as the individuals on the working groups, we've already produced all of that to plaintiffs in response to interrogatories. So they know all the individuals on working groups.

THE COURT: Plaintiff want to respond?

MR. SIEGFRIED: Sure. I guess so far all we've heard that this 22,000 encompasses is we've talked about three categories: The working-group documents that Your Honor just ordered them to produce and ordered them to produce back in December; the panel documents, which apparently are not included in the 22,000; and the post-panel documents. I

guess we don't understand what else there is, what else is encompassed in this 22,000.

MR. SKURNIK: So plaintiffs told us during the course of meeting and conferring that they believed the court's order required production of all documents responsive to RFP 29.

THE COURT: Um-hum.

MR. SKURNIK: Now, RFP 29 reads, "All documents or communications relating or referring to the February 2018 Department of Defense report and recommendations on military service by transgender persons." That's much broader than simply just working-group documents. That's essentially all documents within the Department of Defense and the military services across the 156 custodians from which we collected, any of those that we've withheld under the deliberative-process privilege during the relevant period.

THE COURT: But we spent two hours in December going through this. So we have the working group that I just spoke to you about. It's part of the transcript. We have the documents that concern those who are decisionmakers on the panel, including the one non-voting decisionmaker. And then, as we pointed out, we have the documents that after the decision is made, we have the documents that are used to draft the final report. Those are three discrete categories. I've told you that the first category, the working group, I

don't believe falls under the deliberative privilege. I already made a ruling on those who are the panel members. And in my last order, I also included the panel member who was non-voting.

In my December order I also included the post documents, which I'm assuming we're going to talk about in just a minute. What about that don't you understand?

MR. SKURNIK: So that makes sense to me, Your Honor. The issue is the plaintiffs have taken -- have contended that the court's order from December requires -- at least Part 1 of that order, which talked about non-voting members of the panel of experts -- that that requires not just working-group materials, but all deliberative materials during the relevant time period.

If the court's order is just the working-group materials, then we can find a way to identify those materials and that can be the scope of the order. But I just want to make sure we know exactly what the court is ordering so we don't have to -- so that there's no further confusion between the parties about what the order requires, precisely.

THE COURT: All right. Do we have an understanding?

MR. HEINZ: The problem is, Mr. Siegfried just asked, what else is there besides those three categories of documents within the 22,000? What else is there that you're withholding that you believe is not encompassed by her order

but is responsive to RFP 29?

MR. SKURNIK: For instance, any custodians from which we've collected that have deliberative documents that were not members of a working group.

MR. HEINZ: So, for instance, someone at the services flagging the issue that the data being presented to the working group and the panel is incorrect. We'd want to know that. That's very relevant information.

MR. SKURNIK: So my question here, Your Honor, is what -- is whether the court's order extends to, for instance, someone at the services saying -- who is not a member of any of the working groups -- saying: Hey, what if we tried Idea X for transgender policy? And someone else who is not a member of a working group responding: No, I don't think that's a great idea. And then that never makes it up further, never makes it to a working group or a panel, whether the court's order encompasses everything; which is broader than just working groups.

MR. SIEGFRIED: So, Your Honor, our position first of all is, yes, that is responsive and should be produced. And I think the Ninth Circuit addressed this when they placed the burden on the defendants to say, when you're doing the analysis, when the court is doing the analysis for deliberative-process privilege, if the defendants believe the analysis should be more granular, they have the burden to

explain why. And, frankly, I don't understand what these documents are or why the analysis would be meaningfully different.

THE COURT: Okay. Well, we're running into a problem that honestly the government, further down in its joint status report, they make the complaint that the plaintiffs have not brought a motion to compel. And, therefore, certain requests are not ripe. I don't know what you think this whole privilege is about. I mean, we are here to sort out discovery over a motion to produce. So there is a motion to compel. And each side wrote for me in a way that I didn't think was helpful for me to sort this out. So I said, this is the path that we're going to take.

And so I've methodically looked at each request. The government complained that this was too much, they couldn't respond. I say, fine, we're going to do five at a time. For you to come back and tell me that there's no motion to compel on the table and therefore it's not ripe, makes absolutely no sense to me.

The other thing I would say is that under the civil rules, a motion to compel is not necessary. It is a motion to protect. If you've got documents out there that you believe are responsive but you're still withholding, you have the burden of bringing on the motion to protect. They don't have to move to compel. So among these thousands of documents, if

you think that there is something out there that is responsive to this RFP, you've got to put it in a log and you've got to defend why it is that the deliberative privilege still applies. It's not the other way around. You have the documents. You can see what's there. They can't.

And when you throw out ideas that maybe the services are offering up and saying this is the wrong data, of course that's responsive. If you think it's deliberative, you have to apply the privilege.

So, let's go back and talk again. I'm going to issue an order that covers -- we've covered now the first two categories, we're going to get to the third. If you think there's something else out there, because the order says you have to respond, it's your obligation to identify what it is, it's not theirs. Okay?

MR. SKURNIK: Your Honor, just to be clear. We have done so. Every single document that is responsive that we've withheld is listed on a privilege log. So plaintiffs know about every single document.

THE COURT: Okay. Well, we've got some problems with the privilege logs, because they're telling me you've got a whole lot of people on those logs that they can't tell whether they give you cover or not, because they don't know who they are. But let's stop and work through the next portion. And that is post-decision, the write-up portion.

Everybody with me with that definition?

MR. SIEGFRIED: Yes, Your Honor.

MR. SKURNIK: Your Honor, could I just ask one last question about the previous category that we just discussed?

THE COURT: Um-hum.

MR. SKURNIK: So the defendants, in our motion, have requested a stay of the court's order while the Solicitor General considers whether to seek relief in the Court of Appeals. So we'd just like to request that stay.

THE COURT: You're not going to get a stay. But you can certainly -- we have other clawback provisions that if something gets turned over that has to be clawed back, we'll claw it back, if the Ninth Circuit says that's what we're going to do. But we're not going to wait for the Solicitor General on every single ruling that I make.

It seems to me we ought to get through this whole thing and then you decide if you want to take the package up. But I consider it a real tactic of delay that every time I hold one of these hearings, that's the threat. We're going to go to the Ninth Circuit. It's delay, delay, delay. We've been at this for years now. And I'm giving you every opportunity to tell me what you don't understand.

If you disagree with it, there may be a time for you to take it up. But in the middle of an ongoing hearing over what you have to produce, I don't think is the right time.

Let me finish it. Okay? If you don't like it, you have a perfect right to do whatever procedural maneuver you wish. But this is an ongoing process. Okay?

So, let's go forward and talk about the post-decisional documents. Plaintiff, tell me what are you not getting and what do you think you deserve?

MR. SIEGFRIED: Well, Your Honor, we haven't gotten anything. And I think we talked about this, and I think Your Honor analyzed it, in the December 18th order. All of the post-decisional information, the drafts, the communications, post-panel, we think -- we've overcome the privilege for all the reasons Your Honor analyzed. And the defendants' response I think at this point is: Well, we're going to respond to an interrogatory and amend and give you names of people who reviewed, I think reviewed or commented on drafts; is that right?

MR. SKURNIK: Everyone who was involved in drafting the reports, who edited it, had any comments, everyone involved in the drafting process.

MR. SIEGFRIED: Our problem with that, Your Honor, is we're actually just looking for the communications. So we know, for example, that there were folks at the Department of Defense who were out soliciting or having communications with folks who we don't have any reason to believe actually reviewed or commented on a draft. But those communications

that then fed into whatever happened in the report are equally relevant, whether or not they commented on the draft.

So I don't know that this interrogatory response changes anything, although we're happy to have that information.

MR. SKURNIK: So, Your Honor, the plaintiffs' theory this whole time for why they have a need for drafts of the report and recommendation and communications about those drafts, has been that there's some untoward involvement by outside third parties.

Now, by providing plaintiffs with the names of everyone who is involved in the drafting process, and if someone from a third party was communicating with folks at the Department of Defense and that's reflected in any communications, we'll include those names as well, the names of everybody.

But we're facing another situation where the *Doe* court in D.C., Judge Kollar-Kotelly, ordered that defendants in that case did not have to produce these drafts.

THE COURT: For now. Her order -- you represented it as a final order. And I read it as she said "for now" and you can come back. She wasn't satisfied with the arguments that were made. She hasn't issued a written opinion, as I understand it.

MR. SKURNIK: That is correct, Your Honor, this was just during a teleconference call. However, what we've presented to the plaintiffs is we've asked for a stay. And

in the meantime, what we would do is provide plaintiffs with this information of everyone involved in the drafting process and that would allow them to test their theory that there was untoward outside involvement. And it would do so in a way that reconciles the positions of where we are in *Doe* and where we are in this court, and also without sort of undue intrusion into executive branch decisionmaking.

THE COURT: Well, Mr. Carmichael told me that this was simply drafting, that that was one of the arguments he made. And so if it's simply drafting and editing, that wouldn't be deliberative process. And so the privilege wouldn't apply, from what Mr. Carmichael told me the last time.

Now, you only want to give them the names. That means they've got to contact each of those people, find out what they said, get the custodians, get their data of any e-mails that they might have sent -- and interrupt me if I'm wrong with what you'd have to do -- and that's needless if you're sitting on top of that information.

So in December, I told you that you had to turn it over. I asked -- we put out an order. That part of the order I think is very clear. And you don't do anything. You don't move on it. You let the time go by. You don't produce. That's not acceptable.

If you have a motion for reconsideration, I'm telling you

you have to speak up promptly. That's what the rules provide. You don't wait until something else, quote, something may happen and another judge issues not an order but a comment that, as I understood it, that she is not ready to order it at this point. She wasn't satisfied with the arguments that were made. And, quite frankly, the arguments are not the same as the ones that were made here.

So you're late. Turn it over. Okay?

Plaintiff, does that satisfy you?

MR. HEINZ: Yes, Your Honor.

THE COURT: Okay. Now, I will issue an order in the next couple of days. This is what is going to happen. If the plaintiffs are satisfied with the order, fine, you can simply file a -- you know -- we agree. If you believe that there is something else that needs to be put in the record to defend whatever position you believe you need to take, you've already heard the threat of going to the Ninth Circuit, then you build your record.

I will look at it to see if it changes the amended order that I put out. In the meantime, I am not going to slow this process down for some solicitor somewhere to make a decision, I don't know when. One of the things that we did when we first set the trial date is this is a very important case for many, many people. So to keep slowing it down every time doesn't do the public any good.

So that's why I say when we get done, if you want to go to the solicitor and have him make a decision, fine. But you haven't given me any criteria to know when that decision would be made. Is it two days? Two weeks? Two years? We're not going to wait for that.

MR. SKURNIK: So, Your Honor, it would not be two years. It would probably closer to around two weeks. But as I understand the court's order, I just want to make sure I understand correctly that our motion for stay is being denied on the drafts?

THE COURT: The motion for the stay is being denied.

Now, if it turns out that that material should not have been turned over, we can claw it back and the plaintiffs will be in the position that this is for the attorneys to work with at this time, it's not to be passed on or published. Everybody understand that?

MR. SIEGFRIED: Understood, Your Honor.

MR. HEINZ: (Nods head.)

THE COURT: Okay. So that's the way we'll keep moving forward to get this material. I understand between December 10th and today, you've been putting this material together, because you were under an order to do so. So it shouldn't take you very long to produce it, because you haven't had a stay. So I'm telling you that this material has to be turned over in a week.

MR. SKURNIK: Yes, Your Honor.

THE COURT: A week from when my amended order comes out, okay? So that gives you a little more time.

MR. SKURNIK: Your Honor, I'd ask that that week deadline apply to just the drafts and communications about the drafts. As to the first part of the order that we discussed earlier, working groups and documents that are referring or relating to the report and recommendation, that's a much larger universe of documents. And so defendants would need certainly much more than a week in order to produce that material.

THE COURT: I don't understand that, because you should have already been gathering that along the way. And you told me at the beginning, or Mr. Carmichael told me at the beginning, that they had analyzed all this data and put it in categories. It can't possibly be that difficult to call up those various categories if you have organized it appropriately.

MR. SKURNIK: Your Honor, as we stated in the declaration of Mr. Easton, this is approximately 22,000 documents that we withheld on the basis of the deliberative-process privilege that are at issue here. And in order to produce those documents, the Department of Defense and military services would have to re-review those documents to ensure that there is not either personally

to me and say, "I don't understand." You need to act on it promptly if there's a problem.

MR. SKURNIK: Yes, Your Honor.

THE COURT: Okay. All right.

Now, next issue: Scheduling. What I get from this is that nobody thinks we're going to meet our June trial date.

MR. HEINZ: We think that's aggressive, Your Honor. Right now, as you saw in the joint status report, we're only asking for an extension from the current closure, which occurs in two weeks, until the end of April. But we're still waiting for information.

That being said, three weeks ago, we sent the government a list of kind of our first 11 witnesses that we'd like to depose. And we asked for specific dates for two of those, either at the end of this month or the beginning of March. But it does depend on kind of when we get all of these documents that we've been discussing.

MR. SKURNIK: Just to be clear, Your Honor, they asked for those dates for those two witnesses just this past Friday.

THE COURT: Well, I think in December I said, get your dates reserved now. And apparently you waited on that.

MR. HEINZ: Well, no. We sent the government -- I personally sent the e-mail three weeks ago saying: These are the people we want to depose. Didn't hear anything back.

No, "We're going to try to find dates. Here are the dates they're available." Nothing.

So then on Friday, I e-mailed and said: Okay, let's get -- in this timeframe we want these two witnesses to begin.

So we can quibble over that, but we've asked for two specific dates, given the list of 11 people that we initially want to depose -- I believe there will be more people -- but those 11. And we're going to move forward with those depositions, those two.

MR. SKURNIK: Your Honor, just to be clear about this, plaintiff sent us an e-mail with a list of 13 individuals. And they said something along the lines of, we won't be able to figure out dates or we'll have to work on dates once more documents are produced. So I don't think they necessarily have been following what the court ordered or discussed at least at the last hearing.

THE COURT: All right. Well, guess what? You're all here today and you don't need me to set your schedules for you. Why don't you take the time to do that while you're here.

Honestly, I don't know why you're not talking to each other. I see these letters going back and forth, but you're often missing each other in the night.

MR. SIEGFRIED: Your Honor, could I ask for one piece of guidance that I think would help us get through the

deposition issue, which is, we suspect based on prior experience with the few depositions that have been taken, that there will be a lot of objections on deliberative-process privilege grounds during these depositions.

Then furthermore, we have this issue of documents should or will be coming in the future. So, I guess we sort of seek Your Honor's guidance. We're happy to take all of these depositions now, sort of with the caveat that we imagine the government wouldn't want to put them up twice, but we'd have to keep the deposition open or reopen the deposition, pending the documents we get. And, furthermore, how to handle deliberative-process objections as they come up.

THE COURT: Well, there are very few things that can stop the answer from being given. And what I would suggest is if there is an objection based upon deliberative process, the objection is made, then the question is answered, and you seal the deposition. And if we have to, we will go over line-by-line as to what comes in and what doesn't in terms of public testimony.

But otherwise, you're going to have to keep -- we're going to have to keep going back and re-deposing people in order to do it. So I guess my order is, the question gets answered, the deposition is sealed, and then we sort it out.

Now, you all need to remember that I'm the factfinder

here. So when you make objections, you've got to tell me what the objection is, in order for me to forget it. So you're in a dilemma there.

Talking about scheduling. Originally this was set for a two-day bench trial. That doesn't seem to be the way it is shaping up here. And maybe I should go back and comment. The government originally told me there was only one document that they were going to put in. I saw in the joint status report that they seem to think that that position has changed.

But that's what they entered into this whole dialogue, they said one 44-page order and that was going to be it. So it was going to be a pretty simple case when we started. It's not shaping up that way.

So I think one of the things you need to talk about is just how much of my time do you need? And we should start talking about whether you're going to bring witnesses. Are you going to offer up depositions? And how it is that you want to teach me what it is I need to know to be the factfinder here.

MR. SIEGFRIED: Your Honor, I have a quick question. In this court for bench trials, is direct testimony live if they're live witnesses, or only cross examination?

THE COURT: If you want to bring them live, I'll listen to them live for both direct and cross examination.

This is my philosophy: I am the pupil. You are the teachers. You have to put in front of me what it is that I need to learn in order to render a good decision for you.

If that is live, then it will be live. If it is written, it will be written. Just like teachers do lectures or homework assignments. I'm willing to work at whatever plan you come up with. But you need to think about how you're going to present the material.

One thing, however, that drives me crazy is, don't expect me to sit and listen to a talking head. I can read about five times faster than somebody can talk. So it's painful to sit and watch that talking head speak to me. If it's question and answer, pull the camera back and show me the questioner, if that's the way you need to do it.

The other thing we can do is we have the capacity to beam the witnesses in here. So you don't have to physically bring the person in. We can watch them and do the examination -- I can't remember what it's called, and I hesitate to say Facebook-style. That's not what I mean. All that person needs to be is in another federal courthouse. So we have the capacity to make those presentations.

But if you're going to take a chunk of time, I need to know where to put you. And if we don't hit June, the next time we're going to do it is October. So I'd like to have both sides sit down and come up with what's realistic.

EXHIBIT 17

FILED UNDER SEAL

EXHIBIT 18

FILED UNDER SEAL

EXHIBIT 19

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

PERSONNEL AND READINESS

ACTION MEMO

JAN 11 2018

TO: SECRETARY OF DEFENSE

THROUGH: DEPUTY SECRETARY OF DEFENSE
VICE CHAIRMAN OF THE JOINT CHIEFS OF STAFF

FROM: Robert Wilkie, Under Secretary of Defense for Personnel and Readiness

SUBJECT: Recommendations by the Transgender Review Panel of Experts

- On September 14, 2017, you directed the establishment of a Panel of Experts to review and recommend changes to Department of Defense policies regarding the service of transgender individuals (Tab A), in accordance with direction from the President on August 25, 2017 (Tab B).
- The Panel, which I chaired, comprised the officials performing the duties of the Under Secretaries of the Military Departments, the Uniformed Services' Vice Chiefs, and Senior Enlisted Advisors.
- You directed the Panel to conduct its review and render recommendations consistent with military readiness, lethality, deployability, budgetary constraints, and applicable law.
- The Panel was informed by testimony from commanders with transgender troops, currently-serving transgender Service members, military physicians, and other health experts.
- The Panel considered available DoD data and information on currently-serving transgender personnel and relevant external research and studies.
- Based on the individual and collective experience leading warfighters and their expertise in military operational and institutional effectiveness, the Panel makes the following recommendations:
    - Transgender individuals should be allowed to enter the military in their biological sex, subject to meeting all applicable accession standards. A diagnosis of gender dysphoria is disqualifying for accessions unless medical documentation establishes stability in his/her biological sex for no less than 36 consecutive months—as determined by a qualified Department of Defense medical provider—at the time of application. [*Gender Dysphoria*: a medical diagnosis involving significant distress or problems functioning resulting from a difference between the gender with which an individual identifies and the individual's biological sex]

- Transgender Service members should be permitted to serve openly, but only in their biological sex and without receiving cross-sex hormone therapy or surgical transition support.
- In order to keep faith with those transgender Service members who receive a diagnosis of gender dysphoria from a qualified military medical provider prior to the implementation of a revised DoD policy in 2018, they should be authorized all medically necessary and appropriate care and treatment, including cross-sex hormone therapy and medically necessary surgery. Such care and treatment should be authorized and provided at government expense even if it is determined to be necessary and appropriate only after the implementation of a revised policy in 2018.
- Transgender Service members should be subject to the same retention standards applicable to all other Service members.

- To ensure consistent application of the policies, procedures, and guidance currently in effect with regard to the accession[1] and in-service transition[2] of transgender individuals, I intend to issue a memorandum clarifying existing guidance regarding privacy concerns that may arise.

RECOMMENDATION: As discussed, based on your review of these recommendations, and other information and input you elect to consider, we will develop a writing by which you would advise the President of your conclusions and recommendations in this matter.

COORDINATION: TAB C

Attachments:
As stated

[1] As required by court order.
[2] As authorized by DoDI 1300.28, *In-Service, Transition for Transgender Service members*, dated July 1, 2016.

EXHIBIT 20

FILED UNDER SEAL

EXHIBIT 21

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al. Plaintiffs, v. DONALD J. TRUMP, et al. Defendants.	CASE NO. C17-1297-MJP ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

THIS MATTER comes before the Court on Plaintiffs Ryan Karnoski, et al.'s Motion for Preliminary Injunction (Dkt. No. 32) and Defendants Donald J. Trump, et al.'s Motion to Dismiss (Dkt. No. 69). Plaintiffs challenge the constitutionality of Defendant President Donald J. Trump's Presidential Memorandum excluding transgender individuals from the military. Defendants respond that Plaintiffs lack standing, that their claims are neither properly plead nor ripe for review, and that they are not entitled to injunctive relief. Having reviewed the Motions (Dkt. Nos. 32, 69), the Responses (Dkt. Nos. 69, 84), the Replies (Dkt. Nos. 84, 90), and all related papers, and having considered the arguments made in proceedings before the Court, the

Court GRANTS in part and DENIES in part Defendants' Motion to Dismiss and GRANTS Plaintiffs' Motion for Preliminary Injunction.

ORDER SUMMARY

On July 26, 2017, President Donald J. Trump announced on Twitter that "the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military." A Presidential Memorandum followed, directing the Secretaries of Defense and Homeland Security to "return" to the military's policy authorizing the discharge of openly transgender service members (the "Retention Directive"); to prohibit the accession (bringing into service) of openly transgender individuals (the "Accession Directive"); and to prohibit the funding of certain surgical procedures for transgender service members (the "Medical Care Directive"). Plaintiffs filed this action challenging the constitutionality of the policy prohibiting military service by openly transgender individuals. Plaintiffs contend the policy violates their equal protection and due process rights and their rights under the First Amendment. Plaintiffs include transgender individuals currently serving in the military and seeking to join the military; the Human Rights Campaign, the Gender Justice League, and the American Military Partner Association; and the State of Washington. Plaintiffs have moved for a preliminary injunction to prevent implementation of the policy set forth in the Presidential Memorandum, and Defendants have moved to dismiss.

The Court finds that Plaintiffs have standing to bring this action, and that their claims for violation of equal protection, substantive due process, and the First Amendment are properly plead and ripe for resolution. The Court finds that Plaintiffs' claim for violation of procedural due process is defective. The Court finds that the policy prohibiting openly transgender individuals from serving in the military is likely unconstitutional. Accordingly, the Court

GRANTS in part and DENIES in part Defendants' Motion to Dismiss and GRANTS Plaintiffs' Motion for Preliminary Injunction.

BACKGROUND

I. Presidential Memorandum and Interim Guidance

On July 26, 2017, President Donald J. Trump announced on Twitter that the United States government will no longer allow transgender individuals to serve in any capacity in the military. (Dkt. No. 34, Ex. 6.) President Trump's announcement read as follows:

Thereafter, President Trump issued a memorandum (the "Presidential Memorandum") directing the Secretaries of Defense and Homeland Security to "return" to the military's policy authorizing the discharge of openly transgender service members (the "Retention Directive"); to prohibit the accession (bringing into service) of openly transgender individuals (the "Accession Directive"); and to prohibit the funding of certain surgical procedures for transgender service members (the "Medical Care Directive"). (Id. at §§ 1-3.) The Accession Directive takes effect on January 1, 2018; the Retention and Medical Care Directives take effect on March 23, 2018. (Id. at § 3.)

On September 14, 2017, Secretary of Defense James N. Mattis issued a memorandum providing interim guidance to the military (the "Interim Guidance"). (Dkt. No. 69, Ex. 1.) The Interim Guidance identified the intent of the Department of Defense ("DoD") to "carry out the President's policy and directives" and to identify "a plan to implement the policy and directives in the Presidential Memorandum." (Id. at 2.) The Interim Guidance explained that transgender individuals would be prohibited from accession effective immediately. (Id. at 3.)

II. Policy on Transgender Service Members Prior to July 26, 2017

Prior to President Trump's announcement, the military concluded that transgender individuals should be permitted to serve openly and was in the process of implementing a policy to this effect (the "June 2016 Policy"). (Dkt. Nos. 32 at 9-10; 46 at ¶¶ 8-27; 48 at ¶¶ 8-36, Ex. C.) The June 2016 Policy was preceded by extensive research, including an independent study to evaluate the implications of military service by transgender individuals. (Dkt. Nos. 30 at ¶¶ 159-162; 32 at 9-10; 46 at ¶ 11.) This study concluded that allowing transgender individuals to serve would not negatively impact military effectiveness, readiness, or unit cohesion, and that the costs of providing transgender service members with transition-related healthcare would be "exceedingly small" compared with DoD's overall healthcare expenditures. (Dkt. No. 32 at 30; 46 at ¶¶ 15-20.) After consulting with medical experts, personnel experts, readiness experts, commanders whose units included transgender service members, and others, the working group concluded that transgender individuals should be allowed to serve openly. (Dkt. Nos. 30 at ¶ 161; 46 at ¶ 10.) The Secretary of Defense issued a directive-type memorandum on June 30, 2016 affirming that "service in the United States military should be open to all who can meet the rigorous standards for military service and readiness," including transgender individuals. (Dkt. No. 48, Ex. C.) The memorandum established procedures for accession, retention, in-service

transition, and medical coverage, and provided that "[e]ffective immediately, no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity." (Id.) Relying upon the June 2016 Policy, transgender service members disclosed their transgender status to the military and were serving openly at the time of President Trump's announcement. (See Dkt. Nos. 30 at ¶¶ 101-102, 112-114; 48 at ¶ 37.)

III. Plaintiffs Challenge to the Presidential Memorandum

Plaintiffs challenge the constitutionality of the policy prohibiting military service by openly transgender individuals and seek declaratory and injunctive relief.[1] (Dkt. No. 30 at 39.) Plaintiffs contend the policy violates their equal protection and due process rights, and their rights under the First Amendment. (Id. at ¶¶ 214-238.)

Plaintiffs include nine individuals (the "Individual Plaintiffs"), three organizations (the "Organizational Plaintiffs"), and Washington State. (See id. at ¶¶ 7-18; Dkt. No. 101.) Plaintiffs Ryan Karnoski, D.L., and Connor Callahan seek to pursue a military career, and contend that the policy set forth in the Presidential Memorandum forecloses this opportunity. (Dkt. No. 30 at ¶¶ 38-49, 64-73, 130-139.) Plaintiffs Staff Sergeant Cathrine Schmid, Chief Warrant Officer Lindsey Muller, Petty Officer First Class Terece Lewis, Petty Officer Second Class Phillip Stephens, and Petty Officer Second Class Megan Winters currently serve openly in the military. (Id. at ¶¶ 50-63, 74-120.) Plaintiff Jane Doe currently serves in the military, but

[1] Plaintiffs' suit is one of four lawsuits filed in response to President Trump's policy prohibiting transgender individuals from serving openly. See Doe 1 v. Trump, No. 17-1597 (CKK) (D.D.C. filed Aug. 9, 2017); Stone v. Trump, No. MJG-17-2459 (D. Md. filed Aug. 8, 2017); Stockman v. Trump, No. 17-cv-1799-JGB-KK (C.D. Cal. filed Sept. 5, 2017). The District Courts for the Districts of Columbia and Maryland have issued preliminary injunctions suspending enforcement of the policy. See Doe 1, 2017 WL 4873042 (D.D.C. Oct. 30, 2017); Stone, 2017 WL 5589122 (D. Md. Nov. 21, 2017).

does not serve openly. (Id. at ¶¶ 121-129.) The Human Rights Campaign ("HRC"), the Gender Justice League ("GJL"), and the American Military Partner Association ("AMPA") join as Organizational Plaintiffs. (Id. at ¶¶ 140-145.) After the Individual and Organization Plaintiffs filed this action, Washington State moved to intervene to protect its sovereign and quasi-sovereign interests, which it alleged were harmed by the policy set forth in the Presidential Memorandum. (Dkt. No. 55; see also Dkt. No. 97.) On November 27, 2017, the Court granted Washington State's motion. (Dkt. No. 101.) Washington State now joins in Plaintiffs' Motion for Preliminary Injunction based upon its interests in protecting "the health, and physical and economic well-being of its residents" and "securing residents from the harmful effects of discrimination." (Id. at 4.) Defendants include President Donald J. Trump, Secretary James N. Mattis, the United States, and the DoD. (Dkt. No. 30 at ¶¶ 19-22.)

DISCUSSION

I. Motion to Dismiss

Defendants move to dismiss Plaintiffs' Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (See Dkt. No. 69 at 16-22.) The Court finds that Plaintiffs have standing to challenge the Presidential Memorandum and have stated valid claims upon which relief may be granted. However, Plaintiffs have failed to state a valid claim for violation of procedural due process. The Court therefore DENIES Defendants' Motion to Dismiss as to Plaintiffs' equal protection, substantive due process, and First Amendment claims; and GRANTS Defendants' Motion to Dismiss as to Plaintiffs' procedural due process claim.

A. Rule 12(b)(1)

Defendants move to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Defendants contend the Court lacks subject matter jurisdiction for two

reasons: First, they contend Plaintiffs lack standing because they have not suffered injuries in fact. (Id. at 18-20.) Second, they contend Plaintiffs' claims are not ripe for resolution. (Id. at 20-22.) Plaintiffs respond that the Presidential Memorandum gives rise to current harm and credible threats of impending harm sufficient for both standing and ripeness. (See Dkt. No. 84 at 11-27.)

i. *Individual Plaintiffs*

The Court finds that the Individual Plaintiffs have standing to challenge the Presidential Memorandum. To establish standing, Individual Plaintiffs must demonstrate: (1) an "injury in fact"; (2) a causal connection between the injury and the conduct complained of; and (3) that it is likely their injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). "At the preliminary injunction stage, a plaintiff must make a 'clear showing' of his injury in fact." Lopez v. Candaele, 630 F.3d 775, 785 (9th Cir. 2010) (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008)). An "injury in fact" exists where there is an invasion of a legally protected interest that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560 (internal quotation marks and citations omitted).

Each of the Individual Plaintiffs satisfies these requirements: As a result of the Retention Directive, Plaintiffs Schmid, Muller, Lewis, Stephens, Winters, and Doe face a credible threat of discharge. (See Dkt. No. 84 at 14-15.) As a result of the Accession Directive, Plaintiff Schmid has been refused consideration for appointment as a warrant officer and faces a credible threat of being denied opportunities for career advancement. (See Dkt. Nos. 36 at ¶¶ 28-30; 70 at ¶ 3.) Plaintiffs Karnoski, D.L., and Callahan also face a credible threat of being denied opportunities to compete for accession on equal footing with non-

transgender individuals. (See Dkt. Nos. 35 at ¶¶ 16-22; 37 at ¶¶ 3-16; 42 at ¶¶ 3-5, 10-21; see also Doe 1, 2017 WL 4873042, at *18-19 (finding the Accession and Retention Directives impose competitive barriers on transgender individuals who intend to accede). As a result of the Medical Care Directive, Plaintiff Stephens faces a credible threat of being denied surgical treatment, as he is currently ineligible for surgery until after March 23, 2018, the date upon which DoD is to cease funding of transition-related surgical procedures.[2] (Dkt. Nos. 30 at ¶ 102; 34, Ex. 7 at § 3; 40 at ¶ 14.)

In addition to these threatened harms, the Individual Plaintiffs face current harms in the form of stigmatization and impairment of free expression. The policy set forth in the Presidential Memorandum currently denies Individual Plaintiffs the opportunity to serve in the military on the same terms as other service members, deprives them of dignity, and subjects them to stigmatization. (Dkt. No. 30 at ¶¶ 217, 222, 238.) Policies that "stigmatiz[e] members of the disfavored group as 'innately inferior' . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." Heckler v. Mathews, 465 U.S. 728, 737-740 (1984). The Presidential Memorandum currently impairs Plaintiff Jane Doe's rights to express her authentic gender identity, as she fears discharge from the military as a result. (Dkt. No. 33 at ¶¶ 3-15.) Plaintiff Doe's self-censorship is a "constitutionally sufficient injury," as it is based on her "actual and well-founded fear" that the Retention Directive will take effect. See Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1093 (9th Cir. 2003) ("an actual and well-founded fear that [a] law

[2] While the Medical Care Directive includes an exception where necessary "to protect the health of an individual who has already begun a course of treatment to reassign his or her sex" (Dkt. No. 34, Ex. 7 at § 2), the exception does not apply to Plaintiff Stephens and does not diminish the threat of harm he faces. (Dkt. No. 40 at ¶ 14.)

will be enforced against [him or her]" may create standing to bring pre-enforcement claims based on the First Amendment) (quoting Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 393 (1988)).

Each of Defendants' arguments to the contrary is unavailing. First, Defendants claim the harms facing Plaintiffs are not certain, as the Presidential Memorandum directs "further study before the military changes its longstanding policies regarding service by transgender individuals." (See Dkt. No. 69 at 18.) However, the Accession Directive is already in place, and the restrictions set forth in the Medical Care Directive are final and will be implemented on March 23, 2018. (See Dkt. No. 34, Ex. 7 at § 3.) The Court finds that "[t]he directives of the Presidential Memorandum, to the extent they are definitive, are the operative policy toward military service by transgender service members." Doe 1, 2017 WL 4873042, at *17. Similarly, the Court reads the Interim Guidance "as implementing the directives of the Presidential Memorandum," and concludes that "any protections afforded by the Interim Guidance are necessarily limited to the extent they conflict with the express directives of the memorandum." Id.

Second, Defendants claim Plaintiffs Karnoski, D.L., and Callahan have not suffered injury in fact as they have yet to enlist in the military. (Dkt. No. 69 at 19.) However, as a result of the Accession Directive, Plaintiffs Karnoski, D.L., and Callahan cannot compete for accession on equal footing with non-transgender individuals. Denial of this opportunity constitutes injury in fact. See Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 365-66 (1977) ("When a person's desire for a job is not translated into a formal application solely because of his

unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.").[3]

Third, Defendants rely on Allen v. Wright, 468 U.S. 737 (1984) to claim that Plaintiffs have not suffered stigmatic injury. (Dkt. No. 69 at 18.) But unlike the claimants in Allen, who raised abstract instances of stigmatic injury only, the Individual Plaintiffs have identified concrete interests in accession, career advancement, and medical treatment, and have demonstrated that they are "'personally denied equal treatment' by the challenged discriminatory conduct." Allen, 468 U.S. at 755 (quoting Heckler, 465 U.S. at 739-40). Such stigmatic injury is "one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing." Id.[4]

ii. *Organizational Plaintiffs*

The Court finds that Organizational Plaintiffs HRC, GJL, and AMPA have standing to challenge the Presidential Memorandum. An organization has standing where "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). Each of the Organizational Plaintiffs satisfies these requirements. Individual Plaintiffs Karnoski and Schmid are members of HRC, GJL, and

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[3] Defendants' claim that Plaintiffs Karnoski and D.L. would not be able to accede under the June 2016 Policy because they have recently taken steps to transition does not compel a different finding. Plaintiffs' injury "lies in the denial of an equal *opportunity* to compete, not the denial of the job itself," and thus the Court does not "inquire into the plaintiffs' qualifications (or lack thereof) when assessing standing." Shea v. Kerry, 796 F.3d 42, 50 (D.C. Cir. 2015) (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 280-81 & n.14 (1978) (emphasis in original)).

[4] Allen addressed racial discrimination specifically. However, the Supreme Court has also acknowledged stigmatic injury arising from gender-based discrimination. See Heckler, 465 U.S. at 737-40.

AMPA, and Individual Plaintiffs Muller, Stephens, and Winters are also members of AMPA. (See Dkt. No. 30 at ¶¶ 141-145.) The interests each Organizational Plaintiff seeks to protect are germane to their organizational purposes, which include ending discrimination against LGBTQ individuals (HRC and GJL) and supporting families and allies of LGBT service members and veterans (AMPA). (Id. at ¶¶ 16-18.) As Plaintiffs seek injunctive and declaratory relief, participation by the organizations' individual members is not required. See Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity, 950 F.2d 1401, 1408 (9th Cir. 1991) (participation of individual members not required where "the claims proffered and relief requested [by an organization] do not demand individualized proof on the part of its members").

iii. *Washington State*

The Court finds that Washington State has standing to challenge the Presidential Memorandum. A state has standing to sue the federal government to vindicate its sovereign and quasi-sovereign interests. See Massachusetts v. E.P.A., 549 U.S. 497, 518-520 (2007). Sovereign interests include a state's interest in protecting the natural resources within its boundaries. Id. at 518-519. Quasi-sovereign interests include a state's interest in the health and physical and economic well-being of its residents, and in "securing residents from the harmful effects of discrimination." Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 607, 609 (1982). Washington State is home to approximately 45,000 active duty service members and approximately 32,850 transgender adults. (Dkt. No. 97 at 6.) The Washington National Guard is comprised of service members who assist with emergency preparedness and disaster recovery planning, including protecting Washington State's natural resources from wildfires, landslides, flooding, and earthquakes. (Id. at 8.) Washington State contends that prohibiting transgender individuals from serving openly adversely impacts its ability to recruit

and retain members of the Washington National Guard, and thereby impairs its ability to protect its territory and natural resources. (Id.) Additionally, Washington State contends that the prohibition implicates its interest in maintaining and enforcing its anti-discrimination laws, protecting its residents from discrimination, and ensuring that employment and advancement opportunities are not unlawfully restricted based on transgender status. (Id. at 8-9.) The Court agrees.

The injuries to the Individual Plaintiffs, the Organizational Plaintiffs, and to Washington State are indisputably traceable to the policy set forth in the Presidential Memorandum, and may be redressed by a favorable ruling from this Court. Therefore, the Court DENIES Defendants' Motion to Dismiss for lack of standing.

iv. *Ripeness*

The Court finds that Plaintiffs' claims are ripe for review. Ripeness "ensure[s] that courts adjudicate live cases or controversies" and do not "issue advisory opinions [or] declare rights in hypothetical cases." Bishop Paiute Tribe v. Inyo Cnty., 863 F.3d 1144, 1153 (9th Cir. 2017) (citation omitted). "A proper ripeness inquiry contains a constitutional and a prudential component." Id. (citation omitted). Because Plaintiffs have standing to challenge the Presidential Memorandum, their claims satisfy the requirement for constitutional ripeness. See id. (constitutional ripeness "is often treated under the rubric of standing"). Because they raise purely legal issues (i.e., whether the Presidential Memorandum violates their constitutional rights), and because withholding consideration of these issues will subject Plaintiffs to hardships (i.e., denial of career opportunities and transition-related medical care, stigmatic injury, and impairment of self-expression), they also satisfy the requirement for prudential ripeness. See id. at 1154 (prudential ripeness is "guided by two overarching considerations: the fitness of the

issues for judicial decision and the hardship to the parties of withholding court consideration.") (citation and internal quotation marks omitted).

Defendants claim this case is not ripe for resolution because the policy on military service by transgender individuals is "still being studied, developed, and implemented." (Dkt. No. 69 at 20.) However, President Trump's announcement on Twitter and his Presidential Memorandum did not order a study, but instead unilaterally proclaimed a prohibition on transgender service members. See Stone, 2017 WL 5589122, at *10 ("The Court cannot interpret the plain text of the President's Memorandum as being a request for a study to determine whether or not the directives should be implemented. Rather, it orders the directives to be implemented by specified dates."). Defendants' contention that Plaintiffs must first exhaust administrative remedies before the Court can consider their claims is also unavailing, as the Ninth Circuit has explained that "[r]esolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board." Downen v. Warner, 481 F.2d 642, 643 (9th Cir. 1973).

Therefore, the Court DENIES Defendants' Motion to Dismiss for lack of subject matter jurisdiction.

B. Rule 12(b)(6)

To survive a motion to dismiss for failure to state a claim upon which relief can be granted, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). This requirement is met where the complaint "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. The complaint need not include detailed

allegations, but it must have "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. In evaluating a motion under Rule 12(b)(6), the Court accepts all facts alleged in the complaint as true, and makes all inferences in the light most favorable to the non-movant. Barker v. Riverside Cnty. Office of Educ., 584 F.3d 821, 824 (9th Cir. 2009) (internal citations omitted).

The Court finds that Plaintiffs' Amended Complaint states valid claims for violation of equal protection, substantive due process, and the First Amendment. Plaintiffs have established a likelihood of success on the merits with regard to each of these claims (see discussion of Plaintiffs' Motion for Preliminary Injunction, infra), and for the same reasons, these claims survive under Rule 12(b)(6). However, the Court finds that Plaintiffs' Amended Complaint fails to state a valid claim for violation of procedural due process. Plaintiffs' Amended Complaint alleges neither a "protectible liberty or property interest" nor a "denial of adequate procedural protections" as required for a procedural due process claim. (See Dkt. No. 30 at ¶¶ 225-230; Sanchez v. City of Fresno, 914 F. Supp. 2d 1079, 1103 (9th Cir. 2012).) [5]

Therefore, the Court DENIES Defendants' Motion to Dismiss with respect to Plaintiffs' equal protection, substantive due process and First Amendment claims, and GRANTS Defendants' Motion to Dismiss with respect to Plaintiffs' procedural due process claim.

II. Motion for Preliminary Injunction

The Court finds that Plaintiffs are entitled to a preliminary injunction to preserve the status quo that existed prior to the change in policy announced by President Trump on Twitter and in his Presidential Memorandum. The Court considers four factors in evaluating Plaintiffs'

[5] The Court notes that the procedural due process claim is elaborated upon in detail in Plaintiffs' Motion for Preliminary Injunction and Reply. (See Dkt. Nos. 32 at 22-23; 84 at 39-40.)

request for a preliminary injunction: (1) the likelihood of success on the merits; (2) the likelihood of irreparable harm in the absence of an injunction; (3) the balance of equities; and (4) the public interest. Winter, 555 U.S. at 20. "When the government is a party, these last two factors merge." Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing Nken v. Holder, 556 U.S. 418, 435 (2009)).

A. Likelihood of Success on the Merits

The Court finds that Plaintiffs have established a likelihood of success on the merits of their equal protection, substantive due process, and First Amendment claims.

i. *Equal Protection*

Plaintiffs have established a likelihood of success on the merits of their equal protection challenge. The Equal Protection Clause prohibits government action "denying to any person the equal protection of the laws." United States v. Windsor, 133 S. Ct. 2675, 2695 (2013). Plaintiffs contend the policy set forth in the Presidential Memorandum denies them equal protection in that it impermissibly classifies individuals based on transgender status and gender identity and is not substantially related to an important government interest. (Dkt. No. 30 at ¶¶ 217-224.)

The Court must first determine whether the policy burdens "a 'suspect' or 'quasi-suspect' class." See Ball v. Massanari, 254 F.3d 817, 823 (9th Cir. 2001). The Court concludes that the policy distinguishes on the basis of transgender status, a quasi-suspect classification, and is therefore subject to intermediate scrutiny. See id. (noting that gender is a quasi-suspect classification); Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (noting that discrimination based on a person's failure "to conform to socially-constructed

gender expectations" is a form of gender discrimination) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989)).[6]

Next, the Court must determine whether the policy satisfies intermediate scrutiny. Id. A policy subject to intermediate scrutiny must be supported by an "exceedingly persuasive justification." United States v. Virginia, 518 U.S. 515, 531 (1996). The policy must serve important governmental objectives, and the government must show "that the discriminatory means employed are substantially related to the achievement of those objectives." Id. at 533 (citation omitted). While Defendants identify important governmental interests including military effectiveness, unit cohesion, and preservation of military resources, they fail to show that the policy prohibiting transgender individuals from serving openly is related to the achievement of those interests. (See Dkt. No. 69 at 33-35.) Indeed, "all of the reasons proffered by the President for excluding transgender individuals from the military [are] not merely unsupported, but [are] actually *contradicted* by the studies, conclusions, and judgment of the military itself." Doe 1, 2017 WL 4873042, at *30 (emphasis in original). Not only did the DoD previously conclude that allowing transgender individuals to serve openly would not impact military effectiveness and readiness, the working group tasked to evaluate the issue also concluded that *prohibiting* open service would have negative impacts including loss of qualified personnel, erosion of unit cohesion, and erosion of trust in command. (See Dkt. Nos. 46 at ¶¶ 25-26; 48 at ¶¶ 45-47.)

Defendants' arguments to the contrary are unavailing. While Defendants raise concerns about transition-related medical conditions and costs, their concerns "appear to be hypothetical

[6] The June 2016 Policy also stated it was DoD's position "consistent with the U.S. Attorney General's opinion, that discrimination based on gender identity is a form of sex discrimination." (See Dkt. No. 48, Ex. C at 6.)

and extremely overbroad." Doe 1, 2017 WL 4873042, at *29. For instance, Defendants claim that "at least some transgender individuals suffer from medical conditions that could impede the performance of their duties," including gender dysphoria, and complications from hormone therapy and sex reassignment surgery. (See Dkt. No. 69 at 33-34.) But *all* service members might suffer from medical conditions that could impede performance, and indeed the working group found that it is common for service members to be non-deployable for periods of time due to an array of such conditions. (Dkt. No. 46 at ¶ 22.) Defendants claim that accommodating transgender service members would "impose costs on the military." (Dkt. No. 69 at 34.) But the study preceding the June 2016 Policy indicates that these costs are exceedingly minimal. (Dkt. Nos. 48, Ex. B at 57 ("[E]ven in the most extreme scenario . . . we expect only a 0.13-percent ($8.4 million out of $6.2 billion) increase in [active component] health care spending."); 48 at ¶ 41 ("[T]he maximum financial impact . . . is an amount so small it was considered to be 'budget dust,' hardly even a rounding error, by military leadership.'").) Indeed, the cost to discharge transgender service members is estimated to be *more than 100 times greater* than the cost to provide transition-related healthcare. (See Dkt. Nos. 32 at 20; 46 at ¶ 32; 48 at ¶ 18.)

Defendants' claim that the policy prohibiting transgender individuals from serving openly is entitled to substantial deference is also unavailing. (See Dkt. No. 69 at 29.) Defendants rely on Rostker v. Goldberg, 453 U.S. 57 (1981). In Rostker the Supreme Court considered whether the Military Selective Service Act ("MSSA"), which compelled draft registration for men only, was unconstitutional. Id. at 59. Finding that the MSSA was enacted after extensive review of legislative testimony, floor debates, and committee reports, the Supreme Court held that Congress was entitled to deference when, in "exercising the

congressional authority to raise and support armies and make rules for their governance," it does not act "unthinkingly" or "reflexively and not for any considered reason." See id. at 71-72. In contrast, the prohibition on military service by transgender individuals was announced by President Trump on Twitter, abruptly and without any evidence of considered reason or deliberation. (See Dkt. No. 30 at ¶¶ 172-184.) The policy is therefore not entitled to Rostker deference.[7]

Because Defendants have failed to demonstrate that the policy prohibiting transgender individuals from serving openly is substantially related to important government interests, it does not survive intermediate scrutiny.[8] Plaintiffs are therefore likely to succeed on the merits of their equal protection claim.

ii. *Substantive Due Process*[9]

The Court finds that Plaintiffs have established a likelihood of success on the merits of their substantive due process challenge. Substantive due process protects fundamental liberty interests in individual dignity, autonomy, and privacy from unwarranted government intrusion. See U.S. Const., amend. V. These fundamental interests include the right to make decisions concerning bodily integrity and self-definition central to an individual's identity. See Obergefell v. Hodges, 135 S. Ct. 2584, 2584 (2015) ("The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons . . . to define and express

[7] Defendants' reliance on Goldman v. Weinberger, 475 U.S. 503 (1986), is also misplaced. See Doe 1, 2017 WL 4873042, at *30 n.11 (distinguishing the policy at issue in Weinberger as having been "based on the 'considered professional judgment" of the military).

[8] For the same reasons, the policy is also unlikely to survive rational basis review.

[9] Having granted Defendants' Motion to Dismiss with regard to Plaintiffs' procedural due process challenge, the Court does not reach the merits of that claim at this time.

their identity."); see also Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984) (due process "safeguards the ability independently to define one's identity that is central to any concept of liberty"). To succeed on their substantive due process challenge, Plaintiffs must establish a governmental intrusion upon a fundamental liberty interest. The Court concludes that the policy set forth in the Presidential Memorandum constitutes such an intrusion. The policy directly interferes with Plaintiffs' ability to define and express their gender identity, and penalizes Plaintiffs for exercising their fundamental right to do so openly by depriving them of employment and career opportunities. As discussed in the context of Plaintiffs' equal protection challenge, supra, Defendants have not demonstrated that this intrusion is necessary to further an important government interest. Plaintiffs are therefore likely to succeed on the merits of their substantive due process challenge.

iii. *First Amendment*

The Court finds that Plaintiffs have established a likelihood of success on the merits of their First Amendment challenge. In general, laws that regulate speech based on its content (i.e., because of "the topic discussed or the idea or message expressed") are presumptively unconstitutional and subject to strict scrutiny. Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2226-27 (2015). Military regulations on speech are permitted so long as they "restrict speech no more than is reasonably necessary to protect the substantial governmental interest." Brown v. Glines, 444 U.S. 348, 355 (1980).

Plaintiffs contend the policy set forth in the Presidential Memorandum impermissibly burdens "speech or conduct that 'openly' discloses a transgender individual's identity or transgender status" by subjecting openly transgender individuals to discharge and other adverse actions. (See Dkt. No. 30 at ¶¶ 196-197, 234-236.) The Court agrees. The policy penalizes

transgender service members—but not others—for disclosing their gender identity, and is therefore a content-based restriction. Even giving the government the benefit of a more deferential standard of review under Brown, 444 U.S. at 355, the policy does not survive. As discussed in the context of Plaintiffs' equal protection challenge, supra, Defendants have not demonstrated that the intrusion upon protected expression furthers an important government interest.

B. Irreparable Harm

The Court finds that Plaintiffs are likely to suffer irreparable harm if an injunction does not issue. The Individual and Organizational Plaintiffs have demonstrated a likelihood of irreparable harm in the form of current and threatened injuries in fact, including denial of career opportunities and transition-related medical care, stigmatic injury, and impairment of self-expression. While Defendants claim these harms can be remedied with money damages (Dkt. No. 69 at 23-24), they are incorrect. Unlike the plaintiffs in Anderson v. United States, 612 F.2d 1112 (9th Cir. 1979) and Hartikka v. United States, 754 F.2d 1516 (9th Cir. 1985), who alleged harms "common to most discharged employees" (e.g., loss of income, loss of retirement, loss of relocation pay, and damage to reputation) and not "attributable to any unusual actions relating to the discharge itself," Hartikka, 754 F.2d at 1518, the harms facing the Individual Plaintiffs are directly attributable to the policy set forth in the Presidential Memorandum. Back pay and other monetary damages proposed by Defendants will not remedy the stigmatic injury caused by the policy, reverse the disruption of trust between service members, nor cure the medical harms caused by the denial of timely health care. (See Dkt. No. 84 at 28.) Moreover, to the extent Plaintiffs are likely to succeed on the merits of their constitutional claims, these violations are yet another form of irreparable harm. See

Associated Gen. Contractors, 950 F.2d at 1412 ("alleged constitutional infringement will often alone constitute irreparable harm.") (citation omitted); see also Klein v. City of San Clemente, 584 F.3d 1196, 1207-08 (9th Cir. 2009) ("loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)).

Plaintiff Washington State has demonstrated a likelihood of irreparable harm to its sovereign and quasi-sovereign interests if it is "forced to continue to expend its scarce resources to support a discriminatory policy when it provides funding or deploys its National Guard." (See Dkt. No. 97 at 8-9.) Washington State has also demonstrated that its ability to recruit and retain service personnel for the Washington National Guard may be irreparably harmed. See Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir. 1991) ("intangible injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable harm.").

C. Balance of Equities and Public Interest

The Court finds that the balance of equities and the public interest are in Plaintiffs' favor. If a preliminary injunction does not issue, Plaintiffs will continue to suffer injuries as a result of the Presidential Memorandum, including deprivation of their constitutional rights. On the other hand, Defendants will face no serious injustice in maintaining the June 2016 Policy pending resolution of this action on the merits. Defendants claim they are in the process of "gathering a panel of experts" to study the military's policy on transgender service members and assert, without explanation, that an injunction will "directly interfere with the panel's work and the military's ability to thoroughly study a complex and important issue regarding the composition of the armed forces." (Dkt. No. 69 at 40.) The Court is not convinced that

reverting to the June 2016 Policy, which was voluntarily adopted by DoD after extensive study and review, and which has been in place for over a year without documented negative effects, will harm Defendants. See Doe 1, 2017 WL 4873042, at *33 (recognizing "considerable evidence that it is the *discharge* and *banning* of [transgender] individuals that would have such [negative] effects . . . .") (emphasis in original).

Injunctive relief furthers the public interest as it "is always in the public interest to prevent the violation of a party's constitutional rights." Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) (citations omitted). Defendants' contention that the public has a strong interest in national defense does not change this analysis, as "[a] bare invocation of 'national defense' simply cannot defeat every motion for preliminary injunction that touches on the military." Doe 1, 2017 WL 4873042, at *33; Stone, 2017 WL 5589122, at *16.

CONCLUSION

Plaintiffs have standing to bring this lawsuit challenging Defendants' policy of prohibiting transgender individuals from serving openly in the military. Plaintiffs' claims for violations of equal protection, substantive due process, and the First Amendment are properly plead and ripe for resolution, and Plaintiffs are entitled to a preliminary injunction to protect the status quo with regard to each of these claims. Plaintiffs have not properly plead a claim for violation of procedural due process. Therefore, the Court rules as follows:

1. The Court GRANTS Defendants' Motion to Dismiss with respect to Plaintiffs' procedural due process claim;

2. The Court DENIES Defendants' Motion to Dismiss with respect to Plaintiffs' equal protection, substantive due process, and First Amendment claims;

3. The Court GRANTS Plaintiffs' Motion for a Preliminary Injunction, and hereby enjoins Defendants and their officers, agents, servants, employees, and attorneys, and any other person or entity subject to their control or acting directly or indirectly in concert or participation with Defendants from taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement. This Preliminary Injunction shall take effect immediately and shall remain in effect pending resolution of this action on the merits or further order of this Court.

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

Dated December 11, 2017.

Marsha J. Pechman
United States District Judge

EXHIBIT 22

FILED UNDER SEAL

EXHIBIT 23

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

RYAN KARNOSKI, et al.,	)	
	)	
Plaintiffs,	)	No. 2:17-cv-01297-MJP
	)	
vs.	)	Seattle, WA
	)	
DONALD J. TRUMP, et al.,	)	
	)	Motion Hearing
Defendants.	)	July 17, 2018

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

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to take both of your questions, though, if I could.

THE COURT: Okay.

MR. GARDNER: There is a very big difference between an African-American outright ban and restricting those that have a particular medical condition from enlisting. The fact is that African-Americans and non-African-Americans are similarly situated in all respects. And that's why that kind of ban, on its face, would violate the Constitution. But by definition, those that have a medical condition are not similarly situated from those that don't have that medical condition. And, therefore, it is a completely different constitutional analysis.

Now, I want to get back to the question of deference, and what does deference do. Deference does a few things, Your Honor.

One -- and I don't even think this is really challenged in this case. The first thing we have are, the Department of Defense has articulated four objectives that this medical policy is intended to cover, so military readiness -- and I know the Court knows all these things. The courts have recognized, routinely, that those are legitimate government objectives. And so the question now is, does this policy relate to those objectives? And that's one of the ways deference comes into play, is that we give the benefit of the doubt to the military because the military is the one that is

exercising the professional judgment. And here, we have a 44-page report from the Secretary of Defense, Mattis, who has reached conclusions, supported by an extensive administrative record.

You asked the question, Your Honor, what would the government put on at trial? What the government would put on at trial is essentially the administrative record. That may seem unusual, Your Honor, but, frankly, this case is unusual. Because when a DOD policy is typically challenged, it is done so under the APA. And, therefore, we typically don't have trials in APA cases. But accepting the hypothetical, or the reality, that this would go to trial, we would present that administrative record.

THE COURT: And only that administrative record.

MR. GARDNER: Yes, Your Honor. I should back up. There is -- I know that plaintiffs will be disclosing expert witnesses. We'll have to make a decision as to whether it's appropriate to counter those with our experts, or just cross-examine them. But in the main, yes, we would be relying almost exclusively on the administrative record in this case.

THE COURT: You intend to call no witnesses.

MR. GARDNER: Your Honor, we've already made available for deposition Tony Kurta, who is the head of the panel of experts. And it is entirely likely we would call Tony Kurta to present, you know, the administrative record.

But we do think this case could and should go off on summary judgment, because what this Court would be looking at is whether or not that administrative record supports the 44-page decision. If the Court concludes it doesn't, it doesn't. Or if it does, it does. But that's how we would see this case proceeding, and that the Court would apply deference, both in terms of giving credit, if you will, to the Department's means-ends conclusions, but deference also goes to the ultimate level of scrutiny.

And one thing that *Trump vs. Hawaii* also does, that I think is important here, is, it notes that where you might have a gender-based classification that is otherwise subject to greater scrutiny in a different context, in certain contexts, immigration, national security, and, yes, in the military, those decisions, when you apply deference, a lesser standard of scrutiny would apply. That's, in fact, what *Rostker* did, Your Honor. And so our view is that deference, how it applies, is in those two fashions.

THE COURT: All right. Well, you keep calling it a medical diagnosis. And, in fact, the tweet didn't call it a medical diagnosis, nor does the heading of the other report call it a medical diagnosis. And you also have people who may not have the medical diagnosis, but still are required to present themselves in their birth gender.

MR. GARDNER: Your Honor, with all due respect, if

someone has never had gender dysphoria, then there are no restrictions upon their service. That's not right. And the fact that there may be a heading that says "transgender" tells you nothing about the substance of the policy. And the substance of the policy is clearly directed to a medical condition.

And with respect to the tweet, Your Honor, and the 2017 memorandum, remember, Secretary Mattis had to expressly request that the President revoke those things to put its 44-page plan into effect. And that's exactly what the President did in revoking the 2017 memorandum. So, again, just like the travel ban, even though there was a logical nexus between the first executive order and the third executive order, the Supreme Court analyzed the executive order that was in effect. The 2017 memo, the tweet, certainly, are not in effect now. The 2018 memo that the President issued expressly revoked those. So not only are those prior statements not relevant, they certainly don't satisfy plaintiff's need for a higher burden in order to successfully challenge the privilege.

I do want to mention one other thing about one of the questions this Court had, if I could, and that's about whether we are in compliance with this Court's order.

This Court, in the context of a broad motion for a protective order to stay all discovery, ordered the government to submit a privilege log under 26(b)(5). And that privilege