

No. 18-35347

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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RYAN KARNOSKI, et al.,  
Plaintiffs-Appellees,

STATE OF WASHINGTON, Attorney General's Office Civil Rights Unit,  
Intervenor-Plaintiff-Appellee,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.  
Defendants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

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**MOTION FOR STAY PENDING APPEAL**

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## INTRODUCTION

Following an extensive review, Secretary of Defense James Mattis announced a proposed new policy in March 2018 that would presumptively disqualify individuals with gender dysphoria from military service. As a general matter, the military does not permit service by individuals with medical conditions that may significantly limit their deployability, pose increased risk of injury, or otherwise require treatments that threaten to impair the effectiveness of the combat unit. As the Secretary explained, gender dysphoria was among these conditions: Generally allowing service by individuals with this condition poses “substantial risks” and “could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.” Add.60. This conclusion was based on “the Department’s best military judgment,” the recommendations of a panel of experts who had thoroughly studied the issue, and the Secretary’s “own professional judgment.” *Id.*

Less than a month later, the district court preliminarily enjoined the military from implementing this policy without even examining the preliminary-injunction factors with respect to this new framework. The court neither found that plaintiffs were likely to succeed on the merits of any challenge to the 2018 policy nor offered any justification for disregarding the considered professional judgment of senior military leaders. Instead, it simply extended a previous preliminary injunction from December 2017—concerning a presidential memorandum addressing a substantially different policy that has now been formally revoked—to enjoin the military’s 2018 policy. In doing so, the

court ordered the military to maintain a course of action that the Department of Defense squarely rejected in its “professional military judgment,” concluding that it is “not conducive to, and would likely undermine, the inputs ... that are essential to military effectiveness and lethality.” Add.103.

The district court’s disregard for that judgment, and for the comprehensive analysis that produced it, is remarkable. The Supreme Court has repeatedly recognized that special deference is owed to the professional judgments of our Nation’s military leaders, yet the district court implicitly concluded, without explanation, that the Department’s 2018 policy would not survive judicial scrutiny. That rejection of the military’s considered judgment is made all the more inexplicable by the fact that most of the plaintiffs here will not even be affected by the 2018 policy, much less suffer irreparable harm absent an injunction. At a minimum, the district court should have limited any relief to these plaintiffs, rather than enjoin the policy nationwide.

An injunction of this significance should not be permitted to take effect absent this Court’s review. The government respectfully asks this Court to stay the district court’s extension of its now-moot December 2017 injunction and allow the Secretary to adopt the policy that, in his “professional judgment,” will put the military “in the strongest position to protect the American people, to fight and win America’s wars, and to ensure the survival and success of our Service members around the world.” Add.61.<sup>1</sup>

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<sup>1</sup> The government’s counsel contacted counsel for plaintiffs, who indicated that plaintiffs oppose this motion.

## BACKGROUND

**1.a.** Given the unique stresses inherent in military life, the armed forces have traditionally set demanding mental-health standards for service. Add.72. Those standards have typically aligned with the conditions listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association (APA). *Id.* Consistent with the inclusion of “transsexualism” (or “gender identity disorder”) in the DSM, military standards for decades disqualified individuals with “transsexualism” from service absent a waiver. Add.69, 72-73.

In 2013, the APA published a new edition of the DSM reflecting its conclusion that identification with a gender different from one’s biological sex—*i.e.*, transgender status—was no longer a disorder. Add.74. The APA also recognized, however, that a subset of transgender people suffer from the medical condition of gender dysphoria, a “marked incongruence between one’s experience/expressed gender and assigned gender, of at least 6 months duration,” that is “associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.” Add.74-75; *see* Add.82.

Three years later, in June 2016, then-Secretary of Defense Ashton Carter ordered the armed forces to adopt a new policy on military service by transgender individuals. Add.76-77. Under the Carter policy, transgender servicemembers who received a diagnosis of gender dysphoria from a military medical provider could transition genders and remain in the military. *Id.*; *see* Add.114-31. In addition, the military had until July 1,



2017, to revise its accession standards to allow individuals with gender dysphoria, including those who had already transitioned genders, to enter military service provided they met certain medical criteria. Add.77.

**b.** The day before the Carter accession standards were set to take effect, Secretary Mattis, on the recommendation of the Services and in the exercise of his independent discretion, decided that it was “necessary to defer” implementing those standards until January 1, 2018, so that the military could “evaluate more carefully” the effect of accessions by transgender individuals “on readiness and lethality.” Add.112; *see* Add.66, 113. Without “presuppos[ing] the outcome of the review,” he ordered a five-month study that would “include all relevant considerations” and give him “the benefit of the views of the military leadership and of the senior civilian officials who are now arriving in the Department.” Add.112.

While this study was ongoing, the President stated on Twitter on July 26, 2017, that the government “will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military.” Add.111. The President then issued a memorandum in August 2017 calling for “further study” into the risks of maintaining the Carter policy, adherence to the current accession standards during that review, and an implementation plan from the military by February 2018 that would “determine how to address transgender individuals currently serving.” Add.109.

In September 2017, Secretary Mattis created a panel of experts to “conduct an independent multi-disciplinary review and study of relevant data and information

pertaining to transgender Service members.” Add.79. The panel consisted of “senior uniformed and civilian Defense Department and U.S. Coast Guard leaders” who were “uniquely qualified to evaluate the impact of policy changes on the combat effectiveness and lethality of the force.” Add.59, 80. Secretary Mattis ordered the panel “to provide its best military advice, based on increasing the lethality and readiness of America’s armed forces, without regard to any external factors.” Add.59.

In 13 meetings over the span of 90 days, the panel met with military and civilian medical professionals, commanders of transgender servicemembers, and transgender servicemembers themselves. Add.80. It reviewed information regarding gender dysphoria, its treatment, and its impact on military effectiveness, unit cohesion, and resources. *Id.* It received briefing from three separate working groups dedicated to issues involving personnel, medical treatment, and military lethality. *Id.* And unlike in prior reviews, it drew on “the Department’s own data and experience obtained since the Carter policy took effect,” *id.*, which revealed that this issue is “more complicated than the prior administration”—whose policy rested on limited data, estimates, and caveated conclusions—“had assumed,” Add.106. Following “extensive review and deliberation,” which included the consideration of evidence that supported and cut against its ultimate proposals, the panel “exercised its professional military judgment” and provided Secretary Mattis with its recommendations. Add.80.

After considering these recommendations along with additional information, Secretary Mattis, with the agreement of the Secretary of Homeland Security, sent the

President a memorandum in February 2018 recommending that he revoke his 2017 memorandum so that the military could adopt a proposed new policy consistent with the panel's conclusions. Add.59-61, 80. He also provided a 44-page report detailing the Department's reasoning. Add.62-106.

c. Like the Carter policy before it, the Department's 2018 policy turns on the medical condition of gender dysphoria, not transgender status. Under both policies, transgender individuals without gender dysphoria may serve in their biological sex, whereas individuals with a history or diagnosis of that condition are presumptively disqualified. Add.66-68. The main difference between the two policies is the scope of the exceptions to that presumptive disqualification.

Under the new policy, otherwise-eligible individuals with a history or diagnosis of gender dysphoria may join or remain in the military if they neither require nor have undergone gender transition, are willing and able to adhere to the standards associated with their biological sex, and can meet additional criteria. Add.67. For accession into the military, such individuals must demonstrate 36 months of an absence of gender dysphoria before applying, whereas for retention in the military, they may remain so long as they can comply with non-deployability policies. *Id.* Individuals with gender dysphoria who require or have undergone gender transition, however, are disqualified from service unless they obtain a waiver. *Id.* These changes to the Carter policy were necessary because, “[b]ased on the work of the Panel and the Department’s best military judgment,” there are “substantial risks” associated with service by these individuals and

because “exempting such persons from well-established mental health, physical health, and sex-based standards” governing all servicemembers “could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military.” Add.60.

Recognizing, however, that a number of individuals with gender dysphoria had “entered or remained in service following the announcement of the Carter policy,” the Department included a categorical reliance exception for those servicemembers in its 2018 policy. Add.105. Specifically, those servicemembers “who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy, may continue to receive all medically necessary care” as well as “serve in their preferred gender, even after the new policy commences.” *Id.* In the Department’s judgment, its “substantial investment” in and “commitment to” these particular servicemembers “outweigh the risks” associated with continuing to maintain the Carter policy in this area. *Id.*

**d.** On March 23, 2018, the President issued a new memorandum revoking his 2017 memorandum “and any other directive [he] may have made with respect to military service by transgender individuals,” thereby allowing the Secretaries of Defense and Homeland Security to “exercise their authority to implement any appropriate policies concerning military service by transgender individuals.” Add.57.

**2.a.** In September 2017, plaintiffs—nine individuals and three organizations—sought a preliminary injunction of various directives in the President’s 2017 memorandum, Doc.32, and were soon joined by Washington State as an intervenor,

Doc.97. In December 2017, the district court concluded that those directives instituted a policy categorically excluding transgender individuals from military service, Add.46; held that plaintiffs had standing to challenge that policy, Add.40-45; determined that intermediate scrutiny applied and that military deference was unwarranted, Add.48, 51; ruled that plaintiffs' equal-protection, substantive-due-process, and free-speech claims were likely to succeed, Add.48-53; and decided that the remaining factors favored a preliminary injunction, Add.53-55. It then enjoined the government "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." Add.56.

**b.** In March 2018, following the President's revocation of his 2017 memorandum, the government, in an abundance of caution, moved to dissolve the December 2017 preliminary injunction so that the military could safely implement its 2018 policy. Doc.223. The government argued that plaintiffs' challenge to the now-revoked 2017 memorandum is moot and that, in any event, plaintiffs would be unable to satisfy any of the preliminary-injunction factors with respect to the 2018 policy. *Id.*

The district court denied the government's motion and enjoined the military from implementing its 2018 policy. Add.3, 32-33. In doing so, the court never explained why plaintiffs were likely to succeed in any constitutional challenge to the 2018 policy, other than to dismiss that policy as merely "a plan to implement the Ban" announced on Twitter. Add.4. Nor did it ever address the remaining preliminary-injunction factors. Instead, it concluded that "whether the Ban is entitled to deference

raises an unresolved question of fact” because it was unclear “whether the DoD’s deliberative process ... is of the type to which Courts typically should defer,” Add.28, and ordered the parties to “prepare for trial” on “whether ... deference is owed to the Ban” and whether it survives “strict scrutiny,” Add.32-33.

The government appealed on April 30 and sought a stay of the preliminary injunction from the district court. Doc.236, 238. On May 2, the district court declined to issue an expedited ruling on that motion. Add.1-2. The government will promptly notify this Court when that court rules on the motion. *See* Fed. R. App. P. 8(a)(2)(A)(ii).

### **ARGUMENT**

The district court’s order is extraordinary in every respect. That court not only refused to dissolve a now-moot injunction concerning a revoked presidential memorandum addressing a superseded policy, but also extended that injunction to block the Secretary of Defense from implementing a new, carefully crafted, and thoroughly explained policy reflecting the best judgment of his military advisers as to how to address the risks associated with his predecessor’s approach. That court did so, moreover, without finding that plaintiffs are likely to succeed in any challenge to the 2018 policy, and without offering any justification for disregarding the judgments of senior military leaders concerning risks to military readiness. Nothing in this Court’s or the Supreme Court’s precedents countenances a judicial intrusion of this magnitude into the operation of our Nation’s armed forces. This Court should not allow an injunction this momentous to take effect before having a chance to consider the issue.

## **I. The Government Is Likely To Succeed On The Merits.**

The military's independent reexamination of the Carter policy—begun on the recommendation of the Services, without direction from the President, and before his Twitter statement—involved an extensive review by many of the Defense Department's high-ranking officials, combat veterans, and experts in a variety of subjects. Add.59-60, 79-80. As part of that deliberative process, the Department considered evidence and testimony on all sides of the question of military service by persons diagnosed with gender dysphoria—including the materials underlying, and the military's experience with, the Carter policy itself—and thoroughly explained its conclusions in a 44-page report. Add.59-61, 80, 106. Given that analysis, Secretary Mattis determined, as a matter of “the Department's best military judgment,” that allowing individuals with gender dysphoria to serve posed “substantial risks” to military readiness. Add.60. While noting that his predecessor had reached a different conclusion, Secretary Mattis explained that in light of the latest study, “this policy issue has proven more complex than the prior administration ... assumed.” *Id.* That considered military judgment should easily withstand constitutional scrutiny, and the district court provided no reason for its conclusion otherwise.

### **A. The Military's 2018 Policy Is Consistent With Equal Protection.**

1. Under any ordinary application of military-deference principles, the Department's new policy would survive the equal-protection challenge here. As one of the “complex, subtle, and professional decisions as to the composition ... of a military

force, which are essentially professional military judgments,” the 2018 policy merits significant deference. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (quotation marks omitted). That would be true even if, as the district court assumed, an analogous policy in the civilian context would trigger heightened scrutiny. Although the armed forces are subject to constitutional constraints, the Supreme Court has repeatedly stressed that “the tests and limitations to be applied may differ because of the military context.” *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). Judicial “review of military regulations challenged on First Amendment grounds,” for instance, “is far more deferential than constitutional review of similar laws or regulations designed for civilian society,” *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986), and the same can be said for “rights of servicemembers” more generally, including those within the Due Process Clause, *Weiss v. United States*, 510 U.S. 163, 177 (1994).

Although the Supreme Court has expressly refused to attach a “label[]” to the type of review applicable to military policies alleged to trigger heightened scrutiny, *Rostker*, 453 U.S. at 69, the Court’s substantial departures from core aspects of strict or intermediate scrutiny in the military context demonstrate that its approach most closely resembles rational-basis review. In this area, the Court has deferred to military judgments in the face of significant evidence to the contrary, *Goldman*, 475 U.S. at 509; granted the political branches substantial latitude to choose “among alternatives” in furthering military interests, *Rostker*, 453 U.S. at 71-72; tolerated arguable inconsistencies resulting from where the political branches have “drawn the line,”



*Goldman*, 475 U.S. at 510; and relied on concerns about “administrative problems” as well as post hoc justifications, *Rostker*, 453 U.S. at 74-75, 81. Whatever label is assigned this lenient form of review, it is not heightened scrutiny.

Under this deferential standard, the Department’s presumptive disqualification of individuals with gender dysphoria easily withstands plaintiffs’ equal-protection claim. Gender dysphoria, as the APA has stressed, is not the same as transgender status, but is instead a medical condition associated with “clinically significant distress or impairment in social, occupational, or other important areas of functioning.” Add.82-83. As Secretary Mattis explained, generally allowing individuals with this condition to serve would pose “substantial risks” as well as “undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.” Add.60. There should be no dispute that the military’s interest in avoiding those harms is a compelling one: Courts must “give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest,” *Winter*, 555 U.S. at 24 (citation omitted), and here, the Department has concluded that minimizing these risks is “absolutely essential,” Add.60. Thus, the only issue is whether courts should defer to the military’s judgment that the new policy is “necessary” to effectuate that critical interest. Add.94.

That should not be a close question. Drawing on the experience and judgment of senior military leadership, evidence from before and after the adoption of the Carter policy, and its experience under that policy so far, the Department concluded that

generally permitting military service by individuals with gender dysphoria would pose unacceptable risks for a variety of reasons. Add.80. The Department considered evidence that transition-related treatment could render these individuals non-deployable for a significant time, Add.95-97; the burdens these deployability limitations would place on other servicemembers and their families, Add.97; evidence that these individuals continued to have higher rates of psychiatric hospitalization and suicidal behavior even after transition, Add.81-89, 94; the creation of irreconcilable privacy demands that would generate friction in the ranks, Add.90-93, 99-100; the danger of violating federal statutes requiring sex-specific facilities in basic training, Add.91, 99; the safety risks and perceptions of unfairness arising from having training and athletic standards turn on gender identity rather than physiology, Add.91, 97-99; the frustration of non-transgender servicemembers who also wish to be exempted from uniform and grooming standards to express core parts of their identity, Add.91; and disproportionate transition-related costs, Add.103. The Department's professional military judgments on these issues, which involved a sensitive consideration of risks, costs, and internal discipline, handily satisfy the deferential form of review required here.

In all events, heightened scrutiny would be inappropriate here even if principles of military deference did not apply. The Department's 2018 policy, like the Carter policy before it, draws lines on the basis of a medical condition (gender dysphoria) and an associated treatment (gender transition), not transgender status. Add.66-68, 76-78. Such classifications receive only rational-basis review, which the new policy easily

satisfies. *See, e.g., Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365–68 (2001); *Geduldig v. Aiello*, 417 U.S. 484, 494–97 & n.20 (1974).<sup>2</sup>

2. The district court never grappled with the Department’s analysis. Although it claimed to reserve judgment on whether “deference is owed to” the military’s new policy and whether that policy “survives constitutional review,” Add.32, its decision to preliminarily enjoin that policy necessarily meant that it was likely to answer both questions in the negative. But the court never explained why that was so, other than to dismiss the new policy as merely “a plan to implement the Ban” previously announced by the President. Add.4.

The military judgment of the Secretary of Defense, based on an exhaustive analysis by a panel of military experts, deserves more respect. The 2018 policy is not a “ban” in form or substance, and it is plainly not the same policy that the President previously announced and the district court previously enjoined. The prior policy was expressly revoked by the President, at the Secretary’s request, so that the Secretary could instead implement the 2018 policy, which reflects the best advice of the Secretary’s professional military advisers. Add.57, 61. The district court identified no basis for concluding that the 2018 policy was in any respect constitutionally problematic, let

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<sup>2</sup> Even if this policy could be characterized as turning on transgender status, such classifications do not trigger heightened scrutiny either. *See, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227-28 (10th Cir. 2007). In holding otherwise, the district court incorrectly relied on *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), which addressed a statutory claim turning on the facts of that case. *See id.* at 1200-02; Add.48-49.

alone for concluding that these particular plaintiffs were likely to succeed in challenging it. Instead, the court simply declared that it could not presently “determine whether the DoD’s deliberative process ... is of the type to which Courts typically should defer,” Add.28, and extended its prior preliminary injunction without further analysis.

That approach turns principles of military deference on their head. A federal court does not properly enjoin the professional judgment of military commanders until it is persuaded that those judgments are correct or sufficiently deliberative. Rather, courts refrain from interfering in the operation of our Nation’s armed forces unless and until plaintiffs demonstrate that the military’s judgment cannot survive even deferential scrutiny. *See Winter*, 555 U.S. at 20.

In any event, it is not the case that the Department’s new policy, with its various exceptions, constitutes “a ‘categorical’ prohibition on service by openly transgender people.” Add.15. The district court never reconciled that characterization with the existence of the reliance “exception,” for instance, other than to dismiss the latter as “narrow.” Add.15 n.6. But a policy with even a narrow “exception” is by definition not a “categorical” one, Add.15 & n.6, and in any event this exception covers nearly 1,000 servicemembers already, Add.69 n.10.

The district court’s only basis for this characterization was that the new policy would require some transgender individuals “to adhere to all standards associated with their biological sex” and thereby “force [them] to suppress the very characteristic that defines them as transgender.” Add.15 (citations omitted). But the same could be said

about the Carter policy it ordered the military to maintain, which likewise requires transgender individuals who have “no[t] been diagnosed with gender dysphoria ... to adhere to all standards associated with their biological sex,” and presumptively disqualifies individuals with gender dysphoria altogether. *Id.*; see Add.77-78. The court’s objection thus reduces to a disagreement over where the military “has drawn the line.” *Goldman*, 475 U.S. at 510. But such policy decisions regarding how exactly to resolve, in then-Secretary Carter’s words, the “unique challenges associated with addressing” gender transition “in a manner consistent with military mission and readiness needs,” Add.136, should not be subject to judicial second-guessing.

**B. The Military’s 2018 Policy Survives Plaintiffs’ Other Claims.**

The district court further erred in implicitly holding that the 2018 policy likely violates substantive due process and the First Amendment. Although it committed the same mistakes with respect to these issues as it did with equal protection—*i.e.*, concluding that the policy’s alleged “intrusion” on plaintiffs’ “fundamental right” and “protected expression” was unnecessary “to further an important government interest,” Add.52-53, these theories fail for additional reasons. To start, although the court implicitly held that the 2018 policy unnecessarily intruded on plaintiffs’ “fundamental right” to “define and express their gender identity” by “depriving them of employment and career opportunities,” Add.52, there is no fundamental right to serve in the military, much less to do so in a particular manner. And the 2018 policy, like the Carter policy

before it, does not prohibit individuals from revealing their gender identity or restrict the content of their speech. *Contra* Add.52-53.<sup>3</sup>

## II. The Remaining Factors Favor A Stay.

The district court also abused its discretion in weighing the equities to conclude that a preliminary injunction against the 2018 policy was warranted. Because the equities clearly cut against such relief, a stay is necessary. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (considerations for a stay pending appeal include whether applicant will suffer irreparable injury, balance of hardships to other parties, and public interest).

At the outset, plaintiffs cannot establish a cognizable injury, much less an irreparable one. Although the district court held that all individual plaintiffs had standing based on an alleged stigmatic injury, Add.18, such a harm “accords a basis for standing only to ‘those persons who are personally denied equal treatment,’” which no plaintiff has alleged. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (citation omitted), *abrogated on other grounds by Lexmark Int’l v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

Nor do plaintiffs have standing to challenge any specific part of the 2018 policy. As for that policy’s framework for current servicemembers, five of the six currently serving plaintiffs (Schmid, Muller, Lewis, Stephens, and Winters) would fall within the reliance exception because they had begun transition under the Carter policy. Add.145,

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<sup>3</sup> In all events, plaintiffs’ challenge to the President’s 2017 memorandum is moot. If the new policy would disqualify them from service, an injunction barring enforcement of that non-existent memorandum would do nothing to cure their alleged injuries.

147, 159, 161-62, 166-67, 172-73, 179-80. Although the district court questioned whether these servicemembers had received a diagnosis of gender dysphoria by a military medical provider after the Carter policy took effect, Add.17 n.7, it overlooked the fact that they could transition under that policy only upon receipt of such a diagnosis, Add.76-77. And although it is unclear whether the sixth, Doe, has obtained the necessary diagnosis, Add.191-94, nothing prevents this servicemember from doing so and thereby qualifying as well. Any refusal to seek a diagnosis does not create a cognizable injury, as plaintiffs “cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 416 (2013).

The three individual non-servicemember plaintiffs (Karnoski, D.L., and Callahan) likewise lack standing to challenge the 2018 policy’s accession standards. These plaintiffs have not even established that they would otherwise be eligible to enter the military, Add.138-42, 151-54, 186-89, rendering any “threatened injury” far from “*certainly impending*,” *Clapper*, 568 U.S. at 409. Nor can they show that this alleged injury would be redressable by the preliminary injunction, as there is no claim that any of them could obtain the requisite certificate establishing 18 months’ stability post-treatment under the Carter policy. Add.138-42, 151-54, 186-89.

The presence of the organizations and Washington State here makes no difference. The organizations’ standing turns on that of their members, so if the relevant individuals (Karnoski, Schmid, Muller, Stephens, and Winters) cannot satisfy

Article III, the organizations cannot either. Add.19-20. As for Washington, its claim that the 2018 policy may harm its ability to recruit and retain members of the Washington National Guard is wholly speculative. *See* Doc.55 at 7 (exclusion of transgender individuals from the Guard “may” lead to “diminished numbers of service members who can provide emergency response”). Nor does its asserted *parens patriae* interest in protecting its residents from an allegedly discriminatory federal policy confer standing. *See Massachusetts v. Mellon*, 262 U.S. 447, 478, 485-86 (1923).

Even if plaintiffs had standing to challenge some aspect of the new policy, they have not established an irreparable injury relating to their military employment, let alone one that would arise during the appeal. *See Hartikka v. United States*, 754 F.2d. 1516, 1518 (9th Cir. 1985) (damage to reputation as well as lost income, retirement, and relocation pay resulting from less-than-honorable discharge not irreparable).

Denying a stay, by contrast, will force the Defense Department to maintain a policy that it has concluded poses “substantial risks” and threatens to “undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.” Add.60. The district court gave no explanation for why the military (and the public) should sustain this ongoing irreparable harm. To be sure, it previously held that the equities favored an injunction with respect to the 2017 memorandum based on its belief that the Carter policy—which at that time had not been fully implemented—had no “documented negative effects.” Add.55. At this point, however, the Department has detailed the risks associated with



the Carter policy and explained why, in its professional judgment, it is “necessary” to depart from that framework. Add.94. These “specific, predictive judgments” from senior military officials, including the Secretary of Defense, “about how the preliminary injunction would reduce the effectiveness” of the military merit significant deference, as the military need not “wait until the injunction ‘actually results in an inability’” to effectively prepare “‘for the national defense’ before seeking its dissolution.” *Winter*, 555 U.S. at 27, 31 (brackets omitted in third quotation).

### **III. This Court Should Stay The Preliminary Injunction At Least Insofar As It Grants Nationwide Relief.**

Although the district court held that nine individuals had standing to challenge the 2018 policy, it entered a preliminary injunction barring implementation of that framework nationwide. In doing so, it gave no explanation for why such broad relief was necessary to redress their alleged injuries.

Nor could it. That order violates principles of Article III and exceeds the district court’s equitable authority. Consistent with basic principles of standing, “[t]he remedy” ordered by a federal court must “be limited to the inadequacy that produced the injury in fact that the plaintiff has established.” *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Equitable principles likewise require that an injunction “be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). And these constitutional and equitable limits apply with special force to injunctions concerning military policies. *See U.S. Dep’t of Def.*

*v. Meinhold*, 510 U.S. 939 (1993) (staying injunction against military policy to the extent it conferred relief on anyone other than plaintiff); *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994) (vacating injunction save to the extent it applied to plaintiff).

Given that the district court's wide-ranging order is unnecessary to remedy the alleged injuries of the nine individual plaintiffs, this Court should at least issue a stay limiting the application of that injunction to these individuals. That limited stay would provide them with full relief during the appeal. If others believe they have cognizable injuries, they are free to bring their own challenges to the new policy—as some have done. *See* Second Am. Compl., *Doe v. Trump*, No. 17-1597 (D.D.C. filed Apr. 6, 2018).<sup>4</sup>

### CONCLUSION

The government respectfully requests that this Court enter a stay pending appeal of the district court's preliminary injunction.

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<sup>4</sup> Even if the three organizations and Washington had standing to challenge the 2018 policy, nationwide relief would be inappropriate. Based on plaintiffs' assertions, there are only six individuals (Karnoski, Lewis, Schmid, Muller, Stephens, and Winters) with ties to Washington and/or these organizations who may be affected by the new policy.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing Motion complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 5,240 words. This Motion complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ Catherine H. Dorsey  
Catherine H. Dorsey

**CERTIFICATE OF SERVICE**

I hereby certify that on May 4, 2018, I filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Catherine H. Dorsey  
Catherine H. Dorsey

No. 18-35347

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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RYAN KARNOSKI, et al.,  
Plaintiffs-Appellees,

STATE OF WASHINGTON, Attorney General's Office Civil Rights Unit,  
Intervenor-Plaintiff-Appellee,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.  
Defendants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

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**ADDENDUM TO MOTION FOR STAY PENDING APPEAL**

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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

MINUTE ORDER

The following minute order is made by the direction of the court, the Honorable Marsha J. Pechman, United States District Judge: The Court is in receipt of Defendants' Motion to Stay the Preliminary Injunction Pending Appeal. (Dkt. No. 238.) The Court declines to issue an expedited ruling on the Motion, and will issue its ruling following the noting date and in accordance with the briefing schedule set forth in the Local Rule 7(d)(3). The response is due no later than May 14, 2018. The reply is due no later than May 18, 2018.

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

Filed May 2, 2018.

William M. McCool

Clerk of Court

s/Paula McNabb

Deputy Clerk

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  
PLAINTIFFS' AND  
WASHINGTON'S MOTIONS FOR  
SUMMARY JUDGMENT;  
  
GRANTING IN PART AND  
DENYING IN PART  
DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT

THIS MATTER comes before the Court on Plaintiffs' Motion for Summary Judgment (Dkt. No. 129); the State of Washington's Motion for Summary Judgment (Dkt. No. 150); and Defendants' Cross-Motion for Partial Summary Judgment (Dkt. No. 194.) Having reviewed the Motions, the Responses (Dkt. Nos. 194, 207, 209), the Replies (Dkt. Nos. 201, 202, 212) and all related papers, and having considered arguments made in proceedings before the Court, the Court rules as follows: The Court GRANTS IN PART and DENIES IN PART Plaintiffs' and

Washington's Motions and GRANTS IN PART and DENIES IN PART Defendants' Cross-Motion.

### **ORDER SUMMARY**

In July 2017, President Donald J. Trump announced on Twitter a ban on military service by openly transgender people (the "Ban"). Plaintiffs and the State of Washington ("Washington") challenged the constitutionality of the Ban, and moved for a preliminary injunction to prevent it from being carried out.

In December 2017, the Court—along with three other federal judges—entered a nationwide preliminary injunction preventing the military from implementing the Ban. The effect of the order was to maintain the status quo, allowing transgender people to join and serve in the military and receive transition-related medical care. For the past few months, they have done just that.

In March 2018, President Trump announced a plan to implement the Ban. With few exceptions, the plan excludes from military service people "with a history or diagnosis of gender dysphoria" and people who "require or have undergone gender transition." The plan provides that transgender people may serve in the military only if they serve in their "biological sex." Defendants claim that this plan resolves the constitutional issues raised by Plaintiffs and Washington.

In the following order, the Court concludes otherwise, and rules that the preliminary injunction will remain in effect. Each of the claims raised by Plaintiffs and Washington remains viable. The Court also rules that, because transgender people have long been subjected to systemic oppression and forced to live in silence, they are a protected class. Therefore, any attempt to exclude them from military service will be looked at with the highest level of care,

and will be subject to the Court’s “strict scrutiny.” This means that before Defendants can implement the Ban, they must show that it was sincerely motivated by compelling interests, rather than by prejudice or stereotype, and that it is narrowly tailored to achieve those interests.

The case continues forward on the issue of whether the Ban is well-supported by evidence and entitled to deference, or whether it fails as an impermissible violation of constitutional rights. The Court declines to dismiss President Trump from the case and allows Plaintiffs’ and Washington’s claims for declaratory relief to go forward against him.

## BACKGROUND

### I. The Ban on Military Service by Openly Transgender People<sup>1</sup>

***President Trump’s Announcement on Twitter:*** On July 26, 2017, President Donald J. Trump (@realDonaldTrump) announced over Twitter that the United States would no longer “accept or allow” transgender people “to serve in any capacity in the U.S. military” (the “Twitter Announcement”):



(Dkt. No. 149, Ex. 1.)

<sup>1</sup> As used throughout this Order, and as explained in greater detail in this section, the “Ban” refers to Defendants’ policy generally prohibiting military service by openly transgender people, as announced in President Trump’s Twitter Announcement and 2017 Memorandum and as further detailed in the Implementation Plan and 2018 Memorandum.

***The 2017 Memorandum:*** On August 25, 2017, President Trump issued a Presidential Memorandum (the “2017 Memorandum”) formalizing his Twitter Announcement, and directing the Secretaries of Defense and Homeland Security to “return” to an earlier policy excluding transgender service members. (Dkt. No. 149, Ex. 2.) The 2017 Memorandum authorized the discharge of openly transgender service members (the “Retention Directive”); prohibited the accession of openly transgender service members (the “Accession Directive”); and prohibited the use of Department of Defense (“DoD”) and Department of Homeland Security (“DHS”) resources to fund “sex reassignment” surgical procedures (the “Medical Care Directive”). (*Id.* at §§ 1-3.) The Accession Directive was to take effect on January 1, 2018; the Retention and Medical Care Directives on March 23, 2018. (*Id.* at § 3.) The 2017 Memorandum also ordered the Secretary of Defense to “submit to [President Trump] a plan for implementing both [its] general policy . . . and [its] specific directives . . .” no later than February 21, 2018. (*Id.*)

***Secretary Mattis’ Press Release and Interim Guidance:*** On August 29, 2017, Secretary of Defense James N. Mattis issued a press release confirming that the DoD had received the 2017 Memorandum and, as directed, would “carry out” its policy direction. (Dkt. No. 197, Ex. 2.) The press release explained that Secretary Mattis would “develop a study and implementation plan” and “establish a panel of experts . . . to provide advice and recommendation on the implementation of the [P]resident’s direction.” (*Id.*)

On September 14, 2017, Secretary Mattis issued interim guidance regarding President Trump’s Twitter Announcement and 2017 Memorandum to the military (the “Interim Guidance”). (Dkt. No. 149, Ex. 3.) The Interim Guidance again identified the DoD’s intent to “carry out the President’s policy and directives” and “present the President with a plan to implement the policy and directives in the [2017] Memorandum.” (*Id.* at 2.) The Interim

Guidance provided (1) that transgender people would be prohibited from accession effective immediately; (2) that service members diagnosed with gender dysphoria would be provided “treatment,” however, “no new sex reassignment surgical procedures for military personnel [would] be permitted after March 22, 2018”; and (3) that no action would be taken “to involuntarily separate or discharge an otherwise qualified Service member solely on the basis of a gender dysphoria diagnosis or transgender status.” (*Id.* at 3.)

***The Implementation Plan:*** On February 22, 2018, as directed, Secretary Mattis delivered to President Trump a plan for carrying out the policies set forth in his Twitter Announcement and 2017 Memorandum (Dkt. No. 224, Ex. 1) along with a “Report and Recommendations on Military Service by Transgender Persons” (Dkt. No. 224, Ex. 2) (collectively, the “Implementation Plan”). The Implementation Plan recommended the following policies:

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

(Dkt. No. 224, Ex. 1 at 3-4.)

***The 2018 Memorandum:*** On March 23, 2018, President Trump issued another Presidential Memorandum (the “2018 Memorandum”). (Dkt. No. 224, Ex. 3.) The 2018 Memorandum confirms his receipt of the Implementation Plan, purports to “revoke” the 2017 Memorandum and “any other directive [he] may have made with respect to military service by transgender individuals,” and directs the Secretaries of Defense and Homeland Security to “exercise their authority to implement any appropriate policies concerning military service by transgender individuals.” (Id. at 2-3.)

## **II. The Carter Policy**

In 2010, Congress repealed the “Don’t Ask, Don’t Tell” policy that had previously prevented gay, lesbian, and bisexual people from serving openly in the military. (Dkt. No. 145 at ¶ 10.) The repeal of “Don’t Ask, Don’t Tell” raised questions about the military’s policy on transgender service members, as commanders became increasingly aware that there were capable and experienced transgender service members in every branch of the military. (Id. at ¶ 11; Dkt. No. 146 at ¶ 7.) In August 2014, the DoD eliminated its categorical ban on retention of transgender service members, enabling each branch of military service to reassess its own policies. (Dkt. No. 145 at ¶ 12; Dkt. No. 146 at ¶ 8.) In July 2015, then-Secretary of Defense Ashton Carter convened a group to evaluate policy options regarding openly transgender service members (the “Working Group”). (Dkt. No. 142 at ¶ 8.) The Working Group included senior uniformed officials from each branch, a senior civilian official, and various staff members. (Id. at ¶ 9.) It sought to “identify and address all relevant issues relating to service by openly transgender persons.” (Id. at ¶ 22.) To do so, it consulted with medical experts, personnel experts, readiness experts, and commanders whose units included transgender service members, and commissioned an independent study by the RAND Corporation to assess the implications of



allowing transgender people to serve openly (the “RAND Study”). (Id. at ¶¶ 10-11, 22-27.) In particular, the RAND Study focused on: (1) the health care needs of transgender service members and the likely costs of providing coverage for transition-related care; (2) the readiness implications of allowing transgender service members to serve openly; and (3) the experiences of foreign militaries that allow for open service. (Dkt. No. 144, Ex. B at 4.) The RAND Study found “no evidence” that allowing transgender people to serve openly would adversely impact military effectiveness, readiness, or unit cohesion. (Dkt. No. 144 at ¶ 14.) Instead, the RAND Study found that discharging transgender service members would reduce productivity and result in “significant costs” associated with replacing skilled and qualified personnel. (Dkt. No. 142 at ¶ 21.) The results of the RAND Study were published in a 113-page report titled “Assessing the Implications of Allowing Transgender Personnel to Serve Openly.” (See Dkt. No. 144, Ex. B.)

After reviewing the results of the RAND Study and other evidence, the Working Group unanimously agreed that (1) transgender people should be allowed to serve openly and (2) excluding them from service based on a characteristic unrelated to their fitness to serve would undermine military efficacy. (Dkt. No. 142 at ¶¶ 26-27.) On June 30, 2016, Secretary Carter accepted the recommendations of the Working Group and issued Directive-type Memorandum 16-005 (the “Carter Policy”), which affirmed that “service in the United States military should be open to all who can meet the rigorous standards for military service and readiness.” (Dkt. No. 144, Ex. C.) The Carter Policy 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,” and further provided that

transgender people would be allowed to accede into the military not later than July 1, 2017.<sup>2</sup> (Id. at 5.) Consistent with the Carter Policy, each branch of military service issued detailed instructions, policies, and regulations regarding separation and retention, accession, in-service transition, and medical care. (Dkt. No. 144 at ¶¶ 24-36, Exs. D, E, F; Dkt. No. 145 at ¶¶ 41-50, Exs. A, B; Dkt. No. 146 at ¶¶ 27-34, Ex. A.)

In reliance upon the Carter Policy and the DoD's assurances that it would not discharge them for being transgender, many service members came out to the military and had been serving openly for more than a year when President Trump issued his Twitter Announcement and 2017 Memorandum. (Dkt. No. 144, ¶ 37; Dkt. No. 145 at ¶ 51; Dkt. No. 146 at ¶ 35.)

### **III. Procedural History**

On August 28, 2017, Plaintiffs filed this lawsuit challenging the constitutionality of the Ban, as set forth in the Twitter Announcement and the 2017 Memorandum. (See Dkt. No. 1.) Plaintiffs include nine transgender individuals (the "Individual Plaintiffs") and three organizations (the "Organizational Plaintiffs"). (Dkt. No. 30 at ¶¶ 7-18.) Individual Plaintiffs Ryan Karnoski, D.L., and Connor Callahan aspire to enlist in the military; 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 ¶¶ 7-13.) Individual Plaintiff Jane Doe currently serves in the military, but does not serve openly. (Id. at ¶ 14.) Organizational Plaintiffs include the Human Rights Campaign ("HRC"), the Gender Justice League ("GJL"), and the American

<sup>2</sup> On June 30, 2017, Secretary Mattis extended the effective date for accepting transgender recruits to January 1, 2018. (Dkt. No. 197, Ex. 3.)

Military Partner Association (“AMPA”). (Id. at ¶¶ 16-18.) Defendants include President Trump, Secretary Mattis, the United States, and the DoD. (Id. at ¶¶ 19-22.)

On November 27, 2017, the Court granted intervention to Washington, which joined to protect its sovereign and quasi-sovereign interests in its natural resources and in the health and physical and economic well-being of its residents. (See Dkt. No. 101.)

On December 11, 2017, the Court issued a nationwide preliminary injunction barring 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.”<sup>3</sup> (Dkt. No. 103 at 23.) The Court found that Plaintiffs and Washington had standing to challenge the Ban and were likely to succeed on the merits of their claims for violation of equal protection, substantive due process, and the First Amendment. (Id. at 6-12, 15-20.)

On January 25, 2018, Plaintiffs and Washington filed separate motions for summary judgment.<sup>4</sup> (Dkt. Nos. 129, 150.) Both seek an order declaring the Ban unconstitutional and permanently enjoining its implementation. (Dkt. No. 129 at 28-29; Dkt. No. 150-1.)

On February 28, 2018, Defendants filed an opposition and cross-motion for partial summary judgment seeking dismissal of all claims brought against President Trump. (Dkt. No. 194.)

<sup>3</sup> Three other district courts also entered preliminary injunctions against the Ban. See Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017); Stone v. Trump, 280 F. Supp. 3d 747 (D. Md. 2017); Stockman v. Trump, No. 17-cv-1799-JGB-KK, Dkt. No. 79 (C.D. Cal. Dec. 22, 2017).

<sup>4</sup> Plaintiffs are joined by amici the Constitutional Accountability Center (Dkt. No. 163, Ex. 1); Legal Voice (Dkt. No. 169); Retired Military Officers and Former National Security Officials (Dkt. No. 152, Ex. A); and the Commonwealths of Massachusetts and Pennsylvania, the States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and the District of Columbia (Dkt. No. 170, Ex. A.)

On March 23, 2018, as these motions were pending and only days before the Court was set to hear oral argument, President Trump issued the 2018 Memorandum. (Dkt. No. 214, Ex. 1.) On March 27, the Court ordered the parties to present supplemental briefing on the effect of the 2018 Memorandum and the Implementation Plan. (Dkt. No. 221.) That briefing has now been completed and this matter is ready for ruling. (See Dkt. Nos. 226, 227, 228.)

## DISCUSSION

### I. Legal Standard

Summary judgment is proper if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To defeat a motion for summary judgment, the non-movant must point to facts supported by the record which demonstrate a genuine issue of material fact. Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990). Conclusory, non-specific statements are not sufficient. Id. Similarly, “a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda.” S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc., 690 F.2d 1235, 1238 (9th Cir. 1982).

### II. Plaintiffs’ and Washington’s Motions for Summary Judgment

Plaintiffs and Washington contend that summary judgment is proper because the Ban is unsupported by any constitutionally adequate government interest as a matter of law, and therefore violates equal protection, substantive due process, and the First Amendment. (Dkt. No. 129 at 15-28; Dkt. No. 150 at 13-23.) Defendants respond that disputes of material fact preclude summary judgment, including disputes as to (1) whether Plaintiffs’ and Washington’s challenges

are moot as a result of the 2018 Memorandum; (2) whether Plaintiffs and Washington have standing; and (3) whether the Ban satisfies the applicable level of scrutiny. (Dkt. No. 194 at 5-24; Dkt. No. 226 at 3-11.) The Court addresses each of these issues in turn:

### **A. Mootness**

Defendants claim that Plaintiffs’ and Washington’s challenges are now moot, as the policy set forth in the 2017 Memorandum has been “revoked” and replaced by that in the 2018 Memorandum. (Dkt. No. 226 at 3-7.) Defendants claim the “new policy” has “changed substantially,” such that it presents a “substantially different controversy.” (*Id.* at 6 (citations omitted.)) Plaintiffs and Washington respond that there is no “new policy” at all, as the 2018 Memorandum and the Implementation Plan merely implement the directives of the 2017 Memorandum. (Dkt. No. 227 at 2; Dkt. No. 228 at 7-8.)

“The burden of demonstrating mootness ‘is a heavy one.’” Los Angeles County v. Davis, 440 U.S. 625, 631 (1979) (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953)). The Ninth Circuit has explained that a case is not moot unless “subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,” McCormack v. Herzog, 788 F.3d 1017, 1024 (9th Cir. 2015) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)), such that “the litigant no longer ha[s] any need of the judicial protection that is sought.” Jacobus v. Alaska, 338 F.3d 1095, 1102-03 (9th Cir. 2003) (quoting Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 224 (2000)). Accordingly, courts find cases moot only where the challenged policy has been completely revoked or rescinded, not merely voluntarily ceased. See Davis, 440 U.S. at 631 (holding that a case is moot only where “there can be no reasonable expectation” that the alleged violation will recur and “interim relief or events have completely and irrevocably

eradicated the effects of the alleged violation”); City of Mesquite v. Aladdin’s Castle, Inc., 455 U.S. 283, 289 (1982) (holding that “a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice”); see also McCormack, 788 F.3d at 1025 (noting that a case is not moot where the government never “repudiated . . . as unconstitutional” the challenged policy).

The Court finds that the 2018 Memorandum and the Implementation Plan do not substantively rescind or revoke the Ban, but instead threaten the very same violations that caused it and other courts to enjoin the Ban in the first place. The 2017 Memorandum prohibited the accession and authorized the discharge of openly transgender service members (the Accession and Retention Directives); prohibited the use of DoD and DHS resources to fund transition-related surgical procedures (the Medical Care Directive); and directed Secretary Mattis to submit “a plan for implementing” both its “general policy” and its “specific directives” no later than February 21, 2018. (Dkt. No. 149, Ex. 2 at §§ 1-3.) The 2017 Memorandum did not direct Secretary Mattis to determine *whether* or not the directives should be implemented, but instead ordered the directives to be implemented by specific dates and requested a plan for *how* to do so.

The Implementation Plan adheres to the policy and directives set forth in the 2017 Memorandum with few exceptions: With regard to the Accession and Retention Directives, the Implementation Plan excludes from military service and authorizes the discharge of transgender people who “require or have undergone gender transition” and those “with a history or diagnosis of gender dysphoria” unless they have been “stable for 36 consecutive months in their biological sex prior to accession.” (Dkt. No. 224, Ex. 1 at 3-4.) With regard to the Medical Care Directive, the Implementation Plan provides that the military will, with few exceptions, no longer provide

transition-related surgical care (as people who “require . . . gender transition” will no longer be permitted to serve and those who are currently serving will be subject to discharge). (*Id.*)

Defendants claim that the 2018 Memorandum and the Implementation Plan differ from the 2017 Memorandum in that they do not mandate a “categorical” prohibition on service by openly transgender people and “contain[] several exceptions allowing some transgender individuals to serve.” (Dkt. No. 226 at 6-7). The Court is not persuaded. The Implementation Plan prohibits transgender people—including those who have neither transitioned nor been diagnosed with gender dysphoria—from serving, unless they are “willing and able to adhere to all standards associated with their biological sex.” (Dkt. No. 224, Ex. 1 at 4, Ex. 2 at 7.) Requiring transgender people to serve in their “biological sex”<sup>5</sup> does not constitute “open” service in any meaningful way, and cannot reasonably be considered an “exception” to the Ban. Rather, it would force transgender service members to suppress the very characteristic that defines them as transgender in the first place.<sup>6</sup> (*See* Dkt. No. 143 at ¶ 19 (“The term ‘transgender’ is used to describe someone who experiences any significant degree of

<sup>5</sup> The Court notes that the Implementation Plan uses the term “biological sex,” apparently to refer to the sex one is assigned at birth. This is somewhat misleading, as the record indicates that gender identity—“a person’s internalized, inherent sense of who they are as a particular gender (*i.e.*, male or female)” —is also widely understood to have a “biological component.” (*See* Dkt. No. 143 at ¶¶ 20-21.)

<sup>6</sup> While the Implementation Plan contains an exception that allows current service members to serve openly and in their preferred gender and receive “medically necessary” treatment for gender dysphoria, the exception is narrow, and applies only to those service members who “were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter [P]olicy” (*i.e.*, June 30, 2016) but “before the effective date” of the policy set forth in the Implementation Plan. (Dkt. No. 224, Ex. 2 at 7-8.) Further, this exception is severable from the remainder of the Implementation Plan. (*Id.* at 7 (“[S]hould [the DoD]’s decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption is and should be deemed severable from the rest of the policy.”).)

misalignment between their gender identity and their assigned sex at birth.”); Dkt. No. 224, Ex. 2 at 9 n.10 (“[T]ransgender” is “an umbrella term used for individuals who have sexual identity or gender expression that differs from their assigned sex at birth.”)

Therefore, the Court concludes that the 2018 Memorandum and the Implementation Plan do not moot Plaintiffs’ and Washington’s existing challenges.

## **B. Standing**

Defendants claim that Plaintiffs and Washington lack standing to challenge the Ban, and that the 2018 Memorandum and Implementation Plan “have significantly changed the analysis.” (Dkt. No. 194 at 6-12; Dkt. No. 226 at 7.)

Standing requires (1) an “injury in fact”; (2) a “causal connection between the injury and the conduct complained of”; and (3) a likelihood “that the injury will be redressed by a favorable decision.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal quotation marks and citations omitted). 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.” Id. at 560 (internal quotation marks and citations omitted).

While the Court previously concluded that both Plaintiffs and Washington established standing at the preliminary injunction stage (Dkt. No. 103 at 7-12), their burden for doing so on summary judgment is more exacting and requires them to set forth “by affidavit or other evidence ‘specific facts’” such that a “fair-minded jury” could find they have standing. Id. at 561; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

The Court considers standing for the Individual Plaintiffs, the Organizational Plaintiffs, and Washington in turn:



## 1. Individual Plaintiffs

Each of the Individual Plaintiffs has submitted an affidavit detailing the ways in which they have already been harmed by the Ban, and would be further harmed were it to be implemented. (See Dkt. Nos. 130-138.) While Defendants claim that “Plaintiffs are obviously not suffering any harm from the revoked 2017 Memorandum,” and “would neither sustain an actual injury nor face an imminent threat of future injury” as a result of the 2018 Memorandum, the Court disagrees and concludes that each of the Individual Plaintiffs has standing to challenge the Ban.

Karnoski, D.L, and Callahan have “taken clinically appropriate steps to transition” and would be excluded from acceding under the Implementation Plan. (Dkt. No. 130 at ¶ 10; Dkt. No. 132 at ¶ 8; Dkt. No. 137 at ¶ 8.) Whether they could have acceded under the Carter Policy and whether they might be able to obtain “waivers,” as Defendants suggest, are irrelevant. (See Dkt. No. 226 at 8.) As the Court previously found, their injury “lies in the denial of an equal *opportunity* to compete, not the denial of the job itself,” and the Court need not “inquire into the plaintiff’s qualifications (or lack thereof) when assessing standing.” (Dkt. No. 103 at 10 n.3 (citing Shea v. Kerry, 796 F.3d 42, 50 (D.C. Cir. 2015)) (emphasis in original).)

Doe does not currently serve openly, but was intending to come out and to transition surgically before President Trump’s Twitter Announcement. (Dkt. No. 138 at ¶¶ 8-11.) The Ban unambiguously subjects her to discharge should she seek to do either. (See Dkt. No. 224, Ex. 1.) Schmid, Muller, Lewis, Stephens, and Winters have been diagnosed with gender dysphoria, and likewise would be subject to discharge under the Ban.<sup>7</sup> (Dkt. No. 131 at ¶ 9; Dkt. No. 133 at

<sup>7</sup> Defendants claim that the currently serving Plaintiffs were “diagnosed with gender dysphoria within the relevant time period” and “therefore would be able to continue serving in their preferred gender, change their gender marker, and receive all medically necessary

¶ 15; Dkt. No. 134 at ¶ 10; Dkt. No. 135 at ¶ 10; Dkt. No. 136 at ¶ 10.) The threat of discharge facing Doe, Schmid, Muller, Lewis, Stephens, and Winters is “actual or imminent, not conjectural or hypothetical,” and clearly gives rise to standing. See Lujan, 504 U.S. at 560 (internal quotation marks and citation omitted).

Importantly, even if each of the Individual Plaintiffs were granted waivers or otherwise not excluded, discharged, or denied medical care, there can be no dispute that they would nevertheless have standing to challenge the Ban. This is because the Ban already has denied them the opportunity to serve in the military on the same terms as others; has deprived them of dignity; and has subjected them to stigmatization. (See Dkt. No. 103 at 8.) Policies that “stigmatiz[e] members of [a] 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) (citation omitted). Such stigmatic injury, when identified in specific terms, is “one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing.” Allen v. Wright, 468 U.S. 737, 755 (1984), abrogated on other grounds, 134 S. Ct. 1377 (2014).

treatment” under the Implementation Plan’s narrow exception. (Dkt. No. 226 at 8.) The record does not support this claim. As noted previously, the exception applies only to current service members who “were diagnosed with gender dysphoria by a military medical provider *after* the effective date of the Carter [P]olicy” (i.e., June 30, 2016) but “before the effective date” of the policy set forth in the Implementation Plan. (See supra, n.6; Dkt. No. 224, Ex. 2 at 7-8 (emphasis added).) The record suggests that many, if not all, of the currently serving Plaintiffs were diagnosed *before* June 30, 2016. For example, Schmid was diagnosed “approximately four years ago.” (Dkt. No. 131 at ¶ 9.) Muller was diagnosed “approximately six years ago.” (Dkt. No. 133 at ¶ 15.) Lewis, Stephens, and Winters were diagnosed “approximately three years ago,” “approximately two and a half years ago,” and “approximately two years ago” respectively. (Dkt. No. 134 at ¶ 10; Dkt. No. 135 at ¶ 10; Dkt. No. 136 at ¶ 10.) There is also no indication that any of the currently serving Plaintiffs received their diagnosis from a “military medical provider.”

Each of the Individual Plaintiffs has detailed the stigmatic injuries they have suffered through affidavits. For example, Karnoski has explained that the Ban has caused him “great distress, discomfort, and pain.” (Dkt. No. 130 at ¶ 21.) Schmid has explained that the Ban’s “abrupt change in policy and implicit commentary on [her] value to the military and competency to serve has caused [her] to feel tremendous anguish,” and that since it was announced, she has lost sleep and suffered “an immense amount of anxiety.” (Dkt. No. 131 at ¶¶ 23-24, 26.) Muller has explained that the Ban was “devastating” and “wounded [her] more than any combat injury could.” (Dkt. No. 133 at ¶¶ 30-31.) Doe has explained that the Ban precludes her from expressing her authentic gender identity, and that as a result, she has not come out. (Dkt. No. 138 at ¶¶ 10-11.) Doe’s self-censorship alone is a “constitutionally sufficient injury,” as it is based on her “actual and well-founded fear” of discharge. See Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1095 (9th Cir. 2003) (holding that a person’s “actual and well-founded fear that [a] law will be enforced against him or her” may give rise to standing to bring pre-enforcement claims under the First Amendment and that “self-censorship is ‘a harm that can be realized even without an actual prosecution’”) (quoting Virginia v. Am. Booksellers Ass’n, 484 U.S. 383, 393 (1988)).

Therefore, the Court concludes that each of the Individual Plaintiffs has standing.

## **2. Organizational Plaintiffs**

As each of the Individual Plaintiffs has standing, so too do the organizations they represent. 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 Advert. Comm’n, 432 U.S. 333,

343 (1977). Each of the Organizational Plaintiffs satisfies these requirements. Karnoski and Schmid are members of HRC, GJL, and AMPA, and Muller, Stephens, and Winters are also members of AMPA. (Dkt. No. 130 at ¶ 3; Dkt. No. 131 at ¶ 5; Dkt. No. 133 at ¶ 5; Dkt. No. 135 at ¶ 4; Dkt. No. 136 at ¶ 4; Dkt. No. 140 at ¶ 3.) The interests each Organizational Plaintiff seeks to protect are germane to their organizational purposes, which include ending discrimination against lesbian, gay, bisexual, transgender and queer (“LGBTQ”) individuals (HRC and GJL) and supporting families and allies of LGBT service members and veterans (AMPA). (Dkt. No. 139 at ¶ 2; Dkt. No. 140 at ¶ 2; Dkt. No. 141 at ¶ 2.)

Therefore, the Court concludes that each of the Organizational Plaintiffs has standing.

### **3. Washington**

Defendants claim that “Washington has not even attempted to satisfy its burden to demonstrate standing,” and that “in granting Washington’s motion to intervene, the Court expressly declined to decide whether Washington possessed standing to sue.” (Dkt. No. 194 at 12.) To the contrary, the Court explicitly found that Washington had standing in its own right, and not merely as an intervenor. (Dkt. No. 103 at 11-12.)

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 518-19. Quasi-sovereign interests include its interest in “the health and well-being—both physical and economic—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 contends that the Ban will impede its ability to protect its residents and natural resources and will undermine the efficacy of its National Guard. (Dkt. No. 150 at 9-10.) Washington is home to approximately 60,000 active, reserve, and National Guard members, and the military is the second largest public employer in the state. (*Id.* at 9.) Washington is also home to approximately 32,850 transgender adults, and its laws protect these residents against discrimination on the basis of sex, gender, and gender identity. (*Id.* at 9-10); RCW §§ 49.60.030; 49.60.040(25)-(26).

Washington relies on the National Guard to assist with emergency preparedness and disaster recovery planning, and to protect the state's residents and natural resources from wildfires, landslides, flooding, and earthquakes. (Dkt. No. 150 at 9.) When the Governor deploys the National Guard for state active duty, Washington pays its members' wages and provides disability and life insurance benefits for injuries they may sustain while serving the state. (*Id.*); RCW § 38.24.050. The state also oversees recruitment efforts and exercises day-to-day command over Guard members in training and most forms of active duty. (Dkt. No. 170, Ex. A at 20.) Further, the Governor must ensure that the Guard conforms to both federal and state laws and regulations, including the state's anti-discrimination laws and, were the Ban to be implemented, conflicting DoD policies regarding accession and retention. (Dkt. No. 150 at 9-10; Dkt. No. 170, Ex. A at 21-22.) Thus, in addition to diminishing the number of eligible members for the National Guard, the Ban threatens Washington's ability to (1) protect its residents and natural resources in times of emergency and (2) "assur[e] its residents that it will act" to protect them from "the political, social, and moral damage of discrimination." *See Snapp*, 458 U.S. at 609. Defendants have not offered any contrary evidence with respect to

Washington's sovereign and quasi-sovereign interests. Therefore, the Court concludes that Washington has standing.

### **C. Constitutional Violations**

Plaintiffs contend that the Ban violates equal protection, substantive due process, and the First Amendment. (Dkt. No. 129 at 15-28.) Washington contends that the Ban violates equal protection and substantive due process. (Dkt. No. 150 at 13-23.) Before it can reach the merits of these constitutional claims, the Court must determine (1) the applicable level of scrutiny and (2) the applicable level of deference owed to the Ban, if any. The Court addresses each of these issues in turn:

#### **1. Level of Scrutiny**

At the preliminary injunction stage, the Court found that transgender people were, at minimum, a quasi-suspect class. (Dkt. No. 103 at 15-16.) In light of additional evidence before it at this stage, the Court today concludes that they are a suspect class, such that the Ban must satisfy the most exacting level of scrutiny if it is to survive.

In determining whether a classification is suspect or quasi-suspect, the Supreme Court has observed that relevant factors include: (1) whether the class has been “[a]s a historical matter . . . subjected to discrimination,” Bowen v. Gilliard, 483 U.S. 587, 602 (1987); (2) whether the class has a defining characteristic that “frequently bears [a] relation to ability to perform or contribute to society,” City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985); (3) whether the class exhibits “obvious, immutable, or distinguishing characteristics that define [it] as a discrete group,” Bowen, 483 U.S. at 602; and (4) whether the class is “a minority or politically powerless.” Id.; see also Windsor v. U.S., 699 F.3d 169, 181 (2d Cir. 2012), aff’d on other grounds, 570 U.S. 744 (2013). While “[t]he presence of any of the

factors is a signal that the particular classification is ‘more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,’” the first two factors alone may be dispositive. Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012) (quoting Pyler v. Doe, 457 U.S. 202, 216 n.14 (1982)).

The Court considers each of these factors in turn:

### **i. History of Discrimination**

The history of discrimination and systemic oppression of transgender people in this country is long and well-recognized. Transgender people have suffered and continue to suffer endemic levels of physical and sexual violence, harassment, and discrimination in employment, education, housing, criminal justice, and access to health care. (See Dkt. No. 169, Ex. A at 9-12.) According to a nationwide survey conducted by the National Center for Transgender Equality in 2015, 48 percent of transgender respondents reported being “denied equal treatment, verbally harassed, and/or physically attacked in the past year because of being transgender” and 47 percent reported being “sexually assaulted at some point in their lifetime.” (Id. at 10.) Seventy-seven (77) percent report being “verbally harassed, prohibited from dressing according to their gender identity, or physically or sexually assaulted” in grades K-12. (Id. at 10-11.) Thirty (30) percent reported being “fired, denied a promotion, or experiencing some other form of mistreatment in the workplace related to their gender identity or expression, such as being harassed or attacked.” (Id. at 11.) Finally, “it is generally estimated that transgender women face *4.3 times the risk* of becoming homicide victims than the general population.” (Id. at 10 (emphasis in original).)

## ii. Contributions to Society

Discrimination against transgender people clearly is unrelated to their ability to perform and contribute to society. See Doe 1, 275 F. Supp. 3d at 209 (noting the absence of any “argument or evidence suggesting that being transgender in any way limits one’s ability to contribute to society”); Adkins v. City of New York, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (noting the absence of “any data or argument suggesting that a transgender person, simply by virtue of transgender status, is any less productive than any other member of society”). Indeed, the Individual Plaintiffs in this case contribute not only to society as a whole, but to the military specifically. For years, they have risked their lives serving in combat and non-combat roles, fighting terrorism around the world, and working to secure the safety and security of our forces overseas. (See, e.g., Dkt. No. 133 at ¶¶ 7-9; Dkt. No. 134 at ¶¶ 5-6; Dkt. No. 135 at ¶¶ 6-7; Dkt. No. 136 at ¶¶ 6-7.) Their exemplary service has been recognized by the military itself, with many having received awards and distinctions. (See Dkt. No. 131 at ¶ 15; Dkt. No. 133 at ¶ 12; Dkt. No. 134 at ¶ 7.)

## iii. Immutability

Transgender people clearly have “immutable” and “distinguishing characteristics that define them as a discrete group.” Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ., 208 F. Supp. 3d 850, 874 (S.D Ohio 2016) (quoting Lyng v. Castillo, 477 U.S. 635, 638 (1986)). Experts agree that gender identity has a “biological component,” and there is a “medical consensus that gender identity is deep-seated, set early in life, and *impervious to external influences*.” (Dkt. No. 143 at ¶¶ 21-22 (emphasis added).) In other contexts, the Ninth Circuit has held that “[s]exual orientation and sexual identity” are “immutable” and are “so fundamental to one’s identity that a person should not be required to abandon them.”



Hernandez-Montiel v. I.N.S., 225 F.3d 1087, 1093 (9th Cir. 2000), overruled on other grounds, 409 F.3d 1177 (9th Cir. 2005).

#### iv. Political Power

Despite increased visibility in recent years, transgender people as a group lack the relative political power to protect themselves from wrongful discrimination. While the exact number is unknown, transgender people make up less than 1 percent of the nation’s adult population. (Dkt. No. 143, Ex. B at 3 (estimating 0.3 percent)); see also Doe 1, 275 F. Supp. 3d at 209 (estimating 0.6 percent). Fewer than half of the states have laws that explicitly prohibit discrimination against transgender people. (Dkt. No. 169, Ex. A at 12.) Further, recent actions by President Trump’s administration have removed many of the limited protections afforded by federal law. (Id. at 12-13.) Finally, openly transgender people are vastly underrepresented in and have been “systematically excluded from the most important institutions of self-governance.” SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 484 (9th Cir. 2014). There are no openly transgender members of the United States Congress or the federal judiciary, and only one out of more than 7,000 state legislators is openly transgender. (Dkt. No. 169, Ex. A at 14); see also Adkins, 143 F. Supp. 3d at 140.

Recognizing these factors, courts have consistently found that transgender people constitute, at minimum, a quasi-suspect class.<sup>8</sup> See, e.g., Doe 1, 275 F. Supp. 3d at 208-10;

<sup>8</sup> The Ninth Circuit applies heightened scrutiny to equal protection claims involving discrimination based on sexual orientation. SmithKline, 740 F.3d at 484; Latta v. Otter, 771 F.3d 456, 468 (9th Cir. 2014). This reasoning further supports the Court’s conclusion as to the applicable level of scrutiny, as discrimination based on transgender status burdens a group that has in many ways “experienced even greater levels of societal discrimination and marginalization.” Norsworthy, 87 F. Supp. 3d at 1119 n.8; see also Adkins, 143 F. Supp. 3d at 140 (“Particularly in comparison to gay people . . . transgender people lack the political strength to protect themselves. . . . [A]lthough there are and were gay members of the United States

Stone, 280 F. Supp. 3d at 768; Adkins, 143 F. Supp. 3d at 139-40; Highland, 208 F. Supp. 3d at 873-74; Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015). Today, the Court concludes that transgender people constitute a suspect class. Transgender people have long been forced to live in silence, or to come out and face the threat of overwhelming discrimination.

Therefore, the Court GRANTS summary judgment in Plaintiffs’ and Washington’s favor as to the applicable level of scrutiny. The Ban specifically targets one of the most vulnerable groups in our society, and must satisfy strict scrutiny if it is to survive.

## 2. Level of Deference

Defendants claim that “considerable deference is owed to the President and the DoD in making military personnel decisions,” and that for this reason, Plaintiffs’ and Washington’s constitutional claims necessarily fail. (Dkt. No. 194 at 16.)

The Court previously found that the Ban—as set forth in President Trump’s Twitter Announcement and 2017 Memorandum—was not owed deference, as it was not supported by “any evidence of considered reason or deliberation.” (Dkt. No. 103 at 17-18.) Indeed, at the time he announced the Ban, “all of the reasons proffered by the President for excluding transgender individuals from the military were not merely unsupported, but were actually *contradicted* by the studies, conclusions, and judgment of the military itself.” Doe 1, 275 F. Supp. 3d at 212 (emphasis in original); see also Rostker v. Goldberg, 453 U.S. 57, 67-72 (1981) (concluding that deference is owed to well-reasoned policies that are not adopted “unthinkingly” or “reflexively and not for any considered reason”); Goldman v. Weinberger, 475 U.S. 503, 507-08 (1986) (concluding that deference is owed where a policy results from the “professional

Congress . . . as well as gay federal judges, there is no indication that there have ever been any transgender members of the United States Congress or federal judiciary.”)

judgment of military authorities concerning the relative importance of a particular military interest”); compare Owens v. Brown, 455 F. Supp. 291, 305 (D.D.C. 1978) (concluding that deference is not owed where a policy is adopted “casually, over the military’s objections and without significant deliberation”).

Now that the specifics of the Ban have been further defined in the 2018 Memorandum and the Implementation Plan, whether the Court owes deference to the Ban presents a more complicated question. Any justification for the Ban must be “genuine, not hypothesized or invented post hoc in response to litigation.” United States v. Virginia, 518 U.S. 515, 533 (1996). However, the Court is mindful that “complex[,] subtle, and professional decisions as to the composition . . . and control of a military force are essentially professional military judgments,” reserved for the Legislative and Executive Branches. Gilligan v. Morgan, 413 U.S. 1, 10 (1973). The Court’s entry of a preliminary injunction was not intended to prevent the military from continuing to review the implications of open service by transgender people, nor to preclude it from *ever* modifying the Carter Policy.

Defendants claim that the military has done just that, and that the Ban—as set forth in the 2018 Memorandum and the Implementation Plan—is now the product of a deliberative review. In particular, Defendants claim the Ban has been subjected to “an exhaustive study” and is consistent with the recommendations of a “Panel of Experts” convened by Secretary Mattis to study “military service by transgender individuals, focusing on military readiness, lethality, and unit cohesion,” and tasked with “conduct[ing] an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members.” (See Dkt. No. 226 at 9-10; Dkt. No. 224, Ex. 2 at 19.) Defendants claim that the Panel was comprised of senior military leaders who received “support from medical and personnel experts from across

the [DoD] and [DHS],” and considered “input from transgender Service members, commanders of transgender Service members, military medical professionals, and civilian medical professionals with experience in the care and treatment of individuals with gender dysphoria.” (Dkt. No. 224, Ex. 2 at 20.) “Unlike previous reviews on military service by transgender individuals,” Defendants claim that the Panel’s analysis was “informed by the [DoD]’s own data obtained since the new policy began to take effect last year.” (Dkt. No. 224, Ex. 1 at 3.) The Panel’s findings are set forth in a 44-page “Report and Recommendations on Military Service by Transgender Persons,” which concludes that “the realities associated with service by transgender individuals are far more complicated than the prior administration or RAND had assumed,” and that because gender transition “would impede readiness, limit deployability, and burden the military with additional costs . . . the risks associated with maintaining the Carter [P]olicy . . . counsel in favor of” the Ban. (Dkt. No. 224, Ex. 2 at 46.)

Having carefully considered the Implementation Plan—including the content of the DoD’s “Report and Recommendations on Military Service by Transgender Persons”—the Court concludes that whether the Ban is entitled to deference raises an unresolved question of fact. The Implementation Plan was not disclosed until March 29, 2018. (See Dkt. No. 224, Exs. 1, 2.) As Defendants’ claims and evidence regarding their justifications for the Ban were presented to the Court only recently, Plaintiffs and Washington have not yet had an opportunity to test or respond to these claims. On the present record, the Court cannot determine whether the DoD’s deliberative process—including the timing and thoroughness of its study and the soundness of the medical and other evidence it relied upon—is of the type to which Courts typically should defer. See Fed. R. Civ. P. 56(e)(1).

Accordingly, the Court DENIES summary judgment as to the level of deference due. The Court notes that, even in the event it were to conclude that deference is owed, it would not be rendered powerless to address Plaintiffs’ and Washington’s constitutional claims, as Defendants seem to suggest. “‘The military has not been exempted from constitutional provisions that protect the rights of individuals’ and, indeed, ‘[i]t is precisely the role of the courts to determine whether those rights have been violated.’” Doe 1, 275 F. Supp. 3d at 210 (quoting Emory v. Sec’y of Navy, 819 F.2d 291, 294 (D.C. Cir. 1987)); Chappell v. Wallace, 462 U.S. 296, 304 (1983) (“This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.”); Rostker, 453 U.S. at 70 (“[D]eference does not mean abdication.”). Indeed, the Court notes that Defendants’ claimed justifications for the Ban—to promote “military lethality and readiness” and avoid “disrupt[ing] unit cohesion, or tax[ing] military resources”—are strikingly similar to justifications offered in the past to support the military’s exclusion and segregation of African American service members, its “Don’t Ask, Don’t Tell” policy, and its policy preventing women from serving in combat roles. (Dkt. No. 224, Ex. 1 at 2-4; see also Dkt. No. 163, Ex. 1 at 8-16.)

### **3. Equal Protection, Due Process, and First Amendment Claims**

A policy will survive strict scrutiny only where it is motivated by a “compelling state interest” and “the means chosen ‘fit’ the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate . . . prejudice or stereotype.” Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (citation omitted). In making this determination, the Court must carefully evaluate “the importance and the sincerity of the reasons advanced” by the government for the use of a particular classification in a particular context. Id. at 327.

Whether Defendants have satisfied their burden of showing that the Ban is constitutionally adequate (*i.e.*, that it was sincerely motivated by compelling state interests, rather than by prejudice or stereotype) necessarily turns on facts related to Defendants' deliberative process. As discussed previously, these facts are not yet before the Court. (*See supra*, § II.C.2.) Further, Defendants' responsive briefing addresses only the constitutionality of the Interim Guidance, a document that has never been, and is not now, the applicable policy before the Court. (*See* Dkt. No. 194 at 19-24.)

For the same reasons it cannot grant summary judgment as to the level of deference due at this stage, the Court cannot reach the merits of the alleged constitutional violations. Accordingly, the Court DENIES summary judgment as to Plaintiffs' and Washington's equal protection, due process, and First Amendment claims.

#### **IV. Defendants' Motion for Partial Summary Judgment**

Defendants contend that the Court is without jurisdiction to impose injunctive or declaratory relief against President Trump in his official capacity, and move for partial summary judgment on all claims against him individually. (Dkt. No. 194 at 25-27.) Plaintiffs and Washington do not oppose summary judgment as to injunctive relief, but respond that declaratory relief against President Trump is proper. (Dkt. No. 207 at 8-10; Dkt. No. 209 at 6-8.)

The Court is aware of no case holding that the President is immune from declaratory relief—Rather, the Supreme Court has explicitly affirmed the entry of such relief. *See Clinton v. City of New York*, 524 U.S. 417, 425 n.9 (1998) (affirming entry of declaratory judgment against President Clinton stating that Line Item Veto Act was unconstitutional); *NTEU v. Nixon*, 492 F.2d 587, 609 (1974) (“[N]o immunity established under any case known to this Court bars every suit against the president for injunctive, declaratory or mandamus relief.”); *see also Hawaii*

v. Trump, 859 F.3d 741, 788 (9th Cir. 2017) (vacating injunctive relief against President Trump, but not dismissing him in suit for declaratory relief), vacated as moot, 874 F.3d 1112 (9th Cir. 2017).

The Court concludes that, not only does it have jurisdiction to issue declaratory relief against the President, but that this case presents a “most appropriate instance” for such relief. See NTEU, 492 F.2d at 616. The Ban was announced by President Trump (@realDonaldTrump) on Twitter, and was memorialized in the 2017 and 2018 Presidential Memorandums, which were each signed by President Trump. (Dkt. No. 149, Exs. 1, 2; Dkt. No. 224, Ex. 3.) While President Trump’s Twitter Announcement suggests he authorized the Ban “[a]fter consultation with [his] Generals and military experts” (Dkt. No. 149, Ex. 1), Defendants to date have failed to identify even one General or military expert he consulted, despite having been ordered to do so repeatedly. (See Dkt. Nos. 204, 210, 211.) Indeed, the *only* evidence concerning the lead-up to his Twitter Announcement reveals that military officials were entirely unaware of the Ban, and that the abrupt change in policy was “unexpected.” (See Dkt. No. 208, Ex. 1 at 9 (General Joseph F. Dunford, Chairman of the Joint Chiefs of Staff stating on July 27, 2017 “Chiefs, I know yesterday’s announcement was unexpected . . .”); Dkt. No. 152, Ex. A at 11-12 (“The Joint Chiefs of Staff were not consulted at all on the decision . . . The decision was announced so abruptly that White House and Pentagon officials were unable to explain the most basic of details about how it would be carried out.”).) Even Secretary Mattis was given only one day’s notice before President Trump’s Twitter Announcement. (Id.; Dkt. No. 163, Ex. 1 at 26.) As no other persons have ever been identified by Defendants—despite repeated Court orders to do so—the Court is led to conclude that the Ban was devised by the President, and the President alone.

Therefore, the Court GRANTS Defendants' motion for partial summary judgment with regard to injunctive relief and DENIES the motion with regard to declaratory relief.

### CONCLUSION

The Court concludes that all Plaintiffs and Washington have standing; that the 2018 Memorandum and Implementation Plan do not moot their claims; and that transgender people constitute a suspect class necessitating a strict scrutiny standard of review. The Court concludes that questions of fact remain as to whether, and to what extent, deference is owed to the Ban, and whether the Ban, when held to strict scrutiny, survives constitutional review.

Accordingly, the Court rules as follows:

1. The Court GRANTS Plaintiffs' and Washington's motions for summary judgment with respect to the applicable level of scrutiny, which is strict scrutiny;
2. The Court DENIES Plaintiffs' and Washington's motions for summary judgment with respect to the applicable level of deference;
3. The Court DENIES Plaintiffs' and Washington's motions for summary judgment with respect to violations of equal protection, due process, and the First Amendment;
4. The Court GRANTS Defendants' cross-motion for summary judgment with respect to injunctive relief against President Trump and DENIES the cross-motion with respect to declarative relief against President Trump.
5. The preliminary injunction previously entered otherwise remains in full force and effect. Defendants (with the exception of President Trump), 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 are enjoined from taking any action



relative to transgender people that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement.

6. The Court's ruling today eliminates the need for Plaintiffs and Washington to respond to Defendants' Motion to Dissolve the Preliminary Injunction (Dkt. No. 223), which is hereby STRICKEN.

7. The parties are directed to proceed with discovery and prepare for trial on the issues of whether, and to what extent, deference is owed to the Ban and whether the Ban violates equal protection, substantive due process, and the First Amendment.

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

Dated April 13, 2018.



Marsha J. Pechman  
United States District Judge

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.<sup>1</sup> (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

<sup>1</sup> 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.<sup>2</sup> (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

<sup>2</sup> 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.”).<sup>3</sup>

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.<sup>4</sup>

## 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

<sup>3</sup> 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)).

<sup>4</sup> 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).)<sup>5</sup>

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’

<sup>5</sup> 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)).<sup>6</sup>

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

<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> Plaintiffs are therefore likely to succeed on the merits of their equal protection claim.

## ii. *Substantive Due Process*<sup>9</sup>

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

<sup>7</sup> 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).

<sup>8</sup> For the same reasons, the policy is also unlikely to survive rational basis review.

<sup>9</sup> 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



## 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:

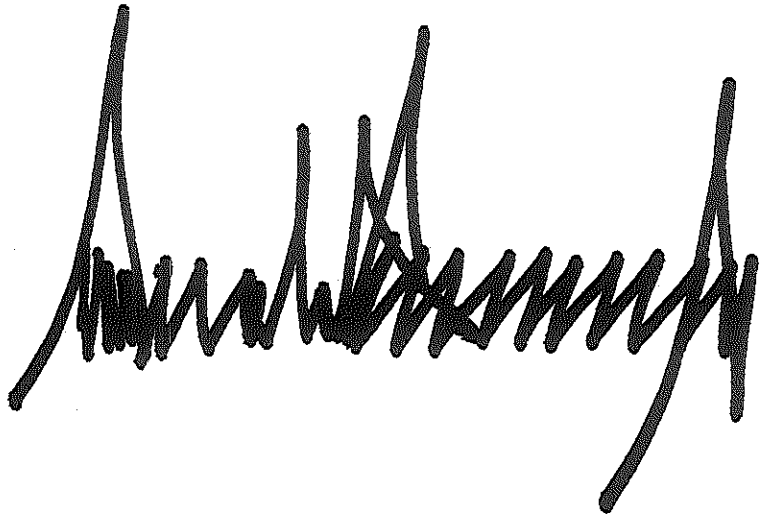
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(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*.

A large, stylized handwritten signature in black ink, appearing to be 'Andrew M. Ross', is written across the lower half of the page.

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

FEB 22 2018

## MEMORANDUM FOR THE PRESIDENT

SUBJECT: Military Service by Transgender Individuals

"Transgender" is a term describing those persons whose gender identity differs from their biological sex. A subset of transgender persons diagnosed with gender dysphoria experience discomfort with their biological sex, resulting in significant distress or difficulty functioning. Persons diagnosed with gender dysphoria often seek to transition their gender through prescribed medical treatments intended to relieve the distress and impaired functioning associated with their diagnosis.

Prior to your election, the previous administration adopted a policy that allowed for the accession and retention in the Armed Forces of transgender persons who had a history or diagnosis of gender dysphoria. The policy also created a procedure by which such Service members could change their gender. This policy was a departure from decades-long military personnel policy. On June 30, 2017, before the new accession standards were set to take effect, I approved the recommendation of the Services to delay for an additional six months the implementation of these standards to evaluate more carefully their impact on readiness and lethality. To that end, I established a study group that included the representatives of the Service Secretaries and senior military officers, many with combat experience, to conduct the review.

While this review was ongoing, on August 25, 2017, you sent me and the Secretary of Homeland Security a memorandum expressing your concern that the previous administration's new policy "failed to identify a sufficient basis" for changing longstanding policy and that "further study is needed to ensure that continued implementation of last year's policy change would not have ... negative effects." You then directed the Department of Defense and the Department of Homeland Security to reinstate the preexisting policy concerning accession of transgender individuals "until such time as a sufficient basis exists upon which to conclude that terminating that policy" would not "hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." You made clear that we could advise you "at any time, in writing, that a change to this policy is warranted."

I created a Panel of Experts comprised of senior uniformed and civilian Defense Department and U.S. Coast Guard leaders and directed them to consider this issue and develop policy proposals based on data, as well as their professional military judgment, that would enhance the readiness, lethality, and effectiveness of our military. This Panel included combat veterans to ensure that our military purpose remained the foremost consideration. I charged the Panel to provide its best military advice, based on increasing the lethality and readiness of America's armed forces, without regard to any external factors.

The Panel met with and received input from transgender Service members, commanders of transgender Service members, military medical professionals, and civilian medical

professionals with experience in the care and treatment of individuals with gender dysphoria. The Panel also reviewed available information on gender dysphoria, the treatment of gender dysphoria, and the effects of currently serving individuals with gender dysphoria on military effectiveness, unit cohesion, and resources. Unlike previous reviews on military service by transgender individuals, the Panel's analysis was informed by the Department's own data obtained since the new policy began to take effect last year.

Based on the work of the Panel and the Department's best military judgment, the Department of Defense concludes that there are substantial risks associated with allowing the accession and retention of individuals with a history or diagnosis of gender dysphoria and require, or have already undertaken, a course of treatment to change their gender. Furthermore, the Department also finds that exempting such persons from well-established mental health, physical health, and sex-based standards, which apply to all Service members, including transgender Service members without gender dysphoria, could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.

The prior administration largely based its policy on a study prepared by the RAND National Defense Research Institute; however, that study contained significant shortcomings. It referred to limited and heavily caveated data to support its conclusions, glossed over the impacts of healthcare costs, readiness, and unit cohesion, and erroneously relied on the selective experiences of foreign militaries with different operational requirements than our own. In short, this policy issue has proven more complex than the prior administration or RAND assumed.

I firmly believe that compelling behavioral health reasons require the Department to proceed with caution before compounding the significant challenges inherent in treating gender dysphoria with the unique, highly stressful circumstances of military training and combat operations. Preservation of unit cohesion, absolutely essential to military effectiveness and lethality, also reaffirms this conclusion.

Therefore, in light of the Panel's professional military judgment and my own professional judgment, the Department should adopt the following policies:

- Transgender persons with a history or diagnosis of gender dysphoria are disqualified from military service, except under the following limited circumstances: (1) if they have been stable for 36 consecutive months in their biological sex prior to accession; (2) Service members diagnosed with gender dysphoria after entering into service may be retained if they do not require a change of gender and remain deployable within applicable retention standards; and (3) currently serving Service members who have been diagnosed with gender dysphoria since the previous administration's policy took effect and prior to the effective date of this new policy, may continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria.
- Transgender persons who require or have undergone gender transition are disqualified from military service.



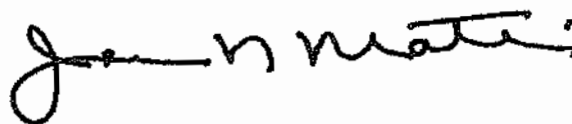
- Transgender persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other Service members, in their biological sex.

I have consulted with the Secretary of Homeland Security, and she agrees with these proposed policies.

By its very nature, military service requires sacrifice. The men and women who serve voluntarily accept limitations on their personal liberties – freedom of speech, political activity, freedom of movement - in order to provide the military lethality and readiness necessary to ensure American citizens enjoy their personal freedoms to the fullest extent. Further, personal characteristics, including age, mental acuity, and physical fitness – among others – matter to field a lethal and ready force.

In my professional judgment, these policies will place the Department of Defense in the strongest position to protect the American people, to fight and win America's wars, and to ensure the survival and success of our Service members around the world. The attached report provided by the Under Secretary of Defense for Personnel and Readiness includes a detailed analysis of the factors and considerations forming the basis of the Department's policy proposals.

I therefore respectfully recommend you revoke your memorandum of August 25, 2017, regarding Military Service by Transgender Individuals, thus allowing me and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to implement appropriate policies concerning military service by transgender persons.



Attachment:  
As stated

cc:  
Secretary of Homeland Security

**DEPARTMENT OF DEFENSE REPORT AND RECOMMENDATIONS  
ON  
MILITARY SERVICE BY TRANSGENDER PERSONS**



**FEBRUARY 2018**

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## Executive Summary

It is a bedrock principle of the Department of Defense that any eligible individual<sup>1</sup> who can meet the high standards for military service without special accommodations should be permitted to serve. This is no less true for transgender persons than for any other eligible individual. This report, and the recommendations contained herein, proceed from this fundamental premise.

The starting point for determining a person's qualifications for military duty is whether the person can meet the standards that govern the Armed Forces. Federal law requires that anyone entering into military service be "qualified, effective, and able-bodied."<sup>2</sup> Military standards are designed not only to ensure that this statutory requirement is satisfied but to ensure the overall military effectiveness and lethality of the Armed Forces.

The purpose of the Armed Forces is to fight and win the Nation's wars. No human endeavor is more physically, mentally, and emotionally demanding than the life and death struggle of battle. Because the stakes in war can be so high—both for the success and survival of individual units in the field and for the success and survival of the Nation—it is imperative that all Service members are physically and mentally able to execute their duties and responsibilities without fail, even while exposed to extreme danger, emotional stress, and harsh environments.

Although not all Service members will experience direct combat, standards that are applied universally across the Armed Forces must nevertheless account for the possibility that any Service member could be thrust into the crucible of battle at any time. As the Department has made clear to Congress, "[c]ore to maintaining a ready and capable military force is the understanding that each Service member is required to be available and qualified to perform assigned missions, including roles and functions outside of their occupation, in any setting."<sup>3</sup> Indeed, there are no occupations in the military that are exempt from deployment.<sup>4</sup> Moreover, while non-combat positions are vital to success in war, the physical and mental requirements for those positions should not be the barometer by which the physical and mental requirements for all positions, especially combat positions, are defined. Fitness for combat must be the metric against which all standards and requirements are judged. To give all Service members the best chance of success and survival in war, the Department must maintain the highest possible standards of physical and mental health and readiness across the force.

While individual health and readiness are critical to success in war, they are not the only measures of military effectiveness and lethality. A fighting unit is not a mere collection of individuals; it is a unique social organism that, when forged properly, can be far more powerful than the sum of its parts. Human experience over millennia—from the Spartans at Thermopylae to the band of brothers of the 101st Airborne Division in World War II, to Marine squads fighting building-to-building in Fallujah—teaches us this. Military effectiveness requires

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<sup>1</sup> 10 U.S.C. §§ 504, 505(a), 12102(b).

<sup>2</sup> 10 U.S.C. § 505(a).

<sup>3</sup> Under Secretary of Defense for Personnel and Readiness, "Fiscal Year 2016 Report to Congress on the Review of Enlistment of Individuals with Disabilities in the Armed Forces," pp. 8-9 (Apr. 2016).

<sup>4</sup> *Id.*



transforming a collection of individuals into a single fighting organism—merging multiple individual identities into one. This transformation requires many ingredients, including strong leadership, training, good order and discipline, and that most intangible, but vital, of ingredients—unit cohesion or, put another way, human bonding.

Because unit cohesion cannot be easily quantified, it is too often dismissed, especially by those who do not know what Justice Oliver Wendell Holmes called the “incommunicable experience of war.”<sup>5</sup> But the experience of those who, as Holmes described, have been “touched with fire” in battle and the experience of those who have spent their lives studying it attest to the enduring, if indescribable, importance of this intangible ingredient. As Dr. Jonathan Shay articulated it in his study of combat trauma in Vietnam, “[s]urvival and success in combat often require soldiers to virtually read one another’s minds, reflexively covering each other with as much care as they cover themselves, and going to one another’s aid with little thought for safety.”<sup>6</sup> Not only is unit cohesion essential to the health of the unit, Dr. Shay found that it was essential to the health of the individual soldier as well. “Destruction of unit cohesion,” Dr. Shay concluded, “cannot be overemphasized as a reason why so many psychological injuries that might have healed spontaneously instead became chronic.”<sup>7</sup>

Properly understood, therefore, military effectiveness and lethality are achieved through a combination of inputs that include individual health and readiness, strong leadership, effective training, good order and discipline, and unit cohesion. To achieve military effectiveness and lethality, properly designed military standards must foster these inputs. And, for the sake of efficiency, they should do so at the least possible cost to the taxpayer.

To the greatest extent possible, military standards—especially those relating to mental and physical health—should be based on scientifically valid and reliable evidence. Given the life-and-death consequences of warfare, the Department has historically taken a conservative and cautious approach in setting the mental and physical standards for the accession and retention of Service members.

Not all standards, however, are capable of scientific validation or quantification. Instead, they are the product of professional military judgment acquired from hard-earned experience leading Service members in peace and war or otherwise arising from expertise in military affairs. Although necessarily subjective, this judgment is the best, if not only, way to assess the impact of any given military standard on the intangible ingredients of military effectiveness mentioned above—leadership, training, good order and discipline, and unit cohesion.

For decades, military standards relating to mental health, physical health, and the physiological differences between men and women operated to preclude from military service transgender persons who desired to live and work as the opposite gender.

<sup>5</sup> *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.*, p. 93 (Richard Posner, ed., University of Chicago Press 1992).

<sup>6</sup> Jonathan Shay, *Achilles in Vietnam*, p. 61 (Atheneum 1994).

<sup>7</sup> *Id.* at 198.

Relying on a report by an outside consultant, the RAND National Defense Research Institute, the Department, at the direction of Secretary Ashton Carter, reversed that longstanding policy in 2016. Although the new policy—the “Carter policy”—did not permit all transgender Service members to change their gender to align with their preferred gender identity, it did establish a process to do so for transgender Service members who were diagnosed with gender dysphoria—that is, the distress or impairment of functioning that is associated with incongruity between one’s biological sex and gender identity. It also set in motion a new accession policy that would allow applicants who had a history of gender dysphoria, including those who had already transitioned genders, to enter into military service, provided that certain conditions were met. Once a change of gender is authorized, the person must be treated in all respects in accordance with the person’s preferred gender, whether or not the person undergoes any hormone therapy or surgery, so long as a treatment plan has been approved by a military physician.

The new accession policy had not taken effect when the current administration came into office. Secretary James Mattis exercised his discretion and approved the recommendation of the Services to delay the Carter accession policy for an additional six months so that the Department could assess its impact on military effectiveness and lethality. While that review was ongoing, President Trump issued a memorandum to the Secretary of Defense and the Secretary of Homeland Security with respect to the U.S. Coast Guard expressing that further study was needed to examine the effects of the prior administration’s policy change. The memorandum directed the Secretaries to reinstate the longstanding preexisting accession policy until such time that enough evidence existed to conclude that the Carter policy would not have negative effects on military effectiveness, lethality, unit cohesion, and military resources. The President also authorized the Secretary of Defense, in consultation with the Secretary of Homeland Security, to address the disposition of transgender individuals who were already serving in the military.

Secretary Mattis established a Panel of Experts that included senior uniformed and civilian leaders of the Department and U.S. Coast Guard, many with experience leading Service members in peace and war. The Panel made recommendations based on each Panel member’s independent military judgment. Consistent with those recommendations, the Department, in consultation with the Department of Homeland Security, recommends the following policy to the President:

A. Transgender Persons Without a History or Diagnosis of Gender Dysphoria, Who Are Otherwise Qualified for Service, May Serve, Like All Other Service Members, in Their Biological Sex. Transgender persons who have not transitioned to another gender and do not have a history or current diagnosis of gender dysphoria—i.e., they identify as a gender other than their biological sex but do not currently experience distress or impairment of functioning in meeting the standards associated with their biological sex—are qualified for service, provided that they, like all other persons, satisfy all standards and are capable of adhering to the standards associated with their biological sex. This is consistent with the Carter policy, under which transgender persons without a history or diagnosis of gender dysphoria must serve, like everyone else, in their biological sex.



B. Transgender Persons Who Require or Have Undergone Gender Transition Are Disqualified. Except for those who are exempt under this policy, as described below, and except where waivers or exceptions to policy are otherwise authorized, transgender persons who are diagnosed with gender dysphoria, either before or after entry into service, and require transition-related treatment, or have already transitioned to their preferred gender, should be ineligible for service. For reasons discussed at length in this report, the Department concludes that accommodating gender transition could impair unit readiness; undermine unit cohesion, as well as good order and discipline, by blurring the clear lines that demarcate male and female standards and policies where they exist; and lead to disproportionate costs. Underlying these conclusions is the considerable scientific uncertainty and overall lack of high quality scientific evidence demonstrating the extent to which transition-related treatments, such as cross-sex hormone therapy and sex reassignment surgery—interventions which are unique in psychiatry and medicine—remedy the multifaceted mental health problems associated with gender dysphoria.

C. Transgender Persons With a History or Diagnosis of Gender Dysphoria Are Disqualified, Except Under Certain Limited Circumstances. Transgender persons who are diagnosed with, or have a history of, gender dysphoria are generally disqualified from accession or retention in the Armed Forces. The standards recommended here are subject to the same procedures for waiver or exception to policy as any other standards. This is consistent with the Department's handling of other mental conditions that require treatment. As a general matter, only in the limited circumstances described below should persons with a history or diagnosis of gender dysphoria be accessed or retained.

1. *Accession of Individuals Diagnosed with Gender Dysphoria.* Persons with a history of gender dysphoria may access into the Armed Forces, provided that they can demonstrate 36 consecutive months of stability (i.e., absence of gender dysphoria) immediately preceding their application; they have not transitioned to the opposite gender; and they are willing and able to adhere to all standards associated with their biological sex.

2. *Retention of Service Members Diagnosed with Gender Dysphoria.* Consistent with the Department's general approach of applying less stringent standards to retention than to accession in order to preserve the Department's substantial investment in trained personnel, Service members who are diagnosed with gender dysphoria after entering military service may be retained without waiver, provided that they are willing and able to adhere to all standards associated with their biological sex, the Service member does not require gender transition, and the Service member is not otherwise non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months).<sup>8</sup>

3. *Exempting Current Service Members Who Have Already Received a Diagnosis of Gender Dysphoria.* Transgender Service members who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy, may continue to receive all medically necessary care,

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<sup>8</sup> Under Secretary of Defense for Personnel and Readiness, "DoD Retention Policy for Non-Deployable Service Members" (Feb. 14, 2018).

to change their gender marker in the Defense Enrollment Eligibility Reporting System (DEERS), and to serve in their preferred gender, even after the new policy commences. This includes transgender Service members who entered into military service after January 1, 2018, when the Carter accession policy took effect by court order. The Service member must, however, adhere to the Carter policy procedures and may not be deemed to be non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months). While the Department believes that its solemn promise to these Service members, and the investment it has made in them, outweigh the risks identified in this report, should its decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption is and should be deemed severable from the rest of the policy.

Although the precise number is unknown, the Department recognizes that many transgender persons who desire to serve in the military experience gender dysphoria and, as a result, could be disqualified under the recommended policy set forth in this report. Many transgender persons may also be unwilling to adhere to the standards associated with their biological sex as required by longstanding military policy. But others have served, and are serving, with distinction under the standards for their biological sex, like all other Service members. Nothing in this policy precludes service by transgender persons who do not have a history or diagnosis of gender dysphoria and are willing and able to meet all standards that apply to their biological sex.

Moreover, nothing in this policy should be viewed as reflecting poorly on transgender persons who suffer from gender dysphoria, or have had a history of gender dysphoria, and are accordingly disqualified from service. The vast majority of Americans from ages 17 to 24—that is, 71%—are ineligible to join the military without a waiver for mental, medical, or behavioral reasons.<sup>9</sup> Transgender persons with gender dysphoria are no less valued members of our Nation than all other categories of persons who are disqualified from military service. The Department honors all citizens who wish to dedicate, and perhaps even lay down, their lives in defense of the Nation, even when the Department, in the best interests of the military, must decline to grant their wish.

Military standards are high for a reason—the trauma of war, which all Service members must be prepared to face, demands physical, mental, and moral standards that will give all Service members the greatest chance to survive the ordeal with their bodies, minds, and moral character intact. The Department would be negligent to sacrifice those standards for any cause. There are serious differences of opinion on this issue, even among military professionals, but in the final analysis, given the uncertainty associated with the study and treatment of gender dysphoria, the competing interests involved, and the vital interests at stake—our Nation's defense and the success and survival of our Service members in war—the Department must proceed with caution.

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<sup>9</sup> The Lewin Group, Inc., "Qualified Military Available (QMA) and Interested Youth: Final Technical Report," p. 26 (Sept. 2016).



### History of Policies Concerning Transgender Persons

For decades, military standards have precluded the accession and retention of certain transgender persons.<sup>10</sup> Accession standards—i.e., standards that govern induction into the Armed Forces—have historically disqualified persons with a history of “transsexualism.” Also disqualified were persons who had undergone genital surgery or who had a history of major abnormalities or defects of the genitalia. These standards prevented transgender persons, especially those who had undergone a medical or surgical gender transition, from accessing into the military, unless a waiver was granted.

Although retention standards—i.e., standards that govern the retention and separation of persons already serving in the Armed Forces—did not require the mandatory processing for separation of transgender persons, it was a permissible basis for separation processing as a physical or mental condition not amounting to a disability. More typically, however, such Service members were processed for separation because they suffered from other associated medical conditions or comorbidities, such as depression, which were also a basis for separation processing.

At the direction of Secretary Carter, the Department made significant changes to these standards. These changes—i.e., the “Carter policy”—prohibit the separation of Service members on the basis of their gender identity and allow Service members who are diagnosed with gender dysphoria to transition to their preferred gender.

Transition-related treatment is highly individualized and could involve what is known as a “medical transition,” which includes cross-sex hormone therapy, or a “surgical transition,”

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<sup>10</sup> For purposes of this report, the Department uses the broad definition of “transgender” adopted by the RAND National Defense Institute in its study of transgender service: “an umbrella term used for individuals who have sexual identity or gender expression that differs from their assigned sex at birth.” RAND National Defense Research Institute, *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, p.75 (RAND Corporation 2016), available at [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR1500/RR1530/RAND\\_RR1530.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf) (“RAND Study”). According to the Human Rights Campaign, “[t]he transgender community is incredibly diverse. Some transgender people identify as male or female, and some identify as genderqueer, nonbinary, agender, or somewhere else on or outside of the spectrum of what we understand gender to be.” Human Rights Campaign, “Understanding the Transgender Community,” <https://www.hrc.org/resources/understanding-the-transgender-community> (last visited Feb. 14, 2018). A subset of transgender persons are those who have been diagnosed with gender dysphoria. According to the *Diagnostic and Statistical Manual of Mental Disorders* published by the American Psychiatric Association, “gender dysphoria” is a “marked incongruence between one’s experienced/expressed gender and assigned gender” that “is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.” American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, pp. 452-53 (5th ed. 2013). Based on these definitions, a person can be transgender without necessarily having gender dysphoria (i.e., the transgender person does not suffer “clinically significant distress or impairment” on account of gender incongruity). A 2016 survey of active duty Service members estimated that approximately 1% of the force—8,980 Service members—identify as transgender. Office of People Analytics, Department of Defense, “2016 Workplace and Gender Relations Survey of Active Duty Members, Transgender Service Members,” pp. 1-2. Currently, there are 937 active duty Service members who have been diagnosed with gender dysphoria since June 30, 2016. In addition, when using the term “biological sex” or “sex,” this report is referring to the definition of “sex” in the RAND study: “a person’s biological status as male or female based on chromosomes, gonads, hormones, and genitals (intersex is a rare exception).” RAND Study at 75.

which includes sex reassignment surgery. Service members could also forego medical transition treatment altogether, retain all of their biological anatomy, and live as the opposite gender—this is called a “social transition.”

Once the Service member’s transition is complete, as determined by the member’s military physician and commander in accordance with his or her individualized treatment plan, and the Service member provides legal documentation of gender change, the Carter policy allows for the Service member’s gender marker to be changed in the DEERS. Thereafter, the Service member must be treated in every respect—including with respect to physical fitness standards; berthing, bathroom, and shower facilities; and uniform and grooming standards—in accordance with the Service member’s preferred gender. The Carter policy, however, still requires transgender Service members who have not changed their gender marker in DEERS, including persons who identify as other than male or female, to meet the standards associated with their biological sex.

The Carter policy also allows accession of persons with gender dysphoria who can demonstrate stability in their preferred gender for at least 18 months. The accession policy did not take effect until required by court order, effective January 1, 2018.

The following discussion describes in greater detail the evolution of accession and retention standards pertaining to transgender persons.

#### Transgender Policy Prior to the Carter Policy

##### A. Accession Medical Standards

DoD Instruction (DoDI) 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services*, establishes baseline accession medical standards used to determine an applicant’s medical qualifications to enter military service. This instruction is reviewed every three to four years by the Accession Medical Standards Working Group (AMSWG), which includes medical and personnel subject matter experts from across the Department, its Military Services, and the U.S. Coast Guard. The AMSWG thoroughly reviews over 30 bodily systems and medical focus areas while carefully considering evidence-based clinical information, peer-reviewed scientific studies, scientific expert consensus, and the performance of existing standards in light of empirical data on attrition, deployment readiness, waivers, and disability rates. The AMSWG also considers inputs from non-government sources and evaluates the applicability of those inputs against the military’s mission and operational environment, so that the Department and the Military Services can formally coordinate updates to these standards.

Accession medical standards are based on the operational needs of the Department and are designed to ensure that individuals are physically and psychologically “qualified, effective, and able-bodied persons”<sup>11</sup> capable of performing military duties. Military effectiveness requires that the Armed Forces manage an integrated set of unique medical standards and qualifications because all military personnel must be available for worldwide duty 24 hours a day without

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<sup>11</sup> 10 U.S.C. § 505(a).



restriction or delay. Such duty may involve a wide range of demands, including exposure to danger or harsh environments, emotional stress, and the operation of dangerous, sensitive, or classified equipment. These duties are often in remote areas lacking immediate and comprehensive medical support. Such demands are not normally found in civilian occupations, and the military would be negligent in its responsibility if its military standards permitted admission of applicants with physical or emotional impairments that could cause harm to themselves or others, compromise the military mission, or aggravate any current physical or mental health conditions that they may have.

In sum, these standards exist to ensure that persons who are under consideration for induction into military service are:

- free of contagious diseases that probably will endanger the health of other personnel;
- free of medical conditions or physical defects that may require excessive time lost from duty for necessary treatment or hospitalization, or probably will result in separation from service for medical unfitness;
- medically capable of satisfactorily completing required training;
- medically adaptable to the military environment without the necessity of geographical area limitations; and
- medically capable of performing duties without aggravation of existing physical defects or medical conditions.<sup>12</sup>

Establishing or modifying an accession standard is a risk management process by which a health condition is evaluated in terms of the probability and effect on the five listed outcomes above. These standards protect the applicant from harm that could result from the rigors of military duty and help ensure unit readiness by minimizing the risk that an applicant, once inducted into military service, will be unavailable for duty because of illness, injury, disease, or bad health.

Unless otherwise expressly provided, a current diagnosis or verified past medical history of a condition listed in DoDI 6130.03 is presumptively disqualifying.<sup>13</sup> Accession standards reflect the considered opinion of the Department's medical and personnel experts that an applicant with an identified condition should only be able to serve if they can qualify for a waiver. Waivers are generally only granted when the condition will not impact the individual's assigned specialty or when the skills of the individual are unique enough to warrant the additional risk. Waivers are not generally granted when the conditions of military service may aggravate the existing condition. For some conditions, applicants with a past medical history may nevertheless be eligible for accession if they meet the requirements for a certain period of "stability"—that is, they can demonstrate that the condition has been absent for a defined period

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<sup>12</sup> Department of Defense Instruction 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services* (Apr. 28, 2010), incorporating Change 1, p. 2 (Sept. 13, 2011) ("DoDI 6130.03").

<sup>13</sup> *Id.* at 10.

of time prior to accession.<sup>14</sup> With one exception,<sup>15</sup> each accession standard may be waived in the discretion of the accessing Service based on that Service's policies and practices, which are driven by the unique requirements of different Service missions, different Service occupations, different Service cultures, and at times, different Service recruiting missions.

Historically, mental health conditions have been a great concern because of the unique mental and emotional stresses of military service. Mental health conditions frequently result in attrition during initial entry training and the first term of service and are routinely considered by in-service medical boards as a basis for separation. Department mental health accession standards have typically aligned with the conditions identified in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), which is published by the American Psychiatric Association (APA). The DSM sets forth the descriptions, symptoms, and other criteria for diagnosing mental disorders. Health care professionals in the United States and much of the world use the DSM as the authoritative guide to the diagnosis of mental disorders.

Prior to implementation of the Carter policy, the Department's accession standards barred persons with a "[h]istory of psychosexual conditions, including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias."<sup>16</sup> These standards were consistent with DSM-III, which in 1980, introduced the diagnosis of transsexualism.<sup>17</sup> In 1987, DSM-III-R added gender identity disorder, non-transsexual type.<sup>18</sup> DSM-IV, which was published in 1994, combined these two diagnoses and called the resulting condition "gender identity disorder."<sup>19</sup> Due to challenges associated with updating and publishing a new iteration of DoDI 6130.03, the DoDI's terminology has not changed to reflect the changes in the DSM, including further changes that will be discussed later.

DoDI 6130.03 also contains other disqualifying conditions that are associated with, but not unique to, transgender persons, especially those who have undertaken a medical or surgical transition to the opposite gender. These include:

- a history of chest surgery, including but not limited to the surgical removal of the breasts,<sup>20</sup> and genital surgery, including but not limited to the surgical removal of the testicles;<sup>21</sup>

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<sup>14</sup> See, e.g., *id.* at 47.

<sup>15</sup> The accession standards for applicants with HIV are not waivable absent a waiver from both the accessing Service and the Under Secretary of Defense for Personnel and Readiness. See Department of Defense Instruction 6485.01, *Human Immunodeficiency Virus (HIV) in Military Service Members* (Jun. 7, 2013).

<sup>16</sup> DoDI 6130.03 at 48.

<sup>17</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-III)*, pp. 261-264 (3rd ed. 1980).

<sup>18</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)*, pp. 76-77 (3rd ed. revised 1987).

<sup>19</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*, pp. 532-538 (4th ed. 1994).

<sup>20</sup> DoDI 6130.03 at 18.

<sup>21</sup> *Id.* at 25-27.



- a history of major abnormalities or defects of the genitalia, including but not limited to change of sex, hermaphroditism, penis amputation, and pseudohermaphroditism;<sup>22</sup>
- mental health conditions such as suicidal ideation, depression, and anxiety disorder;<sup>23</sup> and
- the use of certain medications, or conditions requiring the use of medications, such as hormone therapies and anti-depressants.<sup>24</sup>

Together with a diagnosis of transsexualism, these conditions, which were repeatedly validated by the AMSWG, provided multiple grounds for the disqualification of transgender persons.

#### B. Retention Standards

The standards that govern the retention of Service members who are already serving in the military are generally less restrictive than the corresponding accession standards due to the investment the Department has made in the individual and their increased capability to contribute to mission accomplishment.

Also unlike the Department's accession standards, each Service develops and applies its own retention standards. With respect to the retention of transgender Service members, these Service-specific standards may have led to inconsistent outcomes across the Services, but as a practical matter, before the Carter policy, the Services generally separated Service members who desired to transition to another gender. During that time, there were no express policies allowing individuals to serve in their preferred gender rather than their biological sex.

Previous Department policy concerning the retention (administrative separation) of transgender persons was not clear or rigidly enforced. DoDI 1332.38, *Physical Disability Evaluation*, now cancelled, characterized "sexual gender and identity disorders" as a basis for allowing administrative separation for a condition not constituting a disability; it did not require mandatory processing for separation. A newer issuance, DoDI 1332.18, *Disability Evaluation System (DES)*, August 5, 2014, does not reference these disorders but instead reflects changes in how such medical conditions are characterized in contemporary medical practice.

Earlier versions of DoDI 1332.14, *Enlisted Administrative Separations*, contained a cross reference to the list of conditions not constituting a disability in former DoDI 1332.38. This was how "transsexualism," the older terminology, was used as a basis for administrative separation. Separation on this basis required formal counseling and an opportunity to address the issue, as well as a finding that the condition was interfering with the performance of duty. In practice, transgender persons were not usually processed for administrative separation on account of gender dysphoria or gender identity itself, but rather on account of medical comorbidities (e.g., depression or suicidal ideation) or misconduct due to cross dressing and related behavior.

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<sup>22</sup> Id.

<sup>23</sup> Id. at 47-48.

<sup>24</sup> Id. at 48.

## The Carter Policy

At the direction of Secretary Carter, the Department began formally reconsidering its accession and retention standards as they applied to transgender persons with gender dysphoria in 2015. This reevaluation, which culminated with the release of the Carter policy in 2016, was prompted in part by amendments to the DSM that appeared to change the diagnosis for gender identity disorder from a disorder to a treatable condition called gender dysphoria. Starting from the assumption that transgender persons are qualified for military service, the Department sought to identify and remove the obstacles to such service. This effort resulted in substantial changes to the Department's accession and retention standards to accommodate transgender persons with gender dysphoria who require treatment for transitioning to their preferred gender.

### A. Changes to the DSM

When the APA published the fifth edition of the DSM in May 2013, it changed “gender identity disorder” to “gender dysphoria” and designated it as a “condition”—a new diagnostic class applicable only to gender dysphoria—rather than a “disorder.”<sup>25</sup> This change was intended to reflect the APA's conclusion that gender nonconformity alone—without accompanying distress or impairment of functioning—was not a mental disorder.<sup>26</sup> DSM-5 also decoupled the diagnosis for gender dysphoria from diagnoses for “sexual dysfunction and paraphilic disorders, recognizing fundamental differences between these diagnoses.”<sup>27</sup>

According to DSM-5, gender dysphoria in adolescents and adults is “[a] marked incongruence between one's experience/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least two of the following”:

- A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics).
- A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).

<sup>25</sup> See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, pp. 451-459 (5th ed. 2013) (“DSM-5”).

<sup>26</sup> RAND Study at 77; see also Hayes Directory, “Sex Reassignment Surgery for the Treatment of Gender Dysphoria” (May 15, 2014), p. 1 (“This change was intended to reflect a consensus that gender nonconformity is not a psychiatric disorder, as it was previously categorized. However, since the condition may cause clinically significant distress and since a diagnosis is necessary for access to medical treatment, the new term was proposed.”); Irene Folaron & Monica Lovasz, “Military Considerations in Transsexual Care of the Active Duty Member,” *Military Medicine*, Vol. 181, pp. 1182-83 (2016) (“In the DSM-5, [gender dysphoria] has replaced the diagnosis of ‘gender identity disorder’ in order to place the focus on the dysphoria and to diminish the pathology associated with identity incongruence.”).

<sup>27</sup> Irene Folaron & Monica Lovasz, “Military Considerations in Transsexual Care of the Active Duty Member,” *Military Medicine*, Vol. 181, p. 1183 (2016).

- A strong desire for the primary and/or secondary sex characteristics of the other gender.
- A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).
- A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).
- A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).

Importantly, DSM-5 observed that gender dysphoria “is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.”<sup>28</sup>

#### B. The Department Begins Review of Transgender Policy

On July 28, 2015, then Secretary Carter issued a memorandum announcing that no Service members would be involuntarily separated or denied reenlistment or continuation of service based on gender identity or a diagnosis of gender dysphoria without the personal approval of the Under Secretary of Defense for Personnel and Readiness.<sup>29</sup> The memorandum also created the Transgender Service Review Working Group (TSRWG) “to study the policy and readiness implications of welcoming transgender persons to serve openly.”<sup>30</sup> The memorandum specifically directed the working group to “start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness, unless and except where objective practical impediments are identified.”<sup>31</sup>

As part of this review, the Department commissioned the RAND National Defense Research Institute to conduct a study to “(1) identify the health care needs of the transgender population, transgender Service members’ potential health care utilization rates, and the costs associated with extending health care coverage for transition-related treatments; (2) assess the potential readiness impacts of allowing transgender Service members to serve openly; and (3) review the experiences of foreign militaries that permit transgender Service members to serve openly.”<sup>32</sup> The resulting report, entitled *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, reached several conclusions. First, the report estimated that there are between 1,320 and 6,630 transgender Service members already serving in the active component of the Armed Forces and 830 to 4,160 in the Selected Reserve.<sup>33</sup> Second, the report predicted “annual gender transition-related health care to be an extremely small part of the overall health care provided to the [active component] population.”<sup>34</sup> Third, the report estimated that active component “health care costs will increase by between \$2.4 million and \$8.4 million annually—an amount that will have little impact on and represents an exceedingly small proportion of

<sup>28</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, p. 453 (5th ed. 2013).

<sup>29</sup> Memorandum from Ashton Carter, Secretary of Defense, “Transgender Service Members” (July 28, 2015).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> RAND Study at 1.

<sup>33</sup> *Id.* at x-xi.

<sup>34</sup> *Id.* at xi.



[active component] health care expenditures (approximately \$6 billion in FY 2014).<sup>35</sup> Fourth, the report “found that less than 0.0015 percent of the total available labor-years would be affected, based on estimated gender transition-related health care utilization rates.”<sup>36</sup> Finally, the report concluded that “[e]xisting data suggest a minimal impact on unit cohesion as a result of allowing transgender personnel to serve openly.”<sup>37</sup> “Overall,” according to RAND, “our study found that the number of U.S. transgender Service members who are likely to seek transition-related care is so small that a change in policy will likely have a marginal impact on health care costs and the readiness of the force.”<sup>38</sup>

The RAND report thus acknowledged that there will be an adverse impact on health care utilization and costs, readiness, and unit cohesion, but concluded nonetheless that the impact will be “negligible” and “marginal” because of the small estimated number of transgender Service members relative to the size of the active component of the Armed Forces. Because of the RAND report’s macro focus, however, it failed to analyze the impact at the micro level of allowing gender transition by individuals with gender dysphoria. For example, as discussed in more detail later, the report did not examine the potential impact on unit readiness, perceptions of fairness and equity, personnel safety, and reasonable expectations of privacy at the unit and sub-unit levels, all of which are critical to unit cohesion. Nor did the report meaningfully address the significant mental health problems that accompany gender dysphoria—from high rates of comorbidities and psychiatric hospitalizations to high rates of suicide ideation and suicidality—and the scope of the scientific uncertainty regarding whether gender transition treatment fully remedies those problems.

### C. New Standards for Transgender Persons

Based on the RAND report, the work of the TSRWG, and the advice of the Service Secretaries, Secretary Carter approved the publication of DoDI 1300.28, *In-service Transition for Service Members Identifying as Transgender*, and Directive-type Memorandum (DTM) 16-005, “Military Service of Transgender Service Members,” on June 30, 2016. Although the new retention standards were effective immediately upon publication of the above memoranda, the accession standards were delayed until July 1, 2017, to allow time for training all Service members across the Armed Forces, including recruiters, Military Entrance Processing Station (MEPS) personnel, and basic training cadre, and to allow time for modifying facilities as necessary.

1. *Retention Standards.* DoDI 1300.28 establishes the procedures by which Service members who are diagnosed with gender dysphoria may administratively change their gender. Once a Service member receives a gender dysphoria diagnosis from a military physician, the physician, in consultation with the Service member, must establish a treatment plan. The treatment plan is highly individualized and may include cross-sex hormone therapy (i.e., medical transition), sex reassignment surgery (i.e., surgical transition), or simply living as the opposite gender but without any cross-sex hormone or surgical treatment (i.e., social

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<sup>35</sup> Id. at xi-xii.

<sup>36</sup> Id. at xii.

<sup>37</sup> Id.

<sup>38</sup> Id. at 69.

transition). The nature of the treatment is left to the professional medical judgment of the treating physician and the individual situation of the transgender Service member. The Department does not require a Service member with gender dysphoria to undergo cross-sex hormone therapy, sex reassignment surgery, or any other physical changes to effectuate an administrative change of gender. During the course of treatment, commanders are authorized to grant exceptions from physical fitness, uniform and grooming, and other standards, as necessary and appropriate, to transitioning Service members. Once the treating physician determines that the treatment plan is complete, the Service member's commander approves, and the Service member produces legal documentation indicating change of gender (e.g., certified birth certificate, court order, or U.S. passport), the Service member may request a change of gender marker in DEERS. Once the DEERS gender marker is changed, the Service member is held to all standards associated with the member's transitioned gender, including uniform and grooming standards, body composition assessment, physical readiness testing, Military Personnel Drug Abuse Testing Program participation, and other military standards congruent to the member's gender. Indeed, the Service member must be treated in all respects in accordance with the member's transitioned gender, including with respect to berthing, bathroom, and shower facilities. Transgender Service members who do not meet the clinical criteria for gender dysphoria, by contrast, remain subject to the standards and requirements applicable to their biological sex.

2. *Accession Standards.* DTM 16-005 directed that the following medical standards for accession into the Military Services take effect on July 1, 2017:

- (1) A history of gender dysphoria is disqualifying, unless, as certified by a licensed medical provider, the applicant has been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months.
- (2) A history of medical treatment associated with gender transition is disqualifying, unless, as certified by a licensed medical provider:
  - (a) the applicant has completed all medical treatment associated with the applicant's gender transition; and
  - (b) the applicant has been stable in the preferred gender for 18 months; and
  - (c) if the applicant is presently receiving cross-sex hormone therapy post-gender transition, the individual has been stable on such hormones for 18 months.
- (3) A history of sex reassignment or genital reconstruction surgery is disqualifying, unless, as certified by a licensed medical provider:
  - (a) a period of 18 months has elapsed since the date of the most recent of any such surgery; and

- (b) no functional limitations or complications persist, nor is any additional surgery required.<sup>39</sup>

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<sup>39</sup> Memorandum from Ashton Carter, Secretary of Defense, "Directive-type Memorandum (DTM) 16-005, 'Military Service of Transgender Service Members,'" Attachment, pp. 1-2 (June 30, 2016).

### **Panel of Experts Recommendation**

The Carter policy's accession standards for persons with a history of gender dysphoria were set to take effect on July 1, 2017, but on June 30, after consultation with the Secretaries and Chiefs of Staff of each Service, Secretary Mattis postponed the new standards for an additional six months "to evaluate more carefully the impact of such accessions on readiness and lethality."<sup>40</sup> Secretary Mattis specifically directed that the review would "include all relevant considerations" and would last for five months, with a due date of December 1, 2017.<sup>41</sup> The Secretary also expressed his desire to have "the benefit of the views of the military leadership and of the senior civilian officials who are now arriving in the Department."<sup>42</sup>

While Secretary Mattis's review was ongoing, President Trump issued a memorandum, on August 25, 2017, directing the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to reinstate longstanding policy generally barring the accession of transgender individuals "until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice" would not "hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources."<sup>43</sup> The President found that "further study is needed to ensure that continued implementation of last year's policy change would not have those negative effects."<sup>44</sup> Accordingly, the President directed both Secretaries to maintain the prohibition on accession of transgender individuals "until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary" that is convincing.<sup>45</sup> The President made clear that the Secretaries may advise him "at any time, in writing, that a change to this policy is warranted."<sup>46</sup> In addition, the President gave both Secretaries discretion to "determine how to address transgender individuals currently serving" in the military and made clear that no action be taken against them until a determination was made.<sup>47</sup>

On September 14, 2017, Secretary Mattis established a Panel of Experts to study, in a "comprehensive, holistic, and objective" manner, "military service by transgender individuals, focusing on military readiness, lethality, and unit cohesion, with due regard for budgetary constraints and consistent with applicable law."<sup>48</sup> He directed the Panel to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members."<sup>49</sup>

<sup>40</sup> Memorandum from James N. Mattis, Secretary of Defense, "Accession of Transgender Individuals into the Military Services" (June 30, 2017).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Memorandum from Donald J. Trump, President of the United States, "Military Service by Transgender Individuals" (Aug. 25, 2017).

<sup>44</sup> *Id.* at 1.

<sup>45</sup> *Id.* at 2.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Memorandum from James N. Mattis, Secretary of Defense, "Terms of Reference—Implementation of Presidential Memorandum on Military Service by Transgender Individuals," pp. 1-2 (Sept. 14, 2017).

<sup>49</sup> *Id.* at 2.



The Panel consisted of the Under Secretaries of the Military Departments (or officials performing their duties), the Armed Services' Vice Chiefs (including the Vice Commandant of the U.S. Coast Guard), and the Senior Enlisted Advisors, and was chaired by the Under Secretary of Defense for Personnel and Readiness or an official performing those duties. The Secretary of Defense selected these senior leaders because of their experience leading warfighters in war and peace or their expertise in military operational effectiveness. These senior leaders also have the statutory responsibility to organize, train, and equip military forces and are uniquely qualified to evaluate the impact of policy changes on the combat effectiveness and lethality of the force. The Panel met 13 times over a span of 90 days.

The Panel received support from medical and personnel experts from across the Departments of Defense and Homeland Security. The Transgender Service Policy Working Group, comprised of medical and personnel experts from across the Department, developed policy recommendations and a proposed implementation plan for the Panel's consideration. The Medical and Personnel Executive Steering Committee, a standing group of the Surgeons General and Service Personnel Chiefs, led by Personnel and Readiness, provided the Panel with an analysis of accession standards, a multi-disciplinary review of relevant data, and information about medical treatment for gender dysphoria and gender transition-related medical care. These groups reported regularly to the Panel and responded to numerous queries for additional information and analysis to support the Panel's review and deliberations. A separate working group tasked with enhancing the lethality of our Armed Forces also provided a briefing to the Panel on their work relating to retention standards.

The Panel met with and received input from transgender Service members, commanders of transgender Service members, military medical professionals, and civilian medical professionals with experience in the care and treatment of individuals with gender dysphoria. The Panel also reviewed information and analyses about gender dysphoria, the treatment of gender dysphoria, and the effects of currently serving individuals with gender dysphoria on military effectiveness, unit cohesion, and resources. Unlike past reviews, the Panel's analysis was informed by the Department's own data and experience obtained since the Carter policy took effect.

To fulfill its mandate, the Panel addressed three questions:

- Should the Department of Defense access transgender individuals?
- Should the Department allow transgender individuals to transition gender while serving, and if so, what treatment should be authorized?
- How should the Department address transgender individuals who are currently serving?

After extensive review and deliberation, which included evidence in support of and against the Panel's recommendations, the Panel exercised its professional military judgment and made recommendations. The Department considered those recommendations and the information underlying them, as well as additional information within the Department, and now proposes the following policy consistent with those recommendations.



### Recommended Policy

To maximize military effectiveness and lethality, the Department, after consultation with and the concurrence of the Department of Homeland Security, recommends cancelling the Carter policy and, as explained below, adopting a new policy with respect to the accession and retention of transgender persons.

The Carter policy assumed that transgender persons were generally qualified for service and that their accession and retention would not negatively impact military effectiveness. As noted earlier, Secretary Carter directed the TSRWG, the group charged with evaluating, and making recommendations on, transgender service, to “start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness, unless and except where objective practical impediments are identified.”<sup>50</sup> Where necessary, standards were adjusted or relaxed to accommodate service by transgender persons. The following analysis makes no assumptions but instead applies the relevant standards applicable to everyone to determine the extent to which transgender persons are qualified for military duty.

For the following reasons, the Department concludes that transgender persons should not be disqualified from service solely on account of their transgender status, provided that they, like all other Service members, are willing and able to adhere to all standards, including the standards associated with their biological sex. With respect to the subset of transgender persons who have been diagnosed with gender dysphoria, however, those persons are generally disqualified unless, depending on whether they are accessing or seeking retention, they can demonstrate stability for the prescribed period of time; they do not require, and have not undergone, a change of gender; and they are otherwise willing and able to meet all military standards, including those associated with their biological sex. In order to honor its commitment to current Service members diagnosed with gender dysphoria, those Service members who were diagnosed after the effective date of the Carter policy and before any new policy takes effect will not be subject to the policy recommended here.

### Discussion of Standards

The standards most relevant to the issue of service by transgender persons fall into three categories: mental health standards, physical health standards, and sex-based standards. Based on these standards, the Department can assess the extent to which transgender persons are qualified for military service and, in light of that assessment, recommend appropriate policies.

#### A. Mental Health Standards

Given the extreme rigors of military service and combat, maintaining high standards of mental health is essential to military effectiveness and lethality. The immense toll that the burden and experience of combat can have on the human psyche cannot be overstated. Therefore, putting individuals into battle, who might be at increased risk of psychological injury, would be reckless, not only for those individuals, but for the Service members who serve beside them as well.

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<sup>50</sup> Memorandum from Ashton Carter, Secretary of Defense, “Transgender Service Members” (July 28, 2015).

The Department's experience with the mental health issues arising from our wars in Afghanistan and Iraq, including post-traumatic stress disorder (PTSD), only underscores the importance of maintaining high levels of mental health across the force. PTSD has reached as high as 2.8% of all active duty Service members, and in 2016, the number of active duty Service members with PTSD stood at 1.5%.<sup>51</sup> Of all Service members in the active component, 7.5% have been diagnosed with a mental health condition of some type.<sup>52</sup> The Department is mindful of these existing challenges and must exercise caution when considering changes to its mental health standards.

Most mental health conditions and disorders are automatically disqualifying for accession absent a waiver. For example, persons with a history of bipolar disorder, personality disorder, obsessive-compulsive disorder, suicidal behavior, and even body dysmorphic disorder (to name a few) are barred from entering into military service, unless a waiver is granted.<sup>53</sup> For a few conditions, however, persons may enter into service without a waiver if they can demonstrate stability for 24 to 36 continuous months preceding accession. Historically, a person is deemed stable if they are without treatment, symptoms, or behavior of a repeated nature that impaired social, school, or work efficiency for an extended period of several months. Such conditions include depressive disorder (stable for 36 continuous months) and anxiety disorder (stable for 24 continuous months).<sup>54</sup> Requiring a period of stability reduces, but does not eliminate, the likelihood that the individual's depression or anxiety will return.

Historically, conditions associated with transgender individuals have been automatically disqualifying absent a waiver. Before the changes directed by Secretary Carter, military mental health standards barred persons with a "[h]istory of psychosexual conditions, including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias."<sup>55</sup> These standards, however, did not evolve with changing understanding of transgender mental health. Today, transsexualism is no longer considered by most mental health practitioners as a mental health condition. According to the APA, it is not a medical condition for persons to identify with a gender that is different from their biological sex.<sup>56</sup> Put simply, transgender status alone is not a condition.

Gender dysphoria, by contrast, is a mental health condition that can require substantial medical treatment. Many individuals who identify as transgender are diagnosed with gender dysphoria, but "[n]ot all transgender people suffer from gender dysphoria and that distinction," according to the APA, "is important to keep in mind."<sup>57</sup> The DSM-5 defines gender dysphoria as

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<sup>51</sup> Deployment Health Clinical Center, "Mental Health Disorder Prevalence among Active Duty Service Members in the Military Health System, Fiscal Years 2005-2016" (Jan. 2017).

<sup>52</sup> *Id.*

<sup>53</sup> DoDI 6130.03 at 47-48.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 48.

<sup>56</sup> DSM-5 at 452-53.

<sup>57</sup> American Psychiatric Association, "Expert Q & A: Gender Dysphoria," available at <https://www.psychiatry.org/patients-families/gender-dysphoria/expert-qa> (last visited Feb. 14, 2018). Conversely, not all persons with gender dysphoria are transgender. "For example, some men who are disabled in combat, especially if their injury includes genital wounds, may feel that they are no longer men because their bodies do not conform to their concept of manliness. Similarly, a woman who opposes plastic surgery, but who must undergo mastectomy because of breast



a “marked incongruence between one’s experience/expressed gender and assigned gender, of at least 6 months duration,” that is manifested in various specified ways.<sup>58</sup> According to the APA, the “condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.”<sup>59</sup>

Transgender persons with gender dysphoria suffer from high rates of mental health conditions such as anxiety, depression, and substance use disorders.<sup>60</sup> High rates of suicide ideation, attempts, and completion among people who are transgender are also well documented in the medical literature, with lifetime rates of suicide attempts reported to be as high as 41% (compared to 4.6% for the general population).<sup>61</sup> According to a 2015 survey, the rate skyrockets to 57% for transgender individuals without a supportive family.<sup>62</sup> The Department is concerned that the stresses of military life, including basic training, frequent moves, deployment to war zones and austere environments, and the relentless physical demands, will be additional contributors to suicide behavior in people with gender dysphoria. In fact, there is recent evidence that military service can be a contributor to suicidal thoughts.<sup>63</sup>

Preliminary data of Service members with gender dysphoria reflect similar trends. A review of the administrative data indicates that Service members with gender dysphoria are eight times more likely to attempt suicide than Service members as a whole (12% versus 1.5%).<sup>64</sup>

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cancer, may find that she requires reconstructive breast surgery in order to resolve gender dysphoria arising from the incongruence between her body without breasts and her sense of herself as a woman.” M. Jocelyn Elders, George R. Brown, Eli Coleman, Thomas Kolditz & Alan Steinman, “Medical Aspects of Transgender Military Service,” *Armed Forces & Society*, p. 5 n.22 (Mar. 2014).

<sup>58</sup> DSM-5 at 452.

<sup>59</sup> DSM-5 at 453.

<sup>60</sup> Cecilia Dhejne, Roy Van Vlerken, Gunter Heylens & Jon Arcelus, “Mental health and gender dysphoria: A review of the literature,” *International Review of Psychiatry*, Vol. 28, pp. 44-57 (2016); George R. Brown & Kenneth T. Jones, “Mental Health and Medical Health Disparities in 5135 Transgender Veterans Receiving Healthcare in the Veterans Health Administration: A Case-Control Study,” *LGBT Health*, Vol. 3, p. 128 (Apr. 2016).

<sup>61</sup> Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey*, p. 2 (American Foundation for Suicide Prevention and The Williams Institute, University of California, Los Angeles, School of Law 2014), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>; H.G. Virupaksha, Daliboyina Muralidhar & Jayashree Ramakrishna, “Suicide and Suicide Behavior among Transgender Persons,” *Indian Journal of Psychological Medicine*, Vol.38, pp. 505-09 (2016); Claire M. Peterson, Abigail Matthews, Emily Copps-Smith & Lee Ann Conard, “Suicidality, Self-Harm, and Body Dissatisfaction in Transgender Adolescents and Emerging Adults with Gender Dysphoria,” *Suicide and Life Threatening Behavior*, Vol. 47, pp. 475-482 (Aug. 2017).

<sup>62</sup> Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey*, pp. 2, 12 (American Foundation for Suicide Prevention and The Williams Institute, University of California, Los Angeles, School of Law 2014), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>.

<sup>63</sup> Raymond P. Tucker, Rylan J. Testa, Mark A. Reger, Tracy L. Simpson, Jillian C. Shipherd, & Keren Lehavot, “Current and Military-Specific Gender Minority Stress Factors and Their Relationship with Suicide Ideation in Transgender Veterans,” *Suicide and Life Threatening Behavior* DOI: 10.1111/sltb.12432 (epub ahead of print), pp. 1-10 (2018); Craig J. Bryan, AnnaBelle O. Bryan, Bobbie N. Ray-Sannerud, Neysa Etienne & Chad E. Morrow, “Suicide attempts before joining the military increase risk for suicide attempts and severity of suicidal ideation among military personnel and veterans,” *Comprehensive Psychiatry*, Vol. 55, pp. 534-541 (2014).

<sup>64</sup> Data retrieved from Military Health System data repository (Oct. 2017).

Service members with gender dysphoria are also nine times more likely to have mental health encounters than the Service member population as a whole (28.1 average encounters per Service member versus 2.7 average encounters per Service member).<sup>65</sup> From October 1, 2015 to October 3, 2017, the 994 active duty Service members diagnosed with gender dysphoria accounted for 30,000 mental health visits.<sup>66</sup>

It is widely believed by mental health practitioners that gender dysphoria can be treated. Under commonly accepted standards of care, treatment for gender dysphoria can include: psychotherapy; social transition—also known as “real life experience”—to allow patients to live and work in their preferred gender without any hormone treatment or surgery; medical transition to align secondary sex characteristics with patients’ preferred gender using cross-sex hormone therapy and hair removal; and surgical transition—also known as sex reassignment surgery—to make the physical body—both primary and secondary sex characteristics—resemble as closely as possible patients’ preferred gender.<sup>67</sup> The purpose of these treatment options is to alleviate the distress and impairment of gender dysphoria by seeking to bring patients’ physical characteristics into alignment with their gender identity—that is, one’s inner sense of one’s own gender.<sup>68</sup>

Cross-sex hormone therapy is a common medical treatment associated with gender transition that may be commenced following a diagnosis of gender dysphoria.<sup>69</sup> Treatment for women transitioning to men involves the administration of testosterone, whereas treatment for men transitioning to women requires the blocking of testosterone and the administration of estrogens.<sup>70</sup> The Endocrine Society’s clinical guidelines recommend laboratory bloodwork every 90 days for the first year of treatment to monitor hormone levels.<sup>71</sup>

As a treatment for gender dysphoria, sex reassignment surgery is “a unique intervention not only in psychiatry but in all of medicine.”<sup>72</sup> Under existing Department guidelines

<sup>65</sup> Data retrieved from Military Health System data repository (Oct. 2017). Study period was Oct. 1, 2015 to July 26, 2017.

<sup>66</sup> Data retrieved from Military Health System data repository (Oct. 2017).

<sup>67</sup> RAND Study at 5-7, Appendices A & C; see also Hayes Directory, “Sex Reassignment Surgery for the Treatment of Gender Dysphoria,” p. 1 (May 15, 2014) (“The full therapeutic approach to [gender dysphoria] consists of 3 elements or phases, typically in the following order: (1) hormones of the desired gender; (2) real-life experience for 12 months in the desired role; and (3) surgery to change the genitalia and other sex characteristics (e.g., breast reconstruction or mastectomy). However, not everyone with [gender dysphoria] needs or wants all elements of this triadic approach.”); Irene Folaron & Monica Lovasz, “Military Considerations in Transsexual Care of the Active Duty Member,” *Military Medicine*, Vol. 181, p. 1183 (Oct. 2016) (“The Endocrine Society proposes a sequential approach in transsexual care to optimize mental health and physical outcomes. Generally, they recommend initiation of psychotherapy, followed by cross-sex hormone treatments, then [sex reassignment surgery].”).

<sup>68</sup> RAND Study at 73.

<sup>69</sup> Wylie C. Hembree, Peggy Cohen-Kettenis, Lous Gooren, Sabine Hannema, Walter Meyer, M. Hassan Murad, Stephen Rosenthal, Joshua Safer, Vin Tangpricha, & Guy T’Sjoen, “Endocrine Treatment of Gender-Dysphoric/Gender Incongruent Persons: An Endocrine Society Clinical Practice Guideline,” *The Journal of Clinical Endocrinology & Metabolism*, Vol. 102, pp. 3869-3903 (Nov. 2017).

<sup>70</sup> Id. at 3885-3888.

<sup>71</sup> Id.

<sup>72</sup> Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, “Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden,” *PLoS One*, Vol. 6, pp. 1-8 (Feb. 2011); see also Hayes Directory, “Sex Reassignment Surgery for the Treatment of



implementing the Carter policy, men transitioning to women may obtain an orchiectomy (surgical removal of the testicles), a penectomy (surgical removal of the penis), a vaginoplasty (surgical creation of a vagina), a clitoroplasty (surgical creation of a clitoris), and a labiaplasty (surgical creation of the labia). Women transitioning to men may obtain a hysterectomy (surgical removal of the uterus), a mastectomy (surgical removal of the breasts), a metoidioplasty (surgical enlargement of the clitoris), a phalloplasty (surgical creation of a penis), a scrotoplasty (surgical creation of a scrotum) and placement of testicular prostheses, a urethroplasty (surgical enlargement of the urethra), and a vaginectomy (surgical removal of the vagina). In addition, the following cosmetic procedures may be provided at military treatment facilities as well: abdominoplasty, breast augmentation, blepharoplasty (eyelid lift), hair removal, face lift, facial bone reduction, hair transplantation, liposuction, reduction thyroid chondroplasty, rhinoplasty, and voice modification surgery.<sup>73</sup>

The estimated recovery time for each of the surgical procedures, even assuming no complications, can be substantial. For example, assuming no complications, the recovery time for a hysterectomy is up to eight weeks; a mastectomy is up to six weeks; a phalloplasty is up to three months; a metoidioplasty is up to eight weeks; an orchiectomy is up to six weeks; and a vaginoplasty is up to three months.<sup>74</sup> When combined with 12 continuous months of hormone therapy, which is required prior to genital surgery,<sup>75</sup> the total time necessary for surgical transition can exceed a year.

Although relatively few people who are transgender undergo genital reassignment surgeries (2% of transgender men and 10% of transgender women), we have to consider that the rate of complications for these surgeries is significant, which could increase a transitioning Service member's unavailability.<sup>76</sup> Even according to the RAND study, 6% to 20% of those receiving vaginoplasty surgery experience complications, meaning that "between three and 11 Service members per year would experience a long-term disability from gender reassignment

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Gender Dysphoria," p. 2 (May 15, 2014) (noting that gender dysphoria "does not readily fit traditional concepts of medical necessity since research to date has not established anatomical or physiological anomalies associated with [gender dysphoria]"); Hayes Annual Review, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria" (Apr. 18, 2017).

<sup>73</sup> Memorandum from Defense Health Agency, "Information Memorandum: Interim Defense Health Agency Procedures for Reviewing Requests for Waivers to Allow Supplemental Health Care Program Coverage of Sex Reassignment Surgical Procedures" (Nov. 13, 2017); see also RAND Study at Appendix C.

<sup>74</sup> University of California, San Francisco, Center of Excellence for Transgender Health, "Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People," available at <http://transhealth.ucsf.edu/trans?page=guidelines-home> (last visited Feb. 16, 2018); Discussion with Dr. Loren Schechter, Visiting Clinical Professor of Surgery, University of Illinois at Chicago (Nov. 9, 2017).

<sup>75</sup> RAND Study at 80; see also Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, p. 1184 (Oct. 2016) (noting that Endocrine Society criteria "require that the patient has been on continuous cross-sex hormones and has had continuous [real life experience] or psychotherapy for the past 12 months").

<sup>76</sup> Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey*, pp. 100-103 (National Center for Transgender Equality 2016) available at <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

surgery.”<sup>77</sup> The RAND study further notes that of those receiving phalloplasty surgery, as many as 25%—one in four—will have complications.<sup>78</sup>

The prevailing judgment of mental health practitioners is that gender dysphoria can be treated with the transition-related care described above. While there are numerous studies of varying quality showing that this treatment can improve health outcomes for individuals with gender dysphoria, the available scientific evidence on the extent to which such treatments fully remedy all of the issues associated with gender dysphoria is unclear. Nor do any of these studies account for the added stress of military life, deployments, and combat.

As recently as August 2016, the Centers for Medicare and Medicaid Services (CMS) conducted a comprehensive review of the relevant literature, over 500 articles, studies, and reports, to determine if there was “sufficient evidence to conclude that gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria.”<sup>79</sup> After reviewing the universe of literature regarding sex reassignment surgery, CMS identified 33 studies sufficiently rigorous to merit further review, and of those, “some were positive; others were negative.”<sup>80</sup> “Overall,” according to CMS, “the quality and strength of evidence were low due to mostly observational study designs with no comparison groups, subjective endpoints, potential confounding . . . small sample sizes, lack of validated assessment tools, and considerable [number of study subjects] lost to follow-up.”<sup>81</sup> With respect to whether sex reassignment surgery was “reasonable and necessary” for the treatment of gender dysphoria, CMS concluded that there was “not enough high quality evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria and whether patients most likely to benefit from these types of surgical intervention can be identified prospectively.”<sup>82</sup>

Importantly, CMS identified only six studies as potentially providing “useful information” on the effectiveness of sex reassignment surgery. According to CRS, “the four best designed and conducted studies that assessed the quality of life before and after surgery using validated (albeit, non-specific) psychometric studies did not demonstrate clinically significant changes or differences in psychometric test results after [sex reassignment surgery].”<sup>83</sup>

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<sup>77</sup> RAND Study at 40-41.

<sup>78</sup> *Id.* at 41.

<sup>79</sup> Tamara Jensen, Joseph Chin, James Rollins, Elizabeth Koller, Linda Gousis & Katherine Szarama, “Final Decision Memorandum on Gender Reassignment Surgery for Medicare Beneficiaries with Gender Dysphoria,” Centers for Medicare & Medicaid Services, p. 9 (Aug. 30, 2016) (“CMS Report”).

<sup>80</sup> *Id.* at 62.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 65. CMS did not conclude that gender reassignment surgery can never be necessary and reasonable to treat gender dysphoria. To the contrary, it made clear that Medicare insurers could make their own “determination of whether or not to cover gender reassignment surgery based on whether gender reassignment surgery is reasonable and necessary for the individual beneficiary after considering the individual’s specific circumstances.” *Id.* at 66. Nevertheless, CMS did decline to require all Medicare insurers to cover sex reassignment surgeries because it found insufficient scientific evidence to conclude that such surgeries improve health outcomes for persons with gender dysphoria.

<sup>83</sup> *Id.* at 62.



Additional studies found that the “cumulative rates of requests for surgical reassignment reversal or change in legal status” were between 2.2% and 3.3%.<sup>84</sup>

A sixth study, which came out of Sweden, is one of the most robust because it is a “nationwide population-based, long-term follow-up of sex-reassigned transsexual persons.”<sup>85</sup> The study found increased mortality and psychiatric hospitalization for patients who had undergone sex reassignment surgery as compared to a healthy control group.<sup>86</sup> As described by CMS: “The mortality was primarily due to completed suicides (19.1-fold greater than in [the control group]), but death due to neoplasm and cardiovascular disease was increased 2 to 2.5 times as well. We note, mortality from this patient population did not become apparent until after 10 years. The risk for psychiatric hospitalization was 2.8 times greater than in controls even after adjustment for prior psychiatric disease (18%). The risk for attempted suicide was greater in male-to-female patients regardless of the gender of the control.”<sup>87</sup>

According to the Hayes Directory, which conducted a review of 19 peer-reviewed studies on sex reassignment surgery, the “evidence suggests positive benefits,” including “decreased [gender dysphoria], depression and anxiety, and increased [quality of life],” but “because of serious limitations,” these findings “permit only weak conclusions.”<sup>88</sup> It rated the quality of evidence as “very low” due to the numerous limitations in the studies and concluded that there is

<sup>84</sup> *Id.*

<sup>85</sup> Cecília Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, “Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden,” *PLoS One*, Vol. 6, p. 6 (Feb. 2011); see also *id.* (“Strengths of this study include nationwide representativity over more than 30 years, extensive follow-up time, and minimal loss to follow-up. . . . Finally, whereas previous studies either lack a control group or use standardised mortality rates or standardised incidence rates as comparisons, we selected random population controls matched by birth year, and either birth or final sex.”).

<sup>86</sup> *Id.* at 7; see also at 6 (“Mortality from suicide was strikingly high among sex-reassigned persons, also after adjustment for prior psychiatric morbidity. In line with this, sex-reassigned persons were at increased risk for suicide attempts. Previous reports suggest that transsexualism is a strong risk factor for suicide, also after sex reassignment, and our long-term findings support the need for continued psychiatric follow-up for persons at risk to prevent this. Inpatient care for psychiatric disorders was significantly more common among sex-reassigned persons than among matched controls, both before and after sex reassignment. It is generally accepted that transsexuals have more psychiatric ill-health than the general population prior to the sex reassignment. It should therefore come as no surprise that studies have found high rates of depression, and low quality of life, also after sex reassignment. Notably, however, in this study the increased risk for psychiatric hospitalization persisted even after adjusting for psychiatric hospitalization prior to sex reassignment. This suggests that even though sex reassignment alleviates gender dysphoria, there is a need to identify and treat co-occurring psychiatric morbidity in transsexual persons not only before but also after sex reassignment.”).

<sup>87</sup> CMS Report at 62. It bears noting that the outcomes for mortality and suicide attempts differed “depending on when sex reassignment was performed: during the period 1973-1988 or 1989-2003.” Cecília Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, “Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden,” *PLoS One*, Vol. 6, p. 5 (Feb. 2011). Even though both mortality and suicide attempts were greater for transsexual persons than the healthy control group across both time periods, this did not reach statistical significance during the 1989-2003 period. One possible explanation is that mortality rates for transsexual persons did not begin to diverge from the healthy control group until after 10 years of follow-up, in which case the expected increase in mortality would not have been observed for most of the persons receiving sex reassignment surgeries from 1989-2003. Another possible explanation is that treatment was of a higher quality from 1989-2003 than from 1973-1988.

<sup>88</sup> Hayes Directory, “Sex Reassignment Surgery for the Treatment of Gender Dysphoria,” p. 4 (May 15, 2014).

not sufficient “evidence to establish patient selection criteria for [sex reassignment surgery] to treat [gender dysphoria].”<sup>89</sup>

With respect to hormone therapy, the Hayes Directory examined 10 peer-reviewed studies and concluded that a “substantial number of studies of cross-sex hormone therapy each show some positive findings suggesting improvement in well-being after cross-sex hormone therapy.”<sup>90</sup> Yet again, it rated the quality of evidence as “very low” and found that the “evidence is insufficient to support patient selection criteria for hormone therapy to treat [gender dysphoria].”<sup>91</sup> Importantly, the Hayes Directory also found: “Hormone therapy and subsequent [sex reassignment surgery] failed to bring overall mortality, suicide rates, or death from illicit drug use in [male-to-female] patients close to rates observed in the general male population. It is possible that mortality is nevertheless reduced by these treatments, but that cannot be determined from the available evidence.”<sup>92</sup>

In 2010, Mayo Clinic researchers conducted a comprehensive review of 28 studies on the use of cross-sex hormone therapy in sex reassignment and concluded that there was “very low quality evidence” showing that such therapy “likely improves gender dysphoria, psychological functioning and comorbidities, sexual function and overall quality of life.”<sup>93</sup> Not all of the studies showed positive results, but overall, after pooling the data from all of the studies, the researchers showed that 80% of patients reported improvement in gender dysphoria, 78% reported improvement in psychological symptoms, and 80% reported improvement in quality of life, after receiving hormone therapy.<sup>94</sup> Importantly, however, “[s]uicide attempt rates decreased after sex reassignment but stayed higher than the normal population rate.”<sup>95</sup>

The authors of the Swedish study discussed above reached similar conclusions: “This study found substantially higher rates of overall mortality, death from cardiovascular disease and suicide, suicide attempts, and psychiatric hospitali[z]ations in sex-reassigned transsexual individuals compared to a healthy control population. This highlights that post[-]surgical transsexuals are a risk group that need long-term psychiatric and somatic follow-up. Even though surgery and hormonal therapy alleviates gender dysphoria, it is apparently not sufficient to remedy the high rates of morbidity and mortality found among transsexual persons.”<sup>96</sup>

Even the RAND study, which the Carter policy is based upon, confirmed that “[t]here have been no randomized controlled trials of the effectiveness of various forms of treatment, and

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<sup>89</sup> Id. at 3.

<sup>90</sup> Hayes Directory, “Hormone Therapy for the Treatment of Gender Dysphoria,” pp. 2, 4 (May 19, 2014).

<sup>91</sup> Id. at 4.

<sup>92</sup> Id. at 3.

<sup>93</sup> Mohammad Hassan Murad, Mohamed B. Elamin, Magaly Zumaeta Garcia, Rebecca J. Mullan, Ayman Murad, Patricia J. Erwin & Victor M. Montori, “Hormonal therapy and sex reassignment: a systematic review and meta-analysis of quality of life and psychosocial outcomes,” *Clinical Endocrinology*, Vol. 72, p. 214 (2010).

<sup>94</sup> Id. at 216.

<sup>95</sup> Id.

<sup>96</sup> Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, “Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden,” *PLoS One*, Vol. 6, pp. 1-8 (Feb. 2011).



most evidence comes from retrospective studies.”<sup>97</sup> Although noting that “[m]ultiple observational studies have suggested significant and sometimes dramatic reductions in suicidality, suicide attempts, and suicides among transgender patients after receiving transition-related treatment,” RAND made clear that “none of these studies were randomized controlled trials (the gold standard for determining treatment efficacy).”<sup>98</sup> “In the absence of quality randomized trial evidence,” RAND concluded, “it is difficult to fully assess the outcomes of treatment for [gender dysphoria].”<sup>99</sup>

Given the scientific uncertainty surrounding the efficacy of transition-related treatments for gender dysphoria, it is imperative that the Department proceed cautiously in setting accession and retention standards for persons with a diagnosis or history of gender dysphoria.

#### B. Physical Health Standards

Not only is maintaining high standards of mental health critical to military effectiveness and lethality, maintaining high standards of physical health is as well. Although technology has done much to ease the physical demands of combat in some military specialties, war very much remains a physically demanding endeavor. Service members must therefore be physically prepared to endure the rigors and hardships of military service, including potentially combat. They must be able to carry heavy equipment sometimes over long distances; they must be able to handle heavy machinery; they must be able to traverse harsh terrain or survive in ocean waters; they must be able to withstand oppressive heat, bitter cold, rain, sleet, and snow; they must be able to endure in unsanitary conditions, coupled with lack of privacy for basic bodily functions, sometimes with little sleep and sustenance; they must be able to carry their wounded comrades to safety; and they must be able to defend themselves against those who wish to kill them.

Above all, whether they serve on the frontlines or in relative safety in non-combat positions, every Service member is important to mission accomplishment and must be available to perform their duties globally whenever called upon. The loss of personnel due to illness, disease, injury, or bad health diminishes military effectiveness and lethality. The Department’s physical health standards are therefore designed to minimize the odds that any given Service member will be unable to perform his or her duties in the future because of illness, disease, or injury. As noted earlier, those who seek to enter military service must be free of contagious diseases; free of medical conditions or physical defects that could require treatment, hospitalization, or eventual separation from service for medical unfitness; medically capable of satisfactorily completing required training; medically adaptable to the military environment; and medically capable of performing duties without aggravation of existing physical defects or medical conditions.<sup>100</sup> To access recruits with higher rates of anticipated unavailability for deployment thrusts a heavier burden on those who would deploy more often.

<sup>97</sup> RAND Study at 7.

<sup>98</sup> Id. at 10 (citing only to a California Department of Insurance report).

<sup>99</sup> Id.

<sup>100</sup> DoDI 6130.03 at 2.

Historically, absent a waiver, the Department has barred from accessing into the military anyone who had undergone chest or genital surgery (e.g., removal of the testicles or uterus) and anyone with a history of major abnormalities or defects of the chest or genitalia, including hermaphroditism and pseudohermaphroditism.<sup>101</sup> Persons with conditions requiring medications, such as anti-depressants and hormone treatment, were also disqualified from service, unless a waiver was granted.<sup>102</sup>

These standards have long applied uniformly to all persons, regardless of transgender status. The Carter policy, however, deviates from these uniform standards by exempting, under certain conditions, treatments associated with gender transition, such as sex reassignment surgery and cross-sex hormone therapy. For example, under the Carter policy, an applicant who has received genital reconstruction surgery may access without a waiver if a period of 18 months has elapsed since the date of the most recent surgery, no functional limitations or complications persist, and no additional surgery is required. In contrast, an applicant who received similar surgery following a traumatic injury is disqualified from military service without a waiver.<sup>103</sup> Similarly, under the Carter policy, an applicant who is presently receiving cross-sex hormone therapy post-gender transition may access without a waiver if the applicant has been stable on such hormones for 18 months. In contrast, an applicant taking synthetic hormones for the treatment of hypothyroidism is disqualified from military service without a waiver.<sup>104</sup>

### C. Sex-Based Standards

Women have made invaluable contributions to the defense of the Nation throughout our history. These contributions have only grown more significant as the number of women in the Armed Forces has increased and as their roles have expanded. Today, women account for 17.6% of the force,<sup>105</sup> and now every position, including combat arms positions, is open to them.

The vast majority of military standards make no distinctions between men and women. Where biological differences between males and females are relevant, however, military standards do differentiate between them. The Supreme Court has acknowledged the lawfulness of sex-based standards that flow from legitimate biological differences between the sexes.<sup>106</sup> These sex-based standards ensure fairness, equity, and safety; satisfy reasonable expectations of privacy; reflect common practice in society; and promote core military values of dignity and respect between men and women—all of which promote good order, discipline, steady leadership, unit cohesion, and ultimately military effectiveness and lethality.

<sup>101</sup> *Id.* at 25-27.

<sup>102</sup> *Id.* at 46-48.

<sup>103</sup> *Id.* at 26-27.

<sup>104</sup> *Id.* at 41.

<sup>105</sup> Defense Manpower Data Center, Active and Reserve Master Files (Dec. 2017).

<sup>106</sup> For example, in *United States v. Virginia*, the Court noted approvingly that “[a]dmitting women to [the Virginia Military Institute] would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs.” 518 U.S. 515, 550-51 n.19 (1996) (citing the statute that requires the same standards for women admitted to the service academies as for the men, “except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals”).



For example, anatomical differences between males and females, and the reasonable expectations of privacy that flow from those differences, at least partly account for the laws and regulations that require separate berthing, bathroom, and shower facilities and different drug testing procedures for males and females.<sup>107</sup> To maintain good order and discipline, Congress has even required by statute that the sleeping and latrine areas provided for “male” recruits be physically separated from the sleeping and latrine areas provided for “female” recruits during basic training and that access by drill sergeants and training personnel “after the end of the training day” be limited to persons of the “same sex as the recruits” to ensure “after-hours privacy for recruits during basic training.”<sup>108</sup>

In addition, physiological differences between males and females account for the different physical fitness and body fat standards that apply to men and women.<sup>109</sup> This ensures equity and fairness. Likewise, those same physiological differences also account for the policies that regulate competition between men and women in military training and sports, such as boxing and combatives.<sup>110</sup> This ensures protection from injury.

<sup>107</sup> See, e.g., Department of the Army, Training and Doctrine Command, TRADOC Regulation 350-6, “Enlisted Initial Entry Training Policies and Administration,” p. 56 (Mar. 20, 2017); Department of the Air Force, Air Force Instruction 32-6005, “Unaccompanied Housing Management,” p. 35 (Jan 29., 2016); Department of the Army, Human Resources Command, AR 600-85, “Substance Abuse Program” (Dec. 28, 2012) (“Observers must . . . [b]e the same gender as the Soldier being observed.”).

<sup>108</sup> See 10 U.S.C. § 4319 (Army), 10 U.S.C. § 6931 (Navy), and 10 U.S.C. § 9319 (Air Force) (requiring the sleeping and latrine areas provided for “male” recruits to be physically separated from the sleeping and latrine areas provided for “female” recruits during basic training); 10 U.S.C. § 4320 (Army), 10 U.S.C. § 6932 (Navy), and 10 U.S.C. § 9320 (Air Force) (requiring that access by drill sergeants and training personnel “after the end of the training day” be limited to persons of the “same sex as the recruits”).

<sup>109</sup> See, e.g., Department of the Army, Army Regulation 600-9, “The Army Body Composition Program,” pp. 21-31 (June 28, 2013); Department of the Navy, Office of the Chief of Naval Operations Instruction 6110.1J, “Physical Readiness Program,” p. 7 (July 11, 2011); Department of the Air Force, Air Force Instruction 36-2905, “Fitness Program,” pp. 86-95, 106-146 (Aug. 27, 2015); Department of the Navy, Marine Corps Order 6100.13, “Marine Corps Physical Fitness Program,” (Aug. 1, 2008); Department of the Navy, Marine Corps Order 6110.3A, “Marine Corps Body Composition and Military Appearance Program,” (Dec. 15, 2016); see also United States Military Academy, Office of the Commandant of Cadets, “Physical Program Whitebook AY 16-17,” p. 13 (specifying that, to graduate, cadets must meet the minimum performance standard of 3:30 for men and 5:29 for women on the Indoor Obstacle Course Test); Department of the Army, Training and Doctrine Command, TRADOC Regulation 350-6, “Enlisted Initial Entry Training Policies and Administration,” p. 56 (Mar. 20, 2017) (“Performance requirement differences, such as [Army Physical Fitness Test] scoring are based on physiological differences, and apply to the entire Army.”).

<sup>110</sup> See, e.g., Headquarters, Department of the Army, TC 3-25.150, “Combatives,” p. A-15 (Feb. 2017) (“Due to the physiological difference between the sexes and in order to treat all Soldiers fairly and conduct gender-neutral competitions, female competitors will be given a 15 percent overage at weigh-in.”); id. (“In championships at battalion-level and above, competitors are divided into eight weight class brackets. . . . These classes take into account weight and gender.”); Major Alex Bedard, Major Robert Peterson & Ray Barone, “Punching Through Barriers: Female Cadets Integrated into Mandatory Boxing at West Point,” *Association of the United States Army* (Nov. 16, 2017), <https://www.ausea.org/articles/punching-through-barriers-female-cadets-boxing-west-point> (noting that “[m]atching men and women according to weight may not adequately account for gender differences regarding striking force” and that “[w]hile conducting free sparring, cadets must box someone of the same gender”); RAND Study at 57 (noting that, under British military policy, transgender persons “can be excluded from sports that organize around gender to ensure the safety of the individual or other participants”); see also International Olympic Committee Consensus Meeting on Sex Reassignment and Hyperandrogensim (Nov. 2015), [https://stillmed.olympic.org/Documents/Commissions\\_PDFfiles/Medical\\_commission/2015-11\\_ioc\\_](https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_)

Uniform and grooming standards, to a certain extent, are also based on anatomical differences between males and females. Even those uniform and grooming standards that are not, strictly speaking, based on physical biology nevertheless flow from longstanding societal expectations regarding differences in attire and grooming for men and women.<sup>111</sup>

Because these sex-based standards are based on legitimate biological differences between males and females, it follows that a person's physical biology should dictate which standards apply. Standards designed for biological males logically apply to biological males, not biological females, and vice versa. When relevant, military practice has long adhered to this straightforward and logical demarcation.

By contrast, the Carter policy deviates from this longstanding practice by making military sex-based standards contingent, not necessarily on the person's biological sex, but on the person's gender marker in DEERS, which can be changed to reflect the person's gender identity.<sup>112</sup> Thus, under the Carter policy, a biological male who identifies as a female (and changes his gender marker to reflect that gender) must be held to the standards and regulations for females, even though those standards and regulations are based on female physical biology, not female gender identity. The same goes for females who identify as males. Gender identity alone, however, is irrelevant to standards that are designed on the basis of biological differences.

Rather than apply only to those transgender individuals who have altered their external biological characteristics to fully match that of their preferred gender, under the Carter policy, persons need not undergo sex reassignment surgery, or even cross-sex hormone therapy, in order to be recognized as, and thus subject to the standards associated with, their preferred gender. A male who identifies as female could remain a biological male in every respect and still must be treated in all respects as a female, including with respect to physical fitness, facilities, and uniform and grooming. This scenario is not farfetched. According to the APA, not "all individuals with gender dysphoria desire a complete gender reassignment. . . . Some are satisfied with no medical or surgical treatment but prefer to dress as the felt gender in public."<sup>113</sup> Currently, of the 424 approved Service member treatment plans, at least 36 do not include cross-

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consensus\_meeting\_on\_sex\_reassignment\_and\_hyperandrogenism-en.pdf; NCAA Office of Inclusion; NCAA Inclusion of Transgender Student-Athletes (Aug. 2011), [https://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf).

<sup>111</sup> "The difference between men's and women's grooming policies recognizes the difference between the sexes; sideburns for men, different hairstyles and cosmetics for women. Establishing identical grooming and personal appearance standards for men and women would not be in the Navy's best interest and is not a factor in the assurance of equal opportunity." Department of the Navy, Navy Personnel Command, Navy Personnel Instruction 156651, "Uniform Regulations," Art. 2101.1 (July 7, 2017); see also Department of the Army, Army Regulation 670-1, "Wear and Appearance of Army Uniforms and Insignia," pp. 4-16 (Mar. 31, 2014); Department of the Air Force, Air Force Instruction 26-2903, "Dress and Personal Appearance of Air Force Personnel," pp. 17-27 (Feb. 9, 2017); Department of the Navy, Marine Corps Order P1020.34G, "Marine Corps Uniform Regulations," pp. 1-9 (Mar. 31, 2003).

<sup>112</sup> Department of Defense Instruction 1300.28, *In-service Transition for Service Members Identifying as Transgender*, pp. 3-4 (June 30, 2016).

<sup>113</sup> American Psychiatric Association, "Expert Q & A: Gender Dysphoria," available at <https://www.psychiatry.org/patients-families/gender-dysphoria/expert-qa> (last visited Feb. 14, 2018).



sex hormone therapy or sex reassignment surgery.<sup>114</sup> And it is questionable how many Service members will obtain any type of sex reassignment surgery. According to a survey of transgender persons, only 25% reported having had some form of transition-related surgery.<sup>115</sup>

The variability and fluidity of gender transition undermine the legitimate purposes that justify different biologically-based, male-female standards. For example, by allowing a biological male who retains male anatomy to use female berthing, bathroom, and shower facilities, it undermines the reasonable expectations of privacy and dignity of female Service members. By allowing a biological male to meet the female physical fitness and body fat standards and to compete against females in gender-specific physical training and athletic competition, it undermines fairness (or perceptions of fairness) because males competing as females will likely score higher on the female test than on the male test and possibly compromise safety. By allowing a biological male to adhere to female uniform and grooming standards, it creates unfairness for other males who would also like to be exempted from male uniform and grooming standards as a means of expressing their own sense of identity.

These problems could perhaps be alleviated if a person's preferred gender were recognized only after the person underwent a biological transition. The concept of gender transition is so nebulous, however, that drawing any line—except perhaps at a full sex reassignment surgery—would be arbitrary, not to mention at odds with current medical practice, which allows for a wide range of individualized treatment. In any event, rates for genital surgery are exceedingly low—2% of transgender men and 10% of transgender women.<sup>116</sup> Only up to 25% of surveyed transgender persons report having had some form of transition-related surgery.<sup>117</sup> The RAND study estimated that such rates “are typically only around 20 percent, with the exception of chest surgery among female-to-male transgender individuals.”<sup>118</sup> Moreover, of the 424 approved Service member treatment plans available for study, 388 included cross-sex hormone treatment, but only 34 non-genital sex reassignment surgeries and one genital surgery have been completed thus far. Only 22 Service members have requested a waiver for a genital sex reassignment surgery.<sup>119</sup>

Low rates of full sex reassignment surgery and the otherwise wide variation of transition-related treatment, with all the challenges that entails for privacy, fairness, and safety, weigh in favor of maintaining a bright line based on biological sex—not gender identity or some variation thereof—in determining which sex-based standards apply to a given Service member. After all, a person's biological sex is generally ascertainable through objective means. Moreover, this approach will ensure that biologically-based standards will be applied uniformly to all Service members of the same biological sex. Standards that are clear, coherent, objective, consistent, predictable, and uniformly applied enhance good order, discipline, steady leadership, and unit cohesion, which in turn, ensure military effectiveness and lethality.

<sup>114</sup> Data reported by the Departments of the Army, Navy, and Air Force (Oct. 2017).

<sup>115</sup> *Id.*

<sup>116</sup> Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafī, *The Report of the 2015 U.S. Transgender Survey*, pp. 100-103 (National Center for Transgender Equality 2016) available at <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

<sup>117</sup> *Id.* at 100.

<sup>118</sup> RAND Study at 21.

<sup>119</sup> Defense Health Agency, Supplemental Health Care Program Data (Feb. 2018).

### New Transgender Policy

In light of the forgoing standards, all of which are necessary for military effectiveness and lethality, as well as the recommendations of the Panel of Experts, the Department, in consultation with the Department of Homeland Security, recommends the following policy:

A. Transgender Persons Without a History or Diagnosis of Gender Dysphoria. Who Are Otherwise Qualified for Service, May Serve, Like All Other Service Members, in Their Biological Sex.

Transgender persons who have not transitioned to another gender and do not have a history or current diagnosis of gender dysphoria—i.e., they identify as a gender other than their biological sex but do not currently experience distress or impairment of functioning in meeting the standards associated with their biological sex—are eligible for service, provided that they, like all other persons, satisfy all mental and physical health standards and are capable of adhering to the standards associated with their biological sex. This is consistent with the Carter policy, under which a transgender person's gender identity is recognized only if the person has a diagnosis or history of gender dysphoria.

Although the precise number is unknown, the Department recognizes that many transgender persons could be disqualified under this policy. And many transgender persons who would not be disqualified may nevertheless be unwilling to adhere to the standards associated with their biological sex. But many have served, and are serving, with great dedication under the standards for their biological sex. As noted earlier, 8,980 Service members reportedly identify as transgender, and yet there are currently only 937 active duty Service members who have been diagnosed with gender dysphoria since June 30, 2016.

B. Transgender Persons Who Require or Have Undergone Gender Transition Are Disqualified.

Except for those who are exempt under this policy, as described below in C.3, and except where waivers or exceptions to policy are otherwise authorized, persons who are diagnosed with gender dysphoria, either before or after entry into service, and require transition-related treatment, or have already transitioned to their preferred gender, should be disqualified from service. In the Department's military judgment, this is a necessary departure from the Carter policy for the following reasons:

1. *Undermines Readiness.* While transition-related treatments, including real life experience, cross-sex hormone therapy, and sex reassignment surgery, are widely accepted forms of treatment, there is considerable scientific uncertainty concerning whether these treatments fully remedy, even if they may reduce, the mental health problems associated with gender dysphoria. Despite whatever improvements in condition may result from these treatments, there is evidence that rates of psychiatric hospitalization and suicide behavior remain higher for persons with gender dysphoria, even after treatment, as compared to persons without gender dysphoria.<sup>120</sup> The persistence of these problems is a risk for readiness.

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<sup>120</sup> See *supra* at pp. 24-26.



Another readiness risk is the time required for transition-related treatment and the impact on deployability. Although limited and incomplete because many transitioning Service members either began treatment before the Carter policy took effect or did not require sex reassignment surgery, currently available in-service data already show that, cumulatively, transitioning Service members in the Army and Air Force have averaged 167 and 159 days of limited duty, respectively, over a one-year period.<sup>121</sup>

Transition-related treatment that involves cross-sex hormone therapy or sex reassignment surgery could render Service members with gender dysphoria non-deployable for a significant period of time—perhaps even a year—if the theater of operations cannot support the treatment. For example, Endocrine Society guidelines for cross-sex hormone therapy recommend quarterly bloodwork and laboratory monitoring of hormone levels during the first year of treatment.<sup>122</sup> Of the 424 approved Service member treatment plans available for study, almost all of them—91.5%—include the prescription of cross-sex hormones.<sup>123</sup> The period of potential non-deployability increases for those who undergo sex reassignment surgery. As described earlier, the recovery time for the various sex reassignment procedures is substantial. For non-genital surgeries (assuming no complications), the range of recovery is between two and eight weeks depending on the type of surgery, and for genital surgeries (again assuming no complications), the range is between three and six months before the individual is able to return to full duty.<sup>124</sup> When combined with 12 continuous months of hormone therapy, which is recommended prior to genital surgery,<sup>125</sup> the total time necessary for sex reassignment surgery could exceed a year. If the operational environment does not permit access to a lab for monitoring hormones (and there is certainly debate over how common this would be), then the Service member must be prepared to forego treatment, monitoring, or the deployment. Either outcome carries risks for readiness.

Given the limited data, however, it is difficult to predict with any precision the impact on readiness of allowing gender transition. Moreover, the input received by the Panel of Experts varied considerably. On one hand, some commanders with transgender Service members

<sup>121</sup> Data reported by the Departments of the Army and Air Force (Oct. 2017).

<sup>122</sup> Wylie C. Hembree, Peggy Cohen-Kettenis, Lous Gooren, Sabine Hannema, Walter Meyer, M. Hassan Murad, Stephen Rosenthal, Joshua Safer, Vin Tangpricha, & Guy T'Sjoen, "Endocrine Treatment of Gender-Dysphoric/Gender Incongruent Persons: An Endocrine Society Clinical Practice Guideline," *The Journal of Clinical Endocrinology & Metabolism*, Vol. 102, pp. 3869-3903 (Nov. 2017).

<sup>123</sup> Data reported by the Departments of the Army, Navy, and Air Force (Oct. 2017). Although the RAND study observed that British troops who are undergoing hormone therapy are generally able to deploy if the "hormone dose is steady and there are no major side effects," it nevertheless acknowledged that "deployment to all areas may not be possible, depending on the needs associated with any medication (e.g., refrigeration)." RAND Study at 59.

<sup>124</sup> For example, assuming no complications, the recovery time for a hysterectomy is up to eight weeks; a mastectomy is up to six weeks; a phalloplasty is up to three months; a metoidioplasty is up to 8 weeks; an orchiectomy is up to 6 weeks; and a vaginoplasty is up to three months. See University of California, San Francisco, Center of Excellence for Transgender Health, "Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People," available at <http://transhealth.ucsf.edu/trans?page=guidelines-home> (last visited Feb. 16, 2018); see also Discussion with Dr. Loren Schechter, Visiting Clinical Professor of Surgery, University of Illinois at Chicago (Nov. 9, 2017).

<sup>125</sup> RAND Study at 80; see also id. at 7; Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, p. 1184 (Oct. 2016) (noting that Endocrine Society criteria "require that the patient has been on continuous cross-sex hormones and has had continuous [real life experience] or psychotherapy for the past 12 months").



reported that, from the time of diagnosis to the completion of a transition plan, the transitioning Service members would be non-deployable for two to two-and-a-half years.<sup>126</sup> On the other band, some commanders, as well as transgender Service members themselves, reported that transition-related treatment is not a burden on unit readiness and could be managed to avoid interfering with deployments, with one commander even reporting that a transgender Service member with gender dysphoria under his command elected to postpone surgery in order to deploy.<sup>127</sup> This conclusion was echoed by some experts in endocrinology who found no harm in stopping or adjusting hormone therapy treatment to accommodate deployment during the first year of hormone use.<sup>128</sup> Of course, postponing treatment, especially during a combat deployment, has risks of its own insofar as the treatment is necessary to mitigate the clinically significant distress and impairment of functioning caused by gender dysphoria. After all, “when Service members deploy and then do not meet medical deployment fitness standards, there is risk for inadequate treatment within the operational theater, personal risk due to potential inability to perform combat required skills, and the potential to be sent home from the deployment and render the deployed unit with less manpower.”<sup>129</sup> In short, the periods of transition-related non-availability and the risks of deploying untreated Service members with gender dysphoria are uncertain, and that alone merits caution.

Moreover, most mental health conditions, as well as the medication used to treat them, limit Service members’ ability to deploy. Any DSM-5 psychiatric disorder with residual symptoms, or medication side effects, which impair social or occupational performance, require a waiver for the Service member to deploy.<sup>130</sup> The same is true for mental health conditions that pose a substantial risk for deterioration or recurrence in the deployed environment.<sup>131</sup> In managing mental health conditions while deployed, providers must consider the risk of exacerbation if the individual were exposed to trauma or severe operational stress. These determinations are difficult to make in the absence of evidence on the impact of deployment on individuals with gender dysphoria.<sup>132</sup>

The RAND study acknowledges that the inclusion of individuals with gender dysphoria in the force will have a negative impact on readiness. According to RAND, foreign militaries that allow service by personnel with gender dysphoria have found that it is sometimes necessary to restrict the deployment of transitioning individuals, including those receiving hormone therapy and surgery, to austere environments where their healthcare needs cannot be met.<sup>133</sup> Nevertheless, RAND concluded that the impact on readiness would be minimal—e.g., 0.0015% of available deployable labor-years across the active and reserve components—because of the

<sup>126</sup> Minutes, Transgender Review Panel (Oct. 13, 2017).

<sup>127</sup> *Id.*

<sup>128</sup> Minutes, Transgender Review Panel (Nov. 9, 2017).

<sup>129</sup> Institute for Defense Analyses, “Force Impact of Expanding the Recruitment of Individuals with Auditory Impairment,” pp. 60-61 (Apr. 2016).

<sup>130</sup> Modification Thirteen to U.S. Central Command Individual Protection and Individual, Unit Deployment Policy, Tab A, p. 8 (Mar. 2017).

<sup>131</sup> *Id.*

<sup>132</sup> See generally Memorandum from the Assistant Secretary of Defense for Health Affairs, “Clinical Practice Guidance for Deployment-Limiting Mental Disorders and Psychotropic Medications,” pp. 2-4 (Oct. 7, 2013).

<sup>133</sup> RAND Study at 40.

exceedingly small number of transgender Service members who would seek transition-related treatment.<sup>134</sup> Even then, RAND admitted that the information it cited “must be interpreted with caution” because “much of the current research on transgender prevalence and medical treatment rates relies on self-reported, nonrepresentative samples.”<sup>135</sup> Nevertheless, by RAND’s standard, the readiness impact of many medical conditions that the Department has determined to be disqualifying—from bipolar disorder to schizophrenia—would be minimal because they, too, exist only in relatively small numbers.<sup>136</sup> And yet that is no reason to allow persons with those conditions to serve.

The issue is not whether the military can absorb periods of non-deployability in a small population; rather, it is whether an individual with a particular condition can meet the standards for military duty and, if not, whether the condition can be remedied through treatment that renders the person non-deployable for as little time as possible. As the Department has noted before: “[W]here the operational requirements are growing faster than available resources,” it is imperative that the force “be manned with Service members capable of meeting all mission demands. The Services require that every Service member contribute to full mission readiness, regardless of occupation. In other words, the Services require all Service members to be able to engage in core military tasks, including the ability to deploy rapidly, without impediment or encumbrance.”<sup>137</sup> Moreover, the Department must be mindful that “an increase in the number of non-deployable military personnel places undue risk and personal burden on Service members qualified and eligible to deploy, and negatively impacts mission readiness.”<sup>138</sup> Further, the Department must be attuned to the impact that high numbers of non-deployable military personnel places on families whose Service members deploy more often to backfill or compensate for non-deployable persons.

In sum, the available information indicates that there is inconclusive scientific evidence that the serious problems associated with gender dysphoria can be fully remedied through transition-related treatment and that, even if it could, most persons requiring transition-related treatment could be non-deployable for a potentially significant amount of time. By this metric, Service members with gender dysphoria who need transition-related care present a significant challenge for unit readiness.

2. *Incompatible with Sex-Based Standards.* As discussed in detail earlier, military personnel policy and practice has long maintained a clear line between men and women where their biological differences are relevant with respect to physical fitness and body fat standards; berthing, bathroom, and shower facilities; and uniform and grooming standards. This line promotes good order and discipline, steady leadership, unit cohesion, and ultimately military

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<sup>134</sup> Id. at 42.

<sup>135</sup> Id. at 39.

<sup>136</sup> According to the National Institute of Mental Health, 2.8% of U.S. adults experienced bipolar disorder in the past year, and 4.4% have experienced the condition at some time in their lives. National Institute of Mental Health, “Bipolar Disorder” (Nov. 2017) <https://www.nimh.nih.gov/health/statistics/bipolar-disorder.shtml>. The prevalence of schizophrenia is less than 1%. National Institute of Mental Health, “Schizophrenia” (Nov. 2017) <https://www.nimh.nih.gov/health/statistics/schizophrenia.shtml>.

<sup>137</sup> Under Secretary of Defense for Personnel and Readiness, “Fiscal Year 2016 Report to Congress on the Review of Enlistment of Individuals with Disabilities in the Armed Forces,” p. 9 (Apr. 2016).

<sup>138</sup> Id. at 10.



effectiveness and lethality because it ensures fairness, equity, and safety; satisfies reasonable expectations of privacy; reflects common practice in the society from which we recruit; and promotes core military values of dignity and respect between men and women. To exempt Service members from the uniform, biologically-based standards applicable to their biological sex on account of their gender identity would be incompatible with this line and undermine the objectives such standards are designed to serve.

First, a policy that permits a change of gender without requiring any biological changes risks creating unfairness, or perceptions thereof, that could adversely affect unit cohesion and good order and discipline. It could be perceived as discriminatory to apply different biologically-based standards to persons of the same biological sex based on gender identity, which is irrelevant to standards grounded in physical biology. For example, it unfairly discriminates against biological males who identify as male and are held to male standards to allow biological males who identify as female to be held to female standards, especially where the transgender female retains many of the biological characteristics and capabilities of a male. It is important to note here that the Carter policy does not require a transgender person to undergo any biological transition in order to be treated in all respects in accordance with the person's preferred gender. Therefore, a biological male who identifies as female could remain a biological male in every respect and still be governed by female standards. Not only would this result in perceived unfairness by biological males who identify as male, it would also result in perceived unfairness by biological females who identify as female. Biological females who may be required to compete against such transgender females in training and athletic competition would potentially be disadvantaged.<sup>139</sup> Even more importantly, in physically violent training and competition, such as boxing and combatives, pitting biological females against biological males who identify as female, and vice versa, could present a serious safety risk as well.<sup>140</sup>

This concern may seem trivial to those unfamiliar with military culture. But vigorous competition, especially physical competition, is central to the military life and is indispensable to the training and preparation of warriors. Nothing encapsulates this more poignantly than the words of General Douglas MacArthur when he was superintendent of the U.S. Military Academy and which are now engraved above the gymnasium at West Point: "Upon the fields of friendly

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<sup>139</sup> See *supra* note 109. Both the International Olympic Committee (IOC) and the National Collegiate Athletic Association (NCAA) have attempted to mitigate this problem in their policies regarding transgender athletes. For example, the IOC requires athletes who transition from male to female to demonstrate certain suppressed levels of testosterone to minimize any advantage in women's competition. Similarly, the NCAA prohibits an athlete who has transitioned from male to female from competing on a women's team without changing the team status to a mixed gender team. While similar policies could be employed by the Department, it is unrealistic to expect the Department to subject transgender Service members to routine hormone testing prior to biannual fitness testing, athletic competition, or training simply to mitigate real and perceived unfairness or potential safety concerns. See, e.g., International Olympic Committee Consensus Meeting on Sex Reassignment and Hyperandrogenism (Nov. 2015), [https://stillmed.olympic.org/Documents/Commissions\\_PDFfiles/Medical\\_commission/2015-11\\_ioc\\_consensus\\_meeting\\_on\\_sex\\_reassignment\\_and\\_hyperandrogenism-en.pdf](https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf); NCAA Office of Inclusion, NCAA Inclusion of Transgender Student-Athletes (Aug. 2011), [https://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf).

<sup>140</sup> See *supra* note 109.

strife are sown the seeds that, upon other fields, on other days will bear the fruits of victory.”<sup>141</sup> Especially in combat units and in training, including the Service academies, ROTC, and other commissioning sources, Service members are graded and judged in significant measure based upon their physical aptitude, which is only fitting given that combat remains a physical endeavor.

Second, a policy that accommodates gender transition without requiring full sex reassignment surgery could also erode reasonable expectations of privacy that are important in maintaining unit cohesion, as well as good order and discipline. Given the unique nature of military service, Service members of the same biological sex are often required to live in extremely close proximity to one another when sleeping, undressing, showering, and using the bathroom. Because of reasonable expectations of privacy, the military has long maintained separate berthing, bathroom, and shower facilities for men and women while in garrison. In the context of recruit training, this separation is even mandated by Congress.<sup>142</sup>

Allowing transgender persons who have not undergone a full sex reassignment, and thus retain at least some of the anatomy of their biological sex, to use the facilities of their identified gender would invade the expectations of privacy that the strict male-female demarcation in berthing, bathroom, and shower facilities is meant to serve. At the same time, requiring transgender persons who have developed, even if only partially, the anatomy of their identified gender to use the facilities of their biological sex could invade the privacy of the transgender person. Without separate facilities for transgender persons or other mitigating accommodations, which may be unpalatable to transgender individuals and logistically impracticable for the Department, the privacy interests of biological males and females and transgender persons could be anticipated to result in irreconcilable situations. Lieutenants, Sergeants, and Petty Officers charged with carrying out their units’ assigned combat missions should not be burdened by a change in eligibility requirements disconnected from military life under austere conditions.

The best illustration of this irreconcilability is the report of one commander who was confronted with dueling equal opportunity complaints—one from a transgender female (i.e., a biological male with male genitalia who identified as female) and the other from biological females. The transgender female Service member was granted an exception to policy that allowed the Service member to live as a female, which included giving the Service member access to female shower facilities. This led to an equal opportunity complaint from biological females in the unit who believed that granting a biological male, even one who identified as a female, access to their showers violated their privacy. The transgender Service member responded with an equal opportunity complaint claiming that the command was not sufficiently supportive of the rights of transgender persons.<sup>143</sup>

The collision of interests discussed above are a direct threat to unit cohesion and will inevitably result in greater leadership challenges without clear solutions. Leaders at all levels

<sup>141</sup> Douglas MacArthur, *Respectfully Quoted: A Dictionary of Quotations* (1989), available at <http://www.bartleby.com/73/1874.html>.

<sup>142</sup> See *supra* note 108.

<sup>143</sup> Minutes, Transgender Review Panel (Oct. 13, 2017). Limited data exists regarding the performance of transgender Service members due to policy restrictions in Department of Defense 1300.28, *In-Service Transition for Transgender Service Members* (Oct. 1, 2016), that prevent the Department from tracking individuals who may identify as transgender as a potentially unwarranted invasion of personal privacy.



already face immense challenges in building cohesive military units. Blurring the line that differentiates the standards and policies applicable to men and women will only exacerbate those challenges and divert valuable time and energy from military tasks.

The unique leadership challenges arising from gender transition are evident in the Department's handbook implementing the Carter policy. The handbook provides guidance on various scenarios that commanders may face. One such scenario concerns the use of shower facilities: "A transgender Service member has expressed privacy concerns regarding the open bay shower configuration. Similarly, several other non-transgender Service members have expressed discomfort when showering in these facilities with individuals who have different genitalia." As possible solutions, the handbook offers that the commander could modify the shower facility to provide privacy or, if that is not feasible, adjust the timing of showers. Another scenario involves proper attire during a swim test: "It is the semi-annual swim test and a female to male transgender Service member who has fully transitioned, but did not undergo surgical change, would like to wear a male swimsuit for the test with no shirt or other top coverage." The extent of the handbook's guidance is to advise commanders that "[i]t is within [their] discretion to take measures ensuring good order and discipline," that they should "counsel the individual and address the unit, if additional options (e.g., requiring all personnel to wear shirts) are being considered," and that they should consult the Service Central Coordination Cell, a help line for commanders in need of advice.

These vignettes illustrate the significant effort required of commanders to solve challenging problems posed by the implementation of the current transgender service policies. The potential for discord in the unit during the routine execution of daily activities is substantial and highlights the fundamental incompatibility of the Department's legitimate military interest in uniformity, the privacy interests of all Service members, and the interest of transgender individuals in an appropriate accommodation. Faced with these conflicting interests, commanders are often forced to devote time and resources to resolve issues not present outside of military service. A failure to act quickly can degrade an otherwise highly functioning team, as will failing to seek appropriate counsel and implementing a faulty solution. The appearance of unsteady or seemingly unresponsive leadership to Service member concerns erodes the trust that is essential to unit cohesion and good order and discipline.

The RAND study does not meaningfully address how accommodations for gender transition would impact perceptions of fairness and equity, expectations of privacy, and safety during training and athletic competition and how these factors in turn affect unit cohesion. Instead, the RAND study largely dismisses concerns about the impact on unit cohesion by pointing to the experience of four countries that allow transgender service—Australia, Canada, Israel, and the United Kingdom.<sup>144</sup> Although the vast majority of armed forces around the world do not permit or have policies on transgender service, RAND noted that 18 militaries do, but only four have well-developed and publicly available policies.<sup>145</sup> RAND concluded that "the available research revealed no significant effect on cohesion, operational effectiveness, or

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<sup>144</sup> RAND Study at 45.

<sup>145</sup> Id. at 50.

readiness.”<sup>146</sup> It reached this conclusion, however, despite noting reports of resistance in the ranks, which is a strong indication of an adverse effect on unit cohesion.<sup>147</sup> Nevertheless, RAND acknowledged that the available data was “limited” and that the small number of transgender personnel may account for “the limited effect on operational readiness and cohesion.”<sup>148</sup>

Perhaps more importantly, however, the RAND study mischaracterizes or overstates the reports upon which it rests its conclusions. For example, the RAND study cites *Gays in Foreign Militaries 2010: A Global Primer* by Nathaniel Frank as support for the conclusions that there is no evidence that transgender service has had an adverse effect on cohesion, operational effectiveness, or readiness in the militaries of Australia and the United Kingdom and that diversity has actually led to increases in readiness and performance.<sup>149</sup> But that particular study has nothing to do with examining the service of transgender persons; rather, it is about the integration of homosexual persons into the military.<sup>150</sup>

With respect to transgender service in the Israeli military, the RAND study points to an unpublished paper by Anne Speckhard and Reuven Paz entitled *Transgender Service in the Israeli Defense Forces: A Polar Opposite Stance to the U.S. Military Policy of Barring Transgender Soldiers from Service*. The RAND study cites this paper for the proposition that “there has been no reported effect on cohesion or readiness” in the Israeli military and “there is no evidence of any impact on operational effectiveness.”<sup>151</sup> These sweeping and categorical claims, however, are based only on “six in-depth interviews of experts on the subject both inside and outside the [Israeli Defense Forces (IDF)]: two in the IDF leadership—including the spokesman’s office; two transgender individuals who served in the IDF, and two professionals who serve transgender clientele—before, during and after their IDF service.”<sup>152</sup> As the RAND report observed, however: “There do appear to be some limitations on the assignment of transgender personnel, particularly in combat units. Because of the austere living conditions in these types of units, necessary accommodations may not be available for Service members in the midst of a gender transition. As a result, transitioning individuals are typically not assigned to combat units.”<sup>153</sup> In addition, as the RAND study notes, under the Israeli policy at the time, “assignment of housing, restrooms, and showers is typically linked to the birth gender, which does not change in the military system until after gender reassignment surgery.”<sup>154</sup> Therefore, insofar as a Service member’s change of gender is not recognized until after sex reassignment

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<sup>146</sup> Id. at 45.

<sup>147</sup> Id.

<sup>148</sup> Id.

<sup>149</sup> Id.

<sup>150</sup> Nathaniel Frank, “Gays in Foreign Militaries 2010: A Global Primer,” p. 6 *The Palm Center* (Feb. 2010), <https://www.palmcenter.org/wpcontent/uploads/2017/12/FOREIGNMILITARIESPRIMER2010FINAL.pdf>

(“This study seeks to answer some of the questions that have been, and will continue to be, raised surrounding the instructive lessons from other nations that have lifted their bans on openly gay service.”).

<sup>151</sup> Rand Study at 45.

<sup>152</sup> Anne Speckhard & Reuven Paz, “Transgender Service in the Israeli Defense Forces: A Polar Opposite Stance to the U.S. Military Policy of Barring Transgender Soldiers from Service,” p. 3 (2014), <http://www.researchgate.net/publication/280093066>.

<sup>153</sup> RAND Study at 56.

<sup>154</sup> Id. at 55.



surgery, the Israeli policy—and whatever claims about its impact on cohesion, readiness, and operational effectiveness—are distinguishable from the Carter policy.

Finally, the RAND study cites to a journal article on the Canadian military experience entitled *Gender Identity in the Canadian Forces: A Review of Possible Impacts on Operational Effectiveness* by Alan Okros and Denise Scott. According to RAND, the authors of this article “found no evidence of any effect on unit or overall cohesion.”<sup>155</sup> But the article not only fails to support the RAND study’s conclusions (not to mention the article’s own conclusions), but it confirms the concerns that animate the Department’s recommendations. The article acknowledges, for example, the difficulty commanders face in managing the competing interests at play:

Commanders told us that the new policy fails to provide sufficient guidance as to how to weigh priorities among competing objectives during their subordinates’ transition processes. Although they endorsed the need to consult transitioning Service members, they recognized that as commanding officers, they would be called on to balance competing requirements. They saw the primary challenge to involve meeting trans individual’s expectations for reasonable accommodation and individual privacy while avoiding creating conditions that place extra burdens on others or undermined the overall team effectiveness. To do so, they said that they require additional guidance on a range of issues including clothing, communal showers, and shipboard bunking and messing arrangements.<sup>156</sup>

Notwithstanding its optimistic conclusions, the article also documents serious problems with unit cohesion. The authors observe, for instance, that the chain of command “has not fully earned the trust of the transgender personnel,” and that even though some transgender Service members do trust the chain of command, others “expressed little confidence in the system,” including one who said, “I just don’t think it works that well.”<sup>157</sup>

In sum, although the foregoing considerations are not susceptible to quantification, undermining the clear sex-differentiated lines with respect to physical fitness; berthing, bathroom, and shower facilities; and uniform and grooming standards, which have served all branches of Service well to date, risks unnecessarily adding to the challenges faced by leaders at all levels, potentially fraying unit cohesion, and threatening good order and discipline. The Department acknowledges that there are serious differences of opinion on this subject, even among military professionals, including among some who provided input to the Panel of Experts,<sup>158</sup> but given the vital interests at stake—the survivability of Service members, including

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<sup>155</sup> Id. at 45.

<sup>156</sup> Alan Okros & Denise Scott, “Gender Identity in the Canadian Forces,” *Armed Forces and Society* Vol. 41, p. 8 (2014).

<sup>157</sup> Id. at 9.

<sup>158</sup> While differences of opinion do exist, it bears noting that, according to a Military Times/Syracuse University’s Institute for Veterans and Military Families poll, 41% of active duty Service members polled thought that allowing gender transition would hurt their unit’s readiness, and only 12% thought it would be beneficial. Overall, 57% had a negative opinion of the Carter policy. Leo Shane III, “Poll: Active-duty troops worry about military’s transgender



transgender persons, in combat and the military effectiveness and lethality of our forces—it is prudent to proceed with caution, especially in light of the inconclusive scientific evidence that transition-related treatment restores persons with gender dysphoria to full mental health.

3. *Imposes Disproportionate Costs.* Transition-related treatment is also proving to be disproportionately costly on a per capita basis, especially in light of the absence of solid scientific support for the efficacy of such treatment. Since implementation of the Carter policy, the medical costs for Service members with gender dysphoria have increased nearly three times—or 300%—compared to Service members without gender dysphoria.<sup>159</sup> And this increase is despite the low number of costly sex reassignment surgeries that have been performed so far.<sup>160</sup> As noted earlier, only 34 non-genital sex reassignment surgeries and one genital surgery have been completed,<sup>161</sup> with an additional 22 Service members requesting a waiver for genital surgery.<sup>162</sup> We can expect the cost disparity to grow as more Service members diagnosed with gender dysphoria avail themselves of surgical treatment. As many as 77% of the 424 Service member treatment plans available for review include requests for transition-related surgery, although it remains to be seen how many will ultimately obtain surgeries.<sup>163</sup> In addition, several commanders reported to the Panel of Experts that transition-related treatment for Service members with gender dysphoria in their units had a negative budgetary impact because they had to use operations and maintenance funds to pay for the Service members' extensive travel throughout the United States to obtain specialized medical care.<sup>164</sup>

Taken together, the foregoing concerns demonstrate why recognizing and making accommodations for gender transition are not conducive to, and would likely undermine, the inputs—readiness, good order and discipline, sound leadership, and unit cohesion—that are essential to military effectiveness and lethality. Therefore, it is the Department's professional military judgment that persons who have been diagnosed with, or have a history of, gender dysphoria and require, or have already undergone, a gender transition generally should not be eligible for accession or retention in the Armed Forces absent a waiver.

### C. Transgender Persons With a History or Diagnosis of Gender Dysphoria Are Disqualified, Except Under Certain Limited Circumstances.

policies," *Military Times* (July 27, 2017) available at <https://www.militarytimes.com/news/pentagon-congress/2017/07/27/poll-active-duty-troops-worry-about-militarys-transgender-policies/>.

<sup>159</sup> Minutes, Transgender Review Panel (Nov. 21, 2017).

<sup>160</sup> Minutes, Transgender Review Panel (Nov. 2, 2017).

<sup>161</sup> Data retrieved from Military Health System Data Repository (Nov. 2017).

<sup>162</sup> Defense Health Agency Data (as of Feb. 2018).

<sup>163</sup> Data reported by the Departments of the Army, Navy, and Air Force (Oct. 2017).

<sup>164</sup> Minutes, Transgender Review Panel (Oct. 13, 2017); see also Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, p. 1185 (Oct. 2016) ("As previously discussed, a new diagnosis of gender dysphoria and the decision to proceed with gender transition requires frequent evaluations by the [mental health professional] and endocrinologist. However, most [military treatment facilities] lack one or both of these specialty services. Members who are not in proximity to [military treatment facilities] may have significant commutes to reach their required specialty care. Members stationed in more remote locations face even greater challenges of gaining access to military or civilian specialists within a reasonable distance from their duty stations.").

As explained earlier in greater detail, persons with gender dysphoria experience significant distress and impairment in social, occupational, or other important areas of functioning. Gender dysphoria is also accompanied by extremely high rates of suicidal ideation and other comorbidities. Therefore, to ensure unit safety and mission readiness, which is essential to military effectiveness and lethality, persons who are diagnosed with, or have a history of, gender dysphoria are generally disqualified from accession or retention in the Armed Forces. The standards recommended here are subject to the same procedures for waiver as any other standards. This is consistent with the Department's handling of other mental conditions that require treatment. As a general matter, only in the limited circumstances described below should persons with a history or diagnosis of gender dysphoria be accessed or retained.

1. *Accession of Individuals Diagnosed with Gender Dysphoria.* Given the documented fluctuations in gender identity among children, a history of gender dysphoria should not alone disqualify an applicant seeking to access into the Armed Forces. According to the DSM-5, the persistence of gender dysphoria in biological male children "has ranged from 2.2% to 30%," and the persistence of gender dysphoria in biological female children "has ranged from 12% to 50%."<sup>165</sup> Accordingly, persons with a history of gender dysphoria may access into the Armed Forces, provided that they can demonstrate 36 consecutive months of stability—i.e., absence of gender dysphoria—immediately preceding their application; they have not transitioned to the opposite gender; and they are willing and able to adhere to all standards associated with their biological sex. The 36-month stability period is the same standard the Department currently applies to persons with a history of depressive disorder. The Carter policy's 18-month stability period for gender dysphoria, by contrast, has no analog with respect to any other mental condition listed in DoDI 6130.03.

2. *Retention of Service Members Diagnosed with Gender Dysphoria.* Retention standards are typically less stringent than accession standards due to training provided and on-the-job performance data. While accession standards endeavor to predict whether a given applicant will require treatment, hospitalization, or eventual separation from service for medical unfitness, and thus tend to be more cautious, retention standards focus squarely on whether the Service member, despite his or her condition, can continue to do the job. This reflects the Department's desire to retain, as far as possible, the Service members in which it has made substantial investments and to avoid the cost of finding and training a replacement. To use an example outside of the mental health context, high blood pressure does not meet accession standards, even if it can be managed with medication, but it can meet retention standards so long as it can be managed with medication. Regardless, however, once they have completed treatment, Service members must continue to meet the standards that apply to them in order to be retained. Therefore, Service members who are diagnosed with gender dysphoria after entering military service may be retained without waiver, provided that they are willing and able to adhere to all standards associated with their biological sex, the Service member does not require gender transition, and the Service member is not otherwise non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months).<sup>166</sup>

<sup>165</sup> DSM-5 at 455.

<sup>166</sup> Under Secretary of Defense for Personnel and Readiness, "DoD Retention Policy for Non-Deployable Service Members" (Feb. 14, 2018).

3. *Exempting Current Service Members Who Have Already Received a Diagnosis of Gender Dysphoria.* The Department is mindful of the transgender Service members who were diagnosed with gender dysphoria and either entered or remained in service following the announcement of the Carter policy and the court orders requiring transgender accession and retention. The reasonable expectation of these Service members that the Department would honor their service on the terms that then existed cannot be dismissed. Therefore, transgender Service members who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy, may continue to receive all medically necessary treatment, to change their gender marker in DEERS, and to serve in their preferred gender, even after the new policy commences. This includes transgender Service members who entered into military service after January 1, 2018, when the Carter accession policy took effect by court order. The Service member must, however, adhere to the procedures set forth in DoDI 1300.28, and may not be deemed to be non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months). While the Department believes that its commitment to these Service members, including the substantial investment it has made in them, outweigh the risks identified in this report, should its decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption instead is and should be deemed severable from the rest of the policy.



### Conclusion

In making these recommendations, the Department is well aware that military leadership from the prior administration, along with RAND, reached a different judgment on these issues. But as the forgoing analysis demonstrates, the realities associated with service by transgender individuals are more complicated than the prior administration or RAND had assumed. In fact, the RAND study itself repeatedly emphasized the lack of quality data on these issues and qualified its conclusions accordingly. In addition, that study concluded that allowing gender transition would impede readiness, limit deployability, and burden the military with additional costs. In its view, however, such harms were negligible in light of the small size of the transgender population. But especially in light of the various sources of uncertainty in this area, and informed by the data collected since the Carter policy took effect, the Department is not convinced that these risks could be responsibly dismissed or that even negligible harms should be incurred given the Department's grave responsibility to fight and win the Nation's wars in a manner that maximizes the effectiveness, lethality, and survivability of our most precious assets—our Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen.

Accordingly, the Department weighed the risks associated with maintaining the Carter policy against the costs of adopting a new policy that was less risk-favoring in developing these recommendations. It is the Department's view that the various balances struck by the recommendations above provide the best solution currently available, especially in light of the significant uncertainty in this area. Although military leadership from the prior administration reached a different conclusion, the Department's professional military judgment is that the risks associated with maintaining the Carter policy—risks that are continuing to be better understood as new data become available—counsel in favor of the recommended approach.

**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

Add.107



ensure the continued combat readiness of the force until our final policy on this subject is issued.

## 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:

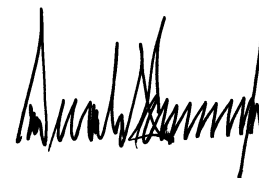
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(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

Case 2:17-cv-01297-MJP Document 149-1 Filed 01/25/18 Page 2 of 2

**Donald J. Trump**  @realDonaldTrump · 4h 

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

 39K  25K  73K 

**Donald J. Trump**  @realDonaldTrump · 4h 

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

 24K  27K  71K 

**Donald J. Trump**  @realDonaldTrump · 4h 

After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow.....

 14K  26K  66K 



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

JUN 30 2017

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS  
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Accession of Transgender Individuals into the Military Services

Since becoming the Secretary of Defense, I have emphasized that the Department of Defense must measure each policy decision against one critical standard: will the decision affect the readiness and lethality of our armed forces? Put another way, how will the decision affect the ability of America's military forces to defend the Nation? It is against this standard that I provide the following guidance on the way forward in accessing transgender individuals into the military Services.

Under existing DoD policy, such accessions were anticipated to begin on July 1, 2017. The Deputy Secretary directed the Services to assess their readiness to begin accessions. Building upon that work and after consulting with the Service Chiefs and Secretaries, I have determined that it is necessary to defer the start of accessions for six months. We will use this additional time to evaluate more carefully the impact of such accessions on readiness and lethality. This review will include all relevant considerations.

My intent is to ensure that I personally have the benefit of the views of the military leadership and of the senior civilian officials who are now arriving in the Department. This action in no way presupposes the outcome of the review, nor does it change policies and procedures currently in effect under DoD Instruction 1300.28, "In-Service Transition for Transgender Service Members." I am confident we will continue to treat all Service members with dignity and respect.

The Under Secretary of Defense for Personnel and Readiness will lead this review and will report the results to me not later than December 1, 2017.

A handwritten signature in black ink, which appears to read "John Mattis", is located at the bottom right of the page.



IMMEDIATE RELEASE

# Statement by Chief Pentagon Spokesperson Dana W. White on Transgender Accessions

Press Operations

Release No: NR-250-17

June 30, 2017

Secretary Mattis today approved a recommendation by the services to defer accessing transgender applicants into the military until Jan. 1, 2018.

The services will review their accession plans and provide input on the impact to the readiness and lethality of our forces.



## DoD INSTRUCTION 1300.28

### IN-SERVICE TRANSITION FOR TRANSGENDER SERVICE MEMBERS

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**Originating Component:** Office of the Under Secretary of Defense for Personnel and Readiness

**Effective:** October 1, 2016

**Releasability:** Cleared for public release. Available on the DoD Issuances Website at <http://www.dtic.mil/whs/directives>.

**Cancels:** Secretary of Defense Memorandum, "Transgender Service Members," July 28, 2015

**Approved by:** Ashton Carter, Secretary of Defense

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**Purpose:** This issuance:

- Establishes a construct by which transgender Service members may transition gender while serving.
- Enumerates prerequisites and prescribes procedures for changing a Service member's gender marker in the Defense Enrollment Eligibility Reporting System (DEERS).
- Specifies medical treatment provisions for Active Component (AC) and Reserve Component (RC) transgender Service members.
- Implements the policies and procedures in Directive-type Memorandum 16-005.

DoDI 1300.28, June 30, 2016

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DoDI 1300.28, June 30, 2016

## SECTION 1: GENERAL ISSUANCE INFORMATION

**1.1. APPLICABILITY.** This issuance applies to OSD, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security, by agreement with that Department, and in all regards, except as to the requirement to submit issuances implementing this issuance to the Office of the Under Secretary of Defense for Personnel and Readiness 30 days in advance of publication in accordance with Paragraphs 2.1c and 2.2e), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.

### 1.2. POLICY.

a. DoD and the Military Departments will institute policies to provide Service members a process by which, while serving, they may transition gender. These policies are premised on the conclusion that open service by transgender persons who are subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming standards, deployability, and retention, is consistent with military service and readiness.

b. The Military Departments and Services recognize a Service member's gender by the member's gender marker in the DEERS. Coincident with that gender marker, the Services apply, and the member is responsible to meet, all standards for uniforms and grooming; body composition assessment (BCA); physical readiness testing (PRT); Military Personnel Drug Abuse Testing Program (MPDATP) participation; and other military standards applied with consideration of the member's gender. As to facilities subject to regulation by the military, the Service member will use those berthing, bathroom, and shower facilities associated with the member's gender marker in DEERS.

c. Service members with a diagnosis from a military medical provider indicating that gender transition is medically necessary, will be provided medical care and treatment for the diagnosed medical condition. Recommendations of a military medical provider will address the severity of the Service member's medical condition and the urgency of any proposed medical treatment. Medical advice to commanders will be provided in a manner consistent with processes used for other medical conditions that may limit the Service member's performance of official duties.

d. Any medical care and treatment provided to an individual Service member in the process of gender transition will be provided in the same manner as other medical care and treatment. Nothing in this issuance will be construed to authorize a commander to deny medically necessary treatment to a Service member.

e. Any determination that a transgender Service member is non-deployable at any time will be consistent with established Military Department and Service standards, as applied to other Service members whose deployability is similarly affected in comparable circumstances unrelated to gender transition.

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f. Commanders will assess expected impacts on mission and readiness after consideration of the advice of military medical providers and will address such impacts in accordance with this issuance. In applying the tools described in this issuance, a commander will not accommodate biases against transgender individuals. If a Service member is unable to meet standards or requires an exception to policy (ETP) during a period of gender transition, all applicable tools, including the tools described in this issuance, will be available to commanders to minimize impacts to the mission and unit readiness.

g. When the military medical provider determines that a Service member's gender transition is complete, and at a time approved by the commander in consultation with the transgender Service member, the member's gender marker will be changed in DEERS and the Service member will be recognized in the preferred gender.



*DoDI 1300.28, June 30, 2016*

## **SECTION 2: RESPONSIBILITIES**

### **2.1. UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS (USD(P&R)).** The USD(P&R):

- a. Updates existing DoD issuances, or promulgate new issuances, as appropriate, in accordance with the provisions of this issuance.
- b. Expeditiously develops and promulgates education and training materials to provide relevant, useful information for transgender Service members, commanders, military medical providers, and the force.
- c. Ensures that the text of proposed revisions to existing Military Department and Service regulations, policies, and guidance, and of any proposed new Military Department and Service issuance, is consistent with this issuance.
- d. Issues guidance to the Military Departments, establishing the prerequisites and procedures for changing a Service member's gender marker in DEERS.

### **2.2. SECRETARIES OF THE MILITARY DEPARTMENTS AND COMMANDANT, UNITED STATES COAST GUARD (USCG).** The Secretaries of the Military Departments and the Commandant, USCG:

- a. Adhere to all provisions of this issuance.
- b. Administer their respective programs, and update existing Military Department regulations, policies, and guidance, or promulgate new issuances, as appropriate, in accordance with the provisions of this issuance.
- c. Establish a Service Central Coordination Cell (SCCC) to provide multi-disciplinary (e.g., medical, legal, military personnel management) expert advice and assistance to commanders with regard to service by transgender Service members and gender transition in the military and to assist commanders in the execution of DoD, Military Department, and Service policies and procedures.
- d. Educate their AC and RC forces to ensure appropriate understanding of the policies and procedures pertaining to gender transition in the military.
- e. Submit to the USD(P&R) the text of any proposed revision to existing Military Department and Service regulations, policies, and guidance, and of any proposed new issuance, not later than 30 days in advance of the proposed publication date.
- f. Ensure the protection of personally identifiable information (PII) and personal privacy considerations in the implementation of this issuance and Military Department and Service regulations, policies, and guidance.

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g. Implement processes for the assessment and oversight of compliance with DoD, Military Department, and Service policies and procedures applicable to service by transgender persons, in accordance with Paragraph 3.8 of this issuance.

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## SECTION 3: GENDER TRANSITION

**3.1. SPECIAL MILITARY CONSIDERATIONS.** Gender transition while serving in the military presents unique challenges associated with addressing the needs of the Service member in a manner consistent with military mission and readiness. Where possible, gender transition should be conducted such that a Service member would meet all applicable standards and be available for duty in the birth gender prior to a change in the member's gender marker in DEERS and would meet all applicable standards and be available for duty in the preferred gender after the change in gender marker. Recognizing, however, that every transition is unique, the policies and procedures set forth herein provide flexibility to the Military Departments, Services, and commanders, in addressing transitions that may or may not follow this construct. These policies and procedures are applicable, in whole or in relevant part, to those Service members who intend to begin transition, are beginning transition, who already may have started transition, and who have completed gender transition and are stable in their preferred gender.

### a. Medical.

(1) In accordance with DoD Instructions (DoDIs) 6025.19 and 1215.13, all Service members have a responsibility to maintain their health and fitness, meet individual medical readiness requirements, and report to their chains of command any medical (including mental health) and health issue that may affect their readiness to deploy or fitness to continue serving in an active status.

(2) Each Service member in the AC or in the Selected Reserve will, as a condition of continued participation in military service, report significant health information to their chain of command. Service members who have or have had a medical condition that may limit their performance of official duties, must consult with a military medical provider concerning their diagnosis and proposed treatment, and must notify their commanders.

(3) As in the case of other health issues, when a Service member receives a diagnosis from a military medical provider indicating that gender transition is medically necessary, the member's notification to the commander must identify all medically necessary care and treatment that is part of the Service member's medical treatment plan and a projected schedule for such treatment, including an estimated date for a change in the member's gender marker in DEERS.

**b. Gender Transition in the Military.** Gender transition begins when a Service member receives a diagnosis from a military medical provider indicating that gender transition is medically necessary, and concludes when the Service member's gender marker in DEERS is changed and the member is recognized in the preferred gender. At that point, the Service member will be responsible for meeting all applicable military standards in the preferred gender, and as to facilities subject to regulation by the military, will use those berthing, bathroom, and shower facilities associated with the preferred gender.

**c. Continuity of Medical Care.** A military medical provider may determine certain medical care and treatment to be medically necessary, even after a Service member's gender marker is

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changed in DEERS (e.g., cross-sex hormone therapy). A gender marker change does not preclude such care and treatment.

**d. Living in Preferred Gender.** Real Life Experience (RLE) is the phase in the gender transition process during which the individual commences living socially in the gender role consistent with their preferred gender. Although in civilian life this phase is generally categorized by living and working full-time in the preferred gender, consistent application of military standards will normally require that RLE occur in an off-duty status and away from the Service member's place of duty, prior to the change of a gender marker in DEERS.

**e. DEERS.** The Military Departments and Services recognize a Service member's gender by the member's gender marker in DEERS. Coincident with that gender marker, the Services apply, and the member is responsible to meet, all standards for uniforms and grooming; BCA; PRT; MPDATP participation; and other military standards applied with consideration of the member's gender. As to facilities subject to regulation by the military, the Service member will use those berthing, bathroom, and shower facilities associated with the member's gender marker in DEERS.

**f. Military Readiness.** Unique to military service, the commander is responsible and accountable for the overall readiness of his or her command. The commander is also responsible for the collective morale and welfare and good order and discipline of the unit, the command climate, and for ensuring that all members of the command are treated with dignity and respect. When a commander receives any request from a Service member that entails a period of non-availability for duty (e.g., necessary medical treatment, ordinary leave, emergency leave, temporary duty, other approved absence), the commander must consider the individual need associated with the request and the needs of the command, in making a decision on that request.

**3.2. ROLES AND RESPONSIBILITIES.** The individual Service member, the military medical provider, the commander, and each of the Military Departments have crucial roles and responsibilities in the process of gender transition in the military.

**a. Service Member's Role.**

- (1) Secure a medical diagnosis from a military medical provider.
- (2) Notify the commander of a diagnosis indicating that gender transition is medically necessary, and identify all medically necessary treatment that is part of the member's medical treatment plan and a projected schedule for such treatment, including an estimated date for a change in the member's gender marker in DEERS, as set forth in Paragraph 3.1.a.
- (3) Notify the commander of any change to the medical treatment plan, the projected schedule for **such** treatment, or the estimated date on which the member's gender marker would be changed in DEERS.

**b. Military Medical Provider's Role.**

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(1) Establish the member's medical diagnosis, recommend medically necessary care and treatment, and, in consultation with the Service member, develop a medical treatment plan associated with the Service member's gender transition, as set forth in Paragraph 3.1.a, for submission to the commander.

(2) In accordance with established military medical practices, advise the commander on the medical diagnosis applicable to the Service member, including the provider's assessment of the medically necessary care and treatment, the urgency of the proposed care and treatment, the likely impact of the care and treatment on the individual's readiness and deployability, and the scope of the human and functional support network needed to support the individual.

(3) In consultation with the Service member, formally advise the commander when the Service member's gender transition is complete, and recommend to the commander a time at which the member's gender marker may be changed in DEERS.

(4) Provide the Service member with medically necessary care and treatment after the member's gender marker has been changed in DEERS.

#### **c. Commander's Role.**

(1) Review a Service member's request to transition gender. Ensure, as appropriate, a transition process that:

(a) Complies with DoD, Military Department, and Service regulations, policies, and guidance.

(b) Considers the individual facts and circumstances presented by the Service member.

(c) Ensures military readiness by minimizing impacts to the mission (including deployment, operational, training, and exercise schedules, and critical skills availability), as well as to the morale and welfare, and good order and discipline of the unit.

(d) Is consistent with the medical treatment plan.

(e) Incorporates consideration of other factors, as appropriate.

(2) Coordinate with the military medical provider regarding any medical care or treatment provided to the Service member, and any medical issues that arise in the course of a Service member's gender transition.

(3) Consult with the SCCC with regard to service by transgender Service members and gender transition in the military, the execution of DoD, Military Department, and Service policies and procedures, and assessment of the means and timing of any proposed medical care or treatment.

#### **d. Role of the Military Department and the USCG.**



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(1) Establish policies and procedures in accordance with this issuance, outlining the actions a commander may take to minimize impacts to the mission and ensure continued unit readiness in the event that a transitioning individual is unable to meet standards or requires an ETP during a period of gender transition. Such policies and procedures may address the means and timing of transition, procedures for responding to a request for an ETP prior to the change of a Service member's gender marker in DEERS, appropriate duty statuses, and tools for addressing any inability to serve throughout the gender transition process. Any such actions available to the commander will consider and balance the needs of the individual and the needs of the command in a manner comparable to the actions available to the commander in addressing comparable Service member circumstances unrelated to gender transition. Such actions may include:

(a) Adjustments to the date on which the Service member's gender transition, or any component of the transition process, will commence.

(b) Advising the Service member of the availability of options for extended leave status or participation in other voluntary absence programs during the transition process.

(c) Arrangements for the transfer of the Service member to another organization, command, location, or duty status (e.g., Individual Ready Reserve), as appropriate, during the transition process.

(d) ETPs associated with changes in the member's physical appearance and body composition during gender transition, such as accommodations in the application of standards for uniforms and grooming, BCA, PRT, and MPDATP participation.

(e) Establishment of, or adjustment to, local policies on the use of berthing, bathroom, and shower facilities subject to regulation by the military, during the transition process.

(f) Referral for a determination of fitness in the disability evaluation system in accordance with DoDI 1332.18.

(g) Other actions, including the initiation of administrative or other proceedings, comparable to actions that could be initiated with regard to others whose ability to serve is similarly affected for reasons unrelated to gender transition.

(2) Establish policies and procedures, consistent with this issuance, whereby a Service member's gender marker will be changed in DEERS based on a determination by the military medical provider that the Service member's gender transition is complete; receipt of written approval from the commander, issued in consultation with the Service member; and production by the Service member of documentation indicating gender change. Such documentation is limited to:

(a) A certified true copy of a State birth certificate reflecting the Service member's preferred gender;

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(b) A certified true copy of a court order reflecting the Service member's preferred gender; or

(c) A United States passport reflecting the member's preferred gender.

(3) When the Service member's gender marker in DEERS is changed:

(a) Apply uniform standards, grooming standards, BCA standards, PRT standards, MPDATP standards, and other standards applied with consideration of the member's gender, applicable to the Service member's gender as reflected in DEERS.

(b) As to facilities that are subject to regulation by the military, direct the use of berthing, bathroom, and shower facilities according to the Service member's gender marker as reflected in DEERS.

### **3.3. GENDER TRANSITION APPROVAL PROCESS.**

a. A Service member on active duty, who receives a diagnosis from a military medical provider for which gender transition is medically necessary may, in consultation with the military medical provider and at the appropriate time, request that the commander approve:

- (1) The timing of medical treatment associated with gender transition;
- (2) An ETP associated with gender transition, consistent with Paragraph 3.2.d, and/or
- (3) A change to the Service member's gender marker in DEERS.

b. The commander, informed by the recommendations of the military medical provider, the SCCC, and others, as appropriate, will respond to the request within a framework that ensures readiness by minimizing impacts to the mission (including deployment, operational, training, exercise schedules, and critical skills availability), as well as to the morale and welfare and good order and discipline of the command.

c. Consistent with applicable law, regulation, and policy, the commander will:

- (1) Comply with the provisions of this issuance, and with Military Department and Service regulations, policies, and guidance, and consult with the SCCC.
- (2) Promptly respond to any request for medical care, as identified by the military medical provider, and ensure that such care is provided consistent with applicable regulations.
- (3) Respond to any request for medical treatment or an ETP associated with gender transition, as soon as practicable, but not later than, 90 days after receiving a request determined to be complete in accordance with the provisions of this issuance and Military Department and Service regulations, policies, and guidance. The response will be in writing; include notice of any actions taken by the commander in accordance with applicable regulations, policies, and guidance and the provisions of this issuance; and will be provided to both the Service member

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and their military medical provider. A request that, upon review by the commander, is determined to be incomplete, will be returned to the Service member, with written notice of the deficiencies identified, as soon as practicable, but not later than 30 days after receipt.

(4) At any time prior to the change of the Service member's gender marker in DEERS, the commander may modify a previously approved approach to, or an ETP associated with, gender transition. A determination that modification is necessary and appropriate will be made in accordance with the procedures, and upon review and consideration of the factors set forth in Paragraph 3.2.c of this issuance. Notice of such modification will be provided to the Service member under procedures established by the Secretary of the Military Department concerned, and may include options as set forth in Paragraph 3.2.d.

(5) The commander will approve, in writing, the change of a Service member's gender marker in DEERS, subsequent to receipt of the recommendation of the military medical provider that the member's gender marker be changed and receipt of the requisite documentation from the Service member. Upon submission of the commander's written approval to the appropriate personnel servicing activity, the change in the Service member's gender marker will be entered in the database and transmitted to and updated in DEERS, under the authority, direction, and control of the Defense Manpower Data Center.

d. As authorized by Military Department and Service regulations, policies, and guidance implementing this issuance, a Service member may request review by a senior officer in the chain of command, of a subordinate commander's decision with regard to any request under this issuance and any subsequent modifications to that decision.

### 3.4. ADDITIONAL RC CONSIDERATIONS.

**a. General.** Excepting only those special considerations set forth below, RC personnel are subject to all policies and procedures applicable to AC Service members as set forth in this issuance and in Military Department and Service regulations, policies, and guidance implementing this issuance.

**b. Gender transition approach.** All RC Service members (except Selected Reserve full-time support personnel) identifying as transgender individuals, will submit to, and coordinate with their chain of command, evidence of a medical evaluation that includes a medical treatment plan. Selected Reserve full-time support personnel will follow the gender transition approval process set forth in Paragraph 3.3.

**c. Medical treatment plans.** A medical treatment plan established by a civilian medical provider will be subject to review and approval by a military medical provider.

**d. Selected Reserve Drilling Member Participation.** To the greatest extent possible, commanders and Service members will address periods of non-availability for any period of military duty, paid or unpaid, during the member's gender transition with a view to mitigating unsatisfactory participation. In accordance with DoDI 1215.13, such mitigation strategies may include:

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- (1) Rescheduled training.
- (2) Authorized absences.
- (3) Alternate training.

**e. Delayed Training Program.** Delayed Training Program personnel must be advised by recruiters and commanders of limitations resulting from being non-duty qualified. As appropriate, Service members in the Delayed Training Program may be subject to the provisions of Paragraph 3.5 of this issuance.

**f. Split Option Training.** When authorized by the Military Department concerned, Service members who elect to complete basic and specialty training over two non-consecutive periods may be subject to the provisions of Paragraph 3.5 of this issuance.

### **3.5. INITIAL ENTRY TRAINING AND CONSIDERATIONS ASSOCIATED WITH THE FIRST TERM OF SERVICE.**

a. A blanket prohibition on gender transition during a Service member's first term of service is not permissible. However, the Department recognizes that the All-Volunteer Force readiness model is largely based on those newly accessed into the military being ready and available for multiple training and deployment cycles during their first term of service. This readiness model may be taken into consideration by a commander in evaluating a request for medical care or treatment or an ETP associated with gender transition during a Service member's first term of service. Any other facts and circumstances related to an individual Service member that impact that model will be considered by the commander as set forth in this issuance and implementing Military Department and Service regulations, policies, and guidance.

b. The following policies and procedures apply to Service members during the first term of service and will be applied to Service members with a diagnosis indicating that gender transition is medically necessary in the same manner, and to the same extent, as to Service members with other medical conditions that have a comparable impact on the member's ability to serve:

(1) A Service member is subject to separation in an entry-level status during the period of initial training (defined as 180 days per DoDI 1332.14) based on a medical condition that impairs the Service member's ability to complete such training.

(2) An individual participant is subject to separation from the Reserve Officers' Training Corps in accordance with DoDI 1215.08, or from a Service Academy in accordance with DoDI 1322.22, based on a medical condition that impairs the individual's ability to complete such training or to access into the Armed Forces, under the same terms and conditions applicable to participants in comparable circumstances not related to transgender persons or gender transition. As with all cadets or midshipmen who experience a medical condition while in the Reserve Officers' Training Corps Program or at a Service Academy, each situation is unique and will be evaluated based on its individual circumstances; however, the individual will be required

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to meet medical accession standards as a prerequisite to graduation and appointment in the Armed Forces.

(3) A Service member is subject to administrative separation for a fraudulent or erroneous enlistment or induction when warranted and in accordance with DoDI 1332.14, based on any deliberate material misrepresentation, omission, or concealment of a fact, including a medical condition, that if known at the time of enlistment, induction, or entry into a period of military service, might have resulted in rejection.

(4) If a Service member requests non-urgent medical treatment or an ETP associated with gender transition during the first term of service, including during periods of initial entry training in excess of 180 days, the commander may give the factors set forth in Paragraph 3.5.a significant weight in considering and balancing the individual need associated with the request and the needs of the command, in determining when such treatment, or whether such ETP may commence in accordance with Paragraph 3.2.d.

### **3.6. PROTECTION OF PII AND PROTECTED HEALTH INFORMATION.**

a. In accordance with DoDD 5400.11, in cases in which there is a need to collect, use, maintain, or disseminate PII in furtherance of this issuance or Military Department and Service regulations, policies, or guidance, the Military Departments and the USCG will protect against unwarranted invasions of personal privacy and the unauthorized disclosure of such PII. The Military Departments and the USCG will maintain such PII so as to protect individual's rights, consistent with federal law, regulation, and policy.

b. Disclosure of protected health information will be consistent with DoD 6025.18-R.

**3.7. PERSONAL PRIVACY CONSIDERATIONS.** A commander may employ reasonable accommodations to respect the privacy interests of Service members.

### **3.8. ASSESSMENT AND OVERSIGHT OF COMPLIANCE.**

a. The Secretaries of the Military Departments and the Commandant, USCG, will implement processes for the assessment and oversight of compliance with DoD, Military Department, and Service policies and procedures applicable to service by transgender persons.

b. Beginning in 2018 and no less frequently than triennially thereafter, Secretaries of the Military Departments and the Commandant, USCG, will direct an Inspector General Special Inspection of compliance with this issuance and implementing Military Department or USCG regulations, policies, and guidance. The directing official will review the Report of Inspection for purposes of assessing and overseeing compliance; identifying compliance deficiencies, if any; timely initiating corrective action, as appropriate; and deriving best practices and lessons learned.



## GLOSSARY

### G.1. ACRONYMS.

AC	Active Component
BCA	body composition assessment
DEERS	Defense Enrollment Eligibility Reporting System
DoDI	DoD instruction
ETP	exception to policy
MPDATP	military personnel drug abuse testing program
PII	personally identifiable information
PRT	physical readiness testing
RLE	real life experience
RC	Reserve Component
SCCC	Service Central Coordination Cell
USCG	United States Coast Guard
USD(P&R)	Under Secretary of Defense for Personnel and Readiness

**G.2. DEFINITIONS.** Unless otherwise noted, these terms and their definitions are for the purpose of this issuance.

**cross-sex hormone therapy.** The use of feminizing hormones in an individual assigned male at birth based on traditional biological indicators or the use of masculinizing hormones in an individual assigned female at birth. A common medical treatment associated with gender transition.

**gender marker.** Data element in DEERS that identifies a Service member's gender. A Service member is expected to adhere to all military standards associated with the member's gender marker in DEERS and use military berthing, bathroom, and shower facilities in accordance with the DEERS gender marker.

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**gender transition is complete.** A Service member has completed the medical care identified or approved by a military medical provider in a documented medical treatment plan as necessary to achieve stability in the preferred gender.

**gender transition process.** Gender transition in the military begins when a Service member receives a diagnosis from a military medical provider indicating that the member's gender transition is medically necessary, and concludes when the Service member's gender marker in DEERS is changed and the member is recognized in the preferred gender.

**human and functional support network.** Support network for a Service member that may be informal (e.g., friends, family, co-workers, social media.) or formal (e.g., medical professionals, counselors, clergy).

**medically necessary.** Those health-care services or supplies necessary to prevent, diagnose, or treat an illness, injury, condition, disease, or its symptoms, and that meet accepted standards of medicine.

**non-urgent medical care.** The care required to diagnose and treat problems that are not life or limb threatening or that do not require immediate attention.

**preferred gender.** The gender in which a transgender Service member will be recognized when that member's gender transition is complete and the member's gender marker in DEERS is changed.

**RLE.** The phase in the gender transition process during which the individual commences living socially in the gender role consistent with their preferred gender. RLE may or may not be preceded by the commencement of cross-sex hormone therapy, depending on the medical treatment associated with the individual Service member's gender transition. The RLE phase is also a necessary precursor to certain medical procedures, including gender transition surgery. RLE generally encompasses dressing in the new gender, as well as using preferred gender berthing, bathroom, and shower facilities.

**SCCC.** Service-level cell of experts created to provide multi-disciplinary (e.g., medical, legal) advice and assistance to commanders with regard to service by transgender Service members and gender transition in the military.

**stable in the preferred gender.** Medical care identified or approved by a military medical provider in a documented medical treatment plan is complete, no functional limitations or complications persist, and the individual is not experiencing clinically significant distress or impairment in social, occupational, or other important areas of functioning. Continuing medical care, including but not limited to cross-sex hormone therapy, may be required to maintain a state of stability.

**transgender Service member.** A Service member who has received a medical diagnosis indicating that gender transition is medically necessary, including any Service member who intends to begin transition, is undergoing transition, or has completed transition and is stable in the preferred gender.

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**transition.** Period of time when individuals change from the gender role associated with their sex assigned at birth to a different gender role. For many people, this involves learning how to live socially in another gender role; for others this means finding a gender role and expression that are most comfortable for them. Transition may or may not include feminization or masculinization of the body through cross-sex hormone therapy or other medical procedures. The nature and duration of transition are variable and individualized.

**urgent medical care.** The care needed to diagnose and treat serious or acute medical conditions that pose no immediate threat to life and health, but require medical attention within 24 hours.

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## REFERENCES

Directive-type Memorandum 16-005, “Military Service of Transgender Service Members,” July 1, 2016

DoD 6025.18-R, “DoD Health Information Privacy Regulation,” January 24, 2003

DoD Directive 5400.11, “DoD Privacy Program,” October 29, 2014

DoD Instruction 1215.08, “Senior Reserve Officers’ Training Corps (ROTC) Programs,” June 26, 2006

DoD Instruction 1215.13, “Ready Reserve Member Participation Policy,” May 5, 2015

DoD Instruction 1322.22, “Service Academies,” September 24, 2015

DoD Instruction 1332.14, “Enlisted Administrative Separations,” January 27, 2014, as amended

DoD Instruction 1332.18, “Disability Evaluation System (DES),” August 5, 2014

DoD Instruction 6025.19, “Individual Medical Readiness (IMR),” June 9, 2014



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

JUN 30 2016

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

SUBJECT: Directive-type Memorandum (DTM) 16-005, "Military Service of Transgender Service Members"

References: DoD Directive 1020.02E, "Diversity Management and Equal Opportunity in the DoD," June 8, 2015  
DoD Directive 1350.2, "Department of Defense Military Equal Opportunity (MEO) Program," August 18, 1995  
DoD Instruction 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services," April 28, 2010, as amended

Purpose. This DTM:

- Establishes policy, assigns responsibilities, and prescribes procedures for the standards for retention, accession, separation, in-service transition, and medical coverage for transgender personnel serving in the Military Services.
- Except as otherwise noted, this DTM will take effect immediately. It will be converted to a new DoDI. This DTM will expire effective June 30, 2017.

Applicability. This DTM applies to OSD, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the



Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.

#### Policy.

- The defense of the Nation requires a well-trained, all-volunteer force comprised of Active and Reserve Component Service members ready to deploy worldwide on combat and operational missions.
- The policy of the Department of Defense is that service in the United States military should be open to all who can meet the rigorous standards for military service and readiness. Consistent with the policies and procedures set forth in this memorandum, transgender individuals shall be allowed to serve in the military.
- These policies and procedures are premised on my conclusion that open service by transgender Service members while being subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability, and retention, is consistent with military readiness and with strength through diversity.

#### Responsibilities

- The Secretaries of the Military Departments will:
  - Take immediate action to identify all DoD, Military Department, and Service issuances, the content of which relate to, or may be affected by, the open service of transgender Service members.
  - Draft revisions to the issuances identified, and, as necessary and appropriate, draft new issuances, consistent with the policies and procedures in this memorandum.
  - Submit to the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) the text of any proposed revisions to existing Military Department and Service regulations, policies, and guidance, and of any proposed new issuance, no later than 30 days in advance of the proposed publication date of each.
- The USD(P&R) will:
  - Take immediate action to identify all DoD, Military Department, and Service issuances, the content of which relate to, or may be affected by, the open service of transgender Service members.

DTM-16-005

- Draft revisions to the issuances identified in this memorandum and, as necessary and appropriate, draft new issuances consistent with the policies and procedures in this memorandum.

Procedures. See Attachment.

Releasability. **Cleared for public release.** This DTM is available on the DoD Issuances Website at <http://www.dtic.mil/whs/directives>.



Attachment:

As stated

cc:

Secretary of Homeland Security

Commandant, United States Coast Guard

## ATTACHMENT

### PROCEDURES

#### 1. SEPARATION AND RETENTION

a. Effective 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.

b. Transgender Service members will be subject to the same standards as any other Service member of the same gender; they may be separated, discharged, or denied reenlistment or continuation of service under existing processes and basis, but not due solely to their gender identity or an expressed intent to transition genders.

c. A Service member whose ability to serve is adversely affected by a medical condition or medical treatment related to their gender identity should be treated, for purposes of separation and retention, in a manner consistent with a Service member whose ability to serve is similarly affected for reasons unrelated to gender identity or gender transition.

#### 2. ACCESSIONS

a. Medical standards for accession into the Military Services help to ensure that those entering service are free of medical conditions or physical defects that may require excessive time lost from duty. Not later than July 1, 2017, the USD(P&R) will update DoD Instruction 6130.03 to reflect the following policies and procedures:

(1) A history of gender dysphoria is disqualifying, **unless**, as certified by a licensed medical provider, the applicant has been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months.

(2) A history of medical treatment associated with gender transition is disqualifying, **unless**, as certified by a licensed medical provider:

(a) the applicant has completed all medical treatment associated with the applicant's gender transition; and

(b) the applicant has been stable in the preferred gender for 18 months;  
and

(c) If the applicant is presently receiving cross-sex hormone therapy post-gender transition, the individual has been stable on such hormones for 18 months.

DTM-16-005

(3) A history of sex reassignment or genital reconstruction surgery is disqualifying, **unless**, as certified by a licensed medical provider:

(a) a period of 18 months has elapsed since the date of the most recent of any such surgery; and

(b) no functional limitations or complications persist, nor is any additional surgery required.

b. The Secretaries of the Military Departments and the Commandant, United States Coast Guard, may waive or reduce the 18-month periods, in whole or in part, in individual cases for applicable reasons.

c. The standards for accession described in this memorandum will be reviewed no later than 24 months from the effective date of this memorandum and may be maintained or changed, as appropriate, to reflect applicable medical standards and clinical practice guidelines, ensure consistency with military readiness, and promote effectiveness in the recruiting and retention policies and procedures of the Armed Forces.

### 3. IN-SERVICE TRANSITION

a. Effective October 1, 2016, DoD will implement a construct by which transgender Service members may transition gender while serving, in accordance with DoDI 1300.28, which I signed today.

b. Gender transition while serving in the military presents unique challenges associated with addressing the needs of the Service member in a manner consistent with military mission and readiness needs.

4. MEDICAL POLICY. Not later than October 1, 2016, the USD(P&R) will issue further guidance on the provision of necessary medical care and treatment to transgender Service members. Until the issuance of such guidance, the Military Departments and Services will handle requests from transgender Service members for particular medical care or to transition on a case-by-case basis, following the spirit and intent of this memorandum and DoDI 1300.28.

### 5. EQUAL OPPORTUNITY

a. All Service members are entitled to equal opportunity in an environment free from sexual harassment and unlawful discrimination on the basis of race, color, national origin, religion, sex, or sexual orientation. It is the Department's position, consistent with the U.S. Attorney General's opinion, that discrimination based on gender identity is a form of sex discrimination.

DTM-16-005

b. The USD(P&R) will revise DoD Directives (DoDDs) 1020.02E, "Diversity Management and Equal Opportunity in the DoD," and 1350.2, "Department of Defense Military Equal Opportunity (MEO) Program," to prohibit discrimination on the basis of gender identity and to incorporate such prohibitions in all aspects of the DoD MEO program. The USD(P&R) will prescribe the period of time within which Military Department and Service issuances implementing the MEO program must be conformed accordingly.

## 6. EDUCATION AND TRAINING

a. The USD(P&R) will expeditiously develop and promulgate education and training materials to provide relevant, useful information for transgender Service members, commanders, the force, and medical professionals regarding DoD policies and procedures on transgender service. The USD(P&R) will disseminate these training materials to all Military Departments and the Coast Guard not later than October 1, 2016.

b. Not later than November 1, 2016, each Military Department will issue implementing guidance and a written force training and education plan. Such plan will detail the Military Department's plan and program for training and educating its assigned force (to include medical professionals), including the standards to which such education and training will be conducted, and the period of time within which it will be completed.

## 7. IMPLEMENTATION AND TIMELINE

a. Not later than October 1, 2016, the USD(P&R) will issue a Commander's Training Handbook, medical guidance, and guidance establishing procedures for changing a Service member's gender marker in DEERS.

b. In the period between the date of this memorandum and October 1, 2016, the Military Departments and Services will address requests for gender transition from serving transgender Service members on a case-by-case basis, following the spirit and intent of this memorandum and DoDI 1300.28.



The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

*Plaintiffs,*

v.

DONALD J. TRUMP, in his official capacity as  
President of the United States, et al.,

*Defendants.*

Case No. 2:17-cv-01297-MJP

**DECLARATION OF RYAN  
KARNOSKI IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

I, Ryan Karnoski, declare as follows:

1. My name is Ryan Karnoski. I am a plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.
2. I am a 23-year-old man and I live in Seattle, Washington with my wife. I am currently registered with the Selective Service.
3. I am a member of both the Human Rights Campaign and the American Military Partner Association.
4. I am a mental health clinician in Seattle, Washington, and I would like to put my social work skills to use for the military. Social work is an area for which there can be significant need in the military, including in the Army and the Navy.
5. I hold a Masters in Social Work from the University of Washington School of Social Work's Child Welfare Training Advancement Program. Given that I hold a master's

degree, I aspire to serve as an officer in the military.

6. I come from a family with a legacy of military service. My grandfather and step-grandfather served in the Army during the Korean War, and I have other relatives who have served in the Army and Navy.

7. My desire to join the military came into sharper focus following the death of my cousin, who was killed in action in Afghanistan in 2009. My cousin's death—and the toll that it took on surviving family members—further impressed upon me the tremendous sacrifice that service members make for our country. I also realized my own desire to serve in the military was motivated by more than simply family legacy: it was a personal calling and it is something that I have long dreamt of being able to fulfill.

8. I am transgender. I was assigned the sex of female at birth. However, I have known for many years, since approximately early 2012, that I am male.

9. I began living openly as male in 2014.

10. In consultation with health care professionals, I have taken clinically appropriate steps as part of my medical transition.

11. I have taken legal steps to transition. In March of 2014, I legally changed my first name to Ryan. At that time, I also changed my name and gender marker to male on my driver's license, birth certificate, social security card and records, and passport.

12. Because I have wanted to enlist in the military for many years, I have followed the policies about service by transgender people closely.

13. On June 30, 2016 Secretary of Defense Ash Carter announced a new policy that lifted the ban on current transgender service.

14. I remember reading Secretary Carter's contemporaneous public statement. He said:

We're talking about talented Americans who are serving with distinction or who want the opportunity to serve. We can't allow barriers unrelated to a person's qualifications prevent us from recruiting and retaining those who can best accomplish the mission.

15. His announcement made me feel like I could finally be respected as an equal by

my government. Effective immediately on June 30, 2016, transgender military members were allowed to serve openly. Additionally, the new policy moved the military one step closer towards allowing transgender people to accession or commission into the military by initiating a process towards developing a practice and policy that would be inclusive of transgender individuals wishing to serve. I was so excited to be one step closer to helping fill the significant need to support our troops and their families, many of whom need mental health support to deal with the burdens that come with military service.

16. As further detailed below, I am ready and able to pursue a military career. In fact, I contacted military recruiters in or around September 2016, but I was open about my transgender status and discussed with a recruiter having to wait until the current accessions bar was lifted. I was referred to recruiting offices in King County, Washington, as my point of contact for further communications regarding my accession.

17. On July 26, 2017, President Trump posted three tweets that introduced a reversal of the inclusive policy for current and prospective service members, and later issued a memorandum ordering a ban on service by transgender people in the military.

18. I am devastated by the judgment within the White House about my ability to serve in the military, as well as by the implementation of President Trump's tweeted ban on transgender service. It has been painful to have to watch people in power and in the media talk about transgender people as if we are unfit to serve, even though we are able-bodied and desire to serve our country. I have seen first-hand the burdens and suffering imposed on families who have lost loved ones in combat, and want to devote my professional energy to helping people cope with those difficult circumstances. I have made careful plans to be able to do exactly that, and this new policy has upended them.

19. The President's tweets and the resulting policy have caused me to feel out of control of my professional future, and distressed that the military is turning away highly qualified people during a time of significant need. Military social workers can help service members and their families deal with anything from long separations from each other, to trauma experienced during service, and the medical and financial stresses that can flow from military

service. If I am kept from the equal opportunity of seeking commission into the military, then I will not only be foreclosed from career opportunities and advancement for which I would be eligible, but more importantly, will not be able to serve a population that has a crucial and urgent need for qualified mental health professionals.

20. I am a man, and I am fit to serve in the military as a man. I believe that this new policy directed by President Trump reflects deeply troubled misconceptions about transgender people not being real men and women. I believe that the transgender ban is an effort to erase my identity entirely.

21. By implementing this discriminatory ban, the President of the United States, my country, the Secretary of Defense, and the Department of Defense have sought to mark me as inferior, marginalize me, and stigmatize me. In doing so, they have caused me great distress, discomfort, and pain.

22. I intend to join the military, although I also want to be reasonably certain that I would not be at risk of discharge for being transgender before I do so. I understand that it remains possible that the military could nonetheless discharge transgender service members in the future, depending on the ultimate outcome of litigation. Because joining the military involves significant sacrifice, such as potentially foregoing stable employment and relocating, I want to be sure the rug will not be pulled out from under me again.

23. In addition, the precise path I take to join the military depends on the outcome of my application to a PhD program at UC Berkeley's School of Social Welfare. If accepted into the program, which would begin in the fall, I would likely pursue the Army or Navy Reserve or the National Guard, which would allow me to pursue my degree at the same time. If not, I would likely seek commission into the military for active duty.

24. I have engaged in speech and conduct disclosing my transgender status and expressing my gender identity and want to continue to be able to do so. For example, it is critical to me to be able to express that I am a man, and for others to understand that I am male.

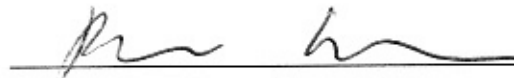
25. All that I want is to live openly as the man I am and to be treated with respect and

///

1 dignity by the military.

2  
3 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the  
4 United States of America that the foregoing is true and correct.

5  
6 DATED: January 20, 2017

7   
8 Ryan Karnoski



**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on January 25, 2018.



Derek A. Newman, WSBA #26967

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Newman Du Wors LLP

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Seattle, WA 98121

(206) 274-2800

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

*Plaintiffs,*

v.

DONALD J. TRUMP, in his official capacity as  
President of the United States, et al.,

*Defendants.*

Case No. 2:17-cv-01297-MJP

**DECLARATION OF CATHRINE  
SCHMID IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

I, CATHRINE SCHMID, declare as follows:

1. My legal name is Cathrine Schmid, although I often use the nickname "Katie." I am a plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.

2. I am a 33-year-old woman, and I live in Lakewood, Washington with my wife.

3. I am a Staff Sergeant in the U.S. Army and am currently stationed at Joint Base Lewis McChord in Washington State.

4. I enlisted in the U.S. Army in 2005. I have been serving for nearly thirteen years.

5. I am a member of the Human Rights Campaign and the American Military Partner Association.

6. I was exposed to military life at an early age. My father served in the military when I was a child. I have always been a patriotic American with a desire to serve others and

was drawn to opportunities presented by serving in the Army. I am proud to put on my uniform each day and serve my country.

7. My military occupation specialty is Signals Intelligence Analyst within the Army and I currently perform duties as Multifunction Team Leader. Before my current role, I performed duties as a Signals Intelligence Analyst, All-Source Analysis System Master Analyst, Human Intelligence Collector, and Counterintelligence Agent.

8. I am transgender. I was assigned the sex of male at birth. I knew from the age of five or six that I am female.

9. I began to come to terms with my gender identity approximately four years ago. At that time, I started to see a mental health professional who diagnosed me with gender dysphoria.

10. I began living openly as a woman in 2014.

11. In consultation with health care professionals, I have taken clinically appropriate steps to transition. I also have further transition-related health care needs, including medically necessary surgical treatment, which is currently scheduled for April 2018.

12. I have taken legal steps to transition. In June 2015, I legally changed my first name to Cathrine. At that time, I also changed my name and changed my gender marker to female on my driver's license, passport, and social security records.

13. I have worked with my chain of command throughout my transition, and both they and other enlisted personnel have been supportive of me throughout that process.

14. The fact that I am transgender has not prevented me from doing my job in the military nor has my gender identity prevented others from doing their jobs in the military. I perform valuable services for the Army working in the field of military intelligence, and my performance of those duties strengthen our nation's military readiness.

15. I have received awards and decorations for my service including a Joint Service Commendation Medal, two Army Commendation Medals, two Joint Service Achievement Medals, an Army Achievement Medal, a Joint Meritorious Unit Award, an Army Superior Unit Award, four Army Good Conduct Medals, a National Defense Service Medal, a Korean Service

Medal, a Global War on Terrorism Service Medal, two Non-Commissioned Officer Professional Development Ribbons, an Army Service Ribbon, two Overseas Service Ribbons, a Marksmanship Qualification Badge-Expert with Rifle, and a Marksmanship Qualification Badge-Sharpshooter with Pistol.

16. Prior to my transition, I was recognized for my excellence at work, but maintaining my secret could, at times, be distracting. I took pains to filter my speech and behavior so as not to appear too feminine and would spend energy worrying that others had noticed when my behavior was feminine in nature. This most negatively affected my ability to be a confident leader. Since my transition, I no longer filter myself and I am a better, more confident leader.

17. Being able to serve openly as a transgender woman has made me a stronger asset to the military. I am able to function as a productive, healthy member of the military, and I am able to forge stronger relationships with others in my unit. Comradery is an absolute necessity in any unit and honesty is the single most important factor in cohesiveness. If members of the unit can be honest with each other, then they can trust each other. Now that I can be open about who I am, I have noticed that others are more open about themselves in my presence because they can perceive my trust in them. Being transgender has not negatively impacted the ability for members of my unit to work together to accomplish our tasks.

18. On June 30, 2016, Secretary of Defense Ash Carter announced a new military-wide policy lifting the ban on transgender service. This change in policy permitted other people, similarly situated to me, to come out and serve openly as transgender members of the military without fear of forced separation based on their transgender status. I remember stating, at the time, that I felt a huge sense of relief and happiness that I was able to stop worrying about losing my career based on my transgender status and simply focus on my duties.

19. On October 1, 2016, the DoD issued instructions for implementing the new inclusive policy. Among the provisions were procedures for how transgender service members may transition, for medical treatment, and for changing a service member's gender marker in the Defense Enrollment Eligibility Reporting System (DEERS).

20. In October 2016, I changed my gender marker in DEERS. Since that time, I have followed female standards for dress, grooming, and physical fitness.

21. Over the last year, the DoD has been implementing new the inclusive policy, including through transgender-specific trainings. I have assisted in the provision of these trainings to fellow service members.

22. On July 26, 2017, President Trump posted three tweets that indicated a radical shift in military policy that previously had allowed open service by transgender service members.

23. This abrupt change in policy and implicit commentary on my value to the military and competency to serve has caused me to feel tremendous anguish. Nevertheless, on the morning that I learned of the tweets, I remained steadfast in my duties—I still stood in morning formation, still did my morning reports, and still did my morning four mile run. I did my job because, in the wake of such sudden chaos, I was able to fall back on my training and focused on my duties.

24. In the weeks after the President posted the tweets about transgender service and the White House issued a memorandum implementing the policy in those tweets, I lost sleep. The memorandum also indicates that the military will no longer provide transition-related surgical care—which I still need—on the same terms as before.

25. The ban against open service has affected my ability to maintain employment in the military at all, causing me to feel incredible fear. Serving in the Army is my calling. I have served for more than twelve years and currently have an Estimate Termination of Service date of February 28, 2026. The ban throws my future and livelihood into jeopardy.

26. I am currently living with an immense amount of anxiety regarding all the ways in which the new retention policy negatively affects me.

27. I am the sole financial provider for my household and I am responsible for monthly child support payments. My wife, who also is transgender, and I both rely on TriCare for all of our medical needs. My separation from the Army would disrupt our medically necessary transition-related care.

28. My military career has already been harmed because of discrimination on the



basis of my transgender status. In June 2017, I submitted an application to become an Army warrant officer, which my commanding officers had encouraged me to do. A warrant officer is a highly specialized expert and trainer in a technical area such as aviation, military police, or, in my case, intelligence.

29. Unless enjoined, the military's accessions bar would not only exclude transgender individuals from enlistment but also from becoming officers, even where an individual is already serving in the military. I was informed in writing in July 2017 by Human Resources Command G3 Special Programs Office at Army Recruiting Command Headquarters that my application was placed on hold, and thus was not being considered further at the time, because of the accessions bar.

30. I was therefore deprived of an equal opportunity to become a warrant officer solely because I am transgender. Although the accessions ban has now been preliminarily enjoined, it prevented me from advancing in my career in a timely manner and foreclosed future opportunities only open to warrant officers. It prevented me from applying my skillset to positively influence the military in a more impactful way than my current position allows. I know that I could better serve the Army as a warrant officer.

31. An enlisted service member must apply to be a Warrant Officer within the first twelve years of their service. I reached twelve years of service in February 2017. I submitted a waiver request with my application in June 2017. Since the preliminary injunction was issued, my waiver request was approved.

32. My Warrant Officer packet is now at the juncture in the application process where it will go before the Warrant Officer Selection Board.

33. I have engaged in speech and conduct disclosing my transgender status and expressing my gender identity, including by coming out to my chain of command and my fellow service members, taking steps to transition, and living openly as a woman in military life. I want to continue to be able to engage in speech and conduct disclosing my transgender status and

///

///

expressing my gender identity.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: January 22, 2017



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Cathrine Schmid

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on January 25, 2018.



Derek A. Newman, WSBA #26967

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Seattle, WA 98121

(206) 274-2800

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RYAN KARNOSKI, et al.,

*Plaintiffs,*

v.

DONALD J. TRUMP, in his official capacity as  
President of the United States, et al.,

*Defendants.*

Case No. 2:17-cv-01297-MJP

**DECLARATION OF D.L. IN  
SUPPORT OF PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT**

I, D.L., declare as follows:

1. I am a plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.

2. I am a 17 year-old man and I live in Corpus Christi, Texas. I recently graduated from high school.

3. I come from a family with military service and take great pride in that. My great grandfather and great uncle both served in the Army. My great grandfather earned a Purple Heart for his service. I want to follow in their footsteps by serving my country.

4. I have put a lot of thought into my career path. For years, I have done research, spoken to veterans of different services, and decided to enlist in the Air Force. My ideal job would be to serve as a Survival, Evasion, Resistance and Escape Specialist in the Air Force. I am

1 adventurous and love the outdoors. I think I would be well suited to excel in this position,  
2 training other Airmen on survival-related techniques needed for various terrains and climates in  
3 the event that their aircraft goes down. I am very serious about pursuing this career path and  
4 want the opportunity to do so.

5         5. I understand that the requirements for transgender people to join the military have  
6 changed over time, including as a result of developments in this case, although I have been ready  
7 and willing to join the military, as I can join at 17 years of age with parental consent. My mother  
8 and next friend, Laura Garza, supports me in my decision. Based on the requirements currently  
9 in place, it is my understanding that I need to wait until 18 months after medical treatment  
10 associated with gender transition to join the military. Although I do not yet meet that 18-month  
11 requirement, I continue to prepare and do what I can in order to join once I meet this  
12 requirement.

13         6. In preparation for enlistment, I began communicating with an Air Force recruiter  
14 in early July 2017. When I disclosed to the recruiter that I am transgender, the recruiter stopped  
15 communicating with me. Given recent developments in this case, I intend to resume  
16 communications with Air Force recruiters and express my ongoing commitment and desire to  
17 join the military as soon as I meet the requirements above.

18         7. I am transgender. I was assigned the sex of female at birth but my gender identity  
19 is male. I came out about this in the summer of 2015 and have lived openly as male since that  
20 time.

21         8. In consultation with health care professionals, I have taken clinically appropriate  
22 steps to transition.

23         9. I have experienced some challenges in coming out as transgender and people are  
24 not always accepting of who I am. I was so relieved and hopeful, though, when I found out that I  
25 would be able to enlist in the military, being open about myself, and being able to follow my  
26 dreams to serve. For some time, based on the announcement that transgender people could serve  
27 openly, I had prepared for the military and been very optimistic about my future in the Air Force.



1           10. To later have the President of the United States take that future away, on Twitter,  
2 and discriminate against me and other people who are transgender was demoralizing. I would not  
3 have expected that from the leader of our country.

4           11. Specifically, on July 26, 2017, I saw that President Trump posted three tweets that  
5 spoke to a potential new policy regarding transgender service people. The tweets read:

6                   After consultation with my Generals and military experts, please be advised that  
7 the United States Government will not accept or allow.....

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

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

12           12. I remember reading these tweets on my cell phone and telling my mother and  
13 girlfriend about them. I will never forget that. I was in disbelief and shocked that the President,  
14 the leader of our country, would say such things and blatantly discriminate against a group of  
15 people, like me, who only want to serve their country. I felt disheartened and devastated. It was  
16 like my whole future dreams were crushed instantly by his words. I also felt anger that the  
17 President would target a specific group of people for exclusion from the military.

18           13. The President's tweets against transgender soldiers and the document that the  
19 President sent on August 25, 2017 – preventing transgender individuals from joining the military  
20 – caused me to feel deep sorrow mixed with anxiety and anger. For instance, after reading the  
21 President's tweets, I had great difficulty sleeping. I lay in bed feeling like my entire future got  
22 thrown out the window, and for such an unfair and unjust reason. It made me feel uncertain  
23 about my future and lost.

24           14. I had put all my energy and focus into joining the military. I was planning to  
25 enlist upon graduation from high school, if not for being barred from doing so, and I still plan to  
26 enlist when I meet the current requirements. I have not made other plans. I was counting on  
27 pursuing a military career, and still feel called to do so. The President's decision to ban people

1 like me from the military feels like someone pulled the rug out from under me. It has caused me  
2 tremendous stress and difficulty.

3 15. I want to be able to join the military as soon as possible. Any delays will hurt my  
4 long-term career possibilities. It also makes it incredibly hard for me to plan my life, not  
5 knowing if I will be able to join the military when I meet the requirements. My peers can all pick  
6 out their future careers, and then pursue that career, but I cannot do that. Plus, the military will  
7 lose out on a capable, committed, and ready service member. I know there are many people like  
8 myself who would add strength to our military and serve honorably if we were only given the  
9 chance. We should be able to do so, and should be judged like everyone else – based on our abilities  
10 – and not our personal traits such as our gender identity.

11 16. If not for the President's tweets and ban on open service by transgender  
12 individuals, I would seek to enlist. I am ready and able to begin pursuing my career in the  
13 military and do not want to be prevented any longer. As noted above, when I meet the current  
14 requirements to enlist, I intend to do so, and I hope that I will not be denied this opportunity  
15 merely because I am a transgender man.

16 17. I have engaged in speech and conduct that has disclosed my status and identity as  
17 a transgender man. I have expressed my gender identity, including by coming out to the Air  
18 Force recruiter, taking steps to transition, and living openly as male in my everyday life. I want  
19 and need to be able to continue to engage in speech and conduct disclosing my transgender status  
20 and expressing my male gender identity.

21  
22 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the  
23 United States of America that the foregoing is true and correct.

24  
25 DATED: January 22, 2018

26 

27 D.L.

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on January 25, 2018.



Derek A. Newman, WSBA #26967

*dn@newmanlaw.com*

Newman Du Wors LLP

2101 Fourth Ave., Ste. 1500

Seattle, WA 98121

(206) 274-2800

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

*Plaintiffs,*

v.

DONALD J. TRUMP, in his official capacity as  
President of the United States, et al.,

*Defendants.*

Case No. 2:17-cv-01297-MJP

**DECLARATION OF LINDSEY  
MULLER IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

I, Lindsey Muller, declare as follows:

1. My name is Lindsey Muller. I am a plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.

2. I am a 36-year-old woman, and I live in Pyeongtaek, South Korea with my wife, who is a veteran of the Marine Corps.

3. I am a Chief Warrant Officer Three in the U.S. Army and am currently stationed at U.S. Army Garrison Humphreys Army Base in Pyeongtaek, South Korea.

4. I enlisted in the U.S. Army in 2000. I have been serving for more than seventeen years.

5. I am a member of the Human Rights Campaign and the American Military Partner Association.

DECLARATION OF LINDSEY MULLER  
IN SUPPORT OF PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT - 1  
[2:17-cv-01297-MJP]

NEWMAN DU WORS LLP

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(206) 274-2800

Add.156

1           6. I chose the military as a career path for the opportunities that it can provide and in  
 2 fact has provided me. I grew up in a very low-income household in Poplar Buff, Missouri where  
 3 the only job opportunities were in agriculture and factories that did not provide much opportunity  
 4 for upward mobility. I wanted specialized education and training, but college was not an option  
 5 for me because of the expense. I also wanted to elevate myself economically and see more of the  
 6 world. These goals, together with my strong sense of patriotism, led me to meet with a military  
 7 recruiter and to enlist in the Army. I have stood shoulder to shoulder with fellow soldiers in  
 8 combat and have been there to collect their remains after hostile engagements with enemy forces.  
 9 I genuinely love and am proud of what I do.

10           7. My military occupation specialty is AH-64D Apache Longbow Attack Helicopter  
 11 Pilot/Aviator within the Army and I currently perform duties as a Battalion Aviation Safety  
 12 Officer. Currently, my duties involve providing combat support and combat service support to  
 13 various echelons of commands up to the division level, including one headquarters support  
 14 company, one distribution company, one Aviation Intermediate Maintenance company, and one  
 15 signal company. I am the principle advisor to Company and Battalion level Commanders on all  
 16 aviation and ground related safety matters. I protect more than 1,100 Soldiers and their families  
 17 and over 300 vehicles and rolling stock valued at over \$70 million. I am responsible for  
 18 managing the Battalion Commander's Safety Program and developing safety policies, safety  
 19 goals, mission objectives, priorities, and integrating them into daily operations. I also assist  
 20 Commanders with quarterly Command Safety Councils, develop risk assessments, and mitigate  
 21 risks to ensure a safe and effective Aviation Support Battalion.

22           8. Before my current role, I performed duties as a Team Leader, Squad Leader,  
 23 Army Recruiter, Instructor/Writer, Proponent Chief, Pilot in Command, and Air Mission  
 24 Commander.

25           9. I served in Operation Iraqi Freedom, Operation Enduring Freedom, and multiple  
 26 assignments to the Republic of Korea.

27           10. I have extensive training. My military and civilian education include the Army



1 Combat Communications Course, Expert Infantry Badge; Combat Infantry Badge; Master  
 2 Breacher Demolition Course; Master Driver Trainer Course; Air Assault Badge; U.S. Army  
 3 Recruiting School; Advanced Leaders Course; Army Family Team Building Instructor (Levels I,  
 4 II, III); Survival, Evasion, Resistance & Escape School (SERE B – C/High Risk); U.S. Army  
 5 Warrant Officer Course; Aviation WOBC, Aviation Life Support Equipment Course; AH-64D  
 6 Longbow Apache Qualification Course; Aviation Safety Officer Course; Commander's Safety  
 7 Course; Aircraft Mishap Investigation Course; Foundation Instructor Facilitator Course; Small  
 8 Group Instructor Training Course; OSHA Standards for General Inspector; and Federal Aviation  
 9 Administration Commercial Pilot.

10 11. The military has invested significant resources in training me. Based on my  
 11 previous experience as a flight instructor, I understand that the military has invested  
 12 approximately \$1.5 million in the training associated with my specific aircraft skillset alone. My  
 13 skills make me a highly valued member of the military.

14 12. My performance has been consistently recognized throughout my time in military  
 15 service. My awards and decorations include the Army Commendation Medal 2 oak leaf clusters  
 16 (2 OLC), Army Achievement Medal (2 OLC), Valorous Unit Award, Meritorious Unit Award,  
 17 Army Superior Unit Award, Army Good Conduct Medal (2<sup>nd</sup> award), National Defense Service  
 18 Medal, Iraq Campaign Medal Campaign Star, Global War on Terrorism Expeditionary Medal,  
 19 Global War on Terrorism Service Medal, Korea Defense Service Medal, Non-Commissioned  
 20 Officer Professional Development Ribbon (2<sup>nd</sup> award), Army Service Ribbon, Overseas Service  
 21 Ribbon (2<sup>nd</sup> award), , Expert Infantry Badge, Combat Infantry Badge, Army Aviator Badge, and  
 22 Air Assault Badge. Additionally I served for a time as an Army Recruiter and earned every  
 23 recognition achievable for that position including: three gold achievement stars for my Basic  
 24 Recruiter Badge, the Gold Recruiter Badge with three sapphire achievement stars, the Army  
 25 Recruiter Ring, and the Glenn. E. Morrell Medallion.

26 13. If I could, I would continue serving in the army as long as I am physically able to  
 27 do so. I have served more than fifty percent of my life in military uniform, serving the citizens



1 of the United States of America and desperately wish to continue to do so.

2 14. I am transgender. I was assigned the sex of male at birth. I have known for more  
3 than thirteen years that I am female.

4 15. I began to come to terms with my gender identity approximately six years ago. At  
5 that time, I started to see a mental health professional who diagnosed me with gender dysphoria.

6 16. I began living openly as a woman in 2014.

7 17. In consultation with health care professionals, I have taken clinically appropriate  
8 steps to transition, and I have further transition-related health care needs—including medically  
9 necessary surgical treatment.

10 18. I have taken legal steps to transition. In May of 2015, I legally changed my first  
11 name to Lindsey. At that time, I also changed my name and changed my gender marker to  
12 female on my driver's license, passport, and social security records.

13 19. I came out in the military as transgender in 2014, my commander was incredibly  
14 supportive. In fact, every person within my chain of command was supportive of my transition  
15 and asked me to stay on in the military even though I had offered to resign, in light of the then-  
16 existing bar against open service. Additionally, other enlisted personnel have been supportive of  
17 me throughout my transition process. Being transgender has not negatively impacted the ability  
18 for members of my unit to work together to accomplish our tasks. In fact serving openly has  
19 actually had a positive effect allowing me to be open with my gender identity and inspire others  
20 by leading by example.

21 20. Despite the fact that my command was supportive of my transition, I was  
22 temporarily medically grounded, meaning that I could not pilot a military aircraft, because of my  
23 transition. I was told that I was grounded for two reasons: (1) because I was on hormone  
24 replacement therapy and (2) because I intended to transition. Under the guidance in 2014, I was  
25 deemed administratively unfit to fly because I wanted to pursue transition.

26 21. Since then, I have pursued a waiver in order to perform full flight duties. I have  
27 also been cleared by four aeromedical psychologists as competent to perform full flight duties.

1 Because I have not yet had surgeries I require as part of my transition, I take a testosterone  
2 blocker, which has been cited as a reason for my grounding. It is my understanding by the  
3 guidance provided by five flight surgeons that non-transgender people on hormone replacement  
4 therapy routinely receive waivers to qualify to fly.

5 22. If I were permitted to complete the course of treatment that is part of my  
6 transition plan, including required surgeries, then I would no longer be required to take  
7 spironolactone and would therefore no longer need of a waiver to fly.

8 23. The fact that I am transgender has not prevented me from doing my job as  
9 Aviation Safety Officer nor has my gender identity prevented others from doing their jobs in the  
10 military. I perform valuable services for the Army, and my performance of those duties  
11 strengthen our nation's military readiness. In fact, in a recent evaluation, my Brigade  
12 Commander noted that I am the best Battalion Safety Officer within the Brigade and am, in his  
13 view, one of the top 25% of all Warrant Officers within the Brigade. Within the review he  
14 recommended me for promotion.

15 24. Being able to serve openly as a transgender woman has made me a stronger asset  
16 to the military. I am able to function as a productive, healthy member of the military, and I am  
17 able to forge stronger relationships with others in my unit. Additionally, my openness as a senior  
18 leader has given other service members the confidence that they need to seek mental health care  
19 without fear of reprisal. When members who are in need of mental health service seek that care,  
20 that improves readiness because it reduces suicidality, reduces instability in the unit, and  
21 therefore, reduces the number of members who could be found unfit to serve based on untreated  
22 mental health issues.

23 25. On June 30, 2016, Secretary of Defense Ash Carter announced a new military-  
24 wide policy lifting the ban on transgender service. This change in policy permitted other people,  
25 similarly situated to me, to come out and serve openly as transgender members of the military  
26 without fear of forced separation based on their transgender status. When the ban was lifted, I  
27 felt a great weight lifted from my shoulders. I also considered the new inclusive policy from my



1 perspective as an officer; I immediately wanted to know what regulatory changes would be  
2 implemented to support the medical and legal needs of transgender service members. I believe  
3 that the policies and protocols implemented over the last year or so have provided support to  
4 both openly serving transgender members and to their commanding officers.

5 26. On October 1, 2016, the DoD issued instructions for implementing the new  
6 inclusive policy. Among the provisions were procedures for how transgender service members  
7 may transition, for medical treatment, and for changing a service member's gender marker in the  
8 Defense Enrollment Eligibility Reporting System (DEERS).

9 27. In February 2017, I changed my gender marker in DEERS. Since that time, I have  
10 followed female standards for dress, grooming, and physical fitness.

11 28. Over the last year or so, the DoD has been implementing the new inclusive policy,  
12 including through transgender-specific trainings. I have assisted in the provision of these  
13 trainings to fellow service members and to dozens of command teams. All told, I have reached  
14 hundreds of service members and I know that my voice, as coming from a Senior Chief Warrant  
15 Officer, has helped to alleviate concerns of members in command positions because I perceive  
16 issues that could affect military readiness through the lens of an officer.

17 29. On July 26, 2017, President Trump posted three tweets that indicated a shift in  
18 policy towards open service by transgender military members.

19 30. Since the tweeted policy change and the memorandum directing a ban on service  
20 by openly transgender service members were released, I have felt like the rug has been pulled out  
21 from under me and my anxiety has been extremely high. Knowing that my Commander-in-Chief  
22 and his military advisors view my service as a burden has utterly crippled my morale. It was a  
23 devastating blow that wounded me more than any combat injury could, because this  
24 discriminatory policy cuts to the core of *who I am*. I feel that my career is being destroyed by  
25 discrimination and prejudice.

26 31. It has been difficult for me to go to work thinking that I am viewed as an  
27 inconvenience, in spite of the recognition and awards I have received for my work. It is

1 challenging to perform to standards when I am afraid of losing my job at any moment. I cannot  
2 express how hurt I am by this policy—it is sending a public message denouncing thousands of  
3 loyal soldiers and dedicated professionals, who have proven their competence time and time  
4 again, many through multiple tours of duty throughout fifteen years of military conflict.

5 32. Because of the change in policy, I faced anxiety attacks, but seeking help for this  
6 issue places me in a difficult position of potentially facing a medical evaluation board regarding  
7 my fitness to serve as an aviator. Nonetheless, I requested anxiety medication from my doctor  
8 after the President posted the tweets because my interpretation was that I was being fired after  
9 more than seventeen years of honorable service. Additionally, I have a family and my healthcare,  
10 pension, and retirement benefits are now all in jeopardy.

11 33. My wife and I are struggling to come to grips with all the consequences of losing  
12 my career and benefits. My wife also is transgender as well as a Veteran of the Marine Corps.  
13 We are in constant fear that we will lose many protections that shield us from discrimination  
14 within the military system.

15 34. My wife and I both rely on TriCare for all of our medical needs. Upon my  
16 separation from the Army, we would lose access to our health care, which would be incredibly  
17 stressful.

18 35. My primary care physician has determined that it is medically necessary for my  
19 transition plan that I receive genital surgical treatment. In early July, my doctor was arranging  
20 the date for the surgery with a visiting military urologist. However, just days after President  
21 Trump's announcement of the change in policy through Twitter, all efforts to arrange the surgery  
22 were called off and following attempts to reschedule were denied.

23 36. Had the policy towards inclusive transgender service and provision of medically  
24 necessary transition-related care not been reversed, I would have received genital surgical  
25 treatment. After I receive that treatment, I will no longer need to take a testosterone blocker.  
26 Therefore, I would no longer need a waiver to fly and may return to my full flight duties. This  
27 would enhance my unit's military readiness because we would have additional attack aviation

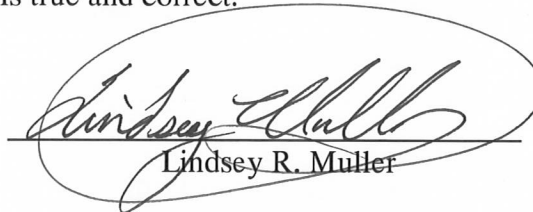
1 capacity.

2 37. Military medical staff have developed a treatment timeline for my transition,  
3 which contemplates surgical treatment among other medical care. My commanding officer,  
4 Lieutenant Colonel Jonathan Easley, has reviewed that timeline and stated in a memorandum  
5 dated December 8, 2017 that he "[saw] no reason it should conflict with military necessity or  
6 current unit requirements." I am currently in the process of pursuing surgical treatment.

7 38. I have engaged in speech and conduct disclosing my transgender status and  
8 expressing my gender identity, including by coming out to my chain of command and my fellow  
9 service members, taking steps to transition, and living openly as a woman in military life. I want  
10 to continue to be able engage in speech and conduct disclosing my transgender status and  
11 expressing my gender identity.

12  
13 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the  
14 United States of America that the foregoing is true and correct.

15  
16 DATED: January 23, 2017

  
Lindsey R. Muller

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DECLARATION OF LINDSEY MULLER  
IN SUPPORT OF PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT - 8  
[2:17-cv-01297-MJP]

NEWMAN DU WORS LLP

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(206) 274-2800



**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on January 25, 2018.



Derek A. Newman, WSBA #26967

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

*Plaintiffs,*

v.

DONALD J. TRUMP, in his official capacity as  
President of the United States, et al.,

*Defendants.*

Case No. 2:17-cv-01297-MJP

**DECLARATION OF TERECE LEWIS  
IN SUPPORT OF PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT**

I, Terece Lewis, do hereby state as follows:

1. My name is Terece Lewis. I am a plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.

2. I am a 33-year-old woman, and I live in Bremerton, Washington with my wife and son.

3. I am a Petty Officer First Class in the U.S. Navy and am currently stationed at Naval Base Kitsap in Bremerton, Washington on the U.S.S. John C. Stennis.

4. I have served in the U.S. Navy for approximately fourteen and a half years.

5. I have always been dedicated to the mission of the United States Navy—to maintain, train, and equip America's combat-ready naval forces capable of winning wars, deterring aggression, and maintaining freedom of the seas. During my over fourteen years of

naval service, I have defended oil platforms in the Arabian Gulf, boarded vessels and seized tons of cocaine in route to the United States from South America, protected shipping lanes off the coast of Africa from Somali pirates, and defended freedom of navigation in the South China Sea. In 2009 and 2011, I served in Operation Enduring Freedom, which is the name for the U.S. government's Global War on Terrorism between 2001 and 2014.

6. Over the past fourteen and a half years, I have served in a variety of roles within the Navy. I have worked as a mechanic, as both an Engineman and Machinists Mate. I currently serve in the latter role, which involves marine mechanics work and the maintenance and repair of auxiliary systems. I have worked on the flight deck of an aircraft carrier ensuring mail and critical parts get to their proper destination. I have been the public affairs officer for a major shore command. I have been a career counselor advising Sailors of their career options. I have stood watch as naval security forces ensure the safety and security of valuable government assets.

7. I have received awards and decorations for my service including five Navy and Marine Corps Achievement Medals, four Good Conduct Medals, a National Defense Service Medal, a Global War on Terror Expeditionary Medal, Rifle Marksmanship Expert Medal, and a Coast Guard Special Operations Service Ribbon.

8. I have continued to serve because of my commitment to my country and to my family. In addition, my son was born with multiple medical complications that now require constant care from physical therapists and medical staff, which has been covered by TRICARE, the military's health care program. My choice to reenlist, near the close of my previous term of service, ensured that my son has the proper medical care and physical therapy necessary to prosper. I am currently the sole provider for my household.

9. I am transgender. I was assigned the sex of male at birth. However, I have known for many years, since approximately early 2013, that I am female.

10. I began to come to terms with my gender identity approximately three years ago. I thereafter started to see a mental health professional who diagnosed me with gender dysphoria.

11. When the ban on open service by transgender service members was lifted in June

2016, I decided to remain in the Navy and transition, which was the best course of action for both me and my family. In late 2016, I began taking the steps necessary with my chain of command to lay the groundwork for my transition.

12. I began living openly as a woman in late 2016.

13. I am taking medical steps to bring my body into conformity with my female gender identity. In consultation with my physician, I began hormone therapy on July 25, 2017, one day before President Trump released the transgender military ban by tweet, which has given me a much more typically feminine appearance.

14. I have taken legal steps to transition. I legally changed my first name to Terece, which is reflected on my driver's license, social security card, and all other personal records.

15. I have worked with my chain of command throughout my transition. I have found a tremendous amount of support from both them and my enlisted peers and they have become a crucial part of my personal support network during my transition.

16. My military medical transition plan, as designed by the Navy Medicine West Transgender Care Team, specifically by Dr. Melissa Hiller Lauby, was approved on or around March 1, 2017. That plan states that "[c]onsistent with currently accepted standards of care, medical transition for Gender Dysphoria is clinically appropriate and medically necessary." The plan further confirms that I am "psychologically stable and fit for full duty."

17. In addition to hormone therapy, my transition plan also includes transition-related surgeries that cannot be performed until after March 2018. According to the plan, "[t]hese surgical procedures are considered medically necessary." However, I am not medically eligible for these procedures until I have received hormone therapy for at least 12 months.

18. The fact that I am is transgender has not prevented me from doing my job in the military. I perform a valuable service for the Navy that strengthens military readiness. Conversely, my exclusion from the military on the basis of my transgender status would weaken military readiness.

19. I was blindsided by President Trump's announcement that he would be banning transgender people like me from serving in the military.

20. Particularly in light of the steps that the military had taken to lift the ban against open service, I feel as though I was lured out with the promise that I would have a safe environment in which to transition, while continuing to carry out my duties and responsibilities in the Navy. Now, with no warning, I am facing a new regime that says I have no place in the military, the institution for which I have sacrificed and served for the entirety of my adult life.

21. I am distressed and appalled by the aspersions cast by White House officials about my ability to serve in the military. I lived in silence for several years and it was very upsetting to have to sit on the sidelines and have people in power and in the media talk about transgender people as if we are unfit to serve even though we are able and willing to put our lives on the line for our country.

22. The White House memorandum implementing the ban solidified my fear that I will be presumptively deemed ineligible to serve based solely on my transgender status. It has caused me to feel like my future and my ability to provide for my family is now on quicksand. The fear of being unable to provide for my child and care for his medical needs eats away at me constantly. Due to my son's medical conditions, he has several appointments throughout the week, nearly every day. No parent should feel as helpless as I have felt in protecting and providing for my child.

23. Still, I continue to perform my duties with honor, doing everything that is expected of me.

24. I feel a profound sense of rejection and betrayal. I face the loss of everything I have worked so hard to achieve—the loss of my career, a critical part of my moral support network, the ability to support my family, and the health insurance on which my family depends—not based on my service or aptitude, but rather based on prejudice, ignorance, lies, and politics.

25. Being able to serve openly as a transgender woman has makes me a stronger asset for the military. I am able to function as a productive, healthy member of the military, without the distress that would otherwise accompany untreated gender dysphoria, and I am able to forge stronger relationships with others in my unit, without having to pretend to live as someone who I



am not. Being transgender has not negatively impacted the ability for members of my unit to work together to accomplish our tasks. All of us come from different backgrounds—from how we were raised, to the religion we practice, to the political beliefs we hold—but we are able to put those things aside, come together as a team, and focus on the work that needs to be done, as the military has trained us to do.


26. If permitted to do so, I would re-enlist in the military following the expiration of my term of service. Indeed, I would, if I could, serve honorably in the military until the age of retirement.

27. I have engaged in speech and conduct disclosing my transgender status and expressing my gender identity, including by coming out to my chain of command and my fellow service members, taking steps to transition, and living openly as a woman in civilian life. I want to continue to be able to engage in speech and conduct disclosing my transgender status and expressing my gender identity.

28. All that I want is to live openly as the woman I am and to be treated with respect and dignity by the military.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: January 22, 2018



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Terece Lewis

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on January 25, 2018.



Derek A. Newman, WSBA #26967

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The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

*Plaintiffs,*

v.

DONALD J. TRUMP, in his official capacity as  
President of the United States, et al.,

*Defendants.*

Case No. 2:17-cv-01297-MJP

**DECLARATION OF PHILLIP  
STEPHENS IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

I, Phillip Stephens, declare as follows:

1. My name is Phillip Stephens. I am a plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.

2. I am a 30-year-old man, and I live in Crestview, Florida with my wife and daughter.

3. I am a Petty Officer Second Class in the U.S. Navy and am currently stationed out of Eglin Air Force Base, Florida.

4. I am a member of the American Military Partner Association ("AMPA"), the nation's largest organization of lesbian, gay, bisexual, and transgender ("LGBT") military families and their allies.

5. I have served in the U.S. Navy for approximately five and a half years.

1           6. I have always been dedicated to the mission of the United States Navy—to  
2 maintain, train, and equip combat-ready Naval forces capable of winning wars, deterring  
3 aggression, and maintaining freedom of the seas. During my five years of naval service, I have  
4 ensured the safety of countless Navy pilots both during active combat and training exercises.

5           7. I have served one main role within the Navy: Aviation Structural Mechanic. I  
6 have worked on the flight deck of an aircraft carrier ensuring Navy aircraft pilots are able to  
7 safely eject from their aircraft in the event of an emergency. I have performed this duty with  
8 honor and precision both during simulated and active duty scenarios of a deployment to the  
9 Persian Gulf.

10          8. I joined the Navy to serve my country and provide my wife and our young child  
11 the security, stability, and benefits that a military career provides.

12          9. I am transgender. I was assigned the sex of female at birth. However, I have  
13 known for many years, since I was a young child, that I am male.

14          10. I began to come to terms with my gender identity approximately two and a half  
15 years ago. I thereafter started to see a mental health professional who diagnosed me with gender  
16 dysphoria.

17          11. On June 30, 2016, I was on deployment in the Persian Gulf and had limited access  
18 to news or media and was therefore initially unaware that the ban on open transgender military  
19 service had been lifted. My wife sent me a link about the policy and I read the posting on the  
20 AMPA Facebook page over and over again, filled with incredible relief and joy.

21          12. When the transgender ban was lifted, I realized that I could do both the best thing  
22 for me and for my wife and child—remain in the Navy and transition. I began living openly as a  
23 man in August 2016, as soon as I returned home from deployment.

24          13. I began scheduling the necessary medical appointments and phone interviews to  
25 acquire the required transition-related paperwork to submit to my Commanding Officer.

26          14. I am taking medical steps to bring my body into conformity with my male gender  
27 identity by following my Medical Treatment Plan for Gender Transition. The plan was signed by  
28 the Chair of the Transgender Care Team, Melissa D. Hiller Lauby, Ph.D. and sent to

1 Commanding Officer, VFA-136 in March of 2016.

2 15. The transition plan states that, “A military behavioral health provider has  
3 diagnosed the member with Gender Dysphoria. Consistent with currently accept standards of  
4 care, medical transition for Gender Dysphoria is clinically appropriate and medically necessary.”  
5 The plan also states that I am “psychologically stable and fit for full duty.”

6 16. In consultation with my physician, I began hormone therapy in November 2016,  
7 shortly after the Department of Defense released guidance on providing transition-related care to  
8 service members. This approved transition plan includes surgical procedures, which it  
9 acknowledges “are considered medically necessary,” but I do not anticipate that they will take  
10 place prior to March 23, 2018. Accordingly, if the ban on transition-related care is implemented,  
11 it will bar me from obtaining this medically necessary care.

12 17. I am also taking legal steps to transition. I will be legally changing my first name  
13 to Phillip. I will also be changing my name and gender marker on my driver’s license and social  
14 security card and records.

15 18. I have worked with my chain of command throughout my transition, and both  
16 they and other enlisted personnel have been supportive of me.

17 19. Since coming out to my chain of command, other service members have  
18 addressed me by male pronouns, which match my gender identity. I have been known, accepted,  
19 and treated as the man I am.

20 20. The fact that I am is transgender has not prevented me from doing my job in the  
21 military. I perform a valuable service for the Navy that strengthens military readiness—keeping  
22 our nation’s aircraft systems safe and operational. Conversely, my exclusion from the military on  
23 the basis of my transgender status would weaken military readiness.

24 21. On July 26, 2017, President Trump posted three tweets that said that transgender  
25 people would not be able to serve in the military “in any capacity.”

26 22. When I first saw the President’s tweets, I was at work and started to receive  
27 messages from my wife and friends sending me support. Confused, I again checked the AMPA  
28 Facebook page, where I learned this devastating news.



23. I was at a complete and utter loss for what to do, but I knew that I could not stay at work. I went home and sat alone in the dark of my living room, trying and failing to shut out the world and this terrifying reality. I juggled my own feelings of anger, fear, and despair, with the unanswerable question of how I would be able to provide solace and support to my family when I myself felt so hopeless.

24. I watched with intermittent rage and shock as White House officials and ignorant people in the media have questioned my capacity to serve in the military, as if I had not already been competently doing so for several years. It adds insult to the injury of living in silence for so long, and it makes a mockery of the sacrifices I make daily at great personal cost to support my family and serve my country.

25. Serving in the United States Navy is everything to me. It makes me profoundly proud to support my wife and our young daughter with my work. I can walk through the world with my head held high, as a proud father, husband, and man.

26. Despite the preliminary injunction, I am living in fear and anxiety that my career may still be in jeopardy because the injunction is not permanent. I understand that it remains possible that the military could, in the future, implement a ban on open transgender service, depending on how the litigation is ultimately resolved. It is painful for me to consider a future without service to my country.

27. I relied upon the lifting of the open service ban for transgender service members before coming out about my transgender status and sharing my true gender identity with my command and colleagues. It would be utterly devastating to have this action, which I took in good faith, used against me to relieve me of my well-established position in the United States Navy.

28. Despite my continued fear and anxiety, I continue to go to work every day and perform my duties with precision and honor, and I will continue to do so up until the minute that the military discharges me.

29. Should the ban on open service for transgender military personnel be implemented, it would deprive me of educational and economic opportunities upon which my

1 family and I have relied in planning our lives. I cannot afford to attend college without the G.I.  
2 Bill, which is another means to bettering myself and ensuring financial security for my wife and  
3 child.

4 30. Implementing the ban on open service for transgender military personnel would  
5 also impair my ability to support and comfort my family because I would no longer feel  
6 supported by the country to which I have dedicated my life in service.

7 31. As an African-American man, there was also a time when the military would have  
8 treated me differently just because of my race. But the military eliminated racial  
9 discrimination—and became stronger because of it. Similarly, allowing transgender individuals  
10 like me to serve openly only make the military stronger because it removes an exclusion to  
11 service that has no bearing on my ability to do my job.

12 32. I have engaged in speech and conduct as enlisted Navy service member regarding  
13 my gender identity and status as a transgender person. Despite the temporary halting of the ban, I  
14 remain fearful for my ability to continue to do so without retribution or punishment given that  
15 the litigation has not yet been ultimately resolved.

16 33. Being able to serve openly as a transgender man enables me to continue to serve  
17 as a productive member of my shop team, without the distress that would otherwise accompany  
18 untreated gender dysphoria. Coming out to my fellow service members and commanding officers  
19 helped us form stronger, more honest working relationships, and deepened our trust of one  
20 another, which is of serious import in the high stakes and stressful environment in which we  
21 serve.

22 34. If permitted to do so, I would re-enlist in the military by my re-enlistment  
23 deadline of October 10, 2018, before the expiration of my term of service in 2019. Indeed, I  
24 would, if I could, serve honorably in the military until the age of retirement.

25 ///

26 ///

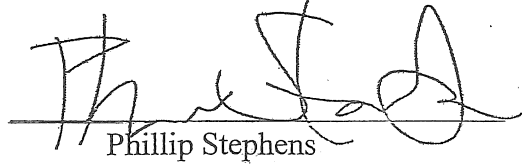
27 ///

28 ///

1           35. All that I want is to live openly as the man I am and to serve my country with  
2 respect and dignity.

3  
4           Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the  
5 United States of America that the foregoing is true and correct.

6  
7 DATED: January 25, 2018

8   
Phillip Stephens

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on January 25, 2018.



Derek A. Newman, WSBA #26967

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(206) 274-2800

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

*Plaintiffs,*

v.

DONALD J. TRUMP, in his official capacity as  
President of the United States, et al.,

*Defendants.*

Case No. 2:17-cv-01297-MJP

**DECLARATION OF MEGAN  
WINTERS IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

I, Megan Winters, declare as follows:

1. My name is Megan Winters. I am a plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.
2. I am a 29-year-old woman, and I live in Alexandria, Virginia.
3. I am a Petty Officer Second Class in the U.S. Navy and am currently stationed at Hopper Information Service Center, in the Office of Naval Intelligence, out of Washington, D.C.
4. I am a member of the American Military Partner Association ("AMPA"), the nation's largest organization of lesbian, gay, bisexual, and transgender ("LGBT") military families and their allies.
5. I have served in the U.S. Navy for approximately five and a half years.
6. I have always been dedicated to the mission of the United States Navy—to



maintain, train and equip combat-ready Naval forces capable of winning wars, deterring aggression, and maintaining freedom of the seas. During my 5 and a half years of naval service, I have delivered responsive, reliable, and adaptable intelligence mission systems, applications, and services in support of sustained global maritime and joint intelligence operations.

7. I have served one main role within the Navy: Information Systems Technician. I have spent the majority of my career receiving specialized training and provided mission-related information technology and services to the Office of Naval Intelligence, its subordinate commands, the Fleet, and Joint Forces commands. I have performed these duties with honor and precision in support of the Global War on Terrorism.

8. I joined the Navy to serve my country and for the security and stability that a military career provides.

9. I am transgender. I was assigned the sex of male at birth. However, I have known for many years, since approximately 2001, that I am female.

10. After struggling for many years to receive family acceptance, I began to come to terms with accepting and living openly in my gender identity, approximately two years ago. I thereafter started to see a mental health professional who diagnosed me with gender dysphoria.

11. On June 30, 2016, I was working in a server room of a sensitive compartmented information facility and had no access to news or media. I was therefore initially unaware that the ban on open transgender military service had been lifted. Another service member notified me of the change in policy. After leaving work, I verified the news through social media postings and was absolutely ecstatic.

12. I had informed my family that I was transgender immediately prior to the announcement that the transgender ban was lifted, while I was on leave. I realized then that I needed to finally live my true, authentic life, and hoped to do so while continuing my service to my country in the Navy. I began living openly as a woman in July 2016.

13. I began scheduling the necessary medical appointments and phone interviews to acquire the required transition-related paperwork to submit to my Commanding Officer.

14. I am taking medical steps to bring my body into conformity with my female

gender identity. In consultation with my physician, I began hormone therapy in July 2016.

15. I have also taken legal steps to transition. I have legally changed my first and middle names to Megan Dawn. I have also changed my name on my driver's license and social security card and records.

16. I have worked with my chain of command throughout my transition.

17. Since coming out, others have mostly addressed me by female pronouns, which match my gender identity. In general, my peers know and treat me as the woman that I am, though some officers have called me "sir," despite the request to use female pronouns, and despite the custom that "sir" is not used with enlisted service members.

18. The fact that I am transgender has not prevented me from doing my job in the military. I perform a valuable service for the Navy that strengthens military readiness—providing information technology and services that, in turn, allows other service members to do their jobs. Conversely, my exclusion from the military on the basis of my transgender status would weaken military readiness.

19. On July 26, 2017, President Trump posted three tweets that said that transgender people would not be able to serve in the military "in any capacity."

20. When I first saw the President's tweets, I was temporarily assigned to another command with other service members from my office, for additional training in the information systems technology field. I began receiving scores of messages on my phone from individuals that were worried about my safety and the safety of other transgender service members. Bewildered, I excused myself from the class to verify the distressing news.

21. I was overcome with anxiety and emotionally concerned about myself and my fellow transgender members of the military. I felt helpless and hopeless. I began reaching out to my medical providers, my chain of command, and other service members whom I know to be transgender to give and receive words of encouragement. Grappling with fear, anger, and insecurity, I realized the necessity of continuing to support my command's mission. I returned to work for the rest of the day.

22. I have been dismayed and enraged to watch people claiming to be experts

publicly question my capacity—and that of an entire group of people like me—to serve in the military, all based on a characteristic that has no relation to ability. At the most basic level, I have abided by every instruction placed in front of me and my work product, military demeanor, and physical readiness have been of the utmost quality, regardless of my gender identity. Having served in silence for so long, at a great personal cost, it adds insult to injury that my gender identity prevents these uninformed persons from acknowledging that not only do I help accomplish the military’s mission, but I do it well.

23. Unfortunately, within a month after the President’s tweets, I received a notification from Naval headquarters at Millington that administrative separation proceedings were being initiated against me, with a cited reason relating directly to the fact that I am transgender.

24. Specifically, Naval command notified me that a basis for the separation proceedings was Military Personnel Manual (MILPERSMAN) 1910-120 “Separation By Reason of Convenience of the Government – Physical or Mental Conditions.” Of the list of conditions in that policy, the only one that applies to me is “(13) Sexual gender and identity disorders paraphilias.” This is a reference to my gender dysphoria diagnosis.

25. I understand that the military now contends the notification of a pending separation or discharge was issued in “error,” but it was terrifying to be put in that position.

26. Beginning in July 2016, I followed every order regarding my treatment plan as indicated by Navy medical officers. This treatment plan did not impact my duty status or my operational readiness.

27. I continually provided my chain of command with military medical paperwork which affirmed that my fitness for duty was not affected. To the contrary, my command validated my status as “fit for full duty” and worldwide deployable in May 2017 and again on September 6, 2017.

28. Following the lifting of the ban on open service by transgender military personnel in June of 2016, Navy medical officers created an individualized treatment plan for my gender transition, which I have followed with their continued supervision and guidance.

29. My Medical Treatment Plan for Gender Transition was signed and approved on December 7, 2016, by my then Commanding Officer, Captain Susan Bryerjoyner.

30. The transition plan states that “P02 Winters has received the diagnosis of Gender Dysphoria from a military Behavioral Health provider and a determination that gender transition is medically necessary on 10 June 2016.” It also states that “[t]his medical treatment plan is unlikely to impact the readiness and deployability of the Service member.”

31. The first step of my treatment plan included the initiation of hormone replacement therapy, pursuing a legal name change, and updating my gender marker in the Defense Enrollment Eligibility Reporting System (“DEERS”).

32. As I discussed with Captain Bryerjoyner in 2017, the second step of my treatment includes medically necessary surgical treatment. I do not anticipate that this treatment will take place by March 23, 2018. Because TRICARE does not outright cover these procedures, I am required to submit and have granted a Defense Health Agency (“DHA”) waiver in order for TRICARE to consider payment.

33. I submitted a DHA waiver to the TRICARE office at Portsmouth for transition-related surgical care as part of my Navy medical approved treatment plan on August 24, 2017.

34. On the following day, August 25, 2017, the White House released its memo directing the Department of Defense to halt all planned surgical treatment for transgender service members. Since August 25, 2017, I have been attempting to make contact with TRICARE personnel at Portsmouth to determine if my paperwork is still in process or has been rejected. As of this date, the decision to grant or deny my medical waiver is still pending.

35. Serving in the United States Navy truly means everything to me. Growing up as the child of a veteran, the military’s core values and creeds have been ingrained into every aspect of my life from a young age. Nothing makes me prouder than being able to hold my head high as I wear the cloth of this country.

36. I live and breathe military service, and have never seen a future for myself without a long and decorated military career. For me, news of the ban felt like the ripping apart of a core aspect of my identity, something as important and sacred as my gender identity. The

deep shame that comes from rejection has caused me immeasurable emotional pain, the scars of which I will carry with me forever.

37. Despite the preliminary injunction, I am living in fear and anxiety that my career may still be in jeopardy because the injunction is not permanent. I understand that it remains possible that the military could, in the future, implement a ban on open transgender service, depending on how the litigation is ultimately resolved.

38. If the ban on open service for transgender military personnel were implemented, it would deprive me of highly specialized educational opportunities that I cannot attain elsewhere. I am honored to serve in the Navy intelligence community, and have received an incredible and costly education in order to do so, but my education must continue in order for me to remain competitive in my field. The Navy provides specialized opportunities that I cannot attain elsewhere.

39. The implementation of the ban on open service for transgender military personnel would rob me of the hard-earned respect I have cultivated with my fellow service members and chain of command. The loss of such respect would not only impact my self-confidence but also my future employability in the private sector, should I in fact be discharged from the military.

40. I have demonstrated professionalism and commitment to serving appropriately in the military by following orders regarding open transgender service. I waited to come out and to pursue the medical treatment I needed until the military deemed it appropriate. I have followed guidance and orders to the letter and am proud to be a disciplined service member in every aspect of my life. I believe these qualities make me a strong asset to the military each day of my service.

41. I disclosed my transgender status and expressed my gender identity openly in reliance upon the open service ban being lifted in the summer of June 2016 and now, despite the preliminary injunction, I cannot shake the feelings of fear, anxiety and betrayal that follow me from day to day.

42. I want to continue to live authentically as a transgender military professional but I remain afraid to speak openly because I may be punished for doing so if the ban is not

1 permanently enjoined.

2 43. All that I want is to live openly as the woman I am and to serve my country with  
3 respect and dignity.

4  
5 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the  
6 United States of America that the foregoing is true and correct.

7  
8 DATED: January 25, 2018

  
Megan Winters



**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on January 25, 2018.



Derek A. Newman, WSBA #26967

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The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

*Plaintiffs,*

v.

DONALD J. TRUMP, in his official capacity as  
President of the United States, et al.,

*Defendants.*

Case No. 2:17-cv-01297-MJP

**DECLARATION OF CONNER  
CALLAHAN IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

I, Conner Callahan, declare as follows:

1. My name is Conner Callahan. I am a plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.
2. I am a 29-year-old man, and I live in Asheville, North Carolina.
3. I am a Public Safety Officer at Warren Wilson College in Asheville, North Carolina.
4. I have wanted to enlist in the military since age 13. I come from a family with a legacy of military service and consider it my personal calling to serve and protect the people of the United States in this capacity.
5. I would like to put my investigative and problem-solving skills to use for the military. In 2014, with the help of a U.S. Air Force recruiter in Kent, Ohio, I identified the

enlisted position I would like to pursue: Explosive Ordnance Disposal (“EOD”).

6. I am transgender. I was assigned the sex of female at birth. However, I have known for many years, since approximately early 2012, that I am male.

7. I began living openly as male in 2014 and have done so consistently since that time.

8. In consultation with health care professionals, I have taken clinically appropriate steps to transition, which were completed in 2015.

9. I have taken legal steps to transition. I legally changed my first name to Conner. I have changed my legal gender to male by court order. I also changed my name and gender marker to male on my driver’s license and on my social security card and records.

10. On June 30, 2016, I learned about the ban on open transgender service being lifted by the military, and also learned that there would be a path for people like me, who wanted to enlist. I did internet research about the different branches and spoke with an Army recruiter in Cleveland, Ohio in July 2016 because they had expressed that their branch was willing to work with transgender people who wanted to enlist.

11. I am ready and able to pursue a military career. When I spoke with military recruiters I was open about my transgender status and discussed with a recruiter what position would be best for me after enlistment. I also took practice Armed Services Vocational Aptitude (also known as “ASVAB”) tests, scoring above the 90th percentile on both tests.

12. On July 26, 2017, President Trump posted three tweets that said that transgender people would not be able to serve in the military “in any capacity.”

13. I was utterly devastated by this news; it felt as if the floor had fallen out from beneath my feet. I felt betrayed by my country and by our government. I had already sacrificed a great deal in my personal life to come out as transgender, including the loss of support from my then spouse and from family members. This was another crippling blow to my self-worth and identity.

14. As a 29-year-old man, I have a finite amount of time to enlist in the military. It has been my life’s goal and it has been difficult to try to make other plans for my future when

this is so clearly the best path for me. I want to serve my country and have felt immense regret that I have not yet been able to do so based upon illegitimate considerations.

15. However, in reliance upon the preliminary injunction granted by this court, I officially began the process of enlistment to serve in the United States Air Force Reserves on January 5, 2018, by speaking with a national Air Force recruiter by telephone. Should I be successful, enlisting in the Reserves will enable me to retain my primary employment as a Public Safety Officer, in the event the ban is not permanently enjoined.

16. The officer I spoke with at the National Air Force Recruitment office connected me with the closest Air Force Reserves Recruitment office, which is located in Duluth, Georgia. I made an appointment to meet at this office on January 24, 2018, to begin processing my enlistment application.

17. However, on January 16, 2018, I was informed me that I would need to gather approximately ten legal documents in advance of the appointment. These documents include medical releases regarding my medical care, as well as my original birth certificate, social security card, driver's license, high school diploma, college transcript, and copies of any other legal documents.

18. In working to collect these documents, medical staff informed me that it can sometimes take 30 days to receive the paperwork I requested. As a result of this information, my appointment to complete my enlistment application will likely occur in February, allowing me to progress to the next stage of the enlistment process.

19. I am cautiously optimistic that this process will be a smooth one, and that I will be able to fulfill my dream of serving in the Air Force Reserves, although I continue to worry about the climate President Trump has created in the military after July 2017 with respect to transgender service members.

20. I have shared my excitement as well as my trepidation with my friends and loved ones. I hope that I will be able to serve my country, as so many people before me have done, regardless of their race, sexual orientation, or gender. All that I want is to live openly as the man

///

1 I am and to serve my country with respect and dignity.

2  
3 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the  
4 United States of America that the foregoing is true and correct.

5  
6 DATED: January 25, 2018

7   
Conner Callahan

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on January 25, 2018.



Derek A. Newman, WSBA #26967

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The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

*Plaintiffs,*

v.

DONALD J. TRUMP, in his official capacity as  
President of the United States, et al.,

*Defendants.*

Case No. 2:17-cv-01297-MJP

**DECLARATION OF JANE DOE IN  
SUPPORT OF PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT**

I, Jane Doe, declare as follows:

1. I am a plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.

2. I am a 29-year-old woman, and I am currently serving in the U.S. military.

3. I am also transgender, although I have not yet transitioned to living openly as a woman. Because of the federal government's recently announced policy with respect to transgender service members, I am limiting the information in my testimony to exclude identifying information, for fear that I would be separated from the military on the basis of my transgender status or face other negative consequences.

4. I joined the military to serve my country and for the security and stability that a military career provides. I enjoy the challenge my military career provides, and I take pride in my role in protecting our country and helping others save innocent lives.

1           5.       I desire to continue serving in the military for the maximum number of years I am  
2 permitted to do so openly. My re-enlistment window opens within the year.

3           6.       I was assigned the sex of male at birth. However, I have felt since I was 11 years  
4 old, and known since I was 20 years old, that I am female. I have long hoped to be able to  
5 transition to living openly as a woman, but the prospect of doing so felt unattainable in the past,  
6 without a supportive environment in which to transition.

7           7.       On or around June 30, 2016, I became aware that the ban on open military service  
8 by transgender individuals had been lifted. I was very excited and nervous about the possibility  
9 of serving openly as a woman. In October 2016, I began extensively reviewing the materials the  
10 military was releasing to implement the lifting of the ban. In December 2016, I attended my  
11 command-level training on the new policy. Around that time, I decided to come out as  
12 transgender to select colleagues whom I felt I could trust. I also researched what was required to  
13 formally change my gender marker in the military's Defense Enrollment Eligibility Reporting  
14 System.

15           8.       I decided to begin my legal and medical transition and begin the process of  
16 officially changing my gender marker once I was posted at my next assigned location. I planned  
17 to time and structure my transition so that it was as smooth as possible for me and others. I  
18 wanted to work carefully with military medical personnel and my Commanding Officer, giving  
19 him plenty of time to prepare my unit so that my transition would go smoothly for everyone. I  
20 also wanted the other service members at my next assigned location to get to know me as a  
21 valuable individual member of the team. I additionally wanted to give myself some time to come  
22 out to individuals to whom I could look for support. I transferred to this assigned location in July  
23 2017.

24           9.       On July 26, 2017, President Trump posted three tweets that said that transgender  
25 people would not be able to serve in the military "in any capacity." After I saw the President's  
26 tweets, I decided to put my plans to transition, come out as transgender, live openly as a woman,  
27 and change my gender marker, on hold.

28           10.      Because of this change in policy, I have not come out to anyone in my chain of

1 command. I am open to a few select individuals with whom I serve, as well as a group of  
2 veterans with whom I communicate about my gender identity for support and friendship.

3 11. I have been extremely anxious and stressed about what to do next. I have placed  
4 my life “on hold.” I have not come out as transgender to any additional people in my life; I have  
5 not pursued any of the steps required for me to transition; and I no longer know if I will be able  
6 to continue serving in the military, a career that I love and wish to continue. This is all due to the  
7 announced policy banning transgender people like me from serving openly in the military.  
8 Because lawsuits regarding the policy are still pending and have not been finally resolved, I  
9 remain concerned that the military could ultimately implement a ban on transgender service  
10 members. If I were to come out in the interim, then I could lose everything if I were subject to  
11 discharge based on my transgender status.

12 12. Furthermore, I am aware that the President issued a memorandum on August 25,  
13 2017 mandating that the federal government stop providing transition-related surgical care as of  
14 March 23, 2018. This ban on surgical care contains a limited exception for situations in which  
15 surgical care is “necessary to protect the health of an individual who has already begun a course  
16 of treatment to reassign his or her sex.” Because I have not yet transitioned to living openly as  
17 female, I have not “begun a course of treatment to reassign [my] sex,” even assuming the other  
18 conditions for the exception were satisfied.

19 13. Based on my individual circumstances, I will need surgical care as part of my  
20 transition. However, the President’s policy prohibits that care. Furthermore, because I have not  
21 yet begun my transition, I do not qualify for the limited exception contained in the policy.

22 14. I am terrified that my career will be brought to an early end because of the  
23 President’s decision to ban transgender individuals from military service.

24 15. The ban on open service for transgender military personnel harms my mental and  
25 emotional health by causing me to continue living as if I were a man, even though I am a  
26 woman, and by indefinitely delaying, if not altogether prohibiting, my medical and legal  
27 transition to living openly as female.

28 16. In short, I am caught between a rock and a hard place. If I transition, I lose my

1 career and everything that comes with it—including my current income, my benefits, my future  
2 employability outside the military, and my identity as a service member. If I do not transition,  
3 then I give up the expression of who I am on the most fundamental level and, instead, must  
4 continue living as someone that I am not.

5 17. All that I want is to live openly as the woman I am and to serve my country with  
6 respect and dignity.

7  
8 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the  
9 United States of America that the foregoing is true and correct.

10  
11 DATED: January 22, 2017

12   
Jane Doe

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on January 25, 2018.



Derek A. Newman, WSBA #26967

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 4, 2018, I filed the foregoing addendum with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Catherine H. Dorsey  
Catherine H. Dorsey