NO.18-35347

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

RYAN KARNOSKI, et al.,

Plaintiffs-Appellees,

STATE OF WASHINGTON,

Intervenor-Plaintiff-Appellee,

v.

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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE
No. 2:17-cv-01297-MJP
The Honorable MARSHA J. PECHMAN
United States District Court Judge

# STATE OF WASHINGTON'S RESPONSE TO MOTION FOR STAY PENDING APPEAL

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# I. INTRODUCTION

Transgender individuals have long devoted their lives to serving our country in the United States military. However, Defendants' longstanding policy barring open service by transgender individuals necessitated service in silence. In 2016, after an extensive review process, the Department of Defense ("DoD") determined that allowing transgender individuals to serve openly would make our military stronger. Relying on DoD's promise of inclusion, enlisted transgender servicemembers began to serve openly and many of whom had long wished to serve— began to plan their accessions.

Without warning, in July 2017, President Donald Trump announced via Twitter that transgender individuals were banned from military service in any capacity ("the Ban"). President Trump memorialized the Ban a month later in an August 25, 2017, Presidential Memorandum ("2017 Memorandum") which directed Secretary of Defense James Mattis to develop an implementation plan for the Ban. Secretary Mattis presented that plan to President Trump on February 22, 2018—"Military Service by Transgender Individuals" memorandum ("Mattis Policy Recommendation")—along with a Department of Defense Report and Recommendations on Military Service by Transgender Persons

("DoD Report"). The President approved the implementation policy recommendation in a March 2018 emorandum.

Defendants argue that the 2018 memorandum, Mattis Policy Recommendation, and DoD Report (collectively "Implementation Plan") constitute a "new policy" governing military service by transgender individuals that should not be encompassed by the District Court's preliminary injunction, and move this Court to stay the injunction pending appeal so they may implement the discriminatory Ban. However, that the final shoe has dropped on the Ban via the Implementation Plan neither eliminates Washington's need for an injunction to protect its interests from harm, nor provides a basis for staying the injunction pending appeal. Because Defendants otherwise fail to satisfy any part of the stay test, this Court should reject their motion.

## II. BACKGROUND

On June 30, 2016, based on the advice of medical, military, and personnel experts—and independent research conducted by the RAND Corporation—former Secretary of Defense Ashton Carter ended the military's longstanding, facially discriminatory policy and welcomed transgender individuals to openly access and serve in the United States military. Add.8-9. To that end, former Secretary Carter issued a directive allowing transgender

individuals currently serving to do so openly, and directed the military to allow transgender individuals to access into military service. Add.9-10.

Over a year later, on July 26, 2017, President Donald J. Trump reneged on the DoD's promise of equal treatment and opportunity for transgender individuals in military service and announced on Twitter that the military would ban transgender people from serving. Add.5.

A month later, on August 25, 2017, President Trump memorialized the Ban in the 2017 Memorandum, titled "Military Service by Transgender Individuals." Add.109-10. In the 2017 Memorandum, President Trump directed the military to "return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016[.]" Add.109. The 2017 Memorandum also directed the Secretaries of Defense and Homeland Security, "[b]y February 21, 2018," to submit "a plan for implementing . . . the general policy set forth in section 1(b)." *Id.*

Secretary of Defense James Mattis issued a Statement on August 29, 2017, confirming receipt of the 2017 Memorandum and affirming that "[t]he department will carry out the president's policy direction . . . ." Statement by Secretary Mattis at 1. Add.107. Secretary Mattis noted that "as directed, [he] will develop a study and implementation plan" including establishing "a panel of

experts serving with the Departments of Defense and Homeland Security to provide advice and recommendations on the implementation of the president's direction."[1] *Id.*

On September 14, 2017, Secretary Mattis issued interim guidance regarding the 2017 Memorandum ("Interim Guidance"). WA.Add.2-3. The Interim Guidance confirmed the intent of the DoD to "carry out the President's policy and directives . . . ." *Id*. Secretary Mattis promised that, "[n]ot later than February 21, 2018, I will present the President with a plan to implement the policy and directives in the Presidential Memorandum." *Id*.

On February 22, 2018, as directed, Secretary Mattis delivered to President Trump his Policy Recommendation and DoD Report, providing his plan to implement the Ban. Add.59-61, 62-106.

The Mattis Policy Recommendation bars (1) accession into military service by transgender individuals "who require or have undergone gender transition;" (2) military service by openly transgender individuals who want to serve our country in a manner consistent with their gender identity; and (3) use

[1] According to Defendants, the panel met 13 times over a 90-day period and—well after this lawsuit placed Defendants on notice of the Ban's constitutional deficiencies—provided input into the 44 page DoD Report that purports to provide a reasoned basis for the Ban. Add.80.

of military resources for transition related medical care. Add.60-61.[2] Secretary Mattis concluded his Policy Recommendation by recommending to the President that he revoke the 2017 Memorandum, "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." Add.61.

On March 23, 2018, President Trump issued a Memorandum for the Secretary of Defense and Secretary of Homeland Security regarding Military Service by Transgender Individuals ("2018 Memorandum"). Add.57-58. The 2018 Memorandum acknowledges receipt of the Mattis Policy Recommendation. Add.57. The 2018 Memorandum also accepts Secretary Mattis' recommendation, purports to revoke the 2017 Memorandum, and authorizes Secretary Mattis and the Secretary of Homeland Security "to implement any appropriate policies concerning military service by transgender individuals." *Id.*

[2] The Mattis Policy Recommendation contains a narrow exception allowing transgender individuals who entered or remained in the military following the announcement of the Carter policy and the imposition of preliminary injunctions to serve in accordance with their gender identity and receive medically necessary treatment. Add.108. The exception is revoked if it is "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." *Id.*

## III. PROCEDURAL BACKGROUND

On August 28, 2017, Plaintiffs filed this lawsuit challenging the constitutionality of the Ban. Add.10-11. Washington intervened "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." Add.11.

On December 11, 2017, the District Court preliminarily enjoined 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." Add.56. Washington moved for summary judgment on January 25, 2018, seeking a declaration that the Ban violated the Fifth Amendment's equal protection and substantive due process guarantees.

Relying on the Implementation Plan, Defendants moved to dissolve the preliminary injunction while Washington's Motion for Summary Judgment was pending. The District Court requested supplemental briefing regarding the impact, if any, of the Implementation Plan on Washington's Motion for Summary Judgment. WA.Add.32-47.

On April 13, 2018, the District Court issued an Order Granting in Part and Denying in Part Plaintiffs' and Washington's Motions for Summary Judgment; and Granting in Part and Denying in Part Defendants' Motion for Partial

Summary Judgment. Add.3-33. The Order found that transgender status is a suspect classification and that the Ban must survive strict scrutiny. Add.22-26. The District Court found that the Implementation Plan "do[es] not substantively rescind or revoke the Ban, but instead threaten[s] the very same violations[.]" Add.14. The District Court also found that "[o]n the present record, the Court cannot determine whether 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 the type to which Courts typically should defer." Add.28. The District Court struck Defendants' Motion to Dissolve the Preliminary Injunction and affirmed that "[t]he preliminary injunction previously entered otherwise remains in full force and effect."Add.32.

Defendants filed a Motion to Stay Preliminary Injunction Pending Appeal in the District Court on April 30, 2018. WA.Add.46-53. Defendants filed a Motion for Stay Pending Appeal before this Court on May 4, 2018.

## IV. ARGUMENT

### A. Defendants' Motion Is Procedurally Improper

Defendants' motion flouts court rules. A party requesting a stay pending appeal must: (i) show that moving first in the district court would be impracticable; or (ii) state that, a motion having been made, the district court

denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action. Fed. R. App. P. 8(a)(2)(A). Defendants fail to explain why this rule does not apply to them.

Four days before filing the present motion with this Court, Defendants filed a motion to stay the preliminary injunction pending appeal with the District Court. Despite noting their motion before the District Court for consideration on May 18, 2018, Defendants threatened to file the present motion with this Court if the District Court did not rule on their motion by May 4 (i.e. *within four days*)—a demand the District Court declined in the absence of full briefing. WA.Add.51-52; Add.1-2. Now Defendants are simultaneously litigating the same issue before both Courts—something not contemplated by court rules.

Further, the District Court is well-equipped to evaluate its injunction and has not yet ruled on Defendants' motion, let alone denied it. *See, e.g.*, *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1124 (9th Cir. 2005) (affirming that district court may modify preliminary injunction to "relieve inequities that arise after the original order") (quoting *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 338 (3d Cir. 1993)); *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000) (affirming that "revision or dissolution" of injunction may be warranted by "significant change in facts or law"). This Court should deny Defendants'

attempt to leapfrog the District Court and allow the District Court the opportunity to review Defendants' request.

### B. Defendants Do Not Meet the Extraordinary Burden to Warrant a Stay

A stay pending appeal is available "only under extraordinary circumstances." *Ruckelhaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers). A stay is an "intrusion into the ordinary processes of administration and judicial review" and "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted); *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017), *cert. denied sub nom. Golden v. Washington*, No. 17-5424, 2017 WL 3224674 (U.S. Nov. 13, 2017).

In seeking a stay, Defendants bear the heavy burden of showing (1) a strong likelihood of success on the merits, (2) the likelihood of irreparable injury if relief is not granted, (3) a balance of hardships favoring Defendants, and (4) that reinstating the Ban, as implemented, is in the public interest. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). In assessing these factors, this Court reviews the district court order for abuse of discretion. *Am. Hotel & Lodging Assoc. v. Los Angeles*, 834 F.3d 958, 962 (9th Cir. 2016). Review is "limited and deferential," and does not extend to the "underlying merits of the case." *Sw.*

*Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). "If the underlying constitutional question is close" the Court "should uphold the injunction and remand for trial on the merits." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 774-65 (2004). The district court was well within its discretion to maintain a nationwide preliminary injunction, and Defendants cannot make any of the necessary showings to stay it. *See, e.g., Credit Suisse First Boston Corp.*, 400 F.3d at 1126 n.7 (noting standard of review for a district court's disposition of a motion to dissolve a preliminary injunction is abuse of discretion).

**1. The Ban—Implementation Plan Included—is Unconstitutional and Defendants Cannot Show a Strong Likelihood of Success on the Merits**

Defendants argue that the culmination of the Ban—issuance of the Implementation Plan—somehow moots Washington's need for the preliminary injunction. That makes little sense as the Implementation Plan merely executed the directives of the 2017 Memorandum before the President purportedly "revoked" it. Nor does the manner in which Defendants now wish to implement the Ban pass constitutional muster.

### a. Defendants' 2018 Implementation Plan does not obviate Washington's need for the preliminary injunction

The District Court correctly found that Defendants' Implementation Plan does not constitute a "new policy" but rather implements the Ban that President Trump first announced on Twitter. It also found that the 2018 Implementation Plan does not moot Washington's claims, nor does it constitute changed circumstances sufficient to warrant dissolving or staying the preliminary injunction.[3] This Court should do the same.

Defendants characterize the Implementation Plan as "a new, carefully crafted, and thoroughly explained policy reflecting the best judgment of . . . military advisers[.]" Defs.' Motion (Mot.) at 9. However, viewing the Implementation Plan as untethered from the President's 2017 directive to ban transgender individuals from military service is ahistorical *and* requires this Court to ignore the actual text of the documents.

The 2018 Memorandum acknowledges that the Mattis Policy Recommendation and DoD Report were created "[p]ursuant to [President

[3] *See Jacobus v. Alaska*, 338 F.3d 1095, 1102 (9th Cir. 2003) (affirming that "dismissal of a case 'on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought.'") (quoting *Adarand Constructors, Inc. v Slater*, 528 U.S. 216, 224 (2000)).

Trump's] memorandum of August 25, 2017," which directed Defendants to ban transgender individuals from military service. Add.57. The Implementation Plan does just that.[4] The Implementation Plan formalized each aspect of the Ban President Trump announced in 2017. It cannot be the basis for staying the District Court's injunction pending Defendants' appeal.

**b. Washington has standing to protect its sovereign and quasi-sovereign *parens patriae* interests**

As the District Court has recognized, Washington has significant protectable sovereign interests that give it standing to challenge the Ban. Add.20-23; Add.44-45.

**(1) Washington has standing to protect its sovereign interests**

"[T]he exercise of sovereign power . . . involves the power to create and enforce a legal code; both civil and criminal[.]" *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982). Washington has sovereign

[4] *Compare* Add.109-10 (ordering the United States military to (1) bar accession by transgender individuals; (2) disallow transgender individuals to openly serve in the military; and (3) deny access to medical services solely because a person is transgender) and Add.60-61 (barring (1) transgender individuals "who require or have undergone gender transition" from military service; (2) requiring "[t]ransgender persons without a history or diagnosis of gender dysphoria … [to] serve … in their biological sex"; and (3) denying access to transgender related healthcare to any servicemember not already receiving such services under the Carter policy and this Court's injunction).

interests in maintaining and enforcing its longstanding antidiscrimination laws. *See* Wash. Rev. Code § 49.60.010 (finding that discrimination "menaces the institutions and foundation of a free democratic state"); WA.Add.58-66 (anti-discrimination policies), and in not being forced to engage in sex-based discrimination in violation of the Washington State Constitution, *see* Washington State Const. art. XXXI, § 1 (affirming that equality of rights and responsibility shall not be denied or abridged on account of sex). By requiring discrimination, the Ban impairs Washington's unique interest in making and enforcing its civil rights protections and infringes on its sovereign interests.

Washington also has protectable interests in "preserv[ing] its sovereign territory." *Massachusetts v. EPA*, 549 U.S. 497, 518-19 (2007) (affirming that states have an "independent interest" in protecting the natural environments and resources within the state's boundaries) (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). Washington protects these interests with its National Guard, as a critical part of the Washington National Guard's mission is to prevent and minimize damage caused by natural disasters like wildfires, landslides, flooding, and earthquakes. Add.44-45; Add.20-22; WA.Add.69-75. Recruitment for the Washington National Guard is subject to DoD policies governing accession into military service, 10 U.S.C. § 12201(b), and excluding

transgender Washingtonians from the pool of candidates who can join the Washington National Guard results in diminished numbers of Guard members who can provide emergency response and disaster mitigation in emergent situations. Any reduction in qualified service members negatively impacts the State's interest in responding to and mitigating harms to its territory.

**(2) Washington has *parens patriae* standing to protect its residents from discrimination**

Washington has standing as *parens patriae* to protect residents from "the harmful effects of discrimination." *Snapp*, 458 U.S. at 609 (holding that protecting residents from overt federal discrimination is squarely a state concern). Washington is home to at least 60,000 active and reserve military servicemembers and approximately 8,000 Guard members. Add.21. Each of these Washingtonians works for the military and, as a result of the Ban, is part of an organization that seeks to discriminate against transgender Washingtonians. As long as the Ban is in place, every Washington servicemember is impacted. Washington is also home to approximately 32,850 transgender adults. Add.21. The Ban targets each of these Washingtonians for disfavored treatment by subjecting them to a discriminatory government policy.

Washington has standing to protect its sovereign and quasi-sovereign interests.

### c. The Ban violates Equal Protection guarantees

The District Court rightfully concluded that transgender individuals constitute a suspect class and the Ban must survive strict scrutiny. Add.26. Under strict scrutiny, Defendants must prove that the Ban forwards compelling government interests and is narrowly tailored to achieve those interests. *See Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). This is a heavy burden, and Defendants cannot show a likelihood of success of meeting this exacting standard. Nor can Defendants even meet the burden of proving that the Ban, as a sex based distinction, survives intermediate scrutiny. *See United States v. Virginia*, 518 U.S. 515, 531 (1996). Indeed, the Ban cannot meet any standard of heightened scrutiny. Seeming to concede this, Defendants did not provide this Court with any evidence or argument that the Ban can survive heightened scrutiny.

#### (1) Defendants articulate no government interests that meet heightened scrutiny

Defendants fail to prove that any legitimate—let alone important or compelling—government interests are protected by the Ban. Defendants cannot show that the Ban forwards any governmental interests that would allow it to survive heightened scrutiny.

*First*, Defendants' claim that military readiness is protected by the Ban is undercut by top military leaders of the Army, Navy, Air Force, and Marine Corps, each of whom independently testified at Senate hearings that there was no negative impact on the military from open service by transgender military servicemembers. WA.Add.54-57.

*Second*, four of Defendants' purported government interests are rooted in bias against transgender servicemembers including: (1) "irreconcilable privacy demands" of non-transgender servicemembers who might feel uncomfortable sharing space with transgender servicemembers; (2) threats to "unit cohesion"—inasmuch as those threats would arise from private discrimination aimed at transgender servicemembers; (3) "[f]rustration of non-transgender servicemembers who also wish to be exempted from uniform and grooming standards;" and (4) ensuring that non-transgender servicemembers do not have to experience "unfairness" because transgender servicemembers are held to standards associated with their gender identity and not their biological sex. Mot. at 13-14. These asserted interests cannot justify the Ban, ratifying, as they do, non-transgender servicemembers' potential bias against transgender individuals. It is well-established that "private biases and the possible injury they might inflict" cannot be the basis of lawful government policies. *Palmore v. Sidoti*, 466

U.S. 429, 433 (1984). Nor can "[p]ublic officials sworn to uphold the Constitution . . . avoid a constitutional duty by bowing to the hypothetical effects of private . . . prejudice that they assume to be both widely and deeply held." *Id.*

*Third*, the purported medical issues Defendants claim impact transgender individuals at higher rates also fail to justify the Ban, as (1) psychiatric hospitalizations; (2) suicidal behavior—even after transition; and (3) significant periods of non-deployability have been deemed invalid concerns by the medical community. *See* Mot at 13. The American Medical Association unwaiveringly affirmed that "[t]here is no medically valid reason to exclude transgender individuals from military service," ECF 255-4, and that "the Defense Department's February 22, 2018, Memorandum for the President mischaracterized and rejected the wide body of peer-reviewed research on the effectiveness of transgender medical care," ECF 251-4. Similarly, the American Psychological Association ("APA") issued a statement in response to the Implementation Plan noting that it "is alarmed by the administration's misuse of psychological science to stigmatize transgender Americans and justify limiting their ability to serve in uniform and access medically necessary health care." ECF 251-3. Even former Surgeons General have critiqued DoD's characterization of "the effectiveness of transgender medical care as

demonstrating 'considerable scientific uncertainty.'" ECF 255-6 at 2. And the Surgeon Generals affirmed that "[a] wide body of reputable, peer-reviewed research has demonstrated to psychological and health experts that treatments for gender dysphoria are effective." *Id.* The Palm Center also issued a report debunking Defendants' purported medical reasons for the Ban and affirming that "[s]cholars and experts agree that transition-related care is reliable, safe, and effective[.]" ECF 255-8 at 1. The Palm Center additionally affirmed that "[s]cholarly research and DoD's own data confirm that transgender personnel, even those with diagnoses of gender dysphoria, are deployable and medically fit." ECF 255-8 at 2.

Biased and unfounded concerns about medical fitness of transgender servicemembers that the larger medical community rejects cannot be deemed legitimate government interests sufficient to justify the Ban.

*Fourth*, while Defendants' interests in protecting the military's budget may be a legitimate and important government interest, Defendants have presented no actual evidence—other than speculation that some transgender servicemembers may receive transition-related surgical care—that transgender servicemembers pose any significant financial burden on the military's budget. Add.103. Further, Defendants have failed to prove that medical costs for

transgender servicemembers are any greater than the cost of other predictable health issues that arise—*i.e.* women may become pregnant. This differential treatment undermines Defendants' claim that the Ban simply protects neutral important government interests.

**(2) The Ban is insufficiently tailored to meet heightened scrutiny requirements**

Defendants' Ban is neither narrowly tailored nor substantially related to the interests it purports to protect. A policy is sufficiently narrowly tailored for strict scrutiny review only if "the means chosen to accomplish the [government's] asserted purpose [is] specifically and narrowly framed to accomplish that purpose[,]" *Shaw v. Hunt*, 517 U.S. 899, 908 (2008), such that "there is little or no possibility that the motive for the classification was illegitimate . . . prejudice or stereotype[,]" *Grutter*, 539 U.S. at 333 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1996)). And a policy will survive intermediate scrutiny only if the discriminatory means employed are "substantially related to the achievement of those objectives." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (quoting *Virginia*, 518 U.S. at 533). The Ban is neither narrowly tailored nor substantially related to any governmental interests.

*First*, a Ban to remedy a problem that military leadership does not recognize as real cannot be deemed narrowly tailored or substantially related to protectable military interests. WA.Add.54-55; ECF 255-14; ECF 255-15; ECF 255-16.

*Second*, the Ban categorically excludes transgender individuals from serving openly. Even assuming *arguendo* that Defendants' purported interests are legitimate, a blanket exclusion is not a targeted method of forwarding those interests. Defendants argue that the Ban does not categorically exclude transgender individuals from serving in the military because the Ban contemplates a *potential* exception—applied only to transgender servicemembers who transitioned under the Carter policy. This is disingenuous. Defendants expressly reserved the right to sever this purported exception "should [their] decision be used by a court as a basis for invalidating the entire policy." Add.105. That isn't an exception. That is a litigation tactic.[5] And the District Court correctly found that there is no meaningful exception to this Ban noting that:

[5] Further, inasmuch as Defendants acknowledge that they can allow transgender individuals to serve in the military, it defeats their argument that a Ban is necessary.

> [r]equiring transgender people to serve in their 'biological sex' does not constitute 'open' service in any meaningful way, and cannot reasonably be considered an 'exception' to the Ban. Rather, it would force transgender service members to suppress the very characteristic that defines them as transgender in the first place.

Add.15.

*Third*, insofar as Defendants claim government interests arise because transgender individuals may experience psychological conditions during their service, Defendants fail to explain why existing military policies governing service by *anyone* who may develop psychological conditions are insufficient to address appropriate medical care or discharge, where appropriate. *See* ECF 255-8 at 18, 20. This individualized approach works for all servicemembers, including transgender servicemembers.

**(3) Courts have authority to protect servicemembers from unconstitutional military policies**

The Supreme Court long ago warned courts that—even in the military context—"deference does not mean abdication." *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). In *Rostker*, the Court also rejected the same request Defendants now make—*i.e.* to find that deference to military affairs limits courts' ability to apply a more rigorous standard than rational basis review. *Id*. Instead, the Court

held that "any further 'refinement' in the applicable tests" when reviewing the constitutionality of military policies was unnecessary.[6] *Id.*

Following this directive, this Court rejected similar arguments from the government. *Witt v. Dept. of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008) (rejecting argument that rational basis review was necessary standard applied to military policy). Indeed, as noted in *Watkins v. U.S. Army*:

> "As recently as World War II both the Army chief of staff and the Secretary of the Navy justified racial segregation in the ranks as necessary to maintain efficiency, discipline, and morale. Today it is unthinkable that the judiciary would defer to the Army's prior 'professional' judgment that black and white soldiers had to be segregated to avoid interracial tensions."

875 F.2d 699, 729 (9th Cir. 1989) (Norris, J., concurring). Articulating the same limit on deference in a companion challenge to the Ban, the District Court of the District of Columbia noted that "[t]he military has not been exempted from constitutional provisions that protect the rights of individuals' and, indeed, '[i]t is precisely the role of courts to determine whether those rights have been violated.'" *Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017) (quoting *Emory*

[6] Defendants argue that the Court actually applied rational basis review, purportedly because the Court entertained post hoc evidence. However, the Court expressly stated that it was applying heightened scrutiny. 453 U.S. at 69.

*v. Secretary of Navy*, 819 F.2d 291, 334 (D.C. Cir. 1987)). Thus, even in the military context, courts apply heightened scrutiny.

Further, Defendants' argument that the District Court should have conducted rational basis review of the Ban—because "[t]he Department's 2018 policy … draws lines on the basis of a medical condition (gender dysphoria) and an associated treatment (gender transition), not transgender status," Mot. at 13—fails. Defendants' policies on their face target transgender individuals solely because of their transgender status, not because of any medical diagnosis or history. The proposed policies regulate and impact every transgender Washingtonian who currently serves or may serve in the future by requiring them to serve in compliance with all standards associated with the sex they were assigned at birth *as if they were not transgender*.

**d. The Ban is unlikely to withstand Washington's Substantive Due Process claim**

Defendants argue that "there is no fundamental right to serve in the military, much less to do so in a particular manner." Mot. at 16. Defendants' attempt to reframe the liberty interests Washington seeks to protect fail. Washington seeks to protect transgender Washingtonians' fundamental right to make intimate decisions regarding self-definition, family life, and personal autonomy—all of which is integral to an individual's sense of dignity,

autonomy, and self-determination and protected by substantive due process. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984).

Defendants' purported interests do not advance any legitimate government interest nor does the Ban limit the intrusion into the liberty interests at stake.

**2. Defendants Are Not likely to Suffer Irreparable Injury If a Stay Is Denied**

Defendants' claim that they will suffer irreparable harm is undercut by the fact that they adduced no evidence in their motion or in their 2018 implementation documents that show any likelihood of *specific* injury to the military from open service by transgender individuals under the Carter policy, or any injury to the military during the last five months that transgender individuals have been accessing into military service. Instead, Defendants point to *Winter* and claim that the military need not wait until there is an injury arising from an injunction to obtain a stay. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 31 (2008).

However, *Winter* shows that Defendants have not presented sufficient evidence to warrant a stay. In *Winter*, the Navy presented *significant* evidence to the district court—including "declarations from some of the Navy's most

senior officers"—detailing *specific* harms to Navy training protocols if the injunction stood. *Id.* at 24. Here, Defendants have not provided this Court with any reliable evidence that allowing transgender individuals to serve openly under the District Court's injunction during the brief period when this Court hears Defendants' appeal—which will be fully briefed by July 17, 2018—will cause them irreparable harm.

**3. The Public Interest Favors Enjoining the Government From Trampling Constitutional Rights**

The equities and public interest strongly favor denying Defendants' requested stay. The discriminatory Ban tramples transgender Washingtonians' Fifth Amendment equal protection and substantive due process guarantees and the balance of equities and public interest always favor "prevent[ing] the violation of a party's constitutional rights[.]" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). *See also Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) ("[U]pholding constitutional rights surely serves the public interest.")

**4. Nationwide Injunctive Relief Was Appropriate**

"The purpose of [a preliminary injunction] is not to conclusively determine the rights of the parties but to balance the equities as the litigation

moves forward." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (internal citation omitted).

Defendants argue the injunction should be limited to the individually named plaintiffs because there are only six individuals "with ties to Washington and/or these organizations who may be affected by the new policy." Mot. at 21 n.4. This is flat wrong. Washington has 32,850 transgender adult residents and each of these individuals is stigmatized and impacted by the Ban, as well as every Washingtonian servicemember stationed throughout the country. Add.20-21. The same is true for Washington residents who may be temporarily deployed outside of Washington. The District Court was well within its discretion to maintain a nationwide injunction, which is necessary to protect Washington residents from the discriminatory Ban. *See Washington*, 847 F.3d at 1166-67; *Hawaii v. Trump*, 871 F.3d 646 (9th Cir. 2017) (affirming nationwide injunction).

## V. CONCLUSION

For the foregoing reasons this Court should deny Defendants' Motion for Stay Pending Appeal.

RESPECTFULLY SUBMITTED this 14th day of May, 2018.

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**CERTIFICATE OF COMPLIANCE** (FRAP 32(a)(7))

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached reply brief is proportionately spaced, has a typeface of 14 points or more and contains 5138 words.

*s/ La Rond Baker*
LA ROND BAKER, WSBA No. 43610

**DECLARATION OF SERVICE**

I hereby certify that on May 14, 2018, the forgoing document was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

Dated this 14th day of May 2018.

*s/ La Rond Baker*
LA ROND BAKER, WSBA No. 43610

NO. 18-35347

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

RYAN KARNOSKI, et al.,

Plaintiffs-Appellees,

STATE OF WASHINGTON,

Intervenor-Plaintiff-Appellee,

v.

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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE
No. 2:17-cv-01297-MJP
The Honorable MARSHA J. PECHMAN
United States District Court Judge

# STATE OF WASHINGTON'S ADDENDUM

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# Exhibit 1

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
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9/14/17

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

SUBJECT: Military Service by Transgender Individuals - Interim Guidance

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

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

Attachment:
As stated

cc:
Secretary of Homeland Security

OSD011321-17/CMD015105-17

Interim Guidance

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

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

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

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

*Separation and Retention of Transgender Service members:*

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

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

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

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

The Honorable Marsha J. Pechman

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

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

**DEFENDANTS' MOTION TO DISSOLVE THE PRELIMINARY INJUNCTION**

NOTED FOR CONSIDERATION: APRIL 13, 2018



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## INTRODUCTION

Last December, this Court entered a preliminary injunction forbidding the enforcement of several directives in a Presidential Memorandum from August 2017 concerning military service by transgender individuals (2017 Memorandum). Dkt. 103 (Op.). The Court understood these directives to institute a categorical policy "excluding transgender individuals from the military" that was based on reasons "'*contradicted* by the studies, conclusions, and judgment of the military itself.'" Op. 1, 16. On that understanding, the Court issued a preliminary injunction precluding Defendants from implementing those specific directives. Op. 1.

The bases for that preliminary injunction no longer exist. Last month, the Secretary of Defense, with the agreement of the Secretary of Homeland Security, sent the President a memorandum recommending that the President revoke his 2017 Memorandum so that the military can implement a new policy. Mattis Memorandum, Exhibit 1. After an extensive review of the issue, the Department of Defense concluded that maintaining the policy on transgender service put in place by Secretary Carter in 2016 would pose substantial risks to military readiness and therefore proposed to adopt a new policy. *Id.* at 1–2. Far from a categorical ban based on transgender status, this new policy, like the Carter policy before it, would turn on the medical condition of gender dysphoria and contains a nuanced set of exceptions allowing some transgender individuals, including many Plaintiffs here, to serve. *Id.* at 2–3. Along with this memorandum, Secretary Mattis sent the President a 44-page report providing a detailed explanation for why, in the professional, independent judgment of the Defense Department, this new policy is necessary to further military interests. Department of Defense Report and Recommendations on Military Service by Transgender Persons (Feb. 2018) (Report), Exhibit 2. The President then issued a new memorandum on March 23, 2018, revoking his 2017 Memorandum, thus allowing the military to implement its preferred policy. Presidential Memorandum (2018 Memorandum), Exhibit 3.

In light of these changed circumstances, the preliminary injunction should be dissolved. Simply put, Plaintiffs can no longer meet any of the four criteria for this extraordinary relief. On the merits, their challenge to the revoked 2017 Memorandum no longer presents a live controversy and, in any event, the military's new policy is constitutional. Plaintiffs—many of whom may continue



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serving under the new policy—cannot show that they would suffer any cognizable injury from the new policy, much less an irreparable one. And given the Department's judgment that retaining the Carter policy would pose risks to military readiness, the balance of the equities and the public interest strongly cut against prolonging this state of affairs.

To be clear, Defendants respectfully maintain that the Court's preliminary injunction, which addressed only certain directives in the President's 2017 Memorandum, does not extend to Secretary Mattis's new policy. But in an abundance of caution, Defendants urge this Court to dissolve the preliminary injunction in order to permit the military to implement the policy it believes will best ensure our Nation's defense. To the extent that Plaintiffs may seek to challenge that new policy, that independent controversy should not be litigated under the shadow of a preliminary injunction of a Presidential Memorandum that is no longer in effect.

## BACKGROUND

### I. History of Policies Concerning Transgender Service Before 2017

For decades, military standards presumptively barred the accession and retention of certain transgender individuals. Report 7. This approach was consistent with the third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association (APA), which treated "transsexualism" as a disorder. *Id.* at 10.

In 2013, the APA published the fifth edition of the DSM, which replaced the term "gender identity disorder" (itself a substitute for "transsexualism" in the fourth) with "gender dysphoria." *Id.* at 10, 12. The change reflected the APA's conclusion that, by itself, identification with a gender different from one's biological sex—*i.e.*, transgender status—was not a disorder. *Id.* at 12. As the APA stressed, "not all transgender people suffer from gender dysphoria." *Id.* at 20 (brackets omitted). Instead, the mental condition of "gender dysphoria" was defined in the DSM as a "marked incongruence between one's experience/expressed gender and assigned gender, of at least 6 months duration" and "associated with clinically significant distress or impairment." *Id.* 12–13.

In the wake of these changes, then-Secretary Carter ordered the creation of a working group in July 2015 to study the possibility of "welcoming transgender persons to serve openly," and



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instructed it to "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness." *Id.* at 13. As part of this review, the Department commissioned RAND to study the issue. *Id.* The resulting RAND report concluded that allowing transgender service members to serve in their preferred gender would limit deployability, impede readiness, and impose costs on the military, but dismissed these burdens as "negligible," "marginal," or "minimal." Dkt. 46-2, at xii, 39–42, 46–47, 69–70; *accord* Report 14.

After this review, then-Secretary Carter ordered the Defense Department on June 30, 2016, to adopt a new policy on transgender service. First, the military had until July 1, 2017, to revise its accession standards. Report 14. Under this revision, a history of "gender dysphoria," "medical treatment associated with gender transition," or "sex reassignment or genital reconstruction surgery" would be disqualifying unless an applicant provided a certificate from a licensed medical provider that the applicant had been stable or free from associated complications for 18 months. *Id.* at 15. Second, and effective immediately, current service members could not be discharged based solely on their "gender identity" or their "expressed intent to transition genders," Dkt. 48-3, at 4, but, if diagnosed with gender dysphoria, could transition genders, Report 14. Transgender service members who do not meet the clinical criteria for gender dysphoria, however, had to continue to serve in their biological sex. *Id.* at 15.

## II. Development of the New Policy

Before the Carter accession standards took effect on July 1, 2017, the Deputy Secretary of Defense "directed the Services to assess their readiness to begin accessions" and received their input. Dkt. 197-4. "Building upon that work and after consulting with the Service Chiefs and Secretaries," Secretary Mattis "determined that it [was] necessary to defer the start of [these] accessions" so that the military could "evaluate more carefully the impact of such accessions on readiness and lethality." *Id.* Based on the recommendation of the services and in the exercise of his independent discretion and judgment, he thus delayed the implementation of the new accession standards on June 30, 2017, until January 1, 2018. *Id.*; *see* Report 4; Dkt. 197-3. He also ordered the Under Secretary of Defense for Personnel and Readiness to lead a review, which would "include all relevant considerations" and



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last for five months, with an end date of December 1, 2017. Dkt. 197-4. Secretary Mattis explained that this study would give him "the benefit of the views of the military leadership and of the senior civilian officials who are now arriving in the Department," and that he "in no way presupposes the outcome of the review." *Id.*; *see* Report 17.

While that review was ongoing, the President stated on Twitter on July 26, 2017, that "the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military." Op. 2. The President then issued his 2017 Memorandum on August 25, 2017, calling for, *inter alia*, "further study" into the risks of maintaining the Carter policy in its entirety. Report 17.[1] In response, Secretary Mattis established a Panel of Experts on September 14, 2017, to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." Report 17. The Panel consisted of the members of senior military leadership who had "the statutory responsibility to organize, train, and equip military forces" and were "uniquely qualified to evaluate the impact of policy changes on the combat effectiveness and lethality of the force." *Id.* at 18.

In 13 meetings over the course of 90 days, the Panel met with commanders of transgender service members, military medical professionals, civilian medical professionals, and transgender service members themselves. *Id.* It reviewed information regarding gender dysphoria, its treatment, and the effects this condition had on military effectiveness, unit cohesion, and military resources. *Id.* It received briefing from three working groups or committees dedicated to issues involving personnel, medical treatment, and military lethality. *Id.* It drew on the military's experience with the Carter policy thus far, and considered evidence that both supported and cut against its recommendations. *Id.* And, unlike those responsible for the Carter policy, it did not "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness," but made "no assumptions" at all. *Id.* at 19. Exercising its professional military judgment, the Panel provided Secretary Mattis with recommendations. *Id.*

After considering these recommendations, along with additional information, Secretary

[1] Given the Court's familiarity, this filing omits a description of the 2017 Memorandum and the litigation up to now.



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Mattis, with the agreement of the Secretary of Homeland Security, sent the President a memorandum in February 2018 proposing a new policy consistent with the Panel's conclusions. *Id.*; *see* Mattis Memo. The memorandum was accompanied by a 44-page report setting forth in detail the bases for the Department's recommended new policy. Mattis Memo 3; *see* Report.

**III. The New Policy**

In his memorandum, Secretary Mattis explained why a departure from the Carter policy was necessary. "Based on the work of the Panel and the Department's best military judgment," the Department had concluded "that there are substantial risks associated with allowing the accession and retention of individuals with a history or diagnosis of gender dysphoria and require, or have already undertaken, a course of treatment to change their gender." Mattis Memo 2. In addition, it had found "that exempting such persons from well-established mental health, physical health, and sex-based standards … could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." *Id.* And although Secretary Carter had concluded otherwise on the basis of the RAND study, that report "contained significant shortcomings." *Id.* It relied on "limited and heavily caveated data"; and "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." *Id.*

Therefore, "in light of the Panel's professional military judgment and [his] own professional judgment," Secretary Mattis proposed a policy that continued some parts of the Carter policy and departed from others. *Id.*; *see id.* at 2–3; Report 4–6, 33–43. Like the Carter policy, the new policy does not draw lines on the basis of transgender status, but presumptively disqualifies individuals with a certain medical condition, gender dysphoria, from service. *Compare* Report 4–6, 19, *with* Dkt. 48-3. The key difference between the two policies is the exceptions to that presumptive disqualification.

Under the new policy, like the Carter policy, individuals who "identify as a gender other than their biological sex" but do not suffer clinically significant "distress or impairment of functioning in meeting the standards associated with their biological sex"—and therefore have no history or



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diagnosis of gender dysphoria—may serve if "they, like all other persons, satisfy all standards and are capable of adhering to the standards associated with their biological sex." Report 4.

Individuals who both 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," are presumptively "ineligible for service." *Id.* at 5. This presumptive bar is subject to both individualized "waivers or exceptions" that generally apply to all Department and Service-specific standards and policies as well as a categorical reliance exception for service members who relied on the Carter policy. *Id.* Specifically, 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," including those who entered the military "after January 1, 2018," "may continue to receive all medically necessary care, 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." *Id.* at 5–6.

Individuals who "are diagnosed with, or have a history of, gender dysphoria" but who neither require nor have undergone gender transition are likewise "generally disqualified from accession or retention." *Id.* at 5. This presumptive disqualification is subject to the same exceptions discussed above as well as two new categorical ones. *Id.* With respect to accession, individuals with a history of gender dysphoria may enter the military if they (1) can demonstrate "36 consecutive months of stability (i.e., absence of gender dysphoria) immediately preceding their application"; (2) "have not transitioned to the opposite gender"; and (3) "are willing and able to adhere to all standards associated with their biological sex." *Id.* With respect to retention, those diagnosed with gender dysphoria after entering the military may remain so long as they (1) can comply with Department and Service-specific "non-deployab[ility]" rules; (2) do "not require gender transition"; and (3) "are willing and able to adhere to all standards associated with their biological sex." *Id.*

On March 23, 2018, the President issued a new memorandum concerning transgender military service. 2018 Memorandum. The 2018 Memorandum revoked the 2017 Memorandum "and any other directive [the President] may have made with respect to military service by



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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 persons." *Id.*

## ARGUMENT

"Because injunctive relief is drafted in light of what the court believes will be the future course of events, a court must never ignore significant changes in the law or circumstances underlying an injunction lest the decree be turned into an instrument of wrong." *Salazar v. Buono*, 559 U.S. 700, 714–15 (2010) (plurality op.) (internal quotation marks, ellipsis, and citation omitted). Courts thus regularly dissolve preliminary injunctions when changed circumstances undermine the basis for the interlocutory relief. *See, e.g.*, *CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1111 (9th Cir. 2017). Ordinarily, "dissolution should depend on the same considerations that guide a judge in deciding whether to grant or deny a preliminary injunction in the first place"—*i.e.*, "[t]he familiar quartet" of "likelihood of success, the threat of irreparable injury to the party seeking interim relief, the equities and the public interest." *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 15 F.3d 1222, 1225 (1st Cir. 1994). The changed circumstances here bar Plaintiffs from meeting these criteria.

### I. Plaintiffs Cannot Demonstrate A Likelihood of Success On The Merits

#### A. The Current Challenge to the 2017 Presidential Memorandum Is Moot

To start, Plaintiffs are no longer likely to succeed because their challenge is moot. A case is moot "'when it is impossible for a court to grant any effectual relief to the prevailing party,'" *Chafin v. Chafin*, 568 U.S. 165, 172 (2013), and that is the situation here. The only relief Plaintiffs seek is a declaration that the policy implemented by "President Trump" in his 2017 Memorandum is unconstitutional and an injunction of its enforcement. Dkt. 30, at 2, 39; *accord* Dkt. 104, at 5, 7. But because that Memorandum has been revoked, a declaration from this Court as to the constitutionality of that Memorandum would amount to an impermissible advisory opinion. If Plaintiffs fear *future* injury from the proposed new policy, which they have not challenged, those harms would stem from the independent action of the Secretaries of Defense and Homeland Security in implementing that policy, not the 2017 or 2018 Memoranda. If Plaintiffs decide to challenge the



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new policy upon implementation, courts can review it at that time.[2]

Nor can Plaintiffs find refuge in the doctrine that "a defendant's voluntary cessation of a challenged practice" does not necessarily moot the case. *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982). When the government repeals and replaces one of its policies, the relevant question is "whether the new [policy] is sufficiently similar to the repealed [one] that it is permissible to say that the challenged conduct continues," or, put differently, whether the policy "has been 'sufficiently altered so as to present a substantially different controversy from the one … originally decided.'" *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993). When a new policy has "changed substantially," the voluntary cessation exception does not apply, as there is "no basis for concluding that the challenged conduct [is] being repeated." *Id.*

Any dispute over the new policy "'present[s] a substantially different controversy'" than Plaintiffs' challenge to the President's 2017 Memorandum. *Id.* The target of Plaintiffs' amended complaint was a "categorical ban" on service "simply because [one is] transgender" in the face of what they described as "extensive study and deliberation" by former military leadership. Dkt. 30, at 2. Likewise, this Court's preliminary injunction rested on its view that the President had ordered a categorical "prohibition on transgender service members … on Twitter, abruptly and without any evidence of considered reason or deliberation" or support from "the 'considered professional judgment' of the military." Op. 18 & n.7. The new policy, by contrast, contains several exceptions allowing some transgender individuals, including many Plaintiffs here, to serve, and it is the product of independent military judgment following an extensive study. *See infra* Parts I.B.1.c, II.

At a minimum, the replacement of an alleged categorical exclusion with a more nuanced regime presents a substantially different controversy. In *Department of Treasury v. Galioto*, 477 U.S. 556 (1986) (per curiam), for instance, a lower court held that a federal statute barring all former mental patients who had been involuntarily committed from buying firearms was unconstitutional because it created an "'irrebuttable presumption'" that anyone involuntarily committed was permanently a threat "no matter the circumstances." *Id.* at 559. During the appeal, Congress amended the law to

[2] Any review in that scenario, which would be governed by the Administrative Procedure Act, would be limited to the administrative record. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).



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allow anyone prohibited from purchasing firearms to seek individualized relief from the Treasury Department. *Id.* Concluding that "no 'irrebuttable presumption' now exists since a hearing is afforded to anyone subject to firearms disabilities," the Supreme Court held the issue moot. *Id.*[3] This case is no different. Because Plaintiffs sought an injunction precluding enforcement of the 2017 Memorandum—and thereby effectively maintain the Carter policy, which, like the new policy, treats gender dysphoria as presumptively disqualifying, Op. 14—the heart of their challenge was necessarily limited to the (allegedly) categorical nature of that Memorandum. With that issue no longer live, the appropriate course is to dissolve the preliminary injunction.[4]

**B. The New Policy Withstands Constitutional Scrutiny**

In all events, Plaintiffs are not entitled to an injunction barring implementation of the new policy, as it does not violate equal protection, substantive due process, or free speech principles.

**1. The new policy is consistent with equal protection principles**

**a. The new policy is subject to highly deferential review**

On its face, the new policy triggers rational basis review. That 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. *Compare* Report 3–5, *with* Dkt. 48-3, at 4–5. Such classifications receive rational basis review, which is why no one ever challenged the Carter policy on grounds that it was subject to heightened scrutiny. *See, e.g.*, *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 365–68 (2001); *Geduldig v. Aiello*, 417 U.S. 484, 494–97 & n.20 (1974).[5]

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[3] In addressing Washington's challenge to the executive orders barring entry of certain foreign nationals, this Court took a similar tack. *Washington v. Trump*, No. 17-0141, 2017 WL 1045950 (W.D. Wash. Mar. 16, 2017) (Robart, J.). It held that its preliminary injunction against the first order did not extend to the second because of a new exception for lawful permanent residents and certain foreign nationals and a clarification that individuals could seek asylum. *Id.* at *3, *4.

[4] If the Court finds both that the challenge to the 2017 Memorandum still presents a live controversy and that at least some of the Plaintiffs would have standing to challenge the new policy, *but see infra* Part II, enjoining that Memorandum would not redress any of their purported injuries. If the new policy itself would necessarily disqualify any of those Plaintiffs from military service, an injunction against that (non-existent) Memorandum would not cure that harm.

[5] Even if the new policy could be characterized as turning on transgender status, such classifications warrant rational basis review, not intermediate scrutiny. *See, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227–28 (10th Cir. 2007) (rational basis review applies to classifications on the basis of transgender status, even in civilian context). Although this Court disagrees, and although cases such as *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), could be read as holding to the contrary, they are distinguishable and, in all events, Defendants respectfully reiterate this position to preserve the issue for further review. Defendants agree with the Court, however, that strict scrutiny is inappropriate. *See* Op. 15–16.



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But even assuming *arguendo* that the new policy would trigger intermediate scrutiny outside of the military context, that context, unquestionably present here, requires a far less searching form of review. While the government is not "free to disregard the Constitution" when acting "in the area of military affairs," it is equally true that "the tests and limitations to be applied may differ because of the military context." *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). "[R]eview of military regulations challenged on First Amendment grounds," for example, "is far more deferential than constitutional review of similar laws or regulations destined for civilian society." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). And the same is true for the constitutional "rights of servicemembers" more generally, including those within the Due Process Clause. *Weiss v. United States*, 510 U.S. 163, 177 (1994); *see also Solorio v. United States*, 483 U.S. 435, 448 (1987) (listing "variety of contexts" where deferential review applied). In short, "constitutional rights must be viewed in light of the special circumstances and needs of the armed forces," and "[r]egulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities." *Beller v. Middendorf*, 632 F.2d 788, 810–11 (9th Cir. 1980) (Kennedy, J.).

This different standard of review is necessary not only because the Constitution itself commits military decisions to "the political branches directly responsible—as the Judicial Branch is not—to the electoral process," but also because "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see Rostker*, 453 U.S. at 65–66. That is particularly true with respect to the "'complex, subtle, and professional decisions as to the composition … of a military force,' which are 'essentially professional military judgments.'" *Winter v. NRDC*, 555 U.S. 7, 24 (2008).

Although the Supreme Court has expressly refused to attach a "label[]" to the standard of review applicable to military policies alleged to trigger heightened scrutiny, *Rostker*, 453 U.S. at 70, several features of its decisions in this area demonstrate that rational basis review most closely describes its approach in practice. First, while the Court has generally refused "to hypothesize or invent governmental purposes for gender classifications *post hoc* in response to litigation," *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1697 (2017) (internal quotation marks, brackets, and citation



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omitted), it has done so when military deference is required. In *Schlesinger v. Ballard*, 419 U.S. 498 (1975), it upheld a statutory scheme under which male naval officers were subject to mandatory discharge for failing twice to be promoted within roughly 10 years of service, while female officers were afforded 13 years to obtain equivalent promotions. *Id.* at 499–505, 510. The Court explained that "Congress may … quite rationally have believed" that female officers "had less opportunity for promotion than did their male counterparts" and that this framework would correct the imbalance. *Id.* at 577. In response, the main dissent criticized the choice "to conjure up a legislative purpose which may have underlain the gender-based distinction." *Id.* at 511 (Brennan, J.); *cf. Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975) ("recitation of a benign, compensatory purpose is not an automatic shield … against any inquiry into the actual purposes" of civilian sex-based classifications).

Similarly, the Court in *Rostker* rejected an equal protection challenge to a statute exempting women from the requirement to register for the draft. 453 U.S. at 83. Even though the suit had been filed in 1971, the Court relied on Congress's analysis of the issue nine years later, when it declined to amend the statute to permit the conscription of women at President Carter's urging. *See id.* at 60–63. In doing so, it rejected the argument that it "must consider the constitutionality of the [relevant statute] solely on the basis of the views expressed by Congress in 1948, when the [law] was first enacted in its modern form." *Id.* at 74. Instead, because Congress in 1980 had "reconsider[ed] the question of exempting women from [the draft], and its basis for doing so," its views from that time were "highly relevant in assessing the constitutional validity of the exemption." *Id.* at 75.

Second, whereas the Court has rejected certain evidentiary defenses of sex-based classifications in the civilian context, *see, e.g.*, *Craig v. Boren*, 429 U.S. 190, 199–204 (1976), it has deferred to the political branches on military matters even in the face of significant evidence to the contrary, including evidence from former military officials. In *Goldman*, it rejected a free-exercise challenge to the Air Force's prohibition of a Jewish officer from wearing a yarmulke while working as a clinical psychologist in an Air Force base hospital, even though that claim would have triggered strict scrutiny at the time had it been raised in the civilian context. 475 U.S. at 510; *see id.* at 506. The Court did so even in the face of "expert testimony" from a former Chief Clinical Psychologist



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to the Air Force that religious exceptions to a military dress code would "increase morale," and even though the "Air Force's assertion to the contrary [was] mere *ipse dixit*, with no support from actual experience or a scientific study in the record." *Id.* at 509; *see* Br. for Pet'r at 21, *Goldman*, 475 U.S. 503 (No. 84-1097); 1985 WL 669072, at *21. In the Court's view, the beliefs of such "expert witnesses" were "quite beside the point," as current "military officials … are under no constitutional obligation to abandon their considered professional judgment." 475 U.S. at 509.[6]

Third, whereas concerns about "administrative convenience" ordinarily cannot be used to survive intermediate scrutiny, *e.g.*, *Califano v. Goldfarb*, 430 U.S. 199, 205 (1977), they may play a key role in challenges to policies concerning the military. In *Rostker*, Congress "did not consider it worth the added burdens of including women in draft and registration plans" in light of the "administrative problems such as housing and different treatment with regard to dependency, hardship and physical standards.'" 453 U.S. at 81. The Court reasoned that it was not its place "to dismiss such problems as insignificant in the context of military preparedness." *Id.* Again, the dissents criticized the Court for jettisoning requirements of intermediate scrutiny. *See id.* at 94 (Brennan, J.) ("This Court has repeatedly stated that … administrative convenience … is not an adequate constitutional justification under the *Craig v. Boren* test."); *id.* at 85 (White, J.) (same).

Fourth, the political branches enjoy significant latitude to choose "among alternatives" in furthering military interests. *Id.* at 72 (majority op.). In *Rostker*, President Carter and military leadership urged a sex-neutral alternative that they believed "would materially increase [military] flexibility,'" but Congress rejected it in favor of retaining its sex-based approach. 453 U.S. at 63; *see id.* at 70. Invoking the "deference due" Congress in this area, the Court refused "to declare unconstitutional [that] studied choice of one alternative in preference to another." *Id.* at 71–72. And again, the main dissent attacked the Court's approach as "significantly different from" its analysis in

[6] Likewise, in *Rostker*, President Carter recommended that Congress require women to register for the draft, 453 U.S. at 60, and provided "testimony of members of the Executive and the military in support of that decision," *id.* at 79. In light of the "testimony and hearing evidence presented to Congress by representatives of the military and the Executive Branch," a lower court held that Congress's refusal to require women to register was unconstitutional because "'military opinion, backed by extensive study, is that the availability of women registrants would materially increase flexibility, not hamper it.'" *Id.* at 63. The Supreme Court reversed, noting that the lower court had "palpably exceeded its authority" in "relying on this testimony," as Congress had "rejected it." *Id.* at 81–82.



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ordinary sex-discrimination cases, as the government had not shown that "a gender-neutral statute would be a less effective means" of accomplishing military objectives. *Id.* at 94 (Brennan, J.).

Finally, arguable inconsistencies resulting from line-drawing have not been enough to render military decisions invalid. In *Goldman*, the Court acknowledged that the Air Force had an "exception … for headgear worn during indoor religious ceremonies" and gave commanders "discretion" to allow "visible religious headgear … in designated living quarters." 475 U.S. at 509. Additionally, service members could "wear up to three rings and one [I.D.] bracelet," even if those items "associate[d] the wearer with a denominational school or a religious or secular fraternal organization" and thereby served as "emblems of religious, social, and ethnic identity." *Id.* at 518 (Brennan, J., dissenting). Yet the Court deferred to the Air Force's judgment that creating an exception for a psychologist who wanted to wear religious headgear in a hospital on base "would detract from the uniformity sought by [its] dress regulations." *Id.* at 510 (majority op.). If this case was in the civilian context and strict scrutiny was applied, it is doubtful that the regulation would have been sustained.

Given the Court's substantial departure from core aspects of intermediate and even strict scrutiny in cases involving military deference, Defendants believe the most appropriate description of the applicable standard is rational basis review. But at a minimum, even if the Court prefers to label the standard a peculiar form of "intermediate scrutiny," Op. 15, its substantive analysis of the new policy should track the Supreme Court's highly deferential approach in this area. *See Rostker*, 453 U.S. at 69–70 (disavowing the utility of traditional scrutiny labels in cases involving military deference). Said differently, regardless of the standard of review the Court ultimately employs, the basic elements of traditional intermediate scrutiny should not apply in this case.

**b. The new policy survives highly deferential scrutiny**

The new policy survives the applicable level of scrutiny. As a threshold matter, certain aspects of the policy should not be at issue. To start, its treatment of transgender individuals without gender dysphoria—who are eligible to serve in their biological sex—is consistent with the Carter policy and hence this Court's preliminary injunction. *See* Dkt. 48-3, at 4. Nor can those with gender dysphoria dispute being held to the same retention standards, including deployability requirements,



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as all other service members. And the 36-month period of stability for accession—as opposed to the Carter policy's 18 months—is not constitutionally significant, especially since it "is the same standard the Department currently applies to persons with a history of depressive disorder," whereas the 18-month period "has no analog with respect to any other mental condition listed in [the accession standards]." Report 42.

The only change in the policy that is even arguably legally significant is its presumptive disqualification of individuals with gender dysphoria who require or have undergone gender transition, along with the corollary requirement that service members generally serve in their biological sex, and that change easily survives the highly deferential review applicable here. In the Department's considered judgment, accommodating gender transition would create unacceptable risks to military readiness; undermine good order, discipline, and unit cohesion; and create disproportionate costs. Mattis Memo 2. There is no dispute that the need to avoid those harms constitutes at least an "important governmental interest[]." Op. 16. Indeed, 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, and here, the Department has concluded that minimizing these risks is "absolutely essential," Mattis Memo 2. Thus, the only issue is whether this Court should defer to the military's judgment that the new policy is necessary to effectuating that critical interest. *See, e.g.*, Report 32. That should not be a close question.

**i. Military Readiness**

In the Department's professional military judgment, service by those who require or have undergone gender transition poses at least two significant risks to military readiness. First, in light of "evidence that rates of psychiatric hospitalization and suicide behavior remain higher for persons with gender dysphoria, even after treatment" (including sex reassignment surgery) compared to others, as well as "considerable scientific uncertainty" over whether these "treatments fully remedy … the mental health problems associated with gender dysphoria," the Department found that "the persistence of these problems is a risk for readiness." Report 32. This risk-based assessment—grounded in an extensive review of evidence, including materials unavailable at the time the Carter



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policy was adopted—is a classic military judgment meriting deference. *See id.* at 19–27.[7]

The need to "proceed cautiously" in this area is particularly compelling given the uniquely stressful nature of a military environment. *Id.* at 27. Although none of the available studies "account for the added stress of military life, deployments, and combat," *id.* at 24, preliminary data show that service members with gender dysphoria are "eight times more likely to attempt suicide" and "nine times more likely to have mental health encounters" than service members as a whole, *id.* at 21–22. Thus, in Secretary Mattis's judgment, the Department should not risk "compounding the significant challenges inherent in treating gender dysphoria with the unique, highly stressful circumstances of military training and combat operations." Mattis Memo 2.

In short, the Department concluded that the military risks stemming from the uncertain efficacy of a particular medical treatment for a particular medical condition outweighed the possible benefits of allowing individuals with that condition to serve as a general matter. That is precisely the sort of analysis the military must perform with respect to any medical accession or retention standard, and the cautious approach it took here is hardly out of the norm. *See* Report 3. Indeed, even the Carter policy implicitly acknowledged that gender dysphoria or gender transition could impede military readiness by requiring applicants to demonstrate that they had been stable or had avoided complications for an 18-month period. *See* Dkt. 48-3. Given that even administrative convenience concerns cannot be dismissed in this context, *see Rostker*, 453 U.S. at 81, then the military's assessment of the tolerable level of risk from a medical condition and treatment should not be second-guessed.

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[7] For example, the Centers for Medicare and Medicaid Services (CMS) issued a study in August 2016, over a month after the Carter policy was announced, concluding that there was "not enough high quality evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria." Report 24. Although this study was primarily concerned with Medicare beneficiaries, it "conducted a comprehensive review" of "the universe of literature regarding sex reassignment surgery," which consisted of "over 500 articles, studies, and reports" addressing a more general population. *Id.* Of these materials, only "33 studies" were "sufficiently rigorous to merit further review," and "[o]verall, the quality and strength of evidence" in even these studies "were low." *Id.* In fact, only "six studies" provided "useful information" on the efficacy of sex reassignment surgery in general, and "the four best designed and conducted" ones "did not demonstrate clinically significant changes or differences in psychometric test results" following the procedure. *Id.* And "one of the most robust" of those six studies, a Swedish "nationwide population-based, long-term follow-up" of those who had undergone the surgery, "found increased mortality [due to suicide and cardiovascular disease] and psychiatric hospitalization for patients who had undergone sex reassignment surgery as compared to a healthy control group." *Id.* at 25. As that study concluded, "post[-]surgical transsexuals are a risk group that need long-term psychiatric and somatic follow-up," and "[e]ven 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." *Id.* at 26.



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Second, even if it were guaranteed that the risks associated with gender dysphoria could be fully addressed by gender transition, "most persons requiring transition-related treatment could be non-deployable for a potentially significant amount of time." Report 35. In the military's view, that limitation on deployability itself posed a separate "readiness risk." *Id.* at 33. After documenting the restrictions associated with transition-related medical treatments—including reports by some commanders that some transitioning service members would be non-deployable for up to two-and-half-years—the Department made an assessment that these burdens on military readiness were unacceptable. *Id.* at 33–35. In addition to being inherently problematic in isolation, these limitations would more broadly harm the service members' units. After all, any "increase in the number of non-deployable military personnel places undue risk and personal burden" on those service members who are "qualified and eligible to deploy." *Id.* at 35. In addition to these personal costs, there are impacts on the families of service members who are deployed "more often to backfill or compensate for non-deployable" ones. *Id.* All of this poses a "significant challenge for unit readiness." *Id.*

This analysis should not be controversial. Even Secretary Carter noted that "[g]ender 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," Dkt. 48-3, at 5. So did RAND, which concluded that the relevant limitations on deployability would "have a negative impact on readiness." Report 34–35. Although RAND dismissed this harm as "minimal" due to its estimation of the "exceedingly small number of transgender Service members who would seek transition-related treatment," *id.*, in the Department's judgment, that was the wrong question: "The issue is not whether the military can absorb periods of non-deployability in a small population" but "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." *Id.* at 35. After all, "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." *Id.* RAND "failed to analyze the impact" on "unit readiness" at



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"the micro level" by taking a "macro" view of the entire military. *Id.* at 14. Given that even Congress may disagree with testimony by some military officers based on legislative concerns about deployability, *see Rostker*, 453 U.S. at 82, then military leadership between administrations should likewise be able to differ over what limitations on deployability are acceptable.

**ii. Order, Discipline, Leadership, and Unit Cohesion**

The Department similarly agreed with the RAND Report's analysis of "the intangible ingredients of military effectiveness"—namely, "leadership, training, good order and discipline," and "unit cohesion." Report 3. While RAND recognized that "unit cohesion" was "a critical input for unit readiness," it concluded that accommodating gender transition would likely have "no significant effect" based on the experiences of four foreign militaries that had "fairly low numbers of openly serving transgender personnel." Dkt. 46-2, at 44–45. By adopting this approach, however, RAND, in the Department's judgment, again failed to "examine the potential impact on unit readiness, perceptions of fairness and equity, personnel safety, and reasonable expectations of privacy"—"all of which are critical to unit cohesion"—"at the unit and sub-unit levels." Report 14. Aside from potential harms to unit cohesion from limits on deployability, *see supra* Part I.B.1.b.i, accommodating gender transition would undermine the "good order and discipline, steady leadership, unit cohesion, and ultimately military effectiveness and lethality" served by the military's sex-based standards in several ways, Report 28.

First, the Department reasonably concluded that any accommodation policy that does not require full sex-reassignment surgery threatens to "erode reasonable expectations of privacy that are important in maintaining unit cohesion, as well as good order and discipline." *Id.* at 37. As the Department explained, "[g]iven the unique nature of military service," service members often must "live in extremely close proximity to one another." *Id.* To protect their reasonable expectations of privacy, the Department "has long maintained separate berthing, bathroom, and showering facilities for men and women." *Id.* Far from a suspect practice, the Supreme Court has acknowledged that it is "necessary to afford members of each sex privacy from the other sex in living arrangements," *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996), and "[i]n the context of recruit training, this



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separation is even mandated by Congress," Report 37 (collecting statutes).

Accommodating gender transition, the Department reasoned, at least as to those individuals who have not undergone a full sex reassignment, would "undermine" these efforts to honor service members' "reasonable expectations of privacy." *Id.* at 36. Allowing transgender service members "who have developed, even if only partially, the anatomy of their identified gender" to use the facilities of either their identified gender or biological sex "would invade the expectations of privacy" of the non-transgender service members who share those quarters. *Id.* at 37. Absent the creation of separate facilities for transgender service members, which may well be both "logistically impracticable" for the Department and unacceptable to those individuals, the military would face irreconcilable privacy demands. *Id.* For example, the Panel received a report from a commander who faced dueling equal opportunity complaints under the Carter policy over allowing a transgender service member who identified as a female but had male genitalia to use the female shower facilities—one from the female service members in the unit and one from the transgender service member. *Id.* These concerns are consistent with reports from commanding officers in the Canadian military that "they would be called on to balance competing requirements" by "meeting [a] trans individual's expectations … while avoiding creating conditions that place extra burdens on others or undermined the overall team effectiveness." *Id.* at 40.

In the Department's judgment, such collisions of privacy demands "are a direct threat to unit cohesion and will inevitably result in greater leadership challenges without clear solutions." *Id.* at 37. Accommodating gender transition would mean the "routine execution of daily activities" could be a recurring source of "discord in the unit," requiring commanders "to devote time and resources to resolve issues not present outside of military service." *Id.* at 38. And any delayed or flawed solution to these conflicts by commanders "can degrade an otherwise highly functioning team," as any "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." *Id.*

In addition, accommodating gender transition, at least in the context of basic recruiting, puts the Department at risk of violating federal law. As it observed, Congress has "required by statute



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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.'" *Id.* at 29. Accommodating the gender transition of recruits, drill sergeants, or training personnel in the context of basic recruiting places the Department in jeopardy of contravening those statutory mandates. The new policy advances the military's obvious interest in avoiding that legal risk.[8]

Second, accommodating gender transition creates safety risks for, and perceptions of unfairness among, service members by applying "different biologically-based standards to persons of the same biological sex based on gender identity, which is irrelevant to standards grounded in physical biology." Report 36. For example, "pitting biological females against biological males who identify as female, and vice versa," in "physically violent training and competition" could pose "a serious safety risk." *Id.* In addition, service members who are not transgender would likely be frustrated by a "biological male who identifies as female" but "remain[s] a biological male in every respect" and yet is "governed by female standards" in "training and athletic competition," which tend to be less exacting than male training and athletic standards. *Id.*

Again, these are legitimate concerns, as both Congress and the Supreme Court have recognized that it is "necessary" to "adjust aspects of the physical training programs" for service members to address biological differences between the sexes. *Virginia*, 518 U.S. at 550 n.19 (citing statute requiring standards for women admitted to the service academies to "be the same as those … for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals"). Especially given that

[8] The Department cannot safely assume that courts will construe these statutes to accommodate gender transition. Instead, because these laws do not provide any specialized definition for "sex," "male," or "female," courts may conclude that the terms retain their ordinary meaning, *e.g.*, *Johnson v. United States*, 559 U.S. 133, 138 (2010), which turns on biology rather than gender identity, *see, e.g.*, *Oxford American English Dictionary* 622 (1980) (defining "sex" as "either of the two main groups (*male* and *female*) into which living things are placed according to their reproductive functions, the fact of belonging to these"); *id.* at 401 (defining "male" as "of the sex that can beget offspring by fertilizing egg cells produced by the female"); *id.* at 237 (defining "female" as "of the sex that can bear offspring or produce eggs"); *Webster's Third New International Dictionary* 836, 1366, 2081 (1993) (similar). That is likely given that Congress has confirmed this understanding by prohibiting discrimination on the basis of "gender identity" in addition to, rather than within, discrimination on the basis of "sex" or "gender." *See, e.g.*, 18 U.S.C. § 249(a)(2); 42 U.S.C. § 13925(b)(13)(A).



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"physical competition[] is central to the military life and indispensable to the training … of warriors," Report 36, the Department's concerns about the risks in this area should not be ignored.

Third, the Department was concerned that exempting transgender service members from uniform and grooming standards associated with their biological sex would create friction in the ranks. As it explained, "allowing a biological male to adhere to female uniform and grooming standards" would "create[] 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." *Id.* at 31. That is particularly likely in cases where the standards prohibit non-transgender service members from expressing core aspects of their identity.

Given these concerns, the Department found that accommodating gender transition "risks unnecessarily adding to the challenges faced by leaders at all levels, potentially fraying unit cohesion, and threatening good order and discipline." Report 40. Due to "the vital interests at stake—the survivability of Service members, including transgender persons, in combat and the military effectiveness and lethality of our forces"—it therefore decided to take a cautious approach. *Id.* That careful military judgment merits significant deference. "Not only are courts ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have, but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy." *Goldman*, 475 U.S. at 507–08. Indeed, the Supreme Court has repeatedly deferred to similar judgments in this military context in the past. *See id.* at 509–10 (deferring to the military's judgment that "the wearing of religious apparel such as a yarmulke … would detract from the uniformity sought by the dress regulations"); *Rostker*, 453 U.S. at 57 (deferring to Congress's concerns about "'administrative problems such as housing and different treatment with regard to … physical standards'"). And it did so even though in each case, others, including current and former military officials, disagreed. *See supra* pp. 11–12. There is no reason why the military's judgment here should be treated any differently.

**iii. Disproportionate Costs**

Finally, the Department explained that in its experience with the Carter policy,



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accommodating gender transition was "proving to be disproportionately costly on a per capita basis." Report 41. Since the Carter policy's implementation, the medical costs for service members with gender dysphoria have "increased nearly three times—or 300%—" compared to others. *Id.* And that is "despite the low number of costly sex reassignment surgeries that have been performed so far"—only 34 non-genital sex reassignment surgeries and one genital surgery—which is likely to increase as more service members with gender dysphoria avail themselves of these procedures. *Id.* Notably, "77% of the 424 Service member treatment plans available for review"—*i.e.*, approximately 327 plans—"include requests for transition-related surgery" of some kind. *Id.*[9]

In light of the military's general interest in maximizing efficiency through minimizing costs, the Department decided that its disproportionate expenditures on accommodating gender transition could be better devoted elsewhere. *See id.* at 3, 41. Such a conclusion is not to be second-guessed. Even when alleged constitutional rights are involved, judgments by the political branches as to whether a benefit "consumes the resources of the military to a degree … beyond what is warranted" are entitled to significant deference. *Middendorf v. Henry*, 425 U.S. 25, 45 (1976).

* * *

Based on these concerns, the Department made a "military judgment" that no longer providing a general accommodation for gender transition was "a necessary departure from the Carter policy." Report 32. While it was "well aware that military leadership from the prior administration, along with RAND, reached a different judgment," the Department's latest review revealed that "the realities associated with service by transgender individuals are more complicated than the prior administration or RAND had assumed." *Id.* at 44. In fact, even RAND had "concluded that allowing gender transition would impede readiness, limit deployability, and burden the military with additional costs," but dismissed "such harms [as] negligible in light of the small size of the

[9] Several commanders also reported that providing transition-related treatment for members of their units "had a negative budgetary impact because they had to use operations and maintenance funds to pay for [their] extensive travel throughout the United States to obtain specialized medical care." *Id.* This is not surprising given that "transition requires frequent evaluations" by both a mental health professional and an endocrinologist, and most military treatment facilities "lack one or both of these specialty services." *Id.* at 41 n.164. Service members therefore "may have significant commutes to reach their required specialty care," and those "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." *Id.*



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transgender population." *Id.* But the Department was "not convinced that these risks could be responsibly dismissed or that even negligible harms" (at the macro level) "should be incurred given [its] grave responsibility." *Id.* It therefore "weighed the risks associated with maintaining the Carter policy against the costs of adopting a new policy that was less risk-favoring," and concluded that the "balances struck" by the new policy "provide the best solution currently available." *Id.* That careful cost-benefit analysis by the military survives deferential review.

**c. The new policy is consistent with the Court's prior reasoning**

The new policy addresses all of the concerns underlying the Court's preliminary injunction. To start, this Court declined to apply a deferential form of review at that point due to its belief that the President's directives were based on neither "considered reason or deliberation" nor the "'considered professional judgment of military officials.'" Op. 18 & n.7. Defendants respectfully disagree, but, in any event, both of those factors are obviously present with respect to the new policy.

Likewise, the reasons why this Court found the 2017 Memorandum would likely fail intermediate scrutiny are no longer present. *See* Op. 16–18.[10] First, the explanations for the new policy were not obviously "'*contradicted* by the studies, conclusions, and judgment of the military itself.'" Op. 16. To be sure, the former officials responsible for the Carter policy may object to the Department's current approach, but, as *Goldman* and *Rostker* illustrate, such disagreement does not alter the deferential analysis required. *See supra* pp. 11–12.

Second, the reasons for this nuanced policy are neither "'hypothetical'" nor "'extremely overbroad.'" Op. 16–17. Instead, they are rooted in extensive studies, *see, e.g.*, Report 19–27; experience under the Carter policy, *see, e.g.*, *id.* at 8, 34, 37, 41; and the considered professional judgment of military officials, *see, e.g.*, *id.* at 4, 18, 32, 41, 44. And even where the new policy appears to sweep broadly, the Department explained why it does so. For example, the Department considered, but rejected, allowing those individuals who had undergone "a full sex reassignment surgery" to serve. *Id.* at 31. As it explained, that measure would be "at odds with current medical practice, which allows for a wide range of individualized treatment" for gender dysphoria. *Id.* It also

[10] In other words, even if an ordinary form of intermediate scrutiny applied, the new policy would survive it. *A fortiori*, the policy would withstand rational basis review. *Cf.* Op. 18 n.8 (ruling otherwise with respect to the Memorandum).



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would have little practical effect, as the "rates for genital surgery are exceedingly low." *Id.* And in any event, it would not address concerns about "the inconclusive scientific evidence that transition-related treatment restores persons with gender dysphoria to full mental health." *Id.* at 41.

Finally, far from being "abruptly" announced, the new policy was the product of a formal process involving "considered reason [and] deliberation." Op. 18. The Department's independent reexamination of the Carter policy—begun without any direction from the President and well before his July 25, 2017 statement on Twitter—was an extensive deliberative process lasting over seven months and involving many of the Department's high-ranking officials as well as experts in a variety of subjects. *See* Mattis Memo 1–2; Report 17–18. The Department considered evidence that supported and cut against its approach, including the materials underlying, and its experience with, the Carter policy, and explained why it was departing from that policy to some extent. *See, e.g.*, Report 18, 44. And while much of this deliberative process occurred while litigation was ongoing, the same was true in *Rostker*, and that did not render Congress's decision suspect. *See supra* p. 11.

**2. The new policy survives Plaintiffs' other constitutional challenges**

Plaintiffs are also unlikely to prevail on their substantive due process or First Amendment claims. Although this Court held otherwise in issuing its preliminary injunction, that was due to its belief that the 2017 Memorandum's alleged "intrusion" on their "fundamental liberty interest" and "protected expression" was unnecessary "to further an important government interest." Op. 19–20. For the reasons above, the same cannot be said about any such intrusion by the new policy.[11]

## II. Plaintiffs Have Not Satisfied The Equitable Factors For A Preliminary Injunction

Even if Plaintiffs could show a live controversy in which they were likely to succeed, they cannot meet any of the equitable factors needed for an order barring adoption of the new policy.

To start, Plaintiffs have not shown that they would suffer any irreparable injury under the new policy. Indeed, they have not even proven that they would have standing to press a challenge to this policy, and it is clear that most of them would not. At the outset, five of the nine individual

[11] In any event, Defendants respectfully maintain for preservation purposes that the new policy would not intrude on any constitutional interest. Even if this policy were to deprive Plaintiffs of "career opportunities," Op. 19, no one has a fundamental right to serve in the U.S. military. Nor is this policy, which, like the Carter policy before it, simply requires the disclosure of information concerning a medical condition, a "content-based restriction" on speech. Op. 20.



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Plaintiffs (Schmid, Muller, Lewis, Stephens, and Winter) would qualify for the new policy's reliance exception—and would therefore be able to continue serving in their preferred gender, obtain commissions, and receive medical treatment—because each received a diagnosis of gender dysphoria from a military medical provider during the time the Carter policy was in effect. *See* Dkt. 30, at 9, 12, 14–15, 17; Dkt. 72, at 2; Report 43. These Plaintiffs therefore will not sustain any injury under the new policy, let alone an irreparable one. And as for the remaining Plaintiffs and Washington, Defendants respectfully maintain for preservation purposes that these litigants cannot establish standing to challenge, or irreparable injury from, the new policy for the same reasons they failed to satisfy these requirements with respect to the 2017 Memorandum. *See* Dkt. 69.

Nor have Plaintiffs established that the balance of the equities or the public interest favors an injunction against the new policy. In contrast to the absence of any irreparable harm associated with dissolving the preliminary injunction, such an order will force the Defense Department to adhere to 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." Mattis Memo 2; *see also, e.g.*, Report 32–35, 41, 44. These "specific, predictive judgments" from "senior" military officials—including the Secretary of Defense himself—"about how the preliminary injunction would reduce the effectiveness" of the military merit significant deference. *Winter*, 555 U.S. at 27. After all, the military is not "required to wait until the injunction actually results in an inability" to effectively prepare "for the national defense before seeking its dissolution." *Id.* at 31 (internal quotation marks, brackets, and ellipsis omitted).[12]

## CONCLUSION

This Court should dissolve the preliminary injunction issued on December 11, 2017. In light of the Department of Defense's judgment that maintaining the Carter policy poses substantial risks to military readiness, Defendants respectfully request a ruling on this motion as soon as possible and no later than May 23, 2018.

[12] Although this Court held that the equities favored granting a preliminary injunction with respect to the 2017 Memorandum, that ruling hinged on its belief that the Carter policy had no "documented negative effects." Op. 22. The Defense Department has now detailed the harms associated with the Carter policy and explained why, in its professional military judgment, it was "necessary" to depart from that framework. Report 32.



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Dated: March 23, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 23, 2018, I electronically filed the foregoing Motion to Dissolve the Preliminary Injunction using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: March 23, 2018

*/s/ Ryan Parker*

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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 TRUMP, et al,

Defendants.

---

STATE OF WASHINGTON,

Intervenor-Plaintiff,

v.

DONALD TRUMP, et al,

Intervenor-Defendants.

Case No: 2:17-cv-1297-MJP

SUPPLEMENTAL BRIEF IN SUPPORT OF WASHINGTON'S MOTION FOR SUMMARY JUDGMENT



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## I. INTRODUCTION

In the absence of evidence justifying the President's unconstitutional Transgender Military Service Ban (the "Ban"), Defendants seek to avoid summary judgment with post-hoc justifications they have now cooked up for the Ban. However, the new Presidential Memorandum, Department of Defense report, and Secretary Mattis Implementation Plan that Defendants filed with the Court on the evening of Friday, March 23, 2018 – just days before the hearing on Washington's Motion for Summary Judgment – fail at their purpose. These documents do not revoke the Ban or put in place a "new" policy; the documents simply implement and finalize the unconstitutional Ban. The documents are not evidence that could defeat summary judgment, as they constitute nothing more than post hoc rationalizations that should be summarily dismissed. Rather than moot Washington's motion, the documents have no bearing on it. Defendants have caused enough harm and delay. The Court should find that the Ban violates the Fifth Amendment's equal protection and substantive due process guarantees and grant summary judgment as soon as practicable.

## II. STATEMENT OF RELEVANT UNDISPUTED MATERIAL FACTS

On June 30, 2016, based on the advice of medical, military, and personnel experts, and an independent research study conducted by the RAND Corporation, former Secretary of Defense Ashton Carter ended the military's longstanding, facially discriminatory policy that barred transgender individuals from openly accessing and serving in the United States military.[1] ECF 150 at 2 (citing ECF 34-1; ECF 46-2 at 90-93; ECF 48-1; ECF 69 at 4; ECF 103 at 4). To that end, former Secretary Carter issued a directive allowing transgender individuals currently serving to do so openly, and directed the military to allow transgender individuals to access into military service beginning July 1, 2017. *Id.* (citing ECF 48-3).

On June 30, 2017, in order to further evaluate any potential impact of accession of

[1] Washington incorporates, by reference, its prior Statement of Undisputed Material Facts, *see* ECF 150 at 1-7, and supplements it, here, as relevant to the issues requested to be briefed.


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transgender individuals into military service, Secretary of Defense James Mattis delayed the date for accepting transgender recruits to January 1, 2018. ECF 150 at 2 (citing ECF 34-3).

Less than a month later, on July 26, 2017, President Donald J. Trump reneged on the Department of Defense's ("DoD") promise of equal treatment and opportunity for transgender individuals in military service and announced on Twitter that the military would return to its discriminatory practices. *Id*. (citing ECF 34-6).

On August 25, 2017, President Trump memorialized the Ban in a Presidential Memorandum titled "Military Service by Transgender Individuals" ("Initial Presidential Memorandum"). *Id*. at 3 (citing ECF 34-7).

In his Initial Presidential Memorandum, President Trump directed the military to "return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016[.]" *Id*. (citing ECF 34-7 §1(b)). In Section 2 of the Initial Presidential Memorandum, President Trump directed the military to: (1) indefinitely bar accession of transgender individuals into military service; and (2) halt all use of DoD or Department of Homeland Security ("DHS") funding for sex-reassignment surgical procedures. *Id.* at § 2. The Initial Presidential Memorandum also directed the Secretaries of Defense and Homeland Security, "[b]y February 21, 2018," to submit "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 . . ." *Id.* at § 3. President Trump retained final decision-making authority regarding any change to his policy directives regarding transgender individuals in military service. *Id.* at § 1(b) (directing the Secretaries of Defense and Homeland Security to "advise [him], in writing" if they believe "that a change to this policy [the Ban] is warranted"); § 2(a) (instructing that his directive regarding accession into military service by transgender individuals shall be maintained "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").

On August 29, 2017, Secretary of Defense James Mattis issued a Statement confirming



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receipt of the Initial Presidential Memorandum and affirming that "[t]he department will carry out the president's policy direction . . . ." Statement by Secretary Mattis at 1, ECF 197, Ex. 2. In his Statement, Secretary Mattis noted that "as directed, [he] will develop a study and implementation plan" including establishing "a panel of experts serving with the Departments of Defense and Homeland Security to provide advice and recommendations on the implementation of the president's direction." *Id.* Secretary Mattis further announced his intent to "issue interim guidance to the force concerning the President's direction . . . ." *Id.*

On September 14, 2017, Secretary Mattis issued Interim Guidance regarding the Initial Presidential Memorandum. ECF 69-1. The Interim Guidance confirmed the intent of the DoD to "carry out the President's policy and directives . . . ." *Id.* Secretary Mattis promised that, "[n]ot later than February 21, 2018, I will present the President with a plan to implement the policy and directives in the Presidential Memorandum." *Id.*

On February 22, 2018, a day after his deadline, Secretary Mattis presented President Trump with the implementation plan for the Ban, completing the final step required by the Initial Presidential Memorandum. Implementation Plan, ECF 216-1. In the "[u]nclassified" Implementation Plan, Secretary Mattis confirms that he created a panel of experts to "provide advice and recommendations on the implementation of the president's" Ban, as promised in his August 29, 2017 Statement. Statement by Secretary Mattis at 1, ECF 197, Ex. 2. *See also* ECF 216-1 at 1. The panel of experts provided Secretary Mattis with their recommendations in an "[u]nclassified" Department of Defense Report and Recommendations on Military Service by Transgender Persons dated February 2018 ("DoD Report").[2] ECF 216, Ex. 2. The Implementation Plan bars (1) accession into military service by transgender individuals "who require or have undergone gender transition;" (2) military service by openly transgender individuals who want to serve our country in a manner consistent with their gender identity; and

[2] The DoD Report indicates that Secretary Mattis established the panel of experts on September 14, 2017, the same day he issued the Interim Guidance. ECF 216, Ex. 2 at 17. *See also* ECF 69-1.


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(3) use of military resources for transition related medical care. ECF 216-1 at 2-3.[3] Secretary Mattis concluded the Implementation Plan by recommending to the President that he revoke the Initial Presidential Memorandum, "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." ECF 216-1 at 3.

On March 23, 2018, a month after receiving Secretary Mattis' Implementation Plan, President Trump issued a Memorandum for the Secretary of Defense and Secretary of Homeland Security regarding Military Service by Transgender Individuals ("Second Presidential Memorandum"). ECF 214-1. The Second Presidential Memorandum acknowledges that, pursuant to the Initial Presidential Memorandum, President Trump received Secretary Mattis' Implementation Plan and DoD Report. *Id*. at 1 Apparently finding those recommendations convincing, the Second Presidential Memorandum accepts Secretary Mattis' recommendation that he revoke the Initial Presidential Memorandum and authorizes Secretary Mattis and the Secretary of Homeland Security "to implement any appropriate policies concerning military service by transgender individuals." *Id.*

## III. ARGUMENT

Defendants filed the Second Presidential Memorandum, Secretary Mattis' Implementation Plan, and the DoD Report with the Court on March 23, 2018 (collectively "March 23rd filings"), long after responding to Washington's Motion for Summary Judgment. Defendants' March 23rd filings have no bearing on the merits of Washington's Motion for Summary Judgment. Rather than constitute a "new" policy on military service by transgender individuals, as Defendants suggest, the March 23rd filings simply finalize the Ban and are post-

[3] The Implementation Plan contains a narrow exception allowing transgender individuals who entered or remained in the military following the announcement of the Carter policy and the imposition of preliminary injunctions to serve in accordance with their gender identity and receive medically necessary treatment. ECF 216-1 at 2. However, the DoD Report indicates that, "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." ECF 216, Ex. 2 at 43.


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hoc evidence that cannot – despite Defendants' suggestions to the contrary – justify the Ban or moot Washington's constitutional challenges.

**A. The Second Presidential Memorandum, Together With the Implementation Plan and DoD Report, Finalizes – Not Revokes – the Ban**

Defendants' March 23rd filings reveal that the Ban is alive and well, and ripe for summary judgment. Defendants, relying on the Second Presidential Memorandum's purported revocation of the Initial Presidential Memorandum, attempt to characterize the March 23rd filings as announcing a "new" policy – separate and distinct from the Ban. However, the documents themselves belie Defendants' contentions.

In his Initial Presidential Memorandum memorializing the Ban, President Trump plainly directed the Secretaries of Defense and Homeland Security to submit to President Trump 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" by February 21, 2018. ECF 34-7 §§ 1(a), 3. Secretary Mattis agreed to carry out this directive. Statement by Secretary Mattis at 1, ECF 197, Ex. 2 ("As directed, we will develop an implementation plan" including establishing "a panel of experts serving with the Departments of Defense and Homeland Security to provide advice and recommendations on the implementation of the president's direction."). To that end, he established a "panel of experts" on September 14, 2017 – the date he issued his Interim Guidance – and they produced the February 2018 DoD Report. On February 22, 2018, Secretary Mattis presented his Implementation Plan to the President. The Implementation Plan ensures that the Accessions, Retention, and Medical Care directives ordered by President Trump in his Initial Memorandum are implemented. *Compare* ECF 216-1 (ordering the United States military to (1) bar accession by transgender individuals; (2) disallow transgender individuals to openly serve in the military; and (3) deny access to medical services solely because a person is transgender) and ECF 216-1 (barring (1) transgender individuals "who require or have undergone gender transition" from military service; (2) requiring "[t]ransgender persons without a history or


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diagnosis of gender dysphoria … [to] serve … in their biological sex"; and (3) denying access to transgender related healthcare to any service member not already receiving such services under the Carter policy and this Court's injunction).

The Second Presidential Memorandum acknowledges the President's receipt of the DoD Report and Implementation Plan. *See* ECF 216-3 (noting that the Implementation Plan and DoD Report were created "[p]ursuant to [President Trump's] memorandum of August 25, 2017"). Apparently finding Secretary Mattis' implementing recommendations convincing – a requirement the President announced in his Initial Presidential Memorandum – the Second Presidential Memorandum authorizes Secretary Mattis and the Secretary of Homeland Security "to implement any appropriate policies concerning military service by transgender individuals."

While the Second Presidential Memorandum also follows Secretary Mattis' recommendation and allegedly "revokes" the Initial Presidential Memorandum, there is nothing left to revoke. With Secretary Mattis' submission of the Implementation Plan and DoD Report to the President, and the President's acceptance and approval of the same, Defendants completed all that the Initial Presidential Memorandum directed be accomplished regarding the Ban.

Thus, the Second Presidential Memorandum did not revoke the Ban. It finalized it.

**B. Defendants' Post-Hoc Justifications Do Not Save the Unconstitutional Ban**

The March 23rd filings do not spare the Ban from Washington's constitutional challenge on summary judgment.

Post-hoc justifications are insufficient to satisfy sex-based distinctions. As the Supreme Court recently noted, "[i]t will not do to hypothesize or invent governmental purposes for gender classifications post hoc in response to litigation." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1696-97 (2017) (rejecting post-hoc claim of governmental interest unsupported by the record) (quoting *United States v. Virginia*, 518 U.S. 515, 533, 535-36 (1996)). Instead, the Supreme Court has consistently required government entities to prove a "genuine" need for a sex-based


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classification, and has been clear that post-hoc justifications do not qualify. *Virginia*, 518 U.S. at 532-33.

Here, the Implementation Plan and the DoD Report are nothing more than post hoc justifications for the Ban. These documents did not exist when President Trump tweeted out the Ban or when it was memorialized in the Initial Presidential Memorandum. The Implementation Plan and DoD Report exist solely because the Initial Presidential Memorandum ordered Defendants to create them as part of the Ban's implementation process. As such, the March 23rd filings constitute quintessential post hoc evidence that should not be relied upon by this Court in deciding whether the Ban passes constitutional muster.

To the extent Defendants point to *Rostker v. Goldberg*, 453 U.S. 57 (1981), in advocating that the Court consider the March 23rd filings, that case is distinguishable and their argument falls flat. The statute at issue in *Rostker* exempted women from the draft. *Id.* at 60-61. Congress reconsidered that sex-based distinction in congressional proceedings arising from a subsequent presidential request to reactivate the draft registration process. *Id.* at 61. In considering whether the subsequent evidence was sufficient to justify the sex-based distinction, the *Rostker* Court observed, "Congress did not act 'unthinkingly' or 'reflexively and not for any considered reason.'" 453 U.S. at 71. Instead, the sex-based distinction in *Rostker* was "extensively considered by Congress in hearings, floor debate, and in committee" and in "[h]earings held by both Houses of Congress in response to the President's request for authorization to register women[.]" Further, Congress "adduced extensive testimony and evidence concerning the issue." *Id.* The result is that the Legislature held extensive proceedings that did not have a predetermined outcome and the Court accepted the resulting findings as sufficiently thorough and devoid of knee-jerk discrimination to warrant the Court's consideration.

Here, Defendants present the Court with the opposite. The self-interested, in-house DoD Report and Implementation Plan at issue here is manifestly different than the extensive vetting of the Military Selective Service Act that Congress undertook in *Rostker*. Defendants' generated


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the DoD Report and Implementation Plan to justify the Ban in the face of the present constitutional challenge. Defendants now ask this Court to defer to a report that directly contradicts an exhaustive DoD assessment – informed by an external civilian research study – which ultimately concluded that service by transgender individuals was beneficial to the United States military. Defendants also ask this Court to not only turn a blind eye to extensive DoD research, but to give deference to the Implementation Plan and DoD Report which all too conveniently purports to reverse engineer evidence to justify the Ban and is transparently responsive to the challenges in this litigation. This quintessential post hoc evidence is nothing like the congressional record considered in *Rostker* and the Court should disregard it in its assessment of the President's basis for the Ban.

**C. Defendants' Post-Hoc Justifications for the Ban Do Not Warrant Deference**

This Court owes no deference to Defendants' March 23rd filings. In reviewing military action for constitutional compliance, under appropriate circumstances courts may accord deference where the challenged restriction arises from military experience or developed research. *Rostker*, 453 U.S. at 67. Although courts owe deference to well-reasoned military policies, blind deference to discriminatory policies is never warranted.[4] Courts owe deference only to well-reasoned policies or practices developed by military experts or the Legislature, as neither is "free to disregard the Constitution when [they] act in the area of military affairs." *Id.* Indeed, if history has instructed anything, it is that there must be limits to judicial deference in the military context: "it is unthinkable that the judiciary would defer to the Army's prior 'professional' judgment that black and white soldiers had to be segregated to avoid interracial tensions." *Watkins v. U.S. Army*, 875 F.2d 699, 729 (1989) (Norris, J., concurring).

Defendants ask this Court to ignore the Carter policy – *i.e.* the military's own well-reasoned policies arising out of extensive research performed by military, medical, and civilian

[4] Inasmuch as Defendants argue that deference to military decision-making requires the Court to subject Washington's constitutional challenges to rational basis review, that argument fails. The Supreme Court rejected exactly such a request from the military in *Rostker*. *See Rostker*, 453 U.S. at 69.


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researchers and experts that found the military is better if transgender individuals are allowed to serve openly. Instead, Defendants argue that this Court must defer to Defendants' post hoc in-house "research" – which supports Defendants' litigation position but runs counter to its own recent neutral assessment of the military's needs and interests. However, the Implementation Plan and DoD Report are not the result of neutral, measured consideration and study by military experts but were created with the express purpose of implementing the Ban. The Court owes no deference to such post hoc evidence expressly created for the purpose of implementing the discriminatory Ban.

**D. Defendants' March 23, 2018 Filings Do Not Moot Washington's Claims**

Defendants contend that Washington's Motion for Summary Judgment is moot as a result of the March 23rd filings. They are wrong.

"The burden of demonstrating mootness 'is a heavy one.'" *Cty. of Los Angeles. v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953)). Further, the Ninth Circuit warned that "dismissal of a case on 'grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had 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)).

Following this guidance, courts consistently find claims are moot only where the challenged policy has been completely revoked or rescinded. *See Burke v. Barnes*, 479 U.S. 361, 363 (1987) (mooting a claim that *only* sought to "litigate the validity of a statute which by its terms had already expired"); *U.S. Dep't of Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986) (finding claim moot *after* Congress altered the challenged statute and rectified the constitutional concerns raised by plaintiff's lawsuit); *Kremens v. Bartley*, 431 U.S. 119, 128-29 (1977) (finding claim moot *after* statutory fix was made to protect plaintiffs' constitutional rights); *Gulf of Me. Fisherman's All. v. Daley*, 292 F.3d 84, 88 (1st Cir. 2002) (finding claim moot *after* a regulation


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had been "replaced by a series of subsequent" regulations).[5] Here, because the March 23rd filings finalize the Ban, the revocation of the Initial Presidential Memorandum does not and cannot moot Washington's constitutional challenge to the Ban on summary judgment.

## IV. CONCLUSION

For the foregoing reasons, the March 23rd filings have no bearing on Washington's motion, and summary judgment should be granted.

DATED this 3rd day of April, 2018.

ROBERT W. FERGUSON
Washington Attorney General

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[5] To the extent Defendants argue that they have voluntarily ceased implementation of the Ban, this Court should reject such empty claims and proceed to a substantive resolution of Washington's constitutional claims. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of a practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 287 (1982). This is especially true where a defendant stopped a challenged practice but implements another practice that causes substantially the same injury to plaintiff. *Ne. Fl. Chapt. of Assoc. Contractors of America v. City of Jacksonville, Fl.*, 508 U.S. 656, 662 (1993). Further, "[w]hen a challenged policy is repealed or amended mid-lawsuit – a 'recurring problem when injunctive relief is sought' – the case is not moot if a substantially similar policy has been instituted or is likely to be instituted." *Smith v. Exec. Dir. of Ind. War Mem'ls Comm'n*, 742 F.3d 282, 287 (7th Cir. 2014) (quoting *ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Prot. Dist.*, 724 F.3d 854, 864 (7th Cir. 2013)). *See also Bunker Ltd. P'ship v. United States*, 820 F.2d 308, 312 (9th Cir. 1987) (noting that Defendants cannot moot a claim by implementing a variant of the challenged policy or law where the new variant does not manifestly change plaintiff's likelihood of injury).

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 3rd day of April, 2018.

*/s/ La Rond Baker*
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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, et al.,

Defendants.

No. 2:17-Cv-1297-MJP

**DEFENDANTS' MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL**

NOTED FOR CONSIDERATION:
May 18, 2018



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## INTRODUCTION

On April 13, 2018, this Court entered an order granting in part and denying in part Plaintiffs' and Intervenor Washington's motions for summary judgment, granting in part and denying in part Defendants' motion for partial summary judgment, and striking Defendants' motion to dissolve the preliminary injunction.[1] Mem. Op., ECF No. 233. In its order, the Court expanded its injunction to preclude Defendants other than the President from implementing the Department of Defense's ("DoD") new policy announced on March 23, 2018. *Id.* at 30–31. Defendants subsequently filed a timely notice of appeal, *see* ECF No. 236, and the Court's order is now on appeal before the United States Court of Appeals for the Ninth Circuit.

Defendants now move to stay the Court's preliminary injunction pending appeal, so that the Defense Department can implement its new policy. Unless stayed, the Court's injunction will irreparably harm the government (and the public) by compelling the military to adhere to a policy it has concluded poses substantial risks. A stay, by contrast, would not likely injure any of the plaintiffs, many of whom may continue to serve under DoD's new policy. Defendants are also likely to succeed on the merits of this case because they are defending a professional decision of military leaders, to which significant deference is due. At a minimum, the Court should stay the preliminary injunction insofar as it grants nationwide relief.

## ARGUMENT

### I. The Court Should Stay The Preliminary Injunction Pending Appeal, So That DoD Can Implement Its New Policy.

Federal Rule of Civil Procedure 62(c) grants district courts discretion to "'suspend, modify, restore, or grant an injunction' during the pendency of the defendant's interlocutory appeal." *Mayweathers v. Newland*, 258 F.3d 930, 935 (9th Cir. 2001) (quoting Fed. R. Civ. P. 62(c)). In deciding whether to stay a preliminary injunction pending appeal, district courts consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)

[1] The Court's order striking Defendants' Motion to Dissolve the Preliminary Injunction, without permitting the parties to finish briefing the issues, is understood as a denial of Defendants' motion.



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whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Doe v. Trump*, 284 F. Supp. 3d 1172, 1178 (W.D. Wash. 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

To be sure, these are the same factors that governed Defendants' Motion to Dissolve the Preliminary Injunction, which the Court recently denied. *See* Mem. Op. 31; *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983) ("The standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction."). But courts regularly find cause to stay their own rulings entering, dissolving, or modifying injunctions. *See, e.g., Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842 (D.C. Cir. 1977) (holding that district court did not abuse its discretion by entering permanent injunction and then staying it pending appeal); *Thiry v. Carlson*, 891 F. Supp. 563, 567 (D. Kan. 1995) (granting stay pending appeal of court's own order dissolving preliminary injunction). Although the Court ruled that its preliminary injunction now covers DoD's new policy, the Court should stay its injunction pending Defendants' appeal, so that the new policy can be implemented.

A stay is critical to prevent irreparable harm to military interests. The nation's military leaders have concluded that absent implementation of the new policy, there will remain "substantial risks" that threaten to "undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." Memorandum by Secretary of Defense James Mattis ("Mattis Memorandum") 2 (Feb. 22, 2018), ECF No. 216-1; *see also, e.g.*, Department of Defense Report and Recommendations on Military Service by Transgender Persons ("DoD Report") 32–35, 41, 44 (Feb. 2018). In their professional military judgment, departing from the Carter framework is necessary to protect these military interests. DoD Report 30–32. Such "specific, predictive judgments" from senior military officials, including the Secretary of Defense himself, "about how the preliminary injunction would reduce the effectiveness" of the military, merit significant deference. *Winter v. NRDC*, 555 U.S. 7, 27 (2008). The Court's decision striking Defendants' Motion to Dissolve the



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**Washington, DC 20530**
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Preliminary Injunction did not grapple with these military judgments. Thus, the Court may still stay the preliminary injunction pending appeal, so that DoD can implement its new policy.

In contrast to Defendants, Plaintiffs face little risk of harm. Many of the individual Plaintiffs would qualify for the new policy's reliance exception—and thus would be able to continue serving in their preferred gender, obtain commissions, and receive medical treatment—because they received a diagnosis of gender dysphoria from a military medical provider while the Carter policy was in effect. *See* First Am. Compl. ¶¶ 53, 79, 88, 100, 111, ECF No. 30; Easley Decl. ¶ 3, ECF No. 72; DoD Report 43. These Plaintiffs are thus highly unlikely to sustain any injury under the new policy.[2] And as for the remaining Plaintiffs and Washington, although the Court has determined that they may have satisfied the requirements for Article III standing, it does not follow that they are likely to suffer an irreparable harm to any significant degree, especially in comparison to the critical military interests at stake. As Defendants have argued previously, *see* Defs.' Mot. to Dismiss 16, ECF 69, the individual Plaintiffs seeking to access into the armed forces have not demonstrated that they have been stable for at least 18 months post-transition, as required under the Carter policy. And even assuming that the implementation of the new policy during the appeal would prevent some plaintiffs from accessing, that harm would only be temporary, lasting at most the length of Defendants' appeal. *Cf. 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). For similar reasons, neither the organizational plaintiffs nor Washington would face harm to any significant degree. Indeed, while Washington asserts that the new policy would "undermine the efficacy of its National Guard," Mem. Op. 19, senior military leaders have studied the issue extensively and come to the opposite conclusion. Accordingly, the judgment of military leaders

[2] In the Court's decision, it suggested that the record did not support the conclusion that the current service member Plaintiffs were diagnosed with gender dysphoria by a military medical provider after June 30, 2016. Mem. Op. 15–16, 15 n.7. But the Court did not address the fact that service members could receive treatment under the Carter policy—which all of these Plaintiffs did—only if they had received a diagnosis of gender dysphoria by a military medical provider after that policy took effect. *See* Declaration of Ryan B. Parker, Exh. 1 (Department of Defense Instruction 1300.28).



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is that not implementing the new policy would undermine the readiness and efficacy of the military—including the Washington National Guard. Mattis Memorandum 2; *see also, e.g.*, DoD Report 32–35, 41, 44; *cf. Winter*, 555 U.S. 7, 27 (2008) ("The lower courts failed properly to defer to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's SOCAL training exercises.").

The likelihood of success on the merits also favors granting a stay. In the Court's decision, it expressly reserved final ruling on the degree of deference that DoD's new policy should receive. Mem. Op. at 27. When the Ninth Circuit and/or this Court ultimately address that question, they are highly likely to conclude that significant deference is appropriate. Although the armed forces are subject to constitutional constraints, "the tests and limitations to be applied may differ because of the military context." *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). For instance, judicial "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations destined for civilian society." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). As one of the many "complex, subtle, and professional decisions as to the composition … of a military force, which are essentially professional military judgments," *Winter*, 555 U.S. at 24 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)), the Department's new policy, which simply declines to generally accommodate gender transition, survives the highly deferential review applicable here. Drawing on the experience and judgment of senior military leadership, evidence from before and after the adoption of the Carter policy, and its experience with the Carter policy so far, the Department concluded that continuing to provide a general accommodation for gender transition would pose unacceptable risks to military interests. DoD Report 18. The Department's professional military judgments on these interests, which involved a sensitive consideration of risks, costs, and internal discipline, clearly satisfy the deferential form of review required of such determinations.[3]

[3] It is also likely that the Ninth Circuit will disagree with the Court's conclusion that DoD's new policy is subject to strict scrutiny. Mem. Op. 24. As an initial matter, the new policy applies to a medical condition and its attendant treatment—gender dysphoria and transition—not on the basis of whether a person is transgender. Yet even if that were not the case, the Court's decision did not cite to a single instance where a court had ruled that a policy that classifies on the basis of transgender status was subject to strict scrutiny. *See generally id.* Relatedly, the Ninth Circuit



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The public interest favors staying the Court's preliminary injunction as well. The Court's previous ruling on the President's 2017 Memorandum and statement on Twitter hinged on its belief that the Carter policy had no "documented negative effects." Order 22, ECF No. 103. That is no longer accurate. DoD has now detailed the risks associated with the Carter policy and explained why, in its professional military judgment, it was "necessary" to depart from that framework. DoD Report 32. Staying the Court's preliminary injunction pending appeal serves the public interest by allowing the military to implement the policy that will best serve military interests, and therefore the security of the public.

Finally, at a minimum, the Court should stay the preliminary injunction insofar as it grants nationwide relief. Under Article III, "[t]he remedy" sought 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). Likewise, equitable principles 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). The Court determined that nine individuals have standing to challenge the new policy. Mem. Op. 15–17. But it did not limit its remedy to their injuries; instead, it barred implementation of the new policy "nationwide." *Id.* at 2. A narrow injunction, barring the application of the new policy to the nine individual plaintiffs, would provide those plaintiffs with full preliminary relief. *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).

## II. Request For Expedited Ruling

If this Court has not ruled on Defendants' motion by May 4, 2018, Defendants intend to file for a stay of the Court's preliminary injunction with the Ninth Circuit Court of Appeals. If this Court rules on Defendants' motion after Defendants' have filed their motion with the Ninth Circuit, Defendants will provide the Ninth Circuit with this Court's ruling.

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is also likely to reject the Court's implicit conclusions that Plaintiffs are likely to succeed on the merits of their equal protection, substantive due process, and First Amendment claims.



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Defense counsel has conferred with counsel for both Plaintiffs and Washington regarding this motion. Washington opposes the motion. Plaintiffs' counsel requested that Defendants include the following statement of Plaintiffs' position: "Plaintiffs intend to oppose the motion to stay. Plaintiffs also respectfully request that the Court refrain from ruling on Defendants' motion until after receiving Plaintiffs' opposition which will be timely filed in accordance with the Local Rules."

Dated: April 30, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

*/s/ Ryan B. Parker*
RYAN B. PARKER
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ANDREW E. CARMICHAEL
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United States Department of Justice
Civil Division, Federal Programs Branch
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Email: ryan.parker@usdoj.gov

*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on April 30, 2018, I electronically filed the foregoing Motion to Stay Preliminary Injunction Pending Appeal using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: April 30, 2018

*/s/ Ryan Parker*

RYAN B. PARKER
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

*Counsel for Defendants*

The Honorable Marsha J. Pechman

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

| | |
|---|---|
| RYAN KARNOSKI, et al,<br>Plaintiffs,<br>v.<br>DONALD TRUMP, et al,<br>Defendants. | Case No: 2:17-cv-1297-MJP<br><br>DECLARATION OF LA ROND BAKER IN SUPPORT OFWASHINGTON'S RESPONSE TO DEFENDANTS' MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL |
| STATE OF WASHINGTON,<br>Intervenor-Plaintiff,<br>v.<br>DONALD TRUMP, et al,<br>Intervenor-Defendants. | |

Pursuant to 28 U.S.C. § 1746(2), I, LA ROND BAKER, hereby declare as follows:

1. I am over the age of eighteen and am competent to testify.
2. I am an Assistant Attorney General for the State of Washington, and I make this declaration as a representative of the State of Washington in Support of Washington's Response to Defendants' Motion to Stay Preliminary Injunction Pending Appeal


ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 442-4492

3. Attached hereto as **Baker Declaration Exhibit A** is a true and correct copy of Washington Military Department Policy No. HR-209-02 – Equal Opportunity/Affirmative Action (October 4, 2017), available online at https://www.mil.wa.gov/uploads/pdf/policies/other-agencies/human-resources/hr-209-02.pdf (last visited May 14, 2018).
4. Attached hereto as **Baker Declaration Exhibit B** is a true and correct copy of a Washington Military Department Policy No. HR-208-01 – Anti-Discrimination (February 1, 2013), available online at https://www.mil.wa.gov/uploads/pdf/policies/other-agencies/human-resources/hr20801_000.pdf (last visited May 14, 2018).
5. Attached hereto as **Baker Declaration Exhibit C** is a true and correct copy of Directive of the Governor 16-11 *LGBTQ Inclusion and Safe Places Initiative*, available online at https://www.governor.wa.gov/sites/default/files/directive/dir_16-11_0.pdf (last visited May 14, 2018).
6. Attached hereto as **Baker Declaration Exhibit D** is a true and correct copy of Proclamation by the Governor 18-03 (May 11, 2018), available online at https://www.governor.wa.gov/sites/default/files/proclamations/18-03%20State%20of%20Emergency%20%28tmp%29.pdf (last visited May 14, 2018).
7. Attached hereto as **Baker Declaration Exhibit E** is a true and correct copy of Proclamation by the Governor 17-13 (Dec. 18, 2017), available online at https://www.governor.wa.gov/sites/default/files/proclamations/proc_17-13.pdf (last visited May 14, 2018).
8. Attached hereto as **Baker Declaration Exhibit F** is a true and correct copy of Proclamation by the Governor 17-12 (Sept. 2, 2017), available online at https://www.governor.wa.gov/sites/default/files/proclamations/proc_17-12.pdf (last



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Civil Rights Unit
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visited May 14, 2018).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this14th day of May 2018 at Seattle, Washington.

s/ *La Rond Baker*
LA ROND BAKER, WSBA No. 43610



ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 442-4492

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 14th day of May, 2018.

*/s/ La Rond Baker*
LA ROND BAKER, WSBA No. 43610



ATTORNEY GENERAL OF WASHINGTON
Civil Rights Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 442-4492

# Exhibit A

**Department Policy No. HR-209-02**

| | |
|---|---|
| **Title:** | Equal Opportunity / Affirmative Action |
| **Former Number:** | 03-203-05 |
| **Authorizing Source:** | Presidential Executive Orders 11246 (as amended) and 11375;<br>Code of Federal Regulations (CFR) Title 41, Part 60-2; Title VII of the Civil Rights Act of 1964, as amended;<br>Equal Employment Opportunity governing guidelines, CFR Titles 28, 29, and 43;<br>Vietnam-Era Veterans Readjustment Act of 1974;<br>The American with Disabilities Act of 1990, as amended<br>The Rehabilitation Act of 1973, Section 504, as amended<br>The Age Discrimination Act of 1975, as amended<br>Governor's Executive Orders 93-07 and 98-01<br>RCW Chapters 41.06 and 49.60<br>WAC Chapter 357-25<br>Directive of the Governor 16-11<br>Human Resource Policy and Procedure #HR-208-01 –Anti-Discrimination |
| **Information Contact:** | Human Resources Director<br>Building #33 (253) 512-7941 |
| **Effective Date:** | June 30, 2005 |
| **Mandatory Review Date:** | October 4, 2021 |
| **Revised:** | October 4, 2017 |
| **Approved By:** | Bret D. Daugherty<br>Bret D. Daugherty, Major General<br>The Adjutant General<br>Washington Military Department Director |

## Purpose

The Washington Military Department affirms its commitment to providing equal employment opportunity in accordance with the principles, intent, and purposes of the laws and regulations cited in this policy, recognizing that affirmative action is an effective legal tool for attaining and maintaining parity within the workforce.

## Applicability

This policy is applicable to all state employees, applicants for state employment, contractors, vendors, and customers/clients. It does not apply to National Guard personnel on state active duty or to federal personnel to include Active Guard Reserve (AGR), traditional guard personnel in a federal military status, or military technicians.

## Policy

The Military Department is committed to equal employment opportunity and access to its programs and services for all persons without regard to race, color, sex, religion, creed, age, marital status, national origin, sexual orientation or gender identity and expression, disabled and Vietnam-Era veteran, veteran or military status, or the presence of any physical, sensory or mental disability or any other legally protected status.

Equal employment opportunity and affirmative action are vital responsibilities that are equally important within all functions of the agency. It is the responsibility of each employee to comply with and promote this policy and for maintaining a work environment that encourages and promotes diversity and inclusion.

The Military Department will provide access to its services and programs in a fair and impartial manner. Equal employment opportunity is the goal, whereas, the Affirmative Action Plan is the methodology by which the Agency will fulfill this goal. In an effort to eliminate barriers and to improve employment opportunities to underutilized groups, this policy shall be implemented in recruitment, hiring, career development, training, promotion, transfer, retention, reclassification, corrective/disciplinary actions, termination, reversion and non-permanent appointments.

The Military Department will provide an environment free from all forms of discrimination. Employees are prohibited from engaging in any form of racial, religious, and sexual harassment behavior including jokes, slurs, and innuendoes. This behavior is inappropriate in the work environment and may be grounds for corrective or disciplinary action in accordance with Washington State Collective Bargaining Agreements and Washington Administrative Code.

## Responsibilities

Equal employment opportunity and affirmative action are vital responsibilities and, as such, assume equal importance within all functions of the Department.

1. **Department Director/The Adjutant General (TAG)**

   The Department Director/TAG has overall responsibility for implementation of the Department's equal employment opportunity program, Affirmative Action Plan, and to ensure management supports and promotes a high visibility of its commitment to equal employment opportunity/affirmative action.

2. **Human Resource Director (HRD)**

   The HRD is the Director's AA/EEO designee with the responsibility for:

   - Developing, implementing, and disseminating the Department's Affirmative Action Plan.
   - Designing, implementing, and monitoring internal reporting systems and advising management and staff regarding Equal Opportunity/Affirmative Action policy, plan and strategies.
   - Analyzing hiring, promotions, demotions, corrective/disciplinary actions, layoffs, termination, and training participation patterns to identify potential barriers to equal employment opportunity and developing strategies to correct/eliminate the barriers.
   - Assisting managers, supervisory and employees with the implementation of the Equal Employment Opportunity/Affirmative action policy, plan, and strategies.

3. **Managers/Supervisors**

   Managers and supervisors are responsible for promoting and implementing the principles of affirmative action and equal opportunity as outlined in the Department's goals and objectives.

4. **Employees**

   Employees are responsible for creating and maintaining a respectful and welcoming work environment, acting within the law, and for complying with this policy.

## Information Dissemination

AA/EEO policies will be provided to all new employees. New policies and updates will be distributed to all employees. The Affirmative Action Plan is available through the State Human Resource Office.

# Exhibit B

Washington State
Military Department

**Department Policy No. HR-208-01**

| | |
|---|---|
| **Title:** | Anti-Discrimination |
| **Former Number:** | 03-201 |
| **Authorizing Source:** | Titles VI and VII of the Civil Rights Act of 1964, as amended<br>Section 504 of the Rehabilitation Act of 1973, as amended<br>The Age Discrimination Act of 1975, as amended<br>The Age Discrimination Employment Act of 1967, as amended<br>The Americans with Disabilities Act of 1990, as amended<br>Washington State Law Against Discrimination, RCW 49.60, as amended<br>Washington State Executive Orders: 89-01, Sexual Harassment; 96-04, Reasonable Accommodation; and 93-07, Equal Employment Opportunity/Affirmative Action |
| **Information Contact:** | Human Resources Director<br>Building # 33 (253) 512-7941 |
| **Effective Date:** | January 1, 1998 |
| **Mandatory Review Date:** | February 1, 2017 |
| **Revised:** | February 1, 2013 |
| **Approved By:** | Bret D. Daugherty, Major General<br>The Adjutant General<br>Washington Military Department Director |

**Purpose**

Maintain a work culture and environment within the Washington Military Department that is free from Discrimination.

**Scope**

This policy applies to all state employees, applicants for state employment, contractors, and vendors.

**Policy**

a. The Washington Military Department prohibits discrimination on the basis of race, color, creed, national origin, sex, marital status, religion, age, sexual preference/orientation, gender identity, or the presence of any sensory, mental, or physical disability in all aspects of service delivery and employment. Accordingly, complaints alleging discrimination will receive prompt and effective treatment.

b. It is the responsibility of all employees to maintain a work environment free from all forms of discrimination. Employees are prohibited from engaging in any form of discrimination based on protected group status, as noted above, in the course of conducting Department business. Employees who engage in such discriminator behavior may be subject to corrective and/or disciplinary action in accordance with Merit System Rules.

c. Employees who believe that they have been discriminated against may file a discrimination complaint. No employee will be subject to any form of retaliation as a result of filing a discrimination complaint.

**Procedure**

Employees that believe they have been subjected to unlawful discrimination should notify the Department as soon as possible, as outlined in the following procedure.

1. Complaints shall be in writing and include a description of the discriminatory act, including the location and date of the action, as well as the name, address, and phone number of complainant. Upon request, alternative means of filing complaints such as personal interview or tape recordings of the complaint will be made available for persons with disabilities.

2. All complaints alleging discrimination should be addressed to:

Human Resources Director
Washington Military Department
State Human Resources Office
Camp Murray, Building #33
Tacoma, WA 98430-5006
(253) 512-7940

3. Complaints alleging sexual harassment should be submitted in accordance with the Department's Sexual Harassment policy.

4. The Human Resources Director will provide written acknowledgment, of all complaints filed in accordance with this procedure, within seven (7) calendar days of their receipt. The acknowledgement will identify a point of contact and provide a reasonable time frame for further response to the complainant. All employees shall cooperate in all phases of the investigative process. The Human Resources Director may determine the need to request the investigation be completed by a neutral, outside party with appropriate investigation skills.

5. Complaints will be investigated, findings shall be addressed expeditiously, and a written response will be provided to the complainant. The response will advise complainants of their right to submit charges to the Washington State Human Rights Commission:

711 South Capitol Way, Suite 402
Olympia, WA 98504-2490
Toll Free (800) 233-3247
TTY: (800) 300-7525

And/or

US Equal Employment Opportunity Commission
Seattle Field Office
Federal Office Building
909 First Avenue, Suite 400
Seattle, WA 98104-1061
Toll Free (800) 669-4000
TTY: (800) 669-6820

6. The investigation of discrimination complaints under this procedure shall be conducted in a confidential manner. Any employee who is a participant in the investigation and violates the confidentiality of the investigation where the integrity of the investigation could be compromised may be subject to corrective and/or disciplinary action in accordance with the Merit System Rules.

7. Employees of the Department who are not satisfied with the Human Resources Director's response to their complaint may request a review by the Adjutant General (Department Director). Requests must be submitted in writing within seven (7) calendars days of the Human Resources Director's written response. The Adjutant General (Department Director) or designee will review the Human Resources Director's response and attempt to seek resolution. The Adjutant General (Department Director) or designee will provide a written response to the employee within twenty-one (21) calendar days from the date of receipt. The response will notify the complainant of their right to seek resolution through appropriate administrative or civil procedure external to the Department. A copy of the response will be forwarded to the Human Resources Director.

# Exhibit C

JAY INSLEE
Governor

STATE OF WASHINGTON
OFFICE OF THE GOVERNOR
P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 902-4111 • www.governor.wa.gov

**DIRECTIVE OF THE GOVERNOR**
**16-11**

June 23, 2016

To: Washington State Cabinet and Small-Cabinet Agencies

From: Governor Jay Inslee

Subject: LGBTQ Inclusion and Safe Places Initiative

The state of Washington has a long and proud history of honoring diversity. Our own law against discrimination predates the Civil Rights Act of 1964, and we were one of the first states to extend civil rights protections to our LGBTQ neighbors, friends, and family members. In Washington we know that the diverse families, expressions of personal identity, and experiences of all our residents enrich our future.

We traditionally celebrate June as LGBTQ Pride Month. I believe that as public leaders and servants, though, our commitment to diversity and inclusion extends beyond a single month of recognition; and the recent violence in Orlando, Florida, highlights the need for us to sustain our efforts year round. Every person in the state of Washington has the right to feel safe, enjoy the benefits of public services, and fully participate in civic life. Accordingly, I am asking you to support me in the following initiatives:

- **Employee Resource Group.** I have always valued the insight and experience of our own employees in creating better workplaces and services. This is true as well in promoting diversity and inclusion. Accordingly, I am directing OFM's State HR Division to work with agencies to create a statewide LGBTQ employee resource group to advise and develop strategies for creating safe, diverse, and inclusive workplaces for our LGBTQ employees and customers.

- **Best Practices.** Many of you are already doing great work building safe and inclusive environments for our LGBTQ employees and customers. I believe that most of these efforts can be replicated. Therefore, I am also asking OFM's State HR Division to work with agencies, institutions, and the LGBTQ employee resource group to identify and share these best practices, so we can all benefit from each other's innovation.

- **Safe Place WA.** The Seattle Police Department recently created a "Safe Place" program, in which local businesses and organizations can signal to the public that they serve as locations for members of the LGBTQ community to find safe and secure spaces to request and wait for police assistance. Businesses and organizations throughout Seattle, including Starbucks and Seattle Public Schools, are participating in this program. I believe that our public-facing state offices should also be safe places where people can connect with emergency and related support services. Consequently, I am also asking my Policy Office and OFM to work with agencies and the new employee resource group to develop a similar state program.

Thank you in advance for your support. Staff from my Policy Office and OFM State Human Resources will be reaching out to all of you shortly to begin work on these initiatives. Together we will build a better future for all Washingtonians.

# Exhibit D

JAY INSLEE
Governor

STATE OF WASHINGTON
Office of the Governor

**PROCLAMATION BY THE GOVERNOR**

**18-03**

**WHEREAS,** a combination of above normal snowpack in the mountains, above average temperatures, and recent rainfall has resulted in higher than normal snow melt causing flooding of rivers and streams in Ferry, Okanogan and Pend Oreille counties; and

**WHEREAS**, continued higher temperatures are predicted to increase the threat of additional flooding in areas of eastern Washington over the next seven days with additional flooding expected to occur in these and other eastern Washington counties as rivers and streams continue to rise to record or near record levels; and

**WHEREAS**, the flooding is resulting in road closures, establishment of alternate transportation routes, evacuations, impacts to local utility services, localized reductions in available drinking water, and damage to public and private property and infrastructure; and

**WHEREAS**, state agencies and local jurisdictions are coordinating resources to address the impacts of and assess damage caused by the flooding, and to implement appropriate response and recovery activities; and

**WHEREAS**, the threat of damage from this situation and its effects impact the life and health of our people as well as the property and infrastructure of Washington State, all of which is a public disaster that affects life, health, property, or the public peace; and

**WHEREAS**, the Washington Military Department has activated the State Emergency Operations Center, implemented response procedures, is coordinating resources to support state and local officials in alleviating the immediate social and economic impacts to people, property and infrastructure, and is continuing to assess impacts resulting from incident.

**NOW, THEREFORE**, I, Jay Inslee, Governor of the State of Washington, as a result of the above-noted situation, and under Chapters 38.08, 38.52 and 43.06 RCW, do hereby proclaim that a State of Emergency exists in Adams, Asotin, Benton, Chelan, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Kittitas, Klickitat, Lincoln, Okanogan, Pend Oreille, Spokane, Stevens, Yakima, Walla Walla, and Whitman counties in the state of Washington, and direct the plans and procedures of the *Washington State Comprehensive Emergency Management Plan* be implemented. State agencies and departments are directed to utilize state resources and to do everything reasonably possible to assist affected political subdivisions in an effort to respond to and recover from the incident.

As a result of this incident, I also hereby order into active state service the organized militia of Washington State to include the National Guard and the State Guard, or such part thereof as may be necessary in the opinion of The Adjutant General, to perform such duties as directed by competent authority of the Washington Military Department in addressing this situation. Additionally, the Washington State Emergency Operations Center is instructed to coordinate all incident-related assistance to the affected areas.

Signed and sealed with the official seal of the State of Washington this 11th day of May, A.D, Two Thousand and Eighteen at Olympia, Washington.

By:

/s/
Jay Inslee, Governor

BY THE GOVERNOR:

/s/
Secretary of State

# Exhibit E

JAY INSLEE
Governor

STATE OF WASHINGTON
Office of the Governor

**PROCLAMATION BY THE GOVERNOR**
**17-13**

**WHEREAS**, on the morning of December 18, 2017, an Amtrak Train derailed onto Interstate 5 at the Mounts Road overpass in Pierce County near the Thurston County line, resulting in loss of life, injuries, and damage to infrastructure; and

**WHEREAS**, the derailment has caused significant structural damage to the overpass, railway and highway infrastructure, resulting in closure of the overpass and Interstate 5 for the safety of the travelling public until repairs can be completed; and

**WHEREAS**, the effects of the derailment and related rail and highway closures impact the life and health of the people as well as the property and infrastructure of Washington State, all of which is a public disaster that affects life, health, property, or the public peace; and

**WHEREAS**, the Washington Military Department has activated the State Emergency Operations Center, implemented response procedures, is coordinating resources to support state and local officials in alleviating the immediate social and economic impacts to people, property and infrastructure, and is continuing to assess impacts resulting from incident.

**NOW, THEREFORE**, I, Jay Inslee, Governor of the state of Washington, as a result of the above-noted situation, and under Chapters 38.08, 38.52 and 43.06 RCW, do hereby proclaim that a State of Emergency exists in Pierce and Thurston counties in the state of Washington, and direct the plans and procedures of the *Washington State Comprehensive Emergency Management Plan* be implemented. State agencies and departments are directed to utilize state resources and to do everything reasonably possible to assist affected political subdivisions in an effort to respond to and recover from the incidents.

As a result of this incident, I also hereby order into active state service the organized militia of Washington State to include the National Guard and the State Guard, or such part thereof as may be necessary in the opinion of The Adjutant General, to perform such duties as directed by competent authority of the

Washington Military Department in addressing this event. Additionally, the Washington State Emergency Operations Center is instructed to coordinate all incident-related assistance to the affected areas.

Signed and sealed with the official seal of the state of Washington this 18th day of December, A.D, Two Thousand and Seventeen at Olympia, Washington.

By:

/s/
Jay Inslee, Governor

BY THE GOVERNOR:

/s/
Secretary of State

# Exhibit F

JAY INSLEE
Governor

STATE OF WASHINGTON
Office of the Governor

**PROCLAMATION BY THE GOVERNOR**

**17-12**

**WHEREAS**, since June 2017, we have experienced drier than normal weather conditions with periods of above average temperatures throughout the State which, when combined with projected weather and fire fuel conditions for early September, present a high risk of severe wildfires throughout the State of Washington; and

**WHEREAS**, current weather forecasts predict continuing elevated temperatures throughout the State for the next seven days, providing hot and dry conditions that, combined with the existing high-risk fire fuel conditions, support an active burning environment capable of producing significant multiple wildfires requiring the need for additional immediate response throughout the State; and

**WHEREAS**, the Jolly Mountain Fire in Kittitas County, which has been burning since August 11, has grown to over 14,500 acres and is threatening local communities, homes and businesses, resulting in road closures and the issuance of evacuation notices by local authorities for some threatened areas; and

**WHEREAS**, the threat to life and property from existing and threatened wildfires throughout the State is extreme and could cause extensive damage to homes, public facilities, businesses, public utilities, and infrastructure impacting the life and health of people throughout Washington State, all of which affect life, health, property, or the public peace, and is a public disaster demanding immediate action; and

**WHEREAS**, current availability of firefighting resources throughout the state of Washington and the western United States is limited due to existing and projected fire conditions and activities throughout the region, and existing firefighting resources may already be committed to fighting wildfires throughout the Pacific Northwest; and

**WHEREAS**, because available firefighting resources may not be adequate to address the outbreak of simultaneous large wildfires resulting from the above noted conditions, the Washington National Guard and State Guard may be needed to assist local jurisdictions and state agencies throughout the state of Washington with this public disaster and for the public health, safety and welfare; and

**WHEREAS**, the Washington Military Department has activated the State Emergency Operations Center, implemented response procedures, is coordinating resources to support state and local officials in alleviating the immediate social and economic impacts to people, property and infrastructure, and is continuing to assess the wildfire danger resulting from existing high risk weather and fire fuel conditions.

**NOW, THEREFORE**, I, Jay Inslee, Governor of the state of Washington, as a result of the above-noted situation, and under Chapters 38.08, 38.52 and 43.06 RCW, do hereby proclaim that a State of Emergency exists in all Counties in the state of Washington, and direct the plans and procedures of the *Washington State Comprehensive Emergency Management Plan* be implemented. State agencies and departments are directed to utilize state resources and to do everything reasonably possible to assist affected political subdivisions in an effort to respond to and recover from the incidents.

As a result of this event, I also hereby order into active state service the organized militia of Washington State to include the National Guard and the State Guard, or such part thereof as may be necessary in the opinion of The Adjutant General, to perform such duties as directed by competent authority of the Washington Military Department in addressing this event. Additionally, the Washington State Emergency Operations Center is instructed to coordinate all incident-related assistance to the affected areas.

Signed and sealed with the official seal of the state of Washington on this 2nd day of September A.D., Two Thousand and Seventeen at Olympia, Washington.

By:

/s/

Jay Inslee, Governor

BY THE GOVERNOR:

/s/

Secretary of State

**DECLARATION OF SERVICE**

I hereby certify that on May 14, 2018, the forgoing document was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

Dated this 14th day of May 2018.

*s/ La Rond Baker*
LA ROND BAKER, WSBA No. 43610