No. 18-678

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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
APPLICANTS

v.

AIDEN STOCKMAN, ET AL.

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APPLICATION FOR A STAY IN THE ALTERNATIVE TO
A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## PARTIES TO THE PROCEEDING

Applicants (defendants-appellants below) are Donald J. Trump, in his official capacity as President of the United States; James N. Mattis, in his official capacity as Secretary of Defense; Joseph F. Dunford, Jr., in his official capacity as Chairman of the Joint Chiefs of Staff; Richard V. Spencer, in his official capacity as Secretary of the Navy; Mark T. Esper, in his official capacity as Secretary of the Army;* Heather A. Wilson, in her official capacity as Secretary of the Air Force; and Kirstjen Nielsen, in her official capacity as Secretary of Homeland Security.

Respondents (plaintiffs-appellees below) are Aiden Stockman, Nicolas Talbott, Tamasyn Reeves, Jaquice Tate, John Doe 1, John Doe 2, Jane Doe, and Equality California. Respondents also include the State of California (intervenor-plaintiff-appellee below).

* Former Acting Secretary of the Army Ryan D. McCarthy was a defendant below in this case. When Mark T. Esper became Secretary of the Army, Secretary Esper was automatically substituted.

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Pursuant to this Court's Rule 23 and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of applicants Donald J. Trump, et al., respectfully seeks, as an alternative to certiorari before judgment, a stay of the nationwide preliminary injunction issued by the United States District Court for the Central District of California (App., infra, 1a-21a, 22a-35a), pending the consideration and disposition of the government's appeal from that injunction to the United States Court of Appeals for the Ninth Circuit and, if the court of appeals affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. Should the Court decline to grant certiorari before judgment or stay the injunction in its entirety, the government respectfully

requests that the Court stay the nationwide scope of the injunction pending the resolution of the government's appeal in the court of appeals and any further proceedings in this Court.

The district court in this case preliminarily enjoined the military from implementing a policy that Secretary of Defense James Mattis announced earlier this year after an extensive review of military service by transgender individuals. In arriving at that new policy, Secretary Mattis and a panel of senior military leaders and other experts determined that the prior policy, adopted by Secretary Mattis's predecessor, posed too great a risk to military effectiveness and lethality. As a result of the court's nationwide preliminary injunction, however, the military has been forced to maintain that prior policy for nearly a year.

The government has appealed that injunction and has filed a petition for a writ of certiorari before judgment to the court of appeals.[1] The government now files this application for a stay of the injunction as an alternative to certiorari before judgment. The government seeks such a stay only if the Court denies certiorari before judgment. If the Court grants certiorari before

[1] The petition for a writ of certiorari before judgment in this case (No. 18-678) was filed on November 23, 2018, and docketed that same day. As explained more fully in a letter filed in this Court with the certiorari petition, the government's filing of the petition on November 23 allows the petition to be distributed on December 26, 2018, for consideration at the Court's January 11, 2019 conference, without a motion for expedition. The government respectfully requests that this stay application be considered simultaneously with the certiorari petition.

judgment, it would presumably render a decision in this case by the end of June 2019. Because such a decision would potentially allow the military to begin implementing the Mattis policy in the reasonably near future, the government does not seek interim relief in the event the Court grants certiorari before judgment.

Should the Court deny certiorari before judgment, however, a decision by the Court this Term would no longer be possible. Even if the government were immediately to seek certiorari from an adverse decision of the court of appeals, this Court would not be able to review that decision until next Term. Absent a stay, the nationwide injunction would thus remain in place for at least another year and likely well into 2020 -- a period too long for the military to be forced to maintain a policy that it has determined, in its professional judgment, to be contrary to the Nation's interests. The government therefore respectfully requests a stay of the injunction pending further proceedings in the court of appeals and this Court, in the event this Court denies certiorari before judgment.

At a minimum, the Court should stay the nationwide scope of the injunction, so that the injunction prohibits the implementation of the Mattis policy only as to the seven individual respondents who are currently serving in the military or seeking to join it -- namely, Stockman, Talbott, Reeves, Tate, John Doe 1, John Doe 2, and Jane Doe. Such a narrower injunction -- which would limit the district court's preliminary remedy to the parties

in this case -- would allow the military to implement the Mattis policy in part while litigation proceeds through 2019 and into 2020. This Court has previously stayed a nationwide injunction against a military policy to the extent it swept beyond the parties to the case, see United States Dep't of Def. v. Meinhold, 510 U.S. 939 (1993), and it should, at a minimum, grant such a partial stay here.[2]

* * * * *

It is with great reluctance that we seek such emergency relief in this Court. Unfortunately this case is part of a growing trend in which federal district courts, at the behest of particular plaintiffs, have issued nationwide injunctions, typically on a preliminary basis, against major policy initiatives. Such injunctions previously were rare, but in recent years they have become routine. In less than two years, federal courts have issued 25 of them, blocking a wide range of significant policies involving national security, national defense, immigration, and domestic issues.

In cases involving these extraordinary nationwide injunctions, moreover, several courts have issued equally

[2] In accordance with this Court's Rule 23.3, the government also moved in the district court and the court of appeals for a stay of the injunction -- and, at a minimum, its nationwide scope -- pending appeal. Neither court has ruled on the government's motion. Should either court rule while this Court is considering this application, the government will promptly notify this Court.

extraordinary discovery orders, compelling massive and intrusive discovery into Executive-Branch decision-making, including blanket abrogations of the deliberative-process privilege. See, e.g., Karnoski Pet. 14 n.4.[3] In the face of these actions, we have had little choice but to seek relief in the courts of appeals; and when that has proven unavailing, to do so in this Court. Absent such relief, the Executive will continue to be denied the ability to implement significant policy measures, subject to appropriate checks by an independent Judiciary in resolving individual cases and controversies.

## STATEMENT

### A. The Military's Policies

1. To assemble a military of "qualified, effective, and able-bodied persons," 10 U.S.C. 505(a), the Department of Defense (Department) has traditionally set demanding standards for military service, Karnoski Pet. App. 116a. "The vast majority of Americans from ages 17 to 24 -- that is, 71% -- are ineligible to join the military without a waiver for mental, medical, or behavioral reasons." Id. at 125a.

Given the "unique mental and emotional stresses of military service," Karnoski Pet. App. 132a, a history of "[m]ost mental health conditions and disorders" is "automatically disqualifying,"

[3] References to "Karnoski Pet." and "Karnoski Pet. App." are to the petition for a writ of certiorari before judgment and the appendix to that petition filed on November 23, 2018, in Trump v. Karnoski, No. 18-676.

id. at 151a. In general, the military has aligned the disorders it has deemed disqualifying with those listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association (APA). Id. at 132a-133a. The 1980 edition of the DSM listed, among other disorders, "transsexualism." Id. at 133a. When the DSM was updated in 1994, "transsexualism" was subsumed within, and replaced by, the term "'gender identity disorder.'" Ibid. (citation omitted); see C.A. E.R. 416.[4]

Consistent with the inclusion of "'transsexualism'" in the DSM, the military's accession standards -- the "standards that govern induction into the Armed Forces" -- had for decades disqualified individuals with a history of "'transsexualism'" from joining the military. Karnoski Pet. App. 126a-127a; see id. at 133a; C.A. E.R. 482. And although the military's retention standards -- the "standards that govern the retention and separation of persons already serving in the Armed Forces" -- did not "require" separating "'transsexual[]'" servicemembers from service, "'transsexualism'" was a "permissible basis" for doing so. Karnoski Pet. App. 127a.

2. In 2013, the APA published a new edition of the DSM, which replaced the term "gender identity disorder" with "gender dysphoria." Karnoski Pet. App. 136a. That change reflected the

[4] References to the "C.A. E.R." are to the excerpts of record filed in Karnoski v. Trump, No. 18-35347 (9th Cir. May 29, 2018).

APA's view that, when there are no "accompanying symptoms of distress, transgender individuals" -- individuals who identify with a gender different from their biological sex -- do not have "a diagnosable mental disorder." C.A. E.R. 416; see Karnoski Pet. App. 204a.

According to the APA, a diagnosis of gender dysphoria should be reserved for individuals who experience a "marked incongruence between [their] experienced/expressed gender and assigned gender, of at least 6 months' duration," associated with "clinically significant distress or impairment in social, occupational, or other important areas of functioning." C.A. E.R. 417; see Karnoski Pet. App. 136a-138a. Treatment for gender dysphoria often involves psychotherapy and, in some cases, may include gender transition through cross-sex hormone therapy, sex-reassignment surgery, or living and working in the preferred gender. Karnoski Pet. App. 155a-156a; C.A. E.R. 345-346. The APA emphasizes that "[n]ot all transgender people suffer from gender dysphoria." Karnoski Pet. App. 152a (citation omitted; brackets in original). "Conversely, not all persons with gender dysphoria are transgender." Id. at 152a n.57; see ibid. (giving the example of men who suffer genital wounds in combat and who "feel that they are no longer men because their bodies do not conform to their concept of manliness") (citation omitted).

3. In June 2016, then-Secretary of Defense Ashton Carter ordered the armed forces to adopt a new policy on "Military Service of Transgender Service Members." Karnoski Pet. App. 87a. In a

shift from the military's longstanding policy, Secretary Carter declared that "transgender individuals shall be allowed to serve in the military." Id. at 88a. But Secretary Carter recognized the need for "[m]edical standards" to "help to ensure that those entering service are free of medical conditions or physical defects that may require excessive time lost from duty." Id. at 91a. Secretary Carter thus ordered the military to adopt, by July 1, 2017, new accession standards that would "disqualify[]" any applicant with a history of gender dysphoria or a history of medical treatment associated with gender transition (including a history of sex reassignment or genital reconstruction surgery), unless the applicant met certain medical criteria. Id. at 91a-92a. An applicant with a history of medical treatment associated with gender transition, for example, would be disqualified unless the applicant provided certification from a licensed medical provider that the applicant had completed all transition-related medical treatment and had been stable in the preferred gender for 18 months. Id. at 92a. If the applicant provided the requisite certification, the applicant would be permitted to enter the military and serve in the preferred gender.

Secretary Carter also imposed new retention standards, effective immediately, prohibiting the discharge of any servicemember on the basis of gender identity. Karnoski Pet. App. 91a. Under the Carter policy, current servicemembers who received a diagnosis of gender dysphoria from a military medical provider

would be permitted to undergo gender transition at government expense and serve in their preferred gender upon completing the transition. C.A. E.R. 219-236; see Karnoski Pet. App. 93a. Transgender servicemembers without a diagnosis of gender dysphoria, by contrast, would be required to continue serving in their biological sex. See Karnoski Pet. App. 128a; C.A. E.R. 221-222.

4. On June 30, 2017 -- the day before the Carter accession standards were set to take effect -- Secretary of Defense James Mattis determined, "after consulting with the Service Chiefs and Secretaries," that it was "necessary to defer" those standards until January 1, 2018, so that the military could "evaluate more carefully" their potential effect "on readiness and lethality." Karnoski Pet. App. 96a. Without "presuppos[ing] the outcome" of that study, Secretary Mattis explained that it was his intent to obtain "the views of the military leadership and of the senior civilian officials who are now arriving in the Department" and to "continue to treat all Service members with dignity and respect." Id. at 97a.

While that study 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." Karnoski Pet. App. 98a. The President issued a memorandum in August 2017 noting the ongoing study and directing the military to "return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis

exists upon which to conclude that terminating that policy and practice would not have * * * negative effects" on the military. Id. at 100a. The President ordered Secretary Mattis to submit "a plan for implementing" a return to the longstanding pre-Carter policy by February 2018, while emphasizing that the Secretary could "advise [him] at any time, in writing, that a change to th[at] policy is warranted." Id. at 100a-101a.

5. Secretary Mattis thereafter established a panel of experts to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." Karnoski Pet. App. 106a. The panel consisted of "senior uniformed and civilian Defense Department and U.S. Coast Guard leaders." Id. at 205a. After "extensive review and deliberation," the panel "exercised its professional military judgment" and presented its independent recommendations to the Secretary. Id. at 148a.

In February 2018, Secretary Mattis sent the President a memorandum proposing a new policy consistent with the panel's conclusions, along with a lengthy report explaining the policy. Karnoski Pet. App. 113a-209a. Like the Carter policy, the Mattis policy holds that "transgender persons should not be disqualified from service solely on account of their transgender status." Id. at 149a. And like the Carter policy, the Mattis policy draws distinctions on the basis of a medical condition (gender dysphoria) and related treatment (gender transition). Id. at 207a-208a.

Under the Mattis policy -- as under the Carter policy -- transgender individuals without a history of gender dysphoria would be required to serve in their biological sex, whereas individuals with a history of gender dysphoria would be presumptively disqualified from service. Ibid. The two policies, however, differ in their exceptions to that disqualification.

Under the Mattis accession standards, individuals with a history of gender dysphoria would be permitted to join the military if they have not undergone gender transition, are willing and able to serve in their biological sex, and can show 36 months of stability (i.e., the absence of gender dysphoria) before joining. Karnoski Pet. App. 123a. Under the Mattis retention standards, servicemembers who are diagnosed with gender dysphoria after entering service would be permitted to continue serving if they do not seek to undergo gender transition, are willing and able to serve in their biological sex, and are able to meet applicable deployability requirements. Id. at 123a-124a.

Under both the accession and the retention standards of the Mattis policy, individuals with gender dysphoria who have undergone gender transition or seek to do so would be ineligible to serve, unless they obtain a waiver. Karnoski Pet. App. 123a. The Mattis policy, however, contains a categorical reliance exemption for "transgender Service members who were diagnosed with gender dysphoria and either entered or remained in service following the announcement of the Carter policy." Id. at 200a.

Under that exemption, those servicemembers "who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy, may continue to receive all medically necessary treatment * * * and to serve in their preferred gender, even after the new policy commences." Ibid.; see C.A. E.R. 489.

6. In March 2018, the President issued a new memorandum "revok[ing]" his 2017 memorandum "and any other directive [he] may have made with respect to military service by transgender individuals." Karnoski Pet. App. 211a. The 2018 memorandum recognized that the Mattis policy reflected "the exercise of [Secretary Mattis's] independent judgment," and it permitted the Secretaries of Defense and Homeland Security "to implement" that new policy. Id. at 210a-211a.

B. Procedural History

1. Shortly after the President issued his 2017 memorandum, respondents -- four current servicemembers, three individuals who seek to join the military, and an advocacy organization -- brought suit in the Central District of California, challenging as a violation of their equal-protection, due-process, privacy, and First Amendment rights what they described as "the ban" on military service by transgender individuals reflected in the President's 2017 tweets and memorandum. D. Ct. Doc. 1, at 3 (Sept. 5, 2017); see id. at 15-19. The State of California subsequently intervened in the suit as a plaintiff. D. Ct. Doc. 66 (Nov. 16, 2017).

2. In December 2017, the district court issued a nationwide preliminary injunction, requiring the military to maintain and implement the Carter policy. See App., infra, 21a. The court construed the President's 2017 tweets and memorandum as reflecting a "ban" on military service by "transgender people." Id. at 18a. The court determined that such "discrimination on the basis of one's transgender status is subject to intermediate scrutiny." Id. at 19a. And in the court's view, the government's justifications for the "ban[]" did not survive such scrutiny. Id. at 19a. The court therefore concluded that respondents were likely to succeed in their equal-protection challenge. Ibid.

3. In March 2018, the government informed the district court that the President had issued the new memorandum, which revoked his 2017 memorandum (and any similar directive) and allowed the military to adopt Secretary Mattis's proposed policy. D. Ct. Doc. 82, at 4 (Mar. 23, 2018); see D. Ct. Doc. 80 (Mar. 23, 2018). In light of that new policy, the government moved to dissolve the December 2017 injunction. D. Ct. Doc. 82, at 1-28.

In September 2018, the district court denied the government's motion. App., infra, 22a-35a. The court found "the new policy" to be "essentially the same as the first policy," "continu[ing]" the "ban[]" on "transgender people" in the military that the President had supposedly "announced" in 2017. Id. at 31a. The court reiterated its determination that "intermediate scrutiny" applies to "transgender discrimination." Id. at 32a. And it

concluded that the military's justifications for "the transgender ban" were still not "persuasive" enough to survive such scrutiny. Id. at 34a.

4. The government appealed, D. Ct. Doc. 125 (Nov. 16, 2018), and filed a motion asking the court of appeals to hold the briefing schedule in abeyance pending the appeal of the nationwide preliminary injunction in the related case of Karnoski v. Trump, No. 18-35347 (9th Cir. argued Oct. 10, 2018), petition for cert. before judgment pending, No. 18-676 (filed Nov. 23, 2018). 18-56539 C.A. Doc. 11, at 3-4 (Nov. 20, 2018). In that motion, the government also informed the court of appeals that, in order to afford this Court "the opportunity to consider all pending appeals of preliminary-injunction decisions enjoining the [Mattis] policy on a nationwide basis," the government intended to file petitions for writs of certiorari before judgment in both this case and Karnoski on November 23, 2018, if the court of appeals had not rendered decisions in the cases by then. Id. at 5. The court of appeals suspended the briefing schedule in this case pending further order of the court. 18-56539 C.A. Doc. 25 (Dec. 11, 2018).

The government also moved in the district court and the court of appeals for a stay of the preliminary injunction -- and, at a minimum, its nationwide scope -- pending appeal. D. Ct. Doc. 130 (Nov. 28, 2018); 18-56539 C.A. Doc. 23-1 (Dec. 3, 2018). Both stay motions remain pending. Should either court rule while this

Court is considering this application, the government will promptly notify this Court.

ARGUMENT

In a petition for a writ of certiorari before judgment filed in this Court on November 23, 2018, the government seeks review of the district court's nationwide preliminary injunction against the Mattis policy. For the reasons set forth in the petition, this Court should grant certiorari before judgment. If the Court declines to do so, however, the government respectfully requests, in the alternative, a stay of the injunction pending the resolution of the government's appeal in the court of appeals and any further proceedings in this Court. At a minimum, the Court should stay the nationwide scope of the injunction pending those proceedings.

Under this Court's Rule 23 and the All Writs Act, 28 U.S.C. 1651, a single Justice or the Court has authority to enter a stay pending proceedings in a court of appeals.[5] In considering an application for such a stay, the Court or Circuit Justice considers the likelihood of whether four Justices would vote to grant a writ of certiorari if the court of appeals ultimately rules against the applicant; whether five Justices would then conclude that the case was erroneously decided below; and whether, on balancing the equities, the injury asserted by the applicant outweighs the harm

[5] See, e.g., Trump v. International Refugee Assistance Project, 138 S. Ct. 542 (2017); West Virginia v. EPA, 136 S. Ct. 1000 (2016); Stephen M. Shapiro et al., Supreme Court Practice § 17.6, at 881-884 (10th ed. 2013).

to the other parties or the public. See San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); Hilton v. Braunskill, 481 U.S. 770, 776 (1987) (traditional stay factors). All of those factors support a stay of the injunction or, at a minimum, its nationwide scope.

## I. THIS COURT IS LIKELY TO GRANT REVIEW IF THE COURT OF APPEALS AFFIRMS THE INJUNCTION AND ITS NATIONWIDE SCOPE

If the court of appeals affirms the district court's nationwide preliminary injunction against the Mattis policy, this Court is likely to grant review. Respondents challenge the constitutionality of the Mattis policy. That challenge concerns a matter of imperative public importance: the authority of the U.S. military to determine who may serve in the Nation's armed forces. After an extensive process of consultation and review involving senior military officials and other experts, the Secretary of Defense determined that individuals with a history of the medical condition gender dysphoria should be presumptively disqualified from military service, particularly if they have undergone the treatment of gender transition or seek to do so. See pp. 10-12, supra.

The district court in this case entered a nationwide preliminary injunction nullifying that exercise of professional military judgment and blocking the implementation of a policy that the Secretary has deemed necessary to "place the Department of

Defense in the strongest position to protect the American people, to fight and win America's wars, and to ensure the survival and success of our Service members around the world." Karnoski Pet. App. 208a. If the court of appeals were to affirm the injunction, a judicial intrusion of that significance into the operation of our Nation's armed forces would warrant this Court's review. See Department of the Navy v. Egan, 484 U.S. 518, 520 (1988) (granting certiorari to address interference with Executive Branch determinations that are of "importance * * * to national security concerns"); see also Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 12 (2008).

Leaving aside the merits of respondents' constitutional challenge, the issue of the appropriate remedy would itself present a question of exceptional importance warranting this Court's review. The district court in this case enjoined the implementation of the Mattis policy on a nationwide basis. The government has previously sought -- and this Court has previously granted -- review of whether a court of appeals erred in affirming the nationwide scope of an injunction entered by a district court. See Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018); Summers v. Earth Island Institute, 555 U.S. 488, 492 (2009). If the court of appeals affirms the nationwide scope of the district court's injunction here, this Court's review would again be warranted.

That is particularly so because the nationwide relief ordered in this case extends a disturbing but accelerating trend among lower

courts of issuing categorical injunctions designed to benefit nonparties. Lower courts, including the Ninth Circuit, once recognized that injunctions should be limited to redressing irreparable harm to the plaintiffs. See Meinhold v. United States Dep't of Def., 34 F.3d 1469, 1480 (9th Cir. 1994) (vacating a "nation-wide injunction" against the Department's policy on military service by gays and lesbians except to the extent that the injunction granted relief to the particular plaintiff before the court); see also, e.g., McKenzie v. City of Chicago, 118 F.3d 552, 555 (7th Cir. 1997).

Those same courts and others, however, have since transformed a remedy that had been imposed in only a small number of cases into the norm. Thus, in a span of less than two years, district courts have issued 25 nationwide injunctions or temporary restraining orders against major policy decisions in areas including national defense, national security, immigration, and domestic policy. For example, district courts have issued nationwide injunctions against:

- the temporary suspension of entry into the United States of certain foreign nationals from select countries previously identified by prior Administrations or Congress as presenting a heightened risk of terrorism or other national-security concerns, in order to review screening and vetting procedures for foreign travelers;[6]

[6] See Darweesh v. Trump, No. 17-cv-480, 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017); Tootkaboni v. Trump, No. 17-cv-10154,

- entry restrictions on foreign nationals from select countries identified by a worldwide review as failing to provide information needed to adequately vet their nationals or otherwise presenting heightened national-security risks;[7]
- conditions on federal grants to local governments to ensure that the Nation's immigration laws are faithfully executed;[8]
- exemptions to protect the sincerely held religious beliefs or moral convictions of certain entities whose

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2017 WL 386550 (D. Mass. Jan. 29, 2017); Mohammed v. United States, No. 17-cv-786, 2017 WL 438750 (C.D. Cal. Jan. 31, 2017); Washington v. Trump, No. 17-cv-141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017); Hawaii v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017); International Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md.), aff'd in part, vacated in part, 857 F. 3d 554 (4th Cir.), vacated, 138 S. Ct. 353 (2017); Hawaii v. Trump, 245 F. Supp. 3d 1227 (D. Haw.), aff'd in part, vacated in part, 859 F.3d 741 (9th Cir.), vacated, 138 S. Ct. 377 (2017).

[7] See Hawaii v. Trump, 265 F. Supp. 3d 1140 (D. Haw.), aff'd in part, vacated in part, 878 F.3d 662 (9th Cir. 2017), rev'd, 138 S. Ct. 2392 (2018); International Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570 (D. Md. 2017) (same), aff'd, 883 F.3d 233 (4th Cir.), vacated, 138 S. Ct. 2710 (2018).

[8] See County of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017); City of Chicago v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017), aff'd, 888 F.3d 272 (7th Cir.), reh'g en banc granted, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4), vacated, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018) (en banc); County of Santa Clara v. Trump, 275 F. Supp. 3d 1196 (N.D. Cal. 2017), aff'd in part, vacated in part, 897 F.3d 1225 (9th Cir. 2018); City & Cnty. of San Francisco v. Sessions, No. 17-cv-4642, 2018 WL 4859528 (N.D. Cal. Oct. 5, 2018); City of Chicago v. Sessions, 321 F. Supp. 3d 855 (N.D. Ill. 2018).

health plans are subject to the mandate of contraceptive coverage under Affordable Care Act regulations;[9]

- the rescission of Deferred Action for Childhood Arrivals (DACA), a discretionary policy of immigration enforcement adopted in 2012 as a temporary stop-gap measure permitting some 700,000 aliens to remain in the United States unlawfully while Congress considered a more permanent solution;[10]
- Executive Orders promoting efficiency and accountability in the federal civil service;[11]
- the termination of discretionary temporary protected status designations for four countries based on the Secretary of Homeland Security's determination that the extraordinary conditions that gave rise to the years-old

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[9] See California v. Health & Human Servs., 281 F. Supp. 3d 806 (N.D. Cal. 2017).

[10] See Regents of the Univ. of Cal. v. Department of Homeland Sec., 279 F. Supp. 3d 1011 (N.D. Cal.), aff'd, 908 F.3d 476 (9th Cir. 2018), petition for cert. pending, No. 18-587 (filed Nov. 5, 2018); Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401 (E.D.N.Y.), appeal docketed, No. 18-485 (2d Cir. Feb. 20, 2018), petition for cert. before judgment pending, No. 18-589 (filed Nov. 5, 2018); see also Casa de Maryland v. Department of Homeland Sec., 284 F. Supp. 3d 758 (D. Md. 2018) (enjoining any change in the use of information provided by DACA recipients to the Department of Homeland Security (DHS), despite DHS's public statements that no such change had been made).

[11] See American Fed'n of Gov't Emps. v. Trump, 318 F. Supp. 3d 370 (D.D.C. 2018).

(sometimes decades-old) "temporary" designations no longer persisted;[12] and

- a rule addressing unlawful mass migration at the southern border and the massive recent increase in meritless asylum claims.[13]

Equally troubling, several courts issuing these nationwide preliminary injunctions have also ordered massive and intrusive discovery into Executive-Branch decision-making, including, in a number of instances, blanket abrogations of the deliberative-process privilege. In the related Karnoski case, for example, the district court ordered the President to compile a detailed privilege log of presidential communications and the Executive Branch to produce many thousands of documents withheld under the deliberative-process privilege. Karnoski Pet. 14 n.4. In other cases involving nationwide injunctions, the government has likewise been ordered to produce wide swaths of deliberative-process materials and, in one instance, "to include in the administrative record all * * * 'emails, letters, memoranda, notes, media items, opinions, and other materials'" considered by an acting Cabinet

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[12] See Ramos v. Nielsen, No. 18-cv-1554, 2018 WL 4778285 (N.D. Cal. Oct. 3, 2018).

[13] See East Bay Sanctuary Covenant v. Trump, No. 18-cv-6810, 2018 WL 6053140 (N.D. Cal. Nov. 19, 2018). On December 11, 2018, the Solicitor General filed an application in this Court for a stay of the district court's nationwide injunction pending appeal to the Ninth Circuit. No. 18A615.

Secretary with respect to a particular policy. In re United States, 875 F.3d 1200, 1212 (9th Cir.) (Watford, J., dissenting), vacated, 138 S. Ct. 443 (2017); see, e.g., Order at 1-2, Ramos v. Nielsen, No. 18-cv-1554 (N.D. Cal. Aug. 15, 2018); Mem. Op. at 13-17, Stone v. Trump, No. 17-2459 (D. Md. Nov. 30, 2018).[14]

There is an additional concern for the Judiciary as well as the Executive. "Given the sweeping power of the individual judge to issue a national injunction, and the plaintiff's ability to select a forum," it raises the prospect that a plaintiff will engage in forum shopping, or that plaintiffs will file in multiple courts in the hope of obtaining a single favorable nationwide ruling. Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 460 (2017). Even if other district courts disagree, see, e.g., Sarsour v. Trump, 245 F. Supp. 3d 719 (E.D. Va. 2017) (declining to preliminarily enjoin the temporary suspension of entry into the United States of certain foreign nationals), so long as any court of appeals lets stand a single nationwide injunction -- which they largely have, with limited exceptions -- it prevents the implementation of Executive-Branch policies nationwide or even globally. See, e.g., Regents

[14] In still other suits against the government, which do not involve nationwide injunctions, intrusive discovery into Executive-Branch decision-making has likewise been ordered or is likely to be sought. See 7/3/18 Tr. at 82, New York v. United States Dep't of Commerce, No. 18-cv-2921 (S.D.N.Y.), mandamus denied, Nos. 18-2652, 18-2856 (2d Cir. 2018), cert. granted, No. 18-557 (Nov. 16, 2018); Statement Pursuant to F.R.C.P. 26(f) at 4, District of Columbia v. Trump, No. 17-cv-1596 (D. Md. Sept. 14, 2018).

of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476 (9th Cir. 2018), petition for cert. pending, No. 18-587 (filed Nov. 5, 2018); International Refugee Assistance Project v. Trump, 883 F.3d 233 (4th Cir. 2018), vacated, 138 S. Ct. 2710 (2018). But see City & Cnty. of San Francisco v. Trump, 897 F.3d 1225, 1244 (9th Cir. 2018) (determining that the record was "not sufficient to support a nationwide injunction"); Order, City of Chicago v. Sessions, No. 17-2991 (7th Cir. June 26, 2018) (staying nationwide scope of preliminary injunction).

Accordingly, if the court of appeals affirms the nationwide scope of the injunction here -- continuing this troubling and increasing trend in the lower courts -- that decision would warrant this Court's review. Hawaii, 138 S. Ct. at 2425 (Thomas, J., concurring); see id. at 2429 ("If federal courts continue to issue [universal injunctions], this Court is duty-bound to adjudicate their authority to do so."). Indeed, it is only this Court that can arrest this trend and address this rapidly expanding threat to the respect that each coordinate Branch of our Nation's government owes the others.

## II. THERE IS AT LEAST A FAIR PROSPECT THAT THIS COURT WILL REVERSE IF THE COURT OF APPEALS AFFIRMS THE INJUNCTION AND ITS NATIONWIDE SCOPE

There is also at least a "fair prospect," Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers), that if the court of appeals affirms the preliminary injunction and its nationwide scope, this Court will reverse.

A. As explained in the government's certiorari petition in the related Karnoski case, respondents' equal-protection challenge to the Mattis policy lacks merit. See Karnoski Pet. 19-25. Under the Mattis policy, individuals may "not be disqualified from service solely on account of their transgender status." Karnoski Pet. App. 149a. Like the Carter policy before it, the Mattis policy turns on a medical condition (gender dysphoria) and related treatment (gender transition) -- not any suspect or quasi-suspect classification. Id. at 92a, 121a-124a. Rational-basis review therefore applies, particularly given the military context in which the policy arises. And the Mattis policy satisfies that deferential review because it reflects, inter alia, the military's reasoned and considered judgment that "making accommodations for gender transition" would "not [be] conducive to, and would likely undermine, the inputs -- readiness, good order and discipline, sound leadership, and unit cohesion -- that are essential to military effectiveness and lethality." Id. at 197a.

B. Even if respondents could demonstrate a likelihood of success on their constitutional claim, there is a fair prospect that this Court would vacate the nationwide scope of the preliminary injunction. Nationwide injunctions like the one here transgress both Article III and longstanding equitable principles by affording relief that is not necessary to redress any cognizable, irreparable injury to the parties in the case. They also frustrate

the development of the law, while obviating the requirements for and protections of class-action litigation.

1. a. Respondents lack Article III standing to seek injunctive relief beyond what is needed to redress an actual or imminent injury-in-fact to respondents themselves. "[S]tanding is not dispensed in gross," and "a plaintiff must demonstrate standing * * * for each form of relief that is sought." Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650 (2017) (citations omitted); see Gill v. Whitford, 138 S. Ct. 1916, 1933 (2018) ("The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it."). The remedy sought thus "must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." Whitford, 138 S. Ct. at 1931 (quoting Lewis v. Casey, 518 U.S. 343, 357 (1996)). "The actual-injury requirement would hardly serve [its] purpose . . . of preventing courts from undertaking tasks assigned to the political branches, if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy all inadequacies in that administration." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 353 (2006) (brackets and citation omitted).

Applying that principle, this Court has invalidated injunctions that afforded relief that was not shown to be necessary to prevent cognizable injury to the plaintiff himself. For example, in Lewis, the Court held that an injunction directed

at certain prison practices was overbroad, in violation of Article III, because it enjoined practices that had not been shown to injure any plaintiff. 518 U.S. at 358. The injunction "mandated sweeping changes" in various aspects of prison administration designed to improve prisoners' access to legal services, including library hours, lockdown procedures, access to research facilities and training, and "'direct assistance'" from lawyers and legal support staff for "illiterate and non-English-speaking inmates." Id. at 347-348 (citation omitted).

This Court held that the plaintiffs lacked standing to seek, and the district court thus lacked authority to grant, such broad relief. Lewis, 518 U.S. at 358-360. The district court had "found actual injury on the part of only one named plaintiff," who claimed that a legal action he had filed was dismissed with prejudice as a result of his illiteracy and who sought assistance in filing legal claims. Id. at 358. "At the outset, therefore," this Court held that "[it] c[ould] eliminate from the proper scope of the injunction provisions directed at" the other claimed inadequacies that allegedly harmed "the inmate population at large." Ibid. "If inadequacies of th[at] character exist[ed]," the Court explained, "they ha[d] not been found to have harmed any plaintiff in this lawsuit, and hence were not the proper object of this District Court's remediation." Ibid.

Here, respondents likewise lack standing to seek an injunction that goes beyond redressing any harm to respondents themselves.

Even if the seven individual respondents who are currently serving in the military or seeking to join it -- namely, Stockman, Talbott, Reeves, Tate, John Doe 1, John Doe 2, and Jane Doe -- could show that they would suffer cognizable, irreparable injuries from the implementation of the Mattis policy, those injuries would be fully redressed by an injunction limited to them. An injunction so limited would also fully redress any purported injuries to the other respondents in this case. The advocacy organization -- Equality California -- has not identified any members beyond the individual respondents named above who would even arguably suffer an irreparable injury. See D. Ct. Doc. 20, at 2 (Oct. 2, 2017) (identifying only Stockman, Talbott, and Tate as members). And even assuming that the State of California has Article III standing at all, the district court did not identify any irreparable injury to the State in issuing the injunction or declining to dissolve it. See App., infra, 19a-20a, 22a-35a. In any event, the State has not identified anyone beyond the individual respondents named above whose disqualification from military service would even arguably irreparably injure it. See D. Ct. Doc. 1, at 4, 6-7 (complaint alleging that three individual respondents -- Stockman, Reeves, and John Doe 1 -- are residents of the State of California).

b. This Court also has recognized and applied the corollary principle that, where a plaintiff faces actual or imminent injury at the outset of a suit but that injury is subsequently redressed or otherwise becomes moot, the plaintiff no longer can seek

injunctive relief to redress alleged harms to anyone else. For example, in Alvarez v. Smith, 558 U.S. 87 (2009), the Court held that the plaintiffs' challenge to a state-law procedure for disputing the seizure of vehicles or money had become moot because their "underlying property disputes" with the State "ha[d] all ended": the cars that had been seized from the plaintiffs had been returned, and the plaintiffs had either forfeited the money seized or had "accepted as final the State's return of some of it." Id. at 89; see id. at 92. The Court accordingly held that the plaintiffs could no longer seek declaratory or injunctive relief against the State's policy. Id. at 92. Although the plaintiffs had "sought certification of a class," class certification had been denied, and that denial was not appealed. Ibid. "Hence the only disputes relevant" in this Court were "those between th[ose] six plaintiffs" and the State concerning specific seized property, "and those disputes [were] * * * over." Id. at 93. And although the plaintiffs "continue[d] to dispute the lawfulness of the State's hearing procedures," their "dispute [wa]s no longer embedded in any actual controversy about the plaintiffs' particular legal rights." Ibid.

Similarly, in Earth Island, the Court held that a plaintiff lacked standing to seek to enjoin certain Forest Service regulations after the parties had resolved the controversy regarding the application of those regulations to the specific project that had caused that plaintiff's own claimed injury. 555 U.S. at 494-497. The plaintiff's "injury in fact with regard to

that project," the Court held, "ha[d] been remedied," and so he lacked standing to maintain his challenge to the regulations. Id. at 494. The Court expressly rejected a contrary rule that, "when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action" -- in Earth Island, "the regulation in the abstract" -- "apart from any concrete application that threatens imminent harm to his interests." Ibid. Such a rule would "fly in the face of Article III's injury-in-fact requirement." Ibid.

The same conclusion logically follows where, as here, a plaintiff's only injury would be eliminated by an injunction barring application of the challenged policy to the plaintiff. If a plaintiff himself is no longer in any imminent danger of suffering injury from the policy -- whether because his injury has become moot, as in Alvarez and Earth Island, or because a plaintiff-specific injunction prevents any future injury to that plaintiff from the policy -- he lacks standing to press for additional injunctive relief. The fact that the challenged policy could still cause concrete injury to nonparties is irrelevant. As Alvarez and Earth Island both demonstrate, the plaintiff must show the relief he seeks is necessary to redress his own actual or imminent injury-in-fact; potential injuries to others do not entitle the plaintiff to seek relief on their behalf.

2. Independent of Article III, the nationwide preliminary injunction here violates fundamental rules of equity by granting relief broader than necessary to prevent irreparable harm to respondents. This Court has long recognized that injunctive relief must "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) (citation omitted). Where no class has been certified, a plaintiff must show that the requested relief is necessary to redress the plaintiff's own irreparable harm; the plaintiff cannot seek injunctive relief in order to prevent harm to others. See Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 163 (2010) (plaintiffs "d[id] not represent a class, so they could not seek to enjoin [an agency order] on the ground that it might cause harm to other parties"). Even where a class has been certified, relief is limited to what is necessary to redress irreparable injury to members of that class. See Lewis, 518 U.S. at 359-360, 360 n.7.

History confirms that the injunction in this case violates "traditional principles of equity jurisdiction." Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 319 (1999) (citation omitted). This Court "ha[s] long held that the jurisdiction" conferred by the Judiciary Act of 1789 "over 'all suits . . . in equity' * * * is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of

Chancery at the time of the separation of the two countries." Id. at 318 (brackets, citation, and internal quotation marks omitted). Absent a specific statutory provision providing otherwise, then, "the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789." Ibid. (citation omitted).

Absent-party injunctions were not "traditionally accorded by courts of equity." Grupo Mexicano, 527 U.S. at 319. Indeed, they did not exist at equity at all. See Bray 424-445 (detailing historical practice). Thus, in the late 19th century, this Court rejected injunctive relief that barred enforcement of a law to nonparties. Bray 429 (discussing Scott v. Donald, 165 U.S. 58 (1897)). As a consequence, for example, in the 1930s courts issued more than 1600 injunctions against enforcement of a single federal statute. Bray 434. The nationwide injunction in this case is thus inconsistent with "longstanding limits on equitable relief." Hawaii, 138 S. Ct. at 2425 (Thomas, J., concurring).

3. Nationwide injunctions like the one here also disserve this Court's interest in allowing an issue to percolate in the lower courts. See United States v. Mendoza, 464 U.S. 154, 160 (1984). While other suits may proceed even after a nationwide injunction is issued, the moment the first nationwide injunction on a question is affirmed by a court of appeals, this Court is forced to either grant review or risk losing the opportunity for

review altogether; there may be no second case if it denies review in the first, because other plaintiffs may simply drop their suits and rely on the first nationwide injunction. Permitting such nationwide injunctions also undercuts the primary mechanism Congress has authorized to permit broader relief: class actions. It enables all potential claimants to benefit from nationwide injunctive relief by prevailing in a single district court, without satisfying the prerequisites of Federal Rule of Civil Procedure 23, while denying the government the corresponding benefit of a definitive resolution as to all potential claimants if it prevails instead. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974). In other words, if plaintiffs file multiple suits against a government policy, they collectively need to win only a single suit for them all to prevail, while the government must run the table to enforce its policy.

4. Finally, nationwide preliminary injunctions (and accompanying discovery orders, as in the related Karnoski case) deeply intrude into the separated powers upon which our national government is based. Under those principles, the political Branches are charged with making national policies, including and especially with regard to the national defense. The Judicial Branch, in contrast, is charged with resolving specific cases and controversies -- and in particular, redressing concrete injuries to specific parties when the policies adopted by the political Branches transgress legal limits. See Marbury v. Madison, 5 U.S.

(1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."). The types of unrestrained orders that have, in recent years, transformed from rare exceptions into routine interim remedies risk undermining, if not reversing, this fundamental constitutional order -- ultimately, to the long-term detriment of all Branches of our national government. This Court's intervention is therefore both necessary and appropriate.

## III. THE BALANCE OF EQUITIES STRONGLY SUPPORTS A STAY OF THE INJUNCTION IN ITS ENTIRETY OR AT LEAST OF ITS NATIONWIDE SCOPE

The nationwide preliminary injunction in this case causes direct, irreparable injury to the interests of the government and the public, which merge here. See Nken v. Holder, 556 U.S. 418, 435 (2009). It does so by forcing the Department to maintain a policy that it has determined poses "substantial risks" and threatens to "undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." Karnoski Pet. App. 206a; cf. King, 567 U.S. at 1303 (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (brackets in original) (quoting New Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Given this severe harm to the

federal government -- which far outweighs respondents' speculative claims of injury, see D. Ct. Doc. 36 at 17-19 (Oct. 23, 2017); D. Ct. Doc. 82, at 27-28 (Mar. 23, 2018); D. Ct. Doc. 105, at 14-15 (May 7, 2018) -- the Court should stay the injunction in its entirety.

At a minimum, the Court should stay the nationwide scope of the injunction, such that the injunction bars the implementation of the Mattis policy only as to Stockman, Talbott, Reeves, Tate, John Doe 1, John Doe 2, and Jane Doe. The Court granted just such a stay in Meinhold. In that case, a discharged Navy servicemember brought a facial constitutional challenge against the Department's "then-existing policy regarding homosexuals." Meinhold, 34 F.3d at 1473. After the district court enjoined the Department from "taking any actions against gay or lesbian servicemembers based on their sexual orientation" nationwide, this Court stayed that order "to the extent it conferred relief on persons other than Meinhold." Ibid.; see Meinhold, 510 U.S. at 939.

The Court should follow the same course here. Indeed, this case and others involving constitutional challenges to the Mattis policy illustrate the distinct harms to the government from nationwide injunctions. The government is currently subject to four different nationwide preliminary injunctions, each requiring the government to maintain the Carter accession and retention standards. Even if the government were to prevail in the Ninth Circuit -- which has before it two of these injunctions (in this

case and in Karnoski v. Trump, No. 18-35347) -- the government would still need to proceed with its appeal before the D.C. Circuit, see Doe 2 v. Trump, No. 18-5257. And even then, the government would still be subject to a fourth nationwide preliminary injunction, issued by the district court in Maryland. See Stone v. Trump, 280 F. Supp. 3d 747 (D. Md. 2017). Although the government moved nine months ago to dissolve that injunction in light of the new Mattis policy, see Gov't Mot. to Dissolve the Prelim. Inj., Stone, supra (No. 17-cv-2459) (Mar. 23, 2018), the district court in Maryland has not ruled on the government's pending motion.

Given the injunctions' nationwide scope, the government would have to succeed in vacating all four before it could begin implementing the Mattis policy. So long as even a single injunction remains in place, the military will be forced to maintain nationwide a policy that it has concluded is contrary to "readiness, good order and discipline, sound leadership, and unit cohesion," which "are essential to military effectiveness and lethality." Karnoski Pet. App. 197a; see id. at 202a (explaining that the "risks" associated with the Carter policy should not be incurred "given the Department's grave responsibility to fight and win the Nation's wars in a manner that maximizes the effectiveness, lethality, and survivability" of servicemembers).

By contrast, respondents will suffer no injury -- let alone irreparable injury -- if the nationwide scope of the injunction is stayed pending the resolution of the government's appeal and any

further proceedings in this Court. That is because the injunction would still bar the implementation of the Mattis policy as to the seven individual respondents who are currently serving in the military or seeking to join it, redressing any purported harm to respondents themselves. See pp. 26-27, supra.

The balance of equities therefore warrants, at a minimum, a stay of the nationwide scope of the injunction. In the absence of certiorari before judgment, such a stay would at least allow the military to implement in part the Mattis policy -- a policy it has determined, after a thorough and independent review, to be in the Nation's best interests -- while litigation continues through 2019 and into 2020.[15]

[15] In applications filed simultaneously with this one, the government also seeks, as an alternative to certiorari before judgment, stays of the preliminary injunctions (or, at a minimum, their nationwide scope) in Karnoski and Doe. If this Court were to stay the injunctions in these cases in whole or in part, that decision would be binding precedent on the application of the stay factors to such an injunction and would therefore require the district court to similarly stay the injunction in Stone.

## CONCLUSION

If the petition for a writ of certiorari before judgment is denied, the injunction should be stayed in its entirety pending the disposition of the appeal in the court of appeals and, if that court affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. At a minimum, the Court should stay the nationwide scope of the injunction, such that the injunction bars the implementation of the Mattis policy only as to the seven individual respondents in this case who are currently serving in the military or seeking to join it.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

DECEMBER 2018

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

| Case No. | **EDCV 17-1799 JGB (KKx)** | Date | December 22, 2017 |
|---|---|---|---|
| Title | ***Aiden Stockman et al. v. Donald J. Trump et al.*** | | |

| Present: The Honorable | JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE |
|---|---|

| MAYNOR GALVEZ | Not Reported |
|---|---|
| Deputy Clerk | Court Reporter |
| Attorney(s) Present for Plaintiff(s): | Attorney(s) Present for Defendant(s): |
| None Present | None Present |

**Proceedings:** **Order (1) DENYING Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure (Dkt. No. 36); and (2) GRANTING Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 15)**

Two motions are before the Court. First, Plaintiffs Aiden Stockman, Nicolas Talbott, Tamasyn Reeves, Jaquice Tate, John Doe 1, John Doe 2, Jane Doe, and Equality California (collectively, "Plaintiffs") have filed a Motion for Preliminary Injunction. ("MPI," Dkt. No. 15.) Second, Defendants Donald J. Trump ("President Trump"), in his official capacity as President of the United States; James N. Mattis, in his official capacity as Secretary of Defense; Joseph F. Dunford, Jr., in his official capacity as Chairman of the Joint Chiefs of Staff; Richard V. Spencer, in his official capacity as Secretary of the Navy; Ryan D. McCarthy, in his official capacity as Acting Secretary of the Army; Heather A. Wilson, in her official capacity as Secretary of the Air Force; and Elaine C. Duke, in her official capacity as Acting Secretary of Homeland Security (collectively, "Defendants,") have filed a Motion to Dismiss Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. ("MTD," Dkt. No. 36.)

The Court held a hearing on these matters on December 11, 2017. After considering the issues raised in oral argument, the papers filed supporting and opposing these motions, and the amici briefs, the Court DENIES Defendants' Motion to Dismiss. Additionally, the Court GRANTS Plaintiffs' Motion for Preliminary Injunction.

# I. BACKGROUND

## A. Procedural History

On September 5, 2017, Plaintiffs filed a complaint against Defendants, asserting four causes of action: (1) Fifth Amendment equal protection; (2) Fifth Amendment due process; (3) Fifth Amendment right to privacy; and (4) First Amendment retaliation for free speech and expression. ("Complaint," Dkt. No. 1 ¶¶ 49–77.) Plaintiffs seek declaratory relief.

Plaintiffs filed their MPI on October 2, 2017. (Dkt. No. 15.) Defendants filed their MTD and Opposition to Plaintiffs' MPI on October 23, 2017. (Dkt. No. 36.) Plaintiffs filed a Reply for their Motion to Preliminary Injunction and an Opposition to Defendants' Motion to Dismiss on November 6, 2017. ("MPI Reply," Dkt. No. 47.) Defendants filed their MTD reply on November 13, 2017. ("MTD Reply," Dkt. No. 61.)

## B. Factual History

The parties do not dispute the basic facts in this case. In June 2016, after multiple years of data review, the Department of Defense ("DOD") announced it would implement a new policy allowing transgender people to serve openly in the United States military ("June 2016 Policy"). (See generally Dkt. No. 28, Exh. C.) In reliance on this policy change, many transgender individuals came out to their chain of command without incident. On July 26, 2017, President Trump changed course, tweeting:

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

("President Trump's Twitter Proclamation," Dkt. No. 28, Exh. F.)

On August 25, 2017, President Trump issued a memorandum ("Presidential Memorandum") formalizing the policy he announced via Twitter. (Dkt. No. 28, Exh. G.) The Presidential Memorandum contains several operative prongs: (1) it indefinitely extends the prohibition preventing transgender individuals from entering the military (the "Accession Directive"); (2) it requires the military to authorize the discharge of transgender service members (the "Retention Directive"); and (3) it largely halts the use of DOD or Department of Homeland Security ("DHS") resources to fund sex reassignment surgical procedures for current military members ("Sex Reassignment Surgery Directive") (collectively, "Directives"). (Id. at 47.) The DOD must submit a plan implementing the Presidential Memorandum by February 2018. (Id.)

On September 14, 2017, Defendant Secretary of Defense James Mattis ("Defendant Mattis") issued an "Interim Guidance"[1] which established the temporary DOD policy regarding transgender persons. (MTD at 7). While the Interim Guidance is in effect, no current transgender service member will be discharged or denied reenlistment solely based on their transgender status. Id. Defendant Mattis must present a plan to implement the Presidential Memorandum to President Trump by February 21, 2018. (Id.)

**1. Military Transgender Policy before July 2017**

In August 2014, the DOD removed references to mandatory exclusion based on gender and identity disorders from its physical disability policy. ("Declaration of Eric K. Fanning," Dkt. No. 22 ¶¶ 12–13.) Additionally, the DOD directed each branch of the armed forces to assess whether there remained any justification to prohibit service by openly transgender individuals. (Id. at 13.)

In July 2015, then-Secretary of Defense Ashton B. Carter created a group to begin comprehensively analyzing whether any justification remained validating the ban on open service by transgender individuals. ("Declaration of Brad Carson," Dkt. No. 26 ¶¶ 8–9.) The working group created by Secretary Carter included the Armed Services, the Joint Chiefs of Staff, the service secretaries, and other specialists from throughout the DOD (the "Working Group"). (Id. ¶ 9.) The review process included analyzing evidence from a variety of sources, such as scholarly materials and consultations with medical experts, personnel experts, readiness experts, health insurance companies, civilian employers, and commanders of units with transgender service members. (Id. ¶ 10.)

Additionally, the Working Group commissioned the RAND Corporation, a nonprofit research institution that provides analysis to the military, to complete a comprehensive study on the impact of permitting transgender individuals to serve openly. (Id. ¶ 11.) The 113-page study, "Assessing the Implications of Allowing Transgender Personnel to Serve Openly" (the "RAND Report," Dkt. No. 26, Exh. B), examined factors such as the health care costs and readiness implications of allowing open service by transgender persons. The RAND Report also analyzed the other 18 foreign militaries which permit military service by transgender individuals, focusing on Australia, Canada, Israel, and the United Kingdom—the four countries "with the most well-developed and publicly available policies on transgender military personnel." (RAND Report at 23.) This comparative analysis found no evidence that allowing open service by transgender persons would negatively affect operational effectiveness, readiness, or unit cohesion. (Id. at 24.) Moreover, the RAND Report concluded healthcare costs for transgender service members would "have little impact on and represents an exceedingly small proportion of [the DOD's] overall health care expenditures." (Id. at 22–23.) Specifically, the RAND Report found health care costs would increase "by between $2.4 million and $8.4 million annually." (Id. at 22.) By

[1] Neither party has included a copy of the Interim Guidance as an exhibit, but a copy may be found at https://defense.gov/Portals/1/Documents/PDFs/Military-Service-By-Transgender-Individuals-Interim-Guidance.pdf (last visited December 8, 2017).

contrast, the overall healthcare cost of those serving in the active component of the military is approximately $6 billion annually, while the overall healthcare cost for the DOD is $49.3 billion annually. (Id. at 22–23.) Furthermore, the RAND Report noted discharging transgender service members, "[a]s was the case in enforcing the policy on homosexual conduct, [] can involve costly administrative processes and result in the discharge of personnel with valuable skills who are otherwise qualified." (Id. at 77.) At the conclusion of its analysis, the Working Group "did not identify any basis for a blanket prohibition on open military service of transgender people. Likewise, no one suggested . . . that a bar on military service by transgender persons was necessary for any reason, including readiness or unit cohesion." (Declaration of Eric K. Fanning ¶ 27.)

Based on the results of this review process, on June 30, 2016, Secretary Carter issued a Directive-type Memorandum announcing transgender Americans may serve openly and without fear of being discharged based solely on that status. ("DTM 16-005," Dkt. No. 22, Exh. C.) Secretary Carter stated:

> These policies and procedures are premised on my conclusion that open service by transgender Service members while being subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability and retention, is consistent with military readiness and with strength through diversity.

(Id. at 135.)

This assessment was shared by some of the highest ranking military officials in the country. (See generally Declaration of Eric K. Fanning; "Declaration of Michael Mullen," Dkt. No. 21; "Declaration of Raymond E. Mabus," Dkt. No. 23; "Declaration of Deborah L. James," Dkt. No. 24.) According to the directive, transgender individuals would be permitted to enlist in the military and serve openly beginning on July 1, 2017. (DTM 16-005, at 137.) This date was later postponed until January 1, 2018. (See Dkt. No. 28, Exh. E.) The DOD also issued handbooks, regulations, and memorandums which provided instruction to military commanders in how to implement the new policies, set forth guidance related to medical treatment provisions, and expressly prohibited discrimination on the basis of gender identity. (See "Transgender Service in the U.S. Military," Dkt. No. 22, Exh. 6.)

The former military leaders among the Working Group, such as, former Secretary of the Army Eric K. Fanning, former Chairman of the Joint Chiefs of Staff Admiral Michael Mullen, former Secretary of the Navy Raymond E. Maubus, and former Secretary of the Air Force Deborah L. James, have all explicitly drawn parallels connecting the allowance of open service by transgender persons to the allowance of open service by gay and lesbian persons. (See Declaration of Eric K. Fanning ¶¶ 10–16; Declaration of Michael Mullen ¶¶ 9–15; Declaration of Raymond E. Mabus ¶¶ 19, 24; Declaration of Deborah L. James ¶ 44.) These leaders contend many of the same worries accompanying allowing open transgender service were vocalized, and eventually allayed, in the context of ending "Don't Ask Don't Tell." (See Declaration of Eric K.

Fanning ¶¶ 10–16; Declaration of Admiral Michael Mullen ¶¶ 9–15; Declaration of Raymond E. Mabus ¶¶ 19, 24; Declaration of Deborah L. James ¶ 44.)

**2. Military Transgender Policy after July 2017**

On July 26, 2017, President Trump changed course, announcing via Twitter that transgender individuals would not be permitted to serve in the military. (President Trump's Twitter Proclamation.) One month later, his Presidential Memorandum promulgated the Accession Directive, Retention Directive, and Sex Reassignment Surgery Directive. (Presidential Memorandum.) President Trump stated the Obama Administration had "dismantled the [DOD and DHS's] established framework by permitting transgender individuals to serve openly in the military." (Id.) Additionally, he stated the Obama Administration failed to identify a sufficient basis to conclude ending the longstanding policy against open transgender service "would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." (Id.) The Accession Directive extends the policy prohibiting open accession into the military beyond January 1, 2018. The Retention and Sex Assignment Directives take effect on March 23, 2018. (Id.)

On September 14, 2017, Defendant Mattis issued the Interim Guidance, which stated the accession prohibition "remain[s] in effect because current or history of gender dysphoria or gender transition does not meet medical standards." (Interim Guidance.) The Interim Guidance notes this general prohibition is still "subject to the normal waiver process." (Id.) By February 21, 2018, Defendant Mattis must submit to President Trump "a plan to implement the policy and directives in the Presidential Memorandum." (Id.)

Regarding the Sex Assignment Directive, the Interim Guidance provides "[s]ervice members who receive a gender dysphoria diagnosis from a military medical provider will be provided treatment for the diagnosed medical condition." (Id.) However, "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." (Id.) This language essentially mirrors that of the Presidential Memorandum. (Presidential Memorandum.)

The reception to President Trump's policy change by the military has been somewhat critical. Current Chairman of the Joint Chiefs of Staff Joseph Dunford disagrees with the decision to reinstate the transgender ban, stating he "believe[s] that any individual who meets the physical and mental standards . . . should be afforded the opportunity to continue to serve." (Dkt. No. 28, Exh. I.) He has also previously told lawmakers transgender troops have served the military honorably and he would continue to abide by this sentiment for as long as he holds his position. (Id.) Additionally, it is not clear the nation's top military leaders were consulted about this policy change prior to President Trump's Twitter Proclamation. (See Dkt. No. 28, Exh. M.) Moreover, after the promulgation of President Trump's tweets, 56 retired generals and admirals signed a declaration stating a ban on open service by transgender persons would degrade military readiness. (Dkt. No. 28, Exh. O.)

## C. The Plaintiffs

### 1. Aiden Stockman

Plaintiff Aiden Stockman is a transgender man from California who intended to join the Air Force. ("Stockman Declaration," Dkt. No. 16 ¶ 1.) Plaintiff Stockman has conducted online research to prepare for the enlistment process, including talking to friends and neighbors stationed at an Air Force base near his home. (Id. ¶ 9.) He came out to his family as transgender during his sophomore year of high school. (Id. ¶ 4.) During his junior year, he took the Armed Services Vocational Aptitude Battery ("ASVAB") test in hopes he could join the military upon graduation. (Id. ¶ 10.) Plaintiff Stockman intends to undergo chest surgery, also called "top surgery" as soon as possible, likely in the spring of 2018. (Id. ¶ 11.) He states that if the ban were lifted, he would go talk with a recruiter about enlisting as soon as his chest surgery is completed. (Id. ¶ 15.)

### 2. Nicolas Talbott

Plaintiff Nicolas Talbott is a transgender man from Ohio who intended to join the Air Force National Guard. ("Talbott Declaration," Dkt. No. 17 ¶ 1.) Plaintiff Talbott came out as transgender to his mother at the age of 16 and, in 2012, started taking hormones according to his transition plan. (Id. ¶¶ 5–6.) He states he tried to enlist but the military recruiters would not allow him because of his transgender status. (Id. ¶ 7.) After he learned the accession ban was lifted in June 2016, Plaintiff Talbott spoke with an Air Force National Guard recruiter who advised him to enlist. (Id. ¶ 11.) Plaintiff Talbott was told to get letters certifying that being transgender had no adverse effects on his ability to serve and that older, unrelated injuries would also have no adverse effects. (Id.) He then began studying for the ASVAB in anticipation of being allowed to join the military, but President Trump's Twitter Proclamation discouraged him. (Id. ¶ 14.) Plaintiff Talbott maintains he would seek immediate enlistment were the ban lifted today. (Id. ¶ 16.)

### 3. Tamasyn Reeves

Plaintiff Tamasyn Reeves is a transgender woman from California who wants to serve in the Navy. ("Reeves Declaration," Dkt. No. 18 ¶ 1.) Plaintiff Reeves had tried to enlist in the military in 2010, but was rejected because she, at the time, identified as gay. (Id. ¶ 5.) In 2011, she learned about what it means to be transgender and started coming out to her colleagues and friends. (Id. ¶ 6.) A year later, she started taking hormones to begin her medical transition. (Id. ¶ 7.) The policy change June 2016 excited Plaintiff Reeves, and she intended to enlist as soon as she finished her college degree. (Id. ¶ 9.) The revived ban, however, sunk her hopes. (Id. ¶ 10.) She states she would immediately talk to a recruiter about enlisting upon receiving her degree in the spring of 2018 if the ban was lifted. (Id. ¶ 12.)

**4. Jaquice Tate**

Plaintiff Jaquice Tate is a transgender man currently serving as a Sergeant in the Army. ("Tate Declaration," Dkt. No. 19 ¶ 1.) He enlisted in 2008 and has served domestically, in Germany, and on deployment in Iraq. (Id. ¶ 4.) For his service in Iraq, he was awarded an Army Commendation Medal. (Id. ¶ 6.) He has also received multiple Army Achievement Medals, Certificates of Appreciation, and two Colonel Coins of Excellence. (Id. ¶ 11.) Plaintiff Tate, in reliance on the June 2016 Policy, came out to his chain of command. (Id. ¶ 19.) In Fall of 2016, Plaintiff Tate, in conjunction with his chain of command and his doctor, created his medical transition plan. (Id. ¶ 21.) Consequently, he started taking hormones in February 2017 and received approval for chest surgery. (Id.) Plaintiff Tate expects to receive chest surgery in late 2017 or early 2018. (Id.) Plaintiff Tate feels as though the ban demeans his years of military service. (Id. ¶ 23.)

**5. John Doe 1**

Plaintiff John Doe 1 is a transgender man who currently serves as a Non-Commissioned Officer in the Air Force. ("John Doe 1 Declaration," Dkt. No. 29, Exh. 2.) Plaintiff John Doe 1 grew up in a military family and intends to make a career out of his military service. (Id. ¶¶ 2–3.) He has received numerous commendations and endorsements from his chain of command. (Id. ¶¶ 7–8.) In April 2017, in reliance on the June 2016 Policy, he came out to his chain of command and received a medical transition plan. (Id. ¶ 17.) Plaintiff John Doe 1 fears he will be discharged under the express terms of the ban. (Id. ¶ 19.) He understands the Sex Reassignment Surgery Directive denies him transition-related medical care. (Id. ¶ 21.) Consequently, he intends to pay out-of-pocket for chest surgery. (Id.) Plaintiff John Doe 1 is bewildered at how he went from first in his class at Airmen Leadership School to being deemed unfit to serve. (Id. ¶ 25.)

**6. John Doe 2**

Plaintiff John Doe 2 is a transgender man who currently serves in the Army. ("John Doe 2 Declaration," Dkt. No. 29, Exh. 3.) Plaintiff John Doe 2 enlisted in 2015 at the age of 17, and earned two Colonel Coins of Excellence by August 2017. (Id. ¶ 6.) He possess technical expertise pertaining to the operations, diagnostics, and maintenance of multichannel communications systems necessary for the Army to make real-time tactical decisions. (Id. ¶ 5.) His position requires Secret-level security clearance. (Id.) He expects to serve in the Army until he is eligible to receive retirement benefits. (Id. ¶ 11.) While Plaintiff John Doe 2 realized he was transgender in his junior year of high school, he did not come out to anyone until he joined the Army. (Id. ¶¶ 15, 18.) In reliance on the June 2016 policy change, he came out to his chain of command and began researching the new policies and guidance. (Id. ¶¶ 20–21.) He worked with an Army doctor to develop a medical transition plan and treatment. (Id. ¶ 21.) After meeting with his commander and doctors, Plaintiff John Doe 2 was approved for chest surgery, and expects to have it completed in March 2018. (Id. ¶ 22.) He anticipates completing his medical transition by 2020. (Id.) However, after the promulgation of the Presidential Memorandum, he fears being subject to an imminent involuntary discharge. (Id. ¶¶ 28–29.)

**7. Jane Doe 2**

Plaintiff Jane Doe is a transgender woman currently serving in the Air Force. ("Jane Doe Declaration," Dkt. No. 29, Exh. 4.) Plaintiff Jane Doe entered the military in 2010, having already completed her college degree. (Id. ¶¶ 2–3.) As a consequence, she entered the military as an Airman First Class. (Id. ¶ 3.) After basic training, she was stationed domestically then selected for deployment in the Middle East. (Id.) She has received an Air Force Commendation Medal for distinctly exemplary service. (Id. ¶ 5.) Plaintiff Jane Doe intends on serving in the military until she is eligible for a pension and retirement benefits. (Id. ¶ 9.) While she identified as transgender at age 14, she waited until college to come out to those closest to her. (Id. ¶ 11.) In reliance on the June 2016 policy change, she came out to the rest of her family and to the public, updating her social media to her correct gender. (Id. ¶ 13.) With her chain of command and doctor, she created a medical transition plan which had received all the necessary approvals. (Id. ¶ 14.) She fears the Presidential Memorandum will strip her of her career, salary, and housing. (Id. ¶¶ 15–18.)

**8. Equality California**

Plaintiff Equality California ("EQCA") is an organization dedicated to LGBTQ civil rights. ("Declaration of Rick Zbur," Dkt. No. 20 ¶ 2.) Its membership includes transgender individuals in active service, transgender military veterans, and transgender individuals who have intend to pursue long-term military careers. (Id. ¶ 4.)

**D. Pending Cases**

On October 30, 2017, the Honorable Colleen Kollar-Kotelly of the D.C. District Court issued a nationwide injunction concerning the Accession and Retention Directives. See Doe 1 v. Trump, --- F. Supp. 3d ----, CV 17-01597 (CKK), 2017 WL 4873042, at *2 (D.D.C. Oct. 30, 2017). That court, however, dismissed the Sex Reassignment Surgery Directive claim, holding the plaintiffs lacked standing to challenge that directive. Id. at *23–24. The court noted one plaintiff, who had her transition-related procedure canceled by the Defense Health Agency, later received a waiver and is currently having her request processed. Id. at *24. A second plaintiff's prospective harm was deemed too speculative, as her transition treatment plan would not begin until after she returned from active duty in Iraq. Id. Finally, a third plaintiff is set to begin transition surgery before the ban would go into effect, also excluding him from harm. Id. The court concluded "no Plaintiffs have demonstrated that they are substantially likely to be impacted by the Sex Reassignment Surgery Directive, and none have standing to challenge that directive." Id.

The court in Doe 1 conducted a lengthy analysis regarding the import of the Presidential Memorandum. As here, Defendants in Doe 1 essentially argued "the Presidential Memorandum merely commissioned an additional policy review; that review is underway; nothing is set in stone, and what policy may come about is unknown; and regardless, Plaintiffs are protected by

the Interim Guidance." Id. at *17. Finding the defendants' arguments to be a "red herring," the court stated:

> The President controls the United States military. The directives of the Presidential Memorandum, to the extent they are definitive, are the operative policy toward military service by transgender service members. The Court must and shall assume that the directives of the Presidential Memorandum will be faithfully executed. See Nat'l Mining Ass'n v. U.S. Army Corps of Engineers, 145 F.3d 1399, 1408 (D.C. Cir. 1998) (assessing "faithful" application of agency rule). Consequently, the Interim Guidance must be read as implementing the directives of the Presidential Memorandum, and any protections afforded by the Interim Guidance are necessarily limited to the extent they conflict with the express directives of the memorandum.
>
> . . .
>
> Nothing in the August 2017 Statement by Secretary Mattis, or the Interim Guidance, can or does alter these realities. The Statement provides that Secretary Mattis will establish a panel of experts "to provide advice and recommendations on the implementation of the president's direction." After the "panel reports its recommendations and following ... consultation with the secretary of Homeland Security," Secretary Mattis will "provide [his] advice to the president concerning implementation of his policy direction." Put differently, the military is studying how to implement the directives of the Presidential Memorandum. Such a policy review and implementation plan are likely necessitated by the fact that—as borne out by the RAND Report and the declarations submitted by the Pseudonym Plaintiffs—transgender service members occupy a variety of crucial positions throughout the military, including active duty postings in war zones. Presumably, the removal and replacement of such individuals during a time of war cannot occur overnight. Accordingly, Defendants are correct that policy decisions are still being made. But the decisions that must be made are how to best implement a policy under which transgender accession is *prohibited*, and discharge of transgender service members is *authorized*. Unless the directives of the Presidential Memorandum are altered—and there is no evidence that they will be—military policy toward transgender individuals must fit within these confines.
>
> . . .
>
> Finally, although Defendants make much of the protections afforded by the Interim Guidance to transgender individuals, that protection is necessarily qualified by the Presidential Memorandum. The Interim Guidance provides that: "*As directed by the [Presidential] 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." (Emphasis added). The protections

> afforded by the Presidential Memorandum lapse by February 21, 2018, and discharge must be authorized by March 23, 2018. The Interim Guidance can do nothing to obviate these facts. Nor is standing vitiated by the mere possibility that the President may alter the directives of the Presidential Memorandum. See Appalachian Power Co. v. EPA, 208 F.3d 1015, 1022 (D.C. Cir. 2000) ("[A]ll laws are subject to change. Even that most enduring of documents, the Constitution of the United States, may be amended from time to time. The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment."). Nor is there evidence that such a change may occur, given the President's unequivocal pronouncement that "the United States government will not accept or allow transgender individuals to serve in any capacity in the U.S. military."

Id. at *17–18 (emphasis in original). The Court considers Doe to be persuasive authority, and finds its analysis sound and useful.

On November 21, 2017, the Honorable Marvin J. Garbis of the District of Maryland issued a nationwide injunction concerning the Accession Directive, the Retention Directive, and the Sex Reassignment Surgery Directive. Stone v. Trump, --- F. Supp. 3d ---- No. CV MJG-17-2459, 2017 WL 5589122, at *16 (D. Md. Nov. 21, 2017). Distinguishing the plaintiffs before it from the plaintiffs in Doe 1, the Stone court noted plaintiffs Stone and Cole were "highly unlikely to complete their medically-necessary surgeries before the effective date of the Directive." Id. at *13. Additionally, while the Doe 1 court found a disqualifying lack of certainty impeded the plaintiffs' standing, the Stone court stated there is "no lack of certainty regarding when transition treatment will begin for [plaintiffs] Stone and Cole since treatment has already begun, and [their] surgeries are endangered by the Directive's deadline." Id. That court approvingly cited the standing and constitutional analysis in Doe 1. Id. at *10, 15.

## II. MOTION TO DISMISS

Defendants present a two-pronged challenged to Plaintiffs' Complaint. First, they assert Plaintiffs lack standing and do not face an imminent threat of future injury. Alternatively, they assert Plaintiffs' claims are unripe and not yet fit for judicial determination. (MTD at 11.) For the reasons stated below, the Court concludes it has jurisdiction to determine the constitutionality of the Accession Directive, Retention Directive, and Sex Reassignment Surgery Directive.

### A. Legal Standard

Under Rule 12(b)(1), a party may bring a motion to dismiss for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A challenge to the court's jurisdiction may be facial or factual. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)). In a facial attack, the moving party asserts the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. Safe Air, 373

F.3d at 1039. By contrast, in a factual attack, the moving party disputes the truth of allegations that, by themselves, would otherwise invoke federal jurisdiction. Id.

When considering a factual attack, a court applies a standard similar to that used in deciding summary judgment motions. Evidence outside the pleadings may be considered, but all factual disputes must be resolved in favor of the nonmoving party. See Dreier v. United States, 106 F.3d 844, 847 (9th Cir. 1996). If the moving party presents admissible evidence in support of its motion, "the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).

In a facial challenge, "a court examines the complaint as a whole to determine whether the plaintiff has alleged a proper basis of jurisdiction." Watson v. Chessman, 362 F. Supp. 2d 1190, 1194 (S.D. Cal. 2005). Again, a plaintiff's complaint is treated similarly to a summary judgment motion: the allegations are treated as true and all inferences are drawn in favor of the plaintiff. Id. "The court will not, however, infer allegations supporting federal jurisdiction; federal subject matter must always be affirmatively alleged." Id. (quoting Century Sw. Cable Television, Inc. v. CIIF Assocs., 33 F.3d 1068 (9th Cir. 1994)). When a plaintiff relies on the general federal question statute, 28 U.S.C. § 1331, "a claim not arising under the United States Constitution, or any federal statute . . . . will not generally survive a Rule 12(b)(1) facial attack." Id. (internal citations and quotation marks omitted).

**B. Standing**

"Constitutional standing concerns whether the plaintiff's personal stake in the lawsuit is sufficient to make out a concrete 'case' or 'controversy' to which the federal judicial power may extend under Article III, § 2." Pershing Park Villas Homeowners Ass'n v. United Pacific Ins. Co., 219 F.3d 895 (9th Cir. 2000). "[T]he irreducible constitutional minimum of standing" is comprised of three elements: (1) an injury-in-fact; (2) a causal connection between the injury and challenged conduct such that the injury is "fairly traceable" to the challenged action; and (3) it must be "likely," not merely "speculative" that the injury can be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). The injury-in-fact must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Id. at 560. "The party invoking federal jurisdiction bears the burden of establishing these elements." Id. at 561.

"The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013). Thus, the "standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of Government was unconstitutional." Id. (quoting Raines v. Byrd, 521 U.S. 811, 819 (1997)). Importantly, when there are multiple plaintiffs, "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint." Town of Chester, N.Y. v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650–51 (2017).

Defendants argue Plaintiffs have not demonstrated injury-in-fact. (MTD at 17.) For the foregoing reasons, the Court finds Plaintiffs met their burden and have standing to challenge the Accession, Retention, and Sex Reassignment Surgery Directives.

**1. Accession Directive**

The Accession Directive indefinitely extends the prohibition preventing transgender individuals from entering the military. The prohibition would have expired on December 31, 2017. Defendants argue no Plaintiff "has been denied accession into the military, which could be denied for numerous reasons wholly unrelated to an applicant's transgender status." (Id. at 18.) Additionally, "allegations of speculative future harms are insufficient to establish standing." (Id.) Defendants have made this argument twice before, to no avail. See Stone, 2017 WL 5589122, at *11; Doe 1, 2017 WL 4873042, at *20–22. Citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 205, (1995), Gratz v. Bollinger, 539 U.S. 244, 251 (2003), and Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 709–10 (2007), the Doe 1 court noted the appropriate inquiry is two-pronged: (1) whether the plaintiff is "very likely" to apply for accession "in the relatively near future"; and (2) whether the plaintiff is "substantially likely to hit a barrier when he applies for accession." Doe 1, 2017 WL 4873042, at *21. The court found it was likely one of the plaintiffs will graduate from the Naval Academy and attempt to accede, and "[a]nything else is the product of mere speculation." Id. Likewise, based on a plaintiff's declarations and testimony showing he had already met with a recruiting officer and had plans to accede which "are not speculative," the Stone court also found a plaintiff faced a "substantial risk" that his "attempt to accede . . . will be prohibited solely on the basis of his transgender status." Stone, 2017 WL 5589122, at *11. Defendants' argument leaves this Court similarly unpersuaded.

Here, Plaintiffs Stockman, Talbott, and Reeves have separately demonstrated an affirmative intent to join the military, going as far as to take the ASVAB, speaking with military recruiters, and attempting to join even before Secretary Carter promulgated DTM 16-005. (See Declaration of Aiden Stockman ¶¶ 9–11; Declaration of Nicolas Talbott ¶¶ 7–16; Declaration of Tamasyn Reeves ¶¶ 7–12.) These Plaintiffs all declare that, were the ban lifted today, they would seek enlistment. See Declaration of Aiden Stockman ¶ 15; Declaration of Nicolas Talbott ¶ 16; Declaration of Tamasyn Reeves ¶ 12.) While Defendants argue Plaintiffs may be eligible for individualized waivers (MTD at 18), Plaintiffs contend, and the Doe 1 court agreed, transgender people have never been eligible for medical waivers. See Doe 1, 2017 WL 4873042, at *21 (finding "no evidence that waivers are actually made available to transgender individuals, or that they will be"); Supplemental Declaration of Eric K. Fanning, Dkt. No. 47-1 ¶ 11; Supplemental Declaration of Raymond Edwin Maybus Jr., Dkt. No. 47-2 ¶ 10.) Additionally, even if Plaintiffs could successfully apply for a waiver, the need to apply for one when no other group must do so is likely also a violation of equal protection rights. See Hawaii v. Trump, 859 F.3d 741, 767–68 (9th Cir. 2017) (holding a plaintiff need not wait for a denial of discretionary waiver from the travel ban in order to challenge the ban), vacated as moot on other grounds, 2017 WL 4782860, at *1 (U.S. Oct. 24, 2017); Doe 1, 2017 WL 4873042, at *21 (stating "even if a bona fide waiver

process were made available . . . [this] would not vitiate the barrier that [the plaintiff] claims is violative of equal protection.")

Based on the submitted declarations, the Court is convinced Plaintiffs Stockman, Talbott, and Reeves are highly likely to apply for accession in the relatively near future and are substantially likely to hit a barrier upon that application. This injury is concrete, particularized, imminent, and not at all hypothetical. Consequently, Plaintiffs have standing to challenge the Accession Directive.

**2. Retention Directive**

Beginning on March 23, 2018, the Retention Directive authorizes the discharge of military members solely on the basis of their transgender status. (See Presidential Memorandum; President Trump's Twitter Proclamation.) Defendants argue Plaintiffs merely "*may* be discharged from the military in the future" and note, as of yet, no transgender service member has been discharged. (MTD at 17 (emphasis added).) Consequently, "Plaintiffs' speculation that they may be discharged in the future is insufficiently concrete and imminent to establish standing." Id. However, by characterizing Plaintiffs' fear as "speculation," Defendants ignore the surrounding political and legal realities. The Commander-in-Chief of the military, President Trump, announced:

> After consultation with my Generals and military experts, please be advised that the United States Government *will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military*. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.

(President Trump's Twitter Proclamation, (emphasis added).)

This proclamation has been expanded into a full Presidential Memorandum, which proclaims the Retention Directive is set to begin on March 23, 2018. (Presidential Memorandum.) Nonetheless, Defendants untenably argue that Plaintiffs' fear of being discharged is speculative because no one has yet been discharged. (MTD at 17.) This logic falls apart under scrutiny, however, as the Presidential Memorandum does not even take effect until 2018. The Presidential Memorandum is clear in its intent, force, and impending effect.

Plaintiffs argue courts routinely decide questions of constitutionality before the promulgation of implementing regulations. (MPI Reply at 10, citing Union Pac. R.R. Co. v. Cal. Pub. Utils. Comm'n, 346 F.3d 851, 872 n.22 (9th Cir. 2003) (holding statutory challenge justiciable despite absence of implementing regulations "because it is clear that any standard required" would violate the constitution although no standard had yet issued); Nance v. EPA, 645 F.2d 701, 713, 717 (9th Cir. 1981) (holding statutory challenge justiciable although the "EPA has not yet promulgated regulations under the amended act).) The Court agrees with Plaintiffs' position. Plaintiffs Tate, John Doe 1, and John Doe 2, all current military service members,

plausibly fear discharge once the Retention Directive becomes operative. (See Tate Declaration ¶ 25; John Doe 1 Declaration ¶ 19; John Doe 2 Declaration ¶¶ 28–29.) This fear is appropriately born out of President Defendant Trump's Twitter Proclamation, the Presidential Memorandum, and the Interim Guidance. Consequently, the Court finds Plaintiffs Tate, John Doe 1, and John Doe 2 face concrete, particularized, and imminent injury. Accordingly, they have standing to challenge the constitutionality of the Retention Directive.

**3. Sex Reassignment Surgery Directive**

The Court believes it useful to juxtapose Plaintiffs against the plaintiffs in Doe 1. The Doe 1 plaintiffs failed this first prong of the standing inquiry, as the court found "the risk of being impacted by the Sex Reassignment Surgery Directive is not sufficiently great to confer standing." 2017 WK 4873042 at * 23. As previously discussed, that court noted Jane Doe 1's transition related procedure had been canceled, but defendants had submitted a declaration stating Jane Doe 1 had received a "health care waiver necessary to receive a transition-related surgery [and] is currently being processed." Id. at 24. This finding rendered Jane Doe 1 ineligible to challenge the Sex Reassignment Surgery Directive. Additionally, Jane Doe 3 would not have begun her transition plan until after she returns from active deployment in Iraq. Id. The court found "[g]iven the possibility of discharge, the uncertainties attended by the fact that she has yet to begin any transition treatment, and the lack of certainty on when such treatment will begin, the prospective harm . . . is too speculative to constitute an injury in fact." Id. Finally, one of the named plaintiffs had stated that he would transition prior to applying for accession; therefore, he also failed to show injury-in-fact. Id.

Here, Plaintiff John Doe 1 received a medical transition plan in April 2017. (John Doe 1 Declaration ¶ 17.) He has also received a diagnosis of gender dysphoria. ("John Doe 1 Supplemental Declaration," Dkt. No. 47-6 ¶ 2.) As a part of his plan, he is to begin taking Hormone Replacement Therapy ("HRT") "later this year," "once [he receives] final approvals from the Medical Multidisciplinary Team and [his] commander." (Id. ¶ 3.) He is scheduled to receive chest surgery in mid-2018 and sex organ surgery in 2020. (Id. ¶¶ 4–5.) Plaintiff John Doe 2 received a formal diagnosis of gender dysphoria in October 2016. ("John Doe 2 Supplemental Declaration," Dkt. No. 47-7 ¶ 2.) He began HRT in March 2017. (Id. ¶ 3.) His transition plan includes a projected chest surgery date in April 2018 and sex organ surgery by the end of 2021. (Id. ¶¶ 4–5.)

According to the Presidential 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." (Presidential Memorandum.) In deciding whether Plaintiffs have standing to challenge the Sex Reassignment Surgery Directive, the Court ordered the parties to submit supplemental briefing discussing the definition of the terms "necessary to protect the health" and "begun a course of treatment to reassign his or her sex." (Dkt. No. 66.) Additionally, the Court asked the parties to discuss whether and how these terms apply to Plaintiffs John Doe 1 and John Doe 2. (Id.) In response to the Court's order, Defendants argue

the Sex Reassignment Surgery Directive is currently under review and the final definitions of these terms are not yet ascertainable. (Dkt. No. 70, at 3.) Thus, Defendants contend Plaintiffs have not demonstrated injury-in-fact because no one yet knows what the future policy will be. (Id.) Despite this hand waiving, Defendants suggest the definitionally hollow term "necessary to protect the health" may equate to the legally hefty term "medically necessary." (Id. at 5–6.) However:

> As of now, Defendants therefore cannot state what the full scope and impact of [the] future policy will be with respect to sex reassignment surgery until the pending review is completed, including whether or not [the] current understanding of the terms 'necessary to protect the health' or 'begun a course of treatment to reassign his or her sex' will be altered in the future.

(Id. at 6.)

By contrast, Plaintiffs contend reading the Sex Reassignment Surgery Directive in context of the overall directive shows that it is intended to deny coverage of the surgery except in cases where the surgery is "necessary to protect the health of a transgender service member *for a reason unrelated to gender transition*." (Dkt. No. 72 (emphasis in original).) Plaintiffs note the Sex Reassignment Surgery Directive is not an isolated order but is part of a larger policy directive excluding transgender people from military service. (Id.) They argue the purpose of the Directive is to "hasten the departure of transgender individuals from the military, both by sending a clear message that they are unwelcome and by causing some current service members to leave military service because they cannot obtain needed medical care." (Id. at 4.) Moreover, Plaintiffs believe Defendants chose the ambiguous phrase "necessary to protect the health" as a way of intentionally avoiding the common legal term "medically necessary." (Id. at 5.) The interpretation must be different because then the surgeries would continue whenever they were proscribed as part of a gender transition plan, a reading which would "essentially nullify the Directive and contravene President Trump's premise about the cost of surgical care." Stone, 2017 WL 558122 at *13. Notably, Defendants made the same argument before the Stone court, which stated:

> [I]f the exception were to be interpreted under the broad terms proposed by Defendants, the 'exception' would essentially nullify the Directive and Contravene President Trump's premise about the cost of surgical care . . . Defendants may not evade judicial review by advancing (or, in this case, weakly suggesting) an interpretation of the challenged action that is both implausible and would fatally undercut the President's announced policy.

Id. at *13 (citation omitted).

This Court is equally unpersuaded by Defendants' construction of the Sex Reassignment Surgery exception. If the Sex Reassignment Surgery Directive means anything, it means a transgender service member cannot receive the surgery simply because it is "medically

necessary." President Trump stated the policy change is occurring because the military would be "burdened with the tremendous medical costs." (President Trump's Twitter Proclamation.) Allowing sex reassignment surgeries whenever they became medically necessary would result in the exception swallowing the rule and would do nothing to address President Trump's concerns. Perhaps anticipating this outcome, Defendants equivocate in their briefing, only suggesting that "necessary to protect the health" might equate to "medical necessity" instead of firmly proffering a definition. Defendants hesitated when deciding whether the exception applies to Plaintiffs (MTD Reply at 7, (stating that Plaintiffs "potentially fall within the exception to the funding directive")), and now attempt to forge that hesitation into an axe sharp enough to chop down Plaintiffs' standing argument. As Defendants are not able to outright state Plaintiffs fit into the exception and are entitled to the surgery, Plaintiffs' fears that the surgery will be denied are plausible given the plain words of President Trump. Consequently, Plaintiffs John Doe 1 and John Doe 2 have demonstrated injury-in-fact as it pertains to the Sex Reassignment Surgery Directive.

As an aside, despite the Court's order for supplemental briefing, neither party addressed the meaning of "begun a course of treatment to reassign his or her sex." This definition could be impactful as it is not at all clear Plaintiff John Doe 1 stands on the same jurisdictional footing as Plaintiff John Doe 2. Without supplemental briefing the Court cannot be certain, but it appears Plaintiff John Doe 1 may not have yet started HRT, while Plaintiff John Doe 2 began it earlier this spring. (Compare John Doe 1 Supplemental Declaration ¶ 3 with John Doe 2 Supplemental Declaration ¶ 3.) Consequently, Plaintiff John Doe 1 may not have sufficiently "begun a course of treatment to reassign his or her sex," and thus would be ineligible for the exception regardless if the surgery was "necessary to protect" his health.

**C. Ripeness**

Alternatively, Defendants argue this case should be dismissed because it is not ripe to be adjudicated. A dispute is ripe when it presents concrete legal issues in actual cases. Colwell v. HHS, 558 F.3d 1112, 1123 (9th Cir. 2009). "Ripeness and standing are closely related because they originate from the same Article III limitation." Montana Envtl. Info. Ctr. v. Stone-Manning, 766 F.3d 1184, 1188 (9th Cir. 2014) (citing Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 n.5 (2014)). In fact, "in many cases, ripeness coincides squarely with standing's injury in fact prong." Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) ("The constitutional component of the ripeness inquiry is often treated under the rubric of standing. . . . Indeed, because the focus of our ripeness inquiry is primarily temporal in scope, ripeness can be characterized as standing on a timeline.")

Plaintiffs have satisfied the injury-in-fact requirements and have standing to challenge the Accession, Retention, and Sex Reassignment Surgery Directives. Thus, Plaintiffs also have established constitutional ripeness. Bishop Paiute Tribe v. Inyo Cty., 863 F.3d 1144, 1153 (9th Cir. 2017). Defendants' ripeness argument is not based in constitutional ripeness, but prudential ripeness. Whether a dispute is ripe depends on "the fitness of the issues for judicial decision" and "the hardship to the parties" of withholding review. Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967), overruled on other grounds by Califano v. Sanders, 430 U.S. 99, 105 (1977).

This case is fit for judicial decision. President Trump has unambiguously stated his policy intentions, then formalized those intentions into an operative Presidential Memorandum. "The only uncertainties are how, not if, the policy will be implemented and whether, in some future context, the President might be persuaded to change his mind and terminate the policies he is now putting into effect." Stone, 2017 WL 5589122, at *14. The constitutionality of the Directives within the Presidential Memorandum are fit for constitutional review; indeed, the Accession Directive goes into effect within a few short weeks. (Presidential Memorandum.) The Court need not wait for the Presidential Memorandum to be fully implemented before determining its constitutionality. Union Pac. R.R. Co., 346 F.3d at 872 n.22. Additionally, Plaintiffs would bear the brunt of the harm were judicial review withheld. Plaintiffs have demonstrated "they are already suffering harmful consequences such as the cancellation and postponements of surgeries, the stigma of being set apart as inherently unfit, facing the prospect of discharge, . . . the inability to move forward with long-term medical plans, and the threat to their prospects of obtaining long-term assignments. Waiting until after the Directives have been implemented to challenge their alleged violation of constitutional rights only subjects them to substantial risk of even greater harms." Stone, 2017 WL 5589122, at *14; Doe 1, 2017 WL 4873042, at *24–25 ("The directives are known, and so are the circumstances under which they were issued. They cannot be more concrete, and future policy by the military—absent action from the president—cannot change what the directives require. . . . Furthermore, the nature of the equal protection analysis in this case, which asses the facial validity of the Presidential Memorandum, means that the Court would not benefit from delay—the salient facts regarding the issuance of the Presidential Memorandum are not subject to change.")

Accordingly, having found Plaintiffs have standing to challenge the Directives, and that this case is ripe for judicial adjudication, the Court DENIES Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

## III. MOTION FOR PRELIMINARY INJUNCTION

### A. Legal Standard

A plaintiff seeking a preliminary injunction must establish that: (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). "A preliminary injunction is an extraordinary and drastic remedy" that should not be granted "unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (describing the "substantial proof" requirement to grant a preliminary injunction as much higher than the burden of proof for a summary judgment).

The Ninth Circuit has adopted a "sliding scale" test for preliminary injunctions. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011). Under this approach, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. Id. For example, "serious questions" as to the

merits of a case, combined with a showing that the hardships tip sharply in the plaintiff's favor, can support the issuance of an injunction, assuming the other two elements of the Winter test are also met. Winter, 555 U.S. at 24 ("Courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief, and should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.") Id.

A preliminary injunction can take two forms: either a prohibitory injunction or a mandatory injunction. Chalk v. U.S. Dist. Court Cent. Dist. of California, 840 F.2d 701, 704 (9th Cir. 1988). A prohibitory injunction prevents a party from taking action pending a resolution on the merits, Heckler v. Lopez, 463 U.S. 1328, 1333 (1983) (stating that a prohibitory injunction "freezes the positions of the parties until the court can hear the case on the merits"), while a mandatory injunction "orders a responsible party to take action." Meghrig v. KFC W., Inc., 516 U.S. 479, 484 (1996). Since the "basic function" of a preliminary injunction is to preserve the status quo pending resolution on the merits, mandatory injunctions are "particularly disfavored." Id. Indeed, mandatory injunctions will not be issued unless failure to do so will result in "extreme or very serious damage." Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir. 2009).

**B. Likelihood of Success on the Merits**

Defendants argue "[t]he President and Secretary Mattis' decision that the complex issues presented by the policy on military service by transgender individuals warrant additional study before changes are made to longstanding policies passes muster under any standard." (MTD at 25.) However, this is not what happened in this case. In July of 2017, President Trump announced transgender people are barred from military service, and nothing in the Presidential Memorandum or Interim Guidance alters the fact that the decision has already been made. Defendants, in their briefing and at oral argument, attempt to focus on the constitutionality of the Interim Guidance and not the policy that takes place once it expires.[2] Even the title of the current operative policy, the "*Interim* Guidance," (emphasis added) attests to its temporary nature.

Defendants additionally contend military personnel decisions should be accorded a highly deferential level of review. However, this deferential review is most appropriate when the military acts with measure, and not "unthinkingly or reflexively." Rostker v. Goldberg, 453 U.S. 57, 72 (1981). Here, the only serious study and evaluation concerning the effect of transgender people in the armed forces led the military leaders to resoundingly conclude there was no justification for the ban. (Supra, "Military Transgender Policy Before July 2017," at 3–5.) The Court agrees with the Doe 1 court, which noted "the record at this stage of the case shows that the reasons offered for categorically excluding transgender individuals were not supported and

[2] The Doe 1 court's analysis of the interaction between the Presidential Memorandum and the Interim Guidance is sound and adopted by the Court. 2017 WL 4873042, at *17–18. Portions of that analysis have been reproduced in this Opinion. (See supra 9–10.)

were in fact contradicted by the only military judgment available at the time." 2017 WL 4873042, at *31. "[T]he Court's analysis in this Opinion has not been based on an independent evaluation of evidence or faulting the President for choosing between two alternatives based on competing evidence." Id.

The Ninth Circuit has strongly suggested that discrimination on the basis of one's transgender status is equivalent to sex-based discrimination. See Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000) ("both [the Gender Motivated Violence Act and Title VII] prohibit discrimination based on gender as well as sex. Indeed, for the purposes of these two acts, the terms 'sex' and 'gender' have become interchangeable." Additionally, sex-based discrimination can include discrimination based on someone failing "to conform to socially-constructed gender expectations.") Several district courts in this circuit have plainly held discrimination on the basis of one's transgender status is subject to intermediate scrutiny. See Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); Olive v. Harrington, No. 115CV01276BAMPC, 2016 WL 4899177, at *5 (E.D. Cal. Sept. 14, 2016). Moreover, the courts which have examined the constitutionality of the transgender ban have also applied intermediate scrutiny. See Stone, 2017 WL 5589122, at *15; Doe 1, 2017 WL 4873042, at *27–29. The Court is persuaded by the analysis contained in these opinions.

Plaintiffs are "protected by the Fifth Amendment's Due Process Clause[, which] contains within it the prohibition against denying to any person the equal protection of the laws." U.S. v. Windsor, 133 S. Ct. 2675, 2695, 186 L. Ed. 2d 808 (2013). Consequently, the government must proffer a justification which is "exceedingly persuasive," "genuine," "not hypothesized," not "invented *post hoc* in response to litigation," and "must not rely on overbroad generalizations." United States v. Virginia, 518 U.S. 515, 531 (1996). Defendants' justifications do not pass muster. Their reliance on cost is unavailing, as precedent shows the ease of cost and administration not survive intermediate scrutiny even if it is significant. Frontiero v. Richardson, 411 U.S. 677, 688–91 (1973). Moreover, all the evidence in the record suggests the ban's cost savings to the government is miniscule. (RAND Report at 22–23.) Furthermore, Defendants' unsupported allegation that allowing transgender individuals to be in the military would adversely affect unit cohesion is similarly unsupported by the proffered evidence. (Compare MTD at 30–31 with RAND Report at 24.) These justifications fall far short of exceedingly persuasive. Accordingly, the Court finds Plaintiffs have demonstrated their Equal Protection claim will likely succeed on the merits and further analysis of their other claims is unnecessary at this stage of the proceedings.

**C. Irreparable Harm**

Defendants first argue, "for much the same reasons they lack standing, Plaintiffs cannot show that they are likely to be injured if the Court does not enter an injunction." (MTD at 24.) Considering the Court has already found Plaintiffs have standing, this argument is easily dismissed. Second, Defendants contend Plaintiffs' injuries would not be beyond remediation. (Id.) For example, they argue separation from the military would not constitute irreparable harm

because it is within the Court's equitable powers to remedy the injury. (Id.) However, these arguments fail to address the negative stigma the ban forces upon Plaintiffs.

Plaintiffs allege, and the Court agrees, the ban sends a damaging public message that transgender people are not fit to serve in the military. (MPI Reply at 19.) There is nothing any court can do to remedy a government-sent message that some citizens are not worthy of the military uniform simply because of their gender. A few strokes of the legal quill may easily alter the law, but the stigma of being seen as less-than is not so easily erased. See Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) ("laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter"); Lawrence v. Texas, 539 U.S. 558, 573 (2003) ("If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.") Additionally, "the deprivation of constitutional rights unquestionably constitutes irreparable injury." Hernandez v. Sessions, 872 F.3d 976, 994 (9th Cir. 2017) (internal quotations omitted) (citing Elrod v. Burns, 427 U.S. 347, 373 (1976)). This ban singles out transgender individuals for unequal treatment solely because of their transgender status. Plaintiffs have appropriately demonstrated irreparable injury. See Stone, 2017 WL 5589122, at *16; Doe 1, 2017 WL 4873042, at *32.

**D. Balance of Equities and Public Interest**

The Court finds Plaintiffs have shown the balance of equities and public interest weighs in favor of granting injunctive relief. Plaintiffs already feel the stigma attached to the Directives. (See Tate Declaration ¶ 23; John Doe 1 Declaration ¶¶ 23–25; John Doe 2 Declaration ¶¶ 30–33, 38–39.) Defendants again attempt to make the preliminary injunction about the Interim Guidance and not the policies which will supersede the Interim Guidance. (MTD at 40.) As noted above, this argument is misplaced. Additionally, as in Stone and Doe 1, Defendants make a perfunctory argument regarding the import of a strong national defense. (MTD at 40.) However:

> A bare invocation of "national defense" simply cannot defeat every motion for preliminary injunction that touches on the military. On the record before the Court, there is absolutely no support for the claim that the ongoing service of transgender people would have any negative effective on the military at all. In fact, there is considerable evidence that it is the discharge and banning of such individuals that would have such effects.... Moreover, the injunction that will be issued will in no way prevent the government from conducting studies or gathering advice or recommendations on transgender service.

Stone, 2017 WL 5589122, at *16 (quoting Doe 1, 2017 4873042, at *33.) The record stands much the same here as it did in Stone and Doe 1, thus the Court has no reason to deviate from the above analysis. In sum, considering all the Winter factors weigh in favor of granting a preliminary injunction, the Court preliminarily enjoins the Accession, Retention, and Sex Reassignment Surgery Directives pending the final resolution of this lawsuit.

## IV. CONCLUSION

Finding the Plaintiffs have established injury-in-fact as it pertains to the Accession, Retention, and Sex Reassignment Surgery Directives, and finding this case ripe for adjudication, the Court DENIES Defendants' Motion to Dismiss. Additionally, finding the Winter factors weigh in favor of granting a preliminary injunction, the Court GRANTS Plaintiffs' Motion for Preliminary Injunction. Therefore, until this litigation is resolved, the Court ORDERS:

1. Defendants, and their agents, employees, assigns, and all those acting in concert with them are enjoined from categorically excluding individuals, including Plaintiffs Aiden Stockman, Nicolas Talbot, Tamasyn Reeves, from military service on the basis that they are transgender; and

2. No current service member, including Plaintiffs Jaquice Tate, John Doe 1, John Doe 2, and Jane Doe, may be separated, denied reenlistment, demoted, denied promotion, denied medically necessary treatment on a timely basis, or otherwise subjected to adverse treatment or differential terms of service on the basis that they are transgender.

**IT IS SO ORDERED.**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

| Case No. | **EDCV 17-01799 JGB (KKx)** | Date | September18, 2018 |
|---|---|---|---|
| Title | ***Aiden Stockman, et al. v. Donald J. Trump, et al.*** | | |

| Present: The Honorable | JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE |
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| MAYNOR GALVEZ | Not Reported |
|---|---|
| Deputy Clerk | Court Reporter |

| Attorney(s) Present for Plaintiff(s): | Attorney(s) Present for Defendant(s): |
|---|---|
| None Present | None Present |

**Proceedings: Order DENYING Defendants' Motion to Dissolve the Preliminary Injunction (Dkt. No. 82) (IN CHAMBERS)**

On March 23, 2018, Defendants Donald J. Trump ("President Trump"), in his official capacity as President of the United States; James N. Mattis, in his official capacity as Secretary of Defense; Joseph F. Dunford, Jr., in his official capacity as Chairman of the Joint Chiefs of Staff; Richard V. Spencer, in his official capacity as Secretary of the Navy; Ryan D. McCarthy, in his official capacity as Acting Secretary of the Army; Heather A. Wilson, in her official capacity as Secretary of the Air Force; and Elaine C. Duke, in her official capacity as Acting Secretary of Homeland Security (collectively, "Defendants") filed a Motion to Dissolve the Preliminary Injunction. ("Motion," Dkt. No. 82.) Plaintiffs Aiden Stockman, Nicolas Talbott, Tamasyn Reeves, Jaquice Tate, John Doe 1, John Doe 2, Jane Doe, and Equality California (collectively, "Plaintiffs") filed an opposition on April 25, 2018. ("Opposition," Dkt. No. 98.) Defendants filed a reply on May 7, 2018. ("Reply," Dkt. No. 105). The Court held a hearing on this matter on July 30, 2018. Upon consideration of the papers filed in support of and in opposition to this Motion, as well as the oral arguments presented by the parties, the Court DENIES Defendants' Motion.

## I. BACKGROUND

### A. Procedural History

On September 5, 2017, Plaintiffs filed a complaint against Defendants, asserting four causes of action: (1) Fifth Amendment equal protection; (2) Fifth Amendment due process;

(3) Fifth Amendment right to privacy; and (4) First Amendment retaliation for free speech and expression. ("Complaint," Dkt. No. 1 ¶¶ 49–77.) Plaintiffs seek declaratory relief. (Id.) Plaintiffs filed a Motion for Preliminary Injunction on October 2, 2017. ("MPI," Dkt. No. 15.) The Court granted Plaintiffs' MPI on December 22, 2017. ("December Order," Dkt. No. 79.)

**B. Factual History**

The parties do not dispute the basic facts in this case. In June 2016, after multiple years of data review, the Department of Defense ("DOD") announced it would implement a new policy which allowed transgender people to serve openly in the United States military ("June 2016 Policy"). (See generally Dkt. No. 28, Exh. C.) On July 26, 2017, President Trump changed course, and tweeted:

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

("President Trump's Twitter Proclamation," Dkt. No. 28, Exh. F.)

On August 25, 2017, President Trump issued a memorandum ("2017 Presidential Memorandum") formalizing the policy he announced via Twitter. (Dkt. No. 28, Exh. G.) The 2017 Presidential Memorandum contained several operative prongs: (1) it indefinitely extended the prohibition preventing transgender individuals from entering the military (the "Accession Directive"); (2) it required the military to authorize the discharge of transgender service members (the "Retention Directive"); and (3) it largely halted the use of DOD or Department of Homeland Security ("DHS") resources to fund sex reassignment surgical procedures for current military members ("Sex Reassignment Surgery Directive") (collectively, "Directives"). (Id. at 47.) The DOD was to submit a plan implementing the 2017 Presidential Memorandum by February 2018. (Id.)

On September 14, 2017, Defendant Mattis, the current Secretary of Defense, issued an "Interim Guidance" which established the temporary DOD policy regarding transgender persons. DoD Interim Guidance on Military Service by Transgender Individuals (September 2017), available at https://defense.gov/Portals/1/Documents/PDFs/Military-Service-By-Transgender-Individuals-Interim-Guidance.pdf (last visited September 13, 2018). While the Interim Guidance was in effect, no current transgender service member could be discharged or denied reenlistment solely based on their transgender status. Id.

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**1. Military Transgender Policy before July 2017**

In August 2014, the DOD removed references to mandatory exclusion based on gender and identity disorders from its physical disability policy. ("Declaration of Eric K. Fanning," Dkt. No. 22 ¶¶ 12–13.) Additionally, the DOD directed each branch of the armed forces to assess whether there remained any justification to prohibit service by openly transgender individuals. (Id. at 13.)

In July 2015, then-Secretary of Defense Ashton B. Carter created a group to begin comprehensively analyzing whether any justification remained which validated the ban on open service by transgender individuals. ("Declaration of Brad Carson," Dkt. No. 26 ¶¶ 8–9.) The working group created by Secretary Carter included the Armed Services, the Joint Chiefs of Staff, the service secretaries, and other specialists from throughout the DOD (the "Working Group"). (Id. ¶ 9.) As part of the review process, the Working Group analyzed evidence from a variety of sources, including scholarly materials and consultations with medical experts, personnel experts, readiness experts, health insurance companies, civilian employers, and commanders of units with transgender service members. (Id. ¶ 10.)

In addition, the Working Group commissioned the RAND Corporation, a nonprofit research institution that provides analysis to the military, to complete a comprehensive study on the impact of permitting transgender individuals to serve openly. (Id. ¶ 11.) The 113-page study, "Assessing the Implications of Allowing Transgender Personnel to Serve Openly" (the "RAND Report," Dkt. No. 26, Exh. B), examined factors such as the health care costs and readiness implications of allowing open service by transgender persons. The RAND Report also analyzed the other 18 foreign militaries which permit military service by transgender individuals, focusing on Australia, Canada, Israel, and the United Kingdom—the four countries "with the most well-developed and publicly available policies on transgender military personnel." (RAND Report at 23.) This comparative analysis found no evidence that allowing open service by transgender persons would negatively affect operational effectiveness, readiness, or unit cohesion. (Id. at 24.) Moreover, the RAND Report concluded healthcare costs for transgender service members would "have little impact on and represents an exceedingly small proportion of [the DOD's] overall health care expenditures." (Id. at 22–23.) Specifically, the RAND Report found health care costs would increase "by between $2.4 million and $8.4 million annually." (Id. at 22.) By contrast, the overall healthcare cost of those serving in the active component of the military is approximately $6 billion annually, while the overall healthcare cost for the DOD is $49.3 billion annually. (Id. at 22–23.) Furthermore, the RAND Report noted discharging transgender service members, "[a]s was the case in enforcing the policy on homosexual conduct, [] can involve costly administrative processes and result in the discharge of personnel with valuable skills who are otherwise qualified." (Id. at 77.) At the conclusion of its analysis, the Working Group "did not identify any basis for a blanket prohibition on open military service of transgender people. Likewise, no one suggested . . . that a bar on military service by transgender persons was necessary for any reason, including readiness or unit cohesion." (Declaration of Eric K. Fanning ¶ 27.)

Based on the results of this review process, on June 30, 2016, Secretary Carter issued a Directive-type Memorandum announcing transgender Americans may serve openly and without fear of being discharged based solely on that status. ("DTM 16-005," Dkt. No. 22, Exh. C.) Secretary Carter stated:

> These policies and procedures are premised on my conclusion that open service by transgender Service members while being subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability and retention, is consistent with military readiness and with strength through diversity.

(Id. at 135.)

Some of the highest ranking military officials in the country concurred with this assessment. (See generally Declaration of Eric K. Fanning; "Declaration of Michael Mullen," Dkt. No. 21; "Declaration of Raymond E. Mabus," Dkt. No. 23; "Declaration of Deborah L. James," Dkt. No. 24.) According to the directive, transgender individuals would be permitted to enlist in the military and serve openly beginning on July 1, 2017. (DTM 16-005, at 137.) This date was later postponed to January 1, 2018. (See Dkt. No. 28, Exh. E.) The DOD also issued handbooks, regulations, and memoranda which instructed military commanders how to implement the new policies, set forth guidance related to medical treatment provisions, and expressly prohibited discrimination on the basis of gender identity. (See "Transgender Service in the U.S. Military," Dkt. No. 22, Exh. 6.)

The former military leaders among the Working Group, such as former Secretary of the Army Eric K. Fanning, former Chairman of the Joint Chiefs of Staff Admiral Michael Mullen, former Secretary of the Navy Raymond E. Maubus, and former Secretary of the Air Force Deborah L. James, have all explicitly drawn parallels between allowing open service by transgender persons and permitting open service by gay and lesbian persons. (See Declaration of Eric K. Fanning ¶¶ 10–16; Declaration of Michael Mullen ¶¶ 9–15; Declaration of Raymond E. Mabus ¶¶ 19, 24; Declaration of Deborah L. James ¶ 44.) These leaders contend that many of the same concerns relating to open transgender service were vocalized, and eventually allayed, in the context of ending "Don't Ask Don't Tell." (See Declaration of Eric K. Fanning ¶¶ 10–16; Declaration of Admiral Michael Mullen ¶¶ 9–15; Declaration of Raymond E. Mabus ¶¶ 19, 24; Declaration of Deborah L. James ¶ 44.)

**2. Military Transgender Policy after July 2017**

On July 26, 2017, President Trump changed course, announcing via Twitter that transgender individuals would not be permitted to serve in the military. (President Trump's Twitter Proclamation.) One month later, his 2017 Presidential Memorandum promulgated the Accession Directive, Retention Directive, and Sex Reassignment Surgery Directive. (2017 Presidential Memorandum.) President Trump claimed the Obama Administration had "dismantled the [DOD and DHS's] established framework by permitting transgender individuals

to serve openly in the military." (Id.) Additionally, he stated the Obama Administration failed to identify a sufficient basis to conclude ending the longstanding policy against open transgender service "would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." (Id.)

The military reception to President Trump's policy change was somewhat critical. Current Chairman of the Joint Chiefs of Staff Joseph Dunford disagreed with the decision to reinstate the transgender ban, stating he "believe[s] that any individual who meets the physical and mental standards . . . should be afforded the opportunity to continue to serve." (Dkt. No. 28, Exh. I.) He also previously told lawmakers transgender troops have served the military honorably, and he would continue to abide by this sentiment for as long as he holds his position. (Id.) Additionally, it is not clear whether the nation's top military leaders were consulted about this policy change prior to President Trump's Twitter Proclamation. (See Dkt. No. 28, Exh. M.) Moreover, after the promulgation of President Trump's tweets, 56 retired generals and admirals signed a declaration stating a ban on open service by transgender persons would degrade military readiness. (Dkt. No. 28, Exh. O.)

The Accession Directive would have extended the policy prohibiting open accession into the military beyond January 1, 2018. The Retention and Sex Assignment Surgery Directives were to take effect on March 23, 2018. (Id.) However, a series of judicial orders, including the Court's December Order, preliminarily enjoined the government from enacting these policies. See Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017); Stone v. Trump, 280 F. Supp. 3d 753 (D. Md. 2017); Karnoski v. Trump, No. C17-1297-MJP, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017). To date, these injunctions remain in place.

**3. The Mattis Memorandum**

On February 22, 2018, Defendant Mattis promulgated a memorandum which recommended that President Trump revoke his prior 2017 Presidential Memorandum in order for the military to implement a new policy. ("Mattis Memorandum," Dkt. No. 83-1.) Defendant Mattis states he "created a Panel of Experts [("the Panel")] comprised of senior uniformed and civilian Defense Department and U.S. Coast Guard leaders and directed them to consider [the issue of transgender military service] and develop policy proposals based on data, as well as their professional military judgment . . . ." (Id. at 1.) The Panel "met with . . . transgender Service members" and "reviewed available information on gender dysphoria . . . and the effects of gender dysphoria on military effectiveness, unit cohesion, and resources." (Id. at 1–2.) Based on the work of the Panel, the DOD concluded 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." (Id. at 2.) Additionally, exempting those individuals could "undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." (Id.) The Mattis Memorandum also criticized the RAND Report, noting it "contained significant shortcomings," "referred to limited and heavily caveated data to support its conclusions, glossed over the impacts of healthcare costs, readiness, and unit cohesion, and

erroneously relied on the selective experiences of foreign militaries . . . ." (Id.) Defendant Mattis concluded the DOD should adopt the following policies:

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

(Id. at 2–3.) Defendant Mattis also sent President Trump a report which detailed why, in the opinion of the DOD, this new policy would be necessary to further the interests of the military. ("DOD Report," Dkt. No. 83-2.) President Trump issued a new memorandum on March 23, 2018, which revoked the 2017 Presidential Memorandum and allowed the DOD to implement its preferred policy. ("2018 Presidential Memorandum," Dkt. No. 83-3.) Given these developments, Defendants ask the Court to dissolve the preliminary injunction issued in the Court's December Order. (Motion at 2.)

**4. Karnoski v. Trump**

On April 13, 2018, the Honorable Marsha J. Pechman issued an order which partially granted plaintiffs' motion for summary judgment in a similar case. Karnoski v. Trump, No. C17-1297-MJP, 2018 WL 1784464 (W.D. Wash. Apr. 13, 2018). In Karnoski, the defendants made several of the same arguments advanced here, such as mootness, standing, and level of deference to the DOD Report. Id. Judge Pechman held that discrimination against transgender persons should be subject to strict scrutiny. Id. at *10–11. However, the court declined to determine the level of deference due to the DOD Report. Id. at 11–13. Additionally, the court held that the preliminary injunction already issued should remain in effect, and struck the defendants' motion to dissolve the preliminary injunction. Id. at *14. The defendants appealed this decision, and that appeal is currently pending before the Ninth Circuit. The Ninth Circuit recently ruled that the preliminary injunction should remain in place during the pendency of the appeal in order to preserve the status quo. (Karnoski, et al. v. Trump, et al., No. 18-35347, Dkt. No. 90.) Thus, under the current legal landscape, the Ninth Circuit has begun the process of reviewing the Karnoski decision, including the order upholding the preliminary injunction and striking

defendants' motion to dissolve, and has maintained the preliminary injunction while Karnoski is under review.

## II. LEGAL STANDARD

The basic function of a preliminary injunction is to preserve the relative positions of the parties until a trial on the merits. Univ. of Texas v. Camenisch, 451 U.S. 390, 392 (1981). To obtain a preliminary injunction, a party must either show (1) a combination of probable success and the possibility of irreparable harm, or (2) the balance of hardship tips in its favor and the party has raised serious questions. Arcamuzi v. Continental Air Lines, Inc., 819 F.2d 935, 937 (9th Cir. 1987); see also Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (holding that, to obtain a preliminary injunction, a movant must show: (1) likelihood of success on the merits; (2) irreparable harm; (3) balance of equities tips in his favor; and (4) an injunction is in the public interest). A district court has discretion to dissolve or to modify a preliminary injunction if factual or legal circumstances have changed since the issuance of the injunction. See Mariscal-Sandoval v. Ashcroft, 370 F.3d 851, 859 (9th Cir. 2004). "A party seeking modification or dissolution of an injunction bears the burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction." Sharp v. Weston, 233 F.3d 1166, 1170 (9th Cir. 2000).

## III. DISCUSSION

### A. Mootness

Defendants contend Plaintiffs' challenge is now moot because any dispute over the new policy "presents a substantially different controversy" than Plaintiffs' challenge to the 2017 Presidential Memorandum. (Motion at 8.) Defendants state the appropriate question is whether the "challenged conduct continues" or whether the policy "has been sufficiently altered as to present a substantially different controversy from the one [previously] decided." (Id. (quoting Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 662 n.3 (1993)).) Defendants argue Plaintiffs' original challenge was premised on the assumption that President Trump had ordered a categorical ban excluding transgender individuals for reasons not supported by prevalent military judgment. (Motion at 8.) The new policy, Defendants argue, contains several exceptions which would allow "some" transgender individuals to serve and is the product of "independent military judgment following extensive study." (Id.) Defendants maintain this new policy turns "on the basis of a medical condition and its associated treatment," and does not implement the 2017 Presidential Memorandum. (Reply at 2.) These arguments fail.

The enactment of a new policy does not moot a challenge to a previous one where, as here, the new one differs little from the first. In City of Jacksonville, the city enacted an ordinance which required it to set aside a certain percentage of its money each year for "Minority Business Enterprises" ("MBE's"). 508 U.S. at 658. The plaintiff challenged this policy, and a district court entered a preliminary injunction against the city. Id. at 659. The city later repealed

its MBE ordinance and replaced it with a new ordinance which had three principal differences: (1) it now applied just to women and black people, not to women and other minority groups; (2) the percentage of money set aside for these businesses became a percentage range rather than a set percentage figure; and (3) there were now five alternative methods for achieving the city's participation goals. Id. at 661. In its discussion on mootness, the Supreme Court noted:

> There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so. *Nor does it matter that the new ordinance differs in certain respects from the old one*. City of Mesquite [,455 U.S. 283 (1982),] does not stand for the proposition that it is only the possibility that the selfsame statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect. The gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts. The new ordinance may disadvantage them to a lesser degree than the old one, but insofar as it accords preferential treatment to black- and female-owned contractors—and, in particular, insofar as its "Sheltered Market Plan" is a "set aside" by another name—*it disadvantages them in the same fundamental way*.

Id. at 669 (emphasis added). Here, President Trump stated the essence of the first policy in his Twitter proclamation: transgender people will no longer be able to serve in the U.S. military. (President Trump's Twitter Proclamation.) In keeping with that proclamation, the first policy banned the accession and retention of transgender individuals. (2017 Presidential Memorandum). The policies described in the 2017 Presidential Memorandum and the 2018 Presidential Memorandum are fundamentally the same. Indeed, President Trump specifically announced this review process along with the first policy. (2017 Presidential Memorandum). This new policy specifically bans transgender individuals from serving in the military in a manner consistent with their gender identity. (Mattis Memorandum.) It excludes anyone who requires or has undergone gender transition, and requires proof that a person has been stable in their birth sex for the last thirty-six months. (Id.) In sum, it disadvantages transgender service members "in the same fundamental way." City of Johnsonville, 508 U.S. at 669.

Defendants contend this policy has exceptions which will allow some transgender individuals to serve in the military (Motion at 5–6), yet these very exceptions expose the policy as being substantially the same as the first. To start, all transgender individuals "who require or have undergone gender transition are disqualified from military service." (Mattis Memorandum at 2–3.) Yet, transgender individuals "without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other Service members, in their biological sex." (Mattis Memorandum at 2–3.) Additionally, people *with* gender dysphoria who do not require or have not undergone gender transition are exempted from the policy as long as they are "willing and able to adhere to all standards associated with their biological sex." (Id.) Taken together, it is clear that a diagnosis of gender dysphoria is neither necessary nor sufficient to be excluded from the military under this new policy. What is both necessary and sufficient to be excluded, irrespective of a diagnosis of gender dysphoria, is a person serving consistent with their

transgender identity. In short, the policy aims to eliminate a person's *trans*ness, and nothing else. See Karnoski, 2018 WL 1784464, at *12 ("Requiring transgender people to serve in their biological sex does not constitute open service in any meaningful way, and cannot reasonably be considered an exception to the Ban. Rather, it would force transgender service members to suppress the very characteristics that defines them as transgender in the first place.") (internal quotation marks omitted); see also Christian Legal Soc'y v. Martinez, 561 U.S. 661, 689 (2010) (rejecting purported distinction between targeting same-sex intimate conduct and discriminating against gay people).

For the purpose of mootness, the controversy presented by the new policy is substantively the same as the controversy presented by the old policy. Transgender individuals will be disadvantaged "in the same fundamental way." City of Jacksonville, 508 U.S. at 669. Defendants have appropriately informed the Court that it must decide whether the challenged conduct continues. (Motion at 8.) It clearly does.

**B. Constitutional Review**

**1. Military Deference and Rational Basis Review**

Defendants argue this new policy triggers rational basis review because it "draws lines on the basis of a medical condition (gender dysphoria) and an associated treatment (gender transition), not on transgender status." (Motion at 10.) This characterization, however, does not match reality. As noted above, a diagnosis of gender dysphoria is neither necessary nor sufficient for a person to be excluded from the military under this new policy. Yet the discussion does not end here, as Defendants also argue they are entitled to deference becasue the new policy is a military decision. (Id. (citing, e.g., Rostker v. Goldberg, 453 U.S. 57, 67 (1981) ("Congress is [not] free to disregard the Constitution when it acts in the area of military affairs . . . but the tests and limitations to be applied may differ because of the military context"); Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.")).) This deferential review is most appropriate when the military acts with measure, and not "unthinkingly or reflexively." Rostker, 453 U.S. at 72.

In the Court's December Order, it noted "the only serious study and evaluation concerning the effect of transgender people in the armed forces led the military leaders to resoundingly conclude there was no justification for the ban." (December Order at 18.) Following the promulgation of this Order, Defendants conducted their own study and have submitted their own report. (DOD Report; Mattis Memorandum.) The DOD has concluded that "accommodating gender transition would create unacceptable risks to military readiness; undermine good order, discipline, and unit cohesion; and create disproportionate costs." (Motion at 15 (citing Mattis Memorandum at 2).) However, there are several reasons why the DOD Report and the new policy are not entitled to military deference.

First, the new policy and DOD Report represent after-the-fact justifications for the military ban on transgender service members. The relevant timeline is as follows: On July 26, 2017, President Trump announced that "*After consultation with my Generals and military experts*, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military." (President Trump's Twitter Proclamation (emphasis added).) With this statement, President Trump made two things clear: (1) he had already consulted the relevant military experts who presumably provided information on how to proceed; and (2) the decision had been made to ban transgender individuals from serving in the military. The Interim Guidance and 2017 Presidential Memorandum formalized the policy announced in the initial proclamation. Following a series of defeats in the courts, including specific rebukes for not having an adequate military record to justify the ban, the DOD now, in 2018, has conducted a study which attempts to rationalize a decision made on July 26, 2017—a decision which, purportedly, already followed such a consultation with military experts.

As noted above, the new policy is essentially the same as the first policy, which distinguishes this case from Trump v. Hawaii, 138 S. Ct. 2392 (June 26, 2018). There, the Supreme Court upheld President Trump's authority to restrict entry of nationals from seven countries "whose systems for managing and sharing information about their nationals the President deemed inadequate." Id. at 2404. The immigration policy at issue underwent two substantive revisions before being squarely presented to the Supreme Court. Id. at 2403–04. In that case, there were serious allegations of religious animus levied at President Trump due to pronouncements, on multiple occasions, that he sought to implement a "Muslim ban." Id. at 2435–38 (Sotomayor, J. dissenting) (noting that President Trump, as a candidate, was "calling for a total and complete shutdown of Muslims entering the United States," which progressed to a characterization of his policy as "a suspension of immigration from countries where there's a proven history of terrorism") (internal quotation marks omitted) . Notably, the final immigration policy before the Supreme Court did not concern a total Muslim ban as originally called for by then-Candidate Trump. Instead, the policy before the Supreme Court concerned seven specific countries, only five of which contained Muslim-majority populations. Id. at 2421. This, then, would cover only 8% of the world's Muslim population. Id. Additionally, three Muslim-majority countries were specifically removed from an earlier iteration of this immigration policy. Id. at 2422.

This case is distinguishable from Hawaii. Here, Trump specifically announced that he was banning transgender people from the military. This second iteration of the policy continues to do exactly that. The evolving limiting principles present in the Hawaii immigration policy revisions are absent here. Additionally, then-Candidate Trump specifically called for a Muslim ban at some point in the future. Here, President Trump announced the United States Government will not accept or allow transgender individuals, a decision which had followed military consultation. This language directly implies the necessary study has already concluded. For these reasons, Hawaii is inapposite to the present discussion.

Perhaps conceding the DOD Report represents an after-the-fact justification for the original transgender ban, Defendants argue Schlesinger v. Ballard, 419 U.S. 498 (1975), offers an

example of when the Supreme Court accepted such a justification. (Motion at 11.) There, the Court upheld a statutory scheme under which male naval officers who failed to be promoted were subject to a shorter mandatory discharge schedule than female officers under the same circumstances. Schlesinger, 419 U.S. at 499–505. In discussing the rationale behind this difference in treatment, the Supreme Court noted that "Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts . . . ." Id. at 577. Defendants note that the dissent criticized the majority for "conjur[ing] up a legislative purpose." Id. at 500 (Brennan, J. dissenting). Plaintiffs contend the Supreme Court looked to whether a sufficient justification for the law existed at the time of its enactment. (Opposition at 12.) Upon review of this case, it is unclear whether the language Defendants quote represents an acceptance of an after-the-fact justification. However, language in other Supreme Court cases is not so ambiguous. See United States v. Virginia, 518 U.S. 515, 531 (1996) (noting that the government must proffer a justification which is "exceedingly persuasive," "genuine," "not hypothesized," not "invented *post hoc* in response to litigation," and "must not rely on overbroad generalizations"); Sessions v. Morales-Santana, 137 S. Ct. 1678, 1696 (2017) ("It will not do to hypothesize or invent governmental purposes for gender classifications *post hoc* in response to litigation.") (internal quotations omitted).

For these reasons, the Court finds Defendants are not entitled to rational-basis review pursuant to the doctrine of military deference. Although Karnoski explicitly found that transgender discrimination should be subject to strict scrutiny, this Court has already found that intermediate scrutiny is appropriate. (December Order at 19 (citing Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000) ("both [the Gender Motivated Violence Act and Title VII] prohibit discrimination based on gender as well as sex. Indeed, for the purposes of these two acts, the terms 'sex' and 'gender' have become interchangeable." Additionally, sex-based discrimination can include discrimination based on someone failing "to conform to socially-constructed gender expectations."); Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); Olive v. Harrington, No. 115CV01276BAMPC, 2016 WL 4899177, at *5 (E.D. Cal. Sept. 14, 2016)).)

**2. Intermediate Scrutiny**

"A party seeking modification or dissolution of an injunction bears the burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction." Sharp v. Weston, 233 F.3d 1166, 1170 (9th Cir. 2000). Under intermediate scrutiny, Defendants must proffer a justification for this new policy which is substantially related to an exceedingly persuasive justification. Virginia, 518 U.S. at 533. Defendants state the transgender ban advances three separate interests: (1) promoting military readiness based on deployability; (2) promoting unit cohesion based on concerns about maintaining sex-based standards; and (3) lowering costs. (Motion at 14–23.) The Court previously considered and rejected Defendants' third argument. (December Order at 19 ("[Defendants'] reliance on cost is unavailing, as precedent shows the ease of cost and administration cannot not survive intermediate scrutiny even if it is significant. Frontiero v. Richardson, 411 U.S. 677, 688–91 (1973)").) Accordingly, the Court will focus on Defendants' first two arguments.

**i. Military Readiness**

Notably, Defendants continue to assert the operative question is whether a person suffers from gender dysphoria. (Motion at 15.) However, as discussed above, this focus misses the mark, as a diagnosis of gender dysphoria is neither necessary nor sufficient to be excluded from the military under this policy. Consequently, the Court is not persuaded by Defendants' fears of increased mental instability for those who suffer from gender dysphoria. (Id. at 14–16.) People with gender dysphoria are explicitly exempted from this new policy as long as they do not present as transgender. (Mattis Memorandum at 2–3.) Likewise, Defendants' concern that those who undergo gender transition surgery could negatively affect deployability is not substantially related to the actual effect of this policy. Defendants state the majority of current transgender service member treatment plans include a request for gender transition surgery. (Motion at 22–23.) However, the Mattis Memorandum bans all individuals who present as transgender from the military, not only those who have undergone gender transition surgery. (Mattis Memorandum at 2–3.) The decision to ban the accession of people who have undergone gender transition surgery is thus one part of the whole policy, and the purported rationalization for this decision, though contested by Plaintiffs, cannot be used to justify the whole policy even if assumed to be valid. In sum, the concerns voiced by Defendants are not substantially related to the effect of the policy, nor are these concerns exceedingly persuasive.

**ii. Unit Cohesion**

Defendants first argue that any transgender service member accommodation policy which "does not require full sex-reassignment surgery could 'erode reasonable expectations of privacy that are important in maintaining unit cohesion, as well as good order and discipline.'" (Motion at 18 (quoting DOD Report at 37).) Defendants premise their argument by stating the only feasible way for transgender service members to serve in the military would involve requiring them to submit to sex reassignment surgery. (Id. at 18–19.) Defendants then state that allowing service members "who have developed . . . 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 19 (citing DOD Report at 37) (internal quotations omitted).) Thus, Defendants argue the military faces two choices: create separate facilities for transgender service members, which is deemed "logistically impracticable," or be presented with "irreconcilable privacy demands." (Id. (citing DOD Report at 37).) Additionally, Defendants cite to a specific instance where a commanding officer faced dueling equal opportunity complaints—one from a transgender woman with male sex organs who wanted to use the female shower facilities, and one from the other female service members in the unit. (Id.)

In response, Plaintiffs cite to a litany of non-binding cases to support their contention that Courts across the country have held that allowing transgender individuals to live in accord with their identity does not threaten the privacy or safety interests of others. (Opposition at 7 (citing, e.g., Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034,

1046–47 (7th Cir. 2017); M.A.B. v. Bd. of Educ. of Talbot Cty., 286 F. Supp. 3d 704, 724–26 (D. Md. 2018)).) Defendants note that none of Plaintiffs' cited cases concern the military context. (Reply at 10.)

The military has often used concerns regarding unit cohesion to contest permitting open service by individuals in minority groups. In Log Cabin Republicans v. U.S., the court ruled that that the military's "don't ask, don't tell" policy ("DADT"), which banned open service by gay persons, violated the First Amendment of the Constitution. 716 F. Supp. 2d 884 (C.D. Cal. 2010).[1] The court made this determination despite the government's argument that DADT "is necessary to protect unit cohesion and heterosexual service members' privacy." Id. at 920. In finding DADT "is not necessary to protect the privacy of service [] members," id. at 923, the court relied upon testimony given by various officers in the military who attested there was no nexus between DADT and a loss of unit cohesion. Id. at 921–22; see also Witt v. U.S. Dep't of Air Force, 739 F. Supp. 2d 1308, 1315 (W.D. Wash. 2010) (finding that open gay service would not affect unit cohesion, and noting that the "men and women of the United States military have over the years demonstrated the ability to accept diverse peoples into their ranks and to treat them with the respect necessary to accomplish the mission, whatever that mission might be. That ability has persistently allowed the armed forces of the United States to be the most professional, dedicated and effective military in the world."). Notably, these concerns were also present in "past efforts to stop the integration of blacks and women into the armed forces; efforts bolstered by arguments that history and common sense proved wrong." Witt v. U.S. Dep't of Air Force, 444 F. Supp. 2d 1138, 1143 (W.D. Wash. 2006), aff'd in part, rev'd in part sub nom. Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008); see also Dahl v. Sec'y U.S. Navy, 830 F. Supp. 1319 (E.D. Cal. 1993) (citing a DOD report as stating "Most of the issues raised regarding the effect that admitting declared homosexuals would have on unit cohesion . . . are also reminiscent of the arguments advanced against the 1948 order to desegregate military establishments, and later the arguments that sought to minimize the role of women Armed Forces. Those who resist changing the traditional policies support their position with statements of the negative effects on discipline, morale, and other abstract values of military life.").

In the history of military service in this country, "the loss of unit cohesion" has been consistently weaponized against open service by a new minority group. Yet, at every turn, this assertion has been overcome by the military's steadfast ability to integrate these individuals into effective members of our armed forces. As with blacks, women, and gays, so now with transgender persons. The military has repeatedly proven its capacity to adapt and grow stronger specifically by the inclusion of these individuals. Therefore, the government cannot use "the loss of unit cohesion" as an excuse to prevent an otherwise qualified class of discrete and insular minorities from joining the armed forces. The Court finds this justification of the transgender ban is not exceedingly persuasive and cannot survive intermediate scrutiny.

[1] A subsequent opinion vacated this decision on the grounds that the original case had become moot due to Congress voluntarily enacting the Don't Ask, Don't Tell Repeal Act of 2010. Log Cabin Republicans v. U.S., 658 F.3d 1162 (9th Cir. 2011).

## IV. CONCLUSION

For the foregoing reasons, the Court DENIES Defendants' Motion to Dissolve the Preliminary Injunction.

**IT IS SO ORDERED.**