No. 18-677

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

JANE DOE 2, ET AL.

APPLICATION FOR A STAY IN THE ALTERNATIVE TO
A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA 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; the United States Department of the Army; the United States Department of the Air Force; Heather A. Wilson, in her official capacity as Secretary of the Air Force; the United States Coast Guard; the United States of America; the United States Department of the Navy; the Defense Health Agency; Richard V. Spencer, in his official capacity as Secretary of the Navy; Raquel C. Bono, in her official capacity as Director of the Defense Health Agency; Mark T. Esper, in his official capacity as Secretary of the Army; and Kirstjen M. Nielsen, in her official capacity as Secretary of Homeland Security.

Respondents (plaintiffs-appellees below) are Jane Doe 2, Jane Doe 3, Jane Doe 4, Jane Doe 5, Dylan Kohere, Regan V. Kibby, John Doe 1, Jane Doe 6, Jane Doe 7, and John Doe 2.

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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 District of Columbia (App., infra, 1a-2a, 3a-78a, 79a-80a, 91a, 92a-125a), pending the consideration and disposition of the government's appeal from that injunction to the United States Court of Appeals for the District of Columbia 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.

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[1] The petition for a writ of certiorari before judgment in this case (No. 18-677) 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.

The government seeks such a stay only if the Court denies certiorari before judgment. If the Court grants certiorari before 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 respondents, ten individuals who are currently serving in the military or seeking to join it -- namely, Jane Doe 2, Jane Doe 3, Jane Doe 4, Jane Doe

5, Jane Doe 6, Jane Doe 7, Kohere, Kibby, John Doe 1, and John Doe 2. Such a narrower injunction -- limited 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.

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[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. The district court denied a stay. App., infra, 126a-151a. The court of appeals has not ruled on the government's motion. Should the court of appeals rule while this Court is considering this application, the government will promptly notify this Court.

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

[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.

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," 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. App. 693.

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. 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. Id. at 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 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. App. 693; 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. App. 694; 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. App. 622-623. 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. App. 490-507; 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. App. 492-493.

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. App. 787.

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 -- individuals currently serving in the military or seeking to join it -- challenged the constitutionality of that memorandum in the federal district court in the District of Columbia. D. Ct. Doc. 9 (Aug. 31, 2017). Respondents alleged that the memorandum violated their equal-protection and due-process rights by "forbidding transgender people from joining or serving in the military." Id. at 15; see id. at 16-17.

2. In October 2017, the district court issued a nationwide preliminary injunction, requiring the military "to revert to the status quo with regard to accession and retention that existed before the issuance of" the President's 2017 memorandum. App., infra, 77a-78a; see id. at 80a. The court construed the President's 2017 memorandum as "unequivocally direct[ing] the military to prohibit indefinitely the accession of transgender individuals and to authorize their discharge." Id. at 4a. The court determined that "intermediate" scrutiny "should apply to the [Memorandum's] discrimination against transgender individuals." Id. at 66a. And the court concluded that the government's reasons for "exclud[ing] transgender service members" were unlikely to survive such scrutiny. Id. at 67a; see id. at 67a-71a. The court therefore held that respondents were likely to succeed in their equal-protection challenge. Id. at 60a-61a.

The government appealed, D. Ct. Doc. 66 (Nov. 21, 2017), and sought a partial stay so that the military would not have to implement the Carter accession standards before finishing its review of those standards, D. Ct. Doc. 73, at 1 (Dec. 6, 2017); 17-5267 Gov't C.A. Emergency Mot. for Administrative Stay and Partial Stay Pending Appeal 2 (Dec. 11, 2017). After both the district court and the court of appeals denied a stay, D. Ct. Doc. 75 (Dec. 11, 2017); 17-5267 C.A. Doc. 1710359 (Dec. 22, 2017), the government dismissed its appeal on the expectation that Secretary Mattis would soon be proposing a final policy that

would render any appeal moot, 17-5267 C.A. Doc. 1711445 (Jan. 4, 2018). The Carter accession standards took effect by court order on January 1, 2018.

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. 96, at 3-4 (Mar. 23, 2018); see D. Ct. Doc. 95 (Mar. 23, 2018). In light of that new policy, the government moved to dissolve the December 2017 injunction. D. Ct. Doc. 96, at 1-38.

In August 2018, the district court denied the government's motion. App., infra, 91a-125a. The court characterized the Mattis policy as a plan that merely "implements the President's 2017 directives that the military not allow transgender individuals to serve in the military." Id. at 115a. And it dismissed the development of the Mattis policy and accompanying report as "post hoc processes" that "appear to have been constrained by, and not truly independent from, the President's initial policy decisions." Id. at 124a. The court therefore concluded that "the circumstances of this case" had not "in fact genuinely changed in such a way that the * * * preliminary injunction is no longer warranted." Id. at 122a.[4]

[4] In a separate order, the district court dismissed the President as a party and dissolved the preliminary injunction "only as it applies to the President." App., infra, 83a. The court explained that "[s]ound separation-of-power[s] principles counsel

4. The government appealed and moved to expedite the briefing schedule, explaining that the district court's injunction "prevents the adoption of a * * * policy that the military, in its best professional judgment, has determined is necessary." 18-5257 Gov't Mot. to Expedite Briefing Schedule 3 (Sept. 10, 2018). The court of appeals granted the government's motion, 18-5257 C.A. Doc. 1750252 (Sept. 12, 2018), and heard oral argument on December 10, 2018, 18-5257 C.A. Doc. 1763459 (Dec. 10, 2018). As of the date of this filing, the court has not issued a decision.[5]

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. 183 (Nov. 21, 2018); 18-5257 C.A. Doc. 1762789 (Dec. 3, 2018). The district court denied a stay. App., infra, 126a-151a. The government's stay motion in the court of appeals remains pending. Should the court of appeals rule while this Court is considering this application, the government will promptly notify this Court.

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the Court against granting [injunctive or declaratory] relief against the President directly." Id. at 84a.

[5] On November 7, 2018, the government informed the court of appeals that, "in order to preserve th[is] Court's ability to hear and decide the case this Term," it intended to file a petition for a writ of certiorari before judgment on November 23 if the court of appeals had not issued its judgment by then. 18-5257 C.A. Doc. 1759087, at 2.

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.[6] 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 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)

[6] 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).

(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 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;[7]

[7] 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, 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.),

- 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;[8]
- conditions on federal grants to local governments to ensure that the Nation's immigration laws are faithfully executed;[9]
- exemptions to protect the sincerely held religious beliefs or moral convictions of certain entities whose

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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).

[8] 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).

[9] 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;[10]

- 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;[11]
- Executive Orders promoting efficiency and accountability in the federal civil service;[12]
- 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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[10] See California v. Health & Human Servs., 281 F. Supp. 3d 806 (N.D. Cal. 2017).

[11] 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 pending, No. 18-485 (2d Cir. filed 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).

[12] 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;[13] and

- a rule addressing unlawful mass migration at the southern border and the massive recent increase in meritless asylum claims.[14]

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

[14] 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).[15]

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

[15] 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 themselves. Even if

respondents -- namely, Jane Doe 2, Jane Doe 3, Jane Doe 4, Jane Doe 5, Jane Doe 6, Jane Doe 7, Kohere, Kibby, John Doe 1, and John Doe 2 -- 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.

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 18-5257 Gov't C.A. Br. 47-51, 18-5257 Gov't C.A. Reply Br. 21-22 -- 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 Jane Doe 2, Jane Doe 3, Jane Doe 4, Jane Doe 5, Jane Doe 6, Jane Doe 7, Kohere, Kibby, John Doe 1, and John Doe 2. 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 this case in the D.C. Circuit, the government would still need to prevail in the Ninth Circuit, which has before it two of these injunctions (in Karnoski v. Trump, No. 18-35347, and in Stockman v. Trump, No. 18-56539). 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 respondents themselves -- ten individuals who are currently serving in the military or seeking to join it. See pp. 27-28, 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.[16]

[16] 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 Stockman. 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

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 respondents in this case -- ten individuals who are currently serving in the military or seeking to join it.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

DECEMBER 2018

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stay factors to such an injunction and would therefore require the district court to similarly stay the injunction in Stone.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, *et al*.,
Plaintiffs
v.
DONALD J. TRUMP, *et al*.,
Defendants

Civil Action No. 17-1597 (CKK)

ORDER
(October 30, 2017)

For the reasons set forth in the accompanying Memorandum Opinion, it is, this 30th day of October, 2017, hereby

ORDERED that Defendants' [45] Motion to Dismiss is GRANTED-IN-PART and DENIED-IN-PART. The Court will grant Defendants' motion to dismiss Plaintiffs' claims to the extent they are based on the Sex Reassignment Surgery Directive, corresponding with section 2(b) of the Presidential Memorandum, as well as Plaintiffs' estoppel claim. Defendants' motion to dismiss is DENIED in all other respects. It is further

ORDERED that Plaintiffs' [13] Motion for Preliminary Injunction is GRANTED-IN-PART and DENIED-IN-PART. Plaintiffs' motion for preliminary injunction is DENIED with respect to the Sex Reassignment Surgery Directive. Plaintiffs' motion for preliminary injunction is GRANTED, however, in that the Court will preliminarily enjoin Defendants from enforcing the following directives of the Presidential Memorandum, referred to by the Court as the Accession and Retention Directives:

> I am directing the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have the negative effects discussed above.

> Presidential Memorandum § 1(b).
>
> The Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, shall . . . maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary that I find convincing . . . ."
>
> Presidential Memorandum § 2(a).

The effect of the Court's Order is to revert to the *status quo* with regard to accession and retention that existed before the issuance of the Presidential Memorandum—that is, the retention and accession policies established in the June 30, 2016 Directive-type Memorandum as modified by Secretary of Defense James Mattis on June 30, 2017.

In all other respects, the Presidential Memorandum is not enjoined. It is further

ORDERED that Plaintiffs are not required to pay a security deposit. Fed. R. Civ. P. 65(c). It is further

ORDERED that the parties shall file a Joint Status Report indicating how they propose to proceed in this matter by no later than November 10, 2017.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, *et al*.,
Plaintiffs
v.
DONALD J. TRUMP, *et al*.,
Defendants

Civil Action No. 17-1597 (CKK)

MEMORANDUM OPINION
(October 30, 2017)

On July 26, 2017, President Donald J. Trump issued a statement via Twitter announcing that "the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military." A formal Presidential Memorandum followed on August 25, 2017. Before the Presidential Memorandum, the Department of Defense had announced that openly transgender individuals would be allowed to enlist in the military, effective January 1, 2018, and had prohibited the discharge of service members based solely on their gender identities. The Presidential Memorandum reversed these policies. First, the Memorandum indefinitely extends a prohibition against transgender individuals entering the military, a process formally referred to as "accession" (the "Accession Directive"). Second, the Memorandum requires the military to authorize, by no later than March 23, 2018, the discharge of transgender service members (the "Retention Directive").

The Department of Defense is required to submit a plan implementing the directives of the Presidential Memorandum by February 21, 2018. On September 14, 2017, Secretary of Defense James Mattis promulgated Interim Guidance establishing Department of Defense policy toward transgender service members until the directives of the Presidential Memorandum take effect. Pursuant to the Presidential Memorandum and the Interim Guidance, the protections afforded to transgender service members against discharge lapse early next year.

Plaintiffs are current and aspiring service members who are transgender. Many have years of experience in the military. Some have decades. They have been deployed on active duty in Iraq and Afghanistan. They have and continue to serve with distinction. All fear that the directives of the Presidential Memorandum will have devastating impacts on their careers and their families. They have moved the Court to enjoin the directives of the Presidential Memorandum, believing that these directives violate the fundamental guarantees of due process afforded by the Fifth Amendment to the United States Constitution. Defendants have moved to dismiss this case, principally on the basis that the Court lacks jurisdiction. Although highly technical, these jurisdictional arguments reduce to a few simple points: the Presidential Memorandum has not effected a definitive change in military policy; rather, that policy is still subject to review; until that review is complete, transgender service members are protected; and any prospective injuries are too speculative to require judicial intervention.

These arguments, while perhaps compelling in the abstract, wither away under scrutiny. The Memorandum unequivocally directs the military to prohibit indefinitely the accession of transgender individuals and to authorize their discharge. This decision has already been made. These directives must be executed by a date certain, and there is no reason to believe that they will not be executed. Plaintiffs have established that they will be injured by these directives, due both to the inherent inequality they impose, and the risk of discharge and denial of accession that they engender. Further delay would only serve to harm the Plaintiffs. Given these circumstances, the Court is in a positon to preliminarily adjudicate the propriety of these directives, and it does so here.

The Court holds that Plaintiffs are likely to succeed on their Fifth Amendment claim. As a form of government action that classifies people based on their gender identity, and disfavors a

class of historically persecuted and politically powerless individuals, the President's directives are subject to a fairly searching form of scrutiny. Plaintiffs claim that the President's directives cannot survive such scrutiny because they are not genuinely based on legitimate concerns regarding military effectiveness or budget constraints, but are instead driven by a desire to express disapproval of transgender people generally. The Court finds that a number of factors—including the sheer breadth of the exclusion ordered by the directives, the unusual circumstances surrounding the President's announcement of them, the fact that the reasons given for them do not appear to be supported by any facts, and the recent rejection of those reasons by the military itself—strongly suggest that Plaintiffs' Fifth Amendment claim is meritorious.

Accordingly, following an exhaustive review of the record, the pleadings,[1] and the relevant authorities, the Court GRANTS-IN-PART and DENIES-IN-PART Plaintiffs' Motion

[1] The Court's consideration has focused on the following documents: Pls.' App. for Preliminary Injunction, ECF No. 13 ("Pls.' Mem."); Defs.' Mot. to Dismiss and Opp'n to Pls.' App. for Preliminary Injunction, ECF No. 45 ("Defs.' Mem."); Pls.' Opp'n to Defs.' Mot. to Dismiss and Reply in Support of App. for Preliminary Injunction, ECF No. 55 ("Pls.' Reply"); and Defs.' Reply in Support of Mot. to Dismiss, ECF No. 57 ("Defs.' Reply"). The Court has also considered the declarations attached to these pleadings, including: Decl. of Kevin M. Lamb, ECF No. 13-1 ("Lamb Decl."); Decl. of Brad R. Carson, ECF No. 13-3 ("Carson Decl."); Decl. of Deborah L. James, ECF No. 13-5 ("James Decl."); Decl. of Eric K. Fanning, ECF No. 13-7 ("Fanning Decl."); Decl. of Raymond E. Mabus, Jr., ECF No. 13-9 ("Mabus Decl."); Decl. of George R. Brown, MD, ECF No. 13-11 ("Brown Decl."); Decl. of Margaret C. Wilmoth, ECF No. 13-13 ("Wilmoth Decl."); Decl. of Regan V. Kibby, ECF No. 13-14 ("Kibby Decl."); Decl. of Dylan Kohere, ECF No. 13-15 ("Kohere Decl."); Decl. of Christopher R. Looney, ECF No. 40 ("Looney Decl."); Decl. of Robert B. Chadwick, ECF No. 45-2 ("Chadwick Decl."); Decl. of Robert O. Burns, ECF No. 45-3 ("Burns Decl."); Supp. Decl. of Raymond E. Mabus, Jr., ECF No. 51-1 ("Mabus Supp. Decl."); Supp. Decl. of Deborah L. James, ECF No. 51-2 ("James Supp. Decl."); Supp. Decl. of Eric K. Fanning, ECF No. 51-3 ("Fanning Supp. Decl."); Decl. of Mark J. Eitelberg, ECF No. 51-4 ("Eitelberg Decl."); Supp. Decl. of George R. Brown, MD, ECF No. 51-5 ("Brown Supp. Decl."); Decl. Pertaining to Jane Doe 1, ECF No. 56-1 ("Decl. re Jane Doe 1"); Decl. Pertaining to Jane Doe 2, ECF No. 56-2 ("Decl. re Jane Doe 2"); Decl. Pertaining to Jane Doe 3, ECF No. 56-3 ("Decl. re Jane Doe 3"); Decl. Pertaining to Jane Doe 4, ECF No. 56-4 ("Decl. re Jane Doe 4"); Decl. Pertaining to Jane Doe 5, ECF No. 56-5 ("Decl. re Jane Doe 5"); Decl. Pertaining to John Doe 1, ECF No. 56-6 ("Decl. re John Doe 1").

for Preliminary Injunction. Defendants shall be preliminarily enjoined from enforcing the Accession and Retention Directives, corresponding with sections 1(b) and 2(a) of the Presidential Memorandum, until further order of the Court or until this case is resolved. The effect of the Court's Order is to revert to the *status quo* with regard to accession and retention that existed before the issuance of the Presidential Memorandum—that is, the retention and accession policies established in a June 30, 2016 Directive-type Memorandum and later modified by Secretary of Defense James Mattis on June 30, 2017.

The Court also GRANTS-IN-PART and DENIES-IN-PART Defendants' Motion to Dismiss. The Court has jurisdiction over and reaches the merits of Plaintiffs' Fifth Amendment claim as it pertains to the Accession and Retention Directives. Plaintiffs have also challenged the Presidential Memorandum's prohibition against the expenditure of military resources on sex reassignment surgeries. Because no Plaintiff has established a likelihood of being impacted by that prohibition, the Court lacks jurisdiction to adjudicate the propriety of this directive. Finally, Plaintiffs have also claimed relief under a theory of estoppel. At this time, that claim will be dismissed without prejudice because the Amended Complaint lacks allegations of the sort of particularized representations, reliance, or government misconduct that could justify estoppel against the government. Plaintiffs may file a further amended complaint with respect to estoppel.

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

I. BACKGROUND

A. The Military's Policy Toward Transgender Service

1. Military Policy Prior to 2014

Accession

Prior to 2014, Department of Defense Instruction ("DODI") 6130.03 "contain[ed] a list of disqualifying physical and mental conditions that preclude[d] applicants from joining the military . . . ." Lamb Decl., Ex. B (Palm Center Report of the Transgender Service Commission), at 7. Disqualifying conditions included "defects of the genitalia including but not limited to change of sex," and "[c]urrent or history of psychosexual conditions, including but not limited to transsexualism, . . . transvestism, . . . and other paraphilias." *Id.*; *see also* Defs.' Mem. at 4 ("For decades, [disqualifying] conditions [under DODI 6130.03] have included 'transsexualism.'").

DODI 6130.03 also requires that the "Secretaries of the Military Departments and Commandant of the Coast Guard shall . . . [a]uthorize the waiver of the standards in individual cases for applicable reasons and ensure uniform waiver determinations." Lamb Decl., Ex. B, at 7. Service-specific implementing rules set forth the waiver process for each branch of the military. For example, under the applicable Army regulations, "[e]xaminees initially reported as medically unacceptable by reason of medical unfitness . . . may request a waiver of the medical fitness standards in accordance with the basic administrative directive governing the personnel action." Army Reg. 40-501 (Standards of Medical Fitness), ¶ 1-6(b); *see also* Lamb Decl., Ex. B, at 7. Although Defendants contend that transgender-related conditions were and remain subject to waiver, *see* Defs.' Mem. at 4, evidence in the record suggests otherwise. At least under the pertinent regulations as they existed prior to 2014, "because some conditions related to

transgender identity [were] grounds for discharge, and because recruiters [could not] waive a condition upon enlistment that would be disqualifying for retention, transgender individuals [could not] obtain medical waivers for entrance into the military." Lamb Decl., Ex. B, at 8. A March 2014 report was unable to find "any instances in which transgender-related conditions have been waived for accession[,]" *id.*, and Defendants have adduced no evidence of waivers ever being granted for this purpose.

Retention

Pertinent regulations prior to 2014 also appear to have provided military commanders with discretion to separate enlisted personnel for transgender-related conditions. In particular, DODI 1332.14, which "controls administrative separations for enlisted persons," provided that a "service member may be separated for the convenience of the government and at the discretion of a commander for 'other designated physical or mental conditions,' a category defined to include 'sexual gender and identity disorders.'" Lamb Decl., Ex. B, at 8. Furthermore, DODI 1332.38, "which contains rules for retiring or separating service members because of physical disability" provided that "service members with conditions 'not constituting a physical disability' . . . can be separated administratively from military service at a commander's discretion, without the opportunity to demonstrate medical fitness for duty or eligibility for disability compensation." *Id.* This category of conditions, under prior iterations of the instruction, included "Sexual Gender and Identity Disorders, including Sexual Dysfunctions and Paraphilias." *Id*.

2. August 2014 Regulation and July 28, 2015 Memorandum

At least with respect to retention, changes to this regulatory scheme were first enacted in August 2014, when "the Department of Defense issued a new regulation, DODI 1332.18,

Disability Evaluation System (DES)." Fanning Decl. ¶ 12. According to Former Secretary of the Army Eric K. Fanning and Former Secretary of the Air Force Deborah Lee James, the new regulation

> eliminated a DoD-wide list of conditions that would disqualify persons from retention in military service, including the categorical ban on open service by transgender persons. This new regulation instructed each branch of the Armed Forces to reassess whether disqualification based on these conditions, including the ban on service by transgender persons, was justified. *As of August 2014, there was no longer a DoD-wide position on whether transgender persons should be disqualified for retention.*

Id. (emphasis added); James Decl. ¶ 8.

Subsequently, on July 28, 2015, then-Secretary of Defense Ash Carter issued a memorandum to the secretaries of the military departments directing that "[e]ffective as of July 13, 2015, no Service member shall be involuntarily separated or denied reenlistment or continuation of active or reserve service on the basis of their gender identity, without the personal approval of the Under Secretary of Defense for Personnel and Readiness." Carson Decl., Ex. A. The memorandum further ordered the Undersecretary of Defense for Personnel and Readiness to "chair a working group composed of senior representatives from each of the Military Departments, Joint Staff, and relevant components from the Office of the Secretary of Defense to formulate policy options for the DoD regarding the military service of transgender Service members." *Id.*

3. The Working Group and the RAND Report

The working group convened by the Undersecretary ("the Working Group") consisted of senior uniformed officers and senior civilian officers from each department of the military. Carson Decl. ¶ 9. The Working Group sought to identify any possible issues related to open military service of transgender individuals. *Id.* ¶ 22. It considered a broad range of information

provided by senior military personnel, various types of experts, health insurance companies, civilian employers, transgender service members themselves, and representatives from the militaries of other nations who allow open service by transgender people. *Id.* ¶ 10. Finally, the Working Group commissioned the RAND Corporation's National Defense Research Institute to conduct a study on the impact of permitting transgender service members to serve openly. *Id.* ¶ 11. RAND is a nonprofit research institution that provides research and analysis to the Armed Services. *Id.*

The RAND Corporation subsequently issued a 91-page report entitled "Assessing the Implications of Allowing Transgender Personnel to Serve Openly." Carson Decl., Ex. B ("RAND Report"). The RAND Report found no evidence that allowing transgender individuals to serve would have any effect on "unit cohesion," and concluded that any related costs or impacts on readiness would be "exceedingly small," "marginal" or "negligible." *Id.* at xi–xii, 39–47, 69–70. The RAND Report also found that "[i]n no case" where foreign militaries have allowed transgender individuals to serve "was there any evidence of an effect on the operational effectiveness, operational readiness, or cohesion of the force." *Id.* at xiii.

Based on all of the information it collected, the Working Group unanimously concluded that transgender people should be allowed to serve openly in the military. Not only did the group conclude that allowing transgender people to serve would not significantly affect military readiness or costs, it found that *prohibiting* transgender people from serving undermines military effectiveness and readiness because it excludes qualified individuals on a basis that has no

relevance to one's fitness to serve, and creates unexpected vacancies requiring expensive and time-consuming recruitment and training of replacements.[2]

The Working Group communicated its conclusion to the Secretary of Defense, along with detailed recommendations for policies and procedures for open transgender service.

4. June 30, 2016 Directive-Type Memorandum 16-005

On June 30, 2016, the Secretary of Defense Ash Carter issued a Directive-type Memorandum ("DTM") establishing a policy, assigning responsibilities, and prescribing procedures for "the retention, accession, separation, in-service transition and medical coverage for transgender personnel serving in the Military Services." James Decl., Ex. B, at 1. The DTM took effect immediately. *Id*. In the DTM, the Secretary of Defense stated his conclusion that open service by transgender Americans was "consistent with military readiness and with strength

[2] *See generally* Carson Decl. ¶¶ 26–27 ("The Working Group . . . concluded that banning service by openly transgender persons would harm the military" and "unanimously resolved that transgender personnel should be permitted to serve openly in the military."); James Decl. ¶ 22 ("The Working Group did not find that permitting transgender soldiers to serve would impose any significant costs or have a negative impact on military effectiveness or readiness," but did find "that barring transgender people from military service causes significant harms to the military, including arbitrarily excluding potential qualified recruits based on a characteristic with no relevance to their ability to serve."); Fanning Decl. ¶¶ 25–26 ("At the conclusion of its discussion and analysis, the members of the Working Group did not identify any basis for a blanket prohibition on open military service of transgender people. Likewise, no one suggested to me that a bar on military service by transgender persons was necessary for any reason, including readiness or unit cohesion. The Working Group communicated its conclusions to the Secretary of Defense, including that permitting transgender people to serve openly in the United States military would not pose any significant costs or risks to readiness, unit cohesion, morale, or good order and discipline."); Mabus Decl. ¶ 21 (stating that "all members of the Working Group . . . expressed their agreement that transgender people should be permitted to serve openly in the United States Armed Forces" and that "President Trump's stated rationales for reversing the policy and banning military service by transgender people make no sense," "have no basis in fact and are refuted by the comprehensive analysis of relevant data and information that was carefully, thoroughly, and deliberately conducted by the Working Group"); Wilmoth Decl. ¶ 23 ("The Working Group concluded that there were no barriers that should prevent transgender service members from serving openly in the military.").

through diversity." *Id*. at 2. Accordingly, the DTM stated that it was the policy of the Department of Defense that "service in the United States military should be open to all who can meet the rigorous standards for military service and readiness" and that, "consistent with the policies and procedures set forth in [the DTM], transgender individuals shall be allowed to serve in the military." *Id*.

Retention

The DTM set forth procedures for the retention and accession of transgender military service members. It stated that "[e]ffective immediately, no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity," or on their "expressed intent to transition genders." James Decl., Ex. B, Attach. (Procedures), at 1. The DTM stated that "Transgender Service members will be subject to the same standards as any other Service member of the same gender; they may be separated, discharged, or denied reenlistment or continuation of service under existing processes and basis, but not due solely to their gender identity or an expressed intent to transition genders." *Id*.

Accession

With respect to accession procedures, the DTM stated that by no later than July 1, 2017, DODI 6130.03 would be updated to allow for the accession of (i) individuals with gender dysphoria, (ii) individuals that have received medical treatment for gender transition, and (iii) individuals that have undergone sex reassignment surgeries. *Id*. at 1–2. The policies and procedures generally provided that these conditions would be disqualifying *unless* the acceding service member was medically stable in their chosen gender for at least 18 months. *Id*. The DTM also provided that, effective October 1, 2016, the Department of Defense would

"implement a construct by which transgender Service members may transition gender while serving." *Id*. at 2.

Equal Opportunity

Finally, the DTM stated that it is "the Department's position, consistent with the U.S. Attorney General's opinion, that discrimination based on gender identity is a form of sex discrimination." *Id*. at 2.

5. June 30, 2016 Remarks by Secretary of Defense Ash Carter

On June 30, 2016, then-Secretary of Defense Ash Carter announced from the Pentagon briefing room that "we are ending the ban on transgender Americans in the United States military." Lamb Decl., Ex. F. He stated that "[e]ffective immediately, transgender Americans may serve openly, and they can no longer be discharged or otherwise separated from the military just for being transgender." *Id.* Secretary Carter also announced that he had "directed that the gender identity of an otherwise qualified individual will not bar them from military service, or from any accession program." *Id.* The Secretary stated that on June 30, 2017, after a year-long implementation period, "the military services will begin acceding transgender individuals who meet all standards—holding them to the same physical and mental fitness standards as everyone else who wants to join the military." *Id.*

Secretary Carter gave three reasons for the Department's decision. First, he stated that "the Defense Department and the military need to avail ourselves of all talent possible in order to remain what we are now—the finest fighting force the world has ever known." *Id*. He added that "[w]e invest hundreds of thousands of dollars to train and develop each individual, and we want to take the opportunity to retain people whose talent we've invested in and who have proven themselves." *Id*. Second, he stated that "the reality is that we have transgender service

members serving in uniform today," and they and their commanders need "clearer and more consistent guidance than is provided by current policies." *Id*. And third, he stated that, as a matter of principle, "Americans who want to serve and can meet our standards should be afforded the opportunity to come to do so." *Id.*

6. September 30, 2016 Publication of "Transgender Service in the U.S. Military: An Implementation Handbook" and Military Department Policies

Consistent with the directives of Secretary Carter in his July 2015 memorandum and June 2016 memorandum and policy announcement, Acting Undersecretary of Defense for Personnel and Readiness Peter Levine published an "implementation handbook" entitled "Transgender Service in the U.S. Military." Mabus Decl., Ex. F; *see also* James Decl., Ex. D. The document was "the product of broad collaboration among the Services" and was intended to serve as a "practical day-to-day guide" to assist Service members and commanders to understand and implement the policy of open transgender military service. James Decl., ¶ 34. The handbook is a lengthy, exhaustive document, providing an explanation of the basics of what it means to be transgender and to undergo gender transition; guidance on how transgender service members can request an in-service transition and communicate with their leadership about their transition process; and guidance for commanders interacting with transgender service members. It also includes extensive question-and-answer and hypothetical scenario sections, as well as a "roadmap" for gender transition for military personnel.

Individual implementing memoranda were subsequently issued by the branches of the Armed Forces. On November 4, 2016, the Secretary of the Navy issued SECNAV Instruction 1000.11, the stated purpose of which was to "establish Department of Navy . . . policy for the accession and service of transgender Sailors and Marines, to include the process for transgender Service Members to transition gender in-service." Mabus Decl., Ex. D, at 1. The memorandum

stated that "transgender individual shall be allowed to serve openly in the [Department of the Navy]." *Id*. at 2.

The Air Force issued a Policy Memorandum on October 6, 2016, which stated that "[i]t is Air Force policy that service in the United States Air Force should be open to all who can meet the rigorous standards for military service and readiness. Consistent with the policies set forth in this memorandum, transgender individuals shall be allowed to serve in the Air Force." James Decl., Ex. C.

The Army issued Directive 2016-30 (Army Policy on Military Service of Transgender Soldiers) on July 1, 2016. Fanning Decl., Ex. D. The Directive stated that

> it is Army policy to allow open service by transgender Soldiers. The Army is open to all who can meet the standards for military service and remains committed to treating all Soldiers with dignity and respect while ensuring good order and discipline. Transgender Soldiers will be subject to the same standards as any other Soldier of the same gender. An otherwise qualified Soldier shall not be involuntarily separated, discharged, or denied reenlistment or continuation of service solely on the basis of gender identity.

Id. at 1.

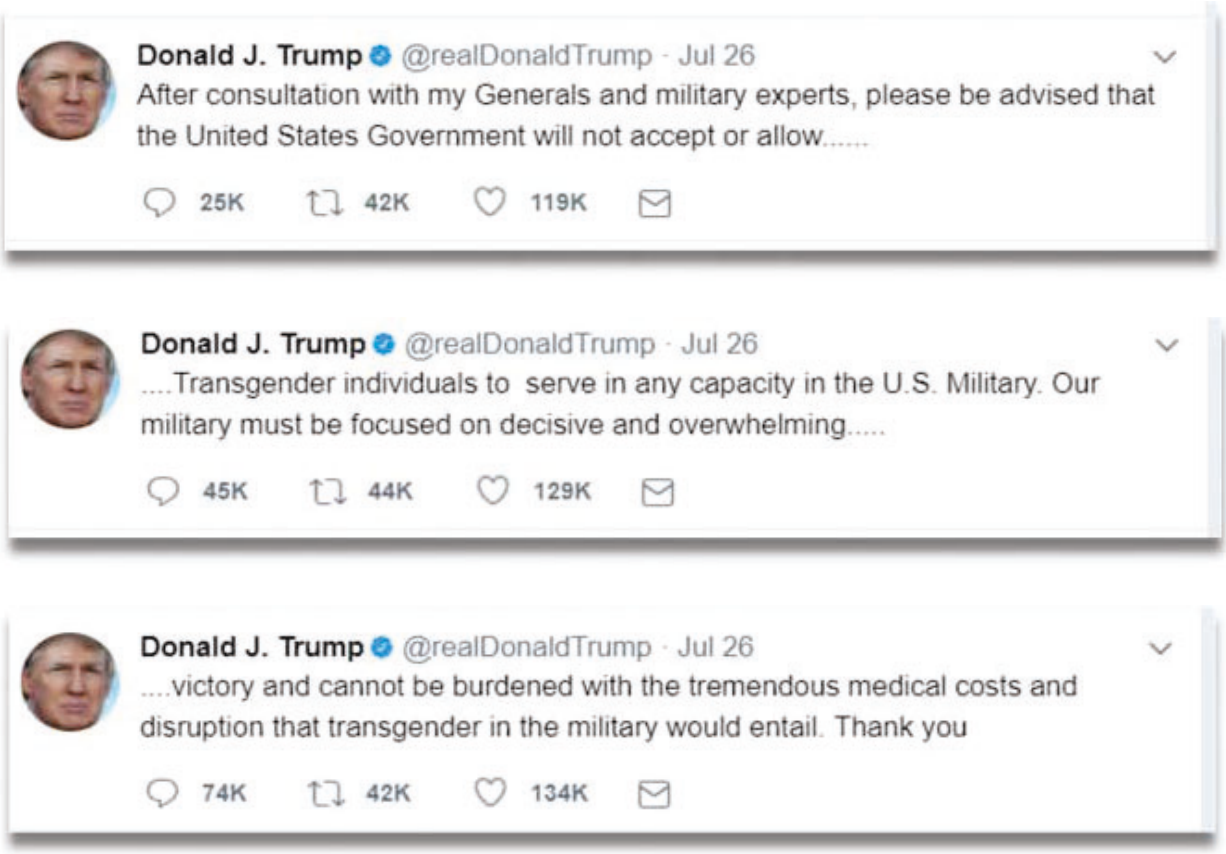
Army Directive 2016-35 was promulgated on October 7, 2016. Fanning Decl., Ex. E. It stated that "The Army allows transgender Soldiers to serve openly." *Id*. at 1.

7. June 30, 2017 Press Release by Secretary James Mattis

On June 30, 2017, Secretary of Defense James Mattis deferred acceding transgender applicants into the military until January 1, 2018, stating that the "services will review their accession plans and provide input on the impact to the readiness and lethality of our forces." Lamb Decl., Ex. C.

8. July 26, 2017 Statement by President Donald J. Trump

On July 26, 2017, President Donald J. Trump issued a statement via Twitter, in which he announced that[3]



[3] The full text reads: "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." Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 5:55 AM), https://twitter.com/realDonaldTrump/status/890193981585444864; Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 6:04 AM), https://twitter.com/realDonaldTrump/status/890196164313833472; Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 6:08 AM), https://twitter.com/realDonaldTrump/status/890197095151546369.

9. August 25, 2017 Presidential Memorandum

On August 25, 2017, President Trump issued a memorandum entitled "Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security." Lamb Decl., Ex. A (the "Presidential Memorandum"). The memorandum begins by stating that until "June 2016, the Department of Defense (DoD) and the Department of Homeland Security (DHS) (collectively, the Departments) generally prohibited openly transgender individuals from accession into the United States military and authorized the discharge of such individuals." Presidential Memorandum § 1(a). According to the memorandum, "[s]hortly before President Obama left office, . . . his Administration dismantled the Departments' established framework by permitting transgender individuals to serve openly in the military, authorizing the use of the Departments' resources to fund sex-reassignment surgical procedures, and permitting accession of such individuals after July 1, 2017." *Id*. The President stated that "the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources, and there remain meaningful concerns that further study is needed to ensure that continued implementation of last year's policy change would not have those negative effects." *Id*.

The memorandum has two operative sections, one general, and the other more specific. Section 1(b) directs "the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have the negative effects discussed above." *Id*. § 1(b). As already stated, the memorandum

defines the pre-June 2016 policy as one under which the military "generally prohibited openly transgender individuals from accession into the United States military and authorized the discharge of such individuals." *Id*. § 1(a). The directive set forth in section 1(b) takes effect on March 23, 2018. *Id*. § 3. The memorandum provides that the "Secretary of Defense, after consulting with the Secretary of Homeland Security, may advise [the President] at any time, in writing, that a change to this policy is warranted." *Id*. § 1(b).

Section 2 contains two specific directives to the Secretary of Defense and the Secretary of Homeland Security. First, section 2(a) directs the Secretaries to "maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary that [the President finds] convincing . . . ." *Id*. § 2(a). This section takes effect on January 1, 2018. *Id*.

Second, section 2(b) directs the Secretaries to "halt all use of DoD or DHS resources to fund sex reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex." *Id*. § 2(b). This section, like section 1(b), takes effect on March 23, 2018. *Id* § 3.

By February 21, 2018, the Secretaries must submit a plan to the President "for implementing both the general policy set forth in section 1(b) of this memorandum and the specific directives set forth in section 2 of this memorandum." *Id*. § 3. This implementation plan must "determine how to address transgender individuals currently serving in the United States military." *Id*. Until that determination is made—and it must be made as part of the implementation plan, which must be submitted by February 21, 2018—"no action may be taken against such individuals under the policy set forth in section 1(b) of this memorandum." *Id*.

That is, only after February 21, 2018, may the Secretaries take actions toward reverting to the pre-June 2016 policy, which by the terms of the memorandum is a policy under which the military "generally prohibited openly transgender individuals from accession into the United States military and authorized the discharge of such individuals." *Id*. § 1(a).

Retention Directive

In sum, by March 23, 2018, the Secretaries *are required* by the plain text of the President's directive to revert to a policy under which the military "authorized the discharge of [transgender] individuals." *Id*. §§ 1(a), 1(b), 3. The protections of the memorandum with respect to discharge and other adverse action expire on February 21, 2018. *Id*. § 3.

Accession Directive

With respect to accession, the memorandum indefinitely delays the implementation of the accession policy of the June 2016 DTM, which was previously set for implementation on January 1, 2018, and by March 23, 2018, requires the Secretaries to revert to a policy by which the military "generally prohibit[s] openly transgender individuals from accession . . . ." *Id*. §§ 1(a), 1(b), 2(a), 3.

10. August 29, 2017 Statement by Secretary Mattis

On August 29, 2017, Secretary Mattis issued a statement concerning the Presidential Memorandum. Lamb Decl., Ex. D. He wrote that "[t]he [Department of Defense] will carry out the president's policy direction, in consultation with the Department of Homeland Security," and that "[a]s directed," the Department of Defense will "develop a study and implementation plan, which will contain the steps that will promote military readiness, lethality, and unit cohesion, with due regard to budgetary constraints and consistent with applicable law." *Id.* The plan, Secretary Mattis wrote, "will address accessions of transgender individuals and transgender

individuals currently serving in the United States military." *Id.* Secretary Mattis stated that he would "establish a panel of experts serving within the Departments of Defense and Homeland Security to provide advice and recommendations on the implementation of the president's direction." *Id.* 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." *Id*. In the interim, "current policy with respect to currently serving members will remain in place." *Id.*

11. September 14, 2017 Interim Guidance

On September 14, 2017, Secretary Mattis issued interim guidance that took "effect immediately and will remain in effect until [he] promulgate[s] DoD's final policy in this matter." Defs.' Mem., ECF No. 45, Ex. 1 ("Interim Guidance"). The Interim Guidance states that "[n]ot later than February 21, 2018, [Secretary Mattis] will present the President with a plan to implement the policy and directives in the Presidential Memorandum." *Id*. at 1. The "implementation plan will establish the policy, standards and procedures for transgender individuals serving in the military." *Id*.

Accession

With respect to accession, the Interim Guidance provides that the procedures previously set forth in a 2010 policy instruction, "which generally prohibit the accession of transgender individuals into the Military Services, remain in effect . . . ." *Id*. at 2.

Medical Care and Treatment

With respect to medical care and treatment, the Interim Guidance provides that "[s]ervice members who receive a gender dysphoria diagnosis from a military medical provider will be provided treatment for the diagnosed medical condition," but that "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*.

Retention

With respect to the separation or retention of transgender service members, the Interim Guidance provides that "[a]n otherwise qualified transgender Service member whose term of service expires while this Interim Guidance remains in effect, *may*, at the Service member's request, be re-enlisted in service under existing procedures." *Id*. (emphasis in original).

Finally, the Interim Guidance states that "[a]s 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." *Id*.

B. The Plaintiffs

1. Jane Doe 1

Plaintiff Jane Doe 1 has served in the Coast Guard since 2003. Looney Decl., Ex. A ("Redacted Jane Doe 1 Decl."), ¶ 1. Jane Doe 1 is transgender. The Coast Guard has made a substantial investment in educating and training Jane Doe 1, and she has done her "best to be hardworking, faithful, and loyal to the Coast Guard." *Id*. ¶ 11. She is married and is the primary wage earner for her family. She and her spouse receive health insurance coverage, called TRICARE, based on her enlisted status. *Id*. ¶ 12. When she came to the realization of her transgender identity, Jane Doe 1, with her spouse's support, sought professional help. *Id*. ¶ 14. She paid for this help herself, fearing that she may be separated from the Coast Guard if she went through military health channels. *Id*. She was diagnosed with gender dysphoria and has

received medical treatment for this condition. *Id*. ¶ 15. However, because TRICARE does not provide comprehensive gender transition healthcare, following the issuance of the June 2016 DTM, she was required to obtain waivers from the Defense Health Agency to obtain treatment. Because this process often led to delays, Jane Doe 1 has continued to pay for her care herself, including surgical care. *Id*. ¶ 21.

Following the President's statement regarding transgender service members, issued via Twitter, Commandant of the Coast Guard Paul F. Zukunft stated, with respect to transgender service members, that "[w]e have made an investment in you and you have made an investment in the Coast Guard and I will not break faith." *Id*. ¶ 23.

According to Jane Doe 1, the Presidential Memorandum has disrupted her medical care, and has had "serious consequences for [her] financial future." *Id*. ¶¶ 29–30. For one, separation from the Coast Guard would mean loss of substantial pension benefits, and health insurance for her and her family. *Id*. ¶¶ 30–31. Separation also means the loss of "a central part of [her] identity." *Id*. ¶ 36. In her own words: "As much as the Coast Guard has invested in me, I have invested in the Coast Guard. I love serving, . . . I had expected to continue serving as a Coast Guard officer for many years." *Id*.

2. Jane Doe 2

Jane Doe 2 joined the Army National Guard in 2003, when she was 17. Looney Decl., Ex. B ("Redacted Jane Doe 2 Decl."), ¶ 3. She met her wife while serving, who soon became pregnant. Jane Doe 2 then "made the decision to go on active duty with the U.S. Army so [she] could obtain health care benefits to support [her] growing family." *Id*. ¶ 5. She now has three children. *Id*. While on active duty, she served in South Korea and was deployed to Kandahar in Afghanistan. *Id*. ¶ 7.

During active duty, Jane Doe 2 came out to her wife as transgender. *Id*. ¶ 9. She felt more connected to her wife and she stopped drinking. *Id*. After the Department of Defense promulgated new regulations in late 2015, she made a public post on Facebook stating that she was transgender. Redacted Jane Doe 2 Decl. ¶ 10. Her company commander was very supportive. *Id*. ¶ 11. She began to see an Army therapist, and following the June 2016 DTM, she obtained a formal gender dysphoria diagnosis which permitted her to receive transition treatment from military healthcare providers, and she began receiving hormone treatment. *Id*. ¶ 13.

Following the President's statement and the Presidential Memorandum, Jane Doe 2 believes that she has received an unfavorable work detail to keep her "separated from the rest of [her] unit because [she is] transgender and because of the President's ban, as [she] never had any problems with this kind of treatment in [her] old unit and [does] not know of any other reason [why] she would be treated this way." *Id*. ¶ 15. She also fears the loss of retirement benefits, which accrue following 20 years of service, and access to "health care services for [her] family on base." *Id*. ¶ 16. She has already accrued 12 to 13 years of service toward these benefits. *Id*. ¶¶ 16, 18. The directives of the Presidential Memorandum have "left [her] feeling excluded, and it hurts [her] that people like [her] are being singled out and told that [they] aren't good enough to serve our country based on a characteristic that has no relevance at all to our abilities or fitness to serve." *Id*. ¶ 19.

Jane Doe 2 "loves this country and [has] served it faithfully and well." *Id*. For her, to "be told that [she is] no longer worthy to serve is a terrible blow. It affects how [she sees herself] . . . ." *Id*. "All [she wants] is to be allowed to serve [her] country and to be evaluated based on [her] job performance rather than on [her] status as a transgender person." *Id*. ¶ 20.

3. Jane Doe 3

Jane Doe 3 serves in the Army. After completing her basic training, she was deployed to Afghanistan for six months. Looney Decl., Ex. C ("Redacted Jane Doe 3 Decl."), ¶ 4. She is currently scheduled to deploy again to Iraq, where she will be going as a team leader, with soldiers reporting to her. *Id*. ¶ 6.

Jane Doe 3 has received a gender dysphoria diagnosis from an Army therapist. *Id.* ¶ 7. Although she has developed a transition plan in coordination with medical professionals, she has not begun any of the treatment steps, which include surgery. *Id*. ¶ 9.

Before the President's statement regarding transgender individuals, Jane Doe 3 "had not come out to anyone in [her] chain of command." *Id*. ¶ 10. However, after the statement, she had a conversation with her company commander, believing that she would receive support based on the June 2016 DTM. *Id*. She told her company commander that she was worried that she would not be deployed, and that she was committed to being deployed. *Id*.

The commander was not supportive—expressing shock and surprise—but she has received support from her squad leader, the platoon sergeant, and another friend in her unit. *Id*. ¶ 11. Since that conversation, she has continued to prepare for deployment, with the understanding that she will not be able to begin her treatment until she returns. *Id*. ¶ 12. In her words, she "will not put [her] personal needs ahead of the needs of the mission and [her] fellow soldiers." *Id*.

Jane Doe 3 has "not told anyone else at [her] rank or below that [she] is transgender." *Id*. ¶ 15. As a result, she "was able to hear an unfiltered reaction to the President's announcement right after he tweeted it." *Id*. "Some made ugly remarks about transgender service members, while others remarked [that] people who kill transgender people should not be punished." *Id*.

According to Jane Doe 3, after "the tweets, people seemed emboldened to express hostility to transgender people." *Id*. ¶ 15.

4. Jane Doe 4

Jane Doe 4 serves in the Army National Guard, but was previously on active duty with the Army. After basic training, she served in South Korea, and subsequently served a tour in Iraq after the 9/11 terrorist attacks. Looney Decl., Ex. D ("Redacted Jane Doe 4 Decl."), ¶¶ 5–6. After she returned from Iraq, Jane Doe 4 enlisted in the Army National Guard, and then joined the Active Guard Reserve. *Id*. ¶ 7. In that capacity, she has been employed as a specialist by the Department of Defense. *Id*. ¶ 10.

Following the June 2016 DTM, Jane Doe 4 decided to come out as transgender to her chain of command. *Id*. ¶ 13. She first spoke to the senior non-commissioned officer of her unit, who said she supported her decision "100%." She then spoke with her commanding officer, a Major, "who acknowledged that he was not very knowledgeable about the experiences of transgender people, but told [her] that he and the rest of [her] unit would support and work with [her] through the process . . . ." *Id*. According to Jane Doe 4, the "change in policy allowing transgender soldiers to serve openly . . . changed [her] life in the military." *Id*. ¶ 14. Her "fellow soldiers in [her] unit and [her] senior leaders . . . told [her] that they . . . noticed how much happier [she was]." *Id.*

The President's statement regarding transgender service members has been "devastating" to her, making her feel "ashamed" and "deeply saddened that he was ordering the Army, which [she] had been a part of for so long and which [she] loved so much, to stop treating [her] with respect." *Id*. ¶ 15. She "went to work each day wondering whether [she] would be discharged,

not because of any problem with [her] job performance or [her] commitment to serve this country, but solely because of [her] gender identity." *Id*.

Jane Doe 4 reenlisted effective August 24, 2017, and has extended her commitment to the Army until February 2020. *See* Defs.' Mem. at 11 (citing Sealed Decl. relating to Jane Doe 4, ECF No. 56-4).

5. Jane Doe 5

"Jane Doe 5 has been an active duty member of the United States Air Force for nearly twenty years, serving multiple tours of duty abroad, including two in Iraq." Am. Compl., ECF No. 9, ¶ 30. After June 2016, she notified her superiors that she is transgender. *Id*. ¶ 31. Her "livelihood depends on her military service[,]" and "[s]eparation from the military w[ould] have devastating financial and emotional consequences for her." *Id*. ¶ 32.

6. John Doe 1

John Doe 1 serves in the Army. His family has "a proud history of serving in the Armed Forces." Looney Decl., Ex. E ("Redacted John Doe 1 Decl."), ¶ 3. His great grandfather served in Europe in World War II. *Id*. His father served in the Air Force and was awarded the Bronze Star for valor. His uncle was a United States Marine who was wounded and paralyzed by an improvised explosive during Operation Desert Storm. His aunt served in the military as well. *Id*. John Doe 1 has idolized military service since childhood. *Id*.

John Doe 1 entered college on a full academic scholarship. *Id*. ¶ 4. After graduating magna cum laude, he entered the Army Reserve Officers' Training Corps ("ROTC") program while pursuing a master's degree. *Id*. ¶ 5. His fellow cadets in the program knew that he was transgender and were supportive, and his superiors were generally supportive as well. *Id*. ¶ 6. He was ranked third in his ROTC class, and was allowed to wear a male dress uniform as part of

his duties for the ROTC Color Guard. *Id*. ¶ 6. While serving in the ROTC program, John Doe 1 also joined the National Guard. *Id*. ¶ 7. He met his future wife, with whom he has a two-year-old son. *Id*. ¶ 9. He graduated in the top 20% of his ROTC class. *Id*. ¶ 12.

Following the June 2016 DTM, John Doe 1 began training at the Basic Officer Leadership Course ("BOLC"), at which time he came out to his platoon instructors, who were very supportive and treated him as male despite his official gender designation. *Id*. ¶¶ 14–15. After the BOLC, John Doe 1 was stationed as the executive officer for his unit, performing administrative tasks on behalf of and reporting directly to his commanding officer. *Id*. ¶ 16. He serves as both the maintenance and supply officer for his unit. *Id*. He is also in charge of preparing his unit for deployment. *Id*. Until recently, John Doe 1 was preparing to deploy to the Middle East with his unit in mid-2018. *Id*; Am. Compl. ¶ 33.

During his first meeting with his commanding officer, John Doe 1 came out as transgender. Redacted John Doe 1 Decl. ¶ 17. He stressed that his "first priority was being a solider, and that in crafting an approved plan for medical treatment under the new policy, it was extremely important to [him] to make sure that [his] plan would not interfere with [his] duties." *Id*. Both his company and battalion commanders have been very supportive "beyond [his] greatest expectations." *Id*.

John Doe 1 has received an approved treatment plan, which includes a planned surgery. The surgery was "encouraged and supported by [his] command team at every level up to and including [his] Brigade Commander." *Id.* ¶ 18. His official gender designation has been changed to male. *Id*. ¶ 19. John Doe 1 is scheduled for transition-related surgery on January 4, 2018. Defs.' Mem. at 11 (citing Sealed Declaration relating to John Doe 1).

John Doe 1 has been "devastated by the President's cancellation of the policy [he] had relied upon to notify command of the fact that [he is] transgender and to take steps forward in treatment for gender transition." Redacted John Doe 1 Decl. ¶ 26. If he is discharged, he fears serious financial and medical consequences for him and his family. *Id.* ¶¶ 27–28.

7. Regan Kibby

Plaintiff Regan Kibby is a 19-year-old midshipman at the United States Naval Academy. Kibby Decl. ¶ 1. Kibby's father served in the Navy, and Kibby has wanted to follow in his footsteps from an early age. *Id.* ¶¶ 2–3. He spent his summers in high school attending seminars at military academies. *Id.* ¶ 5. Despite being accepted with full scholarships to other schools, Kibby immediately decided to enroll at the Naval Academy when he was accepted. *Id.* ¶¶ 7–8. He has now successfully completed his first two years of school and hopes to become a Surface Warfare Officer in the Navy after graduation. *Id.* ¶ 9.

Kibby is transgender. *Id.* ¶ 1. After Secretary of Defense Carter announced that transgender people could not be separated on the basis of their gender identity during his first year at the Naval Academy, Kibby began to come out. *Id.* ¶¶ 13–14. Kibby's Company Officer was very accepting and supportive, and put Kibby in contact with the Brigade Medical Officer to begin the process of preparing a medical treatment plan. *Id.* ¶¶ 16–19. The first step was to receive an official diagnosis, which Kibby did. *Id.* ¶ 20.

Working with the Brigade Medical Officer, Kibby determined that in order to comply with the 18 month stability requirement of the recently announced accession policy for transgender service members, he would have to take a year off from the Naval Academy to ensure that he had completed his transition plan prior to graduating and acceding. *Id.* ¶ 24. His Commandant and the Superintendent officially approved Kibby's medical transition plan and his

request for a year-long medical leave of absence. *Id.* ¶ 26. Kibby is now on medical leave undergoing his medical transition and plans to return to the Academy in the fall of 2018. *Id.* ¶ 28.

When Plaintiff Kibby saw the President's Tweet he "was devastated" and felt that "[t]he entire future [he] had been planning for [himself] was crumbling around [him]." *Id.* ¶ 31. When Kibby came out, he was relying on the recent pronouncements by the Secretary of Defense and the Navy that he would be able to enlist despite being transgender. *Id.* ¶ 33. He is now living in a state of uncertainty and great distress because if the Presidential Memorandum is allowed to stand, he will never be able to serve in the Armed Forces—something he has strived for since he was a child. *Id.* ¶¶ 33–34.

8. Dylan Kohere

Plaintiff Dylan Kohere is an 18-year-old student and member of the Army ROTC at the University of New Haven. Kohere Decl. ¶ 1. Both of Dylan's grandfathers served in the military, and Dylan has wanted to serve since he was a young child. *Id.* ¶ 2. He entered the ROTC program to obtain the career opportunities that come with being a commissioned officer. *Id.* ¶ 2.

Dylan is transgender, and has come out as such to his Sergeant. *Id.* ¶ 9. He has started to work with medical professionals to begin a treatment plan for his transition. *Id.* ¶ 10. When the President declared on Twitter that transgender service members would no longer be allowed to serve in the military in any capacity, Dylan felt that the plan he had made for his life had been "thrown out the window." *Id.* ¶¶ 12–13. He had come out as transgender in the ROTC in reliance on the military's announcement that transgender people could serve openly. *Id.* ¶¶ 11, 15. He feels disheartened that if the Presidential Memorandum remains in force, he will "be

denied an opportunity to serve based on something that has nothing to do with [his] ability or performance." *Id.* ¶ 15. If he is prevented from serving or completing ROTC because of his transgender status, he will lose educational and career opportunities, as well as the opportunity to apply for an ROTC scholarship. *Id.* ¶ 18.[4]

II. LEGAL STANDARDS

A. Motion to Dismiss for Lack of Jurisdiction

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

[4] Plaintiffs' Motion for Leave to File Declarations Under Seal, ECF No. 51, is GRANTED for the reasons set forth in the Court's prior Order regarding sealing.

B. Motion to Dismiss for Failure to State a Claim

Under Rule 12(b)(6), a party may move to dismiss a pleading on the grounds that it "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Rather, a complaint, or counterclaim, must contain sufficient factual allegations that, if accepted as true, "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

C. Motion for Preliminary Injunction

Preliminary injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). A plaintiff seeking a preliminary injunction "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) (quoting *Sherley*, 644 F.3d at 392 (quoting *Winter*, 555 U.S. at 20) (alteration in original; quotation marks omitted)). When seeking such relief, "'the movant has the burden to show that all four factors, taken together, weigh in favor of the injunction.'" *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014) (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009)). "The four factors have typically been evaluated on a 'sliding scale.'" *Davis*, 571 F.3d at 1291 (citation

omitted). Under this sliding-scale framework, "[i]f the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Id.* at 1291–92.[5]

III. DISCUSSION

The Court's Opinion will be divided into three parts. The first part of the Opinion assesses the Court's jurisdiction and addresses Defendants' arguments that Plaintiffs lack standing and that their claims are not ripe. The second part of the Opinion dismisses Plaintiffs' estoppel cause of action for failure to state a claim. Finally, in the third part of the Opinion, the Court addresses Plaintiffs' motion for preliminary injunction.

A. Subject Matter Jurisdiction

Article III of the Constitution limits the jurisdiction of this Court to the adjudication of "Cases" and "Controversies." U.S. Const., Art. III, § 2. "In an attempt to give meaning to Article III's case-or-controversy requirement, the courts have developed a series of principles termed 'justiciability doctrines,' among which are standing [and] ripeness." *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (citing *Allen v. Wright*, 468 U.S. 737, 750 (1984)). Defendants challenge the Court's jurisdiction on the basis of standing and ripeness.

[5] The Court notes that it is not clear whether this circuit's sliding-scale approach to assessing the four preliminary injunction factors survives the Supreme Court's decision in *Winter*. *See Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 105 F. Supp. 3d 108, 112 (D.D.C. 2015). Several judges on the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") have "read *Winter* at least to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.'" *Sherley*, 644 F.3d at 393 (quoting *Davis*, 571 F.3d at 1296 (concurring opinion)). However, the D.C. Circuit has yet to hold definitively that *Winter* has displaced the sliding-scale analysis. *See id.*; *see also Save Jobs USA*, 105 F. Supp. 3d at 112. In any event, this Court need not resolve the viability of the sliding-scale approach today, as it finds that each of the preliminary injunctive factors favors awarding relief on the pending motion.

Plaintiffs bear the burden of establishing jurisdiction, and each "element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) ("*SBA List*") (internal quotation marks omitted). On a motion for preliminary injunction, the plaintiff "must show a substantial likelihood of standing[,]" while on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), the plaintiff must merely "state a plausible claim that they have suffered an injury in fact fairly traceable to the actions of the defendant that is likely to be redressed by a favorable decision on the merits." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) (internal quotation marks and alterations omitted). Although Defendants have pressed their jurisdictional arguments in a motion to dismiss, the Court also has an independent duty to assess its jurisdiction for purposes of Plaintiffs' pending motion for preliminary injunction. Consequently, the Court proceeds by applying the higher burden necessitated by a motion for preliminary injunction.

For the reasons stated below, the Court concludes that it has jurisdiction to adjudicate the propriety of the directives of the Presidential Memorandum with respect to the accession and retention of transgender individuals for military service, which corresponds with sections 1(b) and 2(a) of the Presidential Memorandum (*i.e.*, the Accession and Retention Directives). The Court does not have jurisdiction over section 2(b), which prohibits the use of military resources to fund sex reassignment surgical procedures, because no Plaintiff has demonstrated that they are substantially likely to be impacted by this directive (the "Sex Reassignment Surgery Directive").

1. Standing

Standing is an element of the Court's subject-matter jurisdiction, and requires, in essence,

that a plaintiff have "a personal stake in the outcome of the controversy . . . ." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). A plaintiff cannot be a mere bystander or interested third-party, or a self-appointed representative of the public interest; he or she must show that the defendant's conduct has affected them in a "personal and individual way." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *SBA List*, 134 S. Ct. at 2341–42 (internal quotation marks omitted). Consequently, the standing analysis is "especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

The familiar requirements of Article III standing are:

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

Bennett v. Spear, 520 U.S. 154, 167 (1997) (citing *Lujan*, 504 U.S. at 560–61); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

The parties disagree only over the first element of standing: injury in fact. For the reasons stated below, Plaintiffs have carried their burden of demonstrating a substantial likelihood of standing on the basis of at least two distinct injuries. *First*, Plaintiffs are subject to a competitive barrier that violates equal protection. *Second*, they are subject to a substantial risk

of being denied accession, or being discharged from the military, due to their transgender status. Furthermore, Plaintiffs have demonstrated satisfactorily that both of these injuries are caused by the directives of the Presidential Memorandum, and that they are redressable by this Court.

a. The Import of the Presidential Memorandum

Before turning to the legal basis of the two injuries that support Plaintiffs' standing, the Court first addresses the crux of Defendants' arguments regarding standing, and indeed, this Court's subject-matter jurisdiction more generally.

According to Defendants, the Court lacks subject-matter jurisdiction with respect to the directives of the Presidential Memorandum because Plaintiffs have merely "brought a constitutional challenge to the President's policy directive to conduct further study before the military changes its longstanding policies regarding service by transgender individuals." Defs.' Mem. at 15. According to Defendants, Plaintiffs "challenge a notional policy regarding military service by transgender individuals, but as they concede, that policy is currently being studied and has not been implemented or applied to anyone, let alone Plaintiffs." Defs.' Reply at 1. Defendants also highlight the protections afforded by the Interim Guidance: "Secretary of Defense Mattis has put in place Interim Guidance that, by its terms, maintains the status quo for both current service members and those who seek to accede into the military." *Id*. In Defendants' view, the Court is being asked "to prejudge the constitutionality of a future Government policy regarding military service by transgender individuals and issue the extraordinary relief of a worldwide preliminary injunction." Defs.' Mem. at 1. They further contend that "it is unclear whether those currently serving members will be affected by the future policy regarding service by transgender individuals once it is finalized and implemented." *Id*. at 2.

According to Defendants, the President has only "directed the Secretary of Defense to determine how to address transgender individuals currently serving in the military and that *no action* be taken against such individuals until *after a policy review is completed*." *Id*. at 1 (emphasis in original). In their words: "Secretary Mattis's Memorandum is unambiguous: The Interim Guidance is the operative policy and will remain so until he promulgates DoD's final policy regarding service by transgender individuals." Defs.' Reply at 3. "The Interim Guidance is equally clear: Transgender service members, including the service member Plaintiffs, continue to serve fully in the military." *Id*. With respect to accession, Defendants contend that the operative policy is not a "ban" because transgender individuals are "subject to the normal waiver process." *Id*. (internal quotation marks omitted). In sum, Defendants argue that Plaintiffs disregard the actual policy regarding transgender service members, and instead rely "on a hypothetical future policy on transgender military service." *Id*.

Ultimately, all of these contentions can be summarized into a few overarching points: 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. And while accession by transgender individuals is not permitted, they may obtain waivers. In the Court's view, the government's jurisdictional arguments are a red herring.

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. Finally, to the extent there is ambiguity about the meaning of the Presidential Memorandum, the best guidance is the President's own statements regarding his intentions with respect to service by transgender individuals. To recount: On July 26, 2017, the President issued a statement announcing that the "United States government will not accept or allow transgender individuals to serve in any capacity in the U.S. military." On August 25, 2017, the President issued the Presidential Memorandum. There, the President states that until "June 2016, the [military] generally prohibited openly transgender individuals from accession into the United States military and authorized the discharge of such individuals." Finding subsequent changes to that policy unjustified, in section 1(b), the President directs the military "to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 . . . ." Accordingly, the military has been directed by section 1(b) to return to a policy under which: (i) transgender individuals are generally prohibited from accession; and (ii) the military is authorized to discharge individuals who are transgender.

This change in policy must occur by March 23, 2018, except that the prohibition on accession is extended indefinitely as of January 1, 2018. Likewise, as of March 23, 2018, the military is expressly prohibited from funding sex reassignment surgeries, except as necessary to protect the health of an already transitioning individual. The Memorandum provides that "[a]s part of the implementation plan, the Secretary of Defense . . . shall determine how to address transgender individuals currently serving in the United States military." "Until the Secretary has made that determination, no action may be taken against such individuals under the policy set

forth in section 1(b)"—that is, the directive that requires a return to the policy under which transgender individuals could not accede, and could be discharged. As these two clauses make clear, transgender individuals are immunized only until the Secretary of Defense makes the "determination"; the "determination" must be made "as part of the implementation plan"; and the "implementation plan" must be submitted to the President by February 21, 2018. This means that the "determination" must be made by February 21, 2018, and because the protections afforded to transgender individuals last only until the "determination" is made, those protections necessarily lapse by February 21, 2018, unless the "determination" is made earlier. Consequently, as of January 1, 2018, transgender individuals are prohibited from acceding to the military "until such time [that the President receives] a recommendation to the contrary that [he] find[s] convincing;" and as of March 23, 2018, the military must authorize the discharge of transgender service members. The protections afforded to these individuals by the terms of the Presidential Memorandum lapse, at the latest, by February 21, 2018.

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.

Similarly, the Interim Guidance provides that "[n]ot later than February 21, 2018, [Secretary Mattis] will present the President with a plan to implement the policy and directives in the Presidential Memorandum[,]" and that the "implementation plan will establish the policy, standards and procedures for transgender individuals serving in the military." True, the exact details of the plan to carry out the directives are unknown. But what is known, and what is the bedrock of Plaintiffs' constitutional challenge, is that the implementation plan must prohibit transgender accession and authorize the discharge of transgender service members. Otherwise, the plan would be out of compliance with the requirements of the Presidential Memorandum, and the Court shall not presume the military to be unfaithful to the orders of the President. Consequently, while the Court cannot presently adjudicate the merits of the yet-undecided details of how the directives will be carried out, it can adjudicate the constitutionality of the directives themselves, which are definite, and *must* be implemented by the military.

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." Accordingly, for purposes of its standing analysis, the Court concludes that there is a substantial likelihood that transgender individuals will be indefinitely prevented from acceding to the military as of January 1, 2018, and that the military shall authorize the discharge of current service members who are transgender as of March 23, 2018.

b. Equal Protection Injury

i. Relevant Case Law

The primary injury alleged by Plaintiffs, and which forms the basis of the Court's decision on the merits, is that the directives of the Presidential Memorandum violate the guarantee of equal protection afforded by the Due Process Clause of the Fifth Amendment. For purposes of the standing analysis, the Court assumes *arguendo* that these directives are, in fact, violative of equal protection. *Schnitzler v. United States*, 761 F.3d 33, 40 (D.C. Cir. 2014) ("[T]he Supreme Court has made clear that when considering whether a plaintiff has Article III

standing, a federal court must assume arguendo the merits of his or her legal claim." (internal quotation marks omitted)).

The Supreme Court and this Circuit have made clear that the "injury in fact element of standing in an equal protection case is the denial of equal treatment resulting from the imposition of the barrier." *Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44, 51 (D.C. Cir. 2016) (citing *Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) (Thomas, J.)), cert. denied, 137 S. Ct. 1069 (2017). In *City of Jacksonville*, the Supreme Court assessed a city ordinance that "required that 10% of the amount spent on city contracts be set aside each fiscal year for so-called 'Minority Business Enterprises' (MBE's)." 508 U.S. at 658. "Once projects were earmarked for MBE bidding by the city's chief purchasing officer, they were deemed reserved for minority business enterprises only." *Id*. (internal quotation marks omitted). Plaintiff was an association of individuals and firms in the construction industry who did business in the city and most of whom did not qualify under the ordinance. *Id*. at 659. The members of the association alleged that they "regularly bid on and perform[ed] construction work for the City of Jacksonville," and that they "would have bid on designated set aside contracts but for the restrictions imposed by the ordinance." *Id*. (internal quotations marks and alterations omitted). In assessing the members' standing to challenge the ordinance under these circumstances, the Court held that:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. . . . And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss

> of a contract. . . . To establish standing, therefore, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is *able and ready* to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.

Id. at 666 (emphasis added) (citations omitted).

In *Adarand*, the Court assessed a requirement that federal agency contracts for general contractors contain a clause providing for additional compensation if the general contractor hired subcontractors "certified as small businesses controlled by socially and economically disadvantaged individuals," where socially and economically disadvantaged individuals were deemed to include "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities . . . ." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 205 (1995) (internal quotation marks omitted). Plaintiff submitted a lower bid, but lost to a competing subcontractor that qualified the general contractor for additional compensation under the clause. *Id*. In assessing Plaintiff's standing for purposes of prospective injunctive relief—that is, with respect to *future* injuries—the Court held that the "concrete and particularized" element of injury in fact was readily satisfied by Plaintiff's "claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws . . . ." *Id*. at 211. The Court was less certain, however, "that the future use of subcontractor compensation clauses will cause [the plaintiff] 'imminent' injury[,]" and consequently required a "showing that sometime in the relatively near future [the plaintiff] will bid on another Government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors." *Id*. The plaintiff made a sufficient showing by demonstrating that it was "very likely" to bid on an affected contract at least once per year, and that in so bidding, the plaintiff often competed against small disadvantaged businesses. *Id*. at 212.

In *Gratz*, the plaintiffs, two students who were denied entrance to the University of Michigan, brought suit challenging the University's consideration of race as part of its undergraduate admissions process as violative of equal protection. *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003) (Rehnquist, C.J.). The Court considered whether one of the plaintiffs had standing to seek prospective injunctive relief given his statement that he would not apply for admission as a transfer student until the race-based admissions policy was terminated. *Id*. at 261. Relying on *City of Jacksonville*, the Court found that the plaintiff had standing because "the University had denied him the opportunity to compete for admission on an equal basis." *Id*. at 262. In particular, "[a]fter being denied admission, [the plaintiff] demonstrated that he was 'able and ready' to apply as a transfer student should the University cease to use race in undergraduate admissions. He therefore [had] standing to seek prospective relief with respect to the University's continued use of race in undergraduate admissions." *Id*.

More recently, in *Parents Involved*, the Supreme Court assessed the use by several school districts of "student assignment plans that rely upon race to determine which public schools certain children may attend." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709–10 (2007) (Roberts, C.J.). "In Seattle, this racial classification [was] used to allocate slots in oversubscribed high schools." *Id*. at 710. Consequently, Seattle argued that the members of the plaintiff organization would "only be affected if their children seek to enroll in a Seattle public high school and choose an oversubscribed school that is integration positive[,]" which in Seattle's view was "too speculative a harm to maintain standing." *Id*. at 718. The Court disagreed, finding that plaintiff had standing because its members had "children in the district's elementary, middle, and high schools[,]" and injunctive relief was sought on behalf of members whose children "may be denied admission to the high schools of their choice when

they apply for those schools in the future . . . ." *Id*. (internal quotation marks omitted). The injury was not eliminated merely because it was "possible that children of group members will not be denied admission to a school based on their race—because they choose an undersubscribed school or an oversubscribed school in which their race is an advantage . . . ." *Id*.

This line of authority was summarized by the D.C. Circuit in *Worth v. Jackson*, 451 F.3d 854 (D.C. Cir. 2006) (Tatel, J.). There, the plaintiff challenged written and unwritten employment policies by the Department of Housing and Urban Development ("HUD") that allegedly discriminated on the basis of gender and race, and claimed standing for purposes of prospective injunctive relief by alleging that he intended "to apply for new positions and promotions at HUD on a regular basis in the future," and that HUD would "violate his equal protection and civil rights" when he did so. *Id*. at 858 (internal quotation marks and alteration omitted). Reviewing *City of Jacksonville* and *Adarand*, the D.C. Circuit found no reason to distinguish "between contractors and job applicants[,]" and held that the source of the challenged policy—"whether a statute, a regulation, or agency guidelines"—did not control the standing inquiry. *Id*. at 859. Rather, according to the Circuit, "*Adarand* rests on the common-sense notion that when a contractor depends for its livelihood on competing for government contracts, and when the government has committed itself to doling out those contracts on a race-conscious basis, it stands to reason that the contractor will soon be competing on an uneven playing field." *Id*. at 859. "Under *Adarand*, then, the relevant consideration is whether the agency is sufficiently committed to a particular race-conscious policy that the plaintiff will likely face a career impediment." *Id*.

ii. Application to Plaintiffs

For purposes of the standing analysis, Plaintiffs fall into two groups: Named Plaintiffs—who have yet to accede—and the Pseudonym Plaintiffs—who are currently in the military and fear that they will be discharged. These two groups challenge the two fundamental directives of the Presidential Memorandum as unconstitutional: a reversion of accession and retention policy with respect to transgender individuals (i.e., the Accession and Retention Directives). For the following reasons, the Court concludes that: (i) the Accession and Retention Directives of the Presidential Memorandum impose a competitive barrier that the Named and Pseudonym Plaintiffs are substantially likely to encounter, and (ii) that this barrier constitutes an injury in fact sufficient to imbue the Named and Pseudonym Plaintiffs with standing to challenge the propriety of the Accession and Retention Directives of the Presidential Memorandum.

The Accession Directive

Plaintiff Kibby—one of the Named Plaintiffs—has demonstrated a substantial likelihood that he is able and ready to accede to the military in the relatively near future, and consequently, that he is in a position to challenge the Accession Directive to the extent it imposes a barrier on him from acceding based on his transgender status.

Plaintiff Kibby was inducted into the United States Naval Academy in Annapolis, Maryland as a midshipman on July 1, 2017, and has completed his first two years of education, out of four. Kibby Decl. ¶ 1. "[A]ll midshipmen are members of the military, [but] are still considered part of an accessions program since [they] do not receive [their] commission until graduation." *Id*. ¶ 22. After graduation, Plaintiff Kibby hopes "to perform [his] service as a Surface Warfare Officer aboard a Navy ship." *Id*. ¶ 9. Plaintiff Kibby informed his chain of command that he was transgender in early 2016. *Id*. ¶ 16. At the end of his last school year, in

May 2017, the Commandant and Superintendent "officially approved [Plaintiff's] medical transition plan and the request for a year-long medical leave of absence." *Id*. ¶ 26. The transition plan was created in coordination with the Brigade Medical Officer and the Transgender Care Team at Portsmouth's Naval Medical Center." *Id*. ¶¶ 24–25. The medical year of absence was taken to comply with the requirement under the June 2016 DTM that acceding transgender service members be fully transitioned to their chosen gender for at least 18 months prior to accession. *Id*. ¶ 24. Defendants represent that "Plaintiff Kibby currently is on medical leave and faces no impediment to returning to the Naval Academy when that leave ends in May 2018." Defs.' Mem. at 16. The Commandant of Midshipmen at the Naval Academy, Robert B. Chadwick, has represented that Plaintiff Kibby "was afforded much support from the Brigade Medical Unit, his chain of command, and [the Commandant's] legal advisors in developing his [transition] plan and submitting his request [for medical leave]." Chadwick Decl. ¶ 4. According to the Commandant, the "purpose of the [medical] leave is to allow MIDN Kibby to undergo hormone treatment, and to [obtain] a period of gender stability of sufficient length under current policy and guidance to ensure his eligibility to accept a commission in May 2020 if he successfully completes the course of instruction upon return to [the Naval Academy]." *Id*. ¶ 10.

Upon his return, Plaintiff Kibby will be required to meet the male fitness requirements, which are more difficult than their female counterpart, as well as the Academy's academic standards. *Id*. ¶¶ 15-16. Plaintiff Kibby has represented that during the medical year of absence, he is "completing a rigorous exercise and training regimen so that [he] will be able to meet the male fitness standards upon [his] return[,]" and that he "can already meet the male standards for push-ups and sit-ups and will be working hard on [his] run time." Kibby Decl. ¶ 28. Given his

prior academic success at the Naval Academy, Kibby Decl. ¶ 39, the support afforded to his transition plan by senior officials, and his representations regarding his fitness training, the Court finds that Plaintiff Kibby has demonstrated a substantial likelihood that he will be able to meet the graduation requirements of the Naval Academy. Following graduation, he will be in a position to accede to the Navy or Marine Corps. Chadwick Decl. ¶ 16. Defendants have not argued or presented any evidence that Plaintiff Kibby will be unable to graduate from the Naval Academy—an unsurprising position, given that dismissal stemming from the inability of transgender individuals to accede would itself likely be an injury sufficient to confer standing to challenge the constitutionality of the Presidential Memorandum.

Consequently, Plaintiff Kibby has demonstrated that he is "able and ready" to apply for accession. Using the words of *Adarand*, he is "very likely" to apply for accession in the "relatively near future." Indeed, Plaintiff Kibby has demonstrated a greater likelihood of his being subject to the competitive barrier than many of the plaintiffs in the equal protection cases discussed above. In *Parents Involved*, the members of the plaintiff organization had standing even though it was possible that they would not even apply to an affected high school—and nothing was said of the possibility that the students could fail to graduate from elementary or middle school. In *Gratz*, the plaintiff merely stated an intention to apply as a transfer student—surely it was possible that academic failures at his current institution, or other hardships, would have prevented him from applying. Here, Plaintiff Kibby is on a defined track toward graduation from the Naval Academy and accession to the military. The track has been approved and supported by his chain of command. Like any student at the Naval Academy, there are potential impediments to his graduation. But Plaintiff Kibby has provided affirmative evidence of his ability to overcome these impediments, and it is unlikely that his chain of command would have

adopted a transition plan if they doubted his ability to meet the Academy's graduation requirements. It is accordingly likely that he will graduate and attempt to accede. Anything else is the product of mere speculation.[6]

The remaining question is whether Plaintiff Kibby is substantially likely to "hit" a barrier when he applies for accession to the military. As of January 2018, transgender individuals shall be prohibited entry to the military, until such time that the President receives a recommendation to the contrary that he finds convincing. Given the President's pronouncement that "the United States government will not accept or allow transgender individuals to serve in any capacity in the U.S. military," there is no reason to believe that this directive will change by the time Plaintiff Kibby is ready to apply for accession in May 2020. Chadwick Decl. ¶ 17. In short, the only basis from which to conclude that the directive may change is the ever-present reality that every law is subject to change. But that is insufficient to deprive the Court of subject-matter jurisdiction. *Appalachian Power*, 208 F.3d at 1022. Nor does the potential availability of a waiver change this conclusion. First, Defendants have presented no evidence that waivers are actually made available to transgender individuals, or that they will be; and the only record evidence on this point suggests that transgender individuals are not entitled to waivers for accession purposes. *See supra* at 5–6. Second, even if a bona fide waiver process were made available, Plaintiff Kibby would still be subject to a competitive barrier due to his transgender

[6] Because the Court concludes that Plaintiff Kibby has a substantial likelihood of attempting to accede, the Court need not and does not decide whether Plaintiff Kohere has also demonstrated a likelihood of accession sufficient to stake out an equal protection claim based on the Accession Directive. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) ("At least one plaintiff must have standing to seek each form of relief requested in the complaint."); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 (2006) ("the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement").

status. For accession purposes, he would be presumptively disqualified because of his transgender status, *unless* he obtains a waiver. Those who are not transgender are not subject to the same blanket proscription. Consequently, a waiver process would not vitiate the barrier that Plaintiff Kibby claims is violative of equal protection. Accordingly, Plaintiff Kibby has demonstrated that he is substantially likely to attempt to accede, and to encounter a competitive barrier at the time of his accession due to his status as a transgender individual, which he claims is violative of equal protection. This is sufficient to confer standing to challenge the Accession Directive at this preliminary stage.

With respect to the Pseudonym Plaintiffs, there is no real doubt that they will remain in the military for long enough to hit the "barrier" that they claim is violative of equal protection. Each has submitted a declaration stating, and/or alleged, their intention to remain in military service, and Defendants have submitted declarations for each Pseudonym Plaintiff stating that they shall not be discharged until the military's new policy regarding transgender service members takes effect. *See supra* at 19–28; Defs.' Mem at 10–12. There is also no real doubt that they will face a competitive barrier to their continued retention by the military. As of March 23, 2018, the military is required to effect a policy by which these service members can be discharged solely due to their transgender status. This barrier to their continued retention is imposed upon them, but not other service members. And Plaintiffs claim that this competitive barrier is violative of equal protection. Accordingly, at this preliminary stage, the Pseudonym Plaintiffs have demonstrated a substantial likelihood of standing to challenge the Presidential Memorandum's Retention Directive. *See Worth*, 451 F.3d at 859 ("Under *Adarand*, . . . the relevant consideration is whether the agency is sufficiently committed to a particular race-conscious policy that the plaintiff will likely face a career impediment.").

iii. Substantial Risk of Injury

Plaintiffs have also established a substantial risk of two future injuries: denial of accession and discharge from military service. The substantial risk of these two future injuries is sufficient to constitute an injury in fact. As explained by the Supreme Court, "[a]n allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *SBA List*, 134 S. Ct. at 2341 (internal quotation marks omitted; citing *Clapper*, 133 S. Ct. at 1147, 1150, n.5). Here, even assuming that the future injuries are not "certainly impending," there is a "substantial risk" of their occurrence.

The D.C. Circuit has explained that "the proper way to analyze an increased-risk-of-harm claim is to consider the ultimate alleged harm . . . as the concrete and particularized injury and then to determine whether the increased risk of such harm makes injury to an individual citizen sufficiently imminent for standing purposes." *Attias v. Carefirst, Inc.*, 865 F.3d 620, 627 (D.C. Cir. 2017) (internal quotation marks omitted). In some circumstances, the chain of events that is necessary for the putative future harm to occur is too attenuated to constitute a substantial risk of that harm and to render that harm imminent. Consequently, in *Clapper*, the Supreme Court declined to find standing because the plaintiffs' "theory of standing [relied] on a highly attenuated chain of possibilities . . . ." 568 U.S. at 410. "Several links in this chain would have required the assumption that independent decisionmakers charged with policy discretion . . . and with resolving complex legal and factual questions . . . would exercise their discretion in a specific way. . . . With so many links in the causal chain, the injury that the plaintiffs feared was too speculative to qualify as 'injury in fact.'" *Attias*, 865 F.3d at 626 (citation omitted). Meanwhile, in *Attias*, a personal data theft case, the D.C. Circuit found standing where the plaintiffs plausibly alleged that "an unauthorized party has already accessed personally

identifying data on [the] servers, and it [was] much less speculative . . . to infer that this party [had] both the intent and the ability to use that data for ill." *Id*. at 628. Here, there is no doubt that the denial of accession and discharge from the military constitute concrete and particularized injuries. Whether these are also imminent, based on the reasoning of *Clapper* and *Attias*, requires an analysis of the degree to which these future harms are separated from the present by a "series of contingent events . . . ." *Id*.

In *Navy Chaplaincy*, the plaintiffs, military chaplains who were "non-liturgical Protestants," alleged that "the Navy systematically discriminate[d] against members of their religious denominations in the awarding of promotions in violation" of the Establishment Clause. *In re Navy Chaplaincy*, 697 F.3d 1171, 1173 (D.C. Cir. 2012). The plaintiffs claimed standing for purposes of prospective injunctive relief on the basis that "they face[d] future injury because they [would] likely suffer discrimination on the basis of their religious denomination when they are considered for promotion . . . ." *Id*. at 1176. In the court's view, the plaintiffs' assertion of future injury depended on "two subsidiary premises: that plaintiffs will be considered for promotion by future selection boards and that selection boards will discriminate against them on the basis of their religious denomination." *Id*. The court found that the plaintiffs had satisfactorily established both premises. With respect to the first, because the "Navy concede[d] that future selection boards may very well consider the promotion of at least some plaintiffs." *Id*. With respect to the second, because "plaintiffs challenge[d] specific policies and procedures . . . . that they claim[ed] resulted in denominational discrimination . . . ." *Id*.

Plaintiffs have demonstrated a chain of causation leading to concrete and particularized injuries in which there are few links and each link is substantially likely to occur. With respect to the Accession Directive, Plaintiff Kibby will suffer an injury in fact if he: (i) graduates from

the Naval Academy; (ii) applies for accession; and (iii) is denied accession due to his transgender status. The first two links in this chain are substantially likely to occur for the reasons already stated. *See supra* at 43–46. The third is likely to occur because the Presidential Memorandum indefinitely delays the accession of transgender individuals, and the President has unequivocally stated that transgender individuals shall not be permitted to serve in the military. Given this actuality, it is speculative to assume that transgender individuals *will be permitted to accede* by May 2020. At present, there is a substantial risk that accession will remain forbidden, and Plaintiff Kibby will be precluded from military service.

For the Pseudonym Plaintiffs, the chain of causation is even shorter. They will suffer an injury in fact if: (i) they remain in the military; and (ii) are discharged based on their transgender status after March 23, 2018 due to the Retention Directive. On the first point, there is no disagreement that the Pseudonym Plaintiffs are qualified service members who desire to remain in military service. *See supra* at 19–28. On the second point, the available evidence is that the President—who ultimately controls the military—issued a statement that "the United States government will not . . . allow transgender individuals to serve in any capacity in the U.S. military," and shortly thereafter, issued a Presidential Memorandum that requires the military to authorize the discharge of transgender service members by March 23, 2018. True, it is conceivable that the Pseudonym Plaintiffs will not be discharged from the military, despite the head of the military stating that they will be. But in the absence of a crystal ball, and in light of these unequivocal factual circumstances, at the present time, the Pseudonym Plaintiffs face a substantial risk of discharge. This confers upon them an injury in fact.

iv. Plaintiffs Have Standing to Challenge the Accession and Retention Directives

For the foregoing reasons, Plaintiffs have established two injuries in fact with respect to the Accession and Retention Directives. First, they have demonstrated a substantial likelihood that they will face a competitive barrier with respect to accession and retention due to their transgender status. Second, they have demonstrated a substantial risk that they will be denied accession or discharged from the military due to their transgender status. Defendants do not contest that these injuries are caused by the Accession and Retention Directives of the Presidential Memorandum, or that they are redressable by judicial intervention, and the Court finds that the causation and redressability elements of standing have been satisfied. Were it not for the Presidential Memorandum, the blanket prohibition against accession by transgender individuals would have expired on January 1, 2018. Because of the Presidential Memorandum, that prohibition is extended indefinitely. Furthermore, the Presidential Memorandum requires the reversion of military policy to one where individuals can be discharged solely based on their transgender status. Previously, such action was prohibited by the June 2016 DTM. The accession and retention injuries are caused by the Presidential Memorandum, and they would be redressed to the extent the Court invalidates the directives of the memorandum. Accordingly, Plaintiffs have standing to challenge the Accession and Retention Directives.

v. Plaintiffs Do Not Have Standing to Challenge the Sex Reassignment Surgery Directive

Although the Court concludes that Plaintiffs have standing to challenge the Accession and Retention Directives, none of the Plaintiffs have demonstrated an injury in fact with respect to the Sex Reassignment Surgery Directive. First, only some Plaintiffs are implicated by the provision at all. For those that are, the risk of being impacted by the Sex Reassignment Surgery Directive is not sufficiently great to confer standing.

Jane Doe 1 alleges that "a transition-related procedure Jane Doe 1 was scheduled for was summarily canceled by the Defense Health Agency." Am. Compl. ¶ 16. However, Defendants have submitted a declaration representing that "Jane Doe 1's application for the supplemental health care waiver necessary to receive a transition-related surgery is currently being processed by the Defense Health Agency." Defs.' Mem. at 10. Accordingly, Jane Doe 1 has not demonstrated that she will not receive the surgery prior to the effective date of the Sex Reassignment Surgery Directive.

Jane Doe 3 has developed a transition treatment plan, but will not begin her treatment until after she returns from active deployment in Iraq. *See supra* at 22. Given 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 engendered by the Sex Reassignment Surgery Directive is too speculative to constitute an injury in fact with respect to Jane Doe 3. Furthermore, John Doe 1 is scheduled for transition related-surgery on January 4, 2018, and Defendants have represented that this date remains unaffected by the Presidential Memorandum. Defs.' Mem. at 11. Finally, the Named Plaintiffs are not currently in the military and it is speculative whether they will need surgery while in military service. Plaintiff Kibby, in particular, has stated that he will transition prior to applying for accession. *See supra* at 26–27. Accordingly, 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.

2. Ripeness

Defendants also challenge the Court's subject-matter jurisdiction on the basis of ripeness. "Determining whether administrative action is ripe for judicial review requires [the Court] to

evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). On the first prong, the Court must consider: "whether the issue is purely legal, whether consideration of the issue would benefit from a more concrete setting, and whether the agency's action is sufficiently final." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 440 F.3d 459, 463–64 (D.C. Cir. 2006) (internal quotation marks omitted). On the second prong, the Court must consider "whether postponing judicial review would impose an undue burden on [the Plaintiffs] or would benefit the court." *Id*. (internal quotation marks omitted).

A facial equal protection challenge is a purely legal question. *See Beach Commc'ns, Inc. v. FCC*, 959 F.2d 975, 986 (D.C. Cir. 1992). To the extent the Court considers factual issues with respect to the equal protection analysis, they are only those facts that are already established: namely, those going to the basis for the issuance of the Presidential Memorandum. Future factual development does not alter that basis, and is consequently irrelevant to the equal protection analysis. Defendants do not contest this point. *See XP Vehicles, Inc. v. Dep't of Energy*, 118 F. Supp. 3d 38, 58 (D.D.C. 2015) (finding Fifth Amendment challenge to be a purely legal inquiry).

To a large extent, Defendants' ripeness arguments have already been addressed in the standing context. The Court reiterates its conclusion here. While there is present uncertainty regarding the exact details of the military's future policy towards transgender service members, there is no uncertainty regarding two directives of the Presidential Memorandum: the military must authorize the discharge of transgender service members, and accession by transgender individuals is prohibited, indefinitely. The Court does not adjudicate the details of that future policy, but rather, only assesses whether these directives in-and-of-themselves violate the

Constitution. 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. There is no reason to believe that the President will alter these directives, and the Court must assume that they will be faithfully executed by the military. *See National Mining Association*, 145 F.3d at 1408; *Appalachian Power*, 208 F.3d at 1022. Consequently, the constitutionality of the Accession and Retention Directives is a matter fit for judicial resolution.

Furthermore, the nature of the equal protection analysis in this case, which assesses 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. This contrasts with the burden that delay would impose upon Plaintiffs, who must continue to serve or strive toward service, expending resources and declining other opportunities, while faced with the prospect of discharge and preclusion of military service, and the stigma that the Presidential Memorandum attaches to service by transgender individuals. *See supra* at 19–28. Accordingly, the propriety of the Accession and Retention Directives is a matter ripe for adjudication.

Because Plaintiffs have established standing and ripeness with respect to the Accession and Retention Directives of the Presidential Memorandum, the Court turns to the merits.

B. Defendants' Motion to Dismiss for Failure to State a Claim

Plaintiffs assert two overarching claims in this case. Plaintiffs' first broad claim is that, for a variety of reasons, the Presidential Memorandum violates the guarantees of the Due Process Clause of the Fifth Amendment. Plaintiffs' second distinct claim is for estoppel. Defendants move to dismiss both claims under Federal Rule 12(b)(6). For the same reasons the Court concludes that Plaintiffs are likely to succeed on the merits of their Due Process Clause

challenge for the purposes of their motion for preliminary injunction—discussed below—the Court will not dismiss Plaintiffs' Due Process Clause claims.

However, the Court will dismiss, without prejudice, Plaintiffs' estoppel claim. The Supreme Court has expressed substantial skepticism with respect to government estoppel, noting that when "the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984). Nonetheless, the Court has refused to adopt "a flat rule that estoppel may not in any circumstances run against the Government," noting that "the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." *Id*. at 60–61; *see also Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 419 (1990) ("From our earliest cases, we have recognized that equitable estoppel will not lie against the Government as it lies against private litigants.").

Defendants contend that Plaintiffs' estoppel claim fails because there is no recognized federal cause of action for estoppel. Defs.' Mem. at 37. The Court declines to dismiss Plaintiffs' claim on this basis, however, because although judicial hostility has been expressed with respect to government estoppel, neither the Supreme Court or the D.C. Circuit have definitively ruled out the claim. In fact, recent decisions by the D.C. Circuit have at least assessed the claim on the merits. *See Masters Pharm., Inc. v. DEA*, 861 F.3d 206, 225 (D.C. Cir. 2017); *Morris Commc'ns, Inc. v. FCC*, 566 F.3d 184, 191 (D.C. Cir. 2009); *Graham v. SEC*, 222 F.3d 994, 1007 (D.C. Cir. 2000). Accordingly, at least by implication, the D.C. Circuit has recognized that

an estoppel claim may be brought against agency defendants—here, the Departments of Defense and Homeland Security—under certain circumstances.

The elements of a government estoppel claim are that "(1) the government made a 'definite representation'; (2) on which the entity 'relied in such a manner as to change its position for the worse'; (3) the entity's reliance was reasonable; and (4) 'the government engaged in affirmative misconduct.'" *Masters Pharm.*, 861 F.3d at 225 (citations and alterations omitted). The affirmative misconduct element requires a showing "that government agents engage[d]—by commission or omission—in conduct that can be characterized as misrepresentation or concealment, or, at least, behave[d] in ways that have or will cause an egregiously unfair result." *GAO v. Gen. Accounting Office Pers. Appeals Bd.*, 698 F.2d 516, 526 (D.C. Cir. 1983).

Based on the allegations in the Amended Complaint, the Court concludes that the facts of this case are not actionable under an "estoppel" theory. Plaintiffs claim that the June 2016 DTM "constituted a definite representation to Plaintiffs that they would be able to serve openly." Pls.' Mem. at 26. However, the DTM was not a definite representation to any of the individuals Plaintiffs, but rather constituted a broad policy decision by the government that affected scores of individuals. The DTM did not specifically represent to any particular individual that he or she would be permitted to serve. The cases that Plaintiffs cite are distinguishable on this basis. For example, in *Watkins*, the Ninth Circuit estopped the Army from refusing to reenlist the plaintiff "on the basis of his homosexuality" because "the Army affirmatively acted in violation of its own regulations when it repeatedly represented that [the plaintiff] was eligible to reenlist, as well as when it reenlisted him time after time." *Watkins v. U.S. Army*, 875 F.2d 699, 707–08, 731 (9th Cir. 1989). These representations were directed at the plaintiff, because on "the one

occasion when the record was unclear, [the plaintiff] sought clarification and his classification was immediately changed from 'unknown' to 'eligible for reentry on active duty.'" *Id*. at 707. Similarly, in *Johnson*, the Ninth Circuit estopped the government from rescinding the plaintiff's parole "after his parole computation had passed successfully through as many as eight administrative reviews . . . ." *Johnson v. Williford*, 682 F.2d 868, 872 (9th Cir. 1982).

It may be that some Plaintiffs have detrimentally relied upon specific representations from their chain of command that could more plausibly support a government estoppel claim, but if that is the case, those instances are not adequately alleged; only generalized assertions of reliance are asserted in the complaint. *See, e.g.,* Am. Compl. ¶ 3 ("Plaintiffs, along with many other service members, have followed protocol in informing their chain of command that they are transgender. They did so in reliance on the United States' express promises that it would permit them to continue to serve their country openly."); ¶ 14 ("In or around June 2016, in reliance on the issuance of the policy permitting open service by transgender service members, Jane Doe 1 notified her command that she is transgender."); ¶ 31 ("After June 2016, in reliance on the announcement that transgender people would be permitted to serve openly, she notified her superiors that she is transgender. She has served in the intervening time without incident."). Allowing estoppel claims to go forward based on such generalized theories of reliance would seem to implicate the reasonable concerns other courts have raised about government estoppel.

Furthermore, Plaintiffs have not plausibly alleged that government agents have engaged in specific instances of "affirmative misconduct." No affirmative instances of misrepresentation or concealment have been plausibly alleged. While Plaintiffs point to the revocation of the June 2016 DTM—via the Presidential Memorandum—as "egregiously unfair," they fail to articulate how that unfairness is the product of "misconduct" as the Court understands that term in this

context. *See* Pl.'s Mem. at 28. Because these specific facts have not been plausibly alleged, the Court shall not permit the estoppel claim to proceed at this time. Accordingly, the claim is dismissed without prejudice.

C. Plaintiffs' Motion for Preliminary Injunction

Having determined that Plaintiffs have standing to challenge the Accession and Retention Directives and that their claims are ripe, the Court moves on to consider Plaintiffs' motion for preliminary injunction. Plaintiffs ask the Court to enjoin the enforcement of the Accession and Retention Directives pending the final resolution of this lawsuit. The Court will grant Plaintiffs' motion. The Court finds (1) that Plaintiffs have a likelihood of succeeding on their claim that the Accession and Retention Directives violate the Fifth Amendment, (2) that Plaintiffs would suffer irreparable injury in the absence of an injunction, and (3) that the balance of equities and the public interest favor granting injunctive relief.

1. Likelihood of Success on the Merits

Although Plaintiffs' estoppel claim has been dismissed, the Court is convinced that Plaintiffs are likely to succeed in this lawsuit under the Fifth Amendment. The Due Process Clause of the Fifth Amendment provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Although Plaintiffs have suggested a number of different analytical frameworks for considering whether the Accession and Retention Directives violate this guarantee, the Court finds the framework applicable to the Due Process Clause's equal protection component most relevant. "In numerous decisions, [the Supreme Court] 'has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws.'" *Davis v. Passman*, 442 U.S. 228, 234 (1979) (quoting *Vance v. Bradley*, 440 U.S. 93, 94 n.1 (1979)); *see also United States v.*

Windsor, 133 S. Ct. 2675, 2695 (2013) ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws."). To determine whether the Accession and Retention Directives violate the Due Process Clause's guarantee because they deny the equal protection of the laws to transgender Americans, the Court must decide (a) the level of scrutiny applicable, and (b) whether the Accession and Retention Directives are likely to survive that level of scrutiny.[7]

a. Level of Scrutiny

The general rule is that government action that treats certain classes of people differently "is presumed to be valid and will be sustained if the classification drawn . . . is rationally related to a legitimate state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). However, this general rule does not apply where the government action draws distinctions between individuals based on certain suspect or quasi-suspect classifications. *Id.* at 440–41. In those instances, the Court must apply a heightened degree of scrutiny. *Id.*

At this preliminary stage of the case, the Court is persuaded that it must apply a heightened degree of scrutiny to the Accession and Retention Directives. The Court reaches this conclusion for two reasons. First, on the current record, transgender individuals—who are alone targeted for exclusion by the Accession and Retention Directives—appear to satisfy the criteria of at least a quasi-suspect classification. "The Supreme Court has used several explicit criteria to identify suspect and quasi-suspect classifications." *Padula v. Webster*, 822 F.2d 97, 102 (D.C. Cir. 1987). The Court has observed that a suspect class is one that has "experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped

[7] At the threshold, Defendants argue that Plaintiffs' claims are unlikely to succeed on the merits because Plaintiffs lack standing and their claims are not ripe. The Court has already found that Plaintiffs have standing and ripe claims.

characteristics not truly indicative of their abilities." *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). Also relevant is whether the group has been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* Finally, the Supreme Court has also considered whether the group "exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

The transgender community satisfies these criteria. Transgender individuals have immutable and distinguishing characteristics that make them a discernable class. *See*, *e.g.*, Medical *Amici* Brief at 3-13 (describing what it means to be transgender).[8] As a class, transgender individuals have suffered, and continue to suffer, severe persecution and discrimination. *See, e.g.*, State *Amici* Brief at 3 (describing the discrimination the transgender community suffers); Trevor Project *Amici* Brief at 10-12, 15-16 (discussing the harmful effects of discrimination against transgender youth); *see also Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (holding that "[t]here is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity," and noting report by the National Center for Transgender Equality finding

[8] The Motions for Leave to File Amici Curiae Briefs in Support of Plaintiffs filed by Medical, Nursing, Mental Health, and other Health Care Organizations, ECF No. 44 ("Medical *Amici* Brief"), The Trevor Project, ECF No. 49 ("Trevor Project *Amici* Brief"), Massachusetts, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and the District of Columbia, ECF No. 50 ("State *Amici* Brief"), and the National Center for Transgender Equality, the Tennessee Transgender Political Coalition, TGI Network of Rhode Island, the Transgender Allies Group, the Transgender Legal Defense & Education Fund, TransOhio, the Transgender Resource Center of New Mexico, and the Southern Arizona Gender Alliance, ECF No. 52, are GRANTED. These amici briefs have assisted the Court in reaching its decision.

that 78% of students who identify as transgender or as gender non-conformant report being harassed while in grades K-12). Despite this discrimination, the Court is aware of no argument or evidence suggesting that being transgender in any way limits one's ability to contribute to society. *See* State *Amici* Brief at 2; Medical *Amici* Brief at 2; Trevor Project *Amici* Brief at 9. The exemplary military service of Plaintiffs in this case certainly suggests that it does not. Finally, transgender people as a group represent a very small subset of society lacking the sort of political power other groups might harness to protect themselves from discrimination. *See* Medical *Amici* Brief at 4 (noting that recent estimates suggest that transgender individuals make up approximately 0.6 percent of the adult population in the United States); *see also Adkins v. City of New York*, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015) (noting that there is "no indication that there have ever been any transgender members of the United States Congress or the federal judiciary").

Although the Court is aware of no binding precedent on this issue, it has taken note of the findings and conclusions of a number of other courts from across the country that have also found that discrimination on the basis of someone's transgender identity is a quasi-suspect form of classification that triggers heightened scrutiny. *See Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (holding that "all of the indicia for the application of the heightened intermediate scrutiny standard are present" for transgender individuals); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 872–74 (S.D. Ohio 2016) (finding that "transgender status is a quasi-suspect class under the Equal Protection Clause"); *Adkins*, 143 F. Supp. 3d at 140 ("[T]he Court concludes that transgender people are a quasi-suspect class" and "[a]ccordingly, the Court must apply intermediate scrutiny to defendants' treatment of plaintiff").

Second, the Court is also persuaded that the Accession and Retention Directives are a form of discrimination on the basis of gender, which is itself subject to intermediate scrutiny. It is well-established that gender-based discrimination includes discrimination based on non-conformity with gender stereotypes. *See Price Waterhouse v. Hopkins,* 490 U.S. 228, 251 (1989) ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group"). The Accession and Retention Directives' exclusion of transgender individuals inherently discriminates against current and aspiring service members on the basis of their failure to conform to gender stereotypes. The defining characteristic of a transgender individual is that their inward identity, behavior, and possibly their physical characteristics, do not conform to stereotypes of how an individual of their assigned sex should feel, act and look. *See* Medical *Amici* Brief at 3-13. By excluding an entire category of people from military service on this characteristic alone, the Accession and Retention Directives punish individuals for failing to adhere to gender stereotypes. *See Whitaker,* 858 F.3d at 1051 (holding that heightened scrutiny used for sex-based classifications applied to school policy requiring transgender student to use bathroom of sex listed on his birth certificate because it "treat[ed] transgender students . . . who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently. . . . These students are disciplined under the School District's bathroom policy if they choose to use a bathroom that conforms to their gender identity"); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (holding that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination"); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 577 (6th Cir. 2004) (holding that the facts alleged by transsexual plaintiff to support his claims of gender discrimination on the basis of sex stereotyping "easily constitute a claim of sex discrimination

grounded in the Equal Protection Clause of the Constitution"). A service member who was born a male is punished by the Accession and Retention Directives if he identifies as a woman, whereas that same service member would be free to join and remain in the military if he was born a female, or if he agreed to act in the way society expects males to act. The Accession and Retention Directives are accordingly inextricably intertwined with gender classifications.

For these two reasons, the Court will apply an intermediate level of scrutiny to Defendants' exclusion of transgender individuals from the military, akin to the level of scrutiny applicable in gender discrimination cases. Before moving on to that analysis, however, the Court pauses to note that meaningful scrutiny of the constitutionality of the Accession and Retention Directives is appropriate despite the fact that they pertain to decisions about military personnel. Although the Court recognizes that deference to the Executive and Congress is warranted in the military context, the Court is not powerless to assess whether the constitutional rights of America's service members have been violated. The D.C. Circuit has explained that although "the operation of the military is vested in Congress and the Executive, and . . . it is not for the courts to establish the composition of the armed forces[,] . . . constitutional questions that arise out of military decisions regarding the composition of the armed forces are not committed to the other coordinate branches of government." *Emory v. Sec'y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987). "Where it is alleged, as it is here, that the armed forces have trenched upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act." *Id.* "The military has not been exempted from constitutional provisions that protect the rights of individuals" and, indeed, "[i]t is precisely the role of the courts to determine whether those rights have been violated." *Id.*; *see also Chappell v. Wallace*, 462 U.S. 296, 304 (1983) ("This Court has never held, nor do we now hold, that military personnel are barred from

all redress in civilian courts for constitutional wrongs suffered in the course of military service."); *Matlovich v. Sec'y of the Air Force*, 591 F.2d 852, 859 (D.C. Cir. 1978) ("It is established, of course, that the federal courts have the power and the duty to inquire whether a military discharge was properly issued under the Constitution.").

b. Application of Intermediate Scrutiny

Having determined that an intermediate level of heightened scrutiny should apply to the Accession and Retention Directives' discrimination against transgender individuals, the Court moves on to assessing whether Plaintiffs are likely to succeed when that level of scrutiny is actually applied. Under intermediate scrutiny, the government must demonstrate an "exceedingly persuasive justification" for its actions. *United States v. Virginia*, 518 U.S. 515, 531 (1996). "The burden of justification is demanding and it rests entirely on" the government. *Id.* at 533. The government "must show 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Id.* (quoting *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724 (1982) (internal quotations omitted)). "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.* "And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* Finally, it is well established that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *Windsor*, 133 S. Ct. at 2693 (quoting *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973)).

Applying these standards, the Court finds that Plaintiffs are likely to succeed in demonstrating that the Accession and Retention Directives' exclusion of transgender individuals

from the military is unconstitutional. At the outset, the Court reiterates precisely what is at issue in this case: a policy banning the accession, and allowing the discharge, of an entire category of individuals from the military solely because they are transgender, despite their ability to meet all of the physical, psychological, and other standards for military service. Defendants argue that this policy is necessary for three reasons. First, Defendants argue that "at least some transgender individuals suffer from medical conditions that could impede the performance of their duties." Defs.' Mem. at 31. Second, Defendants argue that "there is room for the military to think" that certain medical conditions "may limit the deployability of transgender individuals as well as impose additional costs on the armed forces." *Id.* at 32. Third, Defendants argue that "the President could reasonably conclude" that the presence of transgender individuals in the military would harm "unit cohesion." *Id.* at 33.[9]

Plaintiffs do not dispute that maximizing military effectiveness, lethality and unit cohesion, and even budgetary considerations, are all important or at least legitimate government interests. Pls.' Mem. at 17. They do challenge, however, whether Defendants can satisfy their burden of demonstrating that the discriminatory means that have been employed in the Presidential Memorandum—the Accession and Retention Directives—are "substantially related" to the achievement of these objectives. Based on the combined effect of a number of unusual factors, the Court finds it likely that Plaintiffs will succeed on this claim.

First, the reasons given for the decision to exclude transgender service members appear to be hypothetical and extremely overbroad. For instance, Defendants cite concerns that "some" transgender individuals "could" suffer from medical conditions that impede their duties, and

[9] Plaintiffs note that similar arguments were proffered in support of prior policies precluding service members from being openly gay, maintaining racially segregated ranks and excluding women from military colleges.

assert that "there is room for the military to think" that transgender people may be limited in their deployability at times. As an initial matter, these hypothetical concerns could be raised about *any* service members. Moreover, these concerns do not explain the need to discharge and deny accession to *all* transgender people who meet the relevant physical, mental and medical standards for service. The Accession and Retention Directives are accordingly extremely overbroad when considered in the light of their proffered justifications. *See Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that law's "sheer breadth is so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class it affects"). The breadth of the Accession and Retention Directives is also discontinuous with the purported concern about costs, which, in addition to having been found to be minimal or negligible, apparently are primarily related to a surgical procedure that only a subset of transgender individuals will even need. Similarly, Defendants provide practically no explanation at all, let alone support, for their suggestion that the presence of transgender individuals may be harmful to "unit cohesion."[10] Indeed, Defendants themselves highlight the absence of any prior studies or evaluations supporting the proffered justifications by arguing that they must *now* conduct studies regarding transgender military service before they can adequately defend the President's decision. At *most*, Defendants' reasons appear therefore to be based on unsupported, "overbroad generalizations about the different talents, capacities, or preferences," of transgender people. *Virginia*, 518 U.S. at 533.

[10] To the extent this is a thinly-veiled reference to an assumption that other service members are biased against transgender people, this would not be a legitimate rationale for the challenged policy. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Nonetheless, given the deference owed to military personnel decisions, the Court has not based its conclusion solely on the speculative and overbroad nature of the President's reasons. A second point is also crucial. As far as the Court is aware at this preliminary stage, all of the reasons proffered by the President for excluding transgender individuals from the military in this case were not merely unsupported, but were actually *contradicted* by the studies, conclusions and judgment of the military itself. As described above, the effect of transgender individuals serving in the military had been studied by the military immediately prior to the issuance of the Presidential Memorandum. In connection with the working group chaired by the Under Secretary of Defense for Personnel and Readiness, the RAND National Defense Research Institute conducted a study and issued a report largely debunking any potential concerns about unit cohesion, military readiness, deployability or health care costs related to transgender military service. The Department of Defense Working Group, made up of senior uniformed officers and senior civilian officers from each military department, unanimously concluded that there were no barriers that should prevent transgender individuals from serving in the military, rejecting the very concerns supposedly underlying the Accession and Retention Directives. In fact, the Working Group concluded that prohibiting transgender service members would undermine military effectiveness and readiness. Next, the Army, Air Force and Navy each concluded that transgender individuals should be allowed to serve. Finally, the Secretary of Defense concluded that the needs of the military were best served by allowing transgender individuals to openly serve. In short, the military concerns purportedly underlying the President's decision had been studied and rejected by the military itself.[11] This highly unusual

[11] This differentiates this case from *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986), a case cited by Defendants, in which the court deferred to a decision that was based on the "considered professional judgment of the Air Force."

situation is further evidence that the reasons offered for the Accession and Retention Directives were not substantially related to the military interests the Presidential Memorandum cited.

Third, the Court has also considered the circumstances surrounding the announcement of the President's policy. "In determining whether a law is motived by an improper animus or purpose, '[d]iscriminations of an unusual character' especially require careful consideration." *Windsor*, 133 S. Ct. at 2693 (quoting *Romer*, 517 U.S. at 633). The discrimination in this case was certainly of an unusual character. As explained above, after a lengthy review process by senior military personnel, the military had recently determined that permitting transgender individuals to serve would not have adverse effects on the military and had announced that such individuals were free to serve openly. Many transgender service members identified themselves to their commanding officers in reliance on that pronouncement. Then, the President abruptly announced, via Twitter—without any of the formality or deliberative processes that generally accompany the development and announcement of major policy changes that will gravely affect the lives of many Americans—that all transgender individuals would be precluded from participating in the military in any capacity. These circumstances provide additional support for Plaintiffs' claim that the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (holding that "[t]he specific sequence of events leading up the challenged decision . . . may shed some light on the decisionmaker's purposes" and "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role").

In sum, even if none of the reasons discussed above alone would be sufficient for the Court to conclude that Plaintiffs were likely to succeed on their Fifth Amendment claim, taken

together they are highly suggestive of a constitutional violation. The likelihood of success factor accordingly weighs in favor of granting preliminary injunctive relief. For the same reasons, the Court will deny Defendants' motion to dismiss Plaintiffs' claims under the Due Process Clause.

Defendants make a few additional points regarding the merits of Plaintiffs' claims that must be addressed. First, Defendants argue that Plaintiffs cannot demonstrate a likelihood of success on the merits regarding the Presidential Memorandum's policy for enlisted service members in particular because Secretary Mattis' Interim Guidance is the "operative policy," and that guidance "does not impermissibly classify service members based on transgender status, but rather prohibits disparate treatment of existing service members based on transgender status." Defs.' Mem. at 24. This may be true, but the focus of Plaintiffs' Amended Complaint is not the Interim Guidance, but the Presidential Memorandum. The Accession and Retention Directives of the Presidential Memorandum require the return to a policy that "generally prohibit[s] openly transgender individuals from accession into the United States military and authorize[s] the discharge of such individuals." Presidential Memorandum § 1(a). This overt disparate treatment, which will become effective when Secretary Mattis' Interim Guidance elapses early next year, is the subject of Plaintiffs' lawsuit.

Second, Defendants cite a number of cases for the proposition that the Presidential Memorandum "is subject to a highly deferential form of review." Defs.' Mem. at 27. The Court has reviewed those cases and determined that none of them require the Court to apply a different level of scrutiny than has been applied here. Of primary importance is the Supreme Court's opinion in *Rostker v. Goldberg*, 453 U.S. 57 (1981). The Supreme Court in *Rostker* expressly declined to hold that the intermediate scrutiny applicable to gender discrimination did not apply in the military personnel context. *Id.* at 69. Instead, the Court reviewed the particular facts

before it and found that the district court in that case had not sufficiently deferred to the reasoned decision of Congress in the context of a particular military personnel-related decision.

The facts of that case are *strikingly* different than those presented here. In *Rostker*, the Court noted that "Congress did not act unthinkingly or reflexively and not for any considered reason," when it passed the challenged policy. *Id.* at 72 (internal quotations omitted). To the contrary, the Court noted Congress' "studied choice of one alternative in preference to another," and relied on the fact that the policy at issue in that case had been "extensively considered by Congress in hearings, floor debate, and in committee." *Id.* In other words, Congress had received extensive evidence on the issue, and simply chose one of two competing alternatives. The Supreme Court found that "[t]he District Court was quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of *Congress'* evaluation of that evidence." *Id.* at 82-83.

The study and evaluation of evidence that the *Rostker* Court found warranted judicial deference is completely absent from the current record. Contrary to Defendants' assertion, this does not appear to be a case where the Court is required to pick sides in a "battle of experts." Defs.' Mem. at 32. To the contrary, the record at this stage of the case shows that the reasons offered for categorically excluding transgender individuals were not supported and were in fact contradicted by the only military judgment available at the time. Accordingly, unlike the district court in *Rostker*, the Court's analysis in this Opinion has not been based on an independent evaluation of evidence or faulting of the President for choosing between two alternatives based on competing evidence.

Third, Defendants seem to argue that they are free of the obligation of rationalizing the Accession and Retention Directives because the directives are a mere continuation of a long-

standing policy. This is false. The Accession and Retention Directives constituted a *revocation* from transgender people of rights they were previously given. Before the Accession and Retention Directives, transgender people had already been given the right to serve openly and the right to accede by a date certain in early 2018. The Accession and Retention Directives took those rights away from transgender people and transgender people only. The targeted revocation of rights from a particular class of people which they had previously enjoyed—for however short a period of time—is a fundamentally different act than not giving those rights in the first place, and it will be the government's burden in this case to show that *this* act was substantially related to important government objectives. *See Perry v. Brown*, 671 F.3d 1052, 1079-80 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) ("Withdrawing from a disfavored group the right to obtain a designation with significant societal consequences is different from declining to extend that designation in the first place, regardless of whether the right was withdrawn after a week, a year, or a decade."). Targeted revocations of rights are a factor that has been present in a number of cases finding equal protection violations. *See Romer*, 517 U.S. at 627 (holding that law that "withdr[ew] from homosexuals, but no others, specific legal protection . . . and . . . forb[ade] reinstatement of these laws and policies" was unconstitutional); *Windsor*, 133 S. Ct. at 2695–96 (holding that the purpose of a law that "impose[d] a disability on [a] class by refusing to acknowledge a status" previously granted was to "disparage and to injure those" in that class).

Finally, Defendants argue that the military's previous study of transgender service cannot forever bind future administrations from looking into the issue themselves. The Court fully agrees with this point. The Court by no means suggests that it was not within the President's authority to order that additional studies be undertaken and that this policy be reevaluated. If the

President had done so and then decided that banning all transgender individuals from serving in the military was beneficial to the various military objectives cited, this would be a different case. But as discussed above, that is not the case before the Court. The Court can only assess Plaintiffs' equal protection claim based on the facts before it. At this time, it appears that the rights of a class of individuals were summarily and abruptly revoked for reasons contrary to the only then-available studies. As explained above, based on the cumulative effect of various unusual facts, the Court is convinced that Plaintiffs are likely to succeed on the merits of their Fifth Amendment claim. This finding in no way should be interpreted to prevent Defendants from continuing to study issues surrounding the service of transgender individuals in the military, as they have asserted that they intend to do.

The Court concludes this portion of its Memorandum Opinion with a caveat. This case comes before the Court on Plaintiffs' motion for a preliminary injunction and Defendants' motion to dismiss. It is accordingly still at its very earliest stages, and the record is necessarily limited. The Court's task at this time is to determine whether Plaintiffs have stated plausible claims and demonstrated a *likelihood*—not a certainty—of success based on the present record. The Court is persuaded that Plaintiffs have made these fairly modest showings, but this is not a final adjudication of the merits of Plaintiffs' claims.

2. Irreparable Injury

Next, the Court finds that Plaintiffs have demonstrated that they would suffer irreparable injury in the absence of preliminary injunctive relief. In order to satisfy the irreparable injury requirement, "[f]irst, the injury 'must be both certain and great; it must be actual and not theoretical.'" *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (citation omitted). "Second, the injury must be beyond remediation." *Id.*

These elements are met here. Defendants argue that "for much the same reasons they lack standing, Plaintiffs cannot show that they will suffer certain, great, or any actual injuries if the Court does not enter an injunction." Defs.' Mem. at 21. The Court has already rejected those arguments in the context of finding that Plaintiffs have standing, at least with respect to the Accession and Retention Directives, and rejects them again in this context. Absent an injunction, Plaintiffs will suffer a number of harms that cannot be remediated after that fact even if Plaintiffs were to eventually succeed in this lawsuit. The impending ban brands and stigmatizes Plaintiffs as less capable of serving in the military, reduces their stature among their peers and officers, stunts the growth of their careers, and threatens to derail their chosen calling or access to unique educational opportunities. *See Elzie v. Aspin*, 841 F. Supp. 439, 443 (D.D.C. 1993) (holding that plaintiff would suffer irreparable injury in the absence of preliminary injunctive relief because "plaintiff faces the stigma of being removed from active duty as a sergeant in the Marine Corps—a position which he has performed in a sterling fashion for eleven years—and labeled as unfit for service solely on the basis of his sexual orientation, a criterion which has no bearing on his ability to perform his job"). Money damages or other corrective forms of relief will not be able to fully remediate these injuries once they occur. Moreover, these injuries are also imminent, in that they are either ongoing or, at the latest, will begin when the Accession and Retention Directives take effect early next year.

These injuries are irreparable for the additional reason that they are the result of alleged violations of Plaintiffs' rights to equal protection of the laws under the Fifth Amendment. "It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976)); *see also Gordon v.*

Holder, 721 F.3d 638, 653 (D.C. Cir. 2013) ("'[A] prospective violation of a constitutional right constitutes irreparable injury.'") (quoting *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998)); *Chaplaincy*, 454 F.3d at 305 ("By alleging that Appellees are engaging in conduct that violates the Establishment Clause, Appellants have satisfied the irreparable injury prong of the preliminary injunction framework."). Under this line of authority, Plaintiffs' allegation of constitutional injury is sufficient to satisfy the irreparable injury requirement for issuance of a preliminary injunction.

3. Balance of Equities and Public Interest

Finally, the Court finds that Plaintiffs have shown that the public interest and the balance of hardships weigh in favor of granting injunctive relief. "A party seeking a preliminary injunction must demonstrate both 'that the balance of equities tips in [its] favor, and that an injunction is in the public interest.'" *FBME Bank Ltd. v. Lew*, 125 F. Supp. 3d 109, 127 (D.D.C. 2015) (quoting *Winter*, 555 U.S. at 20) (alteration in original). "These factors merge when the Government is the opposing party." *Id*. (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

As already established, the Presidential Memorandum is causing Plaintiffs serious ongoing harms and will cause them further harms in the near future absent an injunction. On this record, there are no countervailing equities or public interest in precluding transgender service members from the military that outweigh those harms. Defendants argue that "[t]he public has a strong interest in national defense." Defs.' Mem. at 41. They also argue that the military "is in the process of gathering a panel of experts" to provide advice and recommendations regarding "the development and implementation of the policy on military service by transgender individuals," and that "[g]ranting Plaintiffs their requested relief would directly interfere with the

panel's work and the military's ability to thoroughly study a complex and important issue regarding the composition of the armed forces." *Id.* at 40–41.

Neither point passes muster. 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. The Court also notes that fifteen States have filed an *amici* brief indicating that they and their residents will be harmed by the Presidential Memorandum if it is not enjoined. *See* State *Amici* Brief at 13-22. 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. The balance of equities and public interest accordingly weigh in favor of granting Plaintiffs' motion.

IV. CONCLUSION

For the reasons set out above, the Court will GRANT-IN-PART and DENY-IN-PART Defendants' Motion to Dismiss and GRANT-IN-PART and DENY-IN-PART Plaintiffs' Motion for Preliminary Injunction. The Court will grant Defendants' motion to dismiss Plaintiffs' claims to the extent they are based on the Sex Reassignment Surgery Directive, as well as Plaintiffs' estoppel claim. Defendants' motion to dismiss is DENIED in all other respects. Plaintiffs' motion for preliminary injunction is DENIED with respect to the Sex Reassignment Surgery Directive. Plaintiffs' motion for preliminary injunction is GRANTED, however, in that the Court will preliminarily enjoin enforcement of the Accession and Retention Directives. The effect of the Court's Order is to revert to the *status quo* with regard to accession and retention

that existed before the issuance of the Presidential Memorandum—that is, the retention and accession policies established in the June 30, 2016 Directive-type Memorandum as modified by Secretary of Defense James Mattis on June 30, 2017. An appropriate Order accompanies this Memorandum Opinion.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, *et al*.,
Plaintiffs
v.
DONALD J. TRUMP, *et al*.,
Defendants

Civil Action No. 17-1597 (CKK)

ORDER
(November 27, 2017)

The Court is in receipt of Defendants' [67] Motion for Clarification of the Court's October 30, 2017 Order ("Defs.' Mot."). Defendants seek clarification regarding whether the Court's Order "prohibit[s] the Secretary of Defense from exercising his discretion to defer the January 1, 2018 effective date for the accessions provisions of DTM 16-005 for a limited period of time to further study whether the policy will impact military readiness and lethality or to complete further steps needed to implement the policy." Defs.' Mot. at 2. In other words, Defendants are asking whether the Court's preliminary injunction Order bars the Secretary of Defense from deferring the January 1, 2018 deadline previously established to begin allowing transgender individuals to enlist in the military. Defendants argue that the Court could not "have enjoined the Secretary of Defense from exercising such discretion because Plaintiffs have not challenged the Secretary's exercise of his independent authority to study whether the DTM 16-005 will impact military readiness and lethality." *Id.* Plaintiffs have filed an opposition to Defendants' motion claiming that Defendants are not genuinely seeking a clarification, but are in fact requesting a substantive change to the Court's injunction. Plaintiffs argue that the Court lacks jurisdiction to grant Defendants the relief they seek as a result of Defendants' appeal of the Court's preliminary injunction Order.

The Court's clarification is as follows: In its October 30, 2017 Order, the Court preliminarily enjoined Defendants from enforcing the following directives of the Presidential Memorandum, referred to by the Court as the Accession and Retention Directives:

> I am directing the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have the negative effects discussed above.
>
> Presidential Memorandum § 1(b);
>
> The Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, shall . . . maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary that I find convincing . . . ."
>
> Presidential Memorandum § 2(a).

The Court explained that the effect of its Order was to revert to the *status quo* with regard to accession and retention that existed before the issuance of the Presidential Memorandum—that is, the retention and accession policies established in the June 30, 2016 Directive-type Memorandum as modified by Secretary of Defense James Mattis on June 30, 2017. Those policies allowed for the accession of transgender individuals into the military beginning on January 1, 2018. Any action by any of the Defendants that changes this *status quo* is preliminarily enjoined.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al*.,
Plaintiffs
v.
DONALD J. TRUMP, *et al*.,
Defendants

Civil Action No. 17-1597 (CKK)

ORDER
(August 6, 2018)

For the reasons set forth in the accompanying Memorandum Opinion, it is, this 6th day of August, 2018, hereby

ORDERED that Defendants' [90] Partial Motion for Judgment on the Pleadings and Motion to Partially Dissolve the Preliminary Injunction is **GRANTED**. It is further

ORDERED that President Donald J. Trump is **DISMISSED** as a party from this case. It is further

ORDERED that the Court's October 30, 2017 preliminary injunction is **DISSOLVED** only to the extent that it ran against the President. *The injunction remains in force as it applies to all other Defendants*. It is further

ORDERED that Defendants' [89] Motion for a Protective Order is **DENIED** as **MOOT**.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al*.,
Plaintiffs
v.
DONALD J. TRUMP, *et al*.,
Defendants

Civil Action No. 17-1597 (CKK)

MEMORANDUM OPINION
(August 6, 2018)

On July 26, 2017, President Donald J. Trump issued a statement via Twitter announcing that "the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military." This lawsuit followed. On October 30, 2017, the Court issued a preliminary injunction, the effect of which was to revert to the *status quo ante* with regard to military policy on transgender service.

Defendants have filed several motions which are currently pending before the Court, including Defendants' [89] Motion for a Protective Order and [90] Partial Motion for Judgment on the Pleadings and Unopposed Motion to Partially Dissolve the Preliminary Injunction, both of which relate only to the status of President Donald J. Trump as a party in this litigation. In summary form, Defendants move for the dismissal of the President as a party in this case. In addition, Defendants move to dissolve the preliminary injunction as it applies to the President only. Finally, Defendants also move for an order that the President himself does not have to respond to certain discovery requests that Plaintiffs have issued to him as a party in this case.

Upon consideration of the pleadings,[1] the relevant legal authorities, and the record as a whole, the Court will GRANT Defendant's Partial Motion for Judgment on the Pleadings and to

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

Partially Dissolve the Preliminary Injunction only as to President Trump as a Defendant in this case. The President will be dismissed as a party and the Court's preliminary injunction will be dissolved only as it applies to the President. The Court shall not grant injunctive or declaratory relief directly against the President with respect to his discretionary acts that are the focus of this lawsuit. Because no relief will be granted directly against the President in this case, the Court will dismiss him as a party to avoid unnecessary constitutional confrontations. The Court emphasizes that, regardless of this decision, the Court is still able to review the legality of the President's actions, and Plaintiffs—if successful—can still obtain *all* of the relief that they seek. Given that the President is no longer a party to the case, the Court will DENY as MOOT Defendants' Motion for a Protective Order. That motion sought to prevent discovery that Plaintiffs had requested from the President as a party to this case. The President is no longer a party.

I. LEGAL STANDARD

Pursuant to Federal Rule 12(c), a party may move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial." The standard for reviewing a motion for judgment on the pleadings is virtually identical to that applied to a motion to dismiss

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- Defs.' Mot. for a Protective Order, ECF No. 89;
- Defs.' Partial Mot. for Judgment on the Pleadings and Mot. to Partially Dissolve the Prelim. Inj., ECF No. 90 ("Defs.' Mot.");
- Pls.' Opp'n to Defs.' Mot. for a Protective Order, ECF No. 91;
- Pls.' Opp'n to Defs.' Partial Mot. for Judgment on the Pleadings and Resp. to Mot. to Partially Dissolve the Prelim. Inj., ECF No. 92 ("Pls.' Opp'n");
- Defs.' Reply in Supp. of Mot. for a Protective Order, ECF No. 93; and
- Defs.' Reply in Supp. of Partial Mot. for Judgment on the Pleadings and Mot. to Partially Dissolve the Prelim. Inj., ECF No. 94 ("Defs.' Reply").

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

under Rule 12(b)(6). *See Haynesworth v. Miller,* 820 F.2d 1245, 1254 (D.C. Cir. 1987), *abrogated on other grounds by Hartman v. Moore,* 547 U.S. 250 (2006); *Jung v. Ass'n of Am. Med. Colleges,* 339 F.Supp.2d 26, 36 (D.D.C. 2004) ("[T]he standard of review for motions for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is essentially the same as that for motions to dismiss under Rule 12(b)(6)."). "The court is limited to considering facts alleged in the complaint, any documents attached to or incorporated in the complaint, matters of which the court may take judicial notice, and matters of public record." *Baumann v. D.C.*, 744 F. Supp. 2d 216, 222 (D.D.C. 2010).

II. DISCUSSION

A. Partial Motion for Judgment on the Pleadings and Motion to Partially Dissolve the Preliminary Injunction

As an initial matter, Plaintiffs do not oppose the dissolution of the preliminary injunction insofar as it runs against the President. *See* Pls.' Opp'n at 14. In fact, in their recently-filed Second Amended Complaint, Plaintiffs specify that they are no longer seeking preliminary (or permanent) injunctive relief from the President at all. *See* Second Amended Compl., ECF No. 106 ("Compl."), at 20. Accordingly, the Court GRANTS Defendants' motion to partially dissolve the preliminary injunction as unopposed. The Court will dissolve its October 30, 2017 preliminary injunction to the extent that the injunction applied to the President. *The injunction remains in force as it applies to all other Defendants*.

Next, the Court also GRANTS Defendants' motion in that it will dismiss the President himself as a party to this case. Through this lawsuit, Plaintiffs ask this Court to enjoin a policy that represents an official, non-ministerial act of the President, and declare that policy unlawful. *See* Compl. at 20. Sound separation-of-power principles counsel the Court against granting these forms of relief against the President directly. *See Franklin v. Massachusetts*, 505 U.S. 788, 802-

03 (1992) (holding that "in general 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'") (quoting *State of Mississippi v. Johnson*, 71 U.S. 475, 501 (1866)); *Id.* at 827 (Scalia, J., concurring in part and concurring in the judgment) ("The apparently unbroken historical tradition supports the view, which I think implicit in the separation of powers established by the Constitution, that the principals in whom the executive and legislative powers are ultimately vested—viz., the President and the Congress (as opposed to their agents)—may not be ordered to perform particular executive or legislative acts at the behest of the Judiciary. For similar reasons, I think we cannot issue a declaratory judgment against the President."); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him, and have never submitted the President to declaratory relief") (internal citation omitted); *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996) (holding that courts do not have authority to enjoin the President in the performance of his official duties, and noting that the rationale for this limitation is "painfully obvious"); *Id.* at 976 n.1 ("similar considerations regarding a court's power to issue relief against the President himself apply to [plaintiff's] request for a declaratory judgment."); *Newdow v. Bush*, 355 F. Supp. 2d 265, 280 (D.D.C. 2005) ("There is longstanding legal authority that the judiciary lacks the power to issue an injunction or declaratory judgment against the co-equal branches of the government—the President and the Congress.").[2]

Given that the Court will not grant Plaintiffs the relief that they seek against the President himself, the President should be dismissed. "'[O]ccasion[s] for constitutional confrontation

[2] Indeed, Plaintiffs themselves appear to recognize that at least the injunctive relief they originally sought in this case should not be entered against the President, as they have now amended their complaint to exempt the President from their prayer for that relief. *See* Compl. at 20.

between the two branches' should be avoided whenever possible." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 389-90 (2004) (quoting *United States v. Nixon*, 418 U.S. 683, 692 (1974)). Confrontation can be easily avoided here, because dismissing the President will have little or no substantive effect on this litigation. Plaintiffs argue that the acts of the President himself are central to this case, and the Court agrees. But dismissing the President as a Defendant does not mean that those acts will not be subject to judicial review. The Court can still review those acts and, if Plaintiffs are successful in proving that they are unconstitutional, Plaintiffs can still obtain all of the relief that they seek from the other Defendants. *See* Defs.' Mot. at 7 (conceding that "Plaintiffs could obtain full relief for their alleged injuries through injunctive relief against" the Defendants other than the President); *see also Swan*, 100 F.3d at 978 ("In most cases, any conflict between the desire to avoid confronting the elected head of a coequal branch of government and to ensure the rule of law can be successfully bypassed, because the injury at issue can be rectified by injunctive relief against subordinate officials.").

Plaintiffs raise a number of arguments against dismissal of the President, but none of them are persuasive. First, Plaintiffs argue that the case law cited above addresses whether injunctive and declaratory relief is available against the President, not whether the President must be dismissed from a civil lawsuit altogether. This is true. However, the Court's decision, informed by this case law, that it will not grant relief against the President still counsels in favor of dismissing him as a party from this case. It makes little sense to retain a party in a case from whom no relief will be granted under ordinary circumstances, and especially little sense when retaining that party risks unnecessary constitutional confrontations. By this ruling the Court does not, as Plaintiffs suggest, announce a new rule of "absolute immunity" for the President from civil suits for equitable relief. The Court merely holds that on the particular facts of this case—

where no relief is available from the President himself, the Court can review the policy at issue without the President as a party, and Plaintiffs can obtain all of the relief that they seek from other Defendants—there is no sound reason for risking constitutional confrontations by retaining the President as a Defendant.[3]

Second, Plaintiffs point out that Defendants did not move to dismiss the President earlier, and suggest that Defendants are only now seeking to do so now in order to avoid the President having to respond to pending discovery requests. Defendants' motion was technically timely. A party may move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial." Fed. R. Civ. P. 12(c). More importantly, even assuming that Plaintiffs are correct about Defendants' motive in moving to dismiss the President, the Court would hesitate to deny the motion on that basis. Regardless of the motivation for filing it, Defendants' motion presents sound reasons for dismissing the President based on well-established separation of power principles set forth in United States Supreme Court and D.C. Circuit precedent. Plaintiffs argue that if the President is dismissed, seeking discovery from him will be more difficult. Pls.' Opp'n at 1-2. But it would not be appropriate to retain the President as a party to this case simply because it will be more complicated to seek discovery from him if he is dismissed. To the extent that there exists relevant and appropriate discovery related to the President, Plaintiffs will still be able to obtain that discovery despite the President not being a party to the case.

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[3] Plaintiffs point to a number of cases where the President has been a named party. *See, e.g.*, Pls.' Opp'n at 4. But in those cases, the issue of dismissing the President as a party does not appear to have been raised or analyzed. The Court is unwilling to interpret those Courts' silence as an implicit holding on whether retaining the President under the present circumstances is appropriate. *Cf. Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.").

Third, Plaintiffs cite *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) ("*NTEU*") for the proposition that "no immunity established under any case known to this Court bars every suit against the President for injunctive, declaratory or mandamus relief." *Id.* at 609. As an initial matter, *NTEU* predated the Supreme Court's decision in *Franklin*—which warned that injunctive relief against the President personally is an extraordinary measure not lightly to be undertaken—and accordingly the D.C. Circuit has commented that "[i]t is not entirely clear, of course, whether, and to what extent, [that] decision[ ] remain[s] good law." *Swan*, 100 F.3d at 978. Regardless, *NTEU* is distinguishable. That case dealt with the question—left open by *Mississippi v. Johnson*—of "whether a court can compel the President to perform a *ministerial* act" (in that case, adjusting the pay of federal employees as required by an act of Congress). *Id.* at 607 (emphasis added). "A ministerial duty . . . is one in respect to which nothing is left to discretion." *State of Mississippi v. Johnson*, 71 U.S. at 498. "It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." *Id.* The acts of the President at issue in this case cannot plausibly be considered "ministerial." In addition, the court in *NTEU* distinguished the facts of that case from those in *Mississippi v. Johnson* by noting that "[i]n sharp contrast to *Mississippi v. Johnson* are the circumstances of this suit wherein failure to permit the President to be sued on the ground of separation of powers would prevent the appellant from enforcing its legal rights in federal court." *NTEU* at 614-15. In this case, as discussed above, Plaintiffs will be able to enforce their legal rights and obtain all relief sought in this case without the President as a party.

In sum, the Court GRANTS Defendants' Partial Motion for Judgment on the Pleadings and to Partially Dissolve the Preliminary Injunction. The President will be dismissed as a

Defendant and the Court's preliminary injunction will be dissolved only as it applies to the President.

B. Motion for a Protective Order

Through their Motion for a Protective Order, Defendants sought an order excusing the President himself from responding to certain discovery requests Plaintiffs had issued to him as a party in this case. Because the President will no longer be a party in this case, he will not personally be obligated to respond to those requests. Defendants' motion is accordingly MOOT and will be DENIED on that basis. However, the Court reiterates that dismissing the President as a party to this case does not mean that Plaintiffs are prevented from pursuing discovery related to the President. The Court understands that the parties dispute whether discovery related to the President which has been sought by Plaintiffs is precluded by the deliberative process or presidential communication privileges, and the Court makes no ruling on those disputes at this point.[4] The Court will be issuing further opinions addressing other dispositive motions that have been filed in this case. After all of those opinions have been issued, if necessary, the Court will give the parties further guidance on the resolution of the discovery disputes in this case.[5]

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

[5] Restating the arguments in their Partial Motion for Judgment on the Pleadings and Motion to Partially Dissolve the Preliminary Injunction, Defendants argue in their recently-filed Motion to Dismiss that the Court should "dismiss Plaintiffs' claims against the President because any alleged injury caused by the President is not redressable." Defs.' Mem. in Support of Mot. to Dismiss Pls.' 2d Amended Compl. or, in the Alternative, for Summ. J., ECF No. 115, at 14-17. Because the President will be dismissed as a party, these aspects of Defendants' Motion to Dismiss are now moot.

III. CONCLUSION

For the foregoing reasons, the Court will GRANT Defendants' Partial Motion for Judgment on the Pleadings and to Partially Dissolve the Preliminary Injunction, and DENY as MOOT Defendants' Motion for a Protective Order. An appropriate Order accompanies this Memorandum Opinion.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al*.,
Plaintiffs
v.
DONALD J. TRUMP, *et al*.,
Defendants

Civil Action No. 17-1597 (CKK)

ORDER
(August 6, 2018)

For the reasons set forth in the accompanying Memorandum Opinion, it is, this 6th day of August, 2018, hereby

ORDERED that Defendants' [115] Motion to Dismiss Plaintiffs' Second Amended Complaint, or, in the Alternative, Defendants' Motion for Summary Judgment is **DENIED** to the extent that Motion sought the dismissal of Plaintiffs' Second Amended Complaint for lack of jurisdiction or for failure to state a claim. It is further

ORDERED that Defendants' [116] Motion to Dissolve the Preliminary Injunction is **DENIED**.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*,
Plaintiffs
v.
DONALD J. TRUMP, *et al.*,
Defendants

Civil Action No. 17-1597 (CKK)

MEMORANDUM OPINION
(August 6, 2018)

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

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

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

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

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

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

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

I. BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

Id. at 2-3.

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

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

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

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

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

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

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

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

II. LEGAL STANDARD

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

III. DISCUSSION

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

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

1. Standing

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

The familiar requirements of Article III standing are:

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

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

The Court rejects Defendants' argument that Plaintiffs no longer have standing because they are not harmed by the Mattis Implementation Plan. In its October 30, 2017 Memorandum Opinion, the Court explained in detail why the Plaintiffs in this case had standing. *See Doe 1 v. Trump*, 275 F. Supp. 3d 167, 192-203 (D.D.C. 2017). The Court will assume familiarity with that discussion and will not repeat it here (although it does expressly incorporate that discussion into this Memorandum Opinion as though stated in full). With the principles set forth in that earlier Opinion as a baseline, in this Opinion the Court focuses more narrowly on Defendants' arguments about why the Mattis Implementation Plan has nullified Plaintiffs' standing. As explained above, the effect of that plan would be that individuals who require or have undergone gender transition would be absolutely disqualified from military service, individuals with a history or diagnosis of gender dysphoria would be largely disqualified from military service, and, to the extent that there are any individuals who identify as "transgender" but do not fall under the first two categories, they would be allowed serve, but only "in their biological sex" (which

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

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

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

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

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

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

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

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

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

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

ECF No. 149, at 23.[5] Because their stigmatic injury derives from this unequal treatment, it is sufficient to confer standing.

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

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

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

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

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

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

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

ii. Prospective Service Members Who Have Undergone Gender Transition

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

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

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

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

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

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

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

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

iii. Current Service Member Without a Diagnosis of Gender Dysphoria

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

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

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

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

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

iv. Dylan Kohere

Finally, Plaintiff Dylan Kohere—who is transgender and has begun working with medical professionals on a treatment plan for transition—has standing. Kohere is barred from joining his university's ROTC program and ultimately will not be allowed to accede into the military. As the D.C. Circuit has already acknowledged, Kohere is injured by a policy that prevents him from acceding if for no other reason than because "inability to accede in the future . . . disqualifies [him] from educational opportunities now." *Doe 1*, 2017 WL 6553389, at *3.

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

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

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

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

* * *

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

2. Mootness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

3. Motion to Dissolve the Preliminary Injunction

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

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

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

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

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

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

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

With regard to irreparable injury, Defendants argue again that the Mattis Implementation Plan protects Plaintiffs from any injury. The Court has already rejected those arguments. If the Court were to dissolve its injunction and allow the Mattis Implementation Plan to go into effect, Plaintiffs would suffer very real harms. Defendants also argue that Plaintiffs will not be irreparably injured if the Court dissolves its preliminary injunction because other courts have since issued injunctions that are still in place. The Court rejects this argument as well. The fact that other courts[16] have similarly concluded that Defendants' policy is likely unconstitutional and warrants being preliminarily enjoined is no reason for this Court to lift its own injunction. This is especially so given that Defendants have moved to dissolve those preliminary injunctions, and have appealed the decision of the first court to deny such a motion. Finally, the Court's assessment of the balance of equities and public interest in its preliminary injunction Opinion still stands. It should not be forgotten that the United States military remains engaged in numerous armed conflicts throughout the world, and service members are still being injured and killed in those conflicts. The public interest and equities lie with allowing young men and women who are qualified and willing to serve our Nation to do so.

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

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

enforcing the Mattis Implementation Plan would violate the Court's October 30, 2017 preliminary injunction. All of the directives of that injunction remain in effect until further order of the Court.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss for lack of jurisdiction on standing and mootness grounds is DENIED. Defendants' Motion to Dissolve the Preliminary Injunction is also DENIED. The Court has made no final ruling on the merits of Plaintiffs' claims. It has simply held that all Plaintiffs still have standing to pursue their claims, this case is not moot, and there are no changed circumstances that justify dissolving the preliminary injunction. An appropriate Order accompanies this Memorandum Opinion.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al*.,
Plaintiffs
v.
JAMES MATTIS, *et al*.,
Defendants

Civil Action No. 17-1597 (CKK)

ORDER
(November 30, 2018)

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

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

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

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

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

I. Background

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

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

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

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

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

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

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

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

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

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

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

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

II. Legal Standard

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

III. Likelihood of Success on the Merits

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

A. Constitutional Merit of Plaintiffs' Claims

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

Mattis Implementation Plan turns on a medical condition, gender dysphoria, and its treatment, gender transition, not on any suspect classification such as transgender status or gender. Accordingly, Defendants argue that rational basis review applies, and the policy satisfies that deferential review because it reflects the military's reasoned judgment. *See* Defs.' Mot., ECF No. 183, 5.

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

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

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

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

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

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

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

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

For the reasons discussed above, the Court's original analysis concluding that Plaintiffs are entitled to a preliminary injunction as they are likely to succeed on the merits of their constitutional claims remains unchanged by the Mattis Implementation Plan. As the Court has previously explained, the ban on military service by transgender individuals likely violates Plaintiffs' Fifth Amendment rights based on a number of factors, "including the sheer breadth of the exclusion …, the unusual circumstances surrounding the President's announcement of [the exclusion], the fact that the reasons given for [the exclusion] do not appear to be supported by any facts, and the recent rejection of those reasons by the military itself." *Doe 1*, 275 F. Supp. 3d at 176. Accordingly, the Court is not persuaded by Defendants' claim that they are likely to succeed on the merits of their appeal because Plaintiffs' constitutional challenges lack merit.

B. Nationwide Scope of the Preliminary Injunction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Defendants next cite two Supreme Court cases for the principle that "where a plaintiff faces actual or imminent injury at the outset of a suit but that injury is subsequently redressed or otherwise becomes moot, the plaintiff no longer can seek injunctive relief to redress alleged harms to anyone else." Defs.' Mot., ECF No. 183, 7. In *Alvarez v. Smith*, 558 U.S. 87 (2009), the Court held that the plaintiffs could no longer seek declaratory or injunctive relief against the State's procedure for seizing vehicles and money after the State had returned some of the property and the plaintiffs forfeited their claim to the rest of it. 588 U.S. at 92-93. After all claims had been settled, the plaintiffs could not continue to dispute the lawfulness of the State's procedure because "the dispute [was] no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Id.* at 93. Similarly, in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), the Supreme Court held that a plaintiff lacked standing to enjoin certain Forest Service regulations after the parties had settled their dispute regarding the application of those regulations to the specific project that had caused the plaintiff's injuries. 555 U.S. at 494-97. The Court concluded that once the plaintiff had settled the claim which caused his specific harm, that

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

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

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

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

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

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

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

IV. Irreparable Harm

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

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

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

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

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

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

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

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

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

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

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

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

V. Harm to Plaintiffs

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

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

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

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

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

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

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

VI. Public Interest

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

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

extreme hardships, to endure lengthy deployments and separation from family and friends, and to willingly make the ultimate sacrifice of their lives if necessary to protect the Nation, the people of the United States, and the Constitution against all who would attack them." *Doe 1*, 2017 WL 6553389 at *3.

Absent corroborating evidence, the Court is not prepared to find that allowing Plaintiffs to voluntarily serve and defend their county, while this country faces a prolonged period of warfare, is against the public interest.

VII. Conclusion

The Court finds that Defendants do not have a likelihood of success of the merits of their appeal, that Defendants do not face irreparable harm, that Plaintiffs would be harmed by staying the Court's preliminary injunction, and that public interest does not favor a stay. Accordingly, Defendants' motion for a stay of this Court's preliminary injunction is DENIED.

The Court acknowledges that much of this discussion is repetitive of points made in prior opinions considering and reconsidering Plaintiffs' preliminary injunction. But, Defendants have indicated that they also intend to file for a stay of the Court's preliminary injunction with the D.C. Circuit and that they will furnish the Circuit Court with this Court's ruling. *See* Defs.' Mot., ECF No. 183, 12. Accordingly, the Court provided a fulsome discussion of the issues to aid the Circuit Court in its impending review.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge