IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al., Plaintiffs, vs. DONALD J. TRUMP, et al., Defendants.	Case No. 1:17-cv-02459

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF
CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

On July 26, 2017, President Trump abruptly rescinded the Defense Department's Open Service Directive and instead declared that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military." ECF 40-22. The President then went on national television to announce that he had done the military a "great favor" by short-circuiting the military's own review of its enlistment policy and "just coming out and saying" what the result should be. ECF 40-12. One month later, President Trump issued a memorandum ordering the Secretary of Defense to "submit . . . a plan for implementing" his new Ban. ECF 40-21 ("Transgender Service Member Ban," or "the Ban"). On March 23, 2018, consistent with and "pursuant to" the President's order, the Department of Defense ("DoD") published its February 2018 implementation plan. ECF 120-1, -2, -3 ("Implementation Plan").

Defendants do not even attempt to dispute that President Trump violated the U.S. Constitution in imposing the Transgender Service Member Ban. *See, e.g.*, ECF 107 (February 6, 2018 order memorializing counsel's representation that "[Defendants] will not be defending the policy now at issue but will be defending the policy to be disclosed on February 21, 2018"). Instead, they present a revisionist history in an attempt to characterize the Implementation Plan as "independent" from the very order that called for it. As discussed at length in Plaintiffs' Memorandum in Support of Cross-Motion for Summary Judgment, the government's own contemporaneous documents conclusively establish that the military's independent review was limited to determining how the Ban should apply to existing service members. There was no "independent" review of the underlying question: whether transgender people should be barred from enlisting and serving in the future. ECF 163-2 at 9–11, 28–30.

Even on its own terms, the Implementation Plan violates equal protection. It facially discriminates against people who are transgender—and triggers heightened scrutiny—by predicating eligibility for military service on whether a person has undergone gender transition, or instead is capable of serving in their "biological sex." *See* ECF 120-1. Instead of applying generally applicable standards for fitness and deployability, the Implementation Plan irrationally singles out transgender people for special, disfavored treatment. Again, the government's own documents demonstrate that the military allows people to enlist and deploy when taking hormones as medication management for conditions *other* than gender dysphoria; Defendants never provide *any* explanation for why transgender service members who take hormones to treat gender dysphoria should be treated differently. Defendants' arguments about the effect of gender transition on military cost and readiness are simply irrelevant to the population they wish to bar from enlisting: transgender people who have *already* transitioned. And Defendants' arguments about "sex-based standards" and unit cohesion are discriminatory on their face. Because Defendants have not created a genuine dispute of fact—under any standard of scrutiny—summary judgment should be granted for Plaintiffs.

I. DEFENDANTS' INSUBSTANTIAL JURISDICTIONAL ARGUMENTS PRESENT NO BARRIER TO SUMMARY JUDGMENT.

Defendants continue to attempt to insulate their discriminatory policy from judicial review on the theory that Plaintiffs lack standing to challenge it. They are wrong. Because the Enlisting Plaintiffs unquestionably have standing to challenge Defendants' implementation of the Transgender Service Member Ban, and Defendants have failed to establish that the Serving Plaintiffs' claims are now moot, these arguments fail, and there is no obstacle to the grant of Plaintiffs' cross-motion for summary judgment.

A. The Enlisting Plaintiffs All Have Standing to Challenge the Implementation Plan.

1. Plaintiffs Branco and Wood have standing.

There is no dispute that Plaintiffs Branco and Wood are harmed by the Implementation Plan: under the Open Service Directive (ECF 40-4), they are eligible to enlist *today*, while under Defendants' policy they are barred. ECF 148 ¶¶ 201, 203. Although Defendants originally disputed the eligibility of Branco and Wood under the Open Service Directive, ECF 158 at 16–17, Defendants now admit (in a footnote) that their standing argument was based on a factual error. ECF 176 at 17 n.6.

But if their original standing argument was an honest mistake, Defendants have replaced it with a blatant misrepresentation. Defendants now assert, with no citation to any record evidence, that Plaintiffs Branco and Wood are "not attempting to [enlist] now" in order to "manufacture standing." *See* ECF 176 at 17. This is simply false and an insult to two patriotic Americans who in fact *have* devoted enormous time and energy to joining the military as soon as possible. *See, e.g.*, ECF 148 ¶ 203; ECF 139-32 ¶¶ 11–14 (Branco completed military entrance exam, engaged recruiter, completed all necessary military and transition-related paperwork); 139-36 ¶¶ 7–9 (Wood updated civilian records, worked with recruiter to complete enlistment paperwork, and underwent medical screening and clearance process); 163-14 ¶¶ 2–6 (Branco confirmed all required medical and transition-related paperwork submitted); 163-15 ¶¶ 2–4 (Wood confirmed all necessary paperwork related to transition submitted). Plaintiff Branco has been informed by his recruiter that "the Army did not require any further information related to [his] gender transition" and "that the recruiting center would submit my completed paperwork to the United States Military Entrance Processing Command." ECF 163-14 ¶¶ 4, 6. Likewise, Plaintiff Wood declares that "all necessary medical paperwork related to my transition" is in the

possession of the recruiting center, ECF 163-15 ¶ 2, and that he is simply "awaiting medical clearance," ECF 139-36 ¶ 8. The enlistment of Plaintiffs Branco and Wood is now entirely in the hands of Defendants, *see* ECF 148 ¶ 203, who are actively seeking the dissolution of this Court's injunction so that Plaintiffs can be categorically banned.

It is difficult to understand how defense counsel can represent to the Court on this record that Plaintiffs Branco and Wood are "not attempting to [enlist]" in order to "manufacture standing." ECF 176 at 17. Forced to correct their earlier factual misstatements, it is Defendants that are ignoring facts to manufacture a standing *argument*.

2. Plaintiffs D'Atri, John Doe 2, and Jane Roe 1 have standing.

Under the Open Service Directive, Plaintiffs D'Atri, John Doe 2, and Jane Roe 1 would be eligible to enlist in the imminent future. *See* ECF 40-4; ECF 148 ¶¶ 203–04. By contrast, the Implementation Plan permanently bars these Plaintiffs from enlisting simply because they have recently undergone—or will soon undergo—surgery related to gender transition.[1] ECF 139-34 (D'Atri Decl.), ¶¶ 6, 10–13 (will undergo final transition-related surgery in August 2018); ECF 140-1 (John Doe 2 Decl., filed under seal), ¶¶ 14–17 (underwent transition-related surgery and is actively seeking a waiver to excuse or reduce the 18-month stability requirement); ECF 140-3 (Jane Roe 1 Decl., filed under seal), ¶¶ 7–8, 15–16 (recently underwent transition-related surgery in April 2018 and will have final transition-related surgery in July 2018); ECF 148 ¶¶ 203–04; *see also* ECF 120-1. By depriving them of any possibility of enlisting in the future, the Implementation Plan causes injury in fact. *See Karnoski v. Trump*, 2017 WL 6311305, at *5 (W.D. Wash. Dec. 11, 2017); *see also Shea v. Kerry*, 796 F.3d 42, 50 (D.C. Cir. 2015) ("[A]

[1] Defendants speculate that Plaintiffs D'Atri, John Doe 2, and Jane Roe might not meet the remainder of the Open Service Directive's accession standards even after the 18-month waiting (continued…)

plaintiff may claim an injury in fact from the purported denial of the ability to compete on an equal footing against other candidates for a job. Because the injury lies in the denial of an equal *opportunity* to compete, not the denial of the job itself, we do not inquire into the plaintiff's qualifications (or lack thereof) when assessing standing." (emphasis in original) (citations omitted)). The Open Service Directive's 18-month waiting period does not minimize the immediacy of the harm. *See* ECF 163-2 at 25–26 (explaining that courts "routinely find that 18 months is a sufficiently short time period to demonstrate an impending injury," and citing cases).

3. Plaintiff John Doe 3 has standing.

As a threshold matter, Defendants are wrong when they assert that Plaintiffs did not argue and therefore "waived" the issue of John Doe 3's standing. ECF 176 at 10 n.1. In discussing the Enlisting Plaintiffs' standing, Plaintiffs began by addressing Plaintiffs Branco and Wood, as to whom Defendants had introduced declarations in support of Defendants' motion to dismiss. *See* ECF 163-2 at 16–17. However, Plaintiffs then continued: "The other Enlisting Plaintiffs likewise face a substantial risk of harm," and they explained at length why. *Id.* at 17–18. It is self-evident that "the other Enlisting Plaintiffs" include John Doe 3, who has taken concrete steps to complete his transition and enlist in the U.S. Coast Guard once he is age-eligible. ECF 163-2 at 13; *see* ECF 148 ¶ 204; ECF 140-2 (Doe 3 Decl., filed under seal), ¶ 8. The Implementation Plan will plainly prevent Plaintiff John Doe 3 from enlisting—affording him standing to challenge its constitutionality. *See* ECF 163-2 at 25–26.

period. *See* ECF 176 at 16. That is beside the point. What matters is that Plaintiffs *could* have enlisted before the Implementation Plan. Now, they cannot. That is harm.

B. Defendants Cannot Meet Their Heavy Burden of Showing that the Serving Plaintiffs' Claims Are Now Moot.

This Court has already held that the Serving Plaintiffs have standing to bring their claims. ECF 85 at 31, 33, 38.[2] Plaintiff ACLU's associational standing is derivative of the standing of Serving Plaintiff Brock Stone. *Id.* at 30. Defendants bear the heavy burden of showing that the Implementation Plan has somehow mooted these Plaintiffs' claims. *See* ECF 163-2 at 18–19. No doubt recognizing that they cannot meet that burden, Defendants attempt to skirt it altogether by asserting that the Serving Plaintiffs must re-prove their standing because they have amended their complaint. ECF 176 at 11–12. Defendants are wrong.

The doctrines of standing and mootness safeguard Article III's case-or-controversy requirement in two distinct ways. The standing inquiry "focuse[s] on whether the party invoking jurisdiction had the requisite stake in the outcome *when the suit was filed*." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (emphasis added); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 570 n.5 (1992) ("[S]tanding is to be determined as of the commencement of suit."); *Gonzalez v. ICE*, 2014 WL 12605369, at *6 (C.D. Cal. Oct. 24, 2014) ("[T]he relevant date for purposes of determining a particular plaintiff's standing is the date on which that plaintiff entered the case."). The mootness doctrine governs after standing is initially established, to ensure that an actual controversy exists "at all stages of review." *Friedman's, Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002) (internal quotation marks omitted); *Nat'l All. for Accessibility, Inc. v. C1 Md. Bus. Tr.*, 2013 WL 4229262, at *2 (D. Md. Aug. 14, 2013) (observing that a plaintiff who brings claims for injunctive or declaratory relief "must demonstrate a personal stake in the outcome" that exists

[2] This Court found that, as of November 21, 2017, the Serving Plaintiffs "certainly face[d] a substantial risk of being discharged solely on the basis of being transgender." ECF 85 at 30. "This revocation of equal protection is an injury." *Id.* As discussed *infra*, the same is true today.

"at the commencement of the litigation (standing)" and "continue[s] throughout its existence (mootness)" (internal quotation marks omitted)).

Thus, "[t]he initial standing of the original plaintiff is assessed at the time of the original complaint, even if the complaint is later amended." *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1202 n.3 (Fed. Cir. 2005). "Assessing standing from the time a claim is first asserted is consistent with the common-sense understanding of the admonition that '[s]tanding is determined as of the time the action is brought.' An amended complaint does not 'bring' an action; the original complaint does. Moreover, once a claim is asserted, the court's power to continue to entertain that claim is better thought of as an issue of mootness, not standing." *Saleh v. Fed. Bureau of Prisons*, 2009 WL 3158120, at *5 (D. Colo. Sept. 29, 2009) (citations omitted); *accord Biovail Labs. Inc. v. Abrika, LLLP*, 2005 WL 8154800, at *3 (S.D. Fla. June 27, 2005) ("[Plaintiff] had constitutional standing rights at the time the initial Complaint was filed. Whether or not it had standing at the time of the Filing of the Amended Complaint, therefore, is not dispositive."); *see also* Fed. R. Civ. P. 15(c) (providing that, "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading").

The Fourth Circuit's decision in *Daniels v. Arcade, L.P.*, 477 F. App'x 125 (4th Cir. 2012) (cited by Defendants, ECF 176 at 11–12), does not support Defendants' position. There, the court considered whether the sole remaining plaintiff (who was not named in the original complaint) had standing in light of his allegations in the amended complaint. *Id.* at 130–31. *Daniels* establishes that standing *can* be based on events that occurred between the original filing and the amended complaint—not that standing *must* be re-established at the latter juncture. *Id.*

The rule for which Defendants argue is illogical; it would mean that the Serving Plaintiffs lost standing *only* because they decided to update their complaint to reflect the steps taken to implement the President's unconstitutional actions.[3]

Finally, Defendants note that an amended pleading generally supersedes the original. ECF 176 at 12 (citing *Young v. City of Mount Ranier*, 238 F.3d 567, 572 (4th Cir. 2002)). "While this statement is true for purposes of determining the allegations in the complaint, it is not determinative for standing purposes." *Gonzalez*, 2014 WL 12605369, at *6. Indeed, standing was not at issue in *Young*. *See* 238 F.3d at 572 (addressing whether plaintiffs' failure to include claims against individual officers in their amended § 1983 complaint waived their right to challenge the dismissal of claims in the original complaint against an individual officer).

The Serving Plaintiffs had standing to bring their initial complaint, as this Court has found. ECF 85. Accordingly, it is Defendants' burden to show that the Serving Plaintiffs' claims are now moot. To do so, Defendants must establish that (i) "there is no *reasonable expectation* that the alleged violation will recur," and (ii) "interim relief or events have *completely and irrevocably eradicated* the effects of the alleged violation." *Todd v. Prince*

[3] Defendants mistakenly rely on *G&E Real Estate, Inc. v. Avison Young-Washington, D.C., LLC*, 168 F. Supp. 3d 147 (D.D.C. 2016), and *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007), in arguing that standing *must* be assessed anew each time a complaint is amended. ECF 176 at 11. In *G&E Real Estate*, 168 F. Supp. 3d at 159–60, an out-of-circuit decision, the district court measured standing as of the time of the amended complaint based on the Ninth Circuit's decision in *Northstar Financial Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1046 (9th Cir. 2015). However, the Ninth Circuit has since explained that its *Northstar* decision and the Supreme Court's decision in *Rockwell* "do not actually address whether standing is measured at the time of an initial complaint or at the time of an amended complaint." *In re Zappos.com, Inc.*, 888 F.3d 1020, 1022 (9th Cir. 2018) (Order, *amending* 884 F.3d 893). Instead, *Northstar* and *Rockwell* addressed "whether the allegations in an amended complaint may sometimes be considered in evaluating whether there was standing at the time the case was originally filed" or "whether an amended complaint may be considered a supplemental pleading under Federal Rule of Civil Procedure 15(d)." *Id.*

George's County, 2015 WL 2129702, at *3 (D. Md. May 6, 2015) (emphases added). Because the Implementation Plan is "sufficiently similar" to the Ban and Plaintiffs are disadvantaged "in the same fundamental way"—that is, by virtue of their transgender status—the challenged conduct continues, and Defendants' jurisdictional argument must fail. *See infra* Part II; ECF 163-2 at 19 (citing ECF 148 ¶¶ 184–204); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 & n.3 (1993); *Karnoski v. Trump*, 2018 WL 1784464, at *6 (W.D. Wash. Apr. 13, 2018), *appeal filed*, No. 18-35347 (9th Cir. Apr. 30, 2018).

Defendants insist that this Court lacks jurisdiction due to the "grandfather provision" in the Implementation Plan, which Defendants contend permits the Serving Plaintiffs to serve and receive medical treatment. ECF 176 at 13. However, that protection can end at any moment, depending on how this and related litigation play out. ECF 120-2 at 43 ("[S]hould [DoD's] decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption is and should be deemed severable from the rest of the policy."). With four separate lawsuits challenging the Implementation Plan before four U.S. district court judges in three circuits and on different tracks, Defendants cannot meet their burden of showing (i) "there is no *reasonable expectation* that the alleged violation will recur," and (ii) "interim relief or events have *completely and irrevocably eradicated* the effects of the alleged violation." *Todd*, 2015 WL 2129702, at *3 (emphases added). Indeed, Defendants do not even try.

C. Plaintiffs' Claims Against the President Are Redressable.

Plaintiffs have already briefed at length why President Trump may be subject to a declaratory judgment. *See* ECF 117 (Plaintiffs' Opposition to Defendants' Partial Motion for Judgment on the Pleadings); ECF 163-2 at 25–26 (Plaintiffs' Opposition to Defendants' Motion

to Dismiss). For all the reasons described therein, Defendants' argument that Plaintiffs' injuries are not "redressable" is meritless.

II. THE IMPLEMENTATION PLAN IS A CONTINUATION OF THE PRESIDENT'S UNCONSTITUTIONAL DECISION TO BAN TRANSGENDER SERVICE AND IS THEREFORE EQUALLY UNCONSTITUTIONAL.

This Court already found at the preliminary injunction stage that the President's Ban on military service by transgender people was rooted in discriminatory intent—not genuine military concerns. ECF 85 at 22–23, 43–44 (agreeing with the D.D.C. court that the Ban was "driven by a desire to express disapproval of transgender people generally"). Defendants "respectfully continue[] to disagree" with this Court's finding, ECF 176 at 25, but they do not support that "disagreement" with any argument or evidence—or otherwise retract their earlier concession that they are not defending the constitutionality of President Trump's Ban. *See, e.g.*, ECF 107 (February 6, 2018 order memorializing counsel's representation that "[Defendants] will not be defending the policy now at issue but will be defending the policy to be disclosed on February 21, 2018"). In opposing a motion for summary judgment, Defendants must come forward with evidence and argument sufficient to create a disputed question of fact. Fed. R. Civ. P. 56(c). Because Defendants have failed to do so, the Court should "consider the fact" that President Trump's original action was rooted in discriminatory animus, not legitimate military considerations, "undisputed for purposes of the motion." Fed. R. Civ. P. 56(e).[4]

[4] Defendants call it "illogical" for Plaintiffs to have filed a cross-motion for summary judgment while also opposing Defendants' motion for summary judgment, pursuant to Rule 56(d). ECF 176 at 47–48. Defendants are mistaken. Courts routinely consider, and decide, cross-motions for summary judgment. *Fed. Sav. & Loan Ins. Corp. v. Heidrick*, 774 F. Supp. 352, 356 (D. Md. 1991). Moreover, because each motion must be considered on its own merits, *see Towne Mgmt. Corp. v. Hartford Accident & Indem. Co.*, 627 F. Supp. 170, 172 (D. Md. 1985), "[t]he contention of one party that there are no issues of material fact sufficient to prevent the entry of judgment in its favor does not bar that party from asserting that there are issues of material fact sufficient to prevent the entry of judgment as a matter of law against it," *Zook v. Brown*, 748 (continued…)

The undisputed record evidence further demonstrates that the Implementation Plan is a direct result of the President's discriminatory Ban on military service by transgender people. The Implementation Plan was, consistent with its name, designed to implement the President's Ban. *See Karnoski*, 2018 WL 1784464, at *6 ("The Court finds that the 2018 Memorandum and the Implementation Plan do not substantively rescind or revoke the Ban, but instead threaten the very same violations that caused it and other courts to enjoin the Ban in the first place."). Because President Trump's directive to ban transgender people from serving was plainly a "substantial or motivating factor" behind the Implementation Plan, summary judgment must be granted unless Defendants carry their burden of demonstrating that the Plan "would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).[5]

Defendants have failed to make that showing. Indeed, they have failed to supply *any* evidence—much less raise a genuine dispute—that the Implementation Plan would have been issued in its current form absent the pervasive animus on which it was based. Plaintiffs are

---

F.2d 1161, 1166 (7th Cir. 1984) (internal quotation marks omitted).

[5] Importantly, this analysis is unaffected by the decisions in *Trump v. Hawaii*, __S. Ct.__, 2018 WL 3116337 (June 26, 2018), and *Abbott v. Perez*, __ S. Ct. __, 2018 WL 3096311 (June 25, 2018). In *Trump v. Hawaii*, the Supreme Court declined to consider extrinsic evidence of animus when applying rational-basis review to a policy that was "neutral on its face." 2018 WL 3116337, at *19. Here, on the other hand, Defendants seek to implement a policy that is facially discriminatory. Evidence of the President's improper motive goes to show that Defendants' asserted justifications for the Implementation Plan are pretextual, which is exactly the inquiry that the Constitution requires when a policy discriminates on its face. *See United States v. Virginia*, 518 U.S. 515, 533 (1996).

Nor does the Supreme Court's ruling in *Abbott v. Perez* change the *Hunter* analysis. In *Abbott*, the Court distinguished the redistricting at issue on the basis that the 2013 Texas state legislature did not "use criteria that arguably carried forward the effects of any discriminatory intent on the part of the 2011 Legislature" and instead enacted a different plan that had already been explicitly approved by the court. 2018 WL 3096311, at *14. *Abbott* contrasted *Hunter*, in which the state legislature had reenacted provisions that "did *not* alter the [discriminatory] intent with which the [law] . . . had been adopted," which necessitated a showing that the state's discriminatory intent had been eliminated. *Id.* (emphasis added).

entitled to summary judgment on their claim for equal protection, for this reason alone.

First, Defendants claim that their review process must have been independent of the Ban because it began prior to the Ban's issuance. This is revisionist history at odds with the actual record. DoD did initiate a review of the Open Service Directive in June 2017. ECF 40-11. However, that review assessed the military's readiness to implement the Open Service Directive by July 1, 2017, not whether to implement it at all. *See* Decl. of Marianne F. Kies ("Kies Decl."), Ex. A (USDOE00003258 at 3263). Indeed, each military department was explicitly informed that DoD "d[id] not intend to reconsider prior decisions unless they cause readiness problems that could lessen our ability to fight, survive and win on the battlefield." *Id.* Consistent with that guidance, some of the branches recommended delays to study whether the post-transition waiting period for accessions should be extended beyond 18 months. Tellingly, *no* branch recommended reinstating the historical ban on transgender service. *Id.* at 3258 (Air Force: recommending 12- to 36-month delay to starting accessions), 3260 (Army: recommending 24-month delay to starting accessions), 3262–64 (Navy: finding "no impediments" to the July 1, 2017 start date for accessions, but requesting consideration of one year delay), 3265 (Marine Corps: recommending 12-month delay to starting accessions). In July 2017, President Trump interrupted and preempted DoD's review—in his words, doing the military a "great favor" by resolving this "confusing issue" himself and ordering the military to reinstate the historical ban. ECF 40-12. Nothing in the record supports the idea that the military would have reinstated a complete ban in the absence of President Trump's directives.

Second, Defendants attempt to distinguish the Implementation Plan from the directives that initiated it by cherry-picking language from Secretary Mattis's Terms of Reference. *See* ECF 139-5. The Terms of Reference defeat, rather than support, Defendants' position; indeed,

they articulate DoD's understanding that it had been "direct[ed]" to "prohibit[] accession of transgender individuals into military service." *Id*. Far from instructing the Panel of Experts to consider all of the evidence and reach the best conclusion, Secretary Mattis's instruction simply repeated what "[t]he Presidential Memorandum directs" (i.e., "generally prohibit[ing]" accession of transgender individuals into military service), and requested "update[s]" to the "terminology" DoD should use to describe this ban. *Id.* Although Defendants acknowledge the Terms of Reference (*see* ECF 158 at 46), they do not explain how these instructions could be consistent with the type of independent judgment they claim took place.

Consistent with this direction, military officials acknowledged that DoD had "received formal guidance from the White House reference to transgender personnel serving in the military" and committed to "develop a [sic] implementation plan to meet the President's intent," that is, a ban on military service by people who are transgender. ECF 163-9 at 4; *see also* ECF 40-22 (Tweets). While Defendants cite boilerplate language asserting that Secretary Mattis provided his "professional military judgment," ECF 176 at 24, the Secretary's "judgment" was confined to the clear parameters provided by his Commander-in-Chief. *See* ECF 85 at 39; *Karnoski*, 2018 WL 1784464, at *6 ("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.").

To show a genuine dispute of material fact, Defendants must present some evidence that the military actually conducted an independent review beyond the parameters set by President Trump's directives and the Terms of Reference. They have failed to do so. Indeed, they have shielded highly relevant evidence from this Court's review through sweeping and unfounded assertions of deliberative process privilege. *See* ECF 177-3, 177-33. In the face of the clear

words of the Terms of Reference, demonstrating the importance of the President's "direction" and the heavily circumscribed nature of the implementation process, the bare assertions of defense counsel are insufficient to survive Plaintiffs' cross-motion for summary judgment.

Third, Defendants assert that the Implementation Plan is similar to the Open Service Directive in most respects. *See* ECF 176 at 7–9. This is a gross mischaracterization. Contrary to Defendants' claim, the Open Service Directive and the Implementation Plan differ not simply in the scope of their exceptions, but in the most fundamental respects. The Open Service Directive's enlistment policy allowed transgender people to enlist and serve if they have completed gender transition (with a waive-able requirement of an 18-month waiting period before enlistment). The Implementation Plan's enlistment policy *permanently and categorically bans* transgender people who have transitioned from enlisting, and further *mandates* that transgender service members serve in their "biological sex." *Compare* Open Service Directive (ECF 40-4) at Attachment § 2 ("ACCESSIONS"), § 3 ("IN-SERVICE TRANSITIONS"), *with* Implementation Plan (ECF 120-1) at 2–3 ("Transgender persons who require or have undergone gender transition are disqualified from military service"; "Service members diagnosed with gender dysphoria . . . may be retained if they do not require a change of gender"; "Transgender persons without a history or diagnosis of gender dysphoria . . . may serve . . . in their biological sex."). Thus, to enlist under the Implementation Plan, transgender service members must deny their gender identity and forgo any treatment for gender dysphoria, effectively excluding service

by transgender persons.[6]

Defendants argue that the Implementation Plan's mandate to serve in one's "biological sex" and never transition is the same as the Open Service Directive's requirement that service members comply with the sex-based standards consistent with the gender they were designated at the time of enlistment (their original DEERS marker) until their gender transition is finalized (and their DEERS marker updated). *See* ECF 176 at 21. That is no comparison at all. The Open Service Directive requires compliance with sex-based standards consistent with one's gender marker but *allows service members the opportunity to transition and to alter their gender marker accordingly*, whereas the Implementation Plan categorically bars service by those who have transitioned. ECF 40-4 at Attachment § 3. This aspect of the Open Service Directive addresses people transitioning in service who had previously been serving in their birth-assigned gender. Individuals enlisting who had already transitioned would have been assigned a DEERS marker consistent with that transition and would never have been subject to standards consistent with their birth-assigned sex.

The Implementation Plan thus carries out President Trump's directive to ban transgender people from enlisting. Assertions by counsel that the Implementation Plan is "different" from President Trump's original directives do not raise a genuine dispute of material fact about its constitutionality.

[6] Defendants also omit any discussion of the Open Service Directive's order that "discrimination based on gender identity is a form of sex discrimination" and that all service members should have "equal opportunity in an environment free from sexual harassment and unlawful discrimination"—statements that are noticeably absent from the Implementation Plan. *Compare* ECF 40-4 at Attachment § 5 ("EQUAL OPPORTUNITY"), *with* ECF 120-1.

III. THE IMPLEMENTATION PLAN VIOLATES EQUAL PROTECTION ON ITS FACE.

Even without considering its unconstitutional origins, the Implementation Plan is unconstitutional on its face. It singles out transgender individuals for different and unequal treatment without any constitutionally adequate justification—or any justification at all.

A. The Implementation Plan Requires Heightened Scrutiny.

Defendants' claim that the Implementation Policy is subject only to rational basis review relies on two faulty premises: that the Implementation Plan discriminates based on only gender dysphoria, not transgender status; and that forcing transgender individuals to serve in accordance with their sex assigned at birth is not discriminatory at all. Both arguments are contrary to overwhelming medical consensus and constitutional doctrine. They do not raise genuine disputes as to either the applicability of heightened scrutiny or the fact that Defendants' Implementation Plan fails under that scrutiny. *Infra* pt. III.C.

The Implementation Plan triggers heightened scrutiny because it subjects current and prospective transgender service members to standards different from those applied to non-transgender individuals who are similarly situated. Differential treatment on the basis of transgender status triggers at least heightened scrutiny. *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 719 (D. Md. 2018) (holding that transgender status is "at least" a quasi-suspect classification); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018) ("transgender people bear all of the characteristics of a quasi-suspect class and any rule developed . . . should withstand heightened scrutiny review to be constitutionally sound"). There is no support for applying a lesser level of scrutiny for discrimination against a protected class in the military context. *See* ECF 85 at 43–44 (adopting reasoning of *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 208–10 (D.D.C. 2017)); *Karnoski*, 2018 WL 1784464, at *9 (holding that transgender

individuals "are a suspect class, such that the Ban must satisfy the most exacting level of scrutiny if it is to survive"); *see also Rostker v. Goldberg*, 453 U.S. 57, 69 (1981) (rejecting the government's request to apply rational-basis review rather than "the heightened scrutiny with which we have approached gender-based discrimination").

Defendants insist that the Implementation Plan is constitutional because its framework "turns on gender dysphoria" rather than a person's transgender status. ECF 176 at 20. That is simply not true. Eligibility for service is determined not by a diagnosis of gender dysphoria, but rather by whether the person has transitioned. Specifically, under the Implementation Plan, a person whose gender dysphoria has been completely *cured* as a result of gender transition is barred from enlisting, whereas a person with a history of gender dysphoria is permitted to enlist after 36 months *so long as they serve in their sex assigned at birth*. ECF 120-1 at 2–3. A policy that bans transgender people from transitioning and serving consistently with their gender identity facially discriminates based on transgender status. *See Karnoski*, 2018 WL 1784464, at *6 (a person's medical need to transition is the "very characteristic that defines them as transgender in the first place").

Defendants further attempt to distinguish between discrimination based on transgender status and discrimination based on gender transition. However, courts refuse to distinguish between status and conduct in deciding whether to apply heightened scrutiny when—as here—a particular characteristic or trait is a defining element of a protected class. *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 689 (2010) (recognizing that even though lesbian, gay, and bisexual people can choose to be celibate, requiring them to do so is discrimination based on status); *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in the judgment) (explaining that state sodomy ban was unconstitutional because "the

conduct targeted by this law . . . is closely correlated with" being lesbian, gay, or bisexual); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

In any event, even if Defendants could plausibly recast the Implementation Plan as discriminating based on gender transition, that still would not save their discriminatory policy from heightened scrutiny: discrimination based on the act of gender transition is on its face discrimination on the basis of sex. *See, e.g.*, *EEOC v. R.G. & G.R. Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018) (rejecting distinction between transgender status and gender transition because "transitioning status constitutes an inherently gender non-conforming trait"); *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) (same).

B. Defendants' Call for Blind Deference to Military Judgment Should Be Rejected.

Unable to escape heightened scrutiny, Defendants return to their mantra that this Court must "defer" to military judgments. No such deference is owed here, but even if it were, the Implementation Ban would still fail to pass constitutional muster.

As an initial matter, the mere fact that this case implicates military accessions does not, standing alone, mandate deference to Defendants' decisionmaking process. In *Rostker*, the Supreme Court stressed that the judicial branch should grant a high degree of "deference to *Congress* in military affairs" and emphasized that the policy at issue had been "extensively considered by Congress in hearings, floor debate, and in committee." 453 U.S. at 69, 72 (emphasis added). By contrast, the policy here has its genesis in an arbitrary Twitter announcement by the President, which, as explained above, remains a critical driver of the Implementation Plan. *See* ECF 85 at 43 (observing that the Ban "did not emerge from a policy review" and "was not driven by genuine concerns regarding military efficacy"); *cf. Youngstown*

Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952) ("The President's order does not direct that a *congressional* policy be executed in a manner prescribed by Congress—it directs that a *presidential* policy be executed in a manner prescribed by the President." (emphases added)). Moreover, *Rostker* concerned two classifications of individuals that, in the Court's view, were not similarly situated. 453 U.S. at 78. Here, the Transgender Service Member Ban and Implementation Plan set apart transgender individuals for disparate treatment for no other reason than their transgender identity. *See M.A.B.*, 286 F. Supp. 3d at 718.[7]

Even if deference were owed to the Executive here, "deference does not mean abdication." *Rostker*, 453 U.S. at 70. This Court must still determine whether the President and the military "transgressed an explicit guarantee of individual rights." *Id*. As discussed in pt. III.A, *supra*, this question should be answered under a heightened scrutiny analysis. But even under a rational basis test, it is plain that such a transgression has occurred. As explained below, Defendants rely on such faulty logic and irrational conclusions that no degree of deference could save them.

C. The Implementation Plan Does Not Survive Heightened Scrutiny.

Defendants do not contend that the Plan is "substantially related" to an "exceedingly important" government interest; that its justifications are "genuine, not hypothesized or invented *post hoc* in response to litigation"; or that its justifications do not "rely on overbroad generalizations about the different talents, capacities, or preferences" of transgender people. *See Virginia*, 518 U.S. at 533. Instead, Defendants argue only that the Plan satisfies rational-basis review under a highly deferential military standard—which, even in that context, it does not, *see*

[7] Defendants also rely on *Goldman v. Weinberger*, 475 U.S. 503 (1986). *Goldman*, unlike this case, concerned a facially neutral rule.

infra pt. III.D. As Defendants have conceded that the Implementation Plan cannot survive heightened scrutiny, that is a sufficient basis on which to find it unconstitutional.

D. The Implementation Plan Fails Even Rational Basis Review.

The Implementation Plan also fails even rational basis review. Defendants' stated concerns about gender dysphoria and gender transition "ma[k]e no sense in light of how the [military] treat[s] other groups similarly situated in relevant respects," revealing that the policy is designed to burden transgender individuals as a group—not to address a "medical condition." *See, e.g.*, *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001); *Bostic v. Schaefer*, 760 F.3d 352, 382 (4th Cir. 2014) (rejecting justification that is "so underinclusive" that its real motivation "must have rest[ed] on an irrational prejudice" (internal quotation marks omitted)). Because the Ban and the Implementation Plan are not "rationally related to a legitimate governmental purpose," they do not withstand rational basis scrutiny. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (superseded by statute on other grounds).

As set forth in Plaintiffs' cross-motion for summary judgment, Defendants' purported justifications for banning transgender people from enlisting in the military are baseless in light of how the military treats individuals with other medical conditions that raise the same purported concerns. ECF 163 at 34–44; *cf. Crawford v. Cushman*, 531 F.2d 1114, 1123 (2d Cir. 1976) ("Why the Marine Corps should choose, by means of the mandatory discharge of pregnant Marines, to insure its goals of mobility and readiness, but not to do so regarding other disabilities equally destructive of its goals, is subject to no rational explanation."); *cf. City of Cleburne*, 473 U.S. at 450 ("[T]he expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home [for people with disabilities] for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.").

In response to this charge, Defendants have provided neither evidence nor any rational explanation sufficient to survive summary judgment. Instead, Defendants attempt to muddy the waters by accusing Plaintiffs of asking the Court to "substitute its own judgment for that of current military leaders on matters of military policy" through consideration of "the opinion of a civilian doctor." ECF 176 at 33. To the contrary, the military's own documents establish that the military allows people to enlist and deploy when taking hormones as medication management for conditions *other* than gender dysphoria. *See* ECF 133-15 (Administrative Record) at AR3068 (internal "white paper" memorandum regarding hormones and deployability); *accord* ECF 40-32 (Brown Decl.), ¶¶ 62, 77–83. Defendants never attempt to provide *any* explanation for why transgender service members who take hormones as medication management for gender dysphoria should be treated differently. There is no military judgment to "second guess," because the military has offered no explanation at all.

1. Deployability

Defendants assert that transgender individuals warrant disparate treatment because transition-related medical care poses deployability concerns. But under the Open Service Directive, transgender people must already have completed transition-related care at least 18 months before enlisting. ECF 40-4 at Attachment § 2(a)(2). Plaintiffs have already explained this fundamental disconnect: Defendants seek to ban enlistment because of concerns that *by definition do not apply* to those who would be eligible to enlist. *See* ECF 163-2 at 35–39. It is dispositive of the Implementation Plan's irrationality that Defendants still cannot explain this basic contradiction, continuing to rely on concerns that simply have no applicability. *See* ECF 120-2 at 32–34 (focusing almost entirely on the deployability of service members who are in the process of gender transition and may require monitoring while initiating hormones, or who may be nondeployable for limited periods of time while recovering from transition-related surgery).

For service members who have already transitioned before enlisting, the only relevant medical treatments are maintenance hormone therapy, and military regulations already permit service members in combat settings to take hormones and other medications for various medical conditions, including abnormal menstruation, dysmenorrhea, and endometriosis. ECF 139-19 (Brown Supp. Decl.), ¶¶ 33–38. Moreover, according to the military's own research, "the long-term monitoring requirements, adverse outcomes, and deployment opportunities" for transgender service members receiving cross-sex hormone maintenance "are similar to other common hormone-based therapies" provided to other service members who are able to deploy. ECF 133-15 at AR3068; *accord* ECF 139-19, ¶ 36 ("The risks associated with use of cross-sex hormone therapy to treat gender dysphoria are low and not any higher than for the hormones that many non-transgender active duty military personnel currently take. The medications do not have to be refrigerated, and alternatives to injectables are readily available, further simplifying treatment plans."). The white paper noted that there are many non-transgender service members with diagnostic codes for "low testosterone and low estrogen conditions who are receiving testosterone and estrogen therapy," and that "*[i]ndividuals who are stable on their regimens are deployable.*" ECF 133-15 at AR3074 (emphasis added). In 2016–17 alone, 352 men and 19 women deployed while receiving hormones for these conditions; during the same period, 620 service members were deployed while receiving hormones for hypothyroidism. *Id.* at AR3073–74.

Remarkably, Defendants once again fail even to acknowledge the white paper or provide any explanation, much less evidence, for why transgender service members' need for hormone therapy should be handled any differently from that of other service members. *See* ECF 163-2 at 39–40.

2. Readiness

Defendants also assert that a history of gender dysphoria represents a rational basis for exclusion from military service, because (according to Defendants) people with gender dysphoria disproportionately suffer from anxiety and depression. ECF 176 at 34.[8] But it is undisputed that the military *already requires* that new enlistees undergo examination for potentially disqualifying mental health diagnoses. ECF 139-19 ¶ 21. A history of suicidal behavior is disqualifying under these general criteria, while a history of anxiety or depression is disqualifying unless the individual has been stable and without medical treatment for a period of 24 or 36 months, respectively. *Id.* Defendants have provided no evidence to support their view that a gender dysphoria diagnosis requires exceptional treatment. Moreover, because transgender individuals must be certified as being stable in their gender for 18 months prior to accession under the Open Service Directive, enlistees under the terms of that policy will no longer be experiencing gender dysphoria. *Id.* at 11.

Defendants respond by asserting that there is uncertainty regarding the efficacy of transition-related treatment. But the medical consensus on this issue is clear and is directly contrary to Defendants' position: transition-related medical care is effective at treating gender dysphoria. ECF 40-32 ¶ 32. This is not a "battle of the experts"; it is a rout, with science on one side and Defendants' irrational animus on the other. National medical organizations, including the American Psychological Association, the American Medical Association, the Endocrine Society, and the American Psychiatric Association, among others, all agree that transition-related

[8] Defendants cite the supposedly disproportionate number of visits to mental health care professionals made by transgender service members, ECF 176 at 34, while ignoring the "critical fact" that "service members were required to meet with mental health providers numerous times to document their gender dysphoria as a precondition for receiving health care for gender dysphoria, and for continued access to cross-sex hormones." ECF 139-19 ¶ 29.

medical care is effective. *See id.* ¶ 34; *see also* ECF 139-19 ¶¶ 13–14. Defendants offer no expert medical judgment to contradict this professional consensus. The Implementation Plan's disregard for the established medical consensus reflects stigma, not fact.

The irrational prejudice underlying the policy is further illustrated by Defendants' disparate treatment of people with a history of gender dysphoria who transition and people with a history of gender dysphoria who attempt to serve in their sex assigned at birth. The notion that gender dysphoria can be "cured" by living in accordance with one's sex assigned at birth has been soundly rejected by the scientific community. *See* ECF 139-19 ¶ 9. There is no rational medical basis for concluding that people with a history of gender dysphoria should be able to enlist if they serve in their sex assigned at birth while continuing to assert that there is too much medical uncertainty to allow transgender people to enlist after their gender dysphoria has been cured through transition-related care.

3. Costs

Defendants repeatedly highlight various costs and impacts that they assert would necessarily flow from providing transgender service members with medical treatment and accommodations under the Open Service Directive. ECF 176 at 43–45. Again, however, the Open Service Directive permits transgender individuals to enlist *only after completing their transition*, including a medical certification of stability for a period of 18 months. ECF 40-4 at Attachment § 2. The supposed spike in military medical costs seen since the Open Service Directive issued is illusory, as it reflects the medical costs for existing service members pursuing transition-related surgeries that new enlistees would not need. The same is true for the "negative budgetary impact" cited for accommodating travel related to transition surgical care. New enlistees will have no anticipated surgical needs, and thus they will generally need only maintenance levels of hormone therapy, unlikely to require any travel. *See, e.g.*, ECF 139-19

¶ 35 ("'The Military Health Service maintains a sophisticated and effective system for distributing prescription medications to deployed service members worldwide.'" (quoting M. Joycelyn Elders et al., *Medical Aspects of Transgender Military Service*, 41 Armed Forces & Soc'y 199, 207 (Aug. 2014)). This is well within the range of typical medical costs the military bears for any number of other medical conditions requiring hormone treatment.

4. Unit Cohesion and Privacy

Defendants assert that DoD was reasonably entitled to exclude transgender individuals out of concerns regarding unit cohesion. ECF 176 at 40–43. Even the leaders of the services do not share those concerns.

Marines Commandant Gen. Robert Neller told the U.S. Senate that he was "not aware of any issues" in the areas of unit morale related to transgender service. Kies Decl., Ex. B at 50. Army Chief of Staff Gen. Mark Milley echoed those statements, saying that he had not heard of any issues with unit cohesion. *Id.*, Ex. C at 58. Chief of Naval Operations Adm. John Richardson said the same, *id.*, Ex. B at 50, as did Air Force Chief of Staff David Goldfein, *id.*, Ex. D at 48. If transgender service members posed a real concern for unit cohesion, one would expect the military's most senior officers to be aware of it after presumably receiving extensive pre-hearing briefings.

Defendants also claim that the Implementation Plan reflects the concern that there could be a perception of unfairness if transgender individuals are permitted to adhere to uniform standards not in line with their birth sex, while others are not. ECF 176 at 41. However, under current military regulations individuals must meet the uniform standards associated with their military gender marker. ECF 40-9 at 11 (Implementation Handbook of Open Service Directive). This standard can thus be fairly applied without an appearance of favoritism or inconsistency, alleviating any threat to unit cohesion.

Finally, Defendants assert that transgender service members pose a potential threat to the privacy rights of other service members. Once again, Defendants ignore the existing military frameworks for resolving problems of this kind. Commanders have flexibility to implement practical solutions to alleviate any issues that may arise from, *inter alia*, locker rooms or shared bathroom facilities. ECF 139-29 (Carson Supp. Decl.), ¶¶ 24–29; *see* ECF 63-2 at 41–43 (citing cases and sources). Defendants present no evidence that such issues have, in fact, arisen, nor have posed any threat to unit cohesion. As discussed above, several of the military's senior officers have affirmatively testified that such problems have not arisen. Manufactured privacy concerns have arisen in the military before, both in the context of "Don't Ask, Don't Tell" and in the context of resisting the integration of women into the military. This argument has been debunked each time. It is no more persuasive here.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Plaintiffs' opening brief, Plaintiffs' Cross-Motion for Summary Judgment should be granted.

Dated: July 6, 2018

Respectfully submitted,

/s/ Peter J. Komorowski
Peter J. Komorowski

David M. Zionts*
Carolyn F. Corwin*
Mark H. Lynch (Bar No. 12560)
Augustus Golden*
Jeff Bozman*
Marianne F. Kies (Bar No. 18606)
Joshua Roselman*
Peter J. Komorowski (Bar No. 20034)
Mark Neuman-Lee*
Covington & Burling LLP
One CityCenter
850 Tenth St. NW
Washington, DC 20001
Telephone: (202) 662-6000
Fax: (202) 778-5987
dzionts@cov.com
ccorwin@cov.com
agolden@cov.com
jbozman@cov.com
mkies@cov.com
jroselman@cov.com
pkomorowski@cov.com
mneumanlee@cov.com

Mitchell A. Kamin*
Nicholas A. Lampros*
Covington & Burling LLP
1999 Avenue of the Stars, Suite 3500
Los Angeles, California 90067
Telephone: (424) 332-4800
Facsimile: (424) 332-4749
mkamin@cov.com
nlampros@cov.com

Sara D. Sunderland*
Covington & Burling LLP
One Front Street
San Francisco, California 94111
Telephone: (415) 591-7004
Facsimile: (415) 591-6091
ssunderland@cov.com

Deborah A. Jeon (Bar No. 06905)
David Rocah (Bar No. 27315)
American Civil Liberties Union Foundation of Maryland
3600 Clipper Mill Road, #350
Baltimore, MD 21211
Telephone: (410) 889-8555
Fax: (410) 366-7838
jeon@aclu-md.org
rocah@aclu-md.org

Joshua A. Block*
Chase B. Strangio*
James Esseks*
Leslie Cooper*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: 212-549-2627
Fax: 212-549-2650
jblock@aclu.org
cstrangio@aclu.org
jesseks@aclu.org
lcooper@aclu.org

** Admitted pro hac vice*

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on July 6, 2018, a copy of the foregoing and its exhibits were served on Defendants via CM/ECF.

/s/ Peter J. Komorowski
Peter J. Komorowski