IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*, *Plaintiffs*, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, *Defendants*.	Case 1:17-cv-02459-MJG Hon. Marvin J. Garbis

DEFENDANTS' REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

A year after a significant change to longstanding military policy, the Department of Defense ("DoD") in June 2017 began an extensive review of the issue of military service by transgender individuals. That months-long process, involving a panel of senior military officials who thoroughly studied various aspects of the question, culminated in a new policy announced by Secretary of Defense James Mattis in March 2018. Under this new policy, individuals who suffer from the medical condition of gender dysphoria would be presumptively disqualified from service (subject to various exceptions), but transgender individuals without this condition would be eligible to serve in their biological sex.

Plaintiffs' filings mischaracterize the nature of the military's new policy. In particular, they fail to recognize that DoD's new policy is in many respects consistent with the policy adopted by then-Defense Secretary Ashton Carter ("Carter Policy"), currently in place as a result of preliminary injunctions in this and the related cases. Both policies presumptively disqualify individuals with gender dysphoria. Both policies permit transgender individuals without gender dysphoria to serve in their biological sex. And both polices contain exceptions allowing some transgender individuals who have previously been diagnosed with gender dysphoria to serve. The difference between the two policies comes down to the scope of their exceptions—a matter that is well within the discretion owed to the nation's senior military leadership.

Plaintiffs likewise fail to cast doubt on the process DoD used to develop its new policy or the justifications underlying it. The policy is the result of an independent, extensive review by a panel of military experts, and is rooted in the understanding that both historically and today, the military has not permitted individuals to serve if they have medical conditions that may excessively limit their deployability, pose an increased risk of injury to themselves or others, or otherwise require measures that threaten to impair the effectiveness of their unit. In DoD's professional military judgment, these criteria are met for the medical condition of gender dysphoria, particularly when a person requires or

has undergone gender transition to treat this condition. As Secretary Mattis observed, generally allowing service by such individuals poses "substantial risks" and threatens to "undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." Mattis Mem. 2, Dkt. 120-1. This conclusion is based on "the Department's best military judgment," the recommendations of the panel of military experts who thoroughly studied the issue, and the Secretary's "own professional judgment." *Id.* Plaintiffs' experts may disagree with these conclusions, but their opinions cannot overcome the judgments of current military leaders. The Constitution allocates military decision-making authority to the political branches, not to expert witnesses in lawsuits.

In any event, the Court need not reach the merits of DoD's new policy because none of the Plaintiffs have met their burden to establish standing to challenge that policy. Although Plaintiffs' brief incorrectly analyzes standing under the doctrine of mootness, once the correct standard is applied, it is clear that all of the Plaintiffs lack standing. Moreover, Plaintiffs' claims against the President are not redressable, as discussed in Defendants' present motion, Dkt. 158, and pending partial motion for judgment on the pleadings, Dkt. 115; *see also* Reply, Dkt. 118.

Finally, Plaintiffs' request for additional discovery under Federal Rule of Civil Procedure 56(d) is inconsistent with their cross-motion for summary judgment, which is premised on the assertion that this case involves no genuine disputes of material fact. Even setting aside Plaintiffs' inherently illogical position, they have not met Rule 56(d)'s heavy burden to show that they "cannot present facts essential to justify [their] opposition."

For these reasons and those that follow, the Court should deny Plaintiffs' cross-motion for summary judgment and either dismiss this case or grant summary judgment for Defendants.

BACKGROUND

Given the stakes of warfare, DoD "has historically taken a conservative and cautious approach" in setting standards for military service. DoD Report ("Report") 3, Dkt. 120-2. DoD has long disqualified individuals with "physical or emotional impairments that could cause harm to themselves or others, compromise the military mission, or aggravate any current physical or mental health conditions that they may have" from entering military service. *Id.* at 9. And it has taken a particularly cautious approach with respect to mental-health standards in light of "the unique mental and emotional stresses of military service." *Id.* at 10. "[M]ost mental health conditions" are "automatically disqualifying" for entry into the military absent a waiver, even when an individual no longer suffers from that condition. *Id.* at 20. In general, the military has aligned these disqualifying conditions with the ones listed in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), published by the American Psychiatric Association (APA). *Id.* at 10. Military standards for decades therefore presumptively disqualified individuals with a history of "transsexualism," consistent with the inclusion of that term in the third edition of the DSM. *Id.* at 7, 10–11.

In 2013, the APA published a new edition of the DSM, which replaced the term "gender identity disorder" (itself a replacement for "transsexualism") with "gender dysphoria." *Id.* at 10, 12. In doing so, the APA explained that it no longer considered identification with a gender different from one's biological sex (*i.e.*, transgender status) to be a disorder. *Id.* at 12. It stressed, however, that a subset of transgender people suffer from the medical condition of gender dysphoria, a "marked incongruence between one's experience/expressed gender and assigned gender, of at least 6 months duration," that is "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning." *Id.* at 12–13, 20–21. Individuals diagnosed with gender dysphoria sometimes transition genders—through cross-sex hormone therapy, sex-reassignment

surgery, or simply living and working in their preferred gender—in an attempt to treat this condition. *Id.* at 22; RAND Report 6–7, 21, Dkt. 40-35.

In 2015, then-Secretary of Defense Ashton Carter ordered the creation of a working group to study "the policy and readiness implications of welcoming transgender persons to serve openly," Statement by Secretary Carter 1 (July 13, 2015), Dkt. 40-31, and instructed it to "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness," AR319 (Memorandum from Secretary Carter (July 28, 2015)). As part of this review, DoD commissioned the RAND National Defense Research Institute to conduct a study. Report 13. The resulting RAND report concluded that the proposed policy change would have "an adverse impact on health care utilization and costs, readiness, and unit cohesion," but that these harms would be "'negligible' and 'marginal' because of the small estimated number" of transgender servicemembers relative to the size of the armed forces as a whole. Report 14.

Following this review, in June 2016, then-Secretary Carter ordered the armed forces to adopt a new policy on military service by transgender individuals. Report 14; DTM 16-005, Dkt. 40-4. Under the Carter policy, transgender servicemembers could transition genders at government expense if they received a diagnosis of gender dysphoria from a military medical provider. Report 14-15; *see* DTM 16-005 Attach. at 2; DoDI 1300.28 at 7, Dkt. 40-10. In addition, the military had until July 1, 2017, to revise its accession standards to allow transgender individuals, including those who had already transitioned, to enter military service if they met certain medical criteria. DTM 16-005 Attach. at 1. Specifically, a "history of gender dysphoria" would be disqualifying unless an applicant provided a certificate from a licensed medical provider certifying that the applicant had been "stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months." *Id.* A "history of medical treatment associated with gender transition"—including "sex reassignment or genital reconstruction surgery"—would likewise be disqualifying

absent certification that the applicant had completed all transition-related medical treatment and had been stable or free of complications for 18 months. *Id.* at 1–2. Finally, transgender individuals who lacked a history or diagnosis of gender dysphoria, whether they were currently serving or seeking to serve, could not be disqualified on the basis of their transgender status, but were required, like everyone else, to meet all of the standards associated with their biological sex. *Id.*; Report 4.

On June 30, 2017, the day before the Carter accession standards were set to take effect, Secretary Mattis, on the recommendation of the Service Chiefs and in the exercise of his discretion, decided that it was "necessary to defer" those standards until January 1, 2018, so that the military could "evaluate more carefully" the effect of accessions by transgender individuals "on readiness and lethality." AR326 (Accessions Deferral Memorandum); *see* Report 4. Without "presuppos[ing] the outcome," he ordered a five-month study that would "include all relevant considerations" and give him "the views of the military leadership and of the senior civilian officials who are now arriving in the Department." Accessions Deferral Memorandum.

While this study was ongoing, the President stated on Twitter on July 26, 2017 that the government "will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military." Dkt. 40-22. He then issued a memorandum in August 2017 explaining that former-Secretary Carter had "failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy"—which generally disqualified transgender individuals from service—"would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." AR327 (2017 Memorandum). The President therefore called for "further study" to ensure that implementation of the Carter policy "would not have those negative effects." *Id.*

In the interim, the President directed a "return to the longstanding policy" on service by transgender individuals "until such time as a sufficient basis exists upon which to conclude that terminating [it] would not have the negative effects discussed." *Id.* at 327–28. He ordered the

Secretary of Defense to craft a "plan for implementing" this directive by February 2018 that would "determine how to address transgender individuals currently serving." *Id.* at 328 The President stressed, however, that the Secretary of Defense, after consultation with the Secretary of Homeland Security, "may advise [him] at any time, in writing, that a change to this policy is warranted." *Id.*

In September 2017, Secretary Mattis established a panel of experts to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." Terms of Reference 2, Dkt. 139-5. The panel consisted of "senior uniformed and civilian Defense Department and U.S. Coast Guard leaders," including "combat veterans." Mattis Mem. 1. Given "their experience leading warfighters," "their expertise in military operational effectiveness," and their "statutory responsibility to organize, train, and equip military forces," these senior military leaders were "uniquely qualified to evaluate the impact of policy changes on the combat effectiveness and lethality of the force." Report 18. This panel was instructed "to provide its best military advice, based on increasing the lethality and readiness of America's armed forces, without regard to any external factors." Mattis Mem. 1.

The panel drew on experts across DoD and the Department of Homeland Security, including three groups dedicated to issues involving personnel, medical treatment, and military lethality. Report 18. These groups provided "a multi-disciplinary review of relevant data" and information about medical treatment as well as standards for accession and retention, developed a set of policy recommendations, and responded to "numerous queries for additional information and analysis." *Id.*

In 13 meetings over 90 days, the panel met with military and civilian medical professionals, commanders of transgender servicemembers, and transgender servicemembers themselves. *Id.* It reviewed information regarding gender dysphoria, its treatment, and the impact of this condition on military effectiveness, unit cohesion, and resources. *Id.* And unlike prior reviewers, the panel relied on the "the Department's own data and experience obtained since the Carter policy took effect." *Id.*

After "extensive review and deliberation," which included consideration of evidence that supported and cut against its proposals, the panel "exercised its professional military judgment" and presented its recommendations to the Secretary. *Id.*

After considering these recommendations and additional information, Secretary Mattis, with the agreement of the Secretary of Homeland Security, sent the President a memorandum in February 2018 proposing a new policy, consistent with the panel's conclusions, that differed from both the Carter policy and the longstanding policy addressed in the 2017 Memorandum, along with a 44-page report explaining DoD's position. *See* Mattis Mem.; Report. Noting that the President had "made clear" that the Secretary "could advise" him "at any time, in writing, that a change to [the pre-Carter] policy is warranted," Secretary Mattis recommended that the President "revoke" his 2017 Memorandum, "thus allowing" the military to adopt the new policy. Mattis Mem. 1, 3.

Like the Carter policy before it, DoD's new policy turns on the medical condition of gender dysphoria, not transgender status. Under each policy, transgender individuals without a history or diagnosis of gender dysphoria may serve if they meet the standards associated with their biological sex, whereas those with gender dysphoria are presumptively disqualified. Report 4–6. The main difference between the two policies is the nature of the exceptions to that presumptive disqualification.

Under the 2018 policy, individuals with a history or diagnosis of gender dysphoria may join or remain in the military if they neither need nor have undergone gender transition, are willing and able to adhere to the standards associated with their biological sex, and can meet additional criteria. Report 5. For accession into the military, they must show 36 months of stability (*i.e.*, absence of gender dysphoria) before applying, while for retention in the military, they may remain if they meet deployability standards. *Id.* These exceptions rest on DoD's judgment that "a history of gender dysphoria should not alone" be disqualifying given evidence that the presence of this condition in

children does not always persist into adulthood and the military's interest in retaining those in whom "it has made substantial investments." *Id.* at 42.

By contrast, individuals with gender dysphoria who require or have undergone gender transition are disqualified absent a waiver. *Id.* at 5. "In the Department's military judgment," this is a "necessary departure from the Carter policy" because service by these individuals was "not conducive to, and would likely undermine, the inputs—readiness, good order and discipline, sound leadership, and unit cohesion—that are essential to military effectiveness and lethality." *Id.* at 32, 41. This judgment rests on numerous military concerns, including evidence that individuals with gender dysphoria continued to have higher rates of psychiatric hospitalization and suicidal behavior even after transition, evidence that transition-related treatment could render servicemembers non-deployable for a significant time, the creation of irreconcilable privacy demands that would create friction in the ranks, the safety risks and perceptions of unfairness arising from having training and athletic standards turn on gender identity, the frustration of other servicemembers who also wish to be exempted from uniform and grooming standards, and disproportionate transition-related costs. *Id.* at 19–42.

Recognizing, however, that a number of individuals with gender dysphoria had "entered or remained in service following the announcement of the Carter policy," DoD included a categorical reliance exemption in its 2018 policy. *Id.* at 43. Specifically, those servicemembers "who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy, may continue to receive all medically necessary treatment" as well as "serve in their preferred gender, even after the new policy commences." *Id.* DoD has confirmed that this exemption will cover any servicemember diagnosed with gender dysphoria while the preliminary injunctions in this or the related cases are in place. *Id.* In DoD's judgment, its "substantial investment" in and "commitment to" these particular servicemembers "outweigh the risks" associated with service by individuals with gender dysphoria who need or have

undergone gender transition more generally. Report 43. The following chart summarizes the relevant military policies:

	Issue	Pre-Carter Policy	Carter Policy	2018 Policy
No History or Diagnosis of Gender Dysphoria	*Accession*	Generally disqualified	May serve in biological sex	May serve in biological sex
	Retention	Generally disqualified	May serve in biological sex	May serve in biological sex
	Funded Transition	Unavailable	Unavailable	Unavailable
History or Diagnosis of Gender Dysphoria	*Accession*	Generally disqualified	If no history of gender transition, disqualified unless stable for 18 months	If no history of gender transition, disqualified unless stable for 36 months
			If history of gender transition, disqualified unless stable in preferred gender and no complications for 18 months	If history of gender transition, disqualified absent waiver
	Retention	Generally disqualified	May serve in biological sex or in preferred gender upon completing transition	If no history of gender transition, may serve in biological sex if meet deployability standards
				If history of or need for gender transition, may serve in preferred gender under reliance exemption
	Funded Transition	Unavailable	Available if medically necessary	Available under reliance exemption if medically necessary

On March 23, 2018, the President "revoke[d]" his 2017 Memorandum "and any other directive [he] may have made with respect to military service by transgender individuals," thereby allowing the Secretaries of Defense and Homeland Security to "exercise their authority to implement any

appropriate policies concerning military service by transgender individuals." 2018 Memorandum 1, Dkt. 120-3. In light of the President's revocation of his 2017 Memorandum and DoD's public release of its new policy, Plaintiffs amended their complaint. Dkt. 148. Defendants moved to dissolve the Court's preliminary injunction, Dkt. 120, and to dismiss the new complaint, or, in the alternative, for summary judgment, Dkt. 158. Plaintiffs cross-moved for summary judgment. Dkt. 163.

ARGUMENT

I. Plaintiffs Have Not Established Standing To Challenge The New DoD Policy.

Because the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, 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." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Thus, on summary judgment, "the plaintiff can no longer rest on [ ] 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts'" establishing standing. *Id.* (citation omitted).

A. Plaintiffs Have Not Met Their Burden Of Showing A Cognizable Injury In Fact.

Before reaching the merits of Plaintiffs' claims, the Court must first resolve each Plaintiff's standing to challenge the new policy. As the Supreme Court has recognized, "a plaintiff must demonstrate standing for each claim" and "'for each form of relief sought.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (citation omitted). And because this is not a class action, for the Court to afford relief to each of the Plaintiffs it must separately determine each Plaintiff's standing to sue. At a minimum, to maintain a challenge to both the retention and accession directives set forth in the DoD policy, at least one Plaintiff must have standing to challenge each directive.[1]

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[1] Plaintiffs do not rebut Defendants' arguments that John Doe 3, a 15-year-old who alleges that he wants to join the Coast Guard, lacks standing because his alleged injury is not imminent, and that the American Civil Liberties Union ("ACLU") lacks associational standing because the ACLU failed to identify a member who has suffered an injury. *See* Defs.' Mot. 17–18, Dkt. 158; *see generally* Pls.' Opp. 14–25, Dkt. 163-2. Because Plaintiffs failed to rebut these arguments, the Court should consider them

Current Servicemembers. In an attempt to shift the burden of proof to Defendants, Plaintiffs argue that because the Court determined at the preliminary injunction stage that Plaintiffs Brock Stone, Kate Cole, John Doe 1, Seven Ero George, Teagan Gilbert, and Tommie Parker had standing to challenge the August 2017 Presidential Memorandum, "their ongoing interest in the litigation is assessed under the mootness doctrine."[2] Pls.' Opp. 15, 18–25. Plaintiffs' argument is misplaced; the Court must assess Plaintiffs' standing to sue based on the Second Amended Complaint, which post-dates the Court's preliminary injunction decision.

Plaintiffs cite two cases for this proposition, *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396–97 (1980) and *Cook v. Colgate University*, 992 F.2d 17, 19 (2d Cir. 1993), but neither involved an amended complaint. When a plaintiff has voluntarily amended the complaint—as Plaintiffs have done here to challenge the new DoD policy—"the Court must measure standing by the state of the world as of the date of the Amended Complaint." *G&E Real Estate, Inc. v. Avison Young-Washington, D.C., LLC*, 168 F. Supp. 3d 147, 159 (D.D.C. 2016) (Kollar-Kotelly, J.); *see also Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473–74 (2007) ("[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." (citations omitted)); *Daniels v. Arcade*, 477 F. App'x 125, 130–31 (4th Cir. 2012) (unpublished) (concluding that standing could be based solely on events that occurred between the

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waived and John Doe 3 should be dismissed as a plaintiff. *See Johnson v. Norfolk S. Ry. Co.*, No. CIV.A. MJG-12-3374, 2014 WL 4662384, at *2 (D. Md. Sept. 16, 2014) (Garbis, J.) ("Johnson's failure to respond to the summary judgment assertions regarding the claims based upon the pre-September 23, 2011 incidents constitutes abandonment of those claims." (citations omitted)). Moreover, because Plaintiffs entirely fail to address standing for the ACLU, the Court should find that Plaintiffs failed to meet their burden to show that the ACLU has standing. *See, e.g.*, *Balas v. Huntington Ingalls Indus., Inc.*, 711 F.3d 401, 408 n.4 (4th Cir. 2013) (explaining that arguments "not included in the opening brief are generally considered waived").

[2] This argument is based on the incorrect factual predicate that the new DoD policy is the same as the August 2017 Presidential Memorandum. That is plainly incorrect. *See supra* Page 9 (Chart).

original filing of a complaint and the filing of an amended complaint); *Ingram v. Crown Reef Resort, LLC*, No. 4:15-CV-03404-RBH, 2016 WL 4061142, at *4 n.3 (D.S.C. July 29, 2016) (stating that "when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, the courts should look to the amended complaint to determine jurisdiction" (citing *Daniels*, 477 F. App'x at 131)). This is because "an amended pleading ordinarily supersedes the original and renders it of no legal effect." *Young v. City of Mount Ranier*, 238 F.3d 567, 572 (4th Cir. 2001). Accordingly, the Court should flatly reject Plaintiffs' argument that their alleged injuries should be analyzed under the mootness doctrine and should instead determine whether Plaintiffs have met their burden to establish that the current servicemembers have standing to raise each claim set forth in their Second Amended Complaint.

The six currently serving Plaintiffs fail to meet their burden of establishing any cognizable injury. First, Plaintiffs argue that the severability provision in the DoD policy has caused them "significant stress" because it "threaten[s] to end their careers at any moment due to events beyond their control." Pls.' Opp. 21. But to establish standing for injunctive or declaratory relief, a plaintiff must demonstrate that there is a real and immediate threat that injury will be repeated in the absence of the requested injunctive relief being granted. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *see Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Grp.*, 28 F.3d 1268, 1273 (D.C. Cir. 1994) (holding that *Lyons* applies to requests for declaratory relief). Courts have repeatedly found that stress, anxiety, or fear of future events is insufficient to establish standing for injunctive and declaratory relief.[3]

For example, in *Lyons*, the plaintiff claimed that police officers applied a chokehold to him, and he sought an injunction to prevent the use of chokeholds because he "fear[ed] that any contact he has with Los Angeles police officers may result in his being choked and strangled to death without

[3] Plaintiffs' citation to an unpublished case, *Moore v. Blibaum & Associates, P.A.*, 693 F. App'x 205 (4th Cir. 2017), is inapposite. That case did not involve a request for injunctive or declaratory relief, but rather involved a claim for money damages for a debt collector's past actions under the Fair Debt Collection Practices Act. *Id.* at 205.

provocation, justification, or other legal excuse." 461 U.S. at 98. The Supreme Court held that the plaintiff's fear of being choked in the future did not give him standing to sue for injunctive relief:

> The reasonableness of Lyons' fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct. It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions. The emotional consequences of a prior act simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant.

Id. at 107 n.8; *see also Hoepfl v. Barlow*, 906 F. Supp. 317, 321–23 (E.D. Va. 1995) (plaintiff's allegation that "knowing Dr. Barlow may continue to discriminate against other disabled persons causes her to suffer mental or psychological injury" was insufficient to confer standing to seek injunctive relief).

Like the plaintiff in *Lyons*, the six current servicemembers do not face a "real and immediate threat of future injury" by Defendants. 461 U.S. at 107 n.8. As explained fully in Defendants' Motion, these six current servicemembers may "continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria," Mattis Mem. 2, and their claim that they may be discharged pursuant to the severability provision is too speculative to establish an injury in fact, *see* Defs.' Mot. 9–12, Dkt. 158 (citing, *inter alia*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408-10, 413-14 (2013)). Although Plaintiffs argue that they may face discharge because "it is not 'absolutely clear' that President Trump will refrain from reissuing the Retention Ban," Pls.' Opp. 22 (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)), this argument is improperly based on the mootness standard for voluntary cessation, and a bald assertion about an action the President may take is far too speculative to constitute a "certainly impending" injury, *Clapper*, 568 U.S. at 410.

Plaintiffs also argue that they "continue to face a substantial risk of discharge because the [DoD policy] declares that post-transition hormone maintenance is incompatible with deployment." Pls.' Opp. 23. But the Report does not state, as Plaintiffs imply, that any individuals taking hormones will be deemed nondeployable and thus subject to discharge. *See generally* Report. To the contrary, the Report simply provides evidence supporting the DoD policy, showing, for example, that there is a

"readiness risk" to transition-related treatment, including hormone therapy. *See* Report 33 (citing Endocrine Society guidelines that recommend quarterly bloodwork and laboratory monitoring of hormone levels during the first year of treatment and stating that "[i]f the operational environment does not permit access to a lab for monitoring hormones (and there is certainly debate over how common this would be), then the Service member must be prepared to forego treatment, monitoring, or the deployment"); *see also infra* Section VIII.A. Standards for nondeployability for all servicemembers will be set pursuant to the separate DoD Retention Policy for Non-Deployable Service Members ("Retention Policy"), a policy that Plaintiffs have not challenged in this case. *See* AR32–33, Dkt. 133-3. If Plaintiffs are "designated as nondeployable" and subsequently discharged, Pls.' Opp. 23, their discharge would be pursuant to the Retention Policy. Thus, any future discharge for nondeployability is not fairly traceable to the DoD policy concerning military service by those with gender dysphoria, but rather to a separate, unchallenged Retention Policy, nor would such alleged injury be redressed by enjoining that policy concerning service by those with gender dysphoria or declaring it unconstitutional. *See Lujan*, 504 U.S. at 560–61.

Plaintiffs also speculate that they may not be able to reenlist or apply for a commission at some point in the future. Pls.' Opp. 22, 25. Although the Mattis Memorandum and the Report do not specifically address reenlistment or commissioning, Defendants have submitted a declaration stating that the current servicemembers will be permitted to reenlist in the military upon the expiration of their current terms of service.[4] *See* Exh. 1 (Declaration of Stephanie Barna ¶ 6). Therefore, the

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[4] Plaintiffs attempt to bolster their baseless speculation that they will not be permitted to reenlist by citing to an Army presentation that allegedly shows that the Army "examined how long it would take to 'eliminate[]' all its transgender servicemembers through attrition or involuntary discharge." Pls.' Opp. 22 (citing Dkt. 139-4, at slides 12–13). But this presentation, which was created in early August 2017 (before the 2017 Presidential Memorandum, Interim Guidance, and the new DoD policy) and was only a small part of a broader briefing on personnel-related topics, summarizes the retention data for transgender soldiers in order to determine the scope of the Army population that could be potentially affected by the President's then-recent Twitter statements, with an overall view towards

current servicemembers will suffer no injury related to reenlistment. The declaration further states that DoD has not yet formed a policy regarding commissioning. *Id.* ¶ 7. Because DoD has not yet formed its policy related to commissioning, it is entirely speculative whether Plaintiff George or other current servicemembers will be denied the opportunity to apply for a commission. *See* Pls.' Opp. 25. Such speculative risk of injury is insufficient to establish standing. *See Clapper*, 568 U.S. at 410.

Finally, Plaintiffs have failed to show they will suffer any injury related to their medical care. *See* Pls.' Opp. 23–24. Indeed, they cannot because these six current servicemembers will continue to "receive medically necessary treatment for gender dysphoria." Mattis Mem. 2. Although Plaintiffs speculate that DoD may not consider transition-related surgeries to be "medically necessary," Pls.' Opp. 24, they have not shown that they have been or will be denied any surgeries (or any other medical care), *see id.* at 23–24; *see also* Second Am. Compl. ¶¶ 17–61, 193. Moreover, Plaintiffs' argument that "it is not 'absolutely clear' that President Trump will not change his mind and re-impose a surgery ban for current servicemembers," Pls.' Opp. 24, is yet another improper attempt to shift the burden and have the Court apply the mootness standard for voluntary cessation. And this bald assertion about an action the President may or may not take in the future is far too speculative to constitute a "certainly impending" injury. *Clapper*, 568 U.S. at 410.

Prospective Servicemembers Who Do Not Meet the Accessions Standards Under the Carter Policy. Plaintiffs do not dispute that Plaintiffs Teddy D'Atri, John Doe 2, and Jane Roe 1 do not meet the accessions standards under the Carter policy. *See* Pls.' Opp. 17–18. Because Plaintiffs failed to rebut this argument, the Court should consider it waived and conclude that these Plaintiffs lack

assessing how the statements could impact personnel management within the Army. Dkt. 139-4, at slides 12–13. The presentation does not present any courses of action, nor does it, as Plaintiffs insinuate, state that anyone will be involuntarily discharged from the Army or will not be permitted to reenlist. *See id.* In addition, the Court should disregard Plaintiffs' unsupported speculation that there "may well be other similar documents in Defendants' files." Pls.' Opp. 22.

standing to challenge the accessions policy. *See supra* note 1. As set forth in Defendants' motion, because these Plaintiffs do not meet the Carter policy's accession standards, their alleged injury is not caused by the new policy and would not be redressed by their requested relief. *See* Defs.' Mot. 16.

Rather than address Defendants' causation and redressability arguments, these three Plaintiffs assert that they will seek entry into the military 18 months after their surgeries, which they claim would be permitted under the Carter policy, and argue that "18 months is a sufficiently short time period to demonstrate an impending injury." Pls.' Opp. 17–18. But even if these Plaintiffs sought entry into the military 18 months after their transition-related surgeries, it is entirely speculative that they would meet the Carter policy's accession standards. Under the Carter policy, these three Plaintiffs would have to have a licensed medical provider certify that (1) "a period of 18 months has elapsed since the date of the most recent of any such surgery," (2) "no functional limitations or complications persist," and (3) no "additional surgery [is] required."[5] AR324 (DTM 16-005 at Attachment ¶ 2(a)(3)). Plaintiffs simply cannot know whether they will have functional limitations or complications as a result of their surgeries, and they can identify no prejudice from being required to wait to sue until any of these eventualities actually come to pass, if ever. Also, Plaintiffs assert that they will not require any additional surgeries, *see* Pls.' Opp. 12–13, but their own assertions are insufficient to meet the Carter policy's standard, which requires a "certifi[cation] by a licensed medical provider," AR324 (DTM 16-005 at Attachment ¶ 2(a)(3)). Plaintiffs' speculation that they will be able to join the military under the Carter policy 18 months after their surgeries is insufficient to establish an imminent injury. *See Lujan*, 504 U.S. at 564 n.2 (stating that the purpose of the "imminence" requirement "is to ensure that

[5] Under the Carter policy, these three Plaintiffs also would need a certification from a licensed medical provider that they have been stable in their preferred gender for 18 months, and, because they are receiving cross-sex hormone therapy, *see* Second Am. Compl. ¶¶ 66, 87, 95, that they have been stable on the hormones for 18 months, AR323 (DTM 16-005 at Attachment ¶ 2).

the alleged injury is not too speculative for Article III purposes" and that an injury that may occur at "some indefinite future time" must "proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all" (citations omitted)).

Prospective Servicemembers Who Have Undergone Gender Transition. Plaintiffs Niko Branco and Ryan Wood argue that they are "barred from service because they were [both] successfully treated for gender dysphoria" and they have "completed all anticipated surgery in connection with their gender transition more than 18 months ago."[6] Pls.' Opp. 16. But if that is the case, then both Branco and Wood can attempt to access into the military now while the preliminary injunctions are in place, and if DoD's new policy is later implemented, both Branco and Wood would qualify for the reliance exemption. By not attempting to access now, Branco and Wood are impermissibly trying to manufacture standing. *See Clapper*, 568 U.S. at 416 ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves."). In sum, all of the Plaintiffs lack standing.

B. Plaintiffs' Claims Against The President Are Not Redressable.

The President should be dismissed from this case because Plaintiffs' alleged injuries are not redressable by the entry of a declaratory judgment. *See Lovitky v. Trump*, No. 17-450, 2018 WL 1730278, at *4 (D.D.C. Apr. 10, 2018) (Kollar-Kotelly, J.). Plaintiffs cite three cases in an attempt to show that the President is not "immune from suit seeking a declaration that his actions are unlawful," but all are distinguishable.[7] Pls.' Opp. 25–26 (citing *Clinton v. City of New York*, 524 U.S. 417 (1998);

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[6] In Defendants' opening brief, Defendants relied on a declaration from Major Ricardo S. Flores that erroneously stated the date of Plaintiff Wood's most recent surgery was 2017 rather than 2012. *See* Defs.' Mot. 17, Exh. 4 (Flores Decl.). Major Flores has submitted a supplemental declaration stating that the "2017 date was a typographical error" and he has "verified that the date recorded in Mr. Wood's recruiting records is 2012." Exh. 6 (Flores Supp. Decl. ¶ 4). Accordingly, Defendants do not dispute that Plaintiff Woods will not require any additional surgeries. Nevertheless, for the reasons stated, Plaintiff Woods has failed to meet his burden of establishing standing to sue.

[7] Plaintiffs also cite to the decision in *Karnoski v. Trump*, Pls.' Opp. 26, but the Court should not rely on that decision for the reasons set forth in Defendants' motion. *See* Defs.' Mot. 20–21, Dkt. 158.

Knight First Amendment Inst. at Columbia Univ. v. Trump, No. 17-civ-5205, 2018 WL 2327290 (S.D.N.Y. May 23, 2018); *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) ("*NTEU*"). First, the Supreme Court in *Clinton* "found standing in a challenge to a President's statutory power, but did not concern his executive decisions." *Lovitky*, 2018 WL 1730278, at *7. In this case, by contrast, Plaintiffs (inexplicably) continue to challenge the now-revoked executive decision by the President—the August 2017 Presidential Memorandum—as well as the President's acceptance of DoD's recommended new policy. Moreover, although the Supreme Court in *Clinton* permitted declaratory relief to be entered against the President, it did not analyze whether it was proper to do so. The Court may not infer from the Court's silence that it found authority existed to issue a declaratory judgment against the President for his official conduct. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144–45 (2011); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 63, n.4 (1989); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). In addition, the district court in *Knight* found that the Presidential action there was ministerial rather than discretionary, stating that "the intrusion on executive prerogative presented by an injunction directing the unblocking of individual plaintiffs would be minimal" and "would not direct the President to execute the laws in a certain way, nor would it mandate that he pursue any substantive policy ends." 2018 WL 2327290, at *23. There can be no question here that any Presidential action involving the formation of military policy involves "judgment, planning, or policy decisions" and is not ministerial. *See Beatty v. Wash. Metro. Area Transit Auth.*, 860 F.2d 1117, 1127 (D.C. Cir. 1988) (defining discretionary, non-ministerial duties). Finally, Plaintiffs continue to rely on *NTEU*, but the D.C. Circuit has questioned whether *NTEU* remains good law after *Franklin*. *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996); *see also Lovitky*, 2018 WL 1730278, at *7. It is doubtful that *NTEU* remains good law considering that "as of 2010, the D.C. Circuit opined that 'a court—whether via injunctive or declaratory relief—*does not* sit in judgment of a President's executive decisions." *Lovitky*, 2018 WL 1730278, at *7 (citation omitted).

II. The New DoD Policy Substantially Departs From The President's 2017 Memorandum And Statement On Twitter.

Plaintiffs' filing rests on the faulty premise that DoD's new policy is substantively the same as the policies allegedly set forth in the President's Twitter statement and Memorandum issued in 2017. *See* Pls.' Opp. 26–34, Dkt. 163. But even a passing review of the new policy reveals that it is substantially different from the President's 2017 Memorandum and Statement on Twitter.

On its face, the new policy—which indisputably permits some transgender individuals to serve, including in their preferred gender—fails to effectuate the President's Twitter statement that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military." Dkt. 40-22. Nor does the policy implement, or even reflect, the approach taken by the President's 2017 Memorandum. That memorandum ordered the military to "return" to its "longstanding policy"—adhered to by the armed forces under every administration until June 2016—of generally disqualifying individuals from military service on the basis of their transgender status. 2017 Mem. The military's new policy differs from that pre-Carter framework in at least two critical respects. First, the new policy, like the Carter policy, turns not on transgender status, but on a medical condition (gender dysphoria) and a related medical treatment (gender transition). Report 4–6; *see* Op. 8 n.9 (noting difference between "[t]ransgender status" and "gender dysphoria"), Dkt. 85. In other words, the new policy allows transgender individuals without a history or diagnosis of gender dysphoria to serve, a possibility that was generally unavailable during the pre-Carter era. Second, the new policy categorically permits individuals with gender dysphoria to serve in their preferred gender (and receive transition-related treatment) as they did under the Carter policy, *id.* at 43, an option that likewise did not exist before June 2016, *id.* at 11. Thus, rather than implement a "return" to the pre-Carter policy, the new policy substantially departs from it.

This is why Secretary Mattis had to recommend that the President "revoke" his 2017 Memorandum in order to "allow[]" the military to implement its preferred framework. Mattis Mem.

3. If the new policy simply implemented the pre-Carter policy addressed in the 2017 Memorandum, there would have been no need for the Secretary to have made this recommendation or for the President to have "revoke[d]" that memorandum "and any other directive [he] may have made with respect to military service by transgender individuals." 2018 Mem. In short, DoD's new policy is substantially different from the President's Twitter statement and Memorandum issued in 2017, and Plaintiffs' attempts to conflate the policies are meritless.

III. The New Policy Does Not Categorically Ban Service By Transgender Individuals.

In the face of the new policy's plain terms setting forth a framework that turns on gender dysphoria and its attendant treatment, Plaintiffs nevertheless maintain their assertion that the new policy "facially discriminates based on sex and transgender status." Pls.' Opp. 27. Rather than address the plain language of the actual DoD policy, they quote the *Karnoski* Court's argument that "[r]equiring transgender people to serve in their 'biological sex' does not constitute 'open' service in any meaningful way, and . . . would force transgender service members to suppress the very characteristic that defines them as transgender in the first place." *Id.* at 32 (quoting *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *6, *12 (W.D. Wash. Apr. 13, 2018)). But these arguments necessarily fail. As the RAND Report explained, only "a subset" of transgender individuals "choose to *transition*, the term used to refer to the act of living and working in a gender different from one's sex assigned at birth." RAND Report 6. In other words, while all transgender individuals "identify with a gender different from the sex they were assigned at birth," only some choose to live and work in accordance with that identity. *Id.* In fact, although an estimated 8,980 servicemembers identify as transgender according to one study, to date only 937 of them have taken advantage of the Carter policy's framework for gender transition in the nearly two years of its existence. Report 7 n.10, 32.

In response, Plaintiffs attempt to evade the RAND Report's conclusions. They argue that although "some transgender people may need to delay transition for a period of time, or attempt to

suppress their identity, [] *requiring* them to do so is discrimination." Pls.' Opp. 32. But Plaintiffs' argument is fatally flawed, because for many transgender individuals, the Carter policy currently in place requires just what Plaintiffs condemn—meeting the standards associated with their biological sex. Indeed, under both the Carter policy and DoD's new policy, transgender persons who have not transitioned may serve only in their biological sex. *Id.* at 15; *see* DoDI 1300.28 at 3–4, 8 ("recogniz[ing] a Service member's gender by the member's gender marker in the [Defense Enrollment Eligibility Reporting System]," which may be changed *only* after a "military medical provider determines that a Service member's gender transition is complete"). When one factors in that a subset of transgender individuals never "choose to transition," RAND Report 6 (emphasis omitted), it is apparent that requiring service according to biological sex for certain transgender individuals is neither discriminatory nor even novel (and in any event, would continue under the preliminary injunction).

Granted, the Carter policy allows some transgender individuals to transition while in service and thereafter be held to the standards associated with their transitioned gender. But this option is limited—transition treatment and its corresponding change in gender marker are available under the Carter policy only to those servicemembers who are both diagnosed with gender dysphoria and prescribed a treatment plan that includes gender transition. *See* Report 15; DoDI 1300.28. For all other transgender servicemembers, the Carter policy requires service according to biological sex. In any event, under DoD's new policy, servicemembers who have already transitioned, or will transition in the future pursuant to the reliance exemption, will be allowed to serve according to their transitioned gender. Indeed, the reliance exemption covers nearly 1,000 servicemembers already. Report 7 n.10.

Plaintiffs next argue that DoD's new policy does not turn on a medical condition because it "disqualif[ies] from service any transgender person, regardless of whether they have gender dysphoria, who requires or has undergone gender transition." Pls.' Opp. 30; *see also id.* at 31 (the new DoD plan "bans transgender people from enlisting . . . even if they were able to transition before developing

gender dysphoria in the first place."). As an initial matter, Plaintiffs again ignore the fact that under DoD's new policy, many individuals "who require[] or ha[ve] undergone gender transition" may serve pursuant to its reliance exemption. *Id.* at 10. But more fundamentally, the contention that a history of, or need for, gender transition could be considered in a manner wholly divorced from gender dysphoria is unfounded. Gender transition is a medical treatment for the medical condition of gender dysphoria, meaning that those who require or have undergone gender transition likely either currently suffer, or at one point suffered, from gender dysphoria. *See* Report 7–8, 20–21. And even if there were a Plaintiff who did not have a history of gender dysphoria but "requires or has undergone gender transition," a policy that turns on a history of, or need for, gender transition still does not apply based on sex or transgender *status*.[8] Again, not all transgender people suffer from gender dysphoria, and not all transgender people with gender dysphoria choose to transition. RAND Report 6; Mattis Mem. 1.

Plaintiffs also complain that DoD's new policy does not permit accession by transgender individuals "even if their gender dysphoria has been fully treated through transition-related care." Pls.' Opp. 31. But Plaintiffs fail to acknowledge that considering a prospective servicemember's history of a medical condition is a standard military practice—and one used with respect to gender dysphoria under the Carter Policy. Indeed, prospective servicemembers are presumptively disqualified based solely on a history of many different medical conditions. *See* AR 210–261 (DoDI 6130.03) (setting "medical standards for appointment, enlistment, or induction into the military services").[9] For example, just as the Carter policy and DoD's new policy both presumptively prohibit accession for

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[8] An even in the unlikely event that such an individual exists, none of the Plaintiffs allege, let alone prove, that they have transitioned without a diagnosis of gender dysphoria.

[9] A new version of DoDI 6130.03 became effective May 6, 2018, after the Panel of Experts completed its review and DoD released its new policy. *See* DoD Instruction 6130.03, *Medical Standards for Appointment, Enlistment, or Induction into the Military Services*, http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003p.pdf. It contains similar limitations on military service by individuals with various medical conditions.

those who suffer from gender dysphoria, the military presumptively prohibits accession for those suffering from diabetes, rheumatoid arthritis, narcolepsy, and dozens of other medical conditions. *See id.* at 39–40, 43; *see also* Report 8–13 (discussing medical standards for accessions, including discussing disqualifying conditions, such as a history of chest or genital surgery or most mental health conditions). Especially in light of the "considerable scientific uncertainty concerning whether [transition-related] treatments fully remedy . . . the mental health problems associated with gender dysphoria," Report 32, it is unsurprising that the military would take into account past transition treatments, and doing so does not turn DoD's new policy into a categorical sex-based or transgender ban. In sum, Plaintiffs provide no basis on which to conclude that DoD's new policy is a ban based on sex or transgender status, or that it turns on anything other than a medical condition and its associated treatment.

IV. The New Policy Is Based On The Independent Judgment Of The Military.

Perhaps recognizing that the content of the new DoD policy departs substantially from the President's statement on Twitter, the 2017 Memorandum, and any alleged total ban on transgender service, Plaintiffs instead cite to various documents, contending that the statements within show that DoD lacked independent judgment in formulating the new policy. Plaintiffs point to language from the 2017 Memorandum directing Secretary Mattis to submit "a plan for implementing" that memorandum, and to language in the 2018 Memorandum indicating that the Department's Report was prepared "*[p]ursuant* to [the President's] memorandum of August 25, 2017." Pls.' Opp. 11, 28; *see* 2017 Mem.; 2018 Mem. Plaintiffs also note statements by Secretary Mattis (1) directing the Deputy Secretary of Defense and Vice Chairman of the Joint Chiefs of Staff to assemble a Panel of Experts to "develop[] an Implementation Plan on military service by transgender individuals, to effect the policy and directives" in the 2017 Memorandum; (2) indicating that the DoD Panel of Experts was to conduct a study to "inform the Implementation Plan"; and (3) directing the Panel of Experts to "recommend updated accessions policy guidelines to reflect currently accepted medical terminology."

Pls.' Opp. 9, 28–29; *see* Terms of Reference 1–2. Finally, Plaintiffs note without context a list of talking points dated September 14, 2017, which states that "DOD will develop a [sic] implementation plan to meet the President's intent." Pls.' Opp. 28; *see* Dkt. 163-9.

But none of this remotely demonstrates that the new DoD policy was not based on the military's independent judgment. Notably, Plaintiffs carefully omit other statements explaining that the Panel of Experts was charged to provide its "best military advice . . . without regard to any external factors," Mattis Mem. 1, and that "[t]he Panel made recommendations based on each Panel member's independent military judgment," Report 4. Nor do Plaintiffs mention that the new DoD policy is, in Secretary Mattis's words, the product of the Panel's "professional military judgment," "the Department's best military judgment," and his "own professional judgment." Mattis Mem. 1–2. Plaintiffs discuss none of these statements, and make no effort to explain why representations by senior military leadership, including the Secretary of Defense himself, should be called into question.

Nor do Plaintiffs dispute that the statements they cite are entirely consistent with the 2017 Memorandum's direction to the military to conduct "further study" and maintain the pre-Carter accession policy while doing so. *See* 2017 Mem. §§ 1(a), 2(a)); *see generally* Pls.' Opp. Plaintiffs also overlook the President's instruction to the Secretary of Defense to "advise [him] at any time, in writing, that a change to this policy is warranted," 2017 Mem., as well as the Secretary's explicit reliance on that fact in recommending that the President revoke his 2017 Memorandum, *see* Mattis Mem 1. Nor can Plaintiffs' position be squared with the new DoD policy's content, which as explained above differs fundamentally from both the President's statement on Twitter and his 2017 Memorandum.

Plaintiffs also ignore the fact that DoD's new policy was the product of a significantly different process than the one the Court found preceded the President's 2017 Memorandum. In its preliminary injunction opinion, the Court characterized the President's 2017 Memorandum and statements on Twitter as a "departure from normal procedure." Op. 43, Dkt. 85. In particular, the Court found that

the statements on Twitter "did not emerge from a policy review," and that the 2017 Memorandum did not "identify any policymaking process." *Id.* The Government of course respectfully continues to disagree with the Court's view of these initial judgments by the Commander-in-Chief to maintain a longstanding military policy while DoD conducted a further review. But regardless, there is no disputing that the new policy was the result of an extensive and independent deliberative process by military experts, as reflected in the new policy itself, Secretary Mattis's memorandum, DoD's 44-page report, and the more than 3,000-page administrative record.

Plaintiffs attempt to dismiss this process as merely a means to formulate "post hoc justifications," Pls.' Opp. 30, but the facts do not bear this out. Indeed, it is undisputed that DoD's review process began at the initiative of Secretary Mattis, based on the recommendation of the Services, *nearly a month before* the President's statement on Twitter. *See* Accessions Deferral Mem.; Mattis Mem.

Plaintiffs nevertheless maintain that DoD's study "was predetermined and that the process was influenced by third parties with an anti-transgender agenda," but nothing they point to supports this claim. Dkt. 48. Plaintiffs cite to a DoD spokesperson's statement that "[t]he way that this was done, is it was a coordinated effort with the White House as well as the Department of Justice." Pls.' Opp. 10 (citation omitted). But when read in context, the quotation from the DoD spokesperson merely concerns coordination between DoD and the White House and Justice Department over the *timing* of the posting of the new policy on DoD's website and the filing of Defendants' motions to dissolve the preliminary injunctions in four different cases in a single day.[10]

[10] *See* Dkt. 139-7 at 10 ("Q: Is the secretary proud of the recommendations they made? Because generally if you put something out at 9:30 on a Friday, the impression is that it's being put out there because, you know, it's being hidden or something. And it was not easy to find the memo [on] the website, either. . . . [A]: The secretary was asked for [his] thoughts and he provided his recommendation. The way that this was done, it was a coordinated effort with the White House as

Plaintiffs' reliance on the dissenting opinion by Panel of Experts member Thomas Dee is similarly unavailing. *See id.* at 48–49. All that opinion shows is that DoD's study was a fully independent process in which the members of the Panel of Experts were free to express whatever view they felt best served military interests, and that both sides of the issue were considered. More fundamentally, the fact that one member disagreed with the view of the majority does not render the majority's recommendation, or Secretary Mattis's final decision, illegitimate or even suspect. By way of analogy, the fact that a law clerk disagrees with his judge's ultimate decision and even memorializes that disagreement in a bench memo does not call that judicial decision into question. In sum, even if it could be said that the military "implemented" the August 2017 Memorandum by studying the issue and advising the President that a new and different policy was appropriate, there is no reason to doubt that DoD applied its considered, independent judgment to the issues at hand.

Finally, Plaintiffs cite the Supreme Court's decision in *Hunter v. Underwood*, 471 U.S. 222 (1985), for the untenable proposition that in order to defeat Plaintiffs' cross-motion for summary judgment, Defendants must show that DoD's new policy would have been issued even if the President had never issued his statements on Twitter and his 2017 Memorandum. Pls.' Opp. 26, 28, 30. This argument fails for a number of reasons. In the first place, *Hunter* is easily distinguishable because it involved a challenge to a state restriction on voting, not to a military personnel policy developed after a robust policymaking process. 471 U.S. at 223. Moreover, the Court in *Hunter* merely held that once "discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of [a] law," the burden shifts "to the law's defenders to demonstrate that the law would have been enacted without this factor." *Id.* at 228. Here, Defendants have presented no evidence that DoD's new policy was the product of a discriminatory purpose. In *Hunter* by contrast, the defendant "essentially

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well as the Department of Justice. *And because there were multiple filings done in different time zones, [it] drove the timing of the release*." (emphasis added)).

conceded" that the voting restriction at issue was "enacted with the intent of disenfranchising blacks." *Id.* at 229–230.

Perhaps recognizing the absence of any evidence to support their claim that DoD's new policy was a product of discriminatory intent, Plaintiffs appear instead to assert that it was the President's statement on Twitter and 2017 Memorandum that resulted from impermissible animus, and that DoD's new policy is similarly tainted because it merely implements those policies. Pls.' Opp. 27–28. But as set out above, the content of DoD's new policy is plainly distinct from the President's 2017 Memorandum and statement on Twitter, and was the product of "independent military judgment." Report 4. Nor have Plaintiffs presented any evidence to show that even the 2017 Memorandum or Twitter statement had a discriminatory purpose.[11] They rely on the Court's preliminary injunction opinion concluding that Plaintiffs had a likelihood of success on the merits of their equal protection claim, Op. 42, but that opinion merely reached a preliminary conclusion, not a final decision. Contrary to Plaintiffs' assertion, none of the policies challenged in Plaintiffs' complaint have "been found unconstitutional by this Court." Pls.' Opp. 30.

In all events, Plaintiffs' theory about DoD's new policy draws this Court into an improper inquiry. Plaintiffs essentially ask the Court to determine the purportedly "true" intentions of the leadership of the Department of Defense—a form of "judicial psychoanalysis of" government officials' "heart of hearts" that the Supreme Court has rejected. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). It also thrusts the Court into the untenable position of evaluating the "adequacy" and "authenticity" of the military's judgments regarding matters of national defense. *Cf. Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999). More

[11] Contrary to Plaintiffs' assertions, Defendants have not "conceded" that the 2017 Memorandum is unconstitutional. Pls.' Opp. 28–30.

fundamentally, even conducting such an inquiry would be inconsistent with the presumption of regularity. *See Almy v. Sebelius*, 679 F.3d 297, 309 (4th Cir. 2012) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." (citation omitted)). There is simply no reason to doubt that DoD applied its considered, independent judgment to the issues at hand, as reflected in the new policy itself, Secretary Mattis's memorandum, DoD's 44-page report, and the substantial administrative record.[12]

V. Plaintiffs' Challenge To The President's 2017 Memorandum Is Moot.

Because the President unequivocally has revoked his 2017 Memorandum "and any other directive" he "may have made with respect to military service by transgender individuals," 2018 Memorandum 1, Plaintiffs' claims related to the President's 2017 Memorandum and statement on Twitter are now moot. *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 640 (4th Cir. 2017), *vacated and remanded sub nom. Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017) (noting that an Executive Order that "revoked the earlier order . . . rendered moot the challenge to the earlier order"). At this stage, any decision regarding the constitutionality of the 2017 Memorandum or statements on Twitter would be an impermissible advisory opinion. *See Williams v. Ozmint*, 716 F.3d 801, 809 (4th Cir. 2013). Accordingly, if Plaintiffs' Second Amended Complaint still seeks to challenge those policies, it should be dismissed and summary judgment should be granted to Defendants.

Plaintiffs respond that their challenge to those polices remains live under the voluntary cessation doctrine, but they do not explain how that could be so. Pls.' Opp. 20. Aside from the fact that the new policy is substantially different from the 2017 Memorandum, this doctrine is of limited applicability when members of a coordinate branch of government change a policy in good faith.

[12] For all these reasons, Plaintiffs have also failed to show a "genuine dispute as to any material fact" regarding the independence of DoD's process for developing its new policy. Fed. R. Civ. Pro. 56(a); *see* Pls.' Opp. 48.

Clarke v. United States, 915 F.2d 699, 705 (D.C. Cir. 1990). It would be inconsistent with the presumption of regularity, *see Am. Fed'n of Gov't Emps., AFL-CIO v. Reagan*, 870 F.2d 723, 727 (D.C. Cir.), and inappropriate under the separation of powers, *see Clarke*, 915 F.2d at 705, for courts to imply that the head of the Executive Branch revoked an order to avoid judicial review, especially where, as here, there is no evidence to support such a charge, and where that order came at the request of the military so that the military could implement its own policy.

VI. The New Policy Is Subject To A Highly Deferential Form Of Review.

As one of the "'complex, subtle, and professional decisions as to the composition … of a military force,' which are 'essentially professional military judgments,'" DoD's new policy is subject to a highly deferential form of review. *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). After all, decisions about who should serve "are based on judgments concerning military operations and needs, and the deference unquestionably due the latter judgments is necessarily required in assessing the former as well." *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) (internal citation omitted).

Plaintiffs argue that this case's military context is irrelevant in determining and applying the appropriate level of constitutional scrutiny. Pls.' Opp. 32. That argument is flatly inconsistent with Supreme Court precedent and is not supported by the cases Plaintiffs cite. As discussed below, the Court should afford substantial deference in evaluating the constitutionality of DoD's new policy, which on its face deals with the composition, training, equipping, and control of the armed forces.

Plaintiffs point to this Court's preliminary injunction opinion and note that this Court previously declined to apply deference. Pls.' Opp. 32 n. 9 (quoting Op. 43, Dkt. 85). However, this Court's holding did not apply to the new DoD policy; instead, it rested on the conclusion that the President's now-rescinded 2017 Memorandum and statements on Twitter "did not emerge from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national

interest." Op. 43. By contrast, there can be no legitimate dispute that the new policy is the result of an extensive review by senior military leaders and is based on the considered judgment of DoD. Thus, the Court's prior reasoning cannot fairly be applied to the new DoD policy.

Next, Plaintiffs cite to several cases where heightened scrutiny has been applied to transgender classifications in the civilian context. Pls.' Opp. 31–32. In addition to being inapplicable to cases arising in the military context such as this one, the cases Plaintiffs cite are inapposite because the new DoD policy is based on medical considerations and issues arising from gender dysphoria and gender transition. Thus, under well-established constitutional principles, DoD's policy does not classify on the basis of a suspect classification, and thus is subject to rational basis review even if principles of military deference did not apply. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365–68 (2001).

Plaintiffs then claim that *Rostker v. Goldberg* "explicitly rejected the government's request to apply rational-basis review rather than 'the heightened scrutiny with which we have approached gender-based discrimination.'" Pls.' Opp. 32 (quoting *Rostker*, 453 U.S. at 69). This misapprehends Defendants argument and misstates the holding in *Rostker*. Defendants have argued that this Court should apply rational-basis review because the current policy turns on the medical condition of gender dysphoria. However, *Rostker* also supports Defendants' contention that the type of scrutiny that might apply in the civilian context does not apply in the military context. And although the Supreme Court has expressly refused to attach a "label[]" to the type of review applicable to military policies alleged to trigger heightened scrutiny, *Rostker*, 453 U.S. at 70, the Court's substantial departures from core aspects of strict or intermediate scrutiny in this context demonstrate that it is not applying the traditional heightened scrutiny framework to the military—and that its approach more closely resembles rational-basis review. *See also id.* ("Simply labeling the legislative decision 'military' on the one hand or "gender-based" on the other does not automatically guide a court to the correct constitutional result."). For example, the Court in *Rostker* expressly held that "Congress was certainly

entitled, in the exercise of its constitutional powers to raise and regulate armies and navies, to focus on the question of military need rather than 'equity.'" *Id.* at 80 (citation omitted). DoD's new policy is similarly derived from the authority granted to it by Congress pursuant to the same constitutional authority to raise and regulate the military, and it too may focus on military need.

Plaintiffs next argue that because the military policy at issue in *Goldman v. Weinberger*, was facially neutral, that decision has little relevance here. Pls.' Opp. 33. On the contrary, even assuming, *arguendo,* that the new DoD policy could be viewed as a facial classification, the deference to the military's decision in *Goldman* was not based on whether the particular constitutional challenge involved a facially neutral policy, but rather on the fact that "the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy." 475 U.S. at 508 (citation omitted). In any event, under the framework for free-exercise claims in place at the time, the facially neutral policy at issue in *Goldman* would have triggered strict scrutiny had it arisen in the civilian context. *See* 475 U.S. at 506 (citing cases).[13]

VII. The Constitution Requires Deference To The Military's New Policy.

Plaintiffs' argument that the military is not entitled to deference because DoD's process represents a "sharp departure from military precedent" is not only wrong but misapprehends the nature of military deference. Pls.' Opp. 32 n.9. Military deference stems from the Supreme Court's recognition that control of the armed forces is vested in the Executive and Legislative branches by the

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[13] Plaintiffs also cite to *Berkley v. United States*, 287 F.3d 1076, 1084–85, 1090–91 (Fed. Cir. 2002), which held that a strict scrutiny analysis applied to racial classifications related to a Reduction in Force Board. *See* Pls.' Opp. 34. *Berkley*, however, also stated that "[w]e adhere to the policy of giving deference to the military for matters involving discipline, morale, composition and the like." *Id.* (internal quotations and citation omitted). The Federal Circuit then remanded and ordered the lower court to apply a strict scrutiny analysis but specifically declined to "reach the question of what effect, if any, deference to the military would have on the judicial application of strict scrutiny." *Id.* Thus, *Berkley* does not offer much help in resolving the interplay between heightened scrutiny analysis and military deference, and the Court should instead rely on the more helpful Supreme Court and Fourth Circuit precedents cited in Defendants' opening brief. *See* Defs.' Mot. 23–28.

text of the Constitution itself. *See Rostker*, 453 U.S. at 67 ("[T]he Constitution itself requires such deference."). Article I gives Congress the power to raise and support armies, to provide and maintain a navy, to make rules regulating the armed forces, and to declare war. Article II makes the President the Commander in Chief of the armed forces. There is no question that courts should apply military deference here, or that the Supreme Court has mandated that they must.

Thus, military deference is not something the Court may decide based on whether it agrees with the process the military followed. Instead, it is a constitutionally mandated prerequisite derived from the fact that the text of the Constitution itself commits control over the military to the Executive and Legislative branches. To apply deference, Article III courts look only to whether the decision at issue involves "the composition, training, equipping, and control of the military force[.]" *Gilligan*, 413 U.S. at 10. If so, then deference is applied. *See, e.g.*, *Winter*, 555 U.S. at 27 (reversing the issuance of a preliminary injunction because the "lower courts failed properly to defer to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's SOCAL training exercises."). Here, because this case undisputedly involves the composition of the military force both through accessing new troops into the armed forces and retaining those already in, deference must be applied and no further inquiry into the robustness of that deliberative process is required or appropriate.[14]

VIII. DoD's New Policy Satisfies Highly Deferential Scrutiny.

As the DoD Report demonstrates, and as Defendants showed in their opening brief, the new policy is supported by the military's interests in ensuring military readiness; maintaining order,

[14] For example, the Supreme Court in *Goldman* confronted an argument by the plaintiff that the Air Force had "failed to prove that a specific exception for his practice of wearing an unobtrusive yarmulke would threaten discipline" and "that the Air Force's assertion to the contrary is mere *ipse dixit*, with no support from actual experience or a scientific study in the record, and is contradicted by expert testimony." 475 U.S. at 509. In response, the Court did not question whether the Air Force's judgment rested on adequate evidence or deliberation, but deemed it sufficient that the issue had been "decided by the appropriate military officials" in their "considered professional judgment." *Id.*

discipline, leadership, and unit cohesion; and minimizing military costs. Report 14–24. In response, Plaintiffs primarily rely on the opinion of a civilian doctor who selectively challenges parts of the Report and offers an alternative opinion. *See* Pls.' Opp. 35-40. Plaintiffs thus seek to have this Court substitute its own judgment for that of current military leaders on matters of military policy, including through consideration of expert opinion. But the fact that Plaintiffs can identify an expert with opinions contrary to the military's judgment is irrelevant. *See Goldman*, 475 U.S. at 509 ("[W]hether or not expert witnesses may feel that religious exceptions to [a military policy] are desirable is quite beside the point."). Rather, the Constitution commits military decisions "to the political branches directly responsible—as the Judicial Branch is not—to the electoral process," *Gilligan*, 413 U.S. at 10, and nowhere suggests that disputes over military policy should be resolved through a "battle of the experts." The Court should thus disregard the opinions of Plaintiffs' experts and evaluate DoD's new policy on the strength of its own justifications and supporting materials.

On the merits, Plaintiffs primarily argue that the policy they expected DoD to announce—one banning all transgender individuals from military service—fails intermediate scrutiny. *See, e.g.,* Pls.' Opp. 32, 33, 34, 37, 43 (characterizing DoD's new policy as one that bans all transgender individuals from enlisting). And Plaintiffs' purported expert parrots these legally erroneous arguments. *See* Dkt. 139-19 (repeatedly referring to the DoD's report as the "Implementation Report."); *see also* Dkt. 139-19 ("To justify prohibiting transgender people from serving…."). But, as explained above, even a cursory review of the terms of the new policy confirms that the new DoD policy is not a "transgender ban" as Plaintiffs repeatedly characterize it. Once the pretense that the 2018 DoD policy merely implements a "transgender ban" is set aside, it is clear that the military's judgment survives constitutional review under any standard.[15]

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[15] Plaintiffs emphasize that they "have lodge[d] a facial constitutional challenge[.]" Pls.' Opp. 45. Accordingly, under well-established principles, they must show "that no set of circumstances exists

A. The New DoD Policy Promotes Military Readiness.

As DoD explained, service by individuals with gender dysphoria, and especially those who need or have undergone gender transition, poses at least two significant risks to military readiness. *First*, DoD is concerned that the unique stresses of military life could exacerbate the symptoms of gender dysphoria. Report 21, 40. Indeed, servicemembers suffering from "[a]ny DSM-5 psychiatric disorder with residual symptoms" that "impair social or occupational performance[] require a waiver … to deploy," as the military must consider the "risk of exacerbation if the individual were exposed to trauma or severe operational stress." *Id.* at 34. Particularly given "the absence of evidence on the impact of deployment on individuals with gender dysphoria," DoD concluded that this condition posed readiness risks. *Id.*; *see id.* at 42.[16]

As preliminary evidence from DoD's experience with the Carter policy reveals, servicemembers with gender dysphoria were eight times more likely to attempt suicide and nine times more likely to have mental-health encounters than servicemembers as a whole. *Id.* at 21-22. In fact, over a two-year period of study, the nearly 1000 active servicemembers with gender dysphoria accounted for 30,000 mental-health visits. *Id.* at 22. This data, which was unavailable to DoD when the Carter policy was first announced, was also consistent with data concerning individuals with gender dysphoria more generally, a group that suffers from high rates of suicidal ideation, attempts, and

under which" DoD's new policy is constitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Plaintiffs do not even attempt to meet this high standard.

[16] Plaintiffs assert that the military's "invocation of caution" cannot justify its new policy. Pls.' Opp. 44. But Plaintiffs can point to no authority from the military context that supports the proposition that the military may not take a risk-mitigating approach in this area. Indeed, as DoD's report explains, "[m]ilitary standards are high for a reason—the trauma of war, which all Service members must be prepared to face, demands physical, mental, and moral standards that will give all Service members the greatest chance to survive the ordeal with their bodies, minds, and moral character intact. The Department would be negligent to sacrifice those standards for any cause." Report 6. That Plaintiffs or their purported expert may be willing to tolerate more risk than the armed services is of no moment.

completion, as well as other mental-health conditions such as anxiety, depression, and substance-abuse disorders. *Id.* at 21. Given recent evidence that military service can be a contributor to suicidal thoughts, DoD has legitimate concerns that generally allowing those with gender dysphoria to serve would subject them and their comrades to unacceptable risks. *Id.* at 19, 21.

Second, even if it were guaranteed that the risks associated with gender dysphoria could be fully addressed by gender transition, it remains the case that transition-related medical treatment—namely, cross-sex hormone therapy and sex-reassignment surgery—could render transitioning servicemembers "non-deployable for a potentially significant amount of time." *Id.* at 35. Some commanders, for example, reported that transitioning servicemembers under their authority would be non-deployable for up to two to two-and-a-half years. *Id.* at 34. More generally, Endocrine Society guidelines recommend "quarterly bloodwork and laboratory monitoring of hormone levels during the first year" of therapy, meaning that if "the operational environment does not permit access to a lab for monitoring hormones," then the transitioning servicemember "must be prepared to forego treatment, monitoring, or the deployment," each of which "carries risks for readiness." *Id.* at 33. That period of potential non-deployability only increases for those who obtain sex-reassignment surgery, which in addition to a recommended "12 continuous months of hormone therapy … prior to genital surgery," comes with "substantial" recovery time even without complications. *Id.*

In addition to being inherently problematic, these limits on deployability would have harmful effects on transitioning servicemembers' units as a whole. As DoD explained, any increase in non-deployable servicemembers will require those who can deploy to bear "undue risk and personal burden," which itself "negatively impacts mission readiness." *Id.* at 35. On top of these personal costs, servicemembers deployed more frequently to "compensate for" their unavailable comrades face risks to family resiliency as well. *Id.* And when servicemembers with conditions do deploy but then fail to meet fitness standards in the field, "there is risk for inadequate treatment within the operational

theater, personal risk due to potential inability to perform combat required skills, and the potential to be sent home from the deployment and render the deployed unit with less manpower." *Id.* at 34. All of this, DoD concluded, posed a "significant challenge for unit readiness." *Id.* at 35.

Plaintiffs' challenge to DoD's judgment that the new DoD policy promotes military readiness rests again largely on their legally and factually unsupported view that the policy is a ban on transgender individuals. *See, e.g.*, Pls.' Opp. 34 ("Even under rational basis review, however, the Implementation Plan's sweeping exclusion of transgender people from enlisting violates equal protection…."); *see also* Dkt. 139-19 (declaration from Plaintiffs' purported expert characterizing the policy as one "prohibiting transgender people from serving…."). But as explained in detail above, the new DoD policy does not ban individuals because they are transgender; like numerous other medical conditions that could impede military readiness, the new DoD policy focuses on the medical challenges associated with gender dysphoria. Accordingly, Plaintiffs' argument that a complete ban on transgender service undermines military readiness has no relevance to the actual DoD policy at issue in this case.

Plaintiffs' next contend that it was "irrational" for DoD to consider data and the experiences of current servicemembers diagnosed with gender dysphoria because many of the servicemembers encompassed in the two-year study of nearly 1000 servicemembers were in the process of transitioning. *See* Pls.' Opp. 37-38; Report at 22. Plaintiffs even go so far as to say there is "no logical relationship" between individuals seeking to enlist with gender dysphoria and servicemembers already serving with gender dysphoria. Pls.' Opp. at 37. However, this is exactly the type of data on which Plaintiffs' purported expert bases his own conclusions. *See* Dkt. 40 ("Expert Decl. of Dr. George R. Brown) ¶ 9 ("Over the last 33 years, I have evaluated, treated, and/or conducted research in person with 600-1000 individuals with gender disorders, and during the course of research relate chart reviews with over 5100 patients with gender dysphoria. The vast majority of these patients have been active duty military personnel or veterans").

Plaintiffs and their purported expert instead prefer the RAND report, which relied on a review of the policies of foreign militaries regarding military service by transgender personnel. *See* Dkt. 40 Brown Decl. ¶ 92 ("Based on the available evidence of over 18 foreign militaries, RAND found that open service has had "no significant effect of cohesion, operational effectiveness, or readiness."); *see also* RAND Report (attached as Exhibit C to the Brown Decl.) at 50 (explaining that RAND reviewed the policies of four countries—Australia, Canada, Israel, and the United Kingdom but noting that 18 countries allow transgender personnel to service openly in their militaries). But DoD's current review of the medical data of nearly 1000 actual U.S. servicemembers is significantly more comprehensive than RAND's review of the policies of four foreign militaries. Moreover, this review is consistent with the expectations of former-Secretary Carter, who, in announcing his policy in June 2016, directed that the new accession standards were to "be reviewed" before June 30, 2018, and could be "changed, as appropriate," to "ensure consistency with military readiness." Dkt. 40-4 (DTM 16-005).[17]

Plaintiffs further contend that because the military already has policies in place which prevent individuals with a history of suicidality, depression, and anxiety from enlisting, there is no need for the new policy. Pls.' Opp. 35. But just because gender dysphoria may have some similarities to other

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[17] Plaintiffs claim that DoD reached its conclusions "even though [it] did not receive *any* evidence indicating that transgender people are incapable of meeting the same medical and physical fitness standards as everyone else." Pls.' Opp. 35-36. Here, Plaintiffs cite to the dissenting opinion of one of the members of the Panel of Experts which states "[d]uring the course of our panel, neither the transgender servicemembers, the military doctors, nor the civilian doctors suggested that a person serving outside of their birth gender would necessarily be unable to meet medical or physical standards[.]" *See* Pls.' Opp., Ex. S. But neither the DoD Report nor the new policy conclude otherwise. As stated, the medical aspect of the new policy turns on the medical condition of gender dysphoria, and DoD's Report does not state that the decision to maintain sex based standards is based on a conclusion that transgender individual serving outside of their birth would be unable to meet the physical standards. *See, e.g.,* Report 28 (concluding that a departure from the military's longstanding sex-based standards would inevitably undermine the critical objectives served by those rules, namely, "good order, discipline, steady leadership, unit cohesion, and ultimately military effectiveness and lethality."). Further, the fact that the Panel of Experts included a dissenting opinion only supports the conclusion that the process was independent and not preordained, as Plaintiffs claim.

conditions that can preclude enlistment does not mean that it is irrational for DoD to have a policy that addresses the separate medical condition of gender dysphoria. DoD has reasonably determined that gender dysphoria is "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning," Report 13 (quoting the DSM-V), and that a typical treatment for this condition—gender transition—is unlike any other form of treatment in that it requires a permanent exception from the standards that apply to the patient's biological sex (and remains the subject of "considerable scientific uncertainty"), *id.* at 32. And, while gender dysphoria differs in significant ways from suicidality, depression, or anxiety, it is sufficiently associated with high rates of those conditions, even after treatment, to justify the risk-mitigating approach adopted by DoD specifically for that condition. *Id.* at 21–26. Moreover, Plaintiffs' argument that the new policy is unnecessary because the military has preexisting policies addressing suicidality, depression, and anxiety would apply with equal force to the Carter policy they prefer, which likewise limits accession based on gender dysphoria and transition.[18]

Plaintiffs also contend that under the Carter policy, newly enlisted servicemembers do not present a deployability problem because in order to access, they must establish that they are no longer transitioning. Pls.' Opp. 38–39. But DoD reasonably concluded that completing transition does not eliminate all deployability concerns. As DoD's Report explains, "there is considerable scientific uncertainty concerning whether [transition-related] treatments fully remedy … the mental health problems associated with gender dysphoria," Report 32, and that "[i]n managing mental health

[18] Plaintiffs contend that Defendants' arguments are "akin to saying that because depression is twice as common in women than in men, the military could simply treat all women as at risk for depression and categorically unfit to service." Pls.' Opp. 37. But these examples simply undermine Plaintiffs' argument that the new DoD policy is unconstitutional. The new DoD policy is focused on a specific medical condition—gender dysphoria—and does not purport to exclude all transgender individuals from serving in the armed services. Thus, the proper analogy would be to a rule which turns on anxiety or depression, not female status. Indeed, DoD has in place accession standards related to anxiety and depression, and Plaintiffs do not challenge them. *See* DoDI 6130.03 at 44–46

conditions while deployed, providers must consider the risk of exacerbation if the individual were exposed to trauma or severe operational stress. These determinations are difficult to make in the absence of evidence on the impact of deployment on individuals with gender dysphoria." Report 34. The fact that Plaintiffs' experts may disagree with these judgments is of no legal significance. *See Goldman*, 475 U.S. at 509.

Plaintiffs further contend that the military's accession and deployment standards are not being applied equally to the condition of gender dysphoria. Pls.' Opp. 39–40. Plaintiffs and their purported expert then list several conditions with which prospective servicemembers may enlist and with which servicemembers may deploy that they argue are akin to gender dysphoria and its treatment. *Id.* But prospective servicemembers are presumptively disqualified based on a history of many different medical conditions. *See* DoDI 6130.03 (setting "medical standards for appointment, enlistment, or induction into the military services"); *see also* Report 8–13 (discussing medical standards for accessions, including discussing disqualifying conditions, such as a history of chest or genital surgery or most mental health conditions).

In setting these standards, the military considers several factors: whether the condition may reasonably be expected to require excessive time lost from duty for necessary treatment or hospitalization; whether the condition would allow a servicemember to complete required training and an initial period of contracted service; whether the condition is medically adaptable to the military environment without geographical area limitations; whether the person is medically capable of performing duties without aggravating existing physical defects or medical conditions; and whether the condition involves a contagious disease that may endanger the health of others. *Id.* at 4–5. After examining new data from servicemembers diagnosed and treated for gender dysphoria, the Secretary of Defense, informed by the recommendation of the Panel of Experts, determined that the condition of gender dysphoria and its related treatment met several of these factors. *See* Mattis Mem. 2. Gender

dysphoria resulted in lost duty and deployment time, Report at 33; raised concerns about adaptation to the military environment and aggravation of the condition in such an environment, *id.* at 34; and resulted in geographic area limitations, *id.* at 34.

Likewise, the military's general deployment standard applies in a neutral fashion with respect to specific medical conditions (of which gender dysphoria is one of many) which DoD has determined generally cannot be accommodated in a forward-deployed environment. *See, e.g.*, AR2584–2614 (USCENTCOM Minimal Deployment Standards (Mar. 23, 2017)). Moreover, these same deployment standards existed under the Carter policy. Again, the fact that Plaintiffs' experts disagree and believe that the military can accommodate the particular medical condition of gender dysphoria and its related treatment in a deployed environment is of no legal significance. *See Goldman*, 475 U.S. at 509.[19]

B. DoD's Policy Promotes Good Order, Discipline, Leadership, And Unit Cohesion.

Apart from readiness concerns, DoD reasonably determined that exempting individuals with gender dysphoria who need or have undergone gender transition—whether through hormones, surgery, or simply living and working in their preferred gender—from the military's longstanding sex-based standards would inevitably undermine the critical objectives served by those rules, namely, "good order, discipline, steady leadership, unit cohesion, and ultimately military effectiveness and lethality." Report 28. As DoD observed, "[g]iven the unique nature of military service," servicemembers must often "live in extremely close proximity to one another when sleeping, undressing, showering, and using the bathroom." *Id.* at 37. To protect reasonable expectations of privacy, the military has therefore "long maintained separate berthing, bathroom, and shower facilities

[19] Plaintiffs reliance on *Crawford v. Cushman*, 531 F.2d 1114, 1123 (2d Cir. 1976), is also misplaced. *Crawford* rested on the untenable premise that "military decisions are accorded no presumption of validity in an inquiry on the merits," and the Second Circuit has since rejected that premise in light of *Rostker*. *Mack v. Rumsfeld*, 784 F.2d 438, 439 (2d Cir. 1986) (per curiam); *see also id.* (noting that this "portion of *Crawford* . . . was specifically rejected by us").

for men and women while in garrison," including on deployments. *Id.* In DoD's judgment, allowing individuals who retain some, if not all, of the anatomy of their biological sex to use the facilities of their preferred gender "would invade the expectations of privacy" of the other servicemembers sharing those facilities. *Id.*

Aside from these privacy-related considerations, DoD also was concerned that exempting servicemembers from sex-based standards in training and athletic competition on the basis of gender identity would generate perceptions of unfairness. *Id.* at 36. Moreover, DoD was concerned that exempting servicemembers from uniform and grooming standards on the basis of gender identity would create additional friction in the ranks. For example, allowing someone with male physiology but a female gender identity "to adhere to female uniform and grooming standards" could frustrate male servicemembers who are not transgender but who "would also like to be exempted from male uniform and grooming standards as a means of expressing their own sense of identity." *Id.* at 31. Combined with the significant limits on deployability, DoD determined that the Carter policy's departure from military uniformity poses "a direct threat to unit cohesion and will inevitably result in greater leadership challenges without clear solutions." *Id.* at 37.

Plaintiffs question DoD's reliance on its interest in promoting unit cohesion, arguing that "[w]hen similar hypothetical concerns have been raised as justifications for excluding transgender people from restrooms and locker rooms in the civilian context, the courts have repeatedly found that those concerns had no actual basis in fact." Pls.' Opp. 42. However, as Plaintiffs acknowledge, none of the cases they cite occurred in the military context, where maintaining sex-based standards is necessary to maintain an integrated force and are integral to daily life, applying to, among others things, physical fitness and height and weight standards; berthing, showering, and restroom facilities; and contact sports and combat training. Report 28–29. Comparisons to experience in civilian life or to case law from the civilian context are inapposite. *See, e.g.*, *Beller v. Middendorf*, 632 F.2d 788, 812 (9th

Cir. 1980) (Kennedy, J.), *overruled on other grounds by Witt v. Department of Air Force*, 527 F.3d 806 (9th Cir. 2008) (noting the general "potential for difficulties arising out of possible close confinement aboard ships or bases for long periods of time").

Plaintiffs also assert that DoD's Report lacks sufficient examples of problems arising related to unit cohesion or troop morale. Pls.' Opp. 42. But DoD in fact examined at length problems related to facilities and training, as well as dueling equal opportunity complaints under the Carter policy. Report 37–38. Its concerns are consistent with reports from officers in the Canadian military that "they would be called on to balance competing requirements" by meeting a transitioning servicemember's "expectations … while avoiding creating conditions that place extra burdens on others or undermined the overall team effectiveness" in areas such as "communal showers[] and shipboard bunking." *Id.* at 40. These examples "illustrate the significant effort required of commanders to solve [the] challenging problems posed by the implementation of the [Carter Policy]." *Id.* at 38. Indeed, the prior administration's implementation handbook for the Carter policy repeatedly stressed the need to respect the "privacy interests" and "rights of Service members who are not comfortable sharing berthing, bathroom, and shower facilities with a transitioning Service member," and urged commanders to try to accommodate competing interests to the extent that they could. Exh. 2, Implementation Handbook 38; *see id.* at 22, 29, 33, 60–61, 63–64; *see also* Report 38 (discussing some of "[t]he unique leadership challenges arising from gender transition" that "are evident in the Department's handbook"). DoD is not otherwise required to satisfy a numeric or mathematical formula in order to implement the judgment of the military in this area.[20]

[20] Plaintiffs cite to testimony by the Chief of Staff of the Army, the Chief of Naval Operations, and the Commandant of the Marine Corps explaining that they had not received reports of issues relating to unit cohesion or discipline arising from service by transgender servicemembers. Pls.' Opp. 41–42; *see also* Dkt. 139 at 30. But as Plaintiffs acknowledge, *see* Pls.' Opp. 42, Secretary Mattis himself later testified to Congress that reports of such issues would not have come up to the level of those officials

Given that "[l]eaders at all levels already face immense challenges in building cohesive military units," *id.* at 37-38, DoD reasonably concluded that it would be unwise to maintain a policy that "will only exacerbate those challenges and divert valuable time and energy from military tasks," *id.* at 38. Plaintiffs have provided no reason why that military judgment should be cast aside.

C. The New DoD Policy Is Supported By Concerns About Disproportionate Costs.

Plaintiffs also contest DoD's reliance on cost as a justification for the new policy. Pls.' Opp. 41. They claim that "the Report offers no support for its conclusion that the cost of providing transition-related care is 'disproportionate.'" *Id.* at 41 n.13. But Plaintiffs ignore the fact that since the Carter policy's implementation, the medical costs for servicemembers with gender dysphoria "have increased nearly three times" compared to servicemembers without this condition. Report 41. And that is "despite the low number of costly sex reassignment surgeries that have been performed so far"—34 non-genital procedures and one genital surgery—which likely would only increase as more servicemembers avail themselves of these measures. *Id.* Notably, 77 percent of the 424 treatment plans available for study "include requests for transition-related surgery" of some kind. *Id.*

Several commanders also reported that providing servicemembers in their units with transition-related treatment "had a negative budgetary impact" due to the use of "operations and maintenance funds to pay for … extensive travel throughout the United States to obtain specialized medical care." *Id.* This is not surprising given that transition-related treatments "require[] frequent evaluations" by both a mental-health professional and an endocrinologist, and most military treatment facilities "lack one or both of these specialty services." *Id.* at 41 n.164. Transitioning servicemembers consequently "may have significant commutes to reach their required specialty care," with those "stationed in more remote locations fac[ing] even greater challenges." *Id.*

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due to limitations in the Carter policy on reporting information relating to transgender servicemembers. *See* Dkt. 159-1at 63; *see also* Report 37 n.143.

The prior administration recognized these same challenges, but determined that servicemembers and their command could plan around the challenges. *See, e.g.,* Exh. 3, The Navy's Transgender and Gender Transition Commanding Officer's Toolkit at 12. ("Timing of a Transition Plan should include consideration of a Sailor's planned rotation date (PRD) and planned deployment/operational requirements."). Given the military's interest in maximizing efficiency through minimizing costs, Report 3, and the fact that the prior administration underestimated the number of servicemembers who would seek transition-related health care services,[21] it was certainly reasonable for DoD to now come to a different conclusion.

Plaintiffs contend that the cost of transition-related treatment is insufficient to justify all aspects of DoD's new policy, because part of the policy applies to service members that have already transitioned. Pls.' Opp. 41. But given the "considerable scientific uncertainty concerning whether [transition-related] treatments fully remedy . . . the mental health problems associated with gender dysphoria," Report 32, DoD could reasonably conclude that even accessing prospective servicemembers who have already transitioned would pose a disproportionate cost burden. In any event, DoD's new policy was not based on cost considerations alone, but on the totality of the military's interests.

Finally, Plaintiffs cite to the RAND Report's conclusion—made prior to adoption of the Carter policy—that the cost of transition-related treatment is small in comparison to the military's total health care costs. Pls.' Opp. 41 n.13. The Report explains, however, why this comparison is inapt: it ignores the *cost per capita* of accessing individuals with gender dysphoria. Report 14. By

[21] The RAND report estimated that between 29 and 129 active duty servicemembers would seek transition-related health care annually. RAND Report xi. In reality, 937 servicemembers were diagnosed with gender dysphoria in the approximately eighteen months between June 30, 2016 and when the panel of experts conducted its review—nearly five times the upper bound of RAND's estimate. Report 32.

RAND's logic, the Department would have no basis for considering the treatment cost of *any* medical condition so long as that condition were relatively rare. *See* Report 35 ("[B]y RAND's standard, the readiness impact of many medical conditions that the Department has determined to be disqualifying—from bipolar disorder to schizophrenia—would be minimal because they, too, exist only in relatively small numbers. And yet that is no reason to allow persons with those conditions to serve.").

In sum, even considering Plaintiffs' inappropriate reliance on outside experts, their challenges to the justifications underlying DoD's new policy fall short. The new DoD policy plainly furthers the Government's interests and thus satisfies the highly deferential form of review applicable here.[22]

IX. Plaintiffs' Claimed Need For Discovery To Respond To Defendants' Motion For Summary Judgment—While Moving For Summary Judgment On The Same Claims—Should Be Rejected.

A. Status of Discovery

After the Court entered its preliminary injunction on November 21, 2017, and while the DoD policy process proceeded to conclusion, the Plaintiffs began seeking discovery. Plaintiffs served broad discovery requests on all Defendants, including the President. Plaintiffs issued requests for production and interrogatories seeking information on: (1) the Carter policy and the RAND report; (2) the decision by Secretary Mattis to defer the Carter Policy's revisions to accession standards; (3) the President's 2017 statements on Twitter and Presidential Memorandum; (4) the work by the Panel of Experts; (5) Secretary Mattis's February 2018 memorandum and the accompanying Report regarding

[22] Plaintiffs' discussion of the merits of this case does not substantively respond to any of Defendants' arguments regarding Plaintiffs' substantive due process claim, except to point out that the Court did not dismiss the claim at the time it entered the preliminary injunction. *See* Pls.' Opp. 45. This case now involves a new complaint with new factual allegations, *see* Dkt. 148, and for the reasons set out in Defendants' motion, *see* Defs.' Mot. 41–43, the substantive due process claim should be dismissed or summary judgment on that claim should be granted to Defendants.

the new policy; and (6) the March 2018 Presidential Memorandum that revoked the 2017 Memorandum. *See* Kies Decl., Exhs. A–B, Dkts. 163-17, 163-18.

In response to discovery requests on these topics, Defendants conducted an extensive search and have produced over 30,000 non-privileged, responsive documents (consisting of over 150,000 pages). Because Plaintiffs specifically targeted information and documents protected by the presidential communications privilege and the deliberative process privilege (among others), Defendants objected to some discovery requests and withheld information and documents that are protected by those privileges (among others). Enlow Decl. ¶ 3; *see* Kies Decl. Exhs. C–L, Dkt. 163-19–163-28. Defendants objected to interrogatories when they called for privileged information, but otherwise responded. *See id.*

Plaintiffs subsequently served a motion to compel information and documents subject to the deliberative process privilege, seeking a sweeping ruling from the Court that the privilege categorically does not apply in this case. Enlow Decl. ¶ 11. Defendants served an opposition brief, arguing that the Fourth Circuit has not held that the deliberative process privilege does not apply as a matter of law, and that application of the appropriate balancing test applied by courts in this Circuit demonstrates that the Government's interest in non-disclosure of deliberative information concerning the development of a military policy outweighs Plaintiffs' generalized need for thousands of deliberative documents. *Id.* ¶ 17. Defendants also intend to file soon a motion for protective order to preclude discovery of the President and of presidential communications and deliberations.

On May 22, 2018, Defendants substantially completed their production of non-privileged documents that are responsive to Plaintiffs' first set of requests for production. Defendants also supplemented the interrogatory responses for Secretary Mattis and the Service Secretaries on May 29, 2018. Plaintiffs do not contest the sufficiency of those responses. *Id.* ¶ 16.

Plaintiffs have not sought to take any depositions, and declined to participate in at least one deposition scheduled in a related case, *Doe v. Trump*, No. 17-cv-1597 (D.D.C.). *See* Exh. 5 (email from Marianne Kies to Ryan Parker, Apr. 11, 2018). Although Plaintiffs assert that they "have been unable to determine which witnesses to depose and on what subjects," Defendants filed an administrative record on April 20, 2018, which lists, for example, members of the Panel of Experts. *See, e.g.*, AR2821, 2825, 2830, 2836, 2840 (Panel Meeting Minutes), Dkt. 133-14.[23] In addition, Defendants supplemented their initial disclosures on May 14, 2018, identifying individuals Defendants may rely upon in support of their defenses. Enlow Decl. ¶ 12. Finally, on May 29, 2018, Defendants supplemented their interrogatory responses and provided, for example, lists of hundreds participants in meetings where military service by transgender individuals was discussed. *Id.* ¶ 16.

B. Plaintiffs Are Not Entitled To Additional Discovery.

Plaintiffs' request that this Court withhold consideration of Defendants' summary judgment motion because the evidentiary record is allegedly insufficiently developed, while at the same time asserting that the evidentiary record is sufficiently developed to grant *Plaintiffs'* summary judgment motion, is both illogical and contrary to the evidentiary record actually developed over the course of

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[23] Plaintiffs appear to allege that Defendants improperly withheld deliberative documents from the administrative record and failed to produce a privilege log with the record. Pls.' Opp. 47 n.15. But it is settled that privileged materials are not part of an administrative record, and there is no requirement for the Government to provide a privilege log with an administrative record. *See Outdoor Amusement Bus. Ass'n, Inc. v. DHS*, No. ELH-16-1015, 2017 WL 3189446, at *8 (D. Md. July 27, 2017) ("[A] complete administrative record does not include privileged materials, such as documents that fall within the deliberative process privilege[.]" (citation omitted)); *Am. Petroleum Tankers Parent, LLC v. United States*, 952 F. Supp. 2d 252, 265 (D.D.C. 2013) ("As a corollary to th[e] principle [that privileged materials are not part of the administrative record], the agency need not provide a privilege log of the documents withheld pursuant to the privilege."); *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F.Supp.2d 15, 32 (D.D.C. 2013) ("[P]redecisional and deliberative documents are not part of the administrative record to begin with, so they do not need to be logged as withheld from the administrative record.") (internal citation omitted)).

discovery. The Court should deny Plaintiffs' Rule 56(d)[24] motion for additional discovery, and resolve Defendants' motion for summary judgment on the basis of the same existing record on which Plaintiffs seek summary judgment.

As an initial matter, it is inherently contradictory for Plaintiffs to simultaneously assert that they "cannot present facts essential to justify [their] opposition," Fed. R. Civ. P. 56(d), and that "there is no genuine dispute as to any material fact," *id.* Fed. R. Civ. P. 56(a). The core purpose of Rule 56(d) is "'to prevent railroading the non-moving party through a premature motion for summary judgment before the non-moving party has had the opportunity to make full discovery.'" *Kakeh v. United Planning Org., Inc.*, 537 F. Supp. 2d 65, 71 (D.D.C. 2008) (citation omitted). If Plaintiffs here are indeed being forced to respond prematurely to summary judgment on their claims, then it cannot be the case that there are no material disputes of fact on those claims. Plaintiffs simply cannot have it both ways.

In any event, much of the discovery Plaintiffs would seek under a Rule 56(d) order is immaterial or unavailable on the basis of privilege (or both). *See United States ex rel. Barko v. Halliburton Co.*, 241 F. Supp. 3d 37, 80 (D.D.C. 2017), *aff'd*, 709 F. App'x 23 (D.C. Cir. 2017) ("reject[ing] Mr. Barko's Rule 56(d) argument because the discovery sought is privileged and/or overly broad and unduly burdensome"). Plaintiffs assert that they need additional information regarding the President's motivation for issuing his statements on Twitter in July 2017 and issuing the Presidential Memorandum in August 2017. Kies Decl. ¶¶ 54–57; *see also* Defs.' Mot. 47. But, as explained above, the 2017 Presidential Memorandum has been revoked and any challenge to that policy is moot. *See*

[24] Rule 56(d) provides that where a "nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d). To warrant relief under Rule 56(d), the nonmovant must (1) "outline the particular facts he intends to discover and describe why those facts are necessary to the litigation"; (2) "explain 'why [he] could not produce [the facts] in opposition to the motion [for summary judgment]'"; and (3) "show that the information is in fact discoverable." *Convertino v. Dep't of Justice*, 684 F.3d 93, 99–100 (D.C. Cir. 2012) (citations omitted).

supra Section V. Plaintiffs can have no need for discovery to challenge a revoked policy. Moreover, the discovery Plaintiffs seek is protected by the presidential communications and deliberative process privileges and is subject to Defendants' forthcoming motion for a protective order to preclude discovery of the President and of presidential communications and deliberations.

Plaintiffs also assert that they need further discovery in the form of documents and information withheld under the deliberative process and presidential communications privileges to challenge Defendants' argument that the DoD policy "should be accorded deference because it is the product of independent military judgment." Kies Decl. ¶ 40; *see also id.* ¶¶ 41–53; Pls.' Opp. 50. But as explained above, *see supra* Section VII, military deference is a constitutionally-mandated prerequisite to an Article III court's review of a decision involving military affairs and is not based upon fact-finding concerning the robustness of a deliberative process. *See Gilligan*, 413 U.S. at 10; *Rostker v. Goldberg*, 453 U.S. 57, 65–66 (1981). Deference to military policy judgments stems from the Supreme Court's recognition that the Constitution vests control of the armed forces in the Executive and Legislative branches, and to apply deference, court therefore looks only at whether the decision at issue involves "the composition, training, equipping, and control of a military force." *Gilligan*, 413 U.S. at 10. If it does, then deference to policy judgments must be applied. *See Winter*, 555 U.S. at 27. Plaintiffs' contention that, once this established approach to judicial review is at issue in a challenge to a military policy, the protections of the deliberative process by which that policy was developed fall away, would stand the very doctrine of military deference on its head. As should be apparent, many military policy judgments, to which deference is owed as a matter of law, are the result of a deliberative process. If application of deference would itself require disclosure of internal deliberations, including candid assessments and opinions by military officials, the very notion of deference would be eliminated, in disregard of its constitutional underpinnings. Accordingly, because military deference applies regardless of the deliberative process, Plaintiffs do not need discovery to combat Defendants'

argument that the DoD policy "should be accorded deference because it is the product of independent military judgment." Kies Decl. ¶ 40.

Finally, Plaintiffs contend that they need additional information regarding the process by which the DoD policy was crafted, including all materials considered by the Panel of Experts and the identities of Panel members. Kies Decl. ¶¶ 45–47. But this non-privileged information is contained in the administrative record, which was filed with the Court on April 20, 2018. *See* Dkt. 133; *see also* AR2821, 2825, 2830, 2836, 2840 (Meeting Minutes identifying attendees from the Panel of Experts), Dkt. 133-14. In addition, on May 29, 2018, Defendants supplemented their interrogatory responses and provided, for example, the list of materials the Panel of Experts considered (i.e., the index to the administrative record) and lists of hundreds of names of participants in meetings where military service by transgender individuals was discussed, and Plaintiffs do not dispute the sufficiency of those responses. Enlow Decl. ¶ 16. Accordingly, because Plaintiffs have not established that there are any particular non-privileged facts that are necessary to the litigation, the Court should deny Plaintiffs' request for additional discovery under Rule 56(d).[25]

CONCLUSION

For the foregoing reasons and for the reasons set forth in Defendants' motion, the Court should grant Defendants' motion, deny Plaintiffs' cross-motion for summary judgment, and dismiss Plaintiffs' Second Amended Complaint, or, in the alternative, grant summary judgment for Defendants.

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[25] Additional discovery is also inappropriate because, as set forth in Defendants' motion for a protective order, this case should be reviewed on an administrative record. *See* Dkt. 121 at 5–6; *see Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) (stating that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"). Although the Court has denied Plaintiffs' motion for a protective order, *see* Dkt. 170, Defendants respectfully disagree with that decision, which did not explicitly address Defendants' argument that review in this case should be limited to the administrative record.

Dated: June 15, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2018, the foregoing Reply Memorandum In Further Support Of Defendants' Motion To Dismiss Plaintiffs' Second Amended Complaint, Or, In The Alternative, For Summary Judgment, And Opposition To Plaintiffs' Cross-Motion For Summary Judgment and all supporting documents thereto were served on counsel for Plaintiffs via electronic mail, in accordance with Local Rule 104.8(a) and Federal Rule of Civil Procedure 5(a).

Dated: June 15, 2018

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