IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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On August 25, 2017, in furtherance of his decision to ban transgender individuals from serving in the Armed Forces "in any capacity," ECF No. 40-22, President Trump issued a formal memorandum with three directives to the Secretary of Defense. ECF No. 40-21. Effective January 1, 2018, the Secretary is directed to prohibit all men and women who are transgender from enlisting and commissioning, thereby rescinding the open-service accession policy that was scheduled to take effect on that date. *See id.* § 2(a). Effective March 23, 2018, the Secretary is directed to "halt" the use of government resources "to fund sex-reassignment surgical procedures for military personnel." *Id.* § 2(b). And also effective March 23, the Secretary of Defense is "direct[ed]" to "return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016" — a policy that "authorize[s] the discharge of such individuals" as administratively unfit. *Id.* § 1.

These three directives, comprising President Trump's Transgender Service Member Ban, are binding and self-executing. Unless President Trump amends his orders, men and women who are transgender will be permanently barred from enlisting and commissioning on January 1, will be denied any medically necessary surgical care for gender dysphoria on March 23, and will be subject to discharge as administratively unfit on the same date, even if they meet the military's demanding medical fitness standards. *Id.* §§ 1, 2. On the face of these directives, Secretary Mattis's discretion is limited to developing an "implementation plan" for "how to address transgender individuals currently serving in the United States military" in light of their new status, *i.e.*, subject to discharge as administratively unfit. *Id.* § 3.

Evading the real issue — the President's binding directives soon to take effect — Defendants focus on an irrelevant *Interim* Guidance document that will soon expire. *See* ECF No. 60-5. According to defense counsel, there is no injury-in-fact and no ripe dispute because

President Trump has merely ordered a study, and no one can yet know what the final policy on transgender service members will be until that study is completed. The plain text of the President's directives proves otherwise. President Trump ordered sweeping policy changes first, and only asked questions later. Perhaps the military's study will change the President's mind; perhaps it will not. Either way, Plaintiffs do not ask this Court to speculate about what the President may do in the future; Plaintiffs ask only that the Court enjoin the binding directives that President Trump has already issued and that have caused and will continue to cause irreparable harm.

In straining to claim that the President has done nothing but order a study, Defendants actually underscore how anomalous and unjustifiable it was to direct sweeping policy changes *without* study or evidence, and against the recommendations of the Department of Defense ("DoD") and military leadership. Indeed, since the filing of Plaintiffs' motion it has only become clearer how unusual this decision was: the Chairman of the Joint Chiefs of Staff recently testified that his "advice" regarding transgender service members was that anyone who can meet the military's demanding standards "should be afforded the opportunity to continue to serve." Decl. of M. Kies (attached hereto), Ex. 29 at 22. Likewise, by emphasizing the Interim Guidance's temporary prohibition on discharge on the basis of transgender status, Defendants only highlight the significance of President Trump's directive *revoking* that protection and subjecting transgender service members to discharge as unfit as of March 23. Indeed, each of the Plaintiffs' commanding officers has submitted a declaration ominously noting that none of the service members in their respective units will face "separation or discharge due to his or her transgender status or gender dysphoria diagnosis . . . *absent a change in the existing policy*." ECF No. 52-2 ¶ 4 (re: Stone); ECF No. 52-3 ¶ 4 (re: George); ECF No. 52-4 ¶ 3 (re: Parker);

ECF No. 60 (re: Doe, Cole, Gilbert) (emphasis added). Those careful words betray the illusory nature of the assurance, given that "existing policy" will change on March 23.

Most telling of all is what Defendants do not say. They do not confront the President's own description of his policy as a categorical ban on transgender individuals serving "in any capacity." They do not dispute that President Trump took this precipitous action without evidence, against the advice of DoD, and in response to an appeal from lawmakers who are hostile to men and women who are transgender. And incredibly, Defendants do not even attempt to justify President Trump's decisions to subject transgender service members to discharge and to deny them medically necessary health care during their service.

Plaintiffs and other brave men and women serving their country deserve much better from their Commander-in-Chief. They are already experiencing irreparable harm, and will soon face even greater harm as the new directives take full effect. President Trump's directives targeting transgender service members are blatantly unconstitutional and should be enjoined.

I. The Court Has Subject Matter Jurisdiction Over Plaintiffs' Claims.

A. The Policy Changes Effected By President Trump's Binding Directives Cause Plaintiffs To Suffer Injury-In-Fact.

Defendants assert that Plaintiffs lack standing because President Trump's directives have caused them no injury-in-fact. They are wrong.

An injury-in-fact is "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "Imminent" injuries include future injuries, where "'the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.'" *Kobe v. Haley*, 666 F. App'x 281, 294 (4th Cir. 2016) (per curiam) (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct.

2334, 2341 (2014)); *see also Khan v. Children's Nat'l Health Sys.*, 188 F. Supp. 3d 524, 529 (D. Md. 2016) ("[A plaintiff] need not demonstrate that it is 'literally certain' that they will suffer harm . . . '[Courts] have found standing based on a substantial risk [of harm.]'" (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013))). Plaintiffs face imminent injury, which they will suffer the moment President Trump's directives go into effect.[1]

Plaintiffs are also suffering actual injury right now. While the Interim Guidance has allowed some Plaintiffs to schedule or receive medically necessary surgery for a limited period, the Guidance does nothing to remedy the ongoing stigma, uncertainty, and other concrete harms all of the Plaintiffs are suffering as a result of President Trump's directives.

1. The Directive to Return to the Pre-2016 Policy, Under Which Transgender Service Members Are Subject to Discharge As Administratively Unfit, Creates Imminent and Ongoing Injuries.

President Trump's directive targeting the continued service of transgender service members exposes Plaintiffs to imminent and ongoing injuries. This directive exposes Plaintiffs to imminent injury by mandating that on March 23, 2018, all men and women who are transgender currently serving in the Armed Forces will be subject to discharge as administratively unfit. It is also already exposing Plaintiffs to ongoing harm by proclaiming transgender individuals' unfitness for service, destabilizing Plaintiffs' lives and livelihoods, and stigmatizing them as less worthy than their fellow service members.

Since June 2016, DoD policy has provided that "no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity." ECF No. 40-4 at Attach., § 1(a). President Trump

[1] Plaintiff ACLU of Maryland has associational standing on the basis of the injuries experienced by Plaintiff Stone, who is its member. ECF No. 39 ¶ 18; *see Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

has directed that on March 23, DoD must "return to" the *pre*-June 2016 policy, which he describes as "authoriz[ing] the discharge" of service members who are transgender. ECF No. 40-21 § 1. And based on the plain terms of that pre-2016 policy, transgender service members will become subject to discharge because they are deemed administratively unfit to serve. *See* Decl. of M. Kies (attached hereto), Ex. 30 (DoDI 1332.38, Enclosure 5) (listing "Sexual Gender and Identity Disorders" among conditions that rendered a service member unfit and subject to administrative separation).[2] On its face, this directive voids a policy under which the military expressly *cannot* discharge service members on the basis of transgender status, and replaces it with one that renders every transgender service member administratively unfit and expressly *subject* to discharge — simply because they are transgender.

Defendants ignore this imminent policy reversal. Instead they contend that Plaintiffs lack standing because "no Plaintiff has been discharged from the military and . . . the *Interim* Policy prohibits individuals from being discharged solely on the basis of transgender status or a diagnosis of gender dysphoria." ECF No. 52-1 at 13 (emphasis added). As Defendants are compelled to acknowledge on the first page of their brief, however, this protection against involuntary separation is in place only "*for now*." *Id.* at 1 (emphasis added). Far from defeating standing, this argument recognizes the importance of the existing protection against discharge on the basis of transgender status. That DoD thought it important to codify this protection "for now," during "the interim period," only underscores the harm from President Trump's action eliminating the protection *after* the interim period. And it reveals the emptiness of the promises

[2] In 2014, DoDI 1332.38 was replaced by DoDI 1332.18, which permitted individual Services to change the conditions of administrative unfitness. "The service branches retained the[] bars to service by transgender individuals after DoDI 1332.18 replaced DoDI 1332.38." ECF No. 40-32 ¶ 54; *see generally id.* ¶¶ 47–58.

by Plaintiffs' commanding officers that Plaintiffs will not face discharge "absent a change in the existing policy," *i.e.*, the Interim Guidance. ECF No. 52-2 ¶ 4; ECF No. 52-3 ¶ 4; ECF No. 52-4 ¶ 3; ECF No. 53.[3] Without an injunction, the Interim Guidance will soon be displaced by the President's directive, and "existing policy" will no longer protect Plaintiffs from discharge on the basis of transgender status. Defendants' declarants do not suggest otherwise.

Defendants contend that until Secretary Mattis completes his implementation plan, Plaintiffs can only "speculat[e]" about whether their new status (subject to discharge) will lead to their *actual* discharge. *See* ECF No. 52-1 at 13, 16. But Defendants cannot deny that the President said what he said. He did not announce studies to determine the impact of open transgender service; he announced a categorical ban on transgender individuals serving "in any capacity," ECF No. 40-22, and claimed to be "doing the military a great favor" by "coming out and just saying it," rather than waiting for DoD to study the issue, ECF No. 40-12; *cf. Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 523 (N.D. Cal. 2017) ("The statements of the President . . . belie the Government's argument . . . that the Order does not change the law."), *appeal filed*, 17-16887 (9th Cir. Sept. 18, 2017). Secretary Mattis has the task of determining the time, place, and manner of discharge, but the obvious purpose and inevitable result of declaring transgender service members "authorized [for] discharge" are to actually discharge them. ECF No. 40-21, § 1; *cf. Int'l Refugee Assistance Project v. Trump ("IRAP II")*, — F. Supp. 3d —, 2017 WL 4674314, at *34 (D. Md. Oct. 17, 2017) (directive ordering Secretary of Homeland Security to recommend list of countries to include in travel ban "does not permit the Secretary to recommend that no nationality-based ban is necessary"), *appeal docketed* No. 17-2231 (4th Cir.

[3] Defendants' declaration concerning Staff Sergeant Cole is by a battalion physician assistant, who is not a commanding officer in a position to say whether or not someone will be discharged. *See* ECF No. 60-1.

Oct. 20, 2017). There is at least a substantial risk — and, indeed, a clear likelihood — that Plaintiffs will, in fact, be discharged soon after March 23 simply because they are transgender.

In any event, regardless of when or whether they are ultimately discharged, Plaintiffs are suffering and will continue to suffer serious injury-in-fact simply by being branded subject to discharge as administratively unfit. President Trump's directive singles out transgender service members for differential treatment, withdraws a guarantee that protects their ability to serve on terms equal to those applied to others, and declares instead that they are subject to discharge as of March 23, even if they meet the same standards of fitness that apply to every other service member. Service members who are transgender are obviously harmed by this impending "disfavored legal status." *Romer v. Evans*, 517 U.S. 620, 633 (1996). Indeed, the Supreme Court in *Romer* viewed the withdrawal of legal protection against discrimination as making it "more difficult for one group of citizens . . . to seek aid from the government," which it termed "a denial of equal protection of the laws in the most literal sense." *Id.* at 633–34.

This differential treatment — a literal revocation of equal protection — is itself an injury. *See Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 790 (4th Cir. 2004) ("Discriminatory treatment is a harm that is sufficiently particular to qualify as an actual injury for standing purposes."); *see also Hassan v. City of N.Y.*, 804 F.3d 277, 289–90 (3d Cir. 2015) (as amended Feb. 2, 2016) ("[A] 'discriminatory classification is itself a penalty,' and thus qualifies as an actual injury for standing purposes, where a citizen's right to equal treatment is at stake." (internal citations omitted) (quoting *Saenz v. Roe*, 526 U.S. 489, 505 (1999))); *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012) ("Discriminatory treatment at the hands of the government is an injury . . . [that is] recognizable for standing irrespective of whether the

plaintiff will sustain an actual or more palpable injury as a result of the unequal treatment under law or regulation." (quotation marks omitted)).

Moreover, by branding them as administratively unfit, President Trump's directive is inflicting irreparable dignitary harms on Plaintiffs *now* and will continue to do so beyond March 23. President Trump proclaimed on Twitter that the military "cannot be burdened" with the "tremendous medical costs and disruption that transgender *[sic]* in the military would entail." ECF No. 40-22. His binding directives further declared that service by men and women who are transgender might "hinder military effectiveness" and "disrupt unit cohesion." ECF No. 40-21, § 1(a). The President's directives thus announce to Plaintiffs, their fellow service members, their chain of command, and all the world that their service and sacrifice are unwanted. *Cf. United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (refusal to recognize marriages of same-sex couples "tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition"); *J.E.B. v. Alabama*, 511 U.S. 127, 142 (1994) (when juror is excluded based on sex, "[t]he message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified"). This "[s]tigmatizing injury" is "one of the most serious consequences of discriminatory government action" and gives rise to standing to "those persons who are personally denied equal treatment." *Allen v. Wright*, 468 U.S. 737, 755 (1984) (quotation marks omitted), *abrogated on other grounds*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). On the face of President Trump's directives, Plaintiffs are among "those persons" personally affected. *See Lujan*, 504 U.S. at 561–62 ("[If] the plaintiff is himself an object of the action . . . at issue . . . there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing or requiring the action will redress it.").

These harms are not limited to the period after March 22 — they are happening right now. As an expert in military personnel policy, military sociology, and military psychology explains, the directives necessarily cast a shadow over transgender service members by "negatively impact[ing] their day-to-day relationships with co-workers and other service members." Decl. of M. Eitelberg (filed herewith) ¶ 6; *see also* Decl. of R. Mabus, former Secretary of the Navy (filed herewith) ¶ 14 ("Banning a segment of the [military] community from service . . . sends a message that [that] segment[] . . . [is] not within the scope of the mission."); Decl. of D. James, former Secretary of the Air Force (filed herewith) ¶ 11 ("[T]he President's ban" has "deleterious effect" on the Air Force because it "creates a sub-class of service members" and "suggest[s] that [they] are unworthy of their comrades' trust and support"); Decl. of E. Fanning, former Secretary of the Army (filed herewith) ¶ 11 (directives "degrade[] the value of transgender individuals not only to those service members themselves, but gives license to their leaders and fellow service members to do the same"). Plaintiffs are experiencing stigma due to their new disfavored status. *See* ECF No. 40-40 ¶ 14; ECF No. 41 ¶¶ 12–13; ECF No. 40-42 ¶ 16; ECF No. 40-43 ¶ 14; ECF No. 40-44 ¶ 15; ECF No. 40-45 ¶¶ 14–15. As individuals "personally denied equal treatment" on the face of the President's directives, they properly assert these injuries. *Allen*, 468 U.S. at 755.

President Trump's directive limits Plaintiffs' career opportunities in additional concrete ways, even before they are deemed subject to discharge based on transgender status (or suffer actual discharge). *Cf. Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (plaintiffs suffered injury in the form of harm to their career prospects); *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164, 186–87 (D.C. Cir. 2011) (lost opportunity to engage in one's preferred occupation and imposition of professional stigma are actionable injury). Commanding

officers' "discretionary judgments or decisions" regarding "service opportunities," levels of responsibility, and "career events" such as duty location and trainings depend in part on "expectations regarding a service member's future in the military," and so they are "reluctant to invest significant resources in the training or development of individuals who might leave military service in the near future." Eitelberg ¶¶ 7–8; *see also* Mabus ¶¶ 9–12; James ¶¶ 9–10.

2. The Directive Banning Surgical Care for Gender Dysphoria Beginning March 23 Exposes Plaintiffs to Imminent Injuries.

DoD provides a wide range of surgical care to service members. President Trump has nonetheless directed that, effective March 23, DoD "shall . . . halt all use of [government] resources to fund sex-reassignment surgical procedures for military personnel." ECF No. 40-21 § 2(b). The Interim Guidance on which Defendants rely confirms that, pursuant to President Trump's directive, "no new sex reassignment surgical procedures for military personnel will be permitted after March 22, 2018." *See* ECF No. 60-5 at 3.

Plaintiffs Cole, Doe, Gilbert, and Stone are expecting to receive medically necessary transition-related surgical care as part of their treatment for gender dysphoria. *See* ECF No. 40-40 ¶ 11; ECF No. 41 ¶ 12; ECF No. 40-43 ¶ 4; ECF No. 40-45 ¶¶ 9–10. But in light of the time it takes to work with military medical personnel to develop a treatment plan and proceed to surgery, it is virtually certain that they will not receive all of the surgical treatment they need for their diagnosed gender dysphoria before March 23. *See* Suppl. Decl. of K. Cole (filed herewith) ¶¶ 4–6; ECF No. 41 ¶ 12; ECF No. 40-43 ¶ 6; ECF No. 40-45 ¶ 10.

Petty Officer Stone, for example, has worked diligently with medical providers for over a year to develop a treatment plan, but still does not have a finalized plan in place. *See* Suppl. Decl. of B. Stone (filed herewith) ¶¶ 2–11. He first sought treatment in June 2016, but due to delays within the military, his endocrinologist only began to develop a plan in May 2017. *Id.*

¶¶ 3–5. Petty Officer Stone had to restart this process when he was transferred to Fort Meade in July 2017, and he proceeded to a series of appointments with doctors. *Id.* ¶¶ 7–11. The treatment plan eventually developed now awaits approval, per Navy protocol, from review panels first at Walter Reed, and then Navy Medicine East, and finally from Petty Officer Stone's commanding officer. *Id.* ¶ 11. Even after Petty Officer Stone receives all of these approvals, the two surgeries he requires must be scheduled, taking into account his obligations to his command and the availability of qualified surgeons — who are in high demand as other service members rush to receive the care they need before it is cut off. *Id.* ¶¶ 12–15. In these circumstances, it is highly likely that Petty Officer Stone will not receive one or both of his medically-necessary surgeries before March 23.

It is true, as Defendants note, that the cancellation of one surgery scheduled for another plaintiff, Staff Sergeant Cole, has been remedied. *See* ECF No. 50-2 at 9; Suppl. Cole ¶ 4. That cancellation occurred because individuals under Defendants' supervision apparently moved to enforce President Trump's restrictions on transgender service members' health care even before the directives were to take effect. ECF No. 40-40 ¶ 11; Suppl. Cole ¶ 4. After being sued, Secretary Mattis issued the Interim Guidance to stop such premature actions. But Staff Sergeant Cole's treatment plan calls for two additional surgeries, neither of which she will be able to undergo before March 23, and one of which she is not even eligible for until after that date. Suppl. Cole ¶¶ 6–10. If anything, the role this litigation played in stopping premature application of the surgical care ban confirms the importance of having a preliminary injunction in place the day Plaintiffs lose their right to medically necessary treatment under President Trump's directives.

In a footnote (ECF No. 52-1 at 20 n.10), Defendants cite an exception to the President's directive banning the use of government resources to fund "sex-reassignment surgical procedures" (ECF No. 40-21 § 2(b)). According to the directive, government funds may still be used "to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex." *Id.* This exception appears to refer to situations in which complications arise from surgery performed before March 23. Defendants, however, vaguely insinuate that the exception might be broader, stating in general terms that "medically necessary procedures will be accommodated." ECF No. 52-1 at 20 n.10.

Whatever these carefully chosen words mean, it is telling that Defendants do *not* state plainly that any service member with a medical need for surgery will receive that surgery — even if he or she received no surgical treatment before March 23. Nor is it plausible to read the "exception" as swallowing the announced rule banning provision of surgical treatment for transgender service members. Any such reading would render the directive a nullity, and would contravene President Trump's stated (though inaccurate) premise that providing surgical care under current policy is too expensive. *See* ECF No. 40-21 § 1(a); ECF No. 40-22. Defendants may not evade judicial review by advancing (or, in this case, weakly suggesting) an interpretation of the challenged action that both is implausible and would fatally undercut the President's announced policy. *See Cty. of Santa Clara*, 250 F. Supp. 3d at 515 (rejecting Government's attempt to avoid review by advancing "a construction so narrow that it renders a legal action legally meaningless" and would be "clearly inconsistent with the Order's broad intent").[4]

[4] Moreover, even if there were a plausible reading of the directive that preserved the availability of all medically necessary surgeries, "a narrow construction does not limit a plaintiff['s] standing (continued…)

3. The Directives Harm Plaintiffs by Preventing Their Accessions into the Officer Ranks.

President Trump has further directed DoD to extend indefinitely the ban on transgender accessions, which had been set to expire on December 31, 2017. ECF No. 40-21 § 2(a). Plaintiffs explained in their opening brief that the accession ban will harm at least Plaintiffs George and Gilbert by denying them the opportunity to commission as officers. *See* ECF No. 40-2 at 31–32. While Defendants offhandedly refer to Plaintiffs' position as a "belie[f]," *see* ECF No. 52-1 at 13, they conspicuously do not deny that the accession ban has precisely this consequence.

Instead, Defendants assert that Plaintiffs cannot be harmed by the accession ban because it is merely a continuation of a policy already in effect. *See* ECF No. 52-1 at 21. That misunderstands both the nature of Plaintiffs' claims and the reality of the President's actions. Following a rigorous study, DoD adopted the Open Service Directive, which permitted new accessions of transgender service members who could satisfy stringent medical requirements. *See* ECF No. 40-4. Secretary Mattis postponed the effective date of that policy from July 1, 2017 to January 1, 2018 to permit continued study. ECF No. 40-11. In doing so, however, he expressly stated that *he was not prejudging the outcome of that review* — in other words, that the Open Service Directive remained the current policy, and there was no plan to *disallow* accessions beginning on January 1. President Trump abruptly went on Twitter to preempt and prejudge his own DoD's study. He even claimed to be "doing the military a great favor" by "coming out and just saying it," rather than waiting for DoD to study the issue. ECF No. 40-12.

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to challenge a law that is subject to multiple interpretations." *Cty. of Santa Clara*, 250 F. Supp. 3d at 515; *see also Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988).

What Plaintiffs challenge is thus not the "longstanding" accession ban or even Secretary Mattis's delay of accessions. Plaintiffs challenge the President's decision to preempt DoD's study, rescind the accession standard the military adopted, and ban accessions indefinitely. The injury from this directive is straightforward: under previous policy, Plaintiffs George and Gilbert would have been eligible to commission after January 1. Now, they are not.[5]

Defendants also assert that Plaintiffs' claim of harm is too speculative because they have not "even applied to access into their targeted positions, let alone had an application denied." ECF No. 52-1 at 21–22. Defendants cite no authority for this crabbed view, and it is clearly wrong. "The law does not require [] a futile act." *Townes v. Jarvis*, 577 F.3d 543, 547 n.1 (4th Cir. 2009); *see also, e.g.*, *Sporhase v. Neb. ex rel. Douglas*, 458 U.S. 941, 944 n.2 (1982) ("failure to submit application" for permit did not defeat standing to challenge permit requirement because plaintiffs "would not have been granted a permit had they applied for one"); *In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012) (chaplains challenging discrimination in promotion process had standing because their "promotions will likely be considered by future selection boards"); *cf. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365 (1977) ("If an employer should announce his policy of discrimination by a sign reading 'Whites Only' on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs.").

While vague "some-day intentions" are not sufficient for standing, government action that disrupts a plaintiff's "concrete plans" causes an injury-in-fact. *Lujan*, 504 U.S. at 564. Thus, for example, a plaintiff had standing to challenge a university's admissions policies even

[5] Any suggestion that these accessions would have been denied or further delayed as a result of Secretary Mattis's review process is entirely speculative and cannot defeat standing.

though he did "not intend to apply . . . until next year," after completing a necessary "prerequisite." *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 595–96 (E.D. Va. 2004).

Plaintiffs George and Gilbert have much more than "some-day intentions" to commission as officers. Senior Airman George planned to seek his commission after completing his current educational program, from which he is scheduled to graduate this December. *See* Suppl. Decl. of S. George (filed herewith) ¶ 5. Confirming the seriousness of these plans, in late 2016 Senior Airman George completed an application for conditional release from the Air National Guard in order to commission in the Army, including obtaining approval from the General in command of the 127th Wing. *Id.* ¶ 2. He has confirmed letters of recommendation from a former Navy Nurse and a recently-retired Lieutenant Colonel. *Id.* ¶¶ 7–8. Senior Airman George is prepared to finalize and submit his application for a direct commission as an Army Health Services Administration Officer on January 1, when the accession rules of the Open Service Directive would have taken effect. It is hard to imagine more concrete plans than this.[6]

Petty Officer Gilbert likewise has firm plans to seek a commission. She has just three semesters left to complete in her undergraduate degree, and after she satisfies that prerequisite she will apply to Officer Candidate School. *See* Suppl. Decl. of T. Gilbert (filed herewith) ¶¶ 6–8. Those plans are so concrete that Petty Officer Gilbert has already received a commitment for

[6] Senior Airman George had also postponed filing his application for a direct commission pending processing of his request to have his gender marker in the Defense Enrollment Eligibility Report System (DEERS) updated to accurately reflect his male gender, which request has been pending since at least December 2016. Suppl. George ¶ 4. At the time his prior declaration was filed, Senior Airman George understood that he had submitted all requisite materials and that his request would be granted well in advance of his December graduation. *Id.* ¶¶ 3–4. The military subsequently requested additional information, which Senior Airman George promptly provided. *Id.* ¶ 4. Given that his request has been pending for nearly a year, Senior Airman George expects that it will be granted by January 1, 2018, when he intends to apply for a direct commission. *Id.*

a letter of recommendation. *Id.* ¶ 8. She is also in the process of reenlisting in the Navy for an additional term of six years to prepare for commissioning. *Id.* ¶ 9. These firm plans are more than sufficient to establish injury-in-fact as a result of President Trump's directive on accessions.

Defendants further argue (still without citation to authority) that Plaintiffs are not injured by the accession ban because waivers are theoretically available. *See* ECF No. 52-1 at 22. But a waiver request would be futile as well. Plaintiffs and several former Service Secretaries are aware of no case in the history of the ban on transgender service in which such a waiver was granted. *See* Fanning ¶ 17 (former Secretary of Army unaware of any instance before or after June 2016 in which a person who is transgender was granted a waiver); Mabus ¶ 15 (Navy); James ¶ 13 (Air Force). Moreover, transgender individuals seeking a waiver must persuade the highest levels of the Service of "extraordinary" circumstances.[7] Even if grant of a waiver were not fanciful, Plaintiffs would be injured by this extra hurdle placed in their path, simply because they are transgender. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."); *In re Navy Chaplaincy*, 697 F.3d at 1174 (plaintiffs had standing to challenge promotion process that made it "more likely" — though not certain — that non-liturgical Protestants would not be promoted).

[7] *See, e.g.*, Army Reg. 40-501, Standards of Medical Fitness (Dec. 14, 2007, rev. Aug. 4, 2011), at ¶ 1-6(h), http://www.apd.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN3801_AR40-501_Web_FINAL.pdf (waivers "will not be granted" if applicant does not meet "retention standards," absent "extraordinary circumstances" and approval from The Surgeon General of the Army).

B. President Trump's Binding Directives, Scheduled To Take Effect On January 1 And March 23, Are Ripe For Review.

In a further attempt to postpone review, Defendants insist that it is premature for Plaintiffs to challenge "a possible future policy." ECF No. 52-1 at 16. This ripeness objection, like Defendants' standing arguments, is based on a fundamental unwillingness to confront the actual policy directives President Trump has issued. This is not a case about a "possible future policy" still being studied. Plaintiffs challenge sweeping directives that, absent judicial intervention, will take effect on January 1 and March 23.

The ripeness doctrine "balance[s] 'the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration.'" *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006) (quoting *Franks v. Ross*, 313 F.3d 184, 194 (4th Cir. 2002)). "A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Id.* The validity of President Trump's directives is fit for review, and withholding review would impose significant hardship on Plaintiffs — who will be imminently and irreparably harmed if the directives take effect as scheduled. *See, e.g.*, *IRAP II*, 2017 WL 4674314, at *16 ("Where this case centers on legal issues arising from the Proclamation, which has been issued in its final form, and is not dependent on facts that may derive from application of [an aspect of the Proclamation], it is now fit for decision." (citing *Miller*, 462 F.3d at 319)).

Defendants cannot evade review of these binding directives on the ground that President Trump ordered the Secretary of Defense to prepare an "implementation plan." ECF No. 40-21 § 3. Courts do not delay review of harmful government action simply because some details remain to be filled in. The Fourth Circuit, for example, has held that when a statute establishes clear requirements, it is ripe for challenge even if regulations under the statute have not yet been

promulgated, because "[r]egulations could not alter the Act's provisions." *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 188 (4th Cir. 2007). Similarly, the Seventh Circuit has rejected a ripeness objection to a challenge to a statute requiring certain entities to post a surety bond and pay fees, even though the amount of the fees, the amount of the bond, and the time for payment were not yet determined. *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1275–76 (7th Cir. 1992). Because the plaintiffs would face "immediate damag[e]" "once enabling rules are promulgated," the court of appeals held, there was "no need to wait for regulations or specific applications to evaluate and make a conclusive determination as to the legal issue presented." *Id.*

Here the contours of President Trump's directives and the harms they will impose (and are currently causing) are even more definite. Whatever "plan" the Secretary of Defense develops cannot alter the fact that, on March 23, Plaintiffs will immediately become subject to discharge as administratively unfit on the basis of their transgender status, and will be denied medically necessary care. *See* ECF No. 40-21 §§ 1(b), 2(b). Nor can it change the fact that Plaintiffs eligible for commissions will be blocked from commissioning as of January 1. *See id.* § 2(a). Even on the question of "how to address transgender individuals currently serving," *id.* § 3, the Secretary has simply been directed to prepare a plan that would address the timing and manner of separation. Unless the President's own words are to be ignored, the endpoint of the directive is foreordained: a categorical end to men and women who are transgender serving in the military "in any capacity." ECF No. 40-22; *supra* Part I.A.1; *cf. IRAP II*, 2017 WL 4674314, at *34 (directive to Secretary of Homeland Security "telegraphed the expected recommendations" of a study by "indicat[ing] that the President had decided" the outcome "even before the study had been conducted").

Defendants' suggestion that Secretary Mattis's study might theoretically persuade the President to change his mind in the future cannot insulate from challenge his current, binding policy directives and the harms that flow from them today. The Constitution "does not require citizens to accept assurances from the government that, if the government later determines it has made a misstep, it will take ameliorative action." *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 907 F. Supp. 2d 310, 331 (E.D.N.Y. 2012); *see also Riva v. Massachusetts*, 61 F.3d 1003, 1011 (1st Cir. 1995) (reasoning that "theoretical possibility" of repeal of statute does not defeat ripeness); *Am. Petroleum Inst. v. U.S. EPA*, 906 F.2d 729, 739–40 (D.C. Cir. 1990) ("If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely."); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 92 (D.D.C. 1998) ("To ask the court to stay its hand because Congress hypothetically may amend the statutory framework of the Census Act as it now exists . . . is asking the court to stay its hand based upon nothing more than mere speculation.").

Moreover, if the lawfulness of President Trump's binding directives is not determined before they take effect on January 1 and March 23, Plaintiffs will suffer severe hardship. The "hardship prong is measured by the immediacy of the threat and the burden imposed on the plaintiff[s]." *Lansdowne on the Potomac Homeowners Ass'n v. OpenBand at Lansdowne, LLC*, 713 F.3d 187, 199 (4th Cir. 2013) (quotation marks omitted). Immediacy depends not just on timeframe but on "the inevitability of the operation of a [challenged policy] against certain individuals." *U.S. House of Reps.*, 11 F. Supp. 2d at 92 (quotation marks omitted). Plaintiffs are already experiencing harm from the directives, and those harms will multiply when they are subjected to the new policies in just a few months. These impending changes are far closer in time than what other courts have held to be a ripe challenge. *See, e.g.*, *Riva*, 61 F.3d at 1011

(age discrimination claim ripe five years before benefit reduction takes effect, because even though "distant in time," the reductions "seem[] highly probable"); *U.S. House of Reps.*, 11 F. Supp. 2d at 92 (claim ripe where "twenty months will pass between this date and [the effective date of the statute]").

The burden imposed on Plaintiffs is also great. To say that a claim is not ripe "means that the case will be *better* decided later and that the parties *will not have constitutional rights undermined by the delay*." *Simmonds v. Immigration & Naturalization Serv.*, 326 F.3d 351, 357 (2d Cir. 2003) (second emphasis added). That is emphatically not the case here. As explained above, President Trump's directives will imminently revoke DoD's protection against discharge and subject service members to discharge on the basis of transgender status. The directives will deny service members medically necessary surgical care. They will block new commissions and other accessions. And the directives — all of which violate Plaintiffs' constitutional rights to equal protection and substantive due process — are already undermining military careers to which Plaintiffs have devoted their lives. *Supra* Part I.A. These "immediate harm[s] to [Plaintiffs'] constitutionally protected rights" require immediate judicial review. *Miller*, 462 F.3d at 321.[8]

[8] Defendants' remaining two attempts to evade review are readily dispatched. First, Defendants seek to misapply the constitutional avoidance doctrine (*see* ECF No. 52-1 at 22), which is a canon of statutory construction teaching that legislation should, if possible, be read to avoid serious constitutional concern. *See, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986). The doctrine is not an all-purpose device for postponing a constitutional challenge that is otherwise properly presented. Second, Plaintiffs are not required to "exhaust[] . . . available intraservice corrective measures" (ECF No. 52-1 at 16) before a court can rule on their claims. Exhaustion is not required where "the outcome would predictably be futile." *Guerra v. Scruggs*, 942 F.2d 270, 276 (4th Cir. 1991) (quotation marks omitted). Here, military administrative boards would have no authority to grant relief from the Commander-in-Chief's facially unconstitutional directives. *Cf. Able v. United States*, 88 F.3d 1280, 1289 (2d (continued…)

II. Plaintiffs' Claims Are Likely To Succeed On The Merits.[9]

A. President Trump's Directives Violate Equal Protection.

On their face, the three directives comprising President Trump's Transgender Service Member Ban treat service members who are transgender differently than those who are not. This discrimination lacks a legitimate, rational explanation. Indeed, the extraordinary context of President Trump's abrupt decision to reverse a thoroughly-studied policy — an anomaly Defendants do not and cannot dispute — confirms that the decision is "inexplicable by anything but animus toward the class it affects." *Romer*, 517 U.S. at 632. Plaintiffs' equal protection claim is therefore likely to succeed.

1. President Trump's Abrupt Decision to Override the Military's Considered Professional Judgment Is Owed No Deference.

Defendants' arguments boil down to a plea for blind deference. *See* ECF No. 52-1 at 23–25. But deference, even regarding decisions related to national security, is neither automatic nor absolute. "The military has not been exempted from constitutional provisions that protect the rights of individuals. It is precisely the role of the courts to determine whether those rights have been violated." *Emory v. Sec'y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987) (per curiam) (citations omitted). The mere invocation of national security does not permit courts "to ignore evidence, circumscribe [their] own review, and blindly defer to executive action." *Int'l Refugee Assistance Project v. Trump ("IRAP I")*, 857 F.3d 554, 587 (4th Cir. 2017) (en banc) ("The

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Cir. 1996) (exhaustion not required in facial constitutional challenge to "Don't Ask, Don't Tell").

[9] Defendants assert (without citation) that the amended complaint should be dismissed under Rule 12(b)(6) "[f]or the same reasons that Plaintiffs cannot establish a likelihood on the merits." ECF No. 52-1 at 18 n.9. Defendants ignore the difference between the motion to dismiss standard and the determination of likelihood of success for purposes of a preliminary injunction. In any event, as explained below, Plaintiffs are likely to succeed on the merits of their claims.

deference we give the coordinate branches is surely powerful, but even it must yield in certain circumstances, lest we abdicate our own duties to uphold the Constitution."), *vacated as moot sub nom. Trump v. IRAP*, — S. Ct. —, 2017 WL 4518553 (Oct. 10, 2017).[10]

The cases upon which Defendants rely for a "highly deferential form of review," ECF No. 52-1 at 23–26, share a crucial element that is missing in this case: the exercise of "considered professional judgment," *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986). In *Rostker*, for example, the Supreme Court found it important that in limiting the selective service to males, "Congress did not act 'unthinkingly' or 'reflexively and not for any considered reason.'" *Rostker v. Goldberg*, 453 U.S. 57, 72 (1981) (citation omitted). The Court emphasized Congress's "extensive[] consider[ation] . . . [through] hearings, floor debate, and in committee[,] . . . adduc[ing] extensive testimony and evidence concerning the issue." *Id.* Because "[t]he issue was considered at great length," the Court rejected "undertaking an independent evaluation of th[e] evidence, rather than adopting a[] [] deferential examination of Congress' evaluation of that evidence." *Id.* at 74, 82–83 (emphasis omitted); *see also Weinberger*, 475 U.S. at 508 (relying on Air Force's "considered professional judgment"); *Greer v. Spock*, 424 U.S. 828, 839 (1976) ("What the record shows, therefore, is a considered [military] policy, objectively and evenhandedly applied[.]"); *Cook v. Gates*, 528 F.3d 42, 58–60 (1st Cir. 2008) ("The circumstances surrounding the Act's passage lead to the firm conclusion that Congress and the Executive studied the issues intensely and from many angles, including by considering the constitutional rights of gay and lesbian service members."); *Thomasson v. Perry*, 80 F.3d 915,

[10] Although *IRAP I* was vacated as moot, the Supreme Court did not express any disagreement with its holdings, and it remains persuasive as the views of the *en banc* Fourth Circuit.

922–23 (4th Cir. 1996) (en banc) (military policy "dr[ew] on the combined wisdom of [an] exhaustive examination in the Executive and Legislative branches").

Defendants cannot demand deference to a "considered professional judgment" here, because there was none. As Plaintiffs have established, President Trump issued his abrupt directives without "consult[ing] any experts on th[e] issue"; he did not receive or rely on "any new evidence"; he "startled DoD"; and he made his abrupt announcement immediately following a direct appeal from legislators with a track record of animus toward and moral disapproval of men and women who are transgender. ECF No. 40-2 at 3, 10, 27–28. These are serious charges, so it is all the more remarkable that *Defendants do not deny* them. Defendants instead assert that it is "hardly evidence of animus" for "the current Commander in Chief" to disagree with "the approach preferred by former Secretary Carter." ECF No. 52-1 at 30. The only reason for Defendants to argue so transparently against a straw-man is that they have no response to the much more significant indicia of animus that Plaintiffs presented. President Trump's animus-driven decision is not a proper subject of judicial deference; it is "something the Equal Protection [guarantee] does not permit." *Romer*, 517 U.S. at 635.

Indeed, the only considered military judgment at issue here is the one reflected in the 2016 Open Service Directive. *See* ECF No. 40-37 ¶¶ 1, 8–27 (military working group "formulated its recommendations by collecting and considering evidence from . . . all available scholarly evidence and consultations with medical experts, personnel experts, readiness experts, health insurance companies, civilian employers, [] commanders, . . . [and the] RAND Report"); ECF No. 40-38 ¶¶ 10–24 ("Working Group's process . . . was deliberative and thoughtful, involved significant amounts of research and education, and in the end resulted in a policy that all services supported"). If any deference is due, it is to *that* decision.

2. Defendants Do Not Attempt to Justify the President's Directives to Subject Transgender Service Members to Discharge As Administratively Unfit, and to Deny Them Medical Care.

Pursuant to President Trump's directives, on March 23, 2018, transgender service members will become subject to discharge as administratively unfit, and the military will no longer provide them with medically necessary surgical treatment. ECF No. 40-21 §§ 1, 2(b); *see supra* Part I. Neither action has even a rational basis and, as a consequence, both are unconstitutional under any standard of review.

Strikingly, Defendants have no answer. Nowhere in their brief do they argue that a decision to subject transgender service members to discharge, and to deny them medical treatment, is consistent with the Constitution's guarantee of equal protection. Instead they try to change the subject, defending only the "Interim Guidance" that will soon be *superseded* by the directives they fail to defend. *See* ECF No. 52-1 at 19–22; ECF No. 60-5 (Interim Guidance).

Defendants' reliance on the Interim Guidance is nevertheless revealing. Defendants emphasize that the Interim Guidance, which they call "current operative policy," "*prohibits* disparate treatment of existing service members based on [transgender] status," and argue that "[a] law forbidding disparate treatment obviously cannot violate the Equal Protection Clause." *Id.* at 20. That is indeed a compelling defense of the policy that is about to end. It is also a damning indictment of President Trump's directives, under which this "prohibition on disparate treatment" will disappear on March 23, and be replaced with a *mandate* to discriminate against Plaintiffs and other service members who are transgender.

Defendants' silence on President Trump's directives authorizing discharge and halting medically necessary surgeries speaks volumes. They do not deny that these policy changes were made without justification. To the contrary, Defendants correctly observe that the Court "does not have before it" any "justifications" for the new policy. ECF No. 52-1 at 16. But that is not,

as Defendants suggest, because no policy change has issued. It is because President Trump imposed a discriminatory policy without any justification Defendants are willing to defend. That amounts to a concession that Plaintiffs' claims are likely to succeed on the merits.

3. Defendants Have Not Offered a Rational Justification for the President's Decision to Rescind the Military's Accession Policy.

As Plaintiffs explained in their opening memorandum, discrimination against transgender individuals is subject to heightened scrutiny for purposes of equal protection. Defendants briefly argue that President Trump's accession ban — the only component of his directives they actually defend — is not subject to heightened scrutiny. ECF No. 52-1 at 26. But they do *not* dispute that transgender status meets all of the factors traditionally warranting heightened scrutiny. *See, e.g.*, *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *see generally* ECF No. 40-2 at 19. Nor do they dispute that discrimination against men and women who are transgender is a form of discrimination on the basis of sex. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *see generally* ECF No. 40-2 at 19–20. Defendants' entire argument is that discrimination is subject to a different constitutional standard in the military context. But the Supreme Court has rejected this view. In *Rostker*, a sex discrimination case, the Court refused to "apply a different equal protection test because of the military context," cautioning that courts must "not abdicate [their] ultimate responsibility to decide the constitutional question." 453 U.S. at 67, 69–71.

Even if only rational basis review applied here, Defendants cannot muster a rational justification for President Trump's accession ban. Their effort to justify the accession ban rests on two fictional premises. The first fiction is that Plaintiffs are challenging a "longstanding accession policy." ECF No. 52-1 at 23. Not so. Prior to President Trump's startling tweets and directives, the military's accession policy was set forth in the Open Service Directive, under

which a rigorous framework regulating new accessions by individuals who are transgender was in place and accessions were set to begin on July 1, 2017. ECF No. 40-4 at Attach., § 2. Secretary Mattis delayed implementation until January 1, 2018, but he expressly did *not* change the policy and disclaimed any preconceived plan to do so. ECF No. 40-11. What Plaintiffs challenge is not the historical ban that the Open Service Directive ended, but a decision to reverse existing military policy *without waiting* for DoD to conduct the very study that Secretary Mattis had just announced.

The second fiction underpinning Defendants' argument is that President Trump has done nothing but "order[] a further study." *See* ECF No. 52-1 at 1; *see also, e.g.*, *id.* at 27 ("[I]t was not irrational for the President to maintain the status quo *pending [an expert] panel's review*." (emphasis added)); *id.* at 22, 29–30. Plaintiffs are not challenging a decision to order a study — and indeed did not file a lawsuit when Secretary Mattis did just that on June 30, 2017, before President Trump attacked transgender service members on Twitter. *See* ECF Nos. 40-11, 40-22. This case arises because President Trump *preempted* the study that his Secretary of Defense had just commenced regarding accession of men and women who are transgender, and claimed to be "doing the military a great favor" by "coming out and just saying it," rather than waiting for DoD to study the issue. ECF No. 40-12. Plaintiffs challenge the abruptly declared categorical ban on transgender service "in any capacity," which was first tweeted by the President and then formalized in a series of directives blocking the Open Service Directive from taking effect as scheduled. *See* ECF Nos. 40-21, 40-22.

All of Defendants' purported justifications about military readiness, cost, and unit cohesion, *see* ECF No. 52-1 at 27–29, have been thoroughly studied and refuted or otherwise addressed by the military itself, *see* ECF No. 40-2 at 6–7, 21–25. The military's previous

determination already accounted for Defendants' concern that "at least some transgender individuals suffer from medical conditions that could impede the performance of their duties, . . . [including by] limit[ing] the[ir] ability . . . to deploy," ECF No. 52-1 at 27. The Open Service Directive broadly *disqualified* from accession those transgender individuals diagnosed with gender dysphoria — *unless* they could meet demanding medical criteria specifically designed to ensure readiness and deployability, as well as the fitness criteria all service members must meet. ECF No. 40-4 at Attach., § 2. Defendants never explain why transgender individuals who have *already* completed surgery and been stable for extended periods of time, or who do not experience gender dysphoria or have any expected surgical needs — the accession standards set by the Open Service Directive — are somehow unfit to deploy and serve more generally.

The military's previous determination also addressed and rejected the contention that costs associated with service by men and women who are transgender justify a ban on their service or commission. *See* ECF No. 40-2 at 24–25. Defendants do not dispute that the military had previously found such costs to be *de minimis*, and they offer no competing estimate; although they vaguely refer to "other costs," Defendants never say what those are. ECF No. 52-1 at 28. Defendants' argument is essentially that President Trump may decide to discriminate against a group of service members he disfavors, so long as doing so might redistribute a trivial amount of money within the defense budget. *See* ECF No. 52-1 at 28. But reducing costs cannot justify arbitrary distinctions between similarly situated groups. *See Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011); *Bassett v. Snyder*, 59 F. Supp. 3d 837, 854-55 (E.D. Mich. 2014).

Finally, the military's previous determination rejected the hypothesis that accession by men and women who are transgender would somehow undermine military readiness and unit cohesion. ECF No. 40-37 ¶¶ 10, 22–26; ECF No. 40-38 ¶ 23. Unlike President Trump, the

military cited evidence regarding the favorable experience of militaries of allied countries that permit such service, as well as extensive interviews of service members and commanders. The directive, by contrast, appears to be based on nothing more than an assumption that non-transgender troops share President Trump's own biases (or those of his political allies). And indeed, the reality is that the President's ban actually undermines readiness and unit cohesion. As former Secretary Mabus explains, "[t]he military is designed to be a meritocracy where individuals receive opportunities and tackle assignments based on their ability to do the job. The institution is weakened when people are denied the ability to serve not because they are unqualified or because they cannot do the job but because of who they are." Mabus ¶ 13. Secretary James concurs that "[t]he USAF, and the military in general, are weakened" by "suggesting that service members should be judged based on characteristics having nothing to do with their ability to perform their job." James ¶ 12. President Trump's "sudden reversal undermines the confidence of all service members that important military policy decisions will be made under careful review and consistent with established process" and "creat[es] a culture of fear that is anathema to the stability and certainty that makes for an effective military." Mabus ¶¶ 17–18; *see also* ECF No. 40-17 (letter from 56 retired generals and admirals stating directives "would cause significant disruptions, deprive the military of mission-critical talent, [] compromise the integrity of . . . non-transgender [service members] who would be forced to choose between reporting their comrades or disobeying policy[,] . . . [and] harm [] readiness and morale").

The supposed justifications that Defendants trot out are no more than *post hoc* attempts to rationalize President Trump's evidence-free decision to override the military's thorough and considered determinations. His speculative assertion that a categorical ban on transgender

individuals *might* be warranted is plainly not a rational basis to change the policy on accessions *before* any such study has occurred. Although Defendants claim that "there is room for the military to think otherwise," ECF No. 52-1 at 28, they put forward no evidence that anyone in "the military" actually so advised President Trump before he issued the directives. The determination that DoD has made, after an exhaustive, expert-driven review, has been to embrace service and accession by men and women who are transgender as "consistent with military readiness and with strength through diversity." *See* ECF No. 40-4 at 3; Attach., § 5.

B. President Trump's Directives Violate Substantive Due Process.

The Government may not single out a group of individuals for special disfavor in matters central to the maintenance of personal autonomy and dignity. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015); *see also Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (explaining the "link[]" between"[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty"). Defendants do not challenge this well-established proposition. Their only response is that "[t]he President has provided [constitutionally sufficient] reasons for maintaining the status quo while the military studies the policy on military service by transgender individuals." ECF No. 52-1 at 30. That is doubly wrong. President Trump has not "maintained the status quo" but rather stripped transgender service members of protection and exposed them to special disfavor. *See supra* Part I. And the reasons President Trump identified for this dramatic change are irrational and are apparent pretexts for animus-driven action. *See supra* Part II. For the reasons discussed at length above and in Plaintiffs' opening brief, Defendants' conduct fails even a rational-basis test. *See George Wash. Univ. v. District of Columbia*, 391 F. Supp. 2d 109, 114 (D.D.C. 2005) (rational basis tests under equal protection and due process are "almost indistinguishable").

This Due Process violation is compounded by a shocking bait-and-switch. The military announced that transgender status would no longer be a basis for discharge, *see* ECF No. 40-4, and then *affirmatively encouraged* service members to reveal their transgender status to their commanders and peers, *see* ECF No. 40-9 at 21. Plaintiffs did so in reasonable reliance on that combined assurance and encouragement. *See* ECF No. 40-40 ¶ 3; ECF No. 41 ¶ 4; ECF No. 40-42 ¶ 3; ECF No. 40-43 ¶ 5; ECF No. 40-44 ¶ 3; ECF No. 40-45 ¶ 3. Now the President has directed DoD to treat Plaintiffs as subject to discharge because of a fact about themselves that the military encouraged them to reveal — with a promise that it would *not* be used against them.

The unconstitutionality of this bait-and-switch does not depend on any argument that "a federal agency is estopped from changing its generally applicable policies." ECF No. 52-1 at 31. It simply reflects that "[t]he touchstone of due process is protection of the individual against arbitrary action of government." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (citation omitted). Estoppel principles, which can overlap with due process concerns, *see Bartko v. SEC*, 845 F.3d 1217, 1227 (D.C. Cir. 2017), only confirm the illegitimate nature of the President's action, *see Gen. Accounting Office v. Gen. Accounting Office Pers. Appeals Bd.*, 698 F.2d 516, 526 (D.C. Cir. 1983) ("Estoppel generally requires that government agents engage — by commission or omission — in conduct that can be characterized as misrepresentation or concealment, or, at least, behave in ways that have or will cause an egregiously unfair result.").

C. President Trump's Directive Banning Surgical Care Violates 10 U.S.C. § 1074.

As Plaintiffs have explained, the military has a statutory obligation to provide medically necessary treatment to service members, and in some cases surgical procedures are necessary to treat transgender individuals who have been diagnosed with gender dysphoria. ECF No. 40-2 at 29–30. Defendants do not dispute either point. ECF No. 52-1 at 31–32.

Instead they focus, yet again, on Interim Guidance that will soon be superseded. Indeed, the Guidance states that "no new sex reassignment surgical procedures for military personnel will be permitted after March 22, 2018." ECF No. 60-5 at 3. Defendants' response is essentially that the President's directive will not violate the statute until a few months from now.

Defendants also attempt to evade review on the ground that it is "unclear" whether the President's directive will bar any surgical treatments at all. ECF No. 52-1 at 31. As explained above, the straightforward reading of the directive — and the only one that gives it any effect and fulfills its stated purpose — is that many service members, including most of the Plaintiffs, will be denied medically necessary care. *Supra* Part I.A.2. Half-hearted suggestions that the directive might not amount to anything do not change the fact that Defendants have essentially admitted that the planned denial of care violates Section 1074.

III. Plaintiffs Will Suffer Irreparable Injury Without An Injunction.

Defendants argue that Plaintiffs cannot establish irreparable harm "for much the same reasons they lack standing." ECF No. 52-1 at 18. To the contrary, the very real injuries that support Plaintiffs' standing also establish their irreparable harm. *Supra* Part I. The discrimination inherent in being made subject to discharge as administratively unfit on the basis of transgender status is itself irreparable harm. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976). So is the stigma that Plaintiffs now face, and will continue to face after March 22, even if they are not discharged soon thereafter. *See, e.g.*, *Elzie v. Aspin*, 841 F. Supp. 439, 443 (D.D.C. 1993). So is the stress and uncertainty stemming from Plaintiffs' loss of protection from discharge. *See, e.g.*, *Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008), *rev'd on other grounds sub nom. NASA v. Nelson*, 562 U.S. 134 (2011); *Schalk v. Teledyne, Inc.*, 751 F. Supp. 1261, 1268 (W.D. Mich. 1990), *aff'd*, 948 F.2d 1290 (6th Cir. 1991) (per curiam). So is the loss of professional opportunities because commanders are anticipating the service member's discharge.

See, e.g., *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017). So is loss of the professional opportunity — and distinct honor and privilege — of serving as a commissioned officer. *See, e.g.*, *id.* So is the denial of needed medical care. *See, e.g.*, *Fishman v. Paolucci*, 628 F. App'x 797, 801 (2d Cir. 2015). And so are the many losses — livelihood, benefits, career opportunity, health care, the ability to support one's family, and of course the intrinsic value of serving one's country — associated with actual discharge, once the categorical ban on service is fully implemented. *See, e.g.*, *Cole v. ArvinMeritor, Inc.*, 516 F. Supp. 2d 850, 876–77 (E.D. Mich. 2005); *see generally* ECF No. 40-2 at 30–33 (identifying discrete harms suffered by particular Plaintiffs).

Defendants demean the value of Plaintiffs' service by characterizing "all" of Plaintiffs' injuries as merely "employment-related," as though they could be fully remedied by "back pay and time in service credit." ECF No. 52-1 at 18. As the above list of harms illustrates — and common sense confirms — this case is much more than a mundane employment dispute. The constitutional rights to equal protection and substantive due process are at stake, and the harms Plaintiffs face are irreparable.

IV. The Balance Of Equities And The Public Interest Weigh Heavily In Favor Of An Injunction.

Defendants have not identified any harm they would suffer from the requested injunction. *See* ECF No. 52-1 at 32–33. They state only that an injunction will "directly interfere with . . . the military's ability to thoroughly study" the issues. *See id*. That is simply not the case. The fundamental problem that Defendants again refuse to confront is that President Trump made sweeping discriminatory changes to military policy *without* first seeking the "seasoned judgment" of experts with "mature experience." ECF No. 52-1 at 32 (quoting ECF No. 40-23). It is surely equitable and in the public interest to enjoin an unconstitutional, animus-driven

decision to override the military's considered judgment and discriminate against transgender service members, on the basis of no evidence whatsoever. Enjoining President Trump's unconstitutional directives will not prevent the military from studying anything.

Plaintiffs certainly agree that "the public has a strong interest in national defense." ECF No. 52-1 at 33. So do the 56 retired generals and admirals who concluded that it is President Trump's directives that would cause "significant disruptions" and "deprive the military of mission-critical talent." ECF No. 40-17. And after repeatedly extolling the virtues of the Interim Guidance, Defendants cannot credibly claim any harm to the national defense from an injunction that largely preserves the status quo embodied in that guidance beyond March 22.

V. The Court Should Enjoin Defendants From Implementing Or Enforcing The Facially Unconstitutional Directives.

"When a district court grants an injunction, the scope of such relief rests within its sound discretion." *Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002). The straightforward remedy here is to enjoin Defendants from implementing or enforcing President Trump's facially invalid directives. Defendants' arguments against this common sense relief are not persuasive.

Defendants first ask that any injunction be narrowly drawn so that they may discriminate against any transgender service member other than Plaintiffs. *See* ECF No. 52-1 at 33–35. That would be inappropriate. Plaintiffs have brought a facial challenge and have shown that President Trump's directives are unconstitutional and inconsistent with statutory authority. *See* ECF No. 39 at 32–39. When courts strike down a law, regulation, or order on such a facial challenge, they frequently enjoin the provision in its entirety, rather than allow enforcement against anyone but the plaintiff. *See, e.g.*, *IRAP I*, 857 F.3d at 605 ("[B]ecause Section 2(c) likely violates the Establishment Clause, enjoining it only as to Plaintiffs would not cure the constitutional deficiency, which would endure in all Section 2(c)'s applications."), *vacated as moot*, 2017 WL

4518553; *Cty. of Santa Clara*, 250 F. Supp. 3d at 539 (injunction against "sanctuary city" executive order); *see also IRAP II*, 2017 WL 4674314, at *40. Such a remedy is particularly appropriate where, as here, the challenged law or policy appears motivated by discriminatory intent. *See N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 238 (4th Cir. 2016) ("When discriminatory intent impermissibly motivates the passage of a law, a court may remedy the injury—the impact of the legislation—by invalidating the law.").[11]

Not only is an injunction against President Trump's directives appropriate, it is the only remedy that would "provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc*., 512 U.S. 753, 765 (1994) (citation omitted). One of the many harms at issue is the stigma of being singled out as a member of a class that is labeled unfit to serve. *Supra* Part I.A.1. An injunction that simply created six personalized exceptions to a discriminatory policy, otherwise remaining in effect, would not redress this harm. Enforcement of President Trump's directives against other individuals "would only serve to reinforce the 'message' that Plaintiffs 'are outsiders, not full members'" of the U.S. military. *IRAP I*, 857 F.3d at 605, *vacated as moot*, 2017 WL 4518553 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000)).[12]

Defendants cite a single case, *Meinhold v. Department of Defense*, 34 F.3d 1469 (9th Cir. 1994), to argue that all of these principles should be disregarded because this case involves the

[11] Defendants call this proposed injunction "worldwide" as an apparent pejorative. ECF No. 52-1 at 34. Of course, the geographic scope would be the same even if the injunction were limited to Plaintiffs, unless Defendants mean to suggest that they could evade the injunction by discharging Plaintiffs overseas. The military operates in many places; that is not an argument for permitting it to enforce a discriminatory, unconstitutional policy in some of them.

[12] Moreover, any injunction would have to benefit any present or future member of Plaintiff ACLU of Maryland. The military might have difficulty identifying ACLU members entitled to relief under a narrow injunction. *Cf. Ariz. Dream Act Coal. v. Brewer*, 81 F. Supp. 3d 795, 810–11 (D. Ariz. 2015) (granting broadly applicable injunction because the plaintiff is an organization that "seeks relief on behalf of its members," and it would be "impractical" for those administering the policy to "distinguish" between members and non-members).

military. ECF No. 52-1 at 34. *Meinhold* creates no such special rule. Rather, the relief requested by the plaintiff in *Meinhold* was simply to have "his discharge voided and to be reinstated." 34 F.3d at 1480. In limiting the injunction to that plaintiff, the court provided the full relief he had sought. It had no reason to confront — and it therefore did not address — any suggestion that broader harms would result from otherwise maintaining an invalid policy.

After first arguing that the relief Plaintiffs request is too broad, Defendants next argue that it is too trivial. According to Defendants, Plaintiffs seek an "Obey the Law" order requiring "Defendants to comply with the Interim Guidance." ECF No. 52-1 at 33. This perplexing argument again ignores the fact that the Interim Guidance is *interim* and will imminently be superseded by President Trump's binding, discriminatory directives. An injunction codifying what is in some respects current policy is necessary for the simple reason that without the injunction, that policy will soon be replaced with a different one that is harmful and unlawful.

Finally, Defendants raise the non-sequitur that military personnel decisions are "ordinarily reviewed by a district court in the APA context." ECF No. 52-1 at 35. But Defendants do not appear to argue that this lawsuit is somehow procedurally improper. And as explained above, exhaustion is not required here. *Supra* note 8. Plaintiffs have standing, their claims are ripe, President Trump's directives are likely unconstitutional, and if the directives are not enjoined Plaintiffs will suffer irreparable harm. Defendants cite no authority suggesting that the straightforward injunction Plaintiffs seek is unavailable in these circumstances.

CONCLUSION

For these reasons, and those set forth in Plaintiffs' opening memorandum, the Court should deny Defendants' Motion to Dismiss and grant Plaintiffs' Motion for a Preliminary Injunction.

Dated: October 27, 2017

Respectfully submitted,

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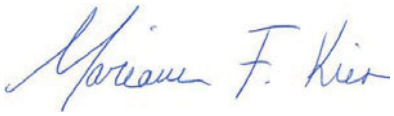
CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2017, copies of the foregoing and any exhibits were served via CM/ECF on all counsel of record.



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