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 IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' contention that the Court has jurisdiction at this stage to hear their challenge to the military's policy on service by transgender individuals is built on an overarching assertion that is incorrect: that the discharge of currently serving transgender individuals has been mandated after March 22, 2018. Plaintiffs' argument is based upon a misreading of the wording of the President's August 25, 2017 Memorandum regarding military service by transgender individuals. Although Plaintiffs acknowledge that the President has charged the Secretary of Defense with studying the issue, they claim that the scope of the Secretary's study is limited and that the outcome is preordained. Based on this premise, Plaintiffs argue that their discharge from the military is imminent, and that this establishes not only their Article III standing but the ripeness of their claims. Plaintiffs are wrong – their claim that currently serving transgender persons face certain discharge in just a few months is contrary to the language of the Presidential Memorandum and the Secretary of Defense's response to that directive.

The Presidential Memorandum specifically directs the Secretary of Defense to study how to address transgender individuals who are currently serving in the military and does not predetermine the outcome of that study. Moreover, in response to the Memorandum, Secretary Mattis has convened a panel of senior DoD officials with combat and deployment experience to analyze all relevant data over a period of several months and make recommendations regarding military service by transgender individuals. A panel of experienced military officials—tasked with examining questions of how such service will impact military considerations such as lethality, readiness, and unit cohesion—would be unnecessary if, as Plaintiffs argue, the Secretary was only charged with deciding how and when to discharge current transgender service members. Because Secretary Mattis is still studying the issue, it remains uncertain whether Plaintiffs will suffer an injury in fact caused by

the military's future policy regarding service by transgender individuals. For these reasons, Plaintiffs do not face the imminent harm necessary to establish standing, and their claims are not ripe.[1]

Plaintiffs also argue that they have standing based on speculation from former military department secretaries and former military officials that uncertainty regarding future military policy is presently harming the careers of transgender service members. But Plaintiffs have not alleged that they have actually suffered the predicted harms, and speculation by third parties is plainly insufficient to establish standing. Finally, Plaintiffs argue that they have standing because they are experiencing stigma as a result of the President's statements and directive. But even assuming that were true, claims of stigmatic injury provide a basis for standing only where individuals are personally denied equal treatment. Here, Plaintiffs are being treated the same as other service members under the Interim Guidance, and they have not established an imminent threat of future injury. For this reason as well, Plaintiffs cannot establish standing or that their claims are ripe.

Finally, even if the Court had jurisdiction, Plaintiffs have failed to state claims upon which relief can be granted. They have not stated an equal protection claim for the reasons set forth in Defendants' opening brief, including because currently serving transgender individuals are subject to the same standards as other service members under the operative Interim Guidance. In addition, it is plainly permissible for the military to undertake further study before pending changes in policy take effect. This is particularly true where long-standing policy concerning accession into the military by transgender persons, examined under the deference appropriately due the military, has a reasoned basis. Plaintiffs' substantive due process claim fails for similar reasons, and because Plaintiffs have not alleged the deprivation of a property or liberty interest. Finally, Plaintiffs' statutory claim concerning the provision of medical care is also meritless. The statute Plaintiffs

[1] As addressed further below, this plainly erroneous reading of the Presidential Memorandum is the central basis for the preliminary injunction entered by the district court in *Doe v. Trump,* --- F.Supp.3d ----, 2017 WL 4873042 (Oct. 30, 2017).

invoke, 10 U.S.C. § 1074, does not provide a private cause of action against the Government, and even if it did, Defendants are not denying Plaintiffs transition related health care at this time under the Interim Guidance. Plaintiffs have not otherwise set forth any authority that the Constitution requires the military to provide transition related surgery. For these reasons, the Court should grant Defendants' motion to dismiss for failure to state a claim upon which relief can be granted.

ARGUMENT

I. Plaintiffs Lack Standing.

Plaintiffs bear the burden of establishing standing to bring their claims, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and they have not meet that burden here. Plaintiffs claim that they face imminent harm by disregarding currently operative policy, plainly misreading the Presidential Memorandum, relying on the speculation of third parties, and arguing that they are experiencing stigma unmoored from an actual adverse action that has been taken against them or which is imminent.

A. Plaintiffs Do Not Face Imminent Discharge from the Military.

Plaintiffs' primary claim to standing in this case is based on a plain misreading of the President's August 25, 2017 Memorandum regarding military service by transgender individuals. Although Plaintiffs acknowledge that the President directed Secretary Mattis to study the issue, they argue that the outcome of the study is a foregone conclusion and that transgender individuals will be discharged from the military and prohibited from accessing into the military solely on the basis of their transgender status. According to Plaintiffs, Secretary Mattis's study is limited to "determining the time, place and manner of discharge." ECF No. 66 at 6. The Court in *Doe v. Trump* recently accepted a similarly incorrect argument. --- F.Supp.3d ----, 2017 WL 4873042, *17 (concluding that, "as of March 23, 2018, the military must authorize the discharge of transgender service members").

But Plaintiffs' argument and the *Doe* Court's conclusion disregard the language of the Presidential Memorandum, and Secretary Mattis's response to the Memorandum.

In the very first section of the August 25 Memorandum, the President stated that, in his judgment, "there remain meaningful concerns that further study is needed to ensure … that terminating the Departments' longstanding policy and practice [regarding military service by transgender individuals] would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources… ." Presidential Memorandum, 82 FR 41319. Based on his conclusion that further study was needed, the President directed the Secretaries of Defense and Homeland Security to maintain the currently effective policy regarding accession of transgender individuals into the military. *Id.* He then directed the Secretary of Defense, in consultation with the Secretary of Homeland Security, to submit an implementation plan by February 21, 2018. *Id.*

The President explicitly granted the Secretary of Defense broad discretion over the conclusions and content that should be included in the implementation plan: "The implementation plan shall adhere to the determinations of the Secretary of Defense, made in consultation with the Secretary of Homeland Security, as to what steps are appropriate and consistent with military effectiveness and lethality, budgetary constraints, and applicable law." *Id.* Critically, the President specifically directed the Secretary of Defense to "determine how to address transgender individuals currently serving in the United States military" and stated unequivocally that, "[u]ntil the Secretary has made that determination, no action may be taken against such individuals" because of their transgender status. *Id.* The notion advanced by Plaintiffs and the Court in *Doe* that this directive mandates the discharge of currently serving transgender persons after March 22, 2018, is therefore incorrect. The text of the Presidential Memorandum shows that Secretary Mattis has not been limited to studying only when and how transgender service members should be discharged, and the outcome of his study has not been preordained.

Secretary Mattis's response to the Presidential Memorandum further undercuts Plaintiffs' argument. After receiving the President's Memorandum, Secretary Mattis announced that he was assembling a panel of experts who would bring "mature experience, most notably in combat and deployed operations, and seasoned judgment" to the task of providing advice and recommendations regarding future policies concerning military service by transgender individuals. Statement of Secretary Jim Mattis, Release No: NR-312-17.[2] Secretary Mattis also explained that the panel would "thoroughly analyze all pertinent data, quantifiable and non-quantifiable." There would be no need at all to convene a panel of military experts with combat and deployment experience or to thoroughly analyze quantifiable and non-quantifiable data if Secretary Mattis was charged only with recommending how and when transgender service members should be discharged from the military.

In addition, on September 14, 2017, Secretary Mattis issued a Memorandum and Interim Guidance regarding military service by transgender individuals. Mattis Memorandum and Interim Guidance, ECF No. 60-5. In that Memorandum, Secretary Mattis stated that, "[c]onsistent with military effectiveness and lethality, budgetary constraints, and applicable law, the implementation plan will establish the policy, standards and procedures for transgender individuals serving in the military." *Id.* Secretary Mattis also noted that the Deputy Secretary of Defense and Vice Chairman of the Joint Chiefs of Staff, supported by the panel of military experts, would provide him with recommendations "supported by appropriate evidence and information." *Id.* He further stated that the Interim Guidance would take effect immediately and "will remain in effect until I promulgate DoD's final policy in this matter." In short, Secretary Mattis has initiated a full policy-making process that is being led by senior officials at the Departments of Defense and Homeland Security. Again it should be apparent that the scope of that process is not limited to determining when and

[2] The August 29, 2017 Statement of Secretary Jim Mattis, Release No: NR-312-17, is available online at: https://www.defense.gov/News/News-Releases/News-Release-View/Article/1294351/ (last visited on Nov. 3, 2017).

how to discharge currently serving transgender persons, and that the outcome of the study has not been predetermined. Regardless of how the Plaintiffs or the court in *Doe* read the text of the Presidential Memorandum, the *Defendants* – who issued and are carrying out the policy being challenged – have *not* determined that currently serving transgender persons will be discharged as of March 23, 2018. In these circumstances, Plaintiffs have failed to establish an imminent threat of future injury.

Plaintiffs' reliance on statements that the President made on Twitter several weeks before issuing his Presidential Memorandum is misplaced. The actual *action* taken by the President was set forth in his August 25 Memorandum, which directs Secretary Mattis to conduct a fulsome study and clearly leaves open the impact of future policy on currently serving individuals until the final policy is resolved. Contrary to what Plaintiffs contend and the Court in *Doe* found, the outcome of the policy-making process has not been predetermined. Again, if a decision had already been reached to discharge currently serving transgender service members on March 23, 2018, an extensive study led by senior DoD officials and experts over a six month period would not be necessary.

Thus, the language of the Presidential Memorandum and Secretary Mattis's response to it show conclusively that the issue of whether transgender service members will ultimately be subject to discharge is still being studied by the military and has not been resolved. Because it is unclear whether Plaintiffs will ever be affected by the future military policy that is currently being studied by senior DoD officials under the direction of Secretary Mattis, Plaintiffs have not shown that they face the certainly impending injury necessary to establish standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("[W]e have repeatedly reiterated that threatened injury must be certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient.").

B. Plaintiffs George and Gilbert Have Not Establish an Imminent Threat That They Will be Denied Accession and Thus Do Not Have Standing to Challenge the Pre-Existing Accession Policy.

Plaintiffs George and Gilbert also allege that they face imminent harm because they will be denied accession into the military as commissioned officers. ECF No. 66 at 13-16. But these plaintiffs have not shown that the injuries they anticipate are imminent. Plaintiff Gilbert, who currently serves in the Naval Reserve, ECF No. 39 ¶ 43, states that "she intends to apply to commission as an officer in the Navy," but she acknowledges that she is not scheduled to complete her undergraduate degree, which is a requirement to commission as an officer, until the Spring of 2019, ECF No. 66-11 ¶¶ 6-8. Similarly, Plaintiff George, who currently serves in the Air National Guard, ECF No. 39 ¶ 36, is scheduled to complete his associate's degree in nursing in December 2017 and then plans to begin a program to earn his bachelor's degree in nursing, which he expects to be able to complete "in 12-18 months," ECF No. 66-9 ¶ 5. Depending on the outcome of the policy study mandated by the President, it is possible that these plaintiffs may be barred from accession in the future. But at this stage, the alleged injuries are at best uncertain, and under established Article III principles, the Court does not have jurisdiction to remedy possible future injuries that may not occur.

Importantly, neither Plaintiff George nor Plaintiff Gilbert has alleged that they have actually applied to access as officers in the military, let alone had an application denied because of the military's accessions policy. Even if their applications to access into the military as officers were denied because they do not meet the current required medical standards, under the Interim Guidance, they could still apply for a waiver. *See* Interim Guidance, ECF No. 60-5 (stating that the current accession policy, which generally prohibits transgender individuals from joining the military because they do not meet medical standards, is "subject to the normal waiver process"). Plaintiffs George's and Gilbert's allegations that they plan to apply to access into the military as officers at

some point in the future, that they believe that their future applications will denied because of their transgender status, and that they will be denied a waiver, are simply too speculative to establish an imminent injury that is sufficient to establish standing.

C. Plaintiffs Also Have Not Established Standing With Respect to the Denial of Medical Care.

Plaintiffs claim that they will be deprived of medical treatment in the future is equally speculative. As an initial matter, it is clear from the Secretary of Defense's Interim Guidance, Defendants' Declarations, and Plaintiffs' Memorandum that no Plaintiff is currently being denied medical treatment. *See* ECF No. 66 at 17 ("The Directive Banning Surgical Care for Gender Dysphoria *Beginning March 23* Exposes Plaintiffs to Imminent Injuries") (emphasis added). Indeed, even the district court in *Doe* concluded that the plaintiffs there lacked standing to pursue their medical treatment claims because they had not "demonstrated that they are substantially likely to be impacted" by the relevant portion of the Memorandum. 2017 WL 4873042, at *24. Thus, Plaintiffs allege two forms of future injury to establish standing as to their medical treatment claim: (1) they claim they will be harmed by the loss of medical coverage generally if they are discharged and (2) they claim they will be harmed by the inability to receive government funded "sex-reassignment surgical procedures" after March 22, 2018 if they are not discharged. ECF No. 66 at 17-19.

Plaintiffs fail to establish standing under their first theory because, as explained *supra*, it is entirely speculative that they will in fact be discharged from the military and therefore lose their DoD-provided medical coverage. Plaintiffs' theory of future medical injuries "rests on a speculative chain of possibilities that does not establish that their potential injury is certainly impending" and therefore cannot establish standing. *See Amnesty Int'l USA*, 568 U.S. at 401; *cf. Doe*, 2017 WL 4873042, at *24 ("Given the possibility of discharge, the uncertainties attended by the fact that she has yet to begin any transition treatment, and the lack of certainty on when such treatment will

begin, the prospective harm engendered by the Sex Reassignment Surgery Directive is too speculative to constitute an injury in fact with respect to Jane Doe 3.")

Plaintiffs' second argument speculates that Plaintiffs Cole, Doe, Gilbert, and Stone will require sex reassignment surgery after March 22, 2018, and DoD may not pay for that surgery. Plaintiffs base this argument on the direction in the Presidential Memorandum and the DoD Interim Guidance to "halt all use of DoD and DHS resources to fund sex reassignment surgical procedures or military personnel," after March 22, 2018 "except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex." Presidential Memorandum, 82 FR 41319. As all of the Plaintiffs have in fact started a course of treatment to reassign their sex, and have transition plans either submitted or already in place, the exception may in fact apply to them. Plaintiffs speculate, however, that it will not. ECF No. 66 at 12. Specifically, Plaintiffs speculate that the exception will not apply to them because it is only intended to correct complications that arise in surgery. *Id.* Plaintiffs cite to no evidence or DoD regulation to support their interpretation but still ask the Court to accept this cramped view of the exception in order to support their speculative standing argument.

D. Plaintiffs' Claims of Stigma Fail to Establish Standing.

Plaintiffs' general allegations that they are experiencing "stigma" are similarly insufficient to establish standing at this stage. ECF No. 66 at 9. Stigmatic injury "accords a basis for standing only to those persons who are personally denied equal treatment." *Allen v. Wright*, 468 U.S. 737, 755 (1984). "[S]tigmatic injury… requires identification of some concrete interest with respect to which respondents are personally subject to discriminatory treatment," and "[t]hat interest must independently satisfy the causation requirement of standing doctrine." *Id.* at 757 n.22. Because Plaintiffs have not alleged that they have personally been subjected to discriminatory treatment, their general claims that they have experienced stigma cannot provide the basis for standing.

Plaintiffs attempt to remedy this defect by arguing that they have been injured because the President has singled them out for differential treatment. ECF No. 66 at 7. In support of their argument, Plaintiffs cite to *Romer v. Evans*, 517 U.S. 620 (1996). *Id.* But *Romer* does not address standing and, indeed, provides a contrast to the facts of this case. In *Romer*, both individuals and municipalities challenged the constitutionality of an amendment to the Colorado Constitution that prohibited "all legislative, executive or judicial action at any level of state or local government designed to protect … homosexual persons or gays and lesbians." *Id.* at 624. The challenged constitutional amendment was final, it had been adopted through a statewide referendum, and had a clear and concrete impact on the plaintiffs by repealing or rescinding the municipalities' non-discrimination ordinances and withdrawing from the individual plaintiffs "specific legal protection from the injuries caused by discrimination" because of their sexual orientation. *Id.* at 623-627. Here, on the other hand, Plaintiffs are attempting to challenge a hypothetical, future policy that is still being studied and may never apply to them. Moreover, the Interim Guidance, which is the current operative policy, specifically prohibits the military from treating service members differently on the basis of their transgender status. *See* Interim Guidance, ECF no. 60-5 ("[N]o action may be taken to involuntarily separate or discharge an otherwise qualified Service member solely on the basis of a gender dysphoria diagnosis or transgender status. Transgender Service members are subject to the same standards as any other Service member of the same gender."). Unlike the Plaintiffs in *Romer,* Plaintiffs have not been, and may never be, injured by Defendants' actions.

Plaintiffs' reliance on *Planned Parenthood of S.C. Inc. v. Rose,* 361 F.3d 786, 790 (4th Cir. 2004), is similarly misplaced. In *Rose*, the plaintiffs brought a First Amendment challenge to a state statute that authorized the issuance of a specialty license plate bearing the message "Choose Life," days after the Act went into effect. *Id.* at 788-89. The Plaintiffs alleged that they were actually suffering discriminatory treatment because the Act allowed "pro-life supporters, but not pro-choice

supporters, to express their viewpoint in the license plate forum." *Id.* at 790. The present circumstance of this case are not remotely analogous. Here, the Interim Guidance, which currently serves as the operative policy, specifically prohibits disparate treatment based on transgender status or a diagnosis of gender dysphoria. Plaintiffs are not being singled out for differential treatment under the interim policy, have not alleged specific instances of present differential treatment, and it is unclear if they will be affected by the future policy. Thus, Plaintiffs' claim that they have been singled out for differential treatment, without allegations that they have actually experienced unequal treatment, does not meet their burden of establishing standing.

E. Plaintiffs Cannot Establish Standing through Speculation by Third Parties

Plaintiffs also attempt to show that they have suffered an injury-in-fact by relying on speculation from former military department secretaries and other military officials concerning how uncertainty surrounding a future policy regarding transgender military service might cause harm to their careers. *See e.g.,* ECF No. 66 at 9 (citing to a declaration from "an expert in military personnel policy, military sociology, and military psychology"). These declarants are not plaintiffs in this case, and their declarations do not establish specific harms that the named Plaintiffs have personally suffered. Rather, these declarants speculate about what potential harm the Plaintiffs may suffer. Notably, Plaintiffs themselves do not appear to allege that they have actually suffered any of the harms predicted by the third party declarations. In the absence of evidence of a concrete injury or imminent threat of injury, the speculative opinions of the former military department secretaries and former military officials regarding possible future injury cannot establish standing. *See Amnesty Int'l USA*, 568 U.S. at 409. Further, even if taken at face value, the types of injuries suggested by the declarants – such as the possible impact on career assignments in light of the ongoing policy review – in themselves do not establish that Plaintiffs are suffering a present, cognizable injury or imminent threat of future injury sufficient to establish Article III standing.

II. Plaintiffs' Claims Are Not Ripe.

In addition to lacking standing, because the military is still studying its policy regarding transgender service members, Plaintiffs claims also are not ripe for adjudication. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732–33 (1998) (observing that the prudential ripeness requirement is designed to prevent courts from "entangling themselves in abstract disagreements over administrative policies" until "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties"). In their Opposition, Plaintiffs attempt to analogize this case to *Retail Industry Leaders Association (RILA) v. Fielder*, 475 F.3d 180 (4th Cir. 2007). But in RILA, the state of Maryland had passed a statute that clearly applied to members of the plaintiff organization, even though all of the implementing regulations had not been issued. *Id.* at 188. After observing that "[a]n issue is not fit for review if 'it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all,'" the court determined that the legal questions presented by the case were ripe "because of their certain applicability to" the plaintiffs. *Id.* (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). Here, however, the policy at issue is still being studied and there is no final, concrete action for Plaintiffs to challenge. Instead, their claims rest entirely on speculation regarding the outcome of Secretary Mattis's study and future military policy decisions. Because it is not certain that the policy that the military ultimately adopts will apply to Plaintiffs, their claims are not ripe and should be dismissed.

Further, even if the military had made a final decision, the Fourth Circuit has traditionally required military service members to exhaust intraservice corrective measure before a district court may review a military decision. *Guerra v. Scruggs*, 942 F.2d 270, 276 (4th Cir. 1991). "This doctrine

applies to cases like the present one where constitutional claims are made." *Id.* (citing *American Fed. of Government Employees, AFL-CIO v. Nimmo*, 711 F.2d 28, 31 (4th Cir. 1983)).

Here, Plaintiffs claim that they do not have to exhaust those remedies because exhaustion would be futile. *See, e.g.,* ECF 66 at 27 n. 8. In support of that argument, they speculate that future administrative boards will have no authority to deviate from the President's directive. *Id.* But such speculation is contrary to the direction in the Presidential Memorandum itself, which specifically states that "the Secretary of Defense, in consultation with the Secretary of Homeland Security, shall determine how to address transgender individuals currently serving in the United States military." Further, administrative board procedures, if used to effectuate Plaintiffs' speculative future discharges, are formal hearings in which the service member is usually appointed an attorney to represent him or her, at no cost, and with the opportunity to present evidence and cross-examine witnesses. *See, e.g.,* Army Reg. 635-200 ¶ 3-7.[3] Such procedures cannot rightly be seen as futile, particularly when they have never been utilized.

For Plaintiffs seeking to access into the military, the procedures articulated in DoD Instruction (DoDI) 6130.03 continue to apply and have not been utilized by any of the Plaintiffs. Just because Plaintiffs are not aware of anyone who has been granted a waiver does not mean that seeking a waiver is legally futile. In *Guerra*, 942 F.2d 270, the case Plaintiffs' rely on to support their futility argument, the plaintiff argued that application to the Army Board for Correction of Military Records, a post discharge service remedy, was "predictably futile" because of the alleged inadequacies of the procedures and the fact that the board was not empowered to provide him with all the relief he sought. Despite these claims, the Fourth Circuit found that exhaustion was still required. Likewise, the Court

[3] Army Reg. 635-200 is available at: http://www.apd.army.mil/epubs/DR_pubs/DR_a/pdf/web/AR635-200_Web_FINAL_18JAN2017.pdf (last visited Nov. 3, 2017).

here should reject Plaintiffs' prediction that their medical circumstances will support accession but their waiver will be denied. *See also Wilt v. Gilmore*, 62 F. App'x 484, 487-88 (4th Cir. 2003).

III. Plaintiffs Have Failed to State Claims upon Which Relief Can Be Granted.

Even if Plaintiffs had standing and their claims were ripe, they have failed to state plausible claims for relief. Executive decisions regarding military matters are entitled to substantial deference and Plaintiffs have not stated plausible claims that the President's decision to maintain the status quo while Secretary Mattis studies military service by transgender individuals violates equal protection, due process, or Federal statutes.

A. Plaintiffs Have Failed to State an Equal Protection Claim.

1. The President's Decision Regarding Military Policy Is Entitled to Substantial Deference.

Notwithstanding clear precedent, Plaintiffs argue that the President's actions at issue here, including to maintain the current accession policy pending further study of overall policy regarding transgender military service, "is owed no deference." ECF No. 66 at 21. That is not the law. To the contrary, "'[c]ourts have traditionally shown the utmost deference to Presidential responsibilities'" in the field of "military and national security affairs." *Dep't of Navy v. Egan*, 484 U.S. 518, 529–30 (1988) (citation omitted); *see also Loving v. United States*, 517 U.S. 748, 768 (1996) (It "would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority."). After all, "[t]he complex[,] subtle, and professional decisions as to the composition … of a military force are … subject always to civilian control of the Legislative and Executive Branches"; indeed, "[i]t is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (emphasis in original); *see also, e.g.*, *Thomasson v. Perry*, 80 F.3d 915, 927 (4th Cir. 1996) (en banc) ("Ultimately, 'the special status of the military has required, the Constitution has contemplated, Congress has created, and the Supreme Court has long recognized'

that constitutional challenges to military personnel policies and decisions face heavy burdens." (quoting *Chappell v. Wallace*, 462 U.S. 296, 303–04 (1983)(brackets omitted)). Of course, the military is not "exempted from constitutional provisions," ECF No. 66 at 21 (quoting *Emory v. Sec'y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987)), but its unique role under the Constitution requires unique – and more deferential – constitutional scrutiny.

Plaintiffs attempt to distinguish cases where deference was afforded to Congressional and Executive judgments regarding military matters by asserting that such deference was granted only after Congress or the military exercised their considered professional judgment in studying policy *prior* to taking action. ECF No. 66 at 22. Here, Plaintiffs contend that the President has already decided the ultimate policy to "ban" transgender service through statements on Twitter, and left nothing for the military to study and resolve. *Id.* at 6. But that characterization is unsupported by a fair reading of the record. The Presidential Memorandum did not change policy precipitously, it maintained longstanding policy, and deferred a change in policy pending further study. The President also clearly directed the Secretary to examine and present recommendations on future policy. He did not mandate that current service members be discharged as of a date certain but directed the Secretary to address that issue as well. *See supra.*

In these circumstances, Plaintiffs effort to distinguish authority like *Rostker v. Goldberg*, 453 U.S. 57 (1981), is meritless and, indeed, somewhat ironic. For example, in *Rostker*, the Supreme Court gave considerable deference to the judgment of Congress and the military on the question of male-only draft registration after careful study of that issue. *Id.* at 64–83. Here, the very action Plaintiffs challenge is the President's determination that more time is needed to carefully consider changes to longstanding military policies before they go into effect. Where deference is due the military after it has studied an issue and acted, deference is certainly due to a decision not to implement changes to longstanding policy until a policy process now underway is completed. What

Plaintiffs seek here is to *halt* the very process by which military leaders would provide their considered professional judgment to the President, an outcome radically inconsistent with the deference recognized in *Rostker* to the policy process. The President's decision to maintain the status quo while military leaders carefully consider the issues raised in the Presidential Memorandum is certainly entitled to substantial deference, just as the outcome of that process would be.

Moreover, the fact that the previous administration decided to change the longstanding policy regarding accessions into the military by transgender individuals does not undercut the deference due the President's determination that the current policy should be maintained and that additional study is needed before implementing any changes. ECF No. 66 at 25-30. As previously explained, policymakers cannot bind their successors to a decision simply by conducting a study, and the rules of deference due the military are not tossed aside merely because current military officials are revisiting an issue that was studied by previous officials. Even in the civilian context, an agency's decision "is not instantly carved in stone. On the contrary, the agency must consider … the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal citation, quotations, and ellipsis omitted). That flexibility is even more important when it comes to "[t]he complex[,] subtle, and professional decisions as to the composition … of a military force" committed "always to civilian control" by the "branches of the government which are periodically subject to electoral accountability." *Gilligan*, 413 U.S. at 10.

2. Currently Operative Policy Does Not Violate the Equal Protection Clause.

Plaintiffs also fail to explain how they can maintain an equal protection claim when the Interim Guidance, which is the currently operative policy, explicitly directs that "transgender service members are subject to the same standards as any other Service member of the same gender." Interim Guidance, ECF No. 60-5. Plaintiffs have not alleged that they have been treated unequally

under the Interim Guidance, and Plaintiffs speculation that they will be treated differently in the future does not state a claim upon which relief can be granted.

3. The Longstanding Accessions Policy Does Not Violate Equal Protection.

Likewise meritless is Plaintiffs' claim that equal protection is violated by maintenance of the longstanding accessions policy until such time as the President hears from his military leaders and determines whether a change is warranted. Instead of the President's decision to maintain the pre-existing and longstanding accessions policy pending further study, Plaintiffs seek the implementation of former Secretary Carter's proposed accessions policy, which had not yet gone into effect. *See* ECF No. 66 at 25-29. But, at bottom, this type of equal protection claim is a disagreement with where the military "has drawn the line." *Weinberger*, 475 U.S. at 510. Secretary Carter's policy would presumptively exclude transgender individuals from military service unless they could show that they have avoided complications for an 18-month period. Many transgender persons would potentially be denied accession into the military under that policy based on their medical condition. The longstanding accessions policy, which the President decided to maintain pending further review, likewise presumptively excludes transgender individuals unless they apply for and receive a waiver. *See* Interim Guidance, ECF No 60-5. In other words, Plaintiffs' equal protection claim reduces to a desire for a categorical exception rather than an individualized one. Both policies – including the one that Plaintiffs prefer – reflect a military judgment as to whether a transgender person should be permitted to access into the military due to his or her individual medical status. But such policy decisions about whether to adopt rules or standards or where to draw the line are matters of military discretion. *See, e.g.*, *Weinberger*, 475 U.S. at 509 (fact that "military commanders may in their discretion permit visible religious headgear and other such apparel in designated living quarters" did not render its prohibition on wearing such headgear indoors on an Air Force base hospital illegitimate). Indeed, Plaintiffs' extensive submissions from former military department secretaries

and other former military officials who served under the last administration underscores that they are attempting to litigate in Federal court the wisdom of competing judgments over the military's policy. *See e.g.,* ECF Nos. 66-4, 66-5, 66-6, and 66-7. But while these former military officials may disagree with the current military officials on certain matters of policy, policy disagreements are insufficient to state an equal protection claim.

Finally, Plaintiffs argue, without any support, that the President's decision that further study was needed before the military changed its longstanding policy was somehow driven by animus because it was an "abrupt" decision. ECF No. 66 at 23. But almost a month before the President made the statements on Twitter to which the Plaintiffs object, Secretary Mattis "approved a recommendation by the services to defer accessing transgender applicants into the military" until January 1, 2018, so that the services could "review their accession plans and provide input on the impact to the readiness and lethality of our forces." Department of Defense, Release No. NR-250-17 (June 30, 2017).[4] The Presidential Memorandum extends that deadline indefinitely unless and until there appears a sufficient basis to abandon the longstanding accessions policy. Presidential Memorandum, § 1(b). That reasonable, non-disruptive decision to maintain a longstanding policy while the issue is under consideration cannot fairly be characterized as evidence of animus.

For the foregoing reasons, Plaintiffs have failed to state a valid equal protection claim.

B. Plaintiffs Have Failed to State a Plausible Due Process Claim

Like Plaintiffs' equal protection claim, Plaintiffs' substantive due process claim fails because it is based on the faulty premise that the Presidential Memorandum mandates their discharges after March 22, 2018. As explained *supra,* the current operative policy is Secretary Mattis' Interim Guidance which presently prohibits Plaintiffs' discharge due to their transgender status. Further, as

[4] Department of Defense, Release No. NR-250-17 (June 30, 2017) is available at: https://www.defense.gov/News/News-Releases/News-Release-View/Article/1236145/statement-by-chief-pentagon-spokesperson-dana-w-white-on-transgender-accessions/ (last visited Nov. 3, 2017).

explained in Defendants' opening brief, ECF No. 52-1 at 30-31, Plaintiffs do not possess a cognizable property right to continued employment in the military and thus their speculated discharge cannot form the basis for their due process claim. *Guerra*, 942 F.2d at 277–78.

Insofar as Plaintiffs suggest that the military is now estopped from discharging them under the Due Process Clause their challenge is equally misplaced. As an initial matter, the Supreme Court has expressed substantial skepticism that such a claim can even exist against the government. *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984).("[T]he Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined."). But even assuming that Plaintiffs could claim estoppel against the government, such an argument assumes that Plaintiffs will be discharged based on their transgender status. As shown above, however, no such decision has been made as to current service members, including the Plaintiffs. In all events, Plaintiffs' generic assertions of reliance on the former policy cannot suffice. Even the district court in *Doe* rejected a similar estoppel claim, observing that "[a]llowing estoppel claims to go forward based on such generalized theories of reliance would seem to implicate the reasonable concerns other courts have raised about government estoppel." 2017 WL 4873042, at *26.

C. Plaintiffs Have Not Shown that They Have A Statutory Right to Future Sex Reassignment Surgery at Taxpayers' Expense

Plaintiffs' claim under 10 U.S.C. § 1074 also fails. Plaintiffs acknowledge that DoD is currently providing for their medical care, including procedures related to their gender transition. They speculate, however, that DoD may not pay for their sex reassignment surgery after March 22, 2018, and claim that the failure to pay for such treatment would be a violation of 10 U.S.C. § 1074. But even if possible future events were sufficient to establish standing now for this claim, Plaintiffs' claim would nonetheless fail.

As an initial matter, as the one Court that examined a claim under § 1074 determined, the statute does not provide for a cause of action against the government. *Disabled Am. Veterans Dep't, Inc. v. United States*, 365 F. Supp. 1190, 1190 (E.D.N.Y. 1973). Plaintiffs' claim can be dismissed for that reason alone.

Moreover, 10 U.S.C. § 1074 does not mandate that DoD provide Plaintiffs with sex reassignment surgery at taxpayers' expense. Section 1074 specifically provides the Secretary of Defense and the military department secretaries the discretion to set the level of care provided at military facilities. 10 U.S.C. § 1074(a)(1); *see also* 10 U.S.C. § 1073(a)(b). Thus, DoD has broad discretion to shape the scope of services based on medical, policy, and military readiness concerns. In support of their claim that DoD is bound by statute to provide Plaintiffs with sex reassignment surgery, Plaintiffs cite a decision from the State of Maryland and three insurance companies who have all decided to provide sex reassignment surgery for patients covered by their policies. ECF No. 40-2 at 5 n3. But decisions by states and private entities to cover such expenses under their own policies cannot bind the Secretary of Defense. Under statutes governing the DoD health care system, there is clearly no statutory entitlement to taxpayer funded sex reassignment surgery.

Finally, Plaintiffs do not even venture an argument that the Constitution requires that the military fund their planned for sex reassignment surgery. Thus, absent a valid statutory claim, they present no legal grounds for invalidating that aspect of the President's Memorandum which forecloses taxpayer funding for such procedures.

CONCLUSION

For the reasons set forth above, the Court should grant Defendants' motion to dismiss Plaintiffs' Amended Complaint.

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Respectfully submitted,

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