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-MJG

MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO DISSOLVE THE PRELIMINARY INJUNCTION

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INTRODUCTION

Last summer, President Trump announced on Twitter that he had decided to ban transgender individuals from serving in the military "in any capacity." ECF 40-22. The President claimed to have based his decision on concerns about military effectiveness. *Id.* As this Court later found, that claim was not true: President Trump's abrupt action was based on no evidence at all, and "was not driven by genuine concerns regarding military efficacy." ECF 85 at 43 (internal quotation marks omitted). The Court further concluded that President Trump's directive to the Department of Defense ("DoD") to develop an "implementation plan" was "not a request for a study but an order to implement the Directives contained therein." *Id.* at 50. This Court—and three other district courts—enjoined enforcement and implementation of the President's unconstitutional act of discrimination.

DoD has now provided the President with the Implementation Plan he requested, and with an unsigned report that attempts to supply evidence justifying the conclusions the President reached last July. The Implementation Plan categorically excludes transgender individuals from enlisting in the Armed Forces. In accordance with the President's instructions, the Implementation Plan also "determine[s] how to address transgender individuals currently serving in the United States military," ECF 40-21 at 2, by offering to "grandfather" them in, while casting doubt on whether they will ever actually be allowed to deploy again. The President was satisfied with this Implementation Plan and, on March 23, 2018, authorized DoD to carry it out, *see* ECF 120-3—effectuating his objective of banning transgender individuals from military service.

Defendants now contend that this Court's preliminary injunction should be dissolved. Their remarkable theory is that, by following President Trump's directives and developing the Implementation Plan he requested, they have somehow laundered President Trump's irrationality

and animus from the discriminatory Ban. But the Constitution and the rule of law are not so easily evaded. As the district court in the Western District of Washington has already concluded, "the 2018 Memorandum and the Implementation Plan do not substantively rescind or revoke the Ban, but instead threaten the very same violations that caused it and other courts to enjoin the Ban in the first place." *Karnoski v. Trump*, 2018 WL 1784464, at *6 (W.D. Wash. Apr. 13, 2018). Defendants attempt to portray the Implementation Plan as a "new," putatively independent policy, but the President's directives and Secretary Mattis's own instructions make clear that the scope of DoD's "independent judgment" was limited to *how* to implement the Ban, not *whether* to implement it. The "Terms of Reference" for the implementation process, for example, specifically states that the President had directed a ban on enlistment, and calls on the expert review process simply to identify the appropriate medical "terminology" to effectuate that ban.

A party moving to dissolve an injunction "bears the burden of establishing that a significant change in facts or law warrants revision or dissolution." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). Defendants do not come close to carrying that burden. But even if the Court were to entertain Defendants' theory that the Implementation Plan created a change in circumstances, that Plan is still infused with the same defects as President Trump's original order. Far from an objective study, the Implementation Plan is transparently designed to provide a veneer of an evidentiary basis to justify a preordained conclusion. The Implementation Report's assertions regarding the fitness and deployability of transgender people are either demonstrably false or subject transgender people to a unique standard that "[makes] no sense in light of how the [military] treat[s] other groups similarly situated in relevant respects." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001). To the alarm of the medical

community, the Implementation Plan distorts and disregards the medical consensus on gender dysphoria in a way that stigmatizes transgender people. The Implementation Plan utterly ignores the fact that transgender people seeking to enlist under the Open Service Directive must establish that they have *already* completed transition and, therefore, could not conceivably raise any of Defendants' professed concerns about the impact of transition-related surgery on cost and deployability. And the Implementation Report's speculation about harms to morale and unit cohesion is in sharp contrast to the recent testimony of top officers from the Army, Navy, and Marine Corps that they have not received a single report of issues related to unit cohesion, discipline, or morale stemming from open service by transgender people. *See, e.g.*, Decl. of Marianne F. Kies (attached hereto), Ex. 1.[1]

The original Plaintiffs in this case remain vulnerable and at risk. They are now joined by six individuals who wish to enlist in the military, and propose to join this case (with Defendants' consent) in order to defend the protection they currently enjoy. All of the factors that supported the original injunction continue to exist, and no bona fide change in circumstance supports dissolving that injunction. Defendants' motion should be denied.

FACTUAL BACKGROUND[2]

On November 21, 2017, this Court enjoined the "policies and directives" encompassed in President Trump's August 25, 2017 Transgender Service Member Ban. ECF 84. Defendants now ask this Court to dissolve the injunction, citing release of a plan that demonstrates that Secretary Mattis has now done what President Trump ordered. ECF 120-1.

[1] Unless otherwise noted, the exhibits cited herein are all attached to the Kies Declaration.

[2] "[D]istrict courts may look to and, indeed, in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted." *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 725–26 (4th Cir. 2016), *vacated on other grounds*, 137 S. Ct. 1239 (2017) (Mem.).

A. The Transgender Service Member Ban

The military welcomed the open service of transgender individuals on June 30, 2016. It did so following the conclusion of an exhaustive review by high-ranking DoD and military officials, who held numerous discussions with military leaders and personnel, commissioned an independent report, and studied the experiences of allied militaries. *See* ECF 40-37 (Carson Decl.) ¶¶ 8–27. Determining that there was no justification for excluding qualified men and women from service solely because they are transgender, DoD issued DTM 16-005 (the "Open Service Directive"). ECF 40-4. In July 2017, President Trump abruptly rescinded the Open Service Directive, announcing that transgender persons would not be permitted to serve in the military "in any capacity." *See* ECF 40-22. While the President asserted that he had "consult[ed] with [his] Generals and military experts," *id.*, the announcement reportedly came as a surprise to the Secretary of Defense and other military officials, ECF 40-13. In fact, the President later said that he had done the military a "great favor" by personally intervening to resolve this "confusing issue." ECF 40-12.[3] In an August 25, 2017 memorandum, the President issued directives formalizing the Transgender Service Member Ban and ordered Secretary Mattis to propose a "plan for implementing" these directives that would "determine[s] how to address transgender individuals currently serving in the United States military." ECF 40-21, § 3.

Plaintiffs filed the instant lawsuit, alleging that the Ban violates their rights to equal protection and substantive due process under the Fifth Amendment because it discriminates

[3] News reports at the time indicated that the primary motivation for President Trump's ban was based on moral disapproval and political calculation, not actual evidence; for example, news reports show that Representative Vicky Hartzler pushed for the Ban based on her moral disapproval of transgender individuals. *See* ECF 40-2 at 10–11 (citing sources); *see also* ECF 40-27 (June 28, 2017 statement by Rep. Hartzler referring to transgender persons as a "disturbing distraction"); Ex. 2 (Deirdre Shesgreen, *Hartzler Wants to Ban Transgender Military Recruits*, Springfield News Leader (Missouri) (June 30, 2017) (Rep. Hartzler "wants Secretary Mattis to rescind [the Open Service Directive], not just delay its implementation")).

against them and other transgender persons on the basis of invidious stereotypes, irrational fears, animus, and moral disapproval, which are not permissible bases for differential treatment. ECF 39 ¶ 152. Plaintiffs alleged that Defendants lacked any rational basis for imposing the Ban—much less a basis that would survive the heightened scrutiny applicable to discrimination against transgender people. *Id*. ¶¶ 150–51. Plaintiffs further alleged that the Ban is so arbitrary as to be an abuse of governmental authority. *Id*. ¶ 157. In response, Defendants argued that the President's decision was an "'essentially professional military judgment'" entitled to deference. ECF 52-1 at 24 (*quoting Rostker v. Goldberg*, 453 U.S. 57, 65–66 (1981)). Defendants also argued that Plaintiffs' claims were not "ripe" for adjudication, since "the policy Plaintiffs assail is still being studied, developed, and implemented" by a purported "panel of experts." *Id.* at 15–16, 19–21.

On November 21, 2017, this Court ruled that Plaintiffs have established a likelihood of success on their claim that President Trump's decision to ban transgender persons from military service violates equal protection, that Plaintiffs would be irreparably harmed absent preliminary injunctive relief, and that the public interest and balance of hardships weighed in favor of granting injunctive relief. ECF 85 at 41–46. The Court rejected Defendants' contention that the case was not ripe for review in light of DoD's conduct of a study at President Trump's direction: "The Court cannot interpret the plain text of the President's Memorandum as being a request for a study to determine whether or not the directives should be implemented. Rather, it *orders the directives to be implemented by specified dates*." ECF 85 at 29 (emphasis added). The Court ordered that Defendants "shall not enforce or implement the [] policies and directives encompassed in President Trump's [August 25, 2017] Memorandum." ECF 84 at 1.

B. The Defense Department's Plan to Implement the Ban.

Shortly after President Trump announced the Ban on Twitter, DoD began studying how to implement it. The Army quickly gathered data from its ranks on the 108 transgender service members who had come forward as of August 7, 2017, and estimated the amount of time it would take to have them all "eliminated" from service through attrition or involuntary discharge. *See* Ex. , at Slides 12–13.

After President Trump issued his formal directives, Secretary Mattis directed the Under Secretary for Personnel and Readiness and the Vice Chairman of the Joint Chiefs of Staff to assemble "a panel of experts" to "develop[] an Implementation Plan on military service by transgender individuals, to effect the policy and directives in [the] Presidential Memorandum." *See* Ex. 4 at 442–43 (Sept. 14, 2017 "Terms of Reference" re "Implementation of Presidential Memorandum on Military Service by Transgender Individuals"). Secretary Mattis's "Terms of Reference" for the "Implementation" of the President's directives illustrate its limited scope. For example, DoD's "Panel of Experts" was assigned not to conduct an open-minded review of the evidence, but to conduct a study to "inform the Implementation Plan." *Id.* at 443. With respect to accessions, DoD was "direct[ed]" to "prohibit[] accession of transgender individuals into military service," and the Panel's narrow task was to "update" that policy's guidelines "to reflect currently accepted medical *terminology*." *Id.* (emphasis added).

The "Panel of Experts" provided its recommendations to Secretary Mattis for how to implement the Ban on January 11, 2018. Political appointees at DoD then considered the recommendations, "as well as additional information within the Department," and prepared an Implementation Plan for Secretary Mattis to deliver to the President on February 22, 2018. ECF 120-2 at 18. The recommendations were prepared "*[p]ursuant to* [the President's] memorandum of August 25, 2017." ECF 120-3 at 1 (emphasis added). The Implementation Plan proposes a

two-pronged approach. First, transgender individuals who "require or have undergone gender transition" are disqualified from military service. ECF 120-2 at 32. Second, all other transgender individuals are permitted to serve only "*in their biological sex*." *Id.* (emphasis added). Together, these provisions effectively exclude all transgender individuals from being able to enlist.

In accordance with the President's instruction to "determine how to address transgender individuals currently serving in the United States military," ECF 40-21 at 2, the Implementation Plan contains a "grandfather" clause, which permits service members diagnosed with gender dysphoria since the Open Service Directive and prior to the effective date of the Implementation Plan to "continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria." ECF 120-1 at 2. However, Defendants purport to retain the right to terminate the grandfather clause depending on how this and related litigation plays out: "[S]hould [DoD's] decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption is and should be deemed severable from the rest of the policy." ECF 120-2 at 43.

President Trump endorsed this Implementation Plan in a memorandum issued on March 23, 2018. The March 23 memorandum from the President states that, pursuant to the President's August 25, 2017 memorandum, DoD had submitted to the President a proposed policy that disqualifies transgender individuals from serving in the military except in "limited circumstances." ECF 120-3 at 1. The March 23, 2018 memorandum then purports to "revoke" the August 25, 2017 memorandum in light of the proposed Implementation Plan. *Id.* § 1. On the basis of the March 23 memorandum and the associated Implementation Plan, Defendants immediately moved to dissolve the preliminary injunction this Court had entered. ECF 120.

Throughout this litigation, the government has shrouded the deliberations of the "panel of experts" and the DoD in secrecy, including through excessive claims of privilege that are the subject of separate motion to compel. Defendants have, however, produced a heavily redacted "dissenting opinion" from Acting Under Secretary of the Navy Thomas Dee, dated December 14, 2017. The few unredacted portions of the document state that the Panel's recommendations "are not supported by the data provided to the panel in terms of military effectiveness, lethality, or budget constraints, and are likely not consistent with applicable law." Ex. 5 (USDOE00081113).

Since the March 23 memorandum and Implementation Plan were released, DoD has admitted that the putatively independent recommendations to the President were in fact "a coordinated effort with the White House as well as the Department of Justice." Ex. 6. Press reports further suggest that Vice President Pence and outside conservative advocacy groups played a significant role in shaping the Implementation Plan. Ex. 7. By contrast, the Joint Chiefs—the President's own military advisors—reportedly were not briefed on the Plan. Ex. 8.

LEGAL STANDARD

A party moving to dissolve an injunction "bears the burden of establishing that a significant change in facts or law warrants revision or dissolution." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). The movant must demonstrate that "conditions have so changed that [the injunctive order] is no longer needed or as to render it inequitable." *Tobin v. Alma Mills*, 192 F.2d 133, 136 (4th Cir. 1951). A court must consider whether changed circumstances or new evidence "shifts the balance of" the four factors considered in determining the need for injunctive relief "out of the plaintiffs' favor." *Darius Int'l, Inc. v. Young*, 2006 WL 1648976, at *3 (E.D. Pa. June 13, 2006); *see also Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003) (factors relevant to reopening an interlocutory order include substantially

different evidence at a subsequent trial, intervening change in controlling law, and clear error or manifest injustice).

ARGUMENT

I. The Implementation Plan Is Not a "Change in Circumstances," but Instead an Execution of the Enjoined Transgender Service Member Ban.

To establish "changed circumstances" that would justify dissolving the injunction, Defendants assert that President Trump's Transgender Service Member Ban has now been revoked and replaced with an allegedly "new" policy based on the independent judgment of the DoD. Presented with the same argument, the district court in *Karnoski* concluded that this allegedly "new" policy was simply an implementation of President Trump's original ban and "threaten[s] the very same violations that caused it and other courts to enjoin the Ban in the first place." *Karnoski*, 2018 WL 1784464, at *6. This Court should reach the same conclusion.

President Trump specifically directed Secretary Mattis to produce an "*implementation* plan," *i.e.*, a plan *implementing* the Ban. ECF 40-21. Secretary Mattis followed the instructions of the Commander-in-Chief by assembling "a panel of experts" to "develop[] an Implementation Plan on military service by transgender individuals, *to effect the policy and directives in [the] Presidential Memorandum*." Ex. 4 ("Terms of Reference"), at 442 (emphasis added). The Terms of Reference made patently clear that the Panel did not have the discretion to determine that transgender individuals should be allowed to enlist: Secretary Mattis instructed the Panel that the "independent multi-disciplinary review and study of relevant data and information . . . will be planned and executed to inform the *Implementation* Plan." *Id.* at 443 (emphasis added). In defining the assignment with respect to enlistment, Secretary Mattis did not ask for a recommendation as to *whether* accession of transgender individuals should be allowed, but rather informed his subordinates that DoD had been "direct[ed]" to prohibit accessions. *Id.* The Panel

of Experts was merely asked to consider how the "guidelines" for such a policy should be updated "to reflect currently accepted medical terminology." *Id.*

At the culmination of that process, on February 22, 2018, Secretary Mattis issued an Implementation Plan that reached the preordained conclusion the President had demanded: the elimination of transgender service members from the military. Indeed, an internal DoD document outlining a "T[ransgender] Policy Development Timeline" *draws a literal straight line* through all of the steps connecting President Trump's initial tweet to the Implementation Plan presented by Secretary Mattis. *See* Ex. 9 (USDOE00101839, at Slide 1).

Defendants attempt to erase the straight line between the 2017 Ban and the Implementation Plan by claiming that the original Ban was "revoked." President Trump's formal "revocation" of his 2017 directives was not a revocation in any meaningful sense, however, but rather an acknowledgement that those directives had been successfully carried out. President Trump ordered a Transgender Service Member Ban, called for an implementation plan, was presented with an implementation plan that satisfied him, and then purported to revoke the original order once it had already been carried out—presumably in an effort to moot this case and other pending litigation. This Court need not and should not accept such a transparent ruse.

The Ban remains the Ban, even though some of the terminology has changed. The government's description of the Implementation Plan as a "more nuanced regime" that does not categorically ban transgender people from serving, ECF 120 at 10, is just sophistry. As the district court in *Karnoski* concluded: "Requiring transgender people to serve in their 'biological sex' does not constitute 'open' service in any meaningful way, and cannot reasonably be considered an 'exception' to the Ban. Rather, it would force transgender service members to suppress the very characteristic that defines them as transgender in the first place." *Karnoski*,

2018 WL 1784464, at *6 (footnotes omitted); *see also* Ex. 10 (statement by 26 Retired General and Flag Officers). Put differently, the only people able to serve openly under the Implementation Plan are people who are not transgender at all.

In the face of President Trump's clear directives and Secretary Mattis's explicit instructions to develop a plan for implementing the President's policy, Defendants now attempt to characterize the Implementation Plan as the product of the military's independent judgment and not the President's caprice. But all the members of the "Panel of Experts" were political appointees or military officials subject to the chain of command. DoD was allowed to exercise judgment only with respect to *how* to implement the Ban, not *whether* to implement it. To the extent that any independent judgment was brought to bear on this issue, it was circumscribed by the terms set by the Commander-in-Chief, whose directive "telegraphed the expected recommendations." *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 624 (D. Md. 2017) ("*IRAP II*"), *aff'd,* 883 F.3d 233 (4th Cir. 2018), as amended (Feb. 28, 2018). Defendants have simply offered a veneer of scientific-sounding analysis in an effort to shore up the conclusions President Trump reached last July. *See infra* § II.A.[4]

Indeed, even with respect to that narrow question of *how* to implement the Ban, news reports indicate that the White House actively participated in what the government now attempts to portray as an independent process. The White House originally disclaimed any involvement in the development of Secretary Mattis's implementation plan, which of course was vital to

[4] Although the government's legal filings repeatedly assert—in the face of the clear terms of Secretary Mattis's "Terms of Reference"—that the DoD conducted an independent review, the government has broadly invoked deliberative process privilege and executive privilege in order to prevent either Plaintiffs or the Court from testing those assertions. *Cf. IRAP II*, 883 F.3d at 268 (refusing to credit government's assertions that a "months-long" "multi-agency review" cured original policy's animus because "the Government chose not to make the review publicly available").

Defendants' litigation strategy of cleansing the taint of the President's original Ban. *See* Ex. 11. DoD contradicted that claim, with its spokesperson describing the policy as "a coordinated effort with the White House." Ex. 6 at 10. The White House's admitted involvement in the Implementation Plan cannot be reconciled with Defendants' effort to convince this Court that the "new" Transgender Service Member Ban was the result of an expert-driven process and professional military judgment, wholly unaffected by the President's invalid motives.[5]

II. Defendants Have Failed to Establish that Preliminary Injunctive Relief Is No Longer Warranted.

Even if the Implementation Plan were a cognizable change in circumstance, dissolution of the preliminary injunction still would be inappropriate unless Defendants could establish that the new circumstance "shifts the balance of" the four factors considered in determining the need for injunctive relief "out of plaintiffs' favor." *Darius Int'l, Inc.*, 2006 WL 1648976, at *3. Defendants have not met their burden of doing so.[6]

A. Plaintiffs Remain Likely to Succeed on the Merits of Their Claims.

This Court, over Defendants' vigorous objections, has previously found that Plaintiffs are likely to succeed on the merits of their equal protection claim. ECF 85 at 41–44. Defendants have not shown that their current arguments fare any better than their original ones.

[5] News reports also indicate that the same individuals and advocacy organizations who prompted President Trump to issue his original tweet, *see supra* n.3, may have intervened during the DoD's review process, *see* Ex. 7.

[6] Defendants are wrong to suggest that by moving to dissolve an injunction, they can place the burden on Plaintiffs to again establish their entitlement to relief. *See, e.g.*, ECF 120 at 8 (arguing that Plaintiffs are "preclude[d]" from establishing the four elements of injunctive relief). But even if Plaintiffs did bear the burden they could still meet it, for the reasons explained below.

1. Defendants have failed to show that changed circumstances deprive this Court of subject-matter jurisdiction.

Defendants argue that the grandfathering provision they inserted into the Implementation Plan has mooted Plaintiffs' claims, depriving this Court of jurisdiction to continue its review of the Ban. Chiefly, Defendants suggest that these Plaintiffs have lost "standing." ECF 120 at 32. As described below, however, the declarations of current Plaintiffs filed in support of this opposition plainly support their standing to argue for keeping the preliminary injunction in place. And it is well-established that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). To establish mootness based on voluntary cessation, Defendants bear the "heavy burden" of showing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968). "[B]ald assertions of a defendant—whether governmental or private—that it will not resume a challenged policy fail to satisfy any burden of showing that a claim is moot." *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014) (footnote omitted).

It is far from "absolutely clear" that the Implementation Plan's grandfathering provision protects the Plaintiffs from future injury because the Implementation Plan *expressly threatens to withdraw* the grandfathering provision based on what a future court might decide. ECF 120-2 at 43. The Implementation Plan, on its face, keeps a Sword of Damocles dangling over currently serving transgender service members. This highly contingent and uncertain "protection" is hardly assurance that Plaintiffs will be protected from discharge; indeed, the stress and uncertainty caused by this explicit threat is alone enough to constitute injury in fact. *See, e.g.*, Stone Decl. (attached hereto), ¶ 6; Cole Decl. (attached hereto), ¶ 5; George Decl. (attached hereto), ¶ 7; Doe

1 Decl. (filed under seal), ¶ 5; Gilbert Decl. (attached hereto), ¶ 5; Parker Decl. (attached hereto) ¶ 4.

In any event, the original Plaintiffs' harms are *not* fully remedied by the grandfathering provision. First, Plaintiff Seven Ero George (currently serving in the Air National Guard) still wishes to commission as an officer in the U.S. Army Nurse Corps, a fact this Court previously held gave him standing to challenge the ban on new accessions. ECF 85 at 33; *see* George Decl. ¶ 5. The Implementation Plan does nothing to change the accessions ban; nowhere does it suggest that currently enlisted members will now be allowed to go through the accession process to commission as officers or to shift to a different military service. The *Department of Justice* now represents, in passing, that currently enlisted members will be able to "apply for commissions," ECF 120 at 32, but it does not specify under what framework, and in any event, the harm to Plaintiff George cannot be discounted without a clear statement by *Defendants*, not their lawyers. *Cf. Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 513–17 (N.D. Cal. 2017) (rejecting the government's efforts to defeat standing on the basis of an interpretation of the challenged policy proffered by "Government counsel").

All of the original Plaintiffs also continue to be injured by implementation of the Ban notwithstanding the contingent grandfathering provision. Although the Implementation Plan states that they may continue to serve if they meet generally applicable standards for deployability, its baseless assertions that transition-related care and hormone maintenance are categorically incompatible with deployment, *see infra* § II.A.3, cast a long shadow over Plaintiffs' continued service. Indeed, Defendants' internal documents reveal that they specifically considered how grandfathering could be accomplished consistent with the President's objective: including documents discussing how transgender service members could

be "eliminated" through attrition over a short period, and mapping out a timeline for achieving the President's goal of a military service free of transgender individuals without having to discharge those currently serving. *See* Ex. 3 (USDOE00124434), at Slides 12–13.[7]

Moreover, even if Plaintiffs are not "eliminated" from service, they will be serving pursuant to a special "exemption" in a military that broadcasts the message that they and persons like them are undesirable and "create disproportionate costs." ECF 120 at 18; ECF 120-2 at 41. As this Court previously concluded, the stigma of this second-class service "is an additional alleged harm" that further supports Plaintiffs' continued standing. ECF 85 at 31; *accord Karnoski*, 2018 WL 1784464, at *8.

In addition, Plaintiffs have moved to amend their complaint, joining six new plaintiffs who unquestionably have standing to challenge the Ban.[8] The proposed new plaintiffs are not currently serving members of the military and so are not covered by the grandfathering provision. Branco Decl. (attached hereto), ¶¶ 11–13; D'Atri Decl. (attached hereto), ¶ 8; Doe 2 Decl. (filed under seal), ¶ 12; Roe 1 Decl. (filed under seal), ¶ 3; Wood Decl. (attached hereto), ¶ 8; Doe 3 Decl. (filed under seal), ¶¶ 7–8. All have concrete plans to serve in the military, including contacts with recruiters and preparing the required medical paperwork. Branco Decl. ¶¶ 11–14; D'Atri Decl. ¶¶ 11–15; Doe 2 Decl. ¶¶ 10–15; Roe 1 Decl. ¶¶ 9–14; Wood Decl. ¶¶ 8–

[7] The Plaintiffs also remain at risk of being denied medically necessary surgical care. *See, e.g.*, proposed Second Amended Complaint ¶ 192 (contemporaneously filed herewith). While the Implementation Report claims that transgender service members who meet certain limited criteria relating to the date their gender dysphoria was diagnosed "may continue to receive all medically necessary care," ECF 120-2 at 5 (§ C.3), the Report provides no details as to what will be considered "medically necessary" or the process that will govern requests for and provision of such care. In light of the Implementation Report's distortion of medical literature regarding the efficacy of care for gender dysphoria and rejection of the views of the mainstream medical community, *infra* § II.A.3, it is unclear what care will still be provided.

[8] The proposed second amended complaint lists eight new plaintiffs, two of whom are the parents of proposed minor plaintiff John Doe 3.

11; Doe 3 Decl. (filed under seal), ¶¶ 7–8. All would qualify to serve their country pursuant to the terms of the Open Service Directive, some immediately (because they have completed all necessary surgical care and can demonstrate the requisite period of stability in their gender), and all but one during the likely life of this litigation. Branco Decl. ¶ 16; D'Atri Decl. ¶ 10; Doe 2 Decl. ¶¶ 14–16; Roe 1 Decl. ¶¶ 13–15; Wood Decl. ¶ 10; Doe 3 Decl. ¶ 10.

These new plaintiffs presently enjoy the protection of this Court's injunction. They now seek to join this case because Defendants seek to divest them of that protection. There is no doubt that the new plaintiffs are injured by the Ban as implemented, which continues to seek to deny them the opportunity to serve.

2. The Implementation Plan does not erase the taint of President Trump's unconstitutional decision to ban military service by transgender individuals, and deserves no deference.

This Court has already found that Defendants' decision to ban transgender service members "did not emerge from a policy review," and "was not driven by genuine concern regarding military efficacy." ECF 85 at 43 (internal quotation marks omitted). This Court further concluded that President Trump's directive to DoD to develop an "implementation plan" was "not a request for a study but an order to implement the Directives contained therein." *Id.* at 50. Defendants now assert that by implementing the President's directive to ban transgender people from serving in any capacity, the DoD somehow cleansed the policy of the President's irrationality and animus.

Defendants' assertions that President Trump's original purpose and motivations are no longer relevant is similar to the government's "rather remarkabl[e]" argument in *IRAP II* that the President's illegitimate motives for banning travelers from majority-Muslim countries could be mooted by his purported delegation to a "multi-agency review" process. *IRAP II*, 883 F.3d at 268

& n.16. The Fourth Circuit explained that "President Trump alone had the authority to issue the Proclamation; he is responsible for its substance and purpose." *Id*. at 268 n.16.

Defendants' argument is even more "remarkable" here than it was in *IRAP II*. When President Trump decided to ban transgender people from serving in the military, he *expressly* claimed that he was taking this decision away from the military, saying that that he was doing the military a "great favor." ECF 40-12. As the President's subordinate in a "unitary executive," *IRAP II*, 883 F.3d at 268 n.16, Secretary Mattis did his duty and developed a plan to faithfully implement his Commander-in-Chief's wish. Defendants cannot claim that the decision to ban transgender service members, a decision the President last summer *boasted about taking away from the military*, now reflects an independent, unsullied, evidence-driven exercise of professional military judgment.

For similar reasons, Defendants' demand for deference is no more successful than the last time they made it. In rejecting deference before, this Court noted the views of retired military officers that President Trump's decision was "[a] sharp departure from decades of precedent on the approach of the U.S. military to major personnel policy changes" and was imposed in the absence of "any considered military policymaking process." ECF 85 at 43 (quoting ECF 65-1 at 6). All that has happened since then is production of an Implementation Plan that was literally compelled by the President's directives, which dictated its timing, scope, and bottom line. ECF 40-21, § 3 ("By February 21, 2018, the Secretary of Defense . . . shall submit to me a plan for implementing [the directives]."); *see also* Ex. 5 ("Terms of Reference") at 443 (instruction from Secretary Mattis that DoD was "direct[ed]" to retain accession ban and that Panel of Experts should consider appropriate "terminology"). The process at issue is no less anomalous because it

involved a purported policy review conducted solely for the purpose of *implementing* the policy decision the President had already made.

The details of the *post hoc* review only add to the case against deference. Defendants have not even identified the authors of the Report, and they continue to withhold, purportedly on the basis of privileges, thousands of documents relating to DoD's deliberations before, during, and after the Panel issued its recommendations. Defendants cannot insist on deference to an internal review process without even identifying the people who participated in the review and the information they considered. *See IRAP II*, 883 F.3d at 268 ("Although in its briefs the Government repeatedly invoked this review, the Government chose not to make the review publicly available and so provided a reasonable observer no basis to rely on the review."). As detailed below, any examination of the Implementation Report shows that it is discriminatory on its face.[9]

3. Even if evaluated on its own terms, the Implementation Plan fails Equal Protection review under any standard.

This Court has already determined that discrimination against transgender persons requires heightened scrutiny under the Equal Protection Clause—both because discrimination against transgender persons is a form of sex discrimination and because classifications based on transgender status independently satisfy all the criteria for triggering heightened scrutiny. *See* ECF 85 at 43–44 (adopting reasoning of *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 208–10 (D.D.C.

[9] Defendants' reliance on *Rostker v. Goldberg*, 453 U.S. 57 (1981) remains misplaced. The policy in *Rostker* was not spontaneously announced by the President over Twitter and implemented behind closed doors under the cloak of "deliberative process" privilege. The decision was "extensively considered by Congress in hearings, floor debate, and in committee," where the justifications and motivations for the policy were out in the open for all to see. *Id.* at 72. There was no allegation in *Rostker* that the policy was motivated by animus, and the Court emphasized that "[t]his is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups." *Id.* at 78.

2017)). Subsequent legal developments have only fortified that conclusion. *See Karnoski,* 2018 WL 1784464, at *1, *9–11 (holding that, "because transgender people have long been subjected to systemic oppression and forced to live in silence, they are a protected class"; "[t]herefore, any attempt to exclude them from military service will be looked at with the highest level of care"—specifically, "strict scrutiny"); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 2018 WL 1257097, at *10–13 (D. Md. Mar. 12, 2018) (holding that transgender status is "at least" a quasi-suspect classification); *F.V. v. Barron*, 2018 WL 1152405, at *9–11 (D. Idaho Mar. 5, 2018) (same).

To withstand heightened scrutiny, any justification for the Transgender Service Member Ban must be "genuine, not hypothesized or invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see Karnoski*, 2018 WL 1784464, at *12. When the President made his Twitter announcement, he was, as this Court already found, "not driven by genuine concerns regarding military efficacy." ECF 85 at 43 (internal quotation marks omitted). Rather, President Trump was seeking to cater to other persons' moral disapproval of people who are transgender. *Id.* The Implementation Plan now attempts to provide post hoc justifications for the President's uninformed actions, but those reverse-engineered conclusions cannot save a policy that was actually rooted in animus.

Even if heightened scrutiny did not apply, the assertions in the Implementation Plan continue to fail even rational basis review. ECF 85 at 44. The February 2018 Report on which Defendants rely is rife with factual errors and misleading statements; it asserts views that have no medical or scientific basis; and it applies a standard to transgender people that the military does not apply to similarly situated groups. *Cf. City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (superseded by statute on other grounds) ("[T]he expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other

residents fail rationally to justify singling out a home [for people with disabilities] for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.").

Moreover, in straining to find data to support a conclusion the President already made, the "Panel of Experts" entirely ignores the stringent enlistment standards set out in the Open Service Directive—standards that require enlistees with a history of gender dysphoria or medical treatment associated with gender transition to be stable for 18 months before entering service. Defendants' professed concerns about "accommodating gender transition" are almost entirely inapplicable to the individuals they are focused on excluding (who will have completed their transitions before enlisting)—a fact that, again, only underscores the discriminatory nature of the Report. *See* Ex. 6 (dissenting opinion from Thomas Dee, a Panel of Experts member: "The recommendations . . . [were] not supported by the data provided to the panel in terms of military effectiveness, lethality, or budget constraints, and are likely not consistent with applicable law.").

a) Fitness to Serve

DoD's implementation of the President's directives bans anyone who requires, or has undergone, gender transition, as well as anyone with any history or diagnosis of gender dysphoria (except under "limited circumstances"). ECF 120-1 at 2. This policy is supposedly based on "evidence" that rates of psychiatric hospitalization and suicidal behavior are higher for persons with gender dysphoria compared to others, as well as "considerable scientific uncertainty" over whether "treatments fully remedy . . . the mental health problems associated with gender dysphoria." ECF 120-2 at 32.[10]

[10] As a threshold matter, the Report draws these conclusions without sufficient bases to support them. Brown Supp. Decl. ¶ 30 (noting that "the underlying data [cited here] refers to 'suicidal ideation,' not actual suicide attempts"). Further, the statistical significance of the data is called

This view has no basis in medical science. If a transgender person is able to live consistently with his or her gender identity (i.e., has successfully undergone a gender transition), he or she may never develop gender dysphoria. Brown Supp. Decl. ¶ 9. If a transgender person does develop gender dysphoria, appropriate transition-related care resolves the clinically significant distress. *Id.* There is no "uncertainty" on this point; the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (2013) ("DSM-V") accordingly provides a "post-transition" diagnostic subtype to reflect when a person's gender dysphoria is in "remission." *Id.* The February 2018 Report ignores the DSM-V and the collective wisdom of the medical community,[11] by treating every transgender person who lives according to the person's gender identity as having a disabling mental health condition, even when the person no longer experiences gender dysphoria. *Id.* ¶ 11.

The Report openly discriminates against transgender people by demanding that the efficacy of surgical care for treating gender dysphoria be supported by "double-blind" scientific studies. ECF 120-2 at 24–27. That is obvious disparate treatment. "Double-blind studies with 'sham' surgeries are often impossible or unethical to conduct." Brown Supp. Decl. ¶ 13. For these reasons, the military does not require double-blind studies to validate treatment for virtually any other medical condition. *Id.* ¶¶ 13−16. Indeed, if the military held other treatments to the same standard it holds treatment for gender dysphoria, it would not conduct

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into question by the Report's failure to specify "whether the suicidal ideation was reported before or after the service member was allowed to serve openly and receive treatment." *Id.*

[11] Following the release of Defendants' Report, the American Psychological Association announced that the Association "is alarmed by the administration's misuse of psychological science to stigmatize transgender Americans and justify limiting their ability to serve in uniform and access medically necessary health care." Brown Supp. Decl., Ex. D. The American Psychiatric Association similarly stated: "Transgender people do not have a mental disorder; thus, they suffer no impairment whatsoever in their judgment or ability to work." Brown Supp. Decl., Ex. E.

appendectomies or tonsillectomies. *Id.* ¶¶ 14–15. By selectively rejecting the efficacy of treatment for gender dysphoria on this basis, the Report subjects transgender people to a unique standard, not applied to persons with other medical conditions, and thereby reveals its true motivation: irrational prejudice. *Cf. Crawford v. Cushman*, 531 F.2d 1114, 1123 (2d Cir. 1976) ("Why the Marine Corps should choose, by means of the mandatory discharge of pregnant Marines, to insure its goals of mobility and readiness, but not to do so regarding other disabilities equally destructive of its goals, is subject to no rational explanation."); *Bostic v. Schaefer*, 760 F.3d 352, 382 (4th Cir. 2014) (rejecting justification that is "so underinclusive" that its real motivation "must have 'rest[ed] on an irrational prejudice'" (quoting *City of Cleburne*, 473 U.S. at 450)).

The Report also relies for its conclusions on sweeping mischaracterizations coupled with material omissions. As just one example, the Report cites a recent decision by the U.S. Department of Health & Human Services Center for Medicare and Medicaid Services ("CMS") for the proposition that there is "insufficient scientific evidence to conclude that [transgender medical] surgeries improve health outcomes for person with gender dysphoria." *See* ECF 120-2 at 24 n.82. To the contrary, the CMS report found that "surgical care to treat gender dysphoria is safe, effective, and not experimental." Brown Supp. Decl. ¶ 17. Consistent with standard medical practice, as well as the Open Service Directive, the CMS report endorsed individualized treatment plans to treat gender dysphoria. *Id.*

As with their other dubious use of scientific research, Defendants' use of suicide statistics smacks of pretext and prejudice. Because of historical patterns of discrimination, transgender people as a class experience higher rates of depression, anxiety, and, as a result, suicidal ideation. But the military already has neutral policies handling these mental health conditions: anyone

with a history of suicidal ideation is barred from enlisting, and anyone with a history of anxiety or depression is barred from enlisting unless they have been stable for 24 or 36 months (respectively). Ex. 12 (Department of Defense Instruction 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services* (Apr. 28, 2010), Incorporating Change 1, at 2 (Sept. 13, 2011) ("DoDI 6130.03")). There is no rational basis for excluding transgender individuals who can demonstrate the same mental fitness as any other enlistee. Defendants' arguments are akin to saying that because depression is twice as common in women than in men, *see* Brown Supp. Decl. ¶ 22, the military could simply treat all women as at risk for depression and unfit for service. Defendants' proffered interest in disqualifying a class of people because some in that group suffer from mental illness is not how the military treats other such associations, and is plainly pretextual. *Bostic*, 760 F.3d at 382.[12]

b) Deployability

The Report's invocation of supposed limitations on deployability for transgender service members is equally irrational. The Implementation Report's assertions regarding the deployability of transgender service members are either demonstrably false or again "ma[k]e no sense in light of how the [military] treat[s] other groups similarly situated in relevant respects." *Garrett*, 531 U.S. at 366 n.4.

First, transgender service members—like their peers—are (and always have been) subject to DoD's generally applicable deployability requirements. Given that the military *already* has a generally applicable policy to guarantee deployability, Defendants' references to deployability

[12] As in other areas, the Report also makes the basic mistake of treating all transgender people alike irrespective of their individual health. Defendants cite alleged statistics of the experience of people who have been diagnosed with gender dysphoria *in the military*. ECF 120-2 at 21–22. But Defendants offer no reason at all to assume that new enlistees, who by definition must be stable and had their gender dysphoria successfully treated, would have a similar experience.

limitations to support their conclusion that transgender persons should be excluded from the military amounts to holding transgender persons *who can meet that policy's requirements* to a higher standard. That is plainly illegitimate. *See City of L.A. v. Patel*, 135 S. Ct. 2443, 2451 (2015) ("The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." (internal quotation marks omitted)).

Second, Defendants rely on deployability limitations that may result from surgical treatment, without acknowledging that under the Open Service Directive, newly enlisting transgender persons must establish that they are no longer "transitioning," and will not need transition-related surgeries that cause temporary periods of non-deployability. *See* ECF 40-4. Defendants' reliance on an apples-to-oranges comparison showcases the irrational pretext behind the Report.

Third, to the extent Defendants rely on the supposed burdens created by hormone treatments, they ignore the military's "effective system for distributing prescribed medications to deployed service members across the globe, including those in combat settings." Carson Supp. Decl. ¶ 16. Individuals with abnormal menstruation, dysmenorrhea, and endometriosis may all enlist if their conditions are adequately managed through hormone medication. Brown Supp. Decl. ¶ 33 (citing DoDI 6130.03, Enclosure 4 §§ 14(a), (d), (e)); Carson Supp. Decl. ¶ 16. ("[T]ransgender service members could deploy while continuing to receive cross-sex hormone therapy without relaxing generally applicable standards"; indeed, "military policy and practice allows service members to use a range of medications, including hormones, while in such [deployed] settings."). Irrational prejudice is the only explanation for treating hormone treatment differently only because it is being used by transgender people rather than non-transgender people with different conditions.

Fourth, even assuming that some transgender service members undergoing transition would be temporarily non-deployable due to medical needs, "[i]t is common for service members to be non-deployable for periods of time due to medical conditions such as pregnancy, orthopedic injuries, obstructive sleep apnea, appendicitis, gall bladder disease, infectious disease, and myriad other conditions." Carson Supp. Decl. ¶ 21. Defendants' Implementation Plan "does not provide any indication that the temporary non-deployability of some transgender service members raises unique logistical concerns." *Id.* Once again, Defendants are holding transgender individuals to a different standard than other service members in order to justify the President's wishes.

The "dispositive realit[y]," *United States v. Virginia*, 518 U.S.at 550, is that "[t]ransgender people—like other service members who receive prescription medication on deployment—have been deploying across the globe for decades," Carson Supp. Decl. ¶ 20. The new enlistees that Defendants are now focused on excluding present no special deployability limitations whatsoever, because they would be subject to the rigorous accession standards of the Open Service Directive. Defendants' professed concerns about deployability limitations are facially disingenuous and pretextual.

c) Costs

Defendants assert that "transition-related treatment is also proving to be disproportionately costly." ECF 120-2 at 41. They once again do not explain how the cost of "transition-related treatment" justifies a ban on enlistees *who have already transitioned*, and will have to demonstrate that they will not require the surgeries that form the basis of Defendants' cost concern. It is entirely irrational to invoke the cost of transition-related surgery as a reason to deny enlistment to people who can demonstrate that they will not need such surgery.

Even apart from this flaw, the Report offers no support for its conclusion that the cost of providing transition-related care is "disproportionate." ECF 120-2 at 41. Indeed, at no point does the Report actually quantify the cost of care, or compare it to the cost of other treatments the military routinely provides to service members. Neither does the Report undermine the conclusion reached by the RAND study that such costs are negligible relative to the military's overall health budget. *See* ECF 40-35 (RAND Report) at xi–xii (transition-related treatment has "little impact on and represents an exceedingly small proportion of [active component] health care expenditures" in the military).[13] Defendants simply have not shown that there is a rational reason to treat the medical costs incurred in treating some transgender service members differently from the costs of treating a range of other conditions that the military willingly covers. *See, e.g.*, *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (where interest in "cost savings and reducing administrative burdens" "depend[s] upon distinguishing between homosexual and heterosexual employees, similarly situated," it "cannot survive rational basis review").[14]

d) "Sex-Based Standards"

Finally, the Report devotes substantial space to bare speculation that by requiring a change to so-called "sex-based standards," acceptance of transgender service members would impair unit cohesion by leading non-transgender service members to feel unfairly treated. As an initial matter, while this professed interest can be rejected on its own terms, the Court should

[13] Unable to contest this conclusion, the (unidentified) authors of the Implementation Report were left with mere anecdotes of unnamed "commanders" reporting an unspecified "negative budgetary impact" caused by travel costs for service members to see specialists. ECF 120-2 at 41. The Report does not suggest that gender dysphoria is the only condition for which service members must travel to see specialists, and of course it is not.

[14] Notably, the military spends at least 10 times more on medication to treat erectile dysfunction than it would to care for transgender service members. *See* ECF 40-26.

view it with an especially jaundiced eye in view of the history of the Ban. Unable to support the President's biases with real evidence, it is unsurprising that Defendants seek refuge in "considerations [that] are not susceptible to quantification." ECF 120-2 at 40. Where a policy originated illegitimately—as this Court has found happened here—the Court should be particularly wary when the policymaker insists that its post hoc defense cannot be objectively assessed. But even on their own terms, Defendants' arguments are baseless. Far from constituting a rational basis for reversing course and banning transgender persons from serving, the Report's unsupported speculation tends to confirm that the driving force behind the ban is policymakers' own prejudice, discomfort, or moral disapproval.[15]

The Report's alleged concerns about participation by transgender people in military sporting events are flimsy and disingenuous. It is surprising and jarring that Defendants suggest that *categorically banning a class of people who are fit to serve* is a reasonable solution to the problem of fairness in boxing competitions. *See* ECF 120-2 at 29. The Report also mischaracterizes the evidence Defendants cite in support of this claimed interest. For example, the Report relies on an article on boxing competitions at West Point for the proposition that "cadets must box someone of the same gender," but neglect to mention that in fact men and women can box each other in those competitions under certain circumstances. Ex. 13 (Maj. Alex Bedard, et al., *Punching Through Barriers: Female Cadets Integrated into Mandatory Boxing at*

[15] When similar hypothetical concerns have been raised as justifications for excluding transgender people from restrooms and locker rooms in the civilian context, the courts have repeatedly found that those concerns had no actual basis in fact. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046–47 (7th Cir. 2017); *M.A.B.*, 286 F. Supp. 3d at 724–25; *Doe v. Boyertown Area Sch. Dist.*, 2017 WL 3675418, at *52–53 (E.D. Pa. Aug. 25, 2017), *appeal docketed*, No. 17-3113 (3d Cir. Sept. 28, 2017); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, 2016 WL 6134121, at *28–29 (N.D. Ill. Oct. 18, 2016), *report and recommendation adopted by* 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017).

West Point, Ass'n of the U.S. Army (Nov. 16, 2017)). Defendants also take out of context the RAND Report's discussion of British military policy purporting to "exclude" transgender participants from sports for safety reasons; in fact, that policy is narrowly tailored and excludes transgender participants only in "certain circumstances" where necessary "to ensure fair competition or the safety of other competitors." Ex. 14 (Ministry of Defence, *Policy for the Recruitment and Management of Transsexual Personnel in the Armed Forces*, ¶ 31 (Jan. 2009). It is not a categorical ban from competition. Far from supporting Defendants, the sources Defendants cite only underscore how far they are stretching to come up with some justification for the President's Ban.

The Report's speculation about grooming standards is just as dubious. Under the Open Service Directive, transitioning service members do not receive a special exception from any sex-specific standard. For example, until a transgender woman's gender marker is officially changed from male to female, she must meet all the standards for physical fitness and grooming that apply to men. After her gender marker is officially changed, she must meet all the same standards for physical fitness and grooming that apply to other women. *See, e.g.*, ECF 40-9 (Implementation Handbook of Open Service Directive) at 11.[16]

Finally, categorically banning transgender persons from serving is not rationally related to the Report's speculations about potential invasions of privacy. Under the Open Service Directive, commanders have the power and flexibility to maintain good order and discipline and to make accommodations to protect the privacy of all service members—whether transgender or

[16] Defendants inaccurately represent that a person's gender marker in DEERS can be changed on a whim to "reflect the person's gender identity," necessitating treatment consistent with the new marker. ECF 120-2 at 30 & n.112. DEERS is the last step in the process, not the first, and requires a commander's approval, consistent with that commander's evaluation of "expected impacts on mission and readiness." Ex. 15 (DoDI 1300.28, at 4).

not. The Report does not provide any evidence for its assertion that doing so requires "significant effort" or creates "[t]he appearance of unsteady or seemingly unresponsive leadership." ECF 120-2 at 38. Despite 18 months of the Open Service Directive with more than 1,000 service members serving openly during some or all of that period, and a clear effort to find evidence of impairment to unit cohesion, the Report produces only a single anecdote about a single service member—and the details of that anecdote are so sparse that it is impossible even to tell how the issue was resolved. *Id.* at 37.

The remainder of the Report's discussion of sex-based standards consists of speculation that has not been borne out by the experiences of actual transgender service members and their units. *Id.* at 35–38; Stone Decl. ¶ 5; Cole Decl. ¶ 4; George Decl. ¶ 6; Doe 1 Decl. ¶¶ 2, 4; Gilbert Decl. ¶ 4; Parker Decl. ¶ 3. Of particular note, Defendants' representation that "[a] male who identifies as female could remain a biological male in every respect and still must be treated in all respects as a female" is untrue; DoD regulations, service regulations, and the Implementation Handbook for the Open Service Directive provides extensive guidance on Exception to Policy ("ETP") procedures that govern transitions, which are tailored to each individual and account for both the service member's needs and the command's readiness requirements. *See, e.g.*, Ex. 15 (DoDI 1300.28, at 10); ECF 40-9 (Implementation Handbook) at 43–47. Transgender service members cannot unilaterally declare they have transitioned and demand access to particular facilities.

The Report's arguments about supposed invasions of privacy are eerily similar to the argument for excluding gay people from the military. The central justification for "Don't Ask, Don't Tell" was that it would undermine unit cohesion because "heterosexuals who would prefer not to have someone of the same sex find them sexually attractive" would be forced "to share the

most private facilities together, the bedroom, the barracks, the latrines, and showers" with fellow service members who are gay. S. Rep. No. 103-112, at 283 (1993) (statement of General Colin Powell). Actual experience—both before and after Don't Ask, Don't Tell was repealed—demonstrated that those concerns were unfounded. *See Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 954 (C.D. Cal. 2010), *vacated*, 658 F.3d 1162 (9th Cir. 2011); Ex. 16 (Jan. 25, 2018 Decl. of Adm. Michael Mullen, *Karnoski*, ECF 148, ¶ 11); *see also* Stone Decl. ¶ 5; Cole Decl. ¶ 4; George Decl. ¶ 6; Doe 1 Decl. ¶¶ 2, 4; Gilbert Decl. ¶ 4; Parker Decl. ¶ 3.[17] DoD's successful integration of women into the military, despite similar purported privacy concerns, further undercuts Defendants' position. *See United States v. Virginia*, 518 U.S. at 540, 557 (rejecting military institute's argument that "the absence of privacy" is sufficient to preclude the admission of women into the Armed Forces).

Notably, the Chief of Staff of the Army, Gen. Mark Milley, recently testified to Congress that he "monitor[s] very closely" the situation of transgender soldiers, and has "received precisely zero reports of issues of cohesion, discipline, morale and all those sorts of things." Ex. 1. Similarly, Chief of Naval Operations Admiral John Richardson and Marine Corps Commandant Gen. Robert Neller both testified to Congress that they had heard of no reports of issues with regard to discipline or unit cohesion. Ex. 17. When considering Defendants' claim that open service raises "unquantifiable" unit cohesion concerns, the Court should credit the concrete and conclusive testimony of the senior uniformed officers of three branches of the

[17] The Report attempts to poke holes in the RAND Report's reliance on the experiences of the militaries of our allies as a basis for predicting that allowing transgender persons to serve would not negatively affect unit cohesion. But in deciding to proceed with the Open Service Directive DoD did not rely solely on RAND or on the experiences of other militaries. DoD also relied on its own extensive experience after the repeal of "Don't Ask, Don't Tell." *See, e.g.*, ECF 39 ¶ 86. DoD now has an additional 18 months of experience under the Open Service Directive itself.

military—not the speculation contained in an unsigned report, reverse-engineered to justify the whims of a President who had already made up his mind.

B. Defendants Have Failed to Establish that Plaintiffs Are Now Unlikely to Suffer Irreparable Injury.

In addition to concluding that Plaintiffs were likely to succeed on the merits, this Court found earlier that Plaintiffs suffer irreparable harm from the Transgender Service Member Ban. Both conclusions continue to be correct for several reasons.

First, this Court recognized that deprivation of a constitutional right is itself irreparable harm, making "a plaintiff's claimed irreparable harm . . . inseparably linked to the likelihood of success on the merits." ECF 85 at 44–45. Because Plaintiffs remain "likely to succeed on the merits of their constitutional claims," they necessarily "will suffer irreparable harm." *Id.* at 45.

Second, the proposed new plaintiffs are irreparably harmed by the denial of an opportunity to serve their country. Under the Open Service Directive, these individuals would be qualified to serve, in some cases now and in others in the relatively near future. Branco Decl. ¶ 16; D'Atri Decl. ¶ 10; Doe 2 Decl. ¶¶ 14–16; Roe 1 Decl. ¶¶ 13–15; Wood Decl. ¶ 10; Doe 3 Decl. ¶ 10. "[L]oss of opportunity to pursue one's chosen profession constitutes irreparable harm." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017).

Third, the original Plaintiffs continue to face various forms of harm. As discussed above, it is, at best, unclear whether Plaintiffs are fully protected by the grandfather provision Defendants inserted into the Implementation Plan, which in any event Defendants have threatened to withdraw in the event of litigation developments that Plaintiffs cannot control. The

stress, uncertainty, and stigma that these Plaintiffs suffered in November 2017 would return (or increase) if this Court's protection were removed.

C. Defendants Have Failed to Establish that the Equities and the Public Interest Now Counsel Against Enjoining the Ban.

Plaintiffs sought the existing preliminary injunction to preserve the status quo, which permitted transgender persons to serve openly pursuant to the Open Service Directive. This Court agreed that the balance of equities favored Plaintiffs, given "considerable evidence that . . . the *discharge* and *banning* of such individuals" would negatively impact the military. ECF 85 at 45–46 (citing *Doe 1*, 275 F. Supp. 3d at 217); *see also Doe 1 v. Trump*, 2017 WL 6553389, at *3 (D.C. Cir. Dec. 22, 2017) (finding that the Ban is "counter to the public interest" because it "would directly impair and injure the ongoing educational and professional plans of transgender individuals and would deprive the military of skilled and talented troops.").

Defendants have adduced no support for their assertion that the balance of equities has changed. Plaintiffs continue to face irreparable injury under the Implementation Plan, under which "most transgender individuals either cannot serve or must serve under a false presumption of unsuitability, despite having already demonstrated that they can and do serve with distinction." Ex. 10. Defendants will not be harmed should the injunction be maintained. *See Doe 1*, 2017 WL 6553389, at *3 ("[I]n the balancing of equities, it must be remembered that all Plaintiffs seek during this litigation is to serve their Nation with honor and dignity[.]"). As set forth above, their purported "concerns" about the effect of service by transgender persons on readiness, costs, and privacy are disingenuous and pretextual, and should not be credited by this Court.

CONCLUSION

Defendants' Motion to Dissolve the Preliminary Injunction should be denied.

Dated: April 23, 2018

Respectfully submitted,

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