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 DISSOLVE THE PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs' Opposition to Defendants' Motion to Dissolve the Preliminary Injunction mischaracterizes the nature of the military's new policy on service by individuals with gender dysphoria. Like the policy adopted by then-Defense Secretary Ash Carter ("Carter Policy"), the Department's new policy presumptively disqualifies individuals with the medical condition of gender dysphoria but contains multiple exceptions allowing some transgender individuals to serve. The two policies differ in the scope of their exceptions—a matter that is well within the discretion owed to the nation's senior military leadership. Applying the highly deferential standard owed to professional military judgments, the Department's new policy passes muster. Plaintiffs fail in their effort to cast doubt on the Department's process for developing this policy, which involved an independent, extensive review by a panel of military experts. Likewise, Plaintiffs fail in their attempt to place the opinions of their own experts on equal footing with the judgments of military leaders. The Constitution allocates military decision-making authority to the political branches, not to expert witnesses in lawsuits.

Nor will Plaintiffs suffer any harm if the preliminary injunction is dissolved. The *Karnoski* court recently expanded its preliminary injunction to cover the new policy on a nationwide basis, *see Karnoski v. Trump*, No. C17-1297, 2018 WL 1784464, at *14 (W.D. Wash. 2018), and although defendants disagree with that decision and have filed an appeal, while that injunction is still in place, dissolving the preliminary injunction here would have no practical effect on Plaintiffs. And, even if the Defense Department were to implement its new policy, Plaintiffs have failed to show that it would cause them any harm.

ARGUMENT

I. The New DoD Policy Moots Plaintiffs' Current Challenge.

A. Plaintiffs' opposition rests on the faulty premise that DoD's new policy is substantively the same as the policies allegedly set forth in the President's Twitter statement and Memorandum issued in 2017. *See* Pls.' Opp. 9-12; AR327–29 (2017 Mem.), Dkt. 133-4. Rather than engage with the substance of the new policy, Plaintiffs simply dismiss it as the implementation of the "transgender service member ban" purportedly set forth in the 2017 Memorandum, presumably in an attempt to argue that the military's judgment merits no deference. *See* Pls.' Opp. 6-12. Plaintiffs' argument echoes that of the *Karnoski* Court, which improperly dismissed the new policy as simply a more detailed version of "the 'Ban'" announced by the President last year. 2018 WL 1784464, at *1 n.1.

This simply is not the case. One cannot fairly maintain that DoD's new policy, which turns on the basis of a medical condition and its associated treatment and contains a nuanced set of exceptions allowing some transgender individuals to serve, is the same as, or even implements, the 2017 Memorandum, especially as that document was understood by this Court and Plaintiffs (at least before their latest complaint). Both this Court and Plaintiffs understood that Memorandum as "prohibit[ing] transgender individuals from entering or seeking a commission in the military solely on the basis of their transgender status." Op. 31, Dkt. 85; *see, e.g.*, Am. Compl. ¶¶ 40, 144–46, Dkt. 39. Likewise, this Court and Plaintiffs understood that those service members who relied on the Carter policy will be involuntarily "discharged on the basis of their transgender status." Am. Compl. ¶ 8; *see, e.g.*, Op. 30 (stating that the Retention Directive "subjects all of the individual Plaintiffs to the threat of discharge" (footnote omitted)). By contrast, the new policy, like the Carter policy before it, limits the service of only some transgender individuals on the basis of gender dysphoria, and permits those with gender dysphoria who relied on the Carter policy to continue to serve.

This understanding of DoD's new policy is made plain by comparison to the long-standing policy that existed before the Carter policy. Unlike the new policy, the pre-Carter policy generally disqualified individuals on the basis of transgender status, not the medical condition of gender dysphoria. Report 10, 12–13, 20–21, Dkt. 120-2. Moreover, transgender individuals at that time were generally unable to serve in their preferred gender, while the new policy categorically permits some transgender individuals, including many Plaintiffs here, to do so. These differences explain why Secretary Mattis had to recommend that the President "revoke" his 2017 Memorandum to "allow[]" the military to implement its preferred framework. Mattis Mem. 3, Dkt. 120-1.

In the face of the new policy's plain terms setting forth a framework that turns on gender dysphoria and its attendant treatment, Plaintiffs argue that the new policy "remains the Ban" that "categorically bans transgender people from serving," and rely on the *Karnoski* Court's erroneous conclusion that "[r]equiring 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." Pls.' Opp. 10 (quoting 2018 WL 1784464 at *6). But the Carter Policy treated transgender persons that had neither transitioned nor been diagnosed with gender dysphoria in the same manner as the new policy: such individuals could serve only in their biological sex. Report 15; *see* AR2416–17 (DoDI 1300.28), Dkt. 133-14 ("recogniz[ing] a Service member's gender by the member's gender marker in the DEERS," which may be changed *only* after a "military medical provider determines that a Service member's gender transition is complete").

Plaintiffs stray further afield by failing to recognize that not all transgender service members who choose to meet the standards associated with their biological sex are being "force[d] . . . to suppress the very characteristic that defines them as transgender in the first place," Pls.' Opp. 10 (quoting *Karnoski*, 2018 WL 1784464 at *6), and arguing that "the only people able to serve openly under the [new policy] are people who are not transgender at all," Pls.' Opp. 11. To the contrary, as

the RAND Report explained, only "a subset" of transgender individuals "choose to *transition*, the term used to refer to the act of living and working in a gender different from one's sex assigned at birth." AR114 (RAND Report 6), Dkt. 133-3. In other words, transgender individuals "identify with a gender different from the sex they were assigned at birth," but may not choose to live and work in accordance with that identity. *Id.* In asserting that the new policy categorically prohibits transgender military service, Plaintiffs conflate transgender with transition.

Plaintiffs also argue that the new DoD policy excludes individuals "who will have completed their transitions before enlisting." Pls.' Opp 20. But Plaintiffs fail to recognize that considering history of a medical condition is a standard military practice—and one used with respect to gender dysphoria under the Carter Policy—and that there are many medical conditions a history of which can be presumptively disqualifying. *See* AR210–61 (DoDI 6130.03), Dkt. 133-3 (setting "medical standards for appointment, enlistment, or induction in the military services"); *see also* Report 8–13 (discussing medical standards for accessions, including discussing disqualifying conditions, such as a history of chest or genital surgery or most mental health conditions).

B. Rather than address these differences between the pre-Carter framework and the new policy, Plaintiffs cite to statements by Secretary Mattis (1) directing the Deputy Secretary of Defense and Vice Chairman of the Joint Chiefs of Staff to assemble a Panel of Experts to "develop[] an Implementation Plan on military service by transgender individuals, to effect the policy and directives" in the 2017 Memorandum; (2) indicating that the DoD Panel of Experts was to conduct a study to "inform the Implementation Plan"; and (3) directing the Panel of Experts to "recommend updated accessions policy guidelines to reflect currently accepted medical terminology." Pls.' Opp. 6, 9–10; AR331 (Terms of Reference 2). Plaintiffs also rely on a statement from the 2018 Presidential Memorandum indicating that the Department's Report was prepared "[p]ursuant to [the President's] memorandum of August 25, 2017." Pls.' Opp. 6; (quoting 2018 Presidential Memo. 1, Dkt. 120-3).

In doing so, Plaintiffs carefully omit other statements by Secretary Mattis explaining that the Panel of Experts would engage in "an *independent* multi-disciplinary review and study of relevant data and information pertaining to transgender Service members," AR331 (Terms of Reference 2); *accord* Report 17, and that the Panel was charged to provide its "best military advice . . . without regard to any external factors," Mattis Mem. 1. Nor do Plaintiffs mention that "[t]he Panel made recommendations based on each Panel member's independent military judgment," Report 4; or that the new policy is, in Secretary Mattis's words, the product of "the Panel's professional military judgment," "the Department's best military judgment," and his "own professional judgment," Mattis Mem. 2. Plaintiffs discuss none of these statements, let alone explain why representations by senior military leadership, including the Secretary of Defense himself, should be called into question.

Instead, the statements Plaintiffs invoke simply reflect the fact, as Defendants have consistently explained, that the 2017 Memorandum directed the military to conduct "further study" and maintain the pre-Carter accession policy while doing so. AR327–28 (2017 Mem. §§ 1(a), 2(a)), Dkt. 133-4. As Secretary Mattis noted in recommending the new policy to the President, the 2017 Memorandum had "made clear that we could advise you 'at any time, in writing, that a change to [the pre-Carter] policy is warranted,'" and that is exactly what he did. Mattis Mem. 1. In short, one could say that the military "implemented" the 2017 Presidential Memorandum by studying the issue and advising the President that a new and different policy was appropriate.

Although Plaintiffs similarly suggest that the new policy and the Department's Report are simply a "veneer of scientific-sounding analysis in an effort to shore up the conclusions President Trump reached last July," Pls.' Opp. at 11, and that the new policy and Report are an "attempt[] to provide post hoc justifications for the President's uninformed actions," Pls.' Opp. 19, the facts do not bear this out. Indeed, DoD's review process began at the initiative of Secretary Mattis based on the

recommendation of the Services *nearly a month before* the President made his statement on Twitter, see AR326 (Mattis Deferral Mem.), Dkt. 133-4; Mattis Mem. 1.

Nor should the Court be distracted by Plaintiffs' baseless contention that DoD's development of the new policy was not independent because "news reports" indicated that advocacy groups and the White House may have intervened in the process. Pls.' Opp. 11–12 & n.5. Plaintiffs can point to no support in the record for these assertions other than one internet news article, which is based entirely on anonymous sources, *see* Pls.' Opp. Exh. 8, Dkt. 139-8, and is therefore unreliable, *see In re Neustar Sec.*, 83 F. Supp. 3d 671, 686 (E.D. Va. 2015) (refusing to rely on anonymously sourced news article because the court had "no way to assess the credibility of anonymous sources quoted in the article, whether the sources have personal knowledge of the events described, and whether the sources were in a position to learn of such events personally.").

Likewise, Plaintiffs' claim that a DoD spokesperson described the policy as "a coordinated effort with the White House," Pls.' Opp. 12, is beside the point. As an initial matter, when read in context, the quotation from the DoD spokesperson concerns coordination between DoD and the White House over the *timing* of the posting of the new policy on DoD's website and the filing of Defendants' motions to dissolve the preliminary injunctions in four different cases in a single day.[1] In any event, even if there were discussions between DoD and the White House about the substance of the new policy, that is not in any way inconsistent with the express representation by both the Secretary of Defense and the President that the new policy represents the Department of Defense's independent

[1] *See* Pls.' Opp Exh. 6 at 10, Dkt. 139-7 ("Q: Is the secretary proud of the recommendations they made? Because generally if you put something out at 9:30 on a Friday, the impression is that it's being put out there because, you know, it's being hidden or something. And it was not easy to find the memo [on] the website, either. . . . A: The secretary was asked for [his] thoughts and he provided his recommendation. The way that this was done, it was a coordinated effort with the White House as well as the Department of Justice. *And because there were multiple filings done in different time zones, [it] drove the timing of the release.*" (emphasis added)).

military judgment—representations starkly confirmed by the fact that the Department's new policy is materially different from the one set forth in the 2017 Presidential Memorandum. *See* 2018 Presidential Mem. 1 ("These documents set forth the policies on this issue that the Secretary of Defense, in the exercise of his independent judgment, has concluded should be adopted by the Department of Defense."); Mattis Mem. 2 ("[I]n light of the Panel's professional military judgment and my own professional judgment, the Department should adopt the following policies . . . .").

Plaintiffs also cite the dissenting opinion from Thomas Dee, a member of the Panel of Experts, to support their argument that the new policy is a "preordained conclusion." *See* Pls.' Opp. 2, 8, 20. But what the dissenting opinion shows is nothing more than that DoD's study was a fully independent process in which the members of the Panel of Experts were free to express whatever view they felt best served military interests, and that both sides of the issue were considered. More fundamentally, the fact that one member disagreed with the view of the majority does not render the majority's recommendation, or Secretary Mattis's final decision, illegitimate or even suspect. By way of analogy, the fact that a law clerk disagrees with his judge's ultimate decision and even memorializes that disagreement in a bench memo does not call that judicial decision into question. *Cf. United States v. Morgan*, 313 U.S. 409, 422 (1941) ("Much was made of his disregard of a memorandum from one of his officials who, on reading the proposed order, urged considerations [undercutting the Secretary's final decision]. But the short of the business is that the Secretary should never have been subjected to this examination. … Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected.") (internal citations omitted). In all events, none of these various attempts to cast doubt on DoD's process changes the fact that the new policy differs significantly from both the pre-Carter framework and the 2017 Memorandum. *See supra* Part I.A.

C. Because the policy challenged in Plaintiffs' amended complaint has been revoked and replaced with a new policy, the basis for the Court's preliminary injunction is now moot. Plaintiffs

argue that the President's revocation of his 2017 Memorandum "was not a revocation in any meaningful sense . . . but rather an acknowledgement that those directives had been successfully carried out," and that the President's revocation was "presumably in an effort to moot this case and other pending litigation." Pls.' Opp. at 10. However, as explained above, the differences between the pre-Carter policy and the new policy show why Secretary Mattis had to recommend that the President "revoke" his 2017 Memorandum in order to "allow[]" the military to implement its preferred framework. Mattis Mem. 3, Dkt. 120-1.

Nor does this challenge remain live under the voluntary cessation doctrine. *Contra* Pls.' Opp. 13 (citation omitted). Aside from the fact that the new policy is substantially different from the 2017 Memorandum, this doctrine is of limited applicability when members of the Executive Branch change a policy in good faith. The presumption of regularity—the rule that "[e]very public officer is presumed to act in obedience to his duty, until the contrary is shown"—applies "*a fortiori*" to the President. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 33 (1827) (Story, J.); *see generally Am. Fed'n of Gov't Employees, AFL-CIO v. Reagan*, 870 F.2d 723, 727 (D.C. Cir. 1989) ("[The presumption of regularity] supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." (citation omitted)). It would be inconsistent with that heightened presumption, and inappropriate under the separation of powers, for courts to imply that the Head of the Executive Branch revoked an order to avoid judicial review, especially where, as here, there is no evidence to support such a charge, and where that order presumed that the military would develop its own policy.

Plaintiffs rely heavily on *Int'l Refugee Assistance Project ("IRAP") v. Trump*, 883 F.3d 233 (4th Cir. 2018), to support their argument that the new policy does not reflect independent, professional military judgment because it is "taint[ed]" by the President's Twitter statement and 2017 Presidential Memorandum and because "[a]s the President's subordinate in a 'unitary executive,' Secretary Mattis

did his duty and developed a plan to faithfully implement his Commander-in-Chief's wish." *See* Pls.' Opp. 16–18 (quoting *IRAP*, 883 F.3d at 268 n.16). Plaintiffs' reliance on *IRAP* is misplaced. The central issues in that case—including a similar "taint" theory—are currently under review by the Supreme Court, which granted certiorari in *IRAP*'s related case, *Trump v. Hawaii*, 138 S. Ct. 923 (2018), and will presumably issue a decision next month. This Court should not extend the reasoning of *IRAP* to the present dispute while *Hawaii* is under consideration by the Supreme Court.

In any event, Plaintiffs' contention that the Defense Department's process lacked independence because the President "telegraphed the expected recommendations" draws this Court into an improper inquiry. Pls.' Opp. 11 (quoting *IRAP v. Trump*, 265 F. Supp. 3d 570, 624 (D.Md. 2017)). Plaintiffs essentially ask the Court to determine the purportedly "true" intentions of the leadership of the Department of Defense—a form of "judicial psychoanalysis of" government officials' "heart of hearts" that the Supreme Court has rejected. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005). It also thrusts the Court into the untenable position of evaluating the "adequacy" and "authenticity" of the military's judgments regarding matters of national defense. *Cf. Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999). More fundamentally, even conducting such an inquiry would be inconsistent with the presumption of regularity. There is no reason to doubt that DoD applied its considered, independent judgment to the issues at hand, as reflected in the new policy itself, Secretary Mattis's memorandum, DoD's 44-page report, and the substantial administrative record. Plaintiffs are free to attempt a challenge to that policy if they choose, but their fixation on now-superseded prior statements and a revoked memorandum makes little sense.

Because the basis for the Court's preliminary injunction no longer presents a live controversy, the Court should dissolve the injunction and dismiss this case as well. *See* Fed. R. Civ. P. 12(h)(3);

Defs.' M. to Dismiss Pls.' Second Am. Compl., or, in the Alternative, Defs.' M. for Summary Judgment, Dkt. 158.

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

The prior injunction should be dissolved for the additional reason that the new policy is subject to and satisfies a highly deferential standard of review. Specifically, because the new DoD policy rests—and draws lines—on medical considerations arising from gender dysphoria and medical issues arising from gender transition, under settled constitutional principles, it does not classify on the basis of a suspect classification and is subject to rational-basis review. *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 365–68 (2001).

Plaintiffs barely dispute that heightened scrutiny does not apply, and instead engage in an analysis under rational-basis review, s*ee* Pls.' Opp. at 5, 19, underscoring Defendants' point that heightened scrutiny is inappropriate here given the military context. *See* Defs.' Mot. to Dissolve Prelim. Inj. ("Defs.' Mot.") 11–16, Dkt. 120. In any case, Plaintiffs' minimal attempts to dispute the applicable standard of review fall short. They point out that in its earlier decision granting a preliminary injunction, the Court concluded that intermediate scrutiny was applicable. Pls.' Opp. 18 (quoting Order 43–44, Dkt. 85). However, that holding did not apply to the new DoD policy and rested on the Court's conclusion that deference to the Executive was inappropriate because the President's Twitter statement and 2017 Presidential Memorandum did not "identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest." Op. 43. Indeed, the Court stated that it "does not disagree" with Defendants' argument "that deference is owed to military personnel decisions and to the military's policymaking process." *Id.* At this stage, the new policy is the result of an extensive review process by senior military leaders and is based on the considered judgment of the Department of Defense.

Plaintiffs' bare citations to authorities for subjecting a military personnel policy to heightened scrutiny are inapposite. Pls.' Opp. 19. First, this Court should not follow the *Karnoski* Court's recent decision to subject the new policy to strict scrutiny, as that court did not cite a single example of another decision concluding that a policy that classified on the basis of transgender status was subject to strict scrutiny, let alone a military policy turning on gender dysphoria adopted after a substantial review process. *See* 2018 WL 1784464, at *11. Additionally, *United States v. Virginia*, 518 U.S. 515 (1996), did not even discuss military deference, and for good reason: the policy in that case was justified based on pedagogical interests, not military concerns. *Id.* at 549. And even if military concerns had been at issue, they would have been the concerns of Virginia, not of the political branches of the federal government, which, unlike the states, hold constitutional powers related to the regulation and command of the military. *See Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981); *see also Thomasson v. Perry*, 80 F.3d 915, 924 (4th Cir. 1996) ("The Constitution assigns the conduct of military affairs to the Legislative and Executive branches. There is nothing timid or half-hearted about this constitutional allocation of authority."); Defs.' Mot. 12–17. And, neither *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018), nor *F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho 2018), involved the military context at all.

Plaintiffs argue in a footnote that "Defendants' reliance on *Rostker v. Goldberg*, 453 U.S. 57 (1981) remains misplaced" because "[t]he policy in *Rostker* was not spontaneously announced by the President over Twitter and implemented behind closed doors under the cloak of 'deliberative process' privilege." Pls.' Opp. 18 n.9. In addition, according to Plaintiffs, the new policy is not entitled to deference because Defendants have withheld "thousands of documents related to DoD's deliberations" on the basis of privilege. Neither contention impacts the level of deference due to the new DoD policy. As in *Rostker,* DoD has advanced an extensive explanation and record in support of the new policy. Indeed, to the extent discovery remains appropriate at all in a case that should be

subject to record review under the Administrative Procedure Act, *see* Dkt. 121 at 5–6; Dkt. 146 at 5–6, Defendants have produced over 90,000 pages of documents to date and an approximately 3,000-page administrative record, in addition to the 44-page DoD Report. *See* Dkt. 133. Additionally, Plaintiffs have had the opportunity to participate in depositions of four witnesses from DoD and the Services, and Defendants are in the process of scheduling three more depositions, including that of the Chair of the Panel of Experts. Accordingly, Plaintiffs' argument that deference does not apply based on a lack of information about the process, and their attempt to distinguish *Rostker* on this basis, are unavailing.

Finally, it is notable what Plaintiffs do not dispute. Plaintiffs do not even mention—let alone try to distinguish—*Goldman*, where the Supreme Court rejected a free-exercise challenge to the Air Force prohibiting a Jewish officer from wearing a yarmulke even though that claim would have triggered strict scrutiny at the time had it been raised in the civilian context. *See* Defs.' Mot. 14–16. Nor do they dispute that, unlike in the civilian context, courts (1) defer to the military's proffered purpose for a particular classification even if it may not have been the actual purpose for the policy at the time the policy was enacted, *see* Opening Br. 13–14; *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975); *Rostker*, 453 U.S. at 60–63, 74–75; (2) defer to the military's evidentiary justifications even if there exists contrary evidence, including from former military officials, *see* Opening Br. 14–15; *Goldman*, 475 U.S. at 509–10; *Rostker*, 453 U.S. at 80–83; (3) give significant weight to military concerns of administrative convenience, *see* Opening Br. 15–16; *Rostker*, 453 U.S. at 81; (4) defer to the military's choice among alternative means to further a particular military interest, *see* Opening Br. 16; *Rostker*, 453 U.S. at 71–72; and (5) defer to the military's line-drawing efforts, *see* Opening Br. 16–17; *Goldman*, 475 U.S. at 509–510. In short, at no point do Plaintiffs effectively dispute the broad principle that military decisions are entitled to significant deference.

III. The Department's New Policy Satisfies Highly Deferential Scrutiny.

A. As the DoD Report demonstrates, the new policy is at least rationally related to the military's interests in ensuring military readiness; maintaining order, discipline, leadership, and unit cohesion; and minimizing military costs. Report 14–24. In response, Plaintiffs offer declarations from a former DoD appointee and a doctor in an attempt to selectively challenge parts of the Report and offer alternative opinions. Plaintiffs thus seek to have this Court substitute its own judgment for that of current military leaders on matters of military policy, including through consideration of expert opinion. But the fact that Plaintiffs and their amici, *see* Dkt. 151, can identify experts with opinions contrary to the military's judgment is irrelevant, *see Goldman*, 475 U.S. at 509 ("[W]hether or not expert witnesses may feel that religious exceptions to [a military policy] are desirable is quite beside the point."). The Constitution commits military decisions "to the political branches directly responsible—as the Judicial Branch is not—to the electoral process," *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), and nowhere suggests that disputes over military policy should be resolved through expert witnesses.

Even more out of place is Plaintiffs' suggestion that because their experts think differently, the Department's decision must have been pretextual. *See, e.g.*, Pls.' Opp. 22. Plaintiffs essentially ask the Court to declare the views of their experts so correct, and the judgments of the military so fundamentally wrong, that the military could not have been acting reasonably or in good faith. Such an approach cannot be squared with the Constitution's allocation of military decisionmaking authority or Supreme Court precedent. The relevant question is whether—taking into account the deference due to the military's judgment, evidence, and discretion to choose among alternatives—the Government has shown that the new policy is at least rationally related to the military's proffered interests. As outlined above and in Defendants' opening motion, the new policy is plainly an exercise

in reasoned judgment, even if others would reach a different policy outcome. *See Goldman*, 475 U.S. at 506–508; *Rostker*, 453 U.S. at 64–70.[2]

B. Plaintiffs' remaining objections—those unrelated to the testimony of their experts—fall short. For instance, they argue that the Department's conclusions related to deployability are "demonstrably false" or "ma[k]e no sense in light of how the [military] treat[s] other groups similarly situated in relevant respects" because service members with gender dysphoria are subject to the military's generally applicable deployability requirements. Pls.' Opp. 23 (citation omitted) (alteration in original). But the military's general deployability standard applies in a neutral fashion with respect to specific medical conditions (of which gender dysphoria is one of many), which DoD has determined generally cannot be accommodated in a forward-deployed environment. *See, e.g.,* AR2584–2614 (USCENTCOM Minimal Deployment Standards), Dkt. 133-14.

Plaintiffs also contend that under the Carter policy, newly enlisted service members do not present a deployability problem because in order to access, they must establish that they are no longer transitioning. Pls.' Opp. 24. But DoD judged that completing transition does not eliminate all deployability concerns. As DoD's Report explains, "there is considerable scientific uncertainty

[2] When Plaintiffs' declarants are not cherry-picking details, they are mischaracterizing the Report and the underlying evidence. While all of their counterpoints are disputable, one stands out: their claim that the Report mischaracterizes the Center for Medicare and Medicaid Services ("CMS) study and omitted that study's finding that "surgical care to treat gender dysphoria is safe, effective, and not experimental" and the CMS report's "endorse[ment of] individualized treatment plans to treat gender dysphoria." Pls.' Opp. 22 (citation omitted). To the contrary, the Report acknowledges that the "prevailing judgment of mental health practitioners is that gender dysphoria can be treated" with transition-related care and that numerous studies show that such treatments "can improve health outcomes for individuals with gender dysphoria[.]" Report 24. What the Report questions is whether the *extent* of the improvement in health outcomes and the *strength* of the scientific evidence are adequate to resolve or mitigate the various risks associated with gender dysphoria. How much risk the military is willing to bear with respect to a given medical condition is a matter of military judgment, and DoD has concluded—based on the independent findings of governmental and nongovernmental organizations that have assessed the literature on gender dysphoria treatments—that it should proceed cautiously. *See id.* at 24–27.

concerning whether [transition-related] treatments fully remedy … the mental health problems associated with gender dysphoria," Report 32, and "[i]n managing mental health conditions, while deployed, providers must consider the risk of exacerbation if the individual were exposed to trauma or severe operational stress. These determinations are difficult to make in the absence of evidence on the impact of deployment on individuals with gender dysphoria." Report 34.

Further, Plaintiffs contend that because the military already has policies in place addressing histories of suicidality, depression, and anxiety, "[t]here is no rational basis for excluding transgender individuals who can demonstrate the same mental fitness as any other enlistee." Pls.' Opp. 23. But DoD could reasonably determine that gender dysphoria is "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning," Report 13 (quoting the DSM-V), and that a typical treatment for this condition—gender transition—is unlike any other form of treatment in that it requires a permanent exception from the standards that apply to the patient's biological sex (and remains the subject of "considerable scientific uncertainty"), *id.* at 32. And, while gender dysphoria differs in significant ways from suicidality, depression, or anxiety, it is sufficiently associated with high rates of those conditions, even after treatment, to justify the risk-mitigating approach adopted by DoD. *Id.* at 21–26. Moreover, Plaintiffs' argument that the new policy is unnecessary because the military has preexisting policies addressing suicidality, depression, and anxiety would apply with equal force to the Carter policy they prefer, which likewise limits accession based on gender dysphoria and transition.[3]

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

Plaintiffs also question DoD's reliance on its interest in maintaining sex-based standards, arguing that "in the civilian context, the courts have repeatedly found that those concerns had no actual basis in fact." Pls.' Opp. 27 n.15. However, as Plaintiffs appear to acknowledge, none of the cases they cite involved the military context. Plaintiffs nevertheless trivialize the military's concerns, asserting that "categorically banning a class of people who are fit to serve" is not "a reasonable solution to the problem of fairness in boxing competitions." *Id.* at 27 (emphasis omitted). Plaintiffs' argument misunderstands the nature of the military, where sex-based standards are necessary to maintain an integrated force and are integral to daily life, applying to, among others things, physical fitness and height and weight standards; berthing, showering, and restroom facilities; and contact sports and combat training. Report 28–29. Comparisons to experience in civilian life or to case law from the civilian context are inapposite.

Plaintiffs also assert that the Report lacks sufficient examples of problems arising related to sex-based standards, Pls.' Opp. 29, but they ignore its discussion of problems related to facilities and training, as well as dueling equal opportunity complaints under the Carter policy, Report 37–38; Defs.' Mot. 23. These examples "illustrate the significant effort required of commanders to solve [the] challenging problems posed by the implementation of the [Carter Policy]." Report 38.[4]

Plaintiffs also contest DoD's reliance on cost as a justification for the new policy. Pls.' Opp. 25–26. They complain that the Department did not "quantify the cost of care," Pls.' Opp. 26, and

[4] Plaintiffs invoke news articles discussing congressional testimony by the Chief of Staff of the Army, the Chief of Naval Operations, and the Commandant of the Marine Corps explaining that they had not received reports of issues relating to unit cohesion or discipline arising from service by transgender service members. Pls.' Opp. 30. Secretary Mattis himself, however, later testified to Congress that reports of such issues would not have come up to the level of those officials due to limitations in the Carter policy on reporting information relating to transgender service members. *See* Exh. 1, Department of Defense Budget Posture, United States Senate Committee On Armed Services (April 26, 2018) at 63; *see also* Report 37 n.143.

that although the Department justifies the new policy in part based on the cost of transition treatment, some affected by the new policy will have already transitioned before seeking to enlist, Pls.' Opp. 25. But Plaintiffs miss that "[s]ince implementation of the Carter policy, the medical costs for Service members with gender dysphoria"—not just those that receive military-funded transition treatment—"have increased nearly three times" compared to other service members. Report 41.

Plaintiffs nevertheless cite to the RAND Report's conclusion—made prior to adoption of the Carter policy—that the cost of transition-related treatment is small in comparison to the military's total health care costs. Pls.' Opp. 26. The Report explains, however, why this comparison is inapt: it ignores the *cost per capita* of accessing individuals with gender dysphoria. Report 14. By RAND's logic, the Department would have no basis for considering the treatment cost of *any* medical condition so long as that condition were relatively rare. DoD should not be foreclosed from rationally concluding that its new policy furthers its interest in minimizing cost burdens. *See Rostker*, 453 U.S. at 81.

IV. The Equities Favor Dissolving The Preliminary Injunction.

The leadership of the Department of Defense concluded that absent implementation of the new policy, there will remain "substantial risks" that threaten to "undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." Mattis Mem. 2; *see also, e.g.*, Report 32–35, 41, 44. Such "specific, predictive judgments" from senior military officials, including the Secretary of Defense himself, "about how the preliminary injunction would reduce the effectiveness" of the military, merit significant deference. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 27 (2008).

In contrast, Plaintiffs face little risk of harm. The *Karnoski* Court recently expanded its preliminary injunction to cover the new policy on a nationwide basis. *See* 2018 WL 1784464, at *14. As a result, dissolving the preliminary injunction here would have no practical effect on Plaintiffs. *See, e.g.*, Order, Dkt. No. 143, *Pars Equality Center v. Trump*, No. 17-cv-0255-TSC (D.D.C. March 2, 2018)

(staying request for preliminary relief because another nationwide injunction "calls into question whether the harms Plaintiffs allege are actually imminent or certain—a prerequisite for a preliminary injunction."); *Hawai'i v. Trump*, 233 F. Supp. 3d 850, 853 (D. Haw. 2017) ("[T]he Western District of Washington's nationwide injunction already provides the State with the comprehensive relief it seeks in this lawsuit. As such, the State will not suffer irreparable damage").

To be sure, the Government has appealed the *Karnoski* Court's decision and moved to stay the district court's extension of the preliminary injunction to the new DoD policy pending appeal. *See Karnoski v. Trump*, No. 18-35347 (9th Cir.), Dkt. 3-1. But regardless of the ultimate resolution of that stay motion and appeal, this Court should not leave its preliminary injunction in place. If, for example, the Ninth Circuit stays or dissolves the preliminary injunction, that would only further support Defendants' motion to dissolve here. And if the stay is ultimately denied, the nationwide injunction in the *Karnoski* case would remain in place, thereby protecting Plaintiffs from any alleged harm.

Moreover, even if DoD implemented its new policy, the six original Plaintiffs who are current service members would qualify for the policy's reliance exception—and thus would be able to continue serving in their preferred gender, obtain commissions if qualified, and receive medical treatment—because they received a diagnosis of gender dysphoria from a military medical provider while the Carter Policy was in effect. *See* Report 43; Defs.' M. to Dismiss Pls.' Second Am. Compl. 9–15.[5]

Plaintiffs respond by invoking the exception's severability provision, arguing that the new policy "expressly threatens to withdraw the grandfathering provision based on what a future court

[5] The *Karnoski* Court questioned whether the reliance exception would apply in that case, as it was not convinced that the currently serving plaintiffs there had been diagnosed with gender dysphoria by a military medical provider since the Carter Policy took effect. *See* 2018 WL 1784464, at *7 n.7. In doing so, it missed that service members could receive treatment under the Carter Policy—which all of the service member Plaintiffs both here and in *Karnoski* did—only if they had received a diagnosis of gender dysphoria by a military medical provider after that policy took effect. *See, e.g.*, Report 14.

might decide." Pls.' Opp. 13 (emphasis omitted). That provision, however, does not pose any imminent threat of injury. The severability provision simply states: "[S]hould [the] 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." Report 43. Thus, for Plaintiffs to be discharged from the military on the basis of their gender dysphoria, the following would have to occur: First, a court would have to rule that (1) the entire DoD policy was unlawful due to the reliance exception, (2) the entire DoD policy would be lawful but for that exception, and (3) that exception should therefore be severed from the rest of the policy. Second, that decision would have to be upheld upon any further judicial review. Third, with the reliance exception gone, officials within DoD would then have to make the independent decision to discharge current service members who have been diagnosed with gender dysphoria. Finally, these six Plaintiffs would have to be processed for discharge on that basis. Given that a highly attenuated chain of events would have to occur before Plaintiffs were discharged, they cannot establish imminent, let alone irreparable, harm. *See Winter*, 555 U.S. at 22 (mere "possibility" of harm insufficient for preliminary relief); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413–14 (2013); Defs.' M. to Dismiss Pls.' Second Am. Compl. 9–12.[6]

Plaintiffs' remaining arguments are makeweight. They object that the new policy's guarantee that they "may continue to receive all medically necessary care" is vague and will somehow lead to them being denied care, but this is another speculative assertion of harm. Pls.' Opp. 15 n.7. Plaintiffs also argue that they have been stigmatized because they "will be serving pursuant to a special

[6] Even if DoD's new policy were implemented and as a result Plaintiffs were somehow subject to separation, that separation would not amount to irreparable injury sufficient to warrant injunctive relief. *See Guerra v. Scruggs*, 942 F.2d 270, 274 (4th Cir. 1991) ("'[T]he prospect of a general discharge [from the military] under honorable conditions is not an injury of sufficient magnitude to warrant an injunction.'" (quoting *Chilcott v. Orr*, 747 F.2d 29, 34 (1st Cir. 1984)); *see also Hartikka v. United States*, 754 F.2d. 1516, 1518 (9th Cir. 1985) (damage to reputation as well as lost income, retirement, and relocation pay resulting from less-than-honorable discharge not irreparable).

'exemption,' in a military that broadcasts the message that they and persons like them are undesirable and 'create disproportionate costs.'" Pls.' Opp. 15. But that sort of stigmatic injury causes harm "only to those persons who are personally denied equal treatment." *Allen v. Wright*, 468 U.S. 737, 755 (1984) (citation omitted). Plaintiffs have not shown that they themselves have been subject to discriminatory treatment, because they have not identified "some concrete interest with respect to which [they] are personally subject to discriminatory treatment." *Id.* at 757 n.22. No such interest exists here, so nor does any injury, irreparable or otherwise. *See In re Navy Chaplaincy*, 534 F.3d 756, 760–61 (D.C. Cir. 2008); Defs.' M. to Dismiss Pls.' Second Am. Compl. 14–15.

CONCLUSION

For the foregoing reasons, this Court should dissolve the preliminary injunction it issued on November 21, 2017. Given DoD's judgment that maintaining the Carter Policy poses substantial risks to military readiness, Defendants respectfully request a ruling as soon as possible and no later than May 23, 2018. If the Court denies this motion, however, Defendants respectfully request that it stay the application of the preliminary injunction to DoD's new policy pending any appeal.

Dated: May 11, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Ryan B. Parker
RYAN B. PARKER
Senior Trial Counsel
ANDREW E. CARMICHAEL
COURTNEY D. ENLOW
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2018, I electronically filed the foregoing Defendants' Reply in Support of Their Motion to Dissolve the Preliminary Injunction using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: May 11, 2018

/s/ Ryan Parker
RYAN B. PARKER
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants