**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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|---|---|
| JANE DOE 2 *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*,<br><br>Defendants. | Civil Action No. 17-cv-1597 (CKK) |

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT**

**TABLE OF CONTENTS**

Page

TABLE OF AUTHORITIES ..... iii

TABLE OF FREQUENTLY CITED DOCUMENTS ..... vii

INTRODUCTION ..... 1

BACKGROUND ..... 2

ARGUMENT ..... 5

I. THE COURT SHOULD DENY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND GRANT PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT ON THE MERITS ..... 5

A. The Court Should Grant Summary Judgment To Plaintiffs On Their Equal Protection Claim ..... 6

1. The Mattis Plan bans military service by transgender people. ..... 6

a) The Mattis Plan is based on transgender status, not gender dysphoria. ..... 6

b) Defendants' argument that the Mattis Plan resembles the Carter Policy has no basis. ..... 8

2. The Mattis Plan is subject to heightened scrutiny. ..... 10

a) Heightened scrutiny applies because the Mattis Plan facially discriminates based on transgender status and sex. ..... 10

b) Deference, even if it applies, does not require or permit application of a lower standard of scrutiny in military cases. ..... 11

c) No deference is warranted here. ..... 17

3. The Mattis Plan Fails Intermediate Scrutiny. ..... 22

a) The Ban Does Not Promote Military Readiness. ..... 23

b) Defendants' arguments about unit cohesion are circular and rest on impermissible gender stereotypes. ..... 28

c) Banning transgender people from military service cannot be justified based on cost. .....33

d) The "grandfather clause" highlights the incoherence of the Mattis Plan. .....34

4. The same "unusual factors" that warranted a preliminary injunction support granting Plaintiffs' cross-motion for summary judgment. .....35

B. This Court Should Grant Summary Judgment To Plaintiffs On Their Due Process Claim .....36

II. BECAUSE THIS CASE PRESENTS A JUSTICIABLE CONTROVERSY THE COURT SHOULD REJECT DEFENDANTS' REMAINING ARGUMENTS AND DENY THEIR MOTION FOR SUMMARY JUDGMENT .....39

A. Plaintiffs Have Standing .....39

B. The Case Is Not Moot .....42

III. THE COURT SHOULD ENTER PERMANENT DECLARATORY AND INJUNCTIVE RELIEF .....44

CONCLUSION .....45

## TABLE OF AUTHORITIES

### CASES

Page(s)

*Abdelfattah v. U.S. Department of Homeland Security*, 787 F.3d 524 (D.C. Cir. 2015) ..... 37

*Adair v. England*, 183 F. Supp. 2d 31 (D.D.C. 2002) ..... 14, 16

*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) ..... 41

*American Freedom Law Center v. Obama*, 821 F.3d 44 (D.C. Cir. 2016) ..... 40

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) ..... 5

*Aref v. Lynch*, 833 F.3d 242 (D.C. Cir. 2016) ..... 43

*Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001) ..... 2, 25

*Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) ..... 27

*Burke v. Gould*, 286 F.3d 513 (D.C. Cir. 2002) ..... 5

*Califano v. Goldfarb*, 430 U.S. 199 (1977) ..... 14

*Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) ..... 39

*Clinton v. City of New York*, 524 U.S. 417 (1998) ..... 45

*Craig v. Boren*, 429 U.S. 190 (1976) ..... 13, 15, 16

*Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976) ..... 15, 27

*Cruzan v. Special School District*, 294 F.3d 981 (8th Cir. 2002) ..... 29

*County of Sacramento v. Lewis*, 523 U.S. 833 (1998) ..... 36, 37

*Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011) ..... 33

*Doe v. Boyertown Area School District*, 276 F. Supp. 3d 324 (E.D. Pa. 2017) ..... 30

*Emory v. Secretary of Navy*, 819 F.2d 291 (D.C. Cir. 1987) ..... 12

*Exxon Corp. v. FTC*, 663 F.2d 120 (D.C. Cir. 1980) ..... 5

*Frontiero v. Richardson*, 411 U.S. 677 (1973) ..... 12, 16, 17

*Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) ..... 11

*Global Tel*Link v. FCC*, 866 F.3d 397 (D.C. Cir. 2017) .....43

*Goldman v. Weinberger*, 475 U.S. 503 (1986) .....13, 16

*Graham v. Richardson*, 403 U.S. 365 (1971) .....33

*Griswold v. Connecticut*, 381 U.S. 479 (1965) .....38

*Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) .....45

*In re Levenson*, 587 F.3d 925 (9th Cir. 2009) .....34

*In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) .....7

*INS v. St. Cyr*, 533 U.S. 289 (2001) .....36, 38

*Karnoski v. Trump*, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017) .....10

*Karnoski v. Trump*, 2018 WL 1784464 (W.D. Wash. Apr. 13, 2018) .....6, 7, 10, 45

*Kitchen v Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013) .....8

*Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992) .....14

*Landgraf v. USI Film Products*, 511 U.S. 244 (1994) .....39

*Latta v. Otter*, 771 F3d 456 (9th Cir. 2014) .....27

*Lawrence v. Texas*, 539 U.S. 558 (2015) .....37, 38

*Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010) .....15, 16

*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) .....42

*M.A.B. v. Board of Education of Talbot County*, 286 F. Supp. 3d 704 (D. Md. 2018) .....30

*Memoriall Hospital v. Maricopa County*, 415 U.S. 250 (1974) .....33

*Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) .....22

*Motor & Equipment Manufacturers Ass'n v. Nichols*, 142 F.3d 449 (D.C. Cir. 1998) .....42

*National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) .....45

*Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) .....37, 38

*Owens v. Brown*, 455 F. Supp. 291 (D.D.C. 1978) .....14, 31, 32

*Palmore v. Sidoti*, 466 U.S. 429 (1984) ..... 31

*PDK Labs Inc. v. Ashcroft*, 338 F. Supp. 2d 1 (D.D.C. 2004) ..... 44

*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) ..... 38

*Plyler v. Doe*, 457 U.S. 202 (1982) ..... 33, 34

*Reed v. Reed*, 404 U.S. 71 (1971) ..... 13

*Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) ..... 37

*Rochin v. California*, 342 U.S. 165 (1952) ..... 38

*Rockwell International Corp. v. United States*, 549 U.S. 457 (2007) ..... 43

*Romer v. Evans*, 517 U.S. 620 (1996) ..... 2, 23, 36

*Rostker v. Goldberg*, 453 U.S. 57 (1981) ..... 12, 13, 14, 16, 17

*Schlesinger v. Ballard*, 419 U.S. 498 (1975) ..... 15

*Shapiro v. Thompson*, 394 U.S. 618 (1969) ..... 33

*Shays v. FEC*, 424 F. Supp. 2d 100 (D.D.C. 2006) ..... 5

*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) ..... 38

*Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004) ..... 11

*Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) ..... 12

*Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017) ..... 10

*Students & Parents for Privacy v. U.S. Department of Education*, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016) ..... 30

*Troxel v. Granville*, 530 U.S. 57 (2000) ..... 38

*U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) ..... 23

*United States v. Philip Morris USA, Inc.*, 566 F.3d 1095 (D.C. Cir. 2009) ..... 42

*United States v. Virginia*, 518 U.S. 515 (1996) ..... 12, 22, 31, 35, 36

*United States v. Windsor*, 133 S. Ct. 2675 (2013) ..... 22, 36

*Whitaker by Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034 (7th Cir. 2017) ..... 11, 30

*Witt v. Department of Air Force*, 527 F.3d 806 (9th Cir. 2008) .....15, 16, 38

**RULES**

Fed. R. Civ. P. 56 .....5, 18

**OTHER AUTHORITIES**

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UK Sport & Department for Culture, Media, and Sport, *Transsexual People and Sport: Guidance for Sporting Bodies* (May 2005), http://www.lgbthistorymonth.org.uk/documents/DCMS%20Guidance%20-%20Transsexual%20People%20and%20Sport%20(1).pdf .....32

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| Short Citation | Document and Location |
|---|---|
| 2017 Presidential Memorandum | Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security, dated August 25, 2017 (Milgroom Decl., Ex. T) (previously filed at Dkt. No. 13-2, Ex. A)[1] |
| 2018 Presidential Memorandum | Memorandum for the Secretary of Defense and the Secretary of Homeland Security re: Military Service by Transgender Individuals, dated March 23, 2018 (Milgroom Decl., Ex. FF) (previously filed at Dkt. 96-3) |
| DTM 16-005 | Directive-type Memorandum (DTM) 16-005, "Military Service of Transgender Service Members," dated June 30, 2016 (previously filed at Dkt. No. 13-10, Ex. C) |
| Interim Guidance | Military Service by Transgender Individuals – Interim Guidance, dated September 14, 2017 (Milgroom Decl., Ex. W) (previously filed at Dkt. No. 45-1) |
| Mattis Plan | Memorandum for the President re: Military Service by Transgender Individuals, dated February 22, 2018 (Milgroom Decl., Ex. DD) (previously filed at Dkt. No. 96-1) |
| Panel Report | Department of Defense Report and Recommendations on Military Service by Transgender Persons, dated February 2018 (Milgroom Decl., Ex. EE) (previously filed at Dkt. No. 96-2) |
| PI Order | Memorandum Opinion Granting in Part and Denying in Part Defendants' Motion to Dismiss and Plaintiffs' Motion for Preliminary Injunction (Dkt. 61) |
| Terms of Reference | Terms of Reference – Implementation of Presidential Memorandum on Military Service by Transgender Individuals, dated |

[1] For the Court's convenience, certain frequently cited documents are being filed together as exhibits to the Declaration of Lauren Godles Milgroom ("Milgroom Decl."), filed today. For those documents, the table notes both their location in the Milgroom Declaration and where they were previously filed in this case.

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|---|---|
| | September 14, 2017 (Milgroom Decl., Ex. X) (previously filed at Dkt. No. 108-6) |
| US PI Br. | Defendants' Motion to Dissolve the Preliminary Injunction (Dkt. No. 116) |
| US SJ Br. | Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, or, in the Alternative, Defendants' Motion for Summary Judgment (Dkt. No. 115) |

## INTRODUCTION

The transgender military ban is the only policy that excludes people from military service based on their membership in a class rather than on an individual's fitness to serve. No other military policy excludes a class of persons from an equal opportunity to enlist or serve in the U.S. Armed Forces. This Court has already determined that a policy excluding transgender people from military service warrants, and likely cannot survive, heightened scrutiny. PI Order 59-72. Neither Defendants' new articulation of the transgender ban in Secretary Mattis's February 2018 memorandum (the "Mattis Plan") nor the justifications asserted in the report from the Department of Defense panel of experts (the "Panel Report") changes this Court's prior assessment of the merits.

As did the President's directive, the Mattis Plan bars transgender people from accessions and requires their discharge from service "solely because they are transgender, despite their ability to meet all of the physical, psychological, and other standards for military service." PI Order 64. Then, as now, Defendants argue that the ban is justified because of concerns relating to (1) military readiness, (2) unit cohesion, specifically focused on the military's ability to enforce sex-based standards, and (3) costs. As before, while Plaintiffs agree that the governmental interests of military readiness and unit cohesion are important, and that cost concerns are legitimate, Defendants cannot satisfy their burden of demonstrating that the means employed (banning transgender people) is substantially related to their achievement.

The Panel Report, which seeks to justify the Mattis Plan, is most notable for what it fails to do. It never concludes, nor could it, that transgender people are not capable of meeting military standards for service. Rather, it primarily claims that transgender people are purportedly more likely to suffer from a variety of mental health problems and more likely to be nondeployable as a result of transition-related care. But even accepting these sweeping

assertions as true—and they are not—they "do not explain the need to discharge and deny accession to *all* transgender people," including those "who meet the relevant physical, mental and medical standards for service." PI Order 66. Like the measure struck down in *Romer*, the discontinuity between the sweeping nature of the ban and the justifications asserted to support it show that it is "inexplicable by anything but animus toward the class it affects." *Romer v. Evans*, 517 U.S. 620, 632 (1996).[2]

Because undisputed evidence establishes that the Mattis Plan continues to enact a ban on military service by transgender persons, and because Defendants' proffered justifications remain insufficient to satisfy the demanding test of heightened scrutiny, Plaintiffs are entitled to judgment on the merits. The Court should deny Defendants' motion for summary judgment, grant Plaintiffs' cross-motion for summary judgment, and enter permanent declaratory and injunctive relief prohibiting Defendants from excluding otherwise qualified men and women from military service because they are transgender.

## BACKGROUND

In June 2016, the United States Department of Defense ("DOD") adopted a policy permitting transgender people to serve in the military. Dkt. 13-10, Ex. C (Directive-Type Memorandum 16-005 ("DTM 16-005")); Plaintiffs' Statement of Undisputed Material Facts ("PSUMF") ¶¶ 22-30. This policy followed a lengthy review process by senior civilian and uniformed military leaders, which included extensive discussions with commanders and service members, a study by the RAND Corporation, and consideration of the experiences of other

[2] As explained by Justice Kennedy (for himself and Justice O'Connor), animus arises not only from "malice or hostil[ity]," but also from "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

nations that allow service by transgender individuals. *See, e.g.*, Dkt. 13-3 ¶¶ 10-21; PSUMF ¶¶ 1-21. The DOD review determined that there was no valid reason to exclude qualified personnel from military service simply because they are transgender. *See, e.g.*, Dkt. 13-3 ¶¶ 22-27; PSUMF ¶¶ 16-18.

In July 2017, President Donald J. Trump announced via Twitter that "the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military." *See* PI Order 14 n.3; PSUMF ¶ 42. In August 2017, President Trump formalized the ban into an executive directive. *See* 2017 Presidential Memorandum; PSUMF ¶ 48.

On August 9, 2017, Plaintiffs filed this lawsuit challenging the constitutionality of the ban and moved for a preliminary injunction to prevent its implementation. Plaintiffs alleged that the ban denies them equal protection of the laws and violates their right to liberty and privacy under the Due Process Clause of the Fifth Amendment to the United States Constitution. Plaintiffs argued 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. Dkt. 13 at 16-20. In response, Defendants argued that the President's decision was entitled to deference. Dkt. 45 at 27-31. Defendants also argued that Plaintiffs' claims were not ripe for adjudication, because the "policy [Plaintiffs] assail is still being studied, developed, and implemented." *Id*. at 19.

On October 30, 2017, this Court ruled that Plaintiffs had established a likelihood of success on their claim that President Trump's ban 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. PI Order 58-76. The Court rejected Defendants' contention that the case was not ripe for review, holding that "[w]hile there

is present uncertainty regarding the exact details of the military's future policy towards transgender service members, there is no uncertainty regarding two directives of the Presidential Memorandum: the military must authorize the discharge of transgender service members, and accession by transgender individuals is prohibited, indefinitely." PI Order 53.

The Court preliminarily enjoined Defendants from enforcing the Accession and Retention Directive. The effect of the Order is to keep in place "the status quo with regard to accession and retention that existed before the issuance of the Presidential Memorandum—that is, the retention and accession policies established in the June 30, 2016 Directive-type Memorandum as modified by Secretary of Defense James Mattis on June 30, 2017." PI Order 75-76.

The 2017 Presidential Memorandum ordered Secretary Mattis to submit "a plan for implementing" the President's directive by February 21, 2018. 2017 Presidential Memorandum, § 3; PSUMF ¶ 50. Secretary Mattis delivered his proposal to the President on February 22, 2018. Mattis Plan 1; PSUMF ¶ 71.

The Mattis Plan (1) requires transgender individuals to serve only "in their biological sex," and (2) bans transgender persons from military service if they "require or have undergone gender transition." Mattis Plan 2-3; PSUMF ¶¶ 74-75. In accordance with the President's instruction to "determine how to address transgender individuals currently serving in the United States military" (2017 Presidential Memorandum § 3), the Mattis Plan also contains a "grandfather" clause, which permits service members diagnosed with gender dysphoria by military medical personnel since the open service policy went into effect in July 2016 and before the effective date of the Mattis Plan to "continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria." Mattis Plan 2; PSUMF ¶ 77. The Mattis Plan attached and referenced the Panel Report. The Report makes clear that Defendants have

reserved the right to rescind the grandfather provision, stating that "should [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." Panel Report 6, 43; PSUMF ¶¶ 71, 80.

President Trump accepted the Mattis Plan in a memorandum issued on March 23, 2018, in which he also "revoked" his August 25, 2017 memorandum. 2018 Presidential Memorandum.; PSUMF ¶ 72. Defendants have moved for summary judgment. Plaintiffs ask the Court to deny Defendants' motion and to grant Plaintiffs' cross-motion for summary judgment on their constitutional claims.

## ARGUMENT

### I. THE COURT SHOULD DENY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND GRANT PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT ON THE MERITS

Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A motion for summary judgment may be filed "at any time." Fed. R. Civ. P. 56(b). In opposing a summary judgment motion, the nonmoving party cannot rely on "mere allegations or denials." *Burke v. Gould*, 286 F.3d 513, 517 (D.C. Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)). "'[C]onclusory allegations unsupported by factual data will not create a triable issue of fact.'" *Exxon Corp. v. F.T.C.*, 663 F.2d 120, 127 (D.C. Cir. 1980) (citation omitted). In ruling on cross-motions for summary judgment, a court will "grant summary judgment only if one of the moving parties is entitled to judgment as a matter of law upon material facts that are not genuinely disputed." *Shays v. FEC*, 424 F. Supp. 2d 100, 109 (D.D.C. 2006) (citation omitted).

Plaintiffs bring a facial challenge to the Mattis Plan under the equal protection and due process guarantees of the Fifth Amendment. These claims present purely legal questions which can be resolved based on the undisputed facts before this Court. The justifications that Defendants have asserted are also insufficient as a matter of law. Accordingly, Plaintiffs respectfully request that the Court deny Defendants' motion for summary judgment and grant Plaintiffs' cross-motion for summary judgment.

### A. The Court Should Grant Summary Judgment To Plaintiffs On Their Equal Protection Claim

#### 1. The Mattis Plan bans military service by transgender people.

The Mattis Plan bars transgender individuals from military service. On its face, it is a policy about "transgender individuals." Mattis Plan 1; PSUMF ¶ 73. The accession and retention standards exclude transgender people who "require or have undergone gender transition" and require any transgender person who enlists or serves in the military to "adhere to all standards associated with their biological sex." Matts Plan 2-3; Panel Report 32; PSUMF ¶¶ 74-75. By definition, transgender people do not identify or live in accord with their assigned sex at birth. By preventing all such persons from serving, the policy targets transgender people as a class. As the district court concluded in *Karnoski*, another challenge to the Mattis Plan: "Requiring transgender people to serve in their 'biological sex'… would force transgender service members to suppress the very characteristic that defines them as transgender in the first place." *Karnoski v. Trump*, 2018 WL 1784464, at *6, *12 (W.D. Wash. Apr. 13, 2018) (footnote omitted), *appeal docketed* No. 18-35347 (9th Cir.).

##### a) The Mattis Plan is based on transgender status, not gender dysphoria.

Defendants' argument that the Mattis Plan is based on a medical condition (gender dysphoria) rather than on a person's transgender status does not withstand scrutiny. The policy

does not turn on the presence or absence of gender dysphoria but on the requirement that a transgender person conform to their sex assigned at birth. The policy disqualifies from service any transgender person, regardless of whether they have gender dysphoria, who requires or has undergone gender transition. Mattis Plan 2; PSUMF ¶¶ 74-75. For example, the policy bars accession by transgender people who do not have gender dysphoria because they have transitioned; at the same time, it permits continued service by persons with gender dysphoria so long as they do not transition. Mattis Plan 2; PSUMF ¶¶ 74-75. In every instance, the operative consideration is not whether a person has gender dysphoria, but rather whether a person lives in their birth sex.

Defendants also argue that their policy does not categorically ban transgender people from service because it includes an "exception" for transgender people who serve in their birth sex. US SJ Br. 38, 40; Panel Report 5; PSUMF ¶ 77. That argument has no merit. Just as a policy allowing Muslims to serve in the military only if they renounce their faith would be a ban on military service by Muslims, a policy requiring transgender individuals to serve in their birth sex *is* a ban on military service by transgender people. As the district court in *Karnoski* concluded, "[r]equiring transgender people to serve in their 'biological sex' … cannot reasonably be considered an 'exception' to the Ban." *Karnoski*, 2018 WL 1784464, at *6 (footnote omitted).

Defendants' argument is similar to the specious claim, uniformly rejected by courts, that laws limiting marriage only to male-female couples did not discriminate against gay people because a gay person could marry a person of the opposite sex. *See, e.g., In re Marriage Cases*, 183 P.3d 384, 440-41 (Cal. 2008) (rejecting as "sophistic" the claim that such a law does not discriminate because "the marriage statutes permit a gay man or a lesbian to marry someone of

the opposite sex, because making such a choice would require the negation of the person's sexual orientation"); *Kitchen v Herbert*, 961 F. Supp. 2d 1181, 1200 (D. Utah 2013) (finding that "[p]laintiffs' asserted right to marry someone of the opposite sex is meaningless"), *aff'd*, 755 F.3d 1193 (10th Cir. 2014). As the courts in those cases held, where a policy targets the very characteristic that defines a class, it facially discriminates against the class. The same principle applies here and compels the conclusion that a policy that excludes transgender persons who do not live in their birth sex from military service facially discriminates against transgender people.

**b) Defendants' argument that the Mattis Plan resembles the Carter Policy has no basis.**

Defendants also contend that the Mattis Plan is "like the Carter policy"—*i.e.*, the open service policy adopted in 2016—in significant respects. US SJ Br. 17, 37, 40. In fact, the two policies take diametrically opposing approaches to military service by transgender people. The Carter Policy seeks to equalize the treatment of transgender people by holding them to the same standards applied to others, while the Mattis Plan subjects them to a special exclusionary rule. The Carter Policy provides that military service should be "open to all who can meet the rigorous standards for military service and readiness." DTM 16-005 at 2; PSUMF ¶ 23. It makes transgender service members "subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability, and retention." DTM 16-005 at 2; PSUMF ¶ 23. The Mattis Plan does just the opposite. Rather than evaluating the fitness of transgender service members based on the same standards applied to all others, it creates a special rule, applicable solely to transgender persons, in order to prohibit them from enlisting or serving.

The Carter Policy authorizes accessions for transgender individuals who have completed "medical treatment" related to gender transition along with the requisite period (18 months) of

stability following treatment. DTM 16-005, Attachment, at 2.a(2); PSUMF ¶ 28. That policy is consistent with the way the military evaluates accessions for people with other treatable conditions. *See* Milgroom Decl. Ex. II (DoD Instruction 6130.03); *see also* Panel Report 9 (acknowledging that "[f]or some conditions, applicants with a past medical history may … be eligible for accession if they meet the requirements for a certain period of 'stability'").

In contrast, the Mattis Plan creates a unique standard that differs completely from the framework that applies to people with other treatable medical conditions. Rather than permitting enlistment by transgender individuals who have completed gender transition and demonstrated a period of post-treatment stability, the Mattis Plan bars accessions for any transgender person who has undergone or requires gender transition. Mattis Plan 2; PSUMF ¶ 75. In other words, the Mattis Plan bars accession for anyone who is transgender.

With respect to separation and retention, the Carter Policy subjects transgender individuals "to the same standards as any other Service member," permitting their separation, discharge, or denial of reenlistment or continued service "under existing processes … but not due solely to their gender identity or an expressed intent to transition genders." DTM 16-005, Attachment, at 1.b; PSUMF ¶ 25. The Mattis Plan does the opposite, presuming the nondeployability of transgender service members, and subjecting to discharge any transgender person who requires gender transition. Mattis Plan 2; PSUMF ¶ 75.

Defendants also erroneously claim that both the Mattis Plan and the Carter Policy require transgender people to "adhere to all standards associated with their biological sex." US SJ Br. 42-43. That is true of the Mattis Plan, which requires transgender service members to conform to their birth sex in order to remain in the military. Mattis Plan 2-3; PSUMF ¶ 74. In contrast, the Carter Policy permits gender transition and provides that once the DEERS gender marker is

changed upon completion of gender transition, the Service member is held to "all applicable military standards associated with the member's transitioned gender," not with their birth sex. Milgroom Decl. Ex. G (DoD Instruction 1300.28) at 3.1.b. Defendants' suggestion that the Carter Policy also purportedly forces transgender people to "'suppress the very characteristic that defines them as transgender in the first place'" (US SJ Br. 42) has no footing in reality.

**2. The Mattis Plan is subject to heightened scrutiny.**

**a) Heightened scrutiny applies because the Mattis Plan facially discriminates based on transgender status and sex.**

This Court has already held that disparate treatment of transgender people is "at least a quasi-suspect classification." PI Order 59; *see also Karnoski v. Trump*, 2017 WL 6311305, at *7 (W.D. Wash. Dec. 11, 2017) (same); *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017) (same), *appeal filed*, No. 17-2398 (4th Cir. Dec. 6, 2017); *cf. Karnoski*, 2018 WL 1784464, at *20-24 (applying strict scrutiny). Like other types of discrimination based on suspect and quasi-suspect classifications, careful scrutiny of governmental policies based on a person's transgender status is required because such policies are highly likely to reflect improper bias or prejudice rather than legitimate concerns.[3] The Mattis Plan discriminates against transgender people and thus warrants this heightened review.

[3] As this Court previously held, transgender people meet all of the criteria for determining when discrimination against a vulnerable group warrants heightened scrutiny. "Transgender individuals have immutable and distinguishing characteristics that make them a discernable class." PI Order 60; *see also* Dkt. No. 13-11 (Brown PI Decl.) ¶¶ 14-17. "As a class, transgender individuals have suffered, and continue to suffer, severe persecution and discrimination." PI Order 60. Being transgender does not limit one's ability to contribute to society. PI Order 60; *see also* Brown PI Decl. ¶¶ 27-31, 37-40. And "transgender people as a group represent a very small subset of society lacking the sort of political power other groups might harness to protect themselves from discrimination." PI Order 60.

Discrimination against transgender people, as Defendants' own policies acknowledge, is also "a form of discrimination on the basis of gender, which is itself subject to intermediate scrutiny." PI Order 62; *see also* DTM 16-005, Attachment, at 5.a ("[D]iscrimination based on gender identity is a form of sex discrimination."); *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Glenn v. Brumby*, 663 F.3d 1312, 1317-20 (11th Cir. 2011); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 577 (6th Cir. 2004). A transgender person is one whose "inward identity, behavior, and possibly … physical characteristics" depart from "stereotypes of how an individual of their assigned sex should feel, act and look." PI Order 62. "By excluding an entire category of people from military service on this characteristic alone," the Mattis Plan "punishes individuals for failing to adhere to gender stereotypes." *Id*. It is "inextricably intertwined with gender classifications." *Id*.

Defendants' new articulation of the ban highlights even more starkly the gender stereotypes and classifications upon which the ban relies. Under the Mattis Plan, only transgender individuals "who have not transitioned to another gender" are eligible to enlist or to continue serving in the military. *See* Mattis Plan 2-3; Panel Report 4; PSUMF ¶ 75. Such individuals must "adher[e] to the standards associated with their biological sex." Panel Report 4; PSUMF ¶ 74. The policy thus discriminates based on sex in the most direct and basic way, by conditioning eligibility to serve on a transgender person's agreement "to act in the way society expects males [and females] to act." PI Order 63. Such a gender-based policy warrants heightened review.

**b) Deference, even if it applies, does not require or permit application of a lower standard of scrutiny in military cases.**

Defendants again argue, as they did in opposing Plaintiffs' motion for a preliminary injunction, that courts apply a lower level of equal protection review in military cases than in

other settings. As this Court has already held, there is no military exception to the requirement of equal protection. *See* PI Order 63-64. Under settled law, gender-based discrimination receives the same demanding level of scrutiny regardless of the context in which it occurs, even when courts defer to the authority of the political branches over military affairs. That standard of scrutiny is no less applicable to a ban adopted by military leaders than it is to the President's announcement of a ban on Twitter.

*Rostker* expressly declined "to apply a different equal protection test because of the military context." *Rostker v. Goldberg*, 453 U.S. 57, 69-71 (1981). Especially in equal protection cases, "constitutional questions that arise out of military decisions regarding the composition of the armed forces are not committed to the other coordinate branches of government." *Emory v. Sec'y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987). If a military policy discriminates based on race or religion, strict scrutiny applies. *Steffan v. Perry*, 41 F.3d 677, 689 n.9 (D.C. Cir. 1994) (en banc) ("Classifications based on race or religion, of course, would trigger strict scrutiny."). Similarly, when a military policy discriminates based on gender, it may be upheld only if such discrimination is "substantially related" to "an exceedingly persuasive justification." *See United States v. Virginia*, 518 U.S. 515, 531 (1996).

Defendants attempt to cast doubt on this well settled law by arguing that courts must apply a less demanding standard of review in cases where deference to military judgment is warranted—a standard Defendants argue is "most closely" related to rational basis review. *See* US SJ Br. 18. But even where such deference applies, courts do not apply rational basis review to a classification that otherwise compels a higher level of review. In *Frontiero v. Richardson*, 411 U.S. 677, 688-90 (1973) (plurality op.), the Supreme Court applied heightened scrutiny to strike down a statute that treated service members differently on the basis of sex for the purposes

of spousal benefits. In *Rostker*, the Supreme Court also applied heightened scrutiny in evaluating whether exempting women from selective service registration was "sufficiently" and "closely related" to the "important governmental interest" in drafting combat troops. 453 U.S. at 69-70, 76, 79 (citing, *inter alia*, *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971)). *Rostker* expressly rejected either applying rational basis review or layering some degree of deference atop heightened scrutiny simply because a case involving sex discrimination arose in the military context. *See* 453 U.S. at 69-70 ("We do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further 'refinement' in the applica[tion of heightened scrutiny.]").

At most, courts have shown a greater willingness to credit the importance of the government's asserted interests in the military context. *See Rostker*, 453 U.S. at 70 (recognizing the "important governmental interest" in "raising and supporting armies"); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (crediting military justification of need for uniformity). But this deference "regarding the relative importance of … particular military interest[s]," *Goldman*, 475 U.S. at 507, does not allow a court to "abdicat[e]" its constitutional responsibility to determine whether there is a sufficiently close fit between the sex-based distinction and the asserted interest under heightened scrutiny, *Rostker*, 453 U.S. at 70. Only where a policy meets that stringent threshold test is deference to "congressional choices among alternatives" warranted. *Id*. at 71. Deference does not permit a court either to bypass that threshold inquiry or to relax the required level of fit between a discriminatory classification and its justification.

In *Rostker*, the Court upheld a statute exempting women from registration only because at the time Congress decided to retain the exemption, women were not eligible to serve in combat positions. 453 U.S. at 77. As a result, the Supreme Court found that "the exemption of women

from registration [wa]s not only sufficiently but also closely related to Congress' purpose in authorizing registration" of drafting combat troops. *Id.* at 76-77 ("Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft."). By contrast, here, Defendants cannot show that transgender people who meet general fitness standards are differently situated from every other group that is permitted to serve in the military. As the D.C. Circuit has recognized, "*Rostker* [does not] insulate [the government's] empirical judgments from scrutiny, and [does not] even remotely support[] the proposition … that the constitutionality of a sex-based distinction *does not depend* upon the degree of correlation between sex and the attribute for which sex is used as a proxy." *Lamprecht v. FCC*, 958 F.2d 382, 395 n.3 (D.C. Cir. 1992).

Accordingly, courts both inside and outside this circuit have closely scrutinized whether there is a sufficiently close fit between the challenged policy and the asserted government interest when military policies discriminate on the basis of a protected class. In *Owens v. Brown*, 455 F. Supp. 291, 305-09 (D.D.C. 1978), the court struck down a statutory ban on assignment of female service members to duty on navy vessels other than hospital ships and transports under heightened scrutiny, finding an equal protection violation where the overbroad and categorical nature of the ban belied the asserted purpose of preserving combat effectiveness, and rejecting the government's morale and disciplinary rationales as lacking a sufficient basis. *See also id.* at 308 (suggesting that even a "90%" "correlation between sexual traits underlying differences in treatment and important legislative objectives" might be insufficient to pass constitutional muster (citing *Califano v. Goldfarb*, 430 U.S. 199, 225 (1977) (Rehnquist, J., dissenting)). In *Adair v. England*, 183 F. Supp. 2d 31, 52, 64-65 (D.D.C. 2002), the court applied strict scrutiny to equal protection and Establishment Clause claims regarding differential treatment of Naval chaplains

on the basis of religious affiliation. Similarly, in *Crawford v. Cushman*, 531 F.2d 1114, 1122-23 (2d Cir. 1976), the Second Circuit struck down a policy requiring automatic discharge of pregnant women while permitting an individualized assessment of service members with all other temporary disabilities. *See also id.* at 1121 (finding "no basis for a judicial deference to the military here which precludes review of appellant's substantive constitutional claims"). And in *Witt v. Department of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008), the Ninth Circuit held that deference to the important governmental interests advanced by "Don't Ask, Don't Tell" ("DADT") did not preclude heightened scrutiny of whether those interests were significantly furthered by DADT and whether DADT was necessary to further those interests. *Cf. Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 911-23 (C.D. Cal. 2010) (same), *vacated on other grounds as moot*, 658 F.3d 1162 (9th Cir. 2011).

None of the arguments Defendants advance in support of their argument that some lesser standard of review applies has merit. *First*, Defendants are wrong to argue that deference to military judgment commands courts to accept *post hoc* justifications in military cases involving gender-based discrimination. Neither *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975), nor *Rostker* supports that claim. In *Schlesinger*, the Court found that, *at the time the statute at issue in the case was enacted*, Congress sought to compensate for the reduced opportunities for promotion available to women line officers. Far from relying on a *post hoc* justification, the Court looked to whether a sufficient justification for the law existed at the time of its enactment.[4] Similarly, in *Rostker*, the Court considered the views expressed by Congress in 1980, rather than in 1948 when the law exempting women from the draft was first enacted, only because Congress

[4] *Schlesinger* also predates the Court's decision a year later in *Craig*, 429 U.S. at 197, which first clearly established that a gender classification will be upheld only if it serves an important governmental objective and is substantially related to achievement of that objective.

in 1980 had "thoroughly reconsider[ed] the question of exempting women from [the draft]" and expressly declined to change its prior policy. 453 U.S. at 74.

*Second*, Defendants contrast the Court's rejection of the government's evidence in *Craig*, 429 U.S. 190, with its deference to the government's experts in *Goldman*, 475 U.S. at 507. That argument misses the mark. *Craig* involved an equal protection challenge to a *facial* classification based on sex, while *Goldman* involved a First Amendment challenge to the application of a *facially neutral* military regulation regarding dress and appearance. This Court has explicitly rejected extending *Goldman* beyond the context of Free Exercise challenges regarding military conduct regulations, explaining that "[a]lthough this Court is mindful of the Supreme Court's admonishment that the judiciary should give substantial deference to matters related to management of the military, such protection does not extend to practices that may subvert one's inalienable constitutional rights." *Adair*, 183 F. Supp. 2d at 52 (rejecting the "slippery slope" of extending *Goldman* to Equal Protection and Establishment Clause claims). Where plaintiffs challenge a military policy that classifies persons on a suspect or quasi-suspect basis, courts subject that policy and its asserted evidentiary bases to the same careful scrutiny required in non-military cases. *See*, *e.g.*, *Rostker*, 453 U.S. at 67, 74-80 (explaining that gender-based classifications are unconstitutional where they are based on "overbroad generalizations" of sex-based distinctions, and finding that the male-only registration was based not on such a generalization, but on exclusion of women from combat positions); *Frontiero*, 411 U.S. at 689 (plurality op.) (carefully scrutinizing the lack of "concrete evidence" that the differential treatment of service members based on sex saved the government money in spousal benefits); *Witt*, 527 F.3d at 821; *Log Cabin Republicans*, 716 F. Supp. 2d at 911-23.

*Third*, Defendants wrongly claim that *Rostker* upheld a discriminatory law based on mere

"administrative convenience." In fact, the statute survived only because the Court found that the exclusion of women from the draft was "closely related to Congress' purpose" of registering only persons who would be eligible for combat. 453 U.S. at 79; *see also Frontiero*, 411 U.S. at 690 (plurality op.) (explicitly rejecting "administrative convenience" as a legitimate rationale for military spousal benefits statute treating service members differently on the basis of sex).

*Finally*, Defendants note that the Supreme Court tolerated "inconsistencies resulting from line-drawing" in *Goldman*. Again, however, in *Goldman*, the Court deferred to the Air Force's judgment about whether to create an exception to a facially neutral rule. In contrast, the policy here is facially discriminatory; it subjects "transgender persons" to a unique class-based exclusion that is unlike the way the military treats any other group. Mattis Plan 2; PSUMF ¶¶ 73-76. As this Court has already determined, such a policy requires heightened scrutiny, and that remains true regardless of whether the Court views the Mattis Plan as an implementation of the President's ban or an independent policy. In either case, the policy cannot survive intermediate review, and this Court should grant Plaintiffs' motion for summary judgment.

**c) No deference is warranted here.**

Even if President Trump had never banned transgender military service and the DOD had adopted such a ban based on an independent process that warranted deference, Plaintiffs would be entitled to summary judgment on their facial challenge to the Mattis Plan. In any event, however, no deference is warranted here.

Defendants do not claim—nor could they, in light of their own official documentation of the review process—that either the Panel or Secretary Mattis was free to disregard the

President's command to implement a ban on military service by transgender people.[5] The undisputed facts show that the Panel review process was created for the express purpose of supporting the development of a plan to "effect the policy and directives" in the 2017 Presidential Memorandum, which ordered a "return" to the ban on service by transgender people that was "in place prior to June 2016." Terms of Reference 1; 2017 Presidential Memorandum § 1(b); PSUMF ¶¶ 48, 55. Because the review process, at a minimum, was significantly circumscribed by the President's directive to reinstate a ban, its recommendation of a policy that achieves that goal is not the type of independent military judgment that warrants deference.

Defendants do not assert that the review process was unconstrained by the President's directive in the 2017 Presidential Memorandum to implement a ban. Instead, Defendants carefully quote snippets of language taken out of context that describe only parts of the review process—not its overall purpose or scope. *See, e.g.*, Panel Report 43 (asserting that the review process was "independent" and unaffected by "external factors"). For example, Defendants contend that DOD conducted an analysis that did not "'start with [a] presumption' in favor of an outcome, but 'ma[de] no assumptions' at all." *Id.* Read in context, it is clear that the Panel Report's statement that the panel made "no assumptions" means that, unlike the earlier review that led to the adoption of the open service policy under Secretary Carter, the panel did not start

[5] If the Court determines that resolution of the parties' cross-motions for summary judgment turns on whether or not the process that resulted in the Mattis Plan and the Panel Report reflected independent military judgment, Plaintiffs ask this Court to defer ruling on the cross motions until Defendants meet their discovery obligations. Fed. R. Civ. P. 56(d), (e). Defendants have objected to virtually all discovery requests seeking evidence concerning whether, as a factual matter, the review process was an exercise of independent judgment. While the undisputed facts already available demonstrate that the review process was circumscribed, and Plaintiffs contend that these facts are sufficient to entitle them to judgment on the merits, should this Court determine otherwise, Plaintiffs seek the opportunity to complete fact discovery, including resolution of all privilege disputes previously presented to the Court and any further disputes that may arise in the course of discovery.

with or accept the fact that transgender people are already serving and meeting applicable standards as strong evidence that they should be allowed to enlist and serve openly. The quoted statement does not assert—nor do Defendants ever claim—that the review process was launched independently of the President's directive or consisted of an open-ended inquiry unaffected and unguided by the President's orders in the 2017 Presidential Memorandum.

Nor could they. As the government's own official documents consistently show, the military was not writing on a blank slate; rather, the review process was undertaken to consider how to formulate and support a policy consistent with the President's directive. The 2017 Presidential Memorandum directed Secretary Mattis to submit to the President, by February 21, 2018, "a plan for implementing" the policies and directives set out in the memorandum—*i.e.*, a prohibition on military service by transgender persons. 2017 Presidential Memorandum § 3; PSUMF ¶ 50. Secretary Mattis responded that the Department had "received the [August 25, 2017] Presidential Memorandum" and that it would "carry out the President's policy direction." Milgroom Decl. Ex. U; PSUMF ¶ 52. Secretary Mattis affirmed that DOD "will carry out the President's policy and directives" and will "comply with the Presidential Memorandum." Milgroom Decl. Ex. U; PSUMF ¶ 54.

Secretary Mattis directed his staff to "develop[] an Implementation Plan on military service by transgender individuals, *to effect the policy and directives in [the] Presidential Memorandum*." Terms of Reference 1 (emphasis added); PSUMF ¶ 55. Secretary Mattis described the process that DOD would undertake to develop the plan in a September 14, 2017 memorandum setting forth "Terms of Reference" for "Implementation of [the] Presidential Memorandum on Military Service by Transgender Individuals." Terms of Reference 1 (emphasis added); PSUMF ¶ 55. The Terms of Reference directed the Deputy Secretary of

Defense and the Vice Chairman of the Joint Chiefs of Staff to assemble a panel drawn from the DOD and the Department of Homeland Security in order to conduct an "independent multidisciplinary review and study of relevant data and information … *planned and executed to inform the Implementation Plan*." Terms of Reference 2 (emphasis added); PSUMF ¶¶ 56-57.

The Terms of Reference instructed the panel to comply with the directives in the 2017 Presidential Memorandum. In defining the panel's assignment with respect to enlistment, Secretary Mattis informed his subordinates that DOD had been "direct[ed]" to prohibit accessions. Terms of Reference 2; PSUMF ¶ 59. The panel was asked to consider only how the "guidelines" for that policy should be updated "to reflect currently accepted medical terminology." Terms of Reference 2. Similarly, with respect to service by transgender individuals, the panel was told that DOD was required to "return to the longstanding policy and practice … that was in place prior to June 2016," *i.e.*, a ban. *Id.*; PSUMF ¶ 58.

Following Secretary Mattis's instructions, Anthony Kurta, performing the duties of Under Secretary of Defense for Personnel and Readiness, convened the panel and established three Working Groups to support its work. Milgroom Decl. Ex. Y; PSUMF ¶ 61. The Transgender Personnel Policy Working Group was tasked with reviewing the open service policy and "revis[ing] the current DoDI" pertaining to transgender service members. Milgroom Decl. Ex. Y. An agenda and slides prepared for the Personnel Working Group's kickoff meeting reproduced the text of President Trump's tweet stating that the government "will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military" and identified it as "Policy Guidance" for the group. Milgroom Decl. Ex. Z at 11; PSUMF ¶ 64. The 2017 Presidential Memorandum and the Terms of Reference were also listed as guidance. Milgroom Decl. Ex. Z at 4. The panel's task was exactly as Secretary Mattis described it: to develop an

"Implementation Plan" to carry out the President's directive to impose a ban on service by transgender individuals no later than March 23, 2018. An internal DOD document outlining the "T[ransgender] Policy Development Timeline" directly connects each step of the process from the 2017 Presidential Memorandum to Secretary Mattis's presentation of the Mattis Plan and the Panel Report to the President. Milgroom Decl. Ex. BB; PSUMF ¶ 67.

In a January 11, 2018, memorandum, the Under Secretary of Defense for Personnel and Readiness transmitted the panel's recommendations to Secretary Mattis. Milgroom Decl. Ex. CC; PSUMF ¶ 69. The memorandum stated that the recommended policy changes were "in accordance with direction from the President on August 25, 2017." Milgroom Decl. Ex. CC; PSUMF ¶ 69. Consistent with the President's directives, the panel recommended that transgender persons should be permitted to serve "only in their biological sex and without receiving cross-sex hormone therapy or surgical transition support." Milgroom Decl. Ex. CC; PSUMF ¶ 70. In February 2018, Secretary Mattis submitted the implementation plan on the timeline established by the 2017 Presidential Memorandum.

In response to these undisputed facts, Defendants have offered no evidence that either the review process or the Mattis Plan was independent of the President's directives. To the extent Defendants rely on statements by Secretary Mattis regarding the "independence" of the process, the undisputed evidence—including multiple official statements by Secretary Mattis—shows that such statements refer to the exercise of independent judgment about how, not whether, to reverse the Carter Policy. Secretary Mattis has not claimed that he or other military officials were free to disregard the President's direct commands, and the evidence on which Defendants have relied directly supports the contrary conclusion: the review process that led to the Mattis Plan was

circumscribed at every stage by the President's directive to reverse the Carter Policy and restrict military service by transgender people.

**3. The Mattis Plan Fails Intermediate Scrutiny.**

The Mattis Plan bans military service by transgender individuals. As the Court previously concluded, such a ban is subject to heightened scrutiny. That standard of scrutiny is no less applicable to a ban adopted by military leaders than it is to the President's announcement of a ban on Twitter. Even if the Mattis Plan warranted the same deference the Supreme Court has given to military judgment in previous cases, its facially discriminatory policy violates the Fifth Amendment's guarantees of equal protection and due process because the governmental interests Defendants assert, even if important, are not substantially advanced by barring all transgender persons from service. For this reason, Plaintiffs are entitled to summary judgment even if Defendants are correct that the Mattis Plan represents a "new" policy adopted as an exercise of military professional judgment independent of the President's 2017 directives.

To satisfy intermediate scrutiny, the government must demonstrate an "exceedingly persuasive justification" for its actions. *Virginia*, 518 U.S. at 531. "The burden of justification is demanding and it rests entirely on" Defendants. *Id*. at 533. The government "must show 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Id*. (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (alteration in original)). "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Id*. "[I]t must not rely on overbroad generalizations about the different talents, capacities, or preferences" of transgender persons. *Id*. And under any standard of review, "'a bare … desire to harm a politically unpopular group cannot' justify disparate

treatment of that group." *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973)).

Defendants cannot meet that standard here. Rather than offering an "exceedingly persuasive" justification for treating transgender people differently from all others, the Report relies on impermissible gender stereotypes and on the type of "overbroad generalizations" and "fixed notions concerning the roles and abilities" of transgender people that intermediate scrutiny forbids. It is a classic "post hoc" defense generated in response to litigation. In addition, both the novelty (revoking rights previously given) and the sheer breadth of the Mattis Plan (excluding an entire class of people) are so discontinuous with the reasons offered for its adoption that it is "inexplicable by anything but animus toward the class it affects." *Romer*, 517 U.S. at 632.

**a. The Ban Does Not Promote Military Readiness.**

Banning individuals from military service because they are transgender undermines military readiness. The military already has universal policies for enlistment, deployment, and retention. Apart from transgender people, the military relies on these universal standards to determine fitness to serve; no other class of people is excluded from individualized evaluation under those standards or presumed to be unfit simply by virtue of their membership in a particular class. Because transgender service members must already comply with military-wide policies, having a separate policy that excludes them from service simply for being transgender serves only to bar transgender individuals who are fit to serve and to deploy.

*First*, under generally applicable enlistment criteria, all prospective military service members must undergo a rigorous examination to identify any preexisting physical or mental health diagnoses that would preclude enlistment. *See* Milgroom Decl. Ex. II (DoD Instruction 6130.03) at 1.2(c). Ignoring that this screening process already applies to transgender persons as

well, the Panel Report seeks to justify banning transgender people from accession by claiming that they "suffer from high rates of mental health conditions such as anxiety, depression, and substance use disorders" and "[h]igh rates of suicide ideation, attempts and completion." Panel Report 21. But even if these sweeping assertions were true—and they are not—they do not explain the need to single out a particular group (transgender people) for exception from that screening and presumption of its outcome when the military already directly screens for those conditions. Anyone with a history of suicidal behavior—whether transgender or not—is barred from enlisting. *See id.*; DOD Instruction 6130.03 at 5.28(f); Milgroom Decl. Ex. PP (USMEPCOM Regulation No. 40-1, Medical Qualification Program) ¶ 1-1. Anyone with a history of anxiety or depression—whether transgender or not—is barred from enlisting unless they meet generally applicable criteria to demonstrate those conditions will not limit their ability to serve. *See* DOD Instruction 6130.03 at 5.28(f), (q). Under these universal standards, any enlistee, whether transgender or not, is screened to ensure that their past or current medical or mental health history is consistent with service requirements.

Defendants do not claim, nor is it true, that every transgender person shares the characteristics that raise these purported fitness and deployment concerns. As a result, the only effect of the transgender ban is to exclude transgender applicants who are otherwise qualified and fit to serve. The only impact of the policy is to impede, not advance, military readiness.

The irrationality of that result—excluding fit applicants—is why the military does not adopt a similar categorical approach to other demographic groups who have or may have disproportionate rates of depression, suicidality, anxiety, or other mental health conditions. For example, children of service members have a significantly elevated incidence of suicide attempts. Milgroom Decl. Ex. QQ (Decl. of Dr. George Brown ISO Opp. to Mot. to Dissolve

("Brown Decl.") ¶ 22. But the military does not exclude them from military service. Women are twice as likely as men to have anxiety disorders, but the military does not bar women from military service. *Id.* Depression, anxiety, and suicide are more common among white people than black people, but the military does not bar white people from military service. *Id*. Defendants' reliance on this rationale to support a categorical exclusion of transgender people is completely anomalous—strongly suggesting that the policy is based on animus rather than legitimate concerns. *Cf. Garrett*, 531 U.S. at 366 n.4 (noting that a policy should be struck down where its "justifications … made no sense in light of how the [government] treated other groups similarly situated in relevant respects").

The Mattis Plan also irrationally invokes concerns about deployability to justify barring from enlistment even transgender individuals who have completed gender transition and need no further medical care beyond the same routine hormone therapy required by many other service members. *See* Mattis Plan 2; PSUMF ¶ 75. Because the individuals excluded by that prohibition need no surgeries, there is no connection (much less a substantial one) between the policy and any purported concerns about transgender service members' potential nondeployability due to transition-related surgical care. Instead, the policy excludes individuals who are medically stable and fit and who—but for Defendants' singular treatment of transgender people—would be able to meet the same accession criteria applied to other similarly situated applicants.

*Second*, the policy also irrationally excludes transgender people from universal deployment standards that already mandate the discharge of service members who are nondeployable "for more than 12 consecutive months, for any reason." Milgroom Decl. Ex. MM at 1. Defendants do not claim (nor could they) that every transgender service member is incapable of meeting that standard. By their own admission, not all transgender persons undergo

any surgical treatments, and even for those who do, the typical recovery times fall well short of 12 months. Panel Report 23; *see also* Milgroom Decl. Ex. SS (Decl. of Dr. Joshua D. Safer) ¶¶ 17-22 (describing related testimony before the panel of experts). The only effect of having a special rule for transgender people—again—is to require the discharge of individuals who can meet the universal deployment standards and thus to undermine military readiness.

*Finally*, the ban also irrationally creates a special rule requiring discharge of any service member who "require[s] transition" as part of their medical care rather than relying on medical retention standards that already apply to all service members. *Compare* Panel Report 32, *with* Milgroom Decl. Ex. B (DOD Instruction 1332.18, Disability Evaluation System (DES)). Under those existing standards, any service member who develops a health condition that could result in unfitness must undergo a medical evaluation process, including review by a medical evaluation board. *See* DOD Instruction 1332.18 at Encl. 3.2.a (purpose of medical evaluation board); Encl. 3.3.a (purpose of physical evaluation board); Encl. 3, App'x 1.2 (criteria for referral). That review determines whether there are restrictions on the person's ability to serve and may, where appropriate, result in discharge. *See id.*[6] Defendants' policy diverts transgender service members from that individualized review process and subjects them to automatic discharge. There is nothing unique to gender dysphoria or its treatment that justifies bypassing the ordinary medical evaluation process that is already in place. The government does not claim (nor is it true) that all transgender people who require gender transition would fail that

[6] Each service issues implementing instructions to DODI 1332.18 that detail the medical concerns that trigger review by a medical evaluation board. *See, e.g.*, Milgroom Decl. Ex. OO (Army Regulation 40-501, Standards of Medical Fitness). Under those force-wide Army retention standards, mental health counseling, hormone therapy, or surgical treatment do not generally trigger a requirement for a medical evaluation board.

individualized review.[7] Once again, the only effect of Defendants' policy is to require the discharge of individuals who are otherwise fit to serve—thereby undermining, rather than advancing, military readiness.[8]

In sum, singling out transgender people for a special exclusionary rule based on speculation that some transgender people may fail to meet the same military standards applied to all others is both dramatically overinclusive in excluding many transgender people who are fit to serve, and dramatically underinclusive in failing to recognize that many non-transgender people have medical needs that may result in periods of nondeployability or may be at increased risk of the same conditions that Defendants claim justify excluding transgender people. Laws that are "grossly over- and under-inclusive" are thus "so poorly tailored" to any legitimate interest that they "cannot survive heightened scrutiny." *Latta v. Otter*, 771 F3d 456, 472 (9th Cir. 2014); *see also Bostic v. Schaefer*, 760 F.3d 352, 382 (4th Cir. 2014) (rejecting justification that is "so underinclusive" that the policy's real justification "must have rested on irrational prejudice" (internal quotation marks omitted)). As the Second Circuit held in *Crawford*, 531 F.2d at 1123, a military policy that singles out a condition associated with a particular group—in that case,

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[7] As explained by Plaintiffs' expert Dr. George Brown: "If a transgender service member's limited period of nondeployability complies with those generally applicable standards, there is no reason why the service member should be automatically discharged simply because" they are receiving transgender-related care. Milgroom Decl. Ex. QQ (Decl. of Dr. George Brown ISO Opp. to Mot. to Dissolve ("Brown Decl.")) ¶ 41.

[8] Consistent with this pattern of subjecting transgender people to standards not applied to others, the Report states that there is "scientific uncertainty surrounding the efficacy of transition-related treatments for gender dysphoria," citing the absence of "randomized controlled trials." Panel Report 26-27. However, because the military does not apply such a high standard of efficacy to other medical conditions, this asserted rationale holds "treatment for gender dysphoria to … a standard that few if any medical conditions are required to meet." Brown Decl. ¶ 16. As Dr. Brown states, "[i]f the military limited all medical care to surgical procedures supported by prospective, controlled, double-blind studies," very few medical conditions would be treated, and many common procedures such as tonsillectomies and appendectomies would not be provided. *Id.* ¶¶ 13-15.

pregnant women—in such an anomalous fashion fails even rational basis review: "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."

**b. Defendants' arguments about unit cohesion are circular and rest on impermissible gender stereotypes.**

Defendants' attempt to justify the ban on transgender service members because their mere presence is "[i]ncompatible with [s]ex-[b]ased [s]tandards" is also meritless. Panel Report 35. Defendants' Report simply points to a number of instances where the military has different standards for men and women—none of which Plaintiffs challenge here—and then asserts that the presence of transgender service members would be incompatible with "biologically-based" standards. *Id.* at 36. That is not an argument; rather, it is a tautology that merely restates the policy's discriminatory exclusion (only persons living in their birth sex may serve) as an asserted justification.

Plaintiffs do not challenge the ability of the military to maintain any of the sex-based standards that currently exist in the Armed Forces. They simply seek to be held to the same standards as everyone else. Using the phrase "biologically based" to describe these standards does nothing to justify discrimination; nor does it give Defendants *carte blanche* to exclude transgender service members. *See* Panel Report 36.

Permitting transgender men to serve as men and transgender women to serve as women does not disrupt the military's maintenance of sex-based standards in the few areas where they exist. Under the open service policy that went into effect in July 2016, a service member's sex for all purposes while in the military is determined by the DEERS marker. Dkt. No. 13-10, Ex. F (Transgender Service Implementation Handbook) at 11; PSUMF ¶ 36. Changing the DEERS

marker requires demonstration of completion of gender transition and requires a commander's approval, consistent with that commander's evaluation of "expected impacts on mission and readiness." *See* Milgroom Decl. Ex. G (DODI 1300.28) at 1.2(f); Milgroom Decl. Ex. RR (Declaration of Brad R. Carson ISO Opp. to. Mot. to Dissolve ("Carson Decl.")) ¶¶ 12-19, 26; PSUMF ¶ 35. That process creates a bright line rule that ensures the military can maintain sex-based standards, when appropriate, including with regard to the transgender men and women to whom the same standards also apply.

Defendants' contention that a transgender person who retains some physical characteristics of his or her birth sex inherently violates the privacy rights of others has no merit. Panel Report 37. As this Court has already held, "[t]he defining characteristic of a transgender individual is that their inward identity, behavior, and possibly physical characteristics, do not conform to stereotypes of how an individual of their assigned sex should feel, act, and look." PI Order 62. To argue that the mere presence of such a person violates the privacy rights of others is to rely on the same impermissible gender stereotypes that explain why discrimination against transgender people is "a form of discrimination on the basis of gender." *Id.*[9] Defendants' reliance on such stereotypes cannot justify their discrimination against transgender people; rather, it shows why their discriminatory policy fails heightened scrutiny.

Defendants' argument boils down to a claim that, simply by existing as such, transgender people undermine sex-based standards. But if that claim were sufficient to justify barring all transgender people from military service, it would also justify their exclusion from any, and all,

[9] Defendants point to no law in support of their professed concern about liability for violating federal statutes by authorizing transgender people to comply with gender-based standards based on their identity, nor could they. *See Cruzan v. Special School District*, 294 F.3d 981 (8th Cir. 2002) (rejecting discrimination claim brought by non-transgender woman against school that authorized transgender woman's use of shared women's restroom).

institutions that maintain sex-based criteria for facilities, including schools, workplaces, public accommodations, and beyond. In effect, and consistent with their policy requiring transgender people to live in their birth sex in order to serve in the military, Defendants' claim would banish transgender people from any ability to live or participate in virtually any aspect of public life.

Courts have rejected the use of Defendants' rationale to justify discrimination against transgender individuals in other settings. *See Whitaker*, 858 F.3d at 1046-47; *M.A.B. v. Bd. of Educ. of Talbot Cty*., 286 F. Supp. 3d 704, 723-26 (D. Md. 2018); *Doe v. Boyertown Area Sch. Dist*., 276 F. Supp. 3d 324, 383-90 (E.D. Pa. 2017), appeal filed, 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). As these courts have recognized, permitting transgender individuals to live in accord with their gender identity does not undermine the existence of sex-based activities or facilities, nor does it threaten the privacy or safety interests of others. The same analysis applies here.

To the extent Defendants claim there is anything unique about the military justifying a departure from this established precedent, that argument is belied by the military's successful implementation of extensive guidance and training since the adoption of the open service policy. *See* Milgroom Decl. Ex. RR (Carson Decl.) ¶¶ 12-19, 26, 29; PSUMF ¶¶ 31-40. With nearly two years of experience integrating openly transgender people into the service, it is notable that Defendants present no evidence in support of their claims and rely instead on hypothetical rather

than actual concerns. Panel Report 36-37.[10] Under the heightened scrutiny that applies to this case, such hypothetical justifications are insufficient to justify Defendants' policy. *See Virginia*, 518 U.S. at 533. And "[t]o the extent this is a thinly-veiled reference to an assumption that other service members are biased against transgender people, this would not be a legitimate rationale for the challenged policy." PI Order 66 n.10 (citing *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.")).

Defendants' arguments are similar to those rejected by the court in *Owens*. In that case, the government sought to justify a law that barred Navy commanders from assigning female personnel to ships. 455 F. Supp. at 294-95. The government argued that permitting such assignments would undermine morale and discipline, citing "the unknown effects that full sexual integration might have on group dynamics." *Id.* at 306. The court rejected that justification as legally insufficient and granted summary judgment to the Plaintiffs: "'Commanding Officers have sufficient authority to deal with persons having difficulty adjusting to mixed crews. … Adjustments and thawing of previously held barriers to the presence of women and acceptance by the male ship's company are social facts of life which must be recognized and dealt with.'" *Id.* at 309. The court therefore concluded that "none of the practical concerns regarding the integration of male and female personnel afford a warrant for upholding the total exclusion reflected in [the challenged law]. Whatever problems might arise from integrating shipboard

[10] Tellingly, the "best illustration" Defendants can muster is a single commander who "was confronted with dueling equal opportunity complaints" arising from a conflict between a transgender woman and a non-transgender woman. Panel Report 37. However, if the mere existence of a single conflict or complaint were sufficient to justify the exclusion of an entire group of people, then many other groups—including women, gay people, religious minorities, and many racial and ethnic groups—would likely be unable to serve.

crews are matters that can be dealt with through appropriate training and planning." *Id.* The same analysis applies here. Commanding officers have ample authority to deal with any persons having difficulty adjusting to transgender service members, just as they have dealt with any such issues relating to the military's inclusion of women, racial and religious groups, and gay people.[11] The military has already engaged in significant planning and training on this issue, and transgender troops have been serving openly for more than two years. In light of those realities, Defendants' hypothetical concerns that transgender people undermine cohesion, order, or discipline have no bases in fact; like those rejected in *Owen*, they are legally insufficient to justify a policy that facially discriminates based on sex.

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[11] The Panel Report also omits pertinent information relating to the flexibility of the military's sex-based standards, which already recognize that there is a significant degree of individual variation in size, strength, and other related characteristics and that gender is only ever an approximate proxy for such considerations. For example, the Report concludes that fairness and safety are compromised when transgender women compete with other women in sporting events such as boxing competitions (Panel Report 29), citing an article on boxing at the U.S. Military Academy, which stated that "[m]atching men and women according to weight may not adequately account for gender differences regarding striking force" (*id.* at 29 n.110). But the Report omits that the same article observed that cadets' skill level and aggression, not just weight, are factored into safety decisions, and that the Academy *allows* men and women to box each other during training. *See* Bedard et al., *Punching Through Barriers: Female Cadets Integrated into* Mandatory *Boxing at West Point*, Association of the United States Army (Nov. 16, 2017).

Similarly, the Report asserts that under British military policy, transgender persons may be excluded from gender-segregated sports for safety reasons. *See* Panel Report 29 n.110. In fact, the full text of the relevant British regulation merely provides for the same sort of flexibility that the U.S. military currently applies in boxing and other activities involving male and female service members and states that "persons responsible for regulating participation of competitors in sporting events [are not required] to permit transsexual people to compete in their acquired gender in all circumstances." UK Sport & Dept. for Culture, Media, and Sport, Transsexual People and Sport: Guidance for Sporting Bodies ¶ 15 (May 2005). As these sources demonstrate, under both U.S. and foreign military policies, sex-based rules are adjustable based on the circumstances.

**c. Banning transgender people from military service cannot be justified based on cost.**

Defendants argue that the ban is justified by "the military's general interest in maximizing efficiency through minimizing costs." US SJ Br. 33. Under heightened review, however, Defendants "must do more than show that denying … medical care … saves money." *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 263 (1974). "The conservation of the taxpayers' purse is simply not a sufficient state interest" to justify an equal protection violation under heightened scrutiny. *Id.*; *see also Graham v. Richardson*, 403 U.S. 365, 375 (1971) ("The saving of welfare costs cannot justify an otherwise invidious classification." (quoting *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969))).

Even under rational basis review, "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler v. Doe*, 457 U.S. 202, 227 (1982). The government must articulate more than a desire to save resources; it must justify why it chose a particular group, as opposed to others similarly situated, to bear the burden of cost savings. *Id.* at 229 (cost-cutting could not justify denying free public education to children of undocumented immigrants); *see also Diaz v. Brewer*, 656 F.3d 1008, 1013 (9th Cir. 2011) ("[W]hen a state chooses to provide [health care] benefits, it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular.").

Defendants have not explained why the cost savings they seek should be borne by transgender service members. As Margaret Wilmoth, former Deputy Surgeon General for Mobilization, Readiness and Army Reserve Affairs in the Office of the Surgeon General of the United States Army, explained, for the "large majority" of transgender service members' medical care needs, the Military Health System (MHS) "already provid[es] the same or substantially similar services to other service members." Dkt No. 13-13 (Wilmoth PI Decl.) ¶¶ 14-21.

Because the military already provides substantially the same medically necessary surgical and other care for other conditions, Defendants have no sufficient cost-related justification for a policy banning transgender persons from military service. Indeed, their cost-savings argument does nothing more than attempt to "justify [their] classification with a concise expression of an intention to discriminate." *Plyler*, 457 U.S. at 227.

**d. The "grandfather clause" highlights the incoherence of the Mattis Plan.**

Defendants' decision to permit some transgender service members to remain on active duty during or after the process of gender transition while forbidding others from doing the same only highlights the absence of any legitimate basis for banning transgender troops. Mattis Plan, 2; PSUMF ¶ 77. Defendants claim that allowing transgender people to serve will compromise military readiness, yet they propose to allow currently serving transgender individuals who have already transitioned or begun the process of doing so to do exactly that. It is only transgender service members who have not yet sought to transition or those who see to join the military after transitioning in the future who are subjected to this discriminatory refusal. *Id*. at 2-3. If transgender service members who are already serving openly can complete their transition and serve honorably and effectively, then transgender service members who have not yet publicly identified themselves and sought to transition or who join the military going forward can do the same. Defendants' creation of this exception fatally undermines any argument that the ban serves even a legitimate purpose, much less that it is supported by an "exceedingly persuasive justification." *Cf. In re Levenson*, 587 F.3d 925, 933 (9th Cir. 2009) (rejecting a "drastically underinclusive" policy as irrational).

**4. The same "unusual factors" that warranted a preliminary injunction support granting Plaintiffs' cross-motion for summary judgment.**

Defendants argue that "'the unusual factors' that caused this Court to rule that the 2017 Presidential Memorandum would likely fail intermediate scrutiny are absent here." US SJ Br. 37. In fact, however, those factors still exist and strongly support Plaintiffs' equal protection claim. *First*, the Mattis Plan sweeps broadly, excluding transgender people from enlisting or serving; the limited "grandfather clause" for the small number of transgender people who have already come out does not alter the policy's broad goal of eliminating all transgender people from military service.

*Second*, Defendants' asserted justifications for excluding transgender people from military service continue to be both extremely "overbroad" and "hypothetical." Like the generalizations about women that the Supreme Court held to be legally insufficient in *Virginia*, the Report rests on sweeping generalizations about the alleged unfitness of transgender people, despite the undisputed fact that many transgender people are able to meet the same standards as others. 518 U.S. at 541-42 (holding that even if statistical evidence regarding the "propensities" or "average capacities" of most women is accurate, "the question is whether the Commonwealth can constitutionally deny [the opportunity to attend VMI] to women who have the will and capacity"). The Report also rests on hypothetical concerns that transgender people may undermine unit cohesion, despite the absence of any non-invidious basis for those concerns.

*Third*, it remains true that the only independent military examination of military service by transgender people—conducted prior to adoption of the Carter Policy—concluded that there is no valid reason to exclude transgender people from military service. While Defendants have now conducted a subsequent review of this issue at the President's direction, that process was significantly circumscribed by the President's decision to reinstate a ban. The mere existence of

a *post hoc* review process does not mitigate the illegitimate manner in which the ban was first adopted, nor the inescapable inference that the ban is based on prejudice, not genuine military concerns. At a minimum, under settled law, this Court must view such *post hoc* justifications with considerable skepticism. *See Virginia*, 518 U.S. at 533.

*Finally*, like the President's directives, the Mattis Plan involves a "targeted revocation of rights from a particular class of people which they had previously enjoyed." PI Order 71. Such revocations are rare, Milgroom Decl. Ex. RR (Carson Decl.) ¶ 10 (recent review panel assessment was "atypical … because it does not account for the service level impacts where its conclusions may result in discharge of thousands of people currently in service"), and generally raise heightened equal protection concerns. *See Windsor*, 133 S. Ct. at 2692 ("[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." (quoting *Romer*, 517 U.S. at 633) (alteration in original)).

These factors underscore the need for this Court's careful review and the continued validity of the Court's conclusion that "meaningful scrutiny of the constitutionality of the [Mattis Plan] is appropriate despite the fact that they pertain to decisions about military personnel." PI Order 63.

### B. This Court Should Grant Summary Judgment To Plaintiffs On Their Due Process Claim

Due process requires that the government act on a rational basis, not impermissibly burden the exercise of a fundamental right, and not arbitrarily upset settled expectations and commitments. *INS v. St. Cyr*, 533 U.S. 289, 323 (2001); *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845-846 (1998). Defendants' decision to revoke the Carter Policy and ban open service of transgender individuals violates all of those basic requirements.

*First*, "the core" of due process is the protection against arbitrary government action. *Lewis*, 523 U.S. at 845. Thus, the government cannot exercise power "without any reasonable justification in the service of a legitimate governmental objective." *Abdelfattah v. U.S. Dept. of Homeland Sec.*, 787 F.3d 524, 540 (D.C. Cir. 2015). For the reasons discussed above, Defendants' ban on military service by qualified transgender individuals is arbitrary and has no reasonable relationship to any legitimate governmental objectives. As this Court has already recognized, the decision to prohibit open service by transgender individuals was made suddenly, with no deliberative process, and for no legitimate reason—the Mattis Plan's attempt to justify the President's tweets after the fact does not change that. *See* PI Order 65-68. Defendants' policy violates Plaintiffs' right to due process on that basis alone.

*Second*, Defendants' policy infringes on Plaintiffs' fundamental right to live in accord with a basic component of their identity, just as non-transgender people are able to do. A person's gender identity is immutable. PI Order 60; Brown PI Decl. ¶ 15. Requiring transgender individuals to suppress that identity in order to serve in the military strips them of a basic human liberty. As the Supreme Court has repeatedly recognized, "the ability independently to define one's identity" is "central to any concept of liberty." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984); *see Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) (due process "allow[s] persons, within a lawful realm, to define and express their identity"); *Lawrence v. Texas*, 539 U.S. 558, 562 (2015) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."). The Court has also held that the Due Process Clause protects the right to autonomy, which includes important personal decisions that define the meaning of a person's life—such as the freedom to choose whether and whom to marry, whether to use birth control, whether to have a child, how to raise one's child, and whether to engage in

consensual adult intimacy. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *Lawrence*, 539 U.S. at 578. The right to live in accord with one's gender identity falls within the same core protection of personal decision making and identity established by these precedents. Here, Plaintiffs attest to knowing their gender as a core aspect of identity even before they had a word for it. *See* Dkt. 40-5 (John Doe 1 Decl.) ¶ 2 ("From an early age, although I did not understand what it meant to be transgender, I identified as male[.]"); *see also* Dkt. 13-14 (Kibby Decl.) ¶¶ 10-15; Dkt. 13-15 (Kohere Decl.) ¶¶ 5-10; Dkt. 40-2 (Jane Doe 2 Decl.) ¶¶ 1-2; Dkt. 40-3 (Jane Doe 3 Decl.) ¶ 1; Dkt. 40-4 (Jane Doe 4 Decl.) ¶¶ 2, 11; Jane Doe 6 Decl. ¶ 7; Jane Doe 7 Decl. ¶ 2; John Doe 2 Decl. ¶ 2.

The Mattis Plan allows non-transgender individuals to serve in accord with their gender identity but prevents transgender individuals from enjoying that same right. When a law or policy selectively denies a protected liberty, heightened scrutiny applies. *See, e.g.*, *Obergefell*, 135 S.Ct. at 2603. That is true even within the context of military service. *See Witt*, 527 F.3d at 819. For the reasons already discussed, Defendants' sudden, arbitrary decision to revoke the Carter Policy and reinstate a ban on service by transgender persons cannot satisfy rational basis review, let alone heightened scrutiny. *See supra* pp. 22-36.

*Finally*, for those Plaintiffs who are currently serving, the ban violates their due process rights for an additional reason. The Due Process Clause prohibits the government from arbitrarily punishing conduct that the government itself previously sanctioned and induced. *See St. Cyr*, 533 U.S. at 323. The "canons of decency and fair play" that animate the Due Process Clause, *Rochin v. California*, 342 U.S. 165, 173 (1952), "constrain the extent to which

government can upset settled expectations," *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 471 n.22 (1985). Expectations concerning the lawfulness of one's actions, especially, must "not be lightly disrupted," as "considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

Defendants' arbitrary decision to revoke the rights previously given to transgender service members violates Plaintiffs' due process rights. Many transgender service members publicly identified themselves as transgender, undertook medical treatment, and changed their gender markers in reliance on the Carter Policy. Defendants' change in policy penalizes Plaintiffs and other transgender persons for engaging in the very conduct— identifying themselves as transgender—that the government itself encouraged. As discussed above, currently serving Plaintiffs are harmed by this change in policy in numerous ways notwithstanding the grandfather clause. *See infra* pp. 39-42. Due Process prevents Defendants from arbitrarily "changing course" in a way that so violently upsets settled expectations.

## II. BECAUSE THIS CASE PRESENTS A JUSTICIABLE CONTROVERSY THE COURT SHOULD REJECT DEFENDANTS' REMAINING ARGUMENTS AND DENY THEIR MOTION FOR SUMMARY JUDGMENT

### A. Plaintiffs Have Standing

For the reasons stated below and more fully set forth in Plaintiffs' opposition to Defendants' motions to dissolve the preliminary injunction and dismiss the Second Amended Complaint, undisputed facts demonstrate that each Plaintiff has standing to challenge the ban as articulated in the Mattis Plan. The record contains undisputed evidence establishing that each plaintiff falls into one of the following categories: (1) Current transgender service members who have transitioned or begun to transition. *See* Jane Doe 2 Decl. ¶¶ 11-19; PSUMF ¶¶ 91-94; Jane Doe 3 Decl. ¶¶ 7-17; PSUMF ¶¶ 95-98; Jane Doe 4 Decl. ¶¶ 10-18; PSUMF ¶¶ 99-101; John

Doe 1 Decl. ¶¶ 16-29; PSUMF ¶¶ 113-17; Kibby Decl. ¶¶ 17-36; PSUMF ¶¶ 125-26. (2) Current transgender service members who have not yet sought to transition. *See* Jane Doe 6 Decl. ¶ 18; PSUMF ¶¶ 102-09. (3) Transgender individuals who wish to join the military but will be prevented from doing so under the policy set forth in the Mattis Plan. *See* Kohere Decl. ¶¶ 1, 9-10, 16-17; PSUMF ¶¶ 128-31; Jane Doe 7 Decl. ¶¶ 7, 9-10; PSUMF ¶¶ 110-12; John Doe 2 Decl. ¶¶ 9, 11, 13; PSUMF ¶¶ 118-22.

As the Court explained in its preliminary injunction order, "Plaintiffs have established that they will be injured by these directives, due both to the inherent inequality they impose, and the risk of discharge and denial of accession that they engender." PI Order 2. The Court found that "the Accession and Retention Directives of the Presidential Memorandum impose a competitive barrier that the Named and Pseudonym Plaintiffs are substantially likely to encounter" and "that this barrier constitutes an injury in fact." PI Order 43. "The 'injury in fact element of standing in an equal protection case is the denial of equal treatment resulting from the imposition of the barrier.'" *Id.* at 39 (quoting *Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44, 51 (D.C. Cir. 2016)). Plaintiffs continue to suffer those injuries under the Mattis Plan.

Jane Does 2 through 5 and John Doe 1—current service members diagnosed with gender dysphoria—continue to suffer injury in fact because the Mattis Plan subjects them to "inherent inequality." PI Order 2. Even if permitted to continue to serve, Plaintiffs suffer the disparate, adverse treatment of being marked as members of a small group allowed to remain only as an exception to a policy that otherwise subjects members of the group to discharge. The Mattis Plan stigmatizes them as members of a group the military deems mentally unstable, burdensome, and dangerous to the safety and privacy of others. In doing so, it denies them the opportunity to

serve on an equal footing with their peers. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995).

Having been branded as part of a class that is unfit to serve, these Plaintiffs face a substantial risk they will have reduced opportunities for assignments, promotion, training, and deployment, and are placed in harm's way by the eroded bonds of trust with their fellow service members and commanders. *See, e.g.*, Jane Doe 2 Decl. ¶ 15; Dkt. No. 51-4 (Eitelberg Decl.) ¶¶ 5, 8, 11; Dkt. No. 51-3 (Fanning Supp. Decl.) ¶ 5; Dkt. No. 51-1 (Mabus Supp. Decl.) ¶¶ 4-7.

For the other currently serving Plaintiff, Jane Doe 6, the Mattis Plan bars her from transitioning. Because Jane Doe 6, who currently serves in the Army, never received a diagnosis of gender dysphoria from a military physician (nor could she do so now without being marked part of the excluded group), she is not permitted to serve consistent with her gender identity and cannot obtain appropriate military health care. Jane Doe 6 Decl. ¶¶ 13, 18, 21; PSUMF ¶¶ 104-07.

Jane Doe 7 and John Doe 2, who are prospective service members who have already undergone gender transition and taken steps toward enlistment, are forbidden to serve under the express terms of the Mattis Plan because of their transition. Jane Doe 7 Decl. ¶ 10; PSUMF ¶¶ 110-12; John Doe 2 Decl. ¶ 14. Plaintiff Dylan Kohere is a transgender man who is barred from serving because he cannot do so "in [his] biological sex" as the Mattis Plan dictates. *Compare* Kohere Decl. ¶ 15, *with* Mattis Plan 2. He too is categorically barred because he is transgender.

Defendants argue that even though the Mattis Plan bars these Plaintiffs from serving, they nonetheless lack standing to challenge it because it has not yet gone into effect. These arguments are meritless. The only reason that the Mattis Plan has not gone into effect is that this

Court (and other district courts) preliminarily enjoined the enforcement of the government's discriminatory policies. Defendants have made clear that they intend to implement the Mattis Plan as soon as possible, and they have sought to dissolve the preliminary injunction only out of an abundance of caution so that they can do so. *See* US SJ Br. 2. If this Court were to dissolve the injunction as Defendants request, Defendants will implement the Mattis Plan, and Plaintiffs will be barred from serving. In effect, Defendants are arguing that Plaintiffs lack standing because they obtained a preliminary injunction. Unsurprisingly, Defendants offer no authority to support that proposition. The question is not whether Plaintiffs are being injured by the *enjoined* ban; the question is whether Plaintiffs will be injured if Defendants were to *implement* the ban, as they seek to do. Plaintiffs have standing because (1) the Mattis Plan is certain to inflict injury in fact on Plaintiffs; (2) there is a direct causal connection between the Mattis Plan and those injuries, and (3) the relief Plaintiffs seek—permanent injunctive and declaratory relief barring enforcement of the Mattis Plan—would fully redress those injuries. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

**B. The Case Is Not Moot**

For the reasons more fully set forth in Plaintiffs' opposition to Defendants' motions to dissolve the preliminary injunction and dismiss the Second Amended Complaint, Defendants have failed to carry their "'heavy' burden" of demonstrating that this action is moot. *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 459 (D.C. Cir. 1998) (citation omitted). Defendants have failed to show, as they must, both that "the challenged conduct [has] cease[d] such that there is no reasonable expectation that the wrong will be repeated," and that it is "impossible for the court to grant any effectual relief whatever to the prevailing party." *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1135 (D.C. Cir. 2009) (citation omitted).

*First*, Defendants' mootness argument fails because Plaintiffs' Second Amended Complaint directly challenges and seeks to enjoin the Mattis Plan. Defendants cannot escape the obvious fact that there remains a live controversy, unambiguously alleged in Plaintiffs' amended complaint, with respect to this latest iteration of the ban. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473-74 (2007).

*Second*, Defendants have failed to carry their burden of establishing mootness because the Mattis Plan continues to deprive Plaintiffs of the right to serve as equal members of the military solely because they are transgender. Because the Mattis Plan continues to harm Plaintiffs "in the same fundamental way" as the ban announced by the President, this action is not moot. *Global Tel*Link v. FCC*, 866 F.3d 397, 414 (D.C. Cir. 2017) (citation omitted).

*Third*, it is well established that a defendant's voluntary cessation of unlawful conduct does not moot a case unless the defendant can carry "the heavy burden of showing it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to occur" and that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Aref v. Lynch*, 833 F.3d 242, 251 (D.C. Cir. 2016) (citations omitted) (internal quotation marks omitted). Even if the Mattis Plan could be regarded as an entirely new policy that supersedes the ban announced by the President, Defendants could not carry this heavy burden. The policy articulated in the Mattis Plan is a ban on military service by transgender people, which continues to harm Plaintiffs in substantially the same way as the ban previously enjoined by the Court. Thus, under well-established principles, Defendants' policy, whether characterized as new or a continuation or implementation of the prior ban, does not moot this case.

## III. THE COURT SHOULD ENTER PERMANENT DECLARATORY AND INJUNCTIVE RELIEF

The Court recognized early in this litigation that preliminary injunctive relief was necessary to protect Plaintiffs from harms that would result from a ban on transgender military service, including the risk of separation from the military, the denial of a chance to compete on equal footing, the stigmatizing effect such a ban would have, and the constitutional injury of imposing inherent inequality. PI Order 73-74. These harms are no less serious now that the case has progressed, and, as discussed above, Defendants' baseless and irrational policy would cause Plaintiffs significant injury were it allowed to take effect. Because the Mattis Plan in its final form fails to survive heightened scrutiny and unconstitutionally discriminates against transgender people, the preliminary relief entered by the Court must be made permanent if Plaintiffs are to be protected from these grave harms. *See PDK Labs Inc. v. Ashcroft*, 338 F. Supp. 2d 1, 6 (D.D.C. 2004) ("'[A] district court may convert an opinion granting a preliminary injunction into one granting a permanent injunction … by expressly recasting its findings and conclusions in terms of the proper legal standard applicable to a permanent injunction.").

Accordingly, Plaintiffs request an order (1) ruling that Defendants and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with Defendants who receive actual notice of this Order, excepting Defendant Donald J. Trump, are permanently enjoined from excluding individuals, including Plaintiffs, from entering military service on the basis that they are transgender (including because a person has undergone gender transition); and (2) ruling that Defendants and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with Defendants who receive actual notice of this Order, excepting Defendant Donald J. Trump, are permanently enjoined from separating, denying reenlistment, demoting, denying promotion, denying medically necessary treatment on a timely basis, or otherwise subjecting any service member, including

Plaintiffs, to adverse treatment or differential terms of service on the basis that they are transgender (including because a person requires or has undergone gender transition). Plaintiffs also request a declaration running against all Defendants that the policy of excluding transgender people from military service is unconstitutional and violates the Equal Protection and Due Process guarantees of the Fifth Amendment.[12] Only this relief may fully relieve Plaintiffs of the debilitating burden placed on them by the stigmatizing and discriminatory statements made by the President and in the Mattis Plan concerning their fitness to do their jobs, to fight for freedom, and to serve their country.

## CONCLUSION

Plaintiffs' cross-motion for summary judgment should be granted and the government's motion for summary judgment should be denied.

[12] Contrary to Defendants' argument, President Trump is not immune from declaratory relief. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 425 n.9 (1998) (affirming entry of declaratory judgment against President Clinton stating that Line Item Veto Act was unconstitutional); *National Treasury Emps. Union v. Nixon*, 492 F.2d 587, 609 (D.C. Cir. 1974) ("[N]o immunity established under any case known to this Court bars every suit against the President for injunctive, declaratory or mandamus relief."); *see also Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir.) (vacating injunctive relief against President Trump, but not dismissing him in suit for declaratory relief), *vacated as moot*, 874 F.3d 1112 (9th Cir. 2017); *Karnoski*, 2018 WL 1784464, at *13 ("And here, it is particularly appropriate for the Court to issue a declaratory judgment running against the President.").

May 11, 2018

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| JANE DOE 2 *et al.*, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Civil Action No. 17-cv-1597 (CKK) |
| DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, | ) | |
| Defendants. | ) | |

**PLAINTIFFS' OBJECTIONS AND RESPONSES TO DEFENDANTS' STATEMENT OF FACTS**

The Plaintiffs made the following recurring objections to admissibility:

1. Plaintiffs object to admission of the Department of Defense Report and Recommendations on Military Service by Transgender Persons (Feb. 2018) (Dkt. 96-2) ("Report") and the Memorandum for the President regarding Military Service by Transgender Individuals (Feb. 22, 2018) (Dkt. 96-1) ("Mattis Plan"[1]) for the truth of the facts, conclusions, and other matters asserted therein. *See* Fed. R. Evid. 802; *Wilkerson v. Wackenhut Protective Servs.*, 813 F. Supp. 2d 61, 66 (D.D.C. 2011) ("[U]nsworn, authenticated documents cannot be considered on a motion for summary judgment."); *see also* Fed. R. Evid. 803(8)(B); *In re Fannie Mae Securities Litig.*, 905 F. Supp. 2d 63, 79 n.25 (D.D.C. 2012) (government documents prepared for use in litigation, rather than in ordinary course, raise substantial questions of trustworthiness). Further, Plaintiffs object to admission of the Report and Mattis Plan for the purpose of proving facts, conclusions, and other matters that are properly the subject of expert testimony and the corresponding expert disclosure requirements of civil discovery. *See* Fed. R. Evid. 702, 403; Fed. R. Civ. P. 26. Assertions falling with the scope of this objection are disputed as not supported by admissible evidence. *See* Fed. R. Civ. P. 56(c)(2).

2. Plaintiffs object to admission and/or reliance on any facts or information concerning the deliberations of the Panel of Experts and/or Secretary Mattis where Defendants have improperly withheld information concerning such deliberations in discovery pursuant to improper assertions of privilege (which Plaintiffs have timely challenged). *See* Fed. R. Civ. P. 37(c)(1); *see also In re Subpoena*, 145 F.3d 1422, 1424 (D.C. Cir. 1998); *Ideal Elec. Sec. Co. v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 151 (D.C. Cir. 1997). Assertions

[1] This document is referred to as the "Mattis Memorandum" by Defendants and the "Mattis Plan" by Plaintiffs. Plaintiffs refer to it below as the "Mattis Plan" for consistency with their other filings of this same date.

falling with the scope of this objection are disputed as not supported by admissible evidence. *See* Fed. R. Civ. P. 56(c)(2).

| **Assertion by Defendants in Statement of Facts** | **Response** |
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| 1. For decades, military standards presumptively barred the accession and retention of transgender individuals. Department of Defense Report and Recommendations on Military Service by Transgender Persons at 7 (Feb. 2018), Dkt. 96-2 (hereinafter, "Report"). | See Recurring Objection 1. Otherwise, undisputed. |
| 2. The third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association (APA), treated "transsexualism" as a disorder. *See* Report at 10 (citing *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (DSM-III)*, at 261–64 (3d ed. 1980)). | See Recurring Objection 1. Otherwise, undisputed. |
| 3. The military's retention standards at various points generally permitted the discharge of service members with "transsexualism" or "sexual gender and identity disorders." Report at 11 (citing Department of Defense Instruction (DoDI) 1332.38, *Physical Disability Evaluation* (Nov. 14, 1996) *cancelled by* DoDI 1332.18, *Disability Evaluation System* (Aug. 4, 2014)). | See Recurring Objection 1. Otherwise, undisputed. |
| 4. In 2013, the APA published the fifth edition of the DSM, which replaced the term "gender identity disorder" (itself a replacement for "transsexualism" in the fourth edition) with "gender dysphoria." Report at 12 (quoting American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, at 451–59 (5th ed. 2013)). | See Recurring Objection 1. Otherwise, undisputed. |

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| 5. The APA concluded that, by itself, identification with a gender different from one's biological sex—*i.e.*, transgender status—was not a mental disorder because "not all transgender people suffer from gender dysphoria." Report at 20 (quoting APA, "Expert Q & A: Gender Dysphoria," *available at* https://www.psychiatry.org/patients-families/gender-dysphoria/expert-qa (last visited Feb. 14, 2018)) (citing DSM-5 at 452–53). | See Recurring Objection 1. Further, Plaintiffs object to this paragraph because it misconstrues the conclusions of the cited document. Plaintiffs do not dispute what the APA document states. The APA document speaks for itself. |
| 6. The fifth edition of the DSM defines the mental condition of "gender dysphoria" as a "marked incongruence between one's experience/expressed gender and assigned gender, of at least 6 months duration," that is "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning." Report at 12–13 (quoting DSM-5 at 453). | See Recurring Objection 1. Otherwise, undisputed. |
| 7. In July 2015, then-Secretary of Defense Ashton Carter announced that the Department of Defense's longstanding policy concerning transgender service was "outdated, confusing, [and] inconsistent." Statement by Secretary of Defense Ash Carter on DOD Transgender Policy, Release No. NR-272-15 (July 13, 2015), *available at* https://www.defense.gov/News/News-Releases/News-Release-View/Article/612778/ (last visited Apr. 18, 2018), Exh. 1. | Undisputed. |
| 8. In July 2015, Secretary Carter ordered the creation of a working group "to study over the next six months the policy and readiness implications of welcoming transgender persons to serve openly," and instructed it to "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness." Statement by Secretary of Defense Ash Carter on DOD | Undisputed; however, Plaintiffs object to the quotations which, taken out of context, misconstrue goals of the working group. The full quote states:<br><br>"The working group will start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness, unless and except where objective, practical impediments are |

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| Transgender Policy, Release No. NR-272-15 (July 13, 2015), *available at* https://www.defense.gov/News/News-Releases/News-Release-View/Article/612778/ (last visited Apr. 18, 2018), Exh. 1; *see also* Report at 13. | identified, and shall present its recommendations to me within 180 days." *See* Dkt. 115-2. |
| 9. During the pendency of the study directed by Secretary Carter, no service member could be discharged on the basis of gender identity or gender dysphoria without personal approval from the Under Secretary of Defense for Personnel and Readiness. Statement by Secretary of Defense Ash Carter on DOD Transgender Policy, Release No. NR-272-15 (July 13, 2015), *available at* https://www.defense.gov/News/News-Releases/News-Release-View/Article/612778/ (last visited Apr. 18, 2018), Exh. 1; *see also* Report at 13. | Undisputed. |
| 10. The Department of Defense commissioned the RAND National Defense Research Institute (RAND) to conduct a study to "(1) identify the health care needs of the transgender population, transgender service members' potential health care utilization rates, and the costs associated with extending health care coverage for transition-related treatments; (2) assess the potential readiness impacts of allowing transgender service members to serve openly; and (3) review the experiences of foreign militaries that permit transgender service members to serve openly." RAND National Defense Research Institute, *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, at 1 (RAND Corp. 2016), Dkt. 13-6 at Exh. A (hereinafter, "RAND report"). | Undisputed. |
| 11. The resulting RAND report concluded that allowing transgender service members to serve in their preferred gender would limit deployability, impede readiness, and impose costs on the military, but dismissed these burdens as "negligible," | Undisputed that the RAND Report exists, is authentic, and contains the quoted language.<br><br>Plaintiffs object to this assertion because it inaccurately characterizes the RAND Report and its conclusions, and Plaintiffs refer the Court to |

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| "marginal," or "minimal." RAND report at xii, 39–42, 46–47, 69–70. | the RAND report for its complete content. *See* Dkt. 13-4. |
| 12. On June 30, 2016, Secretary Carter approved the publication of Directive-type Memorandum (DTM) 16-005, entitled "Military Service of Transgender Service Members." DTM 16-005, Dkt. 13-6, Exh. B. | Undisputed. |
| 13. In DTM 16-005, Secretary Carter directed the Department of Defense to revise its accession standards by July 1, 2017. DTM 16-005 at Attachment, ¶ 2. Under this revised accession standards [sic], a history of "gender dysphoria," "medical treatment associated with gender transition," or "sex reassignment or genital reconstruction surgery" would remain disqualifying unless an applicant provided a certificate from a licensed medical provider that the applicant had been stable or free from associated complications for 18 months. *Id.* | Undisputed. DTM 16-005 speaks for itself. Plaintiffs object, however, to the extent this assertion contains inaccurate characterizations or omissions concerning the policies and procedures set forth in DTM 16-005. Plaintiffs refer the Court to the DTM itself for its complete content. *See* Dkt. 13-10. |
| 14. In DTM 16-005, Secretary Carter further directed that the accessions standards described in DTM 16-005 would be reviewed "no later than 24 months from the effective date of this memorandum [June 30, 2016] and may be maintained or changed, as appropriate, to reflect applicable medical standards and clinical practice guidelines, ensure consistency with military readiness, and promote effectiveness in the recruiting and retention policies and procedures of the Armed Forces." DTM 16-005 at Attachment, ¶ 2. | Undisputed. |
| 15. DTM 16-005 stated that effective June 30, 2016, current service members could not be discharged "solely on the basis of their gender identity" or their "expressed intent to transition genders." DTM 16-005 at Attachment, ¶ 1. | Undisputed. |
| 16. On June 30, 2016, Secretary Carter approved the publication of DoDI 1300.28, entitled "In-service Transition for | Undisputed. Plaintiffs object, however, because this assertion states that the title of DoDI 1300.28 (June 30, 2016) was "In-service |

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| Service Members Identifying as Transgender." DoDI 1300.28, *available at* https://www.defense.gov/Portals/1/features/2016/0616_policy/DoD-Instruction-1300.28.pdf (last accessed Apr. 19, 2018). | Transition for Service Members Identifying as Transgender." The actual title, as reflected on the face of the cited document, was "In-service Transition for Transgender Service Members." |
| 17. Under DoDI 1300.28, if a service member was diagnosed with gender dysphoria, that individual could transition genders. DoDI 1300.28, para. 3.1.b. | Undisputed that DoDI 1300.28, dated June 30, 2016, exists and is authentic.<br><br>Plaintiffs object because this assertion contains inaccurate characterizations or omissions concerning the content of DoDI 1300.28. The cited paragraph 3.1.b states:<br><br>"Gender Transition in the Military. Gender transition begins when a Service member receives a diagnosis from a military medical provider indicating that gender transition is medically necessary, and concludes when the Service member's gender marker in DEERS is changed and the member is recognized in the preferred gender. At that point, the Service member will be responsible for meeting all applicable military standards in the preferred gender, and as to facilities subject to regulation by the military, will use those berthing, bathroom, and shower facilities associated with the preferred gender." |
| 18. Under DoDI 1300.28, transgender service members who did not meet the clinical criteria for gender dysphoria remained subject to the standards and requirements applicable to their biological sex. Report at 15. | See Recurring Objection 1. Otherwise, undisputed that the DoDI 1300.28 exists. Plaintiffs object because this assertion mischaracterizes its content. In fact, there is no genuine dispute that DoDI 1300.28 does not include the term "gender dysphoria" and, accordingly, draws no distinctions based on a transgender Service member's meeting, or not meeting, the clinical criteria for gender dysphoria. *See generally* DoDI 1300.28 (June 30, 2016). DoDI 1300.28 defines a "transgender Service member" as "[a] Service member who has received a medical diagnosis indicating that gender transition is medically necessary, including any Service member who intends to begin transition, is undergoing transition, or has complete transition and is stable in the preferred gender." DoDI 1300.28 (June 30, 2016) at G.2. |

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| | Plaintiffs refer the Court to the document itself. *See* Milgroom Declaration, Ex. G DODI 1300.28. |
| 19. Before the Carter accession standards took effect on July 1, 2017, the Deputy Secretary of Defense directed the Services to assess their readiness to begin accessing transgender individuals into the military. *See* Memorandum from James N. Mattis, Secretary of Defense, *Accession of Transgender Individuals into the Military Services* (June 30, 2017), Dkt. 96-4. | Undisputed. |
| 20. "Building upon that work and after consulting with the Service Chiefs and Secretaries," Secretary of Defense James Mattis "determined that it [was] necessary to defer the start of [these] accessions" so that the military could "evaluate more carefully the impact of such accessions on readiness and lethality." Memorandum from James N. Mattis, Secretary of Defense, *Accession of Transgender Individuals into the Military Services* (June 30, 2017). | Undisputed. |
| 21. On June 30, 2017, based on the recommendation of the services and in the exercise of his independent discretion, Secretary Mattis delayed the implementation of the Carter accession standards until January 1, 2018. Memorandum from James N. Mattis, Secretary of Defense, *Accession of Transgender Individuals into the Military Services* (June 30, 2017). | Undisputed that Secretary Mattis delayed implementation of the accession standards until January 1, 2018. Plaintiffs object to this paragraph because it asserts without evidentiary basis that Secretary Mattis acted in "the exercise of his independent discretion" or "based on" the recommendations of the services, where the cited document does not contain those assertions. Plaintiffs refer the Court to the cited document for its complete content. *See* Milgroom Declaration, Ex. N. |
| 22. Secretary Mattis ordered the Under Secretary of Defense for Personnel and Readiness to lead a review, which would "include all relevant considerations" and last for five months, with an end date of December 1, 2017. Memorandum from James N. Mattis, Secretary of Defense, *Accession of Transgender Individuals into the Military Services* (June 30, 2017). | Undisputed that, on June 30, 2017, the Secretary of Defense issued a Memorandum for Secretaries of the Military Departments and Chairman of the Joint Chiefs of Staff entitled "Accession of Transgender Individuals into the Military Services," which states in part:<br><br>"Under existing DoD policy, such accessions were anticipated to begin on July 1, 2017. The Deputy Secretary directed the Services to assess |

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| | their readiness to begin accessions. Building upon that work and after consulting with the Service Chiefs and Secretaries, I have determined that it is necessary to defer the start of accessions for six months [*i.e.*, until January 1, 2018]. We will use this additional time to evaluate more carefully the impact of such accessions on readiness and lethality. This review will included all relevant considerations. My intent is to ensure that I personally have the benefit of the views of the military leadership and of the senior civilian officials who are now arriving in the Department. This action in no way presupposes the outcome of the review, nor does it change policies and procedures currently in effect under DoD Instruction 1300.28, 'In-Service Transition for Transgender Service Members.' I am confident we will continue to treat all Service members with dignity and respect. The Under Secretary of Defense for Personnel and Readiness will lead this review and will report the results to me not later than December 1, 2017." |
| 23. Secretary Mattis explained that this review would give him "the benefit of the views of the military leadership and of the senior civilian officials who are now arriving in the Department," and that he "in no way presupposes the outcome of the review." Memorandum from James N. Mattis, Secretary of Defense, *Accession of Transgender Individuals into the Military Services* (June 30, 2017). | Undisputed that, on June 30, 2017, the Secretary of Defense issued a Memorandum for Secretaries of the Military Departments and Chairman of the Joint Chiefs of Staff entitled "Accession of Transgender Individuals into the Military Services," which states in part:<br><br>"Under existing DoD policy, such accessions were anticipated to begin on July 1, 2017. The Deputy Secretary directed the Services to assess their readiness to begin accessions. Building upon that work and after consulting with the Service Chiefs and Secretaries, I have determined that it is necessary to defer the start of accessions for six months [*i.e.*, until January 1, 2018]. We will use this additional time to evaluate more carefully the impact of such accessions on readiness and lethality. This review will included all relevant considerations. My intent is to ensure that I personally have the benefit of the views of the military leadership and of the senior civilian officials who are now arriving in the Department. This action in no |

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| | way presupposes the outcome of the review, nor does it change policies and procedures currently in effect under DoD Instruction 1300.28, 'In-Service Transition for Transgender Service Members.' I am confident we will continue to treat all Service members with dignity and respect. The Under Secretary of Defense for Personnel and Readiness will lead this review and will report the results to me not later than December 1, 2017." |
| 24. While that review was ongoing, the President stated on Twitter on July 26, 2017, that "the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military." Op. 1, Dkt. 61. | Undisputed. |
| 25. On August 25, 2017, the President issued a memorandum ordering "further study" into the risks of maintaining the Carter policy and adherence to current accession standards while that review was ongoing. Military Service by Transgender Individuals, 82 Fed. Reg. 41319 (Aug. 25, 2017) §§ 1(a), 2(a). | Undisputed that the President issued the cited Memorandum. Plaintiffs object to the assertion to the extent that it contains inaccurate characterizations or omissions concerning the content of this Memorandum. The Memorandum speaks for itself. |
| 26. On September 14, 2017, Secretary Mattis established a Panel of Experts (Panel) to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." Memorandum from James N. Mattis, Secretary of Defense, "Terms of Reference—Implementation of Presidential Memorandum on Military Service by Transgender Individuals, at 1–2 (Sept. 14, 2017); *see also* Military Service by Transgender Individuals – Interim Guidance (Sept. 14, 2017), Dkt. 45-1; Report at 17. | Undisputed that the Secretary of Defense issued the cited "Terms of Reference" and "Interim Guidance" documents dated September 14, 2017, and that the "Terms of Reference" document contains the quoted language.<br><br>Plaintiffs object because this assertion contains inaccurate characterizations of and omissions from the cited "Terms of Reference" and "Interim Guidance" documents. Among other things, there is no genuine dispute that Secretary Mattis's "Terms of Reference" directed the Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff, supported by the Panel of Experts, "to lead the Department of Defense (DoD) in developing an Implementation Plan on military service by transgender individuals to effect the policy and directives in Presidential Memorandum, Military Service by Transgender Individuals, dates |

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| | August 25, 2017 (the 'Presidential Memorandum')" and to implement the Presidential Memorandum's directives in the areas of accessions, medical care, and currently serving transgender military service members. Plaintiffs refer the Court to the complete documents for their contents. *See* Milgroom Declaration, Exs. W-X. |
| 27. The Panel consisted of the members of senior military leadership who had "the statutory responsibility to organize, train, and equip military forces" and were "uniquely qualified to evaluate the impact of policy changes on the combat effectiveness and lethality of the force." Report at 18. | See Recurring Objection 1. Otherwise, undisputed that the Report contains the quoted language to describe the composition of the Panel. |
| 28. The Panel was chaired by the Under Secretary of Defense for Personnel and Readiness and included the Under Secretaries of the Military Departments, the Armed Services' Vice Chiefs, and Senior Enlisted Advisors (or officials performing those duties). Report at 18. | See Recurring Objections 1 and 2. Otherwise, undisputed. |
| 29. In 13 separate meetings over the span of 90 days, the Panel met with military and civilian medical professionals, commanders of transgender service members, and transgender service members themselves. Report at 18. | See Recurring Objections 1 and 2. Otherwise, undisputed. |
| 30. The Panel reviewed information regarding gender dysphoria, its treatment, and its impact on military effectiveness, unit cohesion, and military resources. Report at 18. | See Recurring Objections 1 and 2. Otherwise, undisputed. |
| 31. The Panel received briefing from three separate working groups or committees dedicated to issues involving personnel, medical treatment, and military lethality. Report at 18. | See Recurring Objections 1 and 2. Otherwise, undisputed. |
| 32. The Panel drew on the military's experience with the Carter policy to date and | See Recurring Objections 1 and 2. Otherwise, undisputed that the Report makes this assertion. |

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| considered evidence supporting and cutting against its recommendations. Report at 18. | |
| 33. As part of its review, the Panel examined data related to current service members diagnosed with gender dysphoria that was not available to RAND in 2016 and thus not considered or incorporated in its report or the Carter policy. Report at 31. | See Recurring Objections 1 and 2. Otherwise, undisputed. |
| 34. In contrast to the development of the Carter policy, the Panel did not "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness," but made "no assumptions" at all. Report at 19; Statement by Secretary of Defense Ash Carter on DOD Transgender Policy, Release No. NR-272-15 (July 13, 2015), *available at* https://www.defense.gov/News/News-Releases/News-Release-View/Article/612778/ (last visited Apr. 18, 2018). | See Recurring Objections 1 and 2. Otherwise, undisputed that the quoted language exists in the Carter Statement and Mattis Report. Plaintiffs object to the characterization of the Carter policy and the process by which it was developed. Plaintiffs object to the extent that this assertion mischaracterizes the quoted language in the Report by taking it out of context and creates a misimpression that the Panel "made 'no assumptions' at all" with regard to any part of the Panel's review process. Plaintiffs refer the Court to the cited documents for their complete content. *See* Dkt. 115-2; Milgroom Declaration, Ex. EE. |
| 35. Exercising its professional military judgment, the Panel provided Secretary Mattis with a set of recommendations. Report at 19. | See Recurring Objections 1 and 2. Otherwise, undisputed that the Panel provided Secretary Mattis with a set of recommendations. Plaintiffs object to the characterization of the Panel as "exercising its professional military judgment" to the extent that it states a legal conclusion or involves a mixed question of law and fact, and further because the assertion is not supported by the cited evidence. |
| 36. After considering the Panel's recommendations, along with additional information, Secretary Mattis, with the agreement of the Secretary of Homeland Security, sent the President a memorandum in February 2018 proposing a new policy consistent with the Panel's conclusions. Memorandum for the President regarding Military Service by Transgender Individuals (Feb. 22, 2018), Dkt. 96-1 (hereinafter, "Mattis Memorandum"). | See Recurring Objections 1 and 2. Otherwise, undisputed that Secretary Mattis sent the President the specified February 2018 Memorandum (referred to in this document as the "Mattis Plan"). Plaintiffs object to the characterization of the policy contained in the Memorandum as "new" as set forth in Plaintiffs' Opposition to Defendants' Motion for Summary Judgment and Cross-Motion for Summary Judgment. *See* Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), |

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| | https://twitter.com/realdonaldtrump/status/890193981585444864?lang=en; Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), https://twitter.com/realdonaldtrump/status/890196164313833472?lang=en; Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:08 AM), https://twitter.com/realDonaldTrump/status/890197095151546369; Military Service by Transgender Individuals, 82 Fed. Reg. 41319 (Aug. 25, 2017) §§ 1(a), 2(a); Memorandum from James N. Mattis, Secretary of Defense, "Terms of Reference—Implementation of Presidential Memorandum on Military Service by Transgender Individuals (Sept. 14, 2017). Plaintiffs refer the Court to the Mattis Plan for its complete content. *See* Milgroom Declaration, Ex. DD. |
| 37. The Mattis Memorandum was accompanied by a 44-page report setting forth in detail the bases for the Department of Defense's recommended new policy. Mattis Memorandum at 3; *see* Report. | See Recurring Objections 1 and 2. Otherwise, undisputed that the Mattis Plan was accompanied by a 44-page report. Plaintiffs object to the characterization of the policy as "new." *See* Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), https://twitter.com/realdonaldtrump/status/890193981585444864?lang=en; Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), https://twitter.com/realdonaldtrump/status/890196164313833472?lang=en; Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:08 AM), https://twitter.com/realDonaldTrump/status/890197095151546369; Military Service by Transgender Individuals, 82 Fed. Reg. 41319 (Aug. 25, 2017) §§ 1(a), 2(a); Memorandum from James N. Mattis, Secretary of Defense, "Terms of Reference—Implementation of Presidential Memorandum on Military Service by Transgender Individuals (Sept. 14, 2017). |

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| 38. The Mattis Memorandum stated, "Based on the work of the Panel and the Department's best military judgment," the Department of Defense had concluded "that there are substantial risks associated with allowing the accession and retention of individuals with a history or diagnosis of gender dysphoria and require, or have already undertaken, a course of treatment to change their gender." Mattis Memorandum at 2. | See Recurring Objections 1 and 2. Otherwise, undisputed that the Mattis Plan includes the cited language. |
| 39. The Mattis Memorandum stated that the Department of Defense had found "that exempting such persons from well-established mental health, physical health, and sex-based standards, which apply to all Service members, including transgender Service members without gender dysphoria, could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." Mattis Memorandum at 2. | See Recurring Objections 1 and 2. Otherwise, undisputed that the Mattis Plan includes the cited language. |
| 40. The Mattis Memorandum stated that the RAND report "contained significant shortcomings" because, among other defects, it relied on "limited and heavily caveated data to support its conclusions, glossed over the impacts of healthcare costs, readiness, and unit cohesion, and erroneously relied on the selective experiences of foreign militaries with different operational requirements than our own." Mattis Memorandum at 2. | See Recurring Objections 1 and 2. Otherwise, undisputed that the Mattis Plan includes the cited language. Plaintiffs object to the assertion that the RAND report had "defects," a fact not supported by the record citation. |
| 41. The Mattis Memorandum stated, "In short, this policy issue has proven more complex than the prior administration or RAND assumed." Mattis Memorandum at 2. | See Recurring Objections 1 and 2. Otherwise, undisputed that the Mattis Plan contains the cited language. |
| 42. "[I]n light of the Panel's professional military judgment and [his] own professional judgment," Secretary Mattis proposed a policy that continued some aspects of the Carter policy and departed | See Recurring Objections 1 and 2. Otherwise, undisputed that the Mattis Plan contains the cited language. Plaintiffs object to the characterization of the Carter policy. Plaintiffs object to the assertion that the Mattis Plan |

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| from others. Mattis Memorandum at 2–3; Report at 4–6, 33–43. | "proposed a policy that continued some aspects of the Carter Policy and departed from others" as not supported by the cited evidence. Plaintiffs refer the Court to the policies stated in the Mattis Plan. *Compare* Milgroom Declaration, Ex. DD Mattis Plan at 2-3, *with* Dkt. 13-10 DTM 16-005; Milgroom Declaration, Ex. G DODI 1300.28. |
| 43. Like the Carter policy, the new policy set forth in the Mattis Memorandum and Report does not draw lines on the basis of transgender status, but presumptively disqualifies from service individuals with a certain medical condition, gender dysphoria. *Compare* Report at 4–6, 19, with DTM 16-005. | See Recurring Objections 1 and 2. Plaintiffs object to this assertion because it is not supported by the evidence cited and contains conclusions of law instead of assertions of fact with regard to the classification created by Defendants' policy. Plaintiffs object to the characterization of the Carter policy. Plaintiffs also object to the characterization of the policy as a "new" one and to the description of how the policy applies to persons with gender dysphoria. Plaintiffs refer the Court to the Report, Milgroom Declaration Ex. EE, and DTM 16-005, Dkt. 13-10, for their complete content, which speaks for itself. Further, Defendants' policy is set forth at Mattis Plan, pp 2-3, not the Report. The Mattis Plan speaks for itself as to the terms of the policy articulated therein. *See* Milgroom Declaration Ex. DD. |
| 44. Under the new policy, as under the Carter policy, individuals who "identify as a gender other than their biological sex" but who do not suffer clinically significant "distress or impairment of functioning in meeting the standards associated with their biological sex"—and therefore have no history or diagnosis of gender dysphoria—may serve if "they, like all other persons, satisfy all standards and are capable of adhering to the standards associated with their biological sex." Report at 4. | See Recurring Objections 1 and 2. Undisputed that the Report contains the quoted language. Plaintiffs object to the characterizations of the Carter policy and Defendants' policy. Plaintiffs also object to the characterization of Defendants' policy as "new." Defendants' policy is set forth at Mattis Plan, pp 2-3, not the Report. The Mattis Plan speaks for itself as to the terms of the policy articulated therein. *See* Milgroom Declaration Ex. DD. |
| 45. Under the new policy, individuals who both are "diagnosed with gender dysphoria, either before or after entry into service," and "require transition-related treatment, or have already transitioned to | See Recurring Objections 1 and 2. Undisputed that the Report contains the quoted language. Plaintiffs object to the characterization of Defendants' policy. Plaintiffs also object to the characterization of Defendants' policy as "new." Defendants' policy is set forth at Mattis Plan, pp |

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| their preferred gender," are presumptively "ineligible for service." Report at 5. | 2-3, not the Report. The Mattis Plan speaks for itself as to the terms of the policy articulated therein. *See* Milgroom Declaration Ex. DD. |
| 46. This presumptive disqualification for individuals who both are "diagnosed with gender dysphoria, either before or after entry into service," and "require transition-related treatment, or have already transitioned to their preferred gender," is subject to both individualized "waivers or exceptions" that generally apply to all Department and Service-specific standards and policies as well as a categorical reliance exception for service members who took advantage of the Carter policy. Report at 5. | See Recurring Objections 1 and 2. Undisputed that the Report contains the quoted language. Plaintiffs object to the characterizations of the Carter policy and Defendants' policy. Defendants' policy is set forth at Mattis Plan, pp 2-3, not the Report. The Mattis Plan speaks for itself as to the terms of the policy articulated therein. |
| 47. Service members "who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy," including those who entered the military "after January 1, 2018," "may continue to receive all medically necessary care, to change their gender marker in the Defense Enrollment Eligibility Reporting System (DEERS), and to serve in their preferred gender, even after the new policy commences." Report at 5–6. | See Recurring Objections 1 and 2. Undisputed that the Report contains the quoted language. Plaintiffs object to the characterizations of the Carter policy and Defendants' policy. Defendants' policy is set forth at Mattis Plan, pp 2-3, not the Report. The Mattis Plan speaks for itself as to the terms of the policy articulated therein. |
| 48. Under the new policy, individuals who "are diagnosed with, or have a history of, gender dysphoria" but who neither require nor have undergone gender transition are likewise "generally disqualified from accession or retention." Report at 5–6. | See Recurring Objections 1 and 2. Undisputed that the Report contains the quoted language. Plaintiffs object to the characterization of Defendants' policy. Plaintiffs also object to the characterization of Defendants' policy as "new." Defendants' policy is set forth at Mattis Plan, pp 2-3, not the Report. The Mattis Plan speaks for itself as to the terms of the policy articulated therein. |
| 49. This presumptive disqualification for individuals who "are diagnosed with, or have a history of, gender dysphoria" but who neither require nor have undergone gender transition is subject to both individualized "waivers or exceptions" that generally apply to all Department and Service-specific | See Recurring Objections 1 and 2. Undisputed that the Report contains the quoted language. Plaintiffs object to the characterizations of the Carter policy and Defendants' policy. Defendants' policy is set forth at Mattis Plan, pp 2-3, not the Report. The Mattis Plan speaks for itself as to the terms of the policy articulated |

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| standards and policies as well as a categorical reliance exception for service members who took advantage of the Carter policy. Report at 5–6. | therein. Notably, the Mattis Plan does not mention that any waivers or exceptions are available. |
| 50. Under the new policy, with respect to accession, individuals with a history of gender dysphoria may enter the military if they (1) can demonstrate "36 consecutive months of stability (i.e., absence of gender dysphoria) immediately preceding their application"; (2) "have not transitioned to the opposite gender"; and (3) "are willing and able to adhere to all standards associated with their biological sex." Report at 5–6. | See Recurring Objections 1 and 2. Undisputed that the Report contains the quoted language. Plaintiffs object to the characterizations the Defendants' policy. Plaintiffs also object to the characterization of Defendants' policy as "new." Defendants' policy is set forth at Mattis Plan, pp 2-3, not the Report. The Mattis Plan speaks for itself as to the terms of the policy articulated therein. |
| 51. Under the new policy, with respect to retention, individuals diagnosed with gender dysphoria after entering the military may remain so long as they (1) can comply with Department and Service-specific "non-deployab[ility]" rules; (2) do "not require gender transition"; and (3) "are willing and able to adhere to all standards associated with their biological sex." Report at 5. | See Recurring Objections 1 and 2. Undisputed that the Report contains the quoted language. Plaintiffs object to the characterization the Defendants' policy. Plaintiffs also object to the characterization of Defendants' policy as "new." Defendants' policy is set forth at Mattis Plan, pp 2-3, not the Report. The Mattis Plan speaks for itself as to the terms of the policy articulated therein. |
| 52. On March 23, 2018, the President issued a new memorandum that revoked the 2017 Memorandum "and any other directive" the President "may have made with respect to military service by transgender individuals," thereby allowing the Secretaries of Defense and Homeland Security to "exercise their authority to implement any appropriate policies concerning military service by transgender persons." 2018 Memorandum, Dkt. 95-1. | Undisputed. |
| 53. Plaintiffs Jane Doe 2, Jane Doe 3, Jane Doe 4, Jane Doe 5, and John Doe 1 are current service members who have been diagnosed with gender dysphoria. *See* Second Am. Compl. ¶¶ 7–21, 27–30, Dkt. 106. | Undisputed. |

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| 54. Plaintiff Jane Doe 6 is a current service member who has not been diagnosed with gender dysphoria by a military doctor. *See* Second Am. Compl. ¶¶ 22, 23 | Undisputed. |
| 55. Plaintiff Regan Kibby is a midshipman at the U.S. Naval Academy and has notified the Academy that he is transgender. Second Am. Compl. ¶ 33. | Undisputed. |
| 56. Midshipman Kibby is on medical leave, and there is currently no impediment to his returning to the Academy when his leave ends in May 2018. Chadwick Decl. ¶¶ 9, 12, Dkt. 45-2. | Undisputed that, solely as a result of the preliminary injunction in this case, there is no impediment to Midshipman Kibby returning to the Naval Academy when his leave ends. |
| 57. Plaintiffs Jane Doe 7 and John Doe 2 are individuals who have undergone gender transition and wish to join the military. *See* Second Am. Compl. ¶¶ 25, 31. | Undisputed. |
| 58. Plaintiff Jane Doe 7 does not allege that she has actually applied to access in the military, let alone had an application denied because of the DoD policy. *See* Second Am. Compl. ¶¶ 25– 26. | Undisputed. |
| 59. Plaintiff John Doe 2 alleges that he began the enlistment process, but he does not allege that his enlistment application was denied. *See* Second Am. Compl. ¶¶ 31–32. | Undisputed. |
| 60. Plaintiff Dylan Kohere is a first-year college student who is taking academic classes as part of his school's ROTC program. Second Am. Compl. ¶ 35. | Undisputed. |
| 61. Mr. Kohere is transgender, but he does not allege that he has been diagnosed with gender dysphoria. *See* Second Am. Compl. ¶ 35. | Undisputed. |

May 11, 2018

Respectfully submitted,

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