The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

DEFENDANTS' OPPOSITION TO PLAINTIFFS' AND INTERVENOR'S MOTIONS FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Noted for March 23, 2018

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TABLE OF CONTENTS

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INTRODUCTION

Plaintiffs and Intervenor ask this Court to pre-judge the constitutionality of a future Government policy regarding military service by transgender individuals and issue the extraordinary relief of a worldwide permanent injunction. Although they are aware that a final policy will be issued in the near future, they chose to file premature summary judgment motions that entangle the Court in an abstract disagreement over a non-final policy that will be superseded shortly. For this reason alone, the Court should defer ruling on the motions.

In any event, Plaintiffs and Intervenor are not entitled to summary judgment because there are numerous genuine issues of disputed material facts. Among other things, the parties dispute underlying material facts relating to whether Plaintiffs have suffered a cognizable injury in fact sufficient to support legal standing; which is the applicable policy regarding service by transgender persons in the military; and, relatedly, whether there has been a final decision concerning military policy. In addition, they have failed to recognize the substantial deference that should be afforded to the military's personnel decisions and failed to meet their burden to show that the applicable policy violates their constitutional rights. Therefore, the Court should deny Plaintiffs' and Intervenor's summary judgment motions.

Defendants cross-move for partial summary judgment on all of Plaintiffs' and Intervenor's claims against the President of the United States. Although they seek an injunction and a declaratory judgment against all Defendants, the President cannot be subject to direct injunctive relief, *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866), or a declaratory judgment, *Franklin v. Massachusetts*, 505 U.S. 788, 827–28 (1992) (Scalia, J., concurring); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010). Because the Court cannot issue a declaratory judgment or an order enjoining the President for his official, discretionary action, the Court should grant partial summary judgment as a matter of law to Defendants on all of the claims against the President.

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ARGUMENT

As a preliminary matter, Defendants' Opposition to the summary judgment motions is based on the evidence available to Defendants at this early stage in the litigation, as the Court denied Defendants' Rule 56(d) motion seeking a deferral of the ruling on summary judgment to allow Defendants to take discovery. *See* Order, ECF No. 189[1]; *see also Burlington Santa Fe. v. Assinboine, Sioux Tribe*, 323 F.3d 767, 773 (9th Cir. 2003) (where "a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case, district courts should grant any Rule 56[d] motion fairly freely"); *Shelton v. Bledsoe*, 775 F.3d 554, 568 (3d Cir. 2015); *Snook v. Tr. Co. of Ga. Bank of Savannah*, 859 F.2d 865, 870 (11th Cir. 1988).

I. The Summary Judgment Motions Must Be Denied Because There Are Numerous Genuine Issues Of Material Facts In Dispute.

Because there are numerous genuine issues of disputed material facts—such as whether Plaintiffs have suffered a cognizable injury in fact sufficient to support Article III standing; which is the current applicable military policy for service by transgender persons; and whether there has been a final decision concerning the military policy—the Court must deny Plaintiffs' and Intervenor's summary judgment motions. *See* Fed. R. Civ. P. 56(a). Under Rule 56, courts "view the evidence in the light most favorable to the nonmoving party," and "determine whether there are any genuine

[1] Respectfully, the Court's opinion denying Defendants' 56(d) motion overlooked several of Defendants' arguments as to why ruling on summary judgment should be deferred to permit Defendants an opportunity to take discovery. First, in stating that Defendants have "failed to show that they were diligent" in seeking discovery while the "case has been pending for nearly six months," Order, ECF No. 189, at 4, the Court ignored that Defendants were prohibited under Federal Rule of Civil Procedure 26 from taking depositions or serving written discovery until after the Rule 26(f) discovery conference, which did not take place until December 12, 2017. *See* Fed. R. Civ. P. 26(d) ("A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f) ….").

Additionally, although Defendants detailed in their 56(d) motion five categories of discovery they would seek to assist them in establishing that there are genuine issues of material fact, the Court's opinion did not address the majority of these categories of discovery. The only category of discovery the Court directly addressed was related to the standing of the Plaintiffs not currently serving in the military, and the Court otherwise summarily stated that it "already found that the remaining Plaintiffs . . . have standing to challenge the constitutionality of the policy." Order, ECF No. 189, at 4. However, the Court did not address the authority cited by Defendants demonstrating that Plaintiffs' burden to establish standing is significantly more exacting at the summary judgment stage than at the preliminary injunction stage. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Even more problematic is the Court's failure to address Defendants' entitlement to expert discovery. *See* Fed. R. Civ. P. 26(b)(4)(A) ("A party may depose any person who has been identified as an expert . . . . If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided."). Indeed, the Government is unaware of any circumstances where Rule 56(d) discovery has been denied where a plaintiff moves for summary judgment early in the case, relies upon declarations from fact and expert witnesses, and the Court has not yet entered a scheduling order. If Rule 56(d) discovery were ever appropriate, it would be in these circumstances.

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Civil Division, Federal Programs Branch
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Washington, DC 20530
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issues of material fact." *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 989 (9th Cir. 2016). Viewing the evidence in a light most favorable to Defendants, and because there are a number of genuine disputes of material fact, the summary judgment motions must be denied.

A. Whether Plaintiffs Have Suffered Cognizable Injuries Is A Genuine Issue Of Fact In Dispute.

Plaintiffs bear the burden of establishing jurisdiction. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted). Although this Court previously concluded that the Plaintiffs had standing for purposes of their preliminary injunction motion, Plaintiffs' burden on summary judgment is significantly more exacting. *See id.* Now, Plaintiffs "can no longer rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts.'" *Id.* (citation omitted).

Standing is "an indispensable part of each plaintiff's case." *Id.* Each Plaintiff bears the burden of establishing that they have standing in their own right to pursue their claims. *Ellis v. City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993). In addition, "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint." *Town of Chester. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650–51 (2017).

Plaintiffs allege three primary categories of injuries. First, four Plaintiffs allege that they have been injured by the accessions policy. Second, Plaintiffs who are current service members allege that they have been injured because they may be discharged from the military in the future based on their transgender status. Third, one Plaintiff alleges that he will be injured because he will be barred from receiving sex reassignment surgery.[2]

1. There Are Numerous Genuine Issues Of Disputed Material Fact Concerning Whether Plaintiffs Have Standing to Challenge The Accession Policy.

Four Plaintiffs contend that they were denied the opportunity to compete to access into the military on an equal basis. Although Defendants were not provided an opportunity to test assertions

[2] In addition, Plaintiffs each allege that they have been harmed by a stigma resulting from allegedly unconstitutional discrimination. *See* Pls.' Mot., ECF No. 129, at 7–8. But that sort of stigmatic injury "accords a basis for standing only to those persons who are personally denied equal treatment." *Allen v. Wright*, 468 U.S. 737, 755 (1984) *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). As discussed below, because Plaintiffs have not shown that they themselves have been subject to discriminatory treatment, they cannot rely upon a claim of stigmatic injury. Instead, "stigmatic injury…requires identification of some concrete interest with respect to which respondents are personally subject to discriminatory treatment," and "[t]hat interest must independently satisfy the causation requirement of standing doctrine." *Id.* at 757 n.22. No such interest exists here.

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Plaintiffs made in their declarations through the discovery process, Plaintiffs' declarations nevertheless fail to establish standing to sue. Plaintiffs have not met their burden at this stage of the litigation to establish an injury in fact traceable to the Interim Guidance that they seek to challenge.

As discussed below in Part I.B, when the evidence is viewed in the light most favorable to Defendants, the Interim Guidance provides the terms and operation of the applicable policy governing service by transgender individuals. Plaintiffs have not shown that the Interim Guidance denies them an opportunity to access into the military that they would previously have been afforded.

To establish that they suffered cognizable injuries by the applicable accession policy, Plaintiffs must show that the accession policy in the Interim Guidance denied them an opportunity to access into the military that they previously possessed. Thus, Plaintiffs must show that they are "able and ready" to access into the military under the Carter policy that preceded the Interim Guidance. *See, e.g.*, *Carroll v. Nakatani*, 342 F.3d 934, 942 (9th Cir. 2003). But the Carter policy, which is currently in effect as the result of the Court's preliminary injunction, presumptively disqualifies an individual from access into the military if the individual has a history of medical treatment associated with gender transition. Such an individual may access into the military only if (a) the applicant has completed all medical treatment associated with the transition, (b) the applicant has been stable in the preferred gender for 18 months, and (c) the applicant, if receiving cross-sex hormone therapy post-transition, has been stable on such therapy for at least 18 months. Decl. of Ryan Parker, Exh. 1 (DTM-16-005).

Plaintiffs Ryan Karnoski, D.L., and Conner Callahan have not presented specific facts to establish that they are eligible to access into the military under the Carter policy. They admit that they are receiving or have received medical treatment associated with gender transition. Decl. of Ryan Karnoski, ECF No. 130, ¶ 10; Decl. of D.L., ECF No. 132, ¶ 8; Decl. of Connor Callahan, ECF No. 137, ¶ 8. They are therefore presumptively disqualified under the Carter policy. *See* DTM-16-005. D.L. concedes that he has not been stable in his preferred gender for 18 months after the completion of medical treatment associated with his transition. D.L. Decl. ¶ 5. And Karnoski and Callahan have not proffered any evidence that they satisfy the Carter policy requirements to overcome disqualification. When viewed in light most favorable to Defendants, this record contains

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Civil Division, Federal Programs Branch
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genuine issues of disputed fact whether Karnoski and D.L. have even completed all medical treatment associated with their transitions, and whether Karnoski and Callahan have been stable in their preferred gender for at least 18 months, or have been stable for at least 18 months if receiving cross-sex hormone therapy. Thus, Karnoski, D.L., and Callahan have not satisfied their burden to prove that they have standing to pursue their claims. *See Clapper*, 568 U.S. at 408.

Plaintiff Staff Sergeant Cathrine Schmid also has not established that she was deprived of an opportunity to become a warrant officer because of the Interim Guidance's accessions policy. Decl. of Cathrine Schmid, ECF No. 131, ¶¶ 29–30. The record establishes that any hold that may have been placed on her application packet has been lifted, and her packet was advanced to the selection board for consideration. *See* Decl. of Maria Martinez, ¶ 4. The board selection process, which is highly competitive, is prescribed by Army Pamphlet 601-6, and does not take a soldier's transgender status into consideration. *Id.* The board considered Schmid's application in February 2018, and did not select her. *Id.* ¶ 4. Schmid accordingly cannot establish any cognizable injury from the Interim Guidance. At a minimum, the evidence that she was not selected raises genuine issues of material fact about her standing that preclude summary judgment on her claims.

2. There Are Numerous Genuine Issues Of Disputed Material Fact Concerning Whether Plaintiffs Have Suffered Cognizable Injuries Caused By The Interim Guidance.

Plaintiffs also have not met their burden to establish cognizable injuries from the Interim Guidance's policies concerning retention and medical care. At a minimum, genuine issues of disputed material fact preclude summary judgment on their claims.

Plaintiff Schmid, who has failed to establish a cognizable injury from the accessions policy, also has failed to establish a cognizable injury from the retention policy. She states that the Interim Guidance has affected her "ability to maintain employment in the military," Schmid Decl. ¶ 25, but Schmid is not, and will not be, subject to separation or discharge based on her transgender status under the Interim Guidance, *see* Decl. of Timothy McCracken, ECF No. 70, ¶ 2. Nor will she be denied re-enlistment due to her transgender status. *Id.* Thus, Schmid has identified no specific facts to support her claims of injury from the retention policy in the Interim Guidance. At a minimum,

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 514-4336

there is at least a genuine dispute about whether Schmid has suffered a cognizable legal injury from that policy.

Plaintiff Chief Warrant Officer Three Lindsey Muller has failed to meet her burden to establish standing to challenge both the retention and medical treatment policies in the Guidance. With respect to the retention policy, although Muller contends that she is "afraid of losing [her] job" in the Army, Decl. of Lindsey Muller, ECF No. 133, ¶ 3, her commanding officer has stated that Muller is not, and will not be, subject to separation or discharge based on her transgender status under the Interim Guidance, *see* Decl. of Jonathan Easley (Oct. 16, 2017), ECF No. 72, ¶ 3. And the parties dispute whether Muller's treatment plan includes any medically necessary surgical treatments that have been, or would be, denied under the Guidance. *Compare* Muller Decl. ¶¶ 21–22 (declaring that Muller has not had surgeries required as part of her transition), *with* Decl. of Jonathan Easley (Feb. 26, 2018), ¶¶ 3–4 (declaring that Muller "has completed all of the medically necessary surgical treatments approved as part of her medical treatment plan" and that she "may request an evaluation . . . to determine if she is medically qualified to resume flying duties"). There is, at a minimum, a genuine dispute whether Muller has suffered any cognizable injury from the Interim Guidance, and summary judgment is not warranted.

Likewise, Plaintiff Petty Officer First Class Terece Lewis has not satisfied her burden of establishing standing to sue. Lewis is an active duty sailor, who claims that the Interim Guidance would affect her ability to re-enlist. Decl. of Terece Lewis, ECF No. 134, ¶¶ 3, 8, 26. But the Interim Guidance directs that "[a]n otherwise qualified transgender Service member whose term of service expires while this Interim Guidance remains in effect, may, at the Service member's request, be reenlisted in service under existing procedures." Interim Guidance (Sept. 14, 2017), ECF No. 149-3. It also directs that "no action may be taken to involuntarily separate or discharge an otherwise qualified Service member solely on the basis of a gender dysphoria diagnosis or transgender status." *Id.* And Lewis's commander confirmed that, consistent with the Interim Guidance, she will not be involuntarily separated due to her transgender status. Decl. of Gregory Huffman, ECF No. 73, ¶ 3. Lewis thus has not presented specific facts to support a cognizable legal injury from the retention policy, or there is at least a genuine dispute about the facts underlying her claim of injury.

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
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Washington, DC 20530
Tel: (202) 514-4336

Plaintiff Petty Officer Second Class Philip Stephens also fails to establish cognizable injury from the retention and medical care policies. Stephens, an active duty sailor, states that the Interim Guidance places his military career in "jeopardy," Decl. of Philip Stephens, ECF No. 135, ¶¶ 3, 26, but again the Interim Guidance directs that he will not be involuntarily separated solely on the basis of his transgender status, and that he may re-enlist under existing procedures. *See* Interim Guidance, ECF No. 149-3; Decl. of Nicolas Good, ECF No. 74, ¶ 5 (stating that Stephens will not face separation due to his transgender status under the Interim Guidance).

There are also genuine issues of material fact in dispute regarding Petty Officer Second Class Megan Winters' standing. Winters bases her claims of injury on a separation notice she received, but her commanding officer has explained that such a separation notice was in error and that Winters is not pending separation or discharge due to her transgender status. Decl. of Susan Breyerjoyner, ECF No. 75, ¶ 6. Winters' commanding officer has further stated that no member of her command will face separation on the basis of their transgender status absent a change in existing policy, and no member of her command will be denied re-enlistment due to transgender status. *Id.*

Finally, Plaintiff Jane Doe has not satisfied her burden to prove standing to sue. The Interim Guidance directs the military to ensure that no service member is separated or denied re-enlistment due to his or her transgender status. Interim Guidance, ECF No. 149-3. Doe's conclusory statements to the contrary are speculative and insufficient to establish a cognizable injury from the retention policy at the summary judgment stage. *See Cafasso v. Gen. Dynamics*, 637 F.3d 1047, 1061 (9th Cir. 2011) ("To survive summary judgment, a plaintiff must set forth non-speculative evidence of specific facts, not sweeping conclusory allegations."). Likewise, Doe cannot establish standing to challenge the medical treatment policy with speculative statements that she will need surgical procedures as part of her transition. Decl. of Jane Doe, ECF No. 138, ¶ 13. Doe has not provided any foundation to conclude that she is qualified to offer a medical opinion, and her statement is therefore inadmissible.[3] *See Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002) (only evidence that would be admissible may be considered in ruling on a motion for summary judgment). Furthermore,

[3] Had Defendants been given a chance to depose Jane Doe before responding to Plaintiffs' motion, Defendants could have explored the bases for her conclusory statements. *See supra* n.1.

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 514-4336

her conclusory testimony is contradicted by evidence that medical transition plans do not necessarily include surgical procedures. *See* Breyerjoyner Decl. ¶ 7. Accordingly, Plaintiff Jane Doe has not established standing for summary judgment purposes.

Finally, three Plaintiffs appear to allege that they will be denied medically necessary surgical treatments. Lewis Decl. ¶ 17; Stephen Decl. ¶ 16; Winters Decl. ¶¶ 32–34. As an initial matter, it is clear from the Interim Guidance that no Plaintiff is currently being denied medical treatment. Second, the Presidential Memorandum excepts from the directive to halt funding of sex reassignment surgeries for military personnel those procedures which are "necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex." Presidential Memorandum, 82 Fed. Reg. 41,319. All three Plaintiffs have begun a course of treatment to reassign their sex and, therefore, potentially fall within the exception to the funding directive. Lewis Decl. ¶¶ 13, 16–17; Stephen Decl. ¶¶ 14–16; Winters Decl. ¶¶ 28–31. At this point, it is not clear whether the military will pay for Plaintiffs' transition-related surgeries after March 2018, but uncertainty is not enough to establish standing or to present the Court with a ripe question of law. If Plaintiffs are ultimately informed that the military will not pay for specific surgeries, they can bring suit at that time. Until that time, the risk that they may be harmed by the sex reassignment surgery directive in the future is not sufficient to establish standing. *Cf. Doe v. Trump*, 275 F. Supp. 3d 167, 203–04 (D.D.C. 2017) (holding that the plaintiffs lacked standing to pursue their medical treatment claims because "the risk of being impacted by the Sex Reassignment Surgery Directive is not sufficiently great to confer standing").

3. The Organizational Plaintiffs And Intervenor Have Not Satisfied Their Burden To Prove Standing To Sue.

The organizational Plaintiffs also have not satisfied their burden of establishing standing to sue at this stage in the litigation. To establish associational standing, each plaintiff organization must show: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Associated Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1194 (9th Cir. 2013). Because the Interim

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 514-4336

Guidance maintains the status quo, the organizational Plaintiffs cannot identify even a single member who has suffered an injury-in-fact. To the extent they rely upon the individual Plaintiffs who have not established standing for summary judgment purposes, the organizational Plaintiffs have likewise failed to establish standing for their claims.

In addition, because none of the individual or organizational plaintiffs has standing, and Washington cannot establish standing in its own right, Washington cannot proceed with this case as an Intervenor. "An intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted 'is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.'" *Friends of Wild Swan v. Vermillion*, 694 F. App'x 475, 476 (9th Cir. 2017) (quoting *Diamond v. Charles*, 476 U.S. 54, 68 (1986)). Washington has not even attempted to satisfy its burden to demonstrate standing to sue. Rather, Washington simply asserts, without support from a declaration, certain state interests that it seeks to vindicate through this litigation, and notes that the Court recognized these interests as sufficient to support intervention. Int.'s Mot., ECF No. 150, at 4. Yet in granting Washington's motion to intervene, the Court expressly declined to decide whether Washington possessed standing to sue. Order, ECF No. 101 at 3 n.1. And Washington has come forward with no admissible evidence of any cognizable injury caused by an operative policy of the Defendants that is redressable by the Court.

B. Genuine Disputes of Material Fact Exist Concerning Which Policy Is Applicable In The Absence of a Preliminary Injunction.

Perhaps recognizing that they cannot show any cognizable injury from the Interim Guidance, Plaintiffs argue that the President's Twitter statement and the Presidential Memorandum constitute a "ban" on service in the military by transgender individuals and that it is this "ban" that they challenge. But it is beyond reasonable dispute from the face of the Interim Guidance that it would be the applicable policy concerning accession and retention in the absence of the Court's preliminary injunction, and plaintiffs have suffered no legally cognizable injury from that Guidance. Until a final policy is issued, as contemplated by the Presidential Memorandum, there is no "ban" for Plaintiffs to challenge or for this Court to review. At a minimum, there is a genuine issue of disputed material

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Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 514-4336

fact about the currently effective policy that necessitates denial of the summary judgment motions.[4]

Plaintiffs' claims rest on the faulty assumptions that the President has mandated that transgender individuals who are currently serving be involuntarily discharged. Pls.' Mot. at 5–6. Although Plaintiffs acknowledge that the President directed Secretary Mattis to study the issue, they argue that the "unequivocal purpose" of the study is "to implement the policy and directives in the Presidential Memorandum." *Id.* at 11 (citation omitted). That argument, however, is misplaced.

The Memorandum directs Secretary Mattis to study future service by transgender individuals and does not predetermine the outcome of that study. The President stated in the Memorandum that, in his judgment, "further study is needed to ensure . . . that terminating the Departments' longstanding policy and practice [regarding military service by transgender individuals] would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources . . . ." Presidential Memorandum, 82 Fed. Reg. 41,319 (Aug. 25, 2017). Based on that judgment, the President directed the Secretaries of Defense and Homeland Security to maintain the currently effective policy regarding accession of transgender individuals into the military "until such time as a sufficient basis exists upon which to conclude that terminating the policy and practice would not have the negative effects discussed above." *Id.* He then directed the Secretary of Defense, in consultation with the Secretary of Homeland Security, to submit an implementation plan by February 21, 2018, affording the Secretary of Defense broad discretion to determine "what steps are appropriate and consistent with military effectiveness and lethality, budgetary constraints, and applicable law" in formulating that plan. *Id.* Critically, the President directed the Secretary of Defense to "determine how to address transgender individuals currently serving in the United States military" and stated unequivocally that, "[u]ntil the Secretary has made that determination, no action may be taken against such individuals" because of their transgender status. *Id.*

Secretary Mattis's response to this Memorandum makes clear that no accession and retention policy has yet been decided. First, in response to the Presidential Memorandum, Secretary Mattis announced that he was assembling a panel of experts who would bring "mature experience, most

[4] Of course, any concern about which of these documents reflects applicable policy will be moot upon issuance of the ultimate policy and, as discussed in Part I.C., below, this alone is a basis to defer or deny summary judgment.

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 514-4336

notably in combat and deployed operations, and seasoned judgment" to the task of providing advice and recommendations regarding future policies concerning military service by transgender individuals. Parker Decl. Exh. 2 (Statement of Secretary Mattis, Release No: NR-312-17). Secretary Mattis explained that the panel would "thoroughly analyze all pertinent data, quantifiable and non-quantifiable." *Id.* Then, on September 14, 2017, Secretary Mattis issued a Memorandum and Interim Guidance explaining that "[c]onsistent with military effectiveness and lethality, budgetary constraints, and applicable law, the implementation plan will establish the policy, standards and procedures for transgender individuals serving in the military." Interim Guidance, ECF No. 149-3. Secretary Mattis noted that the Deputy Secretary of Defense and Vice Chairman of the Joint Chiefs of Staff, supported by the panel of experts, would provide him with recommendations "supported by appropriate evidence and information." *Id.* And he stated that the Interim Guidance would take effect immediately and "will remain in effect until I promulgate DoD's final policy in this matter." *Id.* Put simply, Secretary Mattis initiated a full policy-making process that is being led by some of the most senior officials at the Departments of Defense and Homeland Security.[5]

The Interim Guidance was the applicable DoD policy concerning accession and retention in effect at the time the Court entered the preliminary injunction and Plaintiffs' arguments to the contrary are mistaken. At a minimum, when viewed in the light most favorable to Defendants, the Interim Guidance creates a genuine dispute of material fact regarding the applicable policy governing military service by transgender individuals. For this reason alone, Plaintiffs' and Intervenor's motions for summary judgment must be denied.

C. Judicial Economy Is Not Served By Summary Judgment Proceedings at This Stage.

The Court should deny the motions for the additional reason that judicial economy is not served by resolving them at this early stage in the litigation and while policy concerning the service of transgender individuals in the military is still being developed. Plaintiffs and Intervenor made a strategic decision to file summary judgment motions early in the litigation, with the awareness that the policy concerning the service of transgender individuals in the military was still being developed.

[5] That policy-making process is now complete, and Secretary Mattis has transmitted his policy recommendation to the President. Defendants will inform Plaintiffs and the Court promptly after a decision is publicly announced.

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Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 514-4336

But the Court does not yet have before it the final policy concerning service by transgender persons or the justifications for that final policy.

A judicial decision at this stage would only entangle the Court in an abstract disagreement over a non-final policy that will be superseded shortly. Once the final policy is in place, the Court will be in a position to assess what, if any, effect this policy has on Plaintiffs and whether Plaintiffs' lawsuit may proceed. But any challenge to the non-final policy now in place will be moot. *See Burke v. Barnes*, 479 U.S. 361, 363 (1987) (question of whether President's pocket veto prevented bill from becoming law rendered moot because bill expired during pendency of appeal); *U.S. Dep't of Treasury v. Galioto*, 477 U.S. 556, 559–60 (1986) (amendment to federal statute rendered case moot); *Kremens v. Bartley*, 431 U.S. 119, 128–29 (1977) (lawsuit concerning commitment of minors is moot once statute is repealed); *Gulf of Me. Fisherman's All. v. Daley*, 292 F.3d 84, 88 (1st Cir. 2002) ("The promulgation of new regulations and amendment of old regulations are among such intervening events as can moot a challenge to the regulation in its original form."); *Bunker Ltd. P'ship v. United States*, 820 F.2d 308, 312 (9th Cir. 1987) (new legislation which superseded prior law rendered arguments based on superseded law moot). And any decision based on the previous policy, if appealed, likely would be vacated as moot. *See, e.g.*, *Galioto*, 477 U.S. at 560 (1986) (vacating and remanding decision where Congress amended challenged law, removing the asserted unconstitutionality, which thereby mooted the dispute under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)); *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1168 (9th Cir. 2011) (vacating the district court decision when Congress amended the statute during the pendency of the appeal); *Madison v. Tulalip Tribes of Wash.*, 163 F. App'x 499, 500 (9th Cir. 2006) (vacating district court decision under *Munsingwear, Inc.* because controversy over concerned permit became moot once permit expired). Judicial economy would be best served by denying or deferring summary judgment and waiting for the new policy to be issued.

II. Plaintiffs and Intervenor Have Not Met Their Burden of Proving That the Applicable Policy Violates the Constitution.

There are several additional reasons why the Court should deny the summary judgment motions. As a preliminary matter, Plaintiffs and Intervenor ignore the considerable deference that

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 514-4336

is owed to the President and the military in making military personnel decisions. Both the decision to conduct further study on a policy that could have adverse effects on the military and the decision to issue the Interim Guidance that maintains the *status quo* during the pendency of the study are reasonable and fully consistent with the Constitution. Furthermore, they have not met their burden to show that the applicable policy—the Interim Guidance—violates their constitutional rights.

A. Considerable Deference is Owed to Military Personnel Decisions.

Plaintiffs' and Intervenor's constitutional claims fail because considerable deference is owed to the President and the DoD in making military personnel decisions. With regard to the President's decisions, "Courts have traditionally shown the utmost deference to Presidential responsibilities" in the field of "military and national security affairs." *Dep't of Navy v. Egan*, 484 U.S. 518, 529–30 (1988) (citation omitted). After all, "[t]he complex[,] subtle, and professional decisions as to the composition . . . of a military force are . . . subject always to civilian control of the Legislative and Executive Branches"; indeed, "[i]t is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

Along with the deference shown to the Commander in Chief, courts also give substantial deference to decisions made by military authorities. Military authorities "have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy," *Goldman v. Weinberger*, 475 U.S. 503, 507–08 (1986), under broad mandates, *see United States v. O'Brien*, 391 U.S. 367, 377 (1968). To effectuate its mission, the military requires "overriding demands of discipline and duty" that make it "a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743–44 (1974). The military's distinct position also sets it "apart from and outside of many of the rules that govern ordinary civilian life in our country." *Greer v. Spock*, 424 U.S. 828, 843 (1976) (Powell, J., concurring). Given its unique position and the notion that courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have," *Chappell v. Wallace*, 462 U.S. 296, 305 (1983), courts grant great deference to the judgment of the military, *see, e.g.*, *Rostker v. Goldberg*, 453 U.S. 57, 64–67 (1981); *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953).

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 514-4336

The special deference to the military applies even in the face of constitutional claims. For example, in *Orloff*, the Supreme Court held that petitioner could not challenge the Army's failure to commission him when he declined, on grounds of a Fifth Amendment privilege against self-incrimination, to say whether he was a member of the Communist Party. 345 U.S. at 91. Similarly, in *Goldman*, the Court rejected a claim that application of an Air Force regulation that precluded plaintiff from wearing his yarmulke violated the First Amendment's protection of the free exercise of religion. 475 U.S. at 509–10. In *Parker*, the Court rejected a First Amendment "overbreadth" challenge to certain articles of the Uniform Code of Military Justice, holding that "[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections." 417 U.S. at 758; *see also Rostker*, 453 U.S. at 64–67 (rejecting an equal protection challenge to the requirement that males, but not females, must register for the draft).

Plaintiffs do not dispute that substantial deference is owed to military policy decisions. *See* Pls.' Mot. at 15. Instead, Plaintiffs merely repeat the Court's erroneous conclusion that the policy concerning military service by transgender individuals is not entitled to deference in this case because it was made without "'considered reason or deliberation.'" *Id.* (quoting Order, ECF No. 103, at 18); *see also* Int.'s Mot. at 13–14. That argument is without merit.[6]

By focusing on the President's statement on Twitter, Plaintiffs fail to recognize that one month before the statement, DoD had already announced that more study was needed on the issue of transgender military service. On June 30, 2017, before the issuance of the Twitter statement or the Presidential Memorandum, Secretary Mattis "approved a recommendation by the services to defer accessing transgender applicants into the military" until January 1, 2018. Parker Decl. Exh. 3 (Statement by Chief Pentagon Spokesperson Dana W. White on Transgender Accessions, NR-250-17). Based on input he received from the Service Chiefs and Secretaries, Secretary Mattis determined that DoD and the services needed "additional time to evaluate more carefully the impact of such accessions on readiness and lethality." Parker Decl. Exh. 4 (Memorandum Regarding Accessions of

[6] Of course, substantial deference also would be owed to the military's forthcoming policy, and it would be clear error for the Court to enter summary judgment before consideration of that policy and deference to the basis for that policy. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 26–31 (2008).

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 514-4336

Transgender Individuals into the Military Services (June 30, 2017)). Secretary Mattis stated that his "intent [was] to ensure that [he] personally [has] the benefit of the views of military leadership and of the civilian officials who are now arriving at the Department" before changing DoD's longstanding policy of prohibiting transgender individuals from accessing into the military. *See id.* Thus, well before the President made statements on Twitter, Secretary Mattis received counsel from the Service Chiefs and Secretaries and determined that additional time was needed to study whether accessions of transgender individuals into the military would impact readiness and lethality. *See id.* The Secretary's decision to continue studying the issue after he received counsel from the Service Chiefs and Secretaries was made with considered reason and deliberation and is thus entitled to substantial deference.

The subsequent Presidential Memorandum extended the accessions deadline indefinitely until there appears a sufficient basis to abandon the longstanding accessions policy. Presidential Memorandum, 82 Fed. Reg. 41,319. Secretary Mattis then issued the Interim Guidance, which maintains the *status quo* for military service by transgender individuals until a final policy is enacted. That reasonable, non-disruptive decision to maintain a longstanding policy while DoD continues studying the issue is also entitled to substantial deference.

B. The Applicable Policies Are Consistent With Constitutional Guarantees.

As set forth above, DoD is entitled to substantial deference for the applicable policies concerning service by transgender individuals in the military. And as Defendants have previously argued, the Government believes that heightened scrutiny does not apply in this context. Defs.' Mot., ECF No. 69, at 28–30. Although this Court disagreed, we again reiterate our view that heightened scrutiny is not the proper standard of review, for purposes of preserving the issue for further review.[7] In any event, the Interim Guidance maintains the *status quo* and does not violate the Constitution. Indeed, Plaintiffs offer no argument to the contrary.

[7] Although *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), and the other cases cited by Plaintiffs, *see* Pls.' Mot. at 16–18, could be interpreted as holding to the contrary, these cases are factually distinguishable and, in all events, Defendants preserve the issue for further review.

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 514-4336

1. The Applicable Policies Do Not Violate Equal Protection.

a. Retention of Current Service Members

Plaintiffs' arguments that the Interim Guidance subjects them to unequal treatment is misplaced. The Interim Guidance explicitly directs that "transgender service members are subject to the same standards as any other Service member of the same gender." Interim Guidance, ECF No. 149-3. Indeed, Defendants have maintained throughout this litigation that neither the August 25, 2017 Presidential Memorandum nor any implementing guidance permit the discharge of currently serving transgender soldiers. *See* Defs.' Mot. at 15–16; Defs.' Reply, ECF No. 90, at 2–5. "A denial of equal protection entails, at a minimum, a classification that treats individuals unequally." *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 707 (9th Cir. 1997). Plaintiffs Schmid, Muller, Lewis, Stephens, Winters, and Doe, who currently serve in the military, provide no evidence that they have been treated unequally under the Interim Guidance. To the contrary, Defendants have submitted declarations stating that, consistent with the Interim Guidance, these individuals will not be discharged from the military based on their transgender status. *See* McCracken Decl. ¶ 2; Easley Decl. (Oct. 16, 2017) ¶ 3; Good Decl. ¶ 5; Breyerjoyner Decl. ¶ 6; Huffman Decl. ¶ 3. Because the applicable policy does not classify service members based on transgender status, and even prohibits disparate treatment of existing service members based on transgender status, Plaintiffs have not met their burden of showing that the applicable policy concerning service of transgender individuals in the military violates their equal protection rights.

b. Surgery

Congress has provided the Secretary of Defense and the service secretaries the discretion to set the level of care provided at military facilities. 10 U.S.C. § 1074(a)(1); *see also* 10 U.S.C. § 1073(a)(b). Thus, DoD has broad discretion to shape the scope of services based on medical, policy, and military readiness concerns. Similarly, the Secretary of Defense has broad discretion to authorize a service member to obtain health care at a private health care facility. 10 U.S.C. § 1074(c)(1). However, Congress has specifically limited the Secretary's authority to pay for surgery in non-DoD facilities for "sex gender changes," but this is subject to "such exceptions as the Secretary of Defense considers necessary," as long as the waiver is based on a case-by-case medical

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
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determination that it would be necessary and appropriate for the patient and not "elective private treatment." 10 U.S.C. §§ 1074(c)(2)(A), 1079(a)(11), 1074(c)(1). And even the Carter policy permits sex-reassignment surgeries only on a "case-by-case basis." Parker Decl. Exh. 1 § 4.

Similarly, the both Interim Guidance and the Presidential Memorandum provide that "no new sex reassignment surgical procedures for military personnel will be permitted after March 22, 2018, except to the extent necessary to protect the health of the individual who has already begun a course of treatment to reassign his or her sex." Interim Guidance, ECF No. 149-3; *accord* Presidential Memorandum § 2(b). Thus, the relevant policies restate the restrictions already existing in Title 10 but provides for the possibility of a waiver when the Secretary of Defense deems the procedure necessary to protect the health of an individual who has already begun a course of treatment. And any difference between the treatment of sex-reassignment surgery under the Carter policy and the challenged policy—both of which authorize the procedure only on a case-by-case basis—is ultimately a matter of line-drawing that should not be second-guessed by the Judiciary. Because Plaintiffs may still receive waivers for medically necessary treatment like any other service member, Plaintiffs have not met their burden of showing that the applicable policy concerning service of transgender individuals in the military violates their equal protection rights.

c. Accessions

Given the considerable deference due to military personnel decisions, Plaintiffs and Intervenor cannot show that they are entitled to summary judgment concerning their equal protection challenge to the longstanding accessions policy. As both Secretary Mattis and the President have explained, there were significant concerns that abandoning this policy could "hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." Presidential Memorandum § 1(a); *see also* Parker Decl. Exh. 4 (stating that "additional time [was needed] to evaluate more carefully the impact of such accessions on readiness and lethality"). Although Plaintiffs and Intervenor claim that these rationales are a pretext for animus, the limited record in this case does not support that claim.

The military's longstanding accessions policy—maintained by both the Presidential Memorandum and Interim Guidance—rests on the reasonable concern that at least some

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
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transgender individuals, including those who have undergone sex reassignment surgical procedures, suffer from medical conditions or have undergone treatments that could impair the performance of their military duties or risk such impairments in the future. *See* Parker Decl. Exh. 5 (DODI 6130.03). Even the new accessions policy announced in 2016 acknowledged the legitimacy of this concern by providing that a history of gender dysphoria, medical treatment associated with gender transition, and sex reassignment surgery were disqualifying unless an applicant could prove that he had avoided complications for an 18-month period—a more lax standard than for other similar conditions. Parker Decl. Exh. 1; *see e.g.*, Parker Decl. Exh. 5 (DoDI 6330.03 at Encl. 4, ¶ 9.g) (disqualifying applicants with a history of depressive disorder unless applicant has been stable for the past 36 months). DoD's expert panel was tasked with studying the relevant medical standards applicable to transgender persons, and in the interim it was not irrational for the President to maintain the *status quo* pending that panel's review.

Also, the longstanding accessions policy rests on the reasonable conclusion that these conditions may limit the ability of transgender individuals to deploy and thus limit the readiness and lethality of the force. For decades, military professionals indicated that one basis for the policy was that complications associated with hormone therapy and sex-change procedures could impair soldiers from serving around the globe. *See, e.g.*, *DeGroat v. Townsend*, 495 F. Supp. 2d 845, 850–52 (S.D. Ohio 2007) (discussing testimony of military doctor); *Doe v. Alexander*, 510 F. Supp. at 902, 905 (D. Minn. 1981) (discussing affidavit of Brigadier General). Although Plaintiffs rely on the RAND Report, *see* Pls.' Mot. at 17, that report acknowledges that medical treatment would limit deployment capabilities, RAND Report 39–42, ECF No. 143-3. For example, the RAND report specifically noted that hormone treatments are a common treatment option for gender dysphoria, *id.* at 6, and that such treatments can leave service members ineligible for deployment, *id.* at xiv. Finally, in June 2017—before the President's Twitter statement or the issuance of the Presidential Memorandum—Secretary Mattis consulted with the Service Chiefs and Secretaries about the accessions policy and determined that DoD needed additional time to study the impact of accession of transgender individuals into the military on the overall readiness and lethality of the force. Parker Decl. Exh. 4.

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 514-4336

Plaintiffs and Intervenor have provided no evidence to dispute Secretary Mattis' determination that more study was needed on these issues.

In addition, it is undisputed that changing the accessions policy would impose costs on the military. Although Plaintiffs isolate one of those costs—"transition-related care"—and dismiss it as "budget dust," Pls.' Mot. at 20, that ignores other costs associated with their desired policy change. *See, e.g.*, Decl. of Lernes Hebert, ECF No. 107, ¶ 10 (discussing costs associated with changing an accessions policy). Also, the military has the freedom to choose "among alternatives," *Rostker*, 453 U.S. at 71, which includes the ability to decide how best to spend its money. At a minimum, the military is entitled to make the reasonable judgment that spending the millions of dollars necessary to accommodate transgender individuals would more effectively accomplish its "primary business"—in other words, "to fight or be ready to fight wars should the occasion arise." *Id.* at 70 (citation omitted).

Moreover, the President could reasonably conclude that the longstanding accessions policy furthers "unit cohesion." Presidential Memorandum § 1(a). The RAND Report acknowledged that "[a] key concern in allowing transgender personnel to serve openly is how this may affect unit cohesion—a critical input for unit readiness," but stated that it did "not have direct survey evidence or other data to directly assess the impact on the U.S. military." RAND Report at 44. Additionally, although the RAND Report found that transgender service members were less deployable when seeking treatment, it did not appear to consider whether an impact on deployability in itself would affect unit cohesion. *See id.* at 40, 44–45. Given the limited information presently available, which the RAND Report itself acknowledges, it is reasonable for the President to have concluded that maintaining the accessions policy could rationally further unit cohesion, a matter that implicates complex and significant privacy issues and that the matter warranted further study by military officials. For example, a departure from that policy could complicate the operation of sex-based standards in the areas of housing and physical training. *Cf. United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996). In any event, it is not the role of the judiciary to second-guess a Commander in Chief's judgment in this regard. As "the Supreme Court has indicated," "military decisions and assessments

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 514-4336

of morale, discipline, and unit cohesion . . . are well beyond the competence of judges." *Bryant v. Gates*, 532 F.3d 888, 899 (D.C. Cir. 2008) (Kavanaugh, J., concurring).

In sum, Plaintiffs and Intervenor are not entitled to summary judgment on the accessions policy because Secretary Mattis' and the President's decisions to maintain the *status quo* while the military studies the policy on service by transgender individuals easily passes constitutional muster—particularly in light of the limited evidence in the record and the deference owed the Executive in this area.

2. The Applicable Policies Do Not Violate Due Process.

Plaintiffs' and Intervenor's substantive due process claim fails for essentially the same reasons as their equal protection claim. Plaintiffs and Intervenor fail to show how Defendants have intruded upon any fundamental liberty interest, even if such interest were cognizable in the military context. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The Interim Guidance provides that the currently serving Plaintiffs may not be discharged from the military based on their transgender status and may re-enlist if their terms of service expire. *See* Interim Guidance, ECF No. 149-3. Moreover, the President and DoD have provided reasons for maintaining the *status quo* while the military studies the policy on service by transgender individuals that pass constitutional muster under any standard, especially in light of the significant deference courts accord to military judgments regarding the composition of the fighting force. Plaintiffs have therefore failed to show that they are entitled to summary judgment on this claim.

3. The Applicable Policies Do Not Violate the First Amendment.

Plaintiffs claim that "the Ban constitutes a content-based regulation of speech because it 'penalizes transgender service members—but not others—for disclosing their gender identity.'" Pls.' Mot. at 22 (quoting Order at 19–20). However, neither the Presidential Memorandum nor the Interim Guidance regulates speech at all, much less on the basis of its content. The Presidential Memorandum does not restrict expression; instead, it directs a further review of the military's policy concerning accessions and reserves for the military the ability to address the treatment of current transgender service members. Nor have Plaintiffs explained how the Interim Guidance inhibits the expression of their transgender status. Similarly, the accession policy is not directed at restricting the

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 514-4336

content of expression, but instead merely requires disclosure of information related to medical conditions, such as gender dysphoria, that may bar military service for failure to meet medical standards. *See id.*

Even assuming *arguendo* that the First Amendment was implicated here, a deferential standard of review applies to regulation of speech in the military context. *See Weinberger*, 475 U.S. at 507. Regulation of speech in the military survives review if it "restrict[s] speech no more than is reasonably necessary to protect the substantial government interest." *Brown v. Glines,* 444 U.S. 348, 355 (1980). Defendants' current policy on service by transgender persons meets this highly deferential standard because the Interim Guidance does not impede expression by current transgender service members or those seeking accession into the military. Accordingly, Plaintiffs' summary judgment motion should be denied as a matter of law.

III. The Injunctive Relief Plaintiffs Seek Is Inappropriate.

The relief Plaintiffs seek—an injunction that would in theory apply to service members worldwide—is inappropriate. *See* Pls.' Mot. at 24. Both constitutional and equitable principles require that injunctive relief be limited to redressing a plaintiff's own cognizable injuries. "The actual-injury requirement [of Article III standing] would hardly serve [its] purpose . . . of preventing courts from undertaking tasks assigned to the political branches[,] if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy all inadequacies in that administration." *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996). Equitable principles independently require that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted). These constitutional and equitable limits apply with special force to injunctions concerning military policies. *See Meinhold v. U.S. Dep't of Def.,* 34 F.3d 1469, 1473 (9th Cir. 1994) (after district court enjoined DoD "from discharging or denying enlistment to any person based on sexual orientation," staying injunction to the extent it conferred relief on anyone other than the plaintiff).

Thus, any injunction here should be limited to Plaintiffs and not extend to other members or applicants not before this Court. Any cognizable injuries to Plaintiffs would be fully addressed

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 514-4336

through an injunction concerning their individual ability either to accede into or continue serving in the military. And if other service members or applicants believe they are injured by the policies at issue, they are free to bring their own challenges—and a few have done so. *See, e.g.*, *Doe v. Trump*, No. 1:17-cv-01587 (D.D.C., Filed Aug. 9, 2017). But to the extent Plaintiffs have a live case or controversy with the government, it is the role of this Court to resolve that case or controversy, not to resolve others that are pending or impending in others courts around the country.

Although the Court already has granted Plaintiffs' motion for a worldwide preliminary injunction, *see* Order, ECF No. 103, at 23, a worldwide permanent injunction would be even more extraordinary, as it could indefinitely preclude the Executive Branch from taking certain actions related to military policy. *See World Wide Polymers, Inc. v. Shinkong Synthetic Fibers Corp.*, No. 03-CV-8843 LAP RME, 2010 WL 3155176, at *10 (S.D.N.Y. July 30, 2010), aff'd, 694 F.3d 155 (2d Cir. 2012) (describing a permanent injunction as an "extraordinary remedy.") (quotation omitted).

Worse, Plaintiffs seek that extraordinary remedy to prevent certain hypothetical adverse personnel actions that have not been taken against them and may never occur. In doing so, they subvert a carefully delineated administrative framework. The military personnel decisions that Plaintiffs speculate they will one day face are ordinarily reviewed by a district court on an administrative record under the Administrative Procedure Act *after* the military decision has been made. Service members would have the opportunity to raise a constitutional challenge then or through intra-military procedures such as the military corrections boards. *See Chappell v. Wallace,* 462 U.S. 296, 303 (1983). That ordinary administrative framework would provide a more appropriate avenue of relief than the premature intrusion into military affairs they currently seek.

For all of these reasons, the injunctive relief Plaintiffs seek is inappropriate.

IV. The Court Should Grant Partial Summary Judgment for Defendants on All Claims Brought Against the President.

In their complaints, both Plaintiffs and Intervenor name the President as a defendant and seek injunctive and declaratory relief against him for discretionary actions taken in his official capacity. *See* Am. Compl., ECF No. 30, ¶ 19; Compl., ECF No. 104, ¶ 12. Because the Court has no jurisdiction to impose injunctive or declaratory relief against the President for his official,

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
Tel: (202) 514-4336

discretionary conduct, the Court should grant partial summary judgment to Defendants on all of Plaintiffs' and Intervenor's claims against the President.

The Supreme Court has long held that it has "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866); *id.* at 500 ("The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance."). A "majority of the Justices" reaffirmed this fundamental principle in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). *Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996). Writing for the plurality, Justice O'Connor stated that it was "extraordinary" that the district court had issued an injunction against the President and two other Government officials. *Franklin*, 505 U.S. at 802, 806. "At the threshold, the District Court should have evaluated whether injunctive relief against the President was available, and if not, whether appellees' injuries were nonetheless redressable." *Id.* at 803. Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827–28 (noting that such principle is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history"). Just as the President is absolutely immune from official capacity damages suits, so is he immune from efforts to enjoin him in his official capacity. *Id.* at 827 ("Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President's performance of executive functions").

Consistent with *Mississippi* and *Franklin*, courts in this and other circuits have rejected demands to enjoin the President in the performance of his official duties, regardless of the claim.[8]

[8] *See, e.g.*, *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 557, 605 (4th Cir.), *vacated and remanded on other grounds sub. nom. Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010); *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996); *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 632 (D. Md. 2017); *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539–40 (N.D. Cal. 2017), *appeal docketed* No. 17-16886 (9th Cir. Sept. 18, 2017); *Settle v. Obama*, No. 15-cv-365, 2015 WL 7283105, at *6 (E.D. Tenn. Nov. 17, 2015); *Day v. Obama*, No. 15-cv-00671, 2015 WL 2122289, *1 (D.D.C. May 1, 2015); *Willis v. Dep't of Health & Human Servs.*, 38 F. Supp. 3d 1274, 1277 (W.D. Okla. 2014); *McMeans v. Obama*, No. 11-cv-891, 2011 WL 6046634, at *3 (D. Del. Dec. 1, 2011); *Shreeve v.*

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20530
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For example, in *Hawaii v. Trump*, Ninth Circuit held that the District Court of Hawaii had abused its discretion in enjoining the President from implementing and enforcing his Executive Order entitled "Protecting the Nation from Foreign Terrorist Entry Into the United States." 859 F.3d 741, 757, 760 (9th Cir. 2017).[9] Although the Ninth Circuit upheld the injunction as against other Executive Branch officials, it agreed with the Government that the injunction should not have extended to the President. As that court explained, "Plaintiffs' injuries can be redressed fully by injunctive relief against the remaining Defendants, and . . . the extraordinary remedy of enjoining the President is not appropriate here." *Id.* at 788 (citing *Franklin*, 505 U.S. at 803).

The *Mississippi v. Johnson* line of cases underscores that the President is not a proper defendant in this case. It is undisputed that Plaintiffs and Intervenor brought suit against the President in his official capacity, challenging discretionary actions he took concerning military policy in his role as Commander in Chief. *See* Am. Compl., ECF No. 30, ¶ 19; Compl., ECF No. 104, ¶ 12. It is also undisputed that Plaintiffs and Intervenor seek declaratory and injunctive relief against the President. *See* Am. Compl. at 39; Compl. ¶¶ 39–43. It is further undisputed that Plaintiffs could obtain full relief for their alleged injuries through injunctive relief against the other Defendants in this case. Accordingly, because this Court cannot issue a declaratory judgment or an order enjoining the President for his official, discretionary action, the Court should grant partial summary judgment to Defendants on all of Plaintiffs' and Intervenor's claims against the President.[10]

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' and Intervenor's summary judgment motions and grant Defendants' cross-motion for partial summary judgment.

Obama, No. 10-cv-71, 2010 WL 4628177, at *5 (E.D. Tenn. Nov. 4, 2010); *Anderson v. Obama*, No. CIV. PJM 10-17, 2010 WL 3000765, at *2 (D. Md. July 28, 2010); *Carlson v. Bush*, No. 6:07CV1129ORL19UAM, 2007 WL 3047138, at *3 (M.D. Fla. Oct. 18, 2007); *Comm. to Establish the Gold Standard v. United States*, 392 F. Supp. 504, 506 (S.D.N.Y. 1975); *Nat'l Ass'n of Internal Revenue Emps. v. Nixon*, 349 F. Supp. 18, 21–22 (D.D.C. 1972); *Reese v. Nixon*, 347 F. Supp. 314, 316–17 (C.D. Cal. 1972); *S.F. Redevelopment Agency v. Nixon*, 329 F. Supp. 672, 672 (N.D. Cal. 1971); *Suskin v. Nixon*, 304 F. Supp. 71, 72 (N.D. Ill. 1969).

[9] Based on subsequent events, the Supreme Court vacated the judgment and remanded the case to the Ninth Circuit with instructions to dismiss the case as moot. *Trump v. Hawaii*, 138 S. Ct. 377 (2017).

[10] For these same reasons, the Court should also dissolve the preliminary injunction "to the extent that the order runs against the President." *Hawaii*, 859 F.3d at 788.

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Civil Division, Federal Programs Branch
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Dated: February 28, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2018, I electronically filed the foregoing Opposition to Plaintiffs' and Intervenor's Motions for Summary Judgment and Defendants' Cross-motion for Partial Summary Judgment using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: February 28, 2018

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