

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

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JANE DOE 2, JANE DOE 3, JANE DOE 4, )  
JANE DOE 5, JANE DOE 6, JANE DOE 7, )  
JOHN DOE 1, JOHN DOE 2, REGAN V. )  
KIBBY, and DYLAN KOHERE, )

Plaintiffs, )

v. )

DONALD J. TRUMP, in his official capacity as )  
President of the United States; JAMES N. )  
MATTIS, in his official capacity as Secretary of )  
Defense; JOSEPH F. DUNFORD, JR., in his )  
official capacity as Chairman of the Joint Chiefs )  
of Staff; the UNITED STATES DEPARTMENT )  
OF THE ARMY; MARK T. ESPER, in his )  
official capacity as Secretary of the Army; the )  
UNITED STATES DEPARTMENT OF THE )  
NAVY; RICHARD V. SPENCER, in his official )  
capacity as Secretary of the Navy; the UNITED )  
STATES DEPARTMENT OF THE AIR )  
FORCE; HEATHER A. WILSON, in her )  
official capacity as Secretary of the Air Force; )  
the UNITED STATES COAST GUARD; )  
KIRSTJEN M. NIELSEN, in her official )  
capacity as Secretary of Homeland Security; the )  
DEFENSE HEALTH AGENCY; RAQUEL C. )  
BONO, in her official capacity as Director of the )  
Defense Health Agency; and the UNITED )  
STATES OF AMERICA, )

Defendants. )

Civil Action No. 17-cv-1597 (CKK)

**NOTICE OF SUPPLEMENTAL AUTHORITY**

Plaintiffs write to notify the Court of supplemental authority in further support of their opposition to Defendants’ motions for partial judgment on the pleadings and for a protective order to preclude discovery pending resolution of their motion to dissolve the preliminary injunction. *See* Dkts. 92, 108. In a related case pending before the United States District Court for the Western District of Washington, the district court rejected the same arguments

Defendants have made in this case for dismissing the President from the litigation and staying all discovery. *See* Slip Op., *Karnoski v. Trump*, No. 2:17-cv-01297-MJP (Apr. 13, 2018), ECF No. 233. With respect to the President’s immunity from suit, the court in *Karnoski* held that it has “jurisdiction to issue declaratory relief against the President,” and a constitutional challenge to the President’s directives to ban military service by transgender individuals “presents a ‘most appropriate instance’ for such relief.” *Id.* at 29 (quoting *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974)).

The court in *Karnoski* likewise rejected the government’s lead argument in this case for staying all discovery—namely, that with the release on March 23, 2018 of Secretary Mattis’s implementation plan and a new memorandum by the President, Plaintiffs’ constitutional challenge is now moot, *see* Dkt. 97, at 6. The court found “that the 2018 Memorandum and the Implementation Plan do not substantively rescind or revoke the Ban, but instead threaten the very same violations that caused it and other courts to enjoin the Ban in the first place.” Slip Op. 12. Indeed, as the court noted, “[t]he Implementation Plan adheres to the policy and directives set forth in the 2017 Memorandum with few exceptions,” *id.*, and the purported exceptions themselves prohibit transgender individuals from serving consistent with their gender identity, *id.* at 13 (“Requiring transgender people to serve in their ‘biological sex’ does not constitute ‘open’ service in any meaningful way, and cannot reasonably be considered an ‘exception’ to the Ban. Rather, it would force transgender service members to suppress the very characteristic that defines them as transgender in the first place.” (footnote omitted)). The court accordingly held that “the 2018 Memorandum and the Implementation Plan do not moot Plaintiffs’ ... existing challenges.” *Id.* at 14.

For the convenience of this Court, the district court's opinion in *Karnoski* is attached to this notice.

April 16, 2018

Claire Laporte (*pro hac vice*)  
Matthew E. Miller (*pro hac vice*)  
Daniel L. McFadden (*pro hac vice*)  
Kathleen M. Brill (*pro hac vice*)  
Michael J. Licker (*pro hac vice*)  
Rachel C. Hutchinson (*pro hac vice*)  
Lauren Godles Milgroom (*pro hac vice*)  
FOLEY HOAG LLP  
155 Seaport Blvd.  
Boston, Massachusetts 02210  
Telephone: 617-832-1000  
Fax: 617-832-7000

Theresa M. Roosevelt (D.C. Bar No. 1021853)  
FOLEY HOAG LLP  
1717 K St. NW  
Washington, D.C. 20009  
Telephone: 202-223-1200  
Fax: 202-785-6687

Jennifer Levi (*pro hac vice*)  
Mary Bonauto (*pro hac vice*)  
GLBTQ LEGAL ADVOCATES & DEFENDERS  
18 Tremont St., Ste. 950  
Boston, Massachusetts 02108  
Telephone: 617-426-1350  
Fax: 617-426-3594

Shannon P. Minter (*pro hac vice*)  
Amy Whelan (*pro hac vice*)  
Christopher F. Stoll (*pro hac vice*)  
NATIONAL CENTER FOR LESBIAN RIGHTS  
870 Market St., Ste. 370  
San Francisco, California 94102  
Telephone: 415-392-6257  
Fax: 415-392-8442

Respectfully submitted,

/s/ Paul R.Q. Wolfson  
Paul R.Q. Wolfson (D.C. Bar No. 414759)  
Kevin M. Lamb (D.C. Bar No. 1030783)  
WILMER CUTLER PICKERING  
HALE & DORR LLP  
1875 Pennsylvania Ave. N.W.  
Washington, D.C. 20006  
Telephone: 202-663-6000  
Fax: 202-663-6363

Alan E. Schoenfeld (*pro hac vice*)  
WILMER CUTLER PICKERING  
HALE & DORR LLP  
7 World Trade Center  
250 Greenwich St.  
New York, New York 10007  
Telephone: 212-230-8800  
Fax: 212-230-8888

Christopher R. Looney (*pro hac vice*)  
Harriet Hoder (*pro hac vice*)  
Adam M. Cambier (*pro hac vice*)  
WILMER CUTLER PICKERING  
HALE & DORR LLP  
60 State Street  
Boston, Massachusetts 02109  
Telephone: 617-526-6000  
Fax: 617-526-5000

Nancy Lynn Schroeder (*pro hac vice*)  
WILMER CUTLER PICKERING  
HALE & DORR LLP  
350 S. Grand Ave., Ste. 2100  
Los Angeles, California 90071  
Telephone: 213-443-5300  
Fax: 213-443-5400

*Attorneys for Plaintiffs*

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RYAN KARNOSKI, et al.,  
  
Plaintiffs,  
  
v.  
  
DONALD J. TRUMP, et al.,  
  
Defendants.

CASE NO. C17-1297-MJP  
  
ORDER GRANTING IN PART  
AND DENYING IN PART  
PLAINTIFFS’ AND  
WASHINGTON’S MOTIONS FOR  
SUMMARY JUDGMENT;  
  
GRANTING IN PART AND  
DENYING IN PART  
DEFENDANTS’ MOTION FOR  
PARTIAL SUMMARY JUDGMENT

THIS MATTER comes before the Court on Plaintiffs’ Motion for Summary Judgment (Dkt. No. 129); the State of Washington’s Motion for Summary Judgment (Dkt. No. 150); and Defendants’ Cross-Motion for Partial Summary Judgment (Dkt. No. 194.) Having reviewed the Motions, the Responses (Dkt. Nos. 194, 207, 209), the Replies (Dkt. Nos. 201, 202, 212) and all related papers, and having considered arguments made in proceedings before the Court, the Court rules as follows: The Court GRANTS IN PART and DENIES IN PART Plaintiffs’ and

1 Washington's Motions and GRANTS IN PART and DENIES IN PART Defendants' Cross-  
2 Motion.

### 3 ORDER SUMMARY

4 In July 2017, President Donald J. Trump announced on Twitter a ban on military service  
5 by openly transgender people (the "Ban"). Plaintiffs and the State of Washington  
6 ("Washington") challenged the constitutionality of the Ban, and moved for a preliminary  
7 injunction to prevent it from being carried out.

8 In December 2017, the Court—along with three other federal judges—entered a  
9 nationwide preliminary injunction preventing the military from implementing the Ban. The  
10 effect of the order was to maintain the status quo, allowing transgender people to join and serve  
11 in the military and receive transition-related medical care. For the past few months, they have  
12 done just that.

13 In March 2018, President Trump announced a plan to implement the Ban. With few  
14 exceptions, the plan excludes from military service people "with a history or diagnosis of gender  
15 dysphoria" and people who "require or have undergone gender transition." The plan provides  
16 that transgender people may serve in the military only if they serve in their "biological sex."  
17 Defendants claim that this plan resolves the constitutional issues raised by Plaintiffs and  
18 Washington.

19 In the following order, the Court concludes otherwise, and rules that the preliminary  
20 injunction will remain in effect. Each of the claims raised by Plaintiffs and Washington remains  
21 viable. The Court also rules that, because transgender people have long been subjected to  
22 systemic oppression and forced to live in silence, they are a protected class. Therefore, any  
23 attempt to exclude them from military service will be looked at with the highest level of care,  
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1 and will be subject to the Court’s “strict scrutiny.” This means that before Defendants can  
 2 implement the Ban, they must show that it was sincerely motivated by compelling interests,  
 3 rather than by prejudice or stereotype, and that it is narrowly tailored to achieve those interests.

4 The case continues forward on the issue of whether the Ban is well-supported by  
 5 evidence and entitled to deference, or whether it fails as an impermissible violation of  
 6 constitutional rights. The Court declines to dismiss President Trump from the case and allows  
 7 Plaintiffs’ and Washington’s claims for declaratory relief to go forward against him.

## 8 BACKGROUND

### 9 I. The Ban on Military Service by Openly Transgender People<sup>1</sup>

10 *President Trump’s Announcement on Twitter:* On July 26, 2017, President Donald J.  
 11 Trump (@realDonaldTrump) announced over Twitter that the United States would no longer  
 12 “accept or allow” transgender people “to serve in any capacity in the U.S. military” (the “Twitter  
 13 Announcement”):



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 20 (Dkt. No. 149, Ex. 1.)

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 23 <sup>1</sup> As used throughout this Order, and as explained in greater detail in this section, the  
 24 “Ban” refers to Defendants’ policy generally prohibiting military service by openly transgender people, as announced in President Trump’s Twitter Announcement and 2017 Memorandum and as further detailed in the Implementation Plan and 2018 Memorandum.

1           ***The 2017 Memorandum:*** On August 25, 2017, President Trump issued a Presidential  
2 Memorandum (the “2017 Memorandum”) formalizing his Twitter Announcement, and directing  
3 the Secretaries of Defense and Homeland Security to “return” to an earlier policy excluding  
4 transgender service members. (Dkt. No. 149, Ex. 2.) The 2017 Memorandum authorized the  
5 discharge of openly transgender service members (the “Retention Directive”); prohibited the  
6 accession of openly transgender service members (the “Accession Directive”); and prohibited the  
7 use of Department of Defense (“DoD”) and Department of Homeland Security (“DHS”)   
8 resources to fund “sex reassignment” surgical procedures (the “Medical Care Directive”). (Id. at  
9 §§ 1-3.) The Accession Directive was to take effect on January 1, 2018; the Retention and  
10 Medical Care Directives on March 23, 2018. (Id. at § 3.) The 2017 Memorandum also ordered  
11 the Secretary of Defense to “submit to [President Trump] a plan for implementing both [its]  
12 general policy . . . and [its] specific directives . . .” no later than February 21, 2018. (Id.)

13           ***Secretary Mattis’ Press Release and Interim Guidance:*** On August 29, 2017, Secretary  
14 of Defense James N. Mattis issued a press release confirming that the DoD had received the  
15 2017 Memorandum and, as directed, would “carry out” its policy direction. (Dkt. No. 197, Ex.  
16 2.) The press release explained that Secretary Mattis would “develop a study and  
17 implementation plan” and “establish a panel of experts . . . to provide advice and  
18 recommendation on the implementation of the [P]resident’s direction.” (Id.)

19           On September 14, 2017, Secretary Mattis issued interim guidance regarding President  
20 Trump’s Twitter Announcement and 2017 Memorandum to the military (the “Interim  
21 Guidance”). (Dkt. No. 149, Ex. 3.) The Interim Guidance again identified the DoD’s intent to  
22 “carry out the President’s policy and directives” and “present the President with a plan to  
23 implement the policy and directives in the [2017] Memorandum.” (Id. at 2.) The Interim  
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1 Guidance provided (1) that transgender people would be prohibited from accession effective  
2 immediately; (2) that service members diagnosed with gender dysphoria would be provided  
3 “treatment,” however, “no new sex reassignment surgical procedures for military personnel  
4 [would] be permitted after March 22, 2018”; and (3) that no action would be taken “to  
5 involuntarily separate or discharge an otherwise qualified Service member solely on the basis of  
6 a gender dysphoria diagnosis or transgender status.” (*Id.* at 3.)

7 ***The Implementation Plan:*** On February 22, 2018, as directed, Secretary Mattis  
8 delivered to President Trump a plan for carrying out the policies set forth in his Twitter  
9 Announcement and 2017 Memorandum (Dkt. No. 224, Ex. 1) along with a “Report and  
10 Recommendations on Military Service by Transgender Persons” (Dkt. No. 224, Ex. 2)  
11 (collectively, the “Implementation Plan”). The Implementation Plan recommended the following  
12 policies:

- 13 • Transgender persons with a history or diagnosis of gender dysphoria are  
14 disqualified from military service, except under the following limited  
15 circumstances: (1) if they have been stable for 36 consecutive months in their  
16 biological sex prior to accession; (2) Service members diagnosed with gender  
17 dysphoria after entering into service may be retained if they do not require a  
18 change of gender and remain deployable within applicable retention  
19 standards; and (3) currently serving Service members who have been  
20 diagnosed with gender dysphoria since the previous administration’s policy  
21 took effect and prior to the effective date of this new policy, may continue to  
22 serve in their preferred gender and receive medically necessary treatment for  
23 gender dysphoria.
- Transgender persons who require or have undergone gender transition are  
disqualified from military service.
- Transgender persons without a history or diagnosis of gender dysphoria, who  
are otherwise qualified for service, may serve, like all other Service members,  
in their biological sex.

(Dkt. No. 224, Ex. 1 at 3-4.)

1           **The 2018 Memorandum:** On March 23, 2018, President Trump issued another  
2 Presidential Memorandum (the “2018 Memorandum”). (Dkt. No. 224, Ex. 3.) The 2018  
3 Memorandum confirms his receipt of the Implementation Plan, purports to “revoke” the 2017  
4 Memorandum and “any other directive [he] may have made with respect to military service by  
5 transgender individuals,” and directs the Secretaries of Defense and Homeland Security to  
6 “exercise their authority to implement any appropriate policies concerning military service by  
7 transgender individuals.” (Id. at 2-3.)

## 8       **II. The Carter Policy**

9           In 2010, Congress repealed the “Don’t Ask, Don’t Tell” policy that had previously  
10 prevented gay, lesbian, and bisexual people from serving openly in the military. (Dkt. No. 145 at  
11 ¶ 10.) The repeal of “Don’t Ask, Don’t Tell” raised questions about the military’s policy on  
12 transgender service members, as commanders became increasingly aware that there were capable  
13 and experienced transgender service members in every branch of the military. (Id. at ¶ 11; Dkt.  
14 No. 146 at ¶ 7.) In August 2014, the DoD eliminated its categorical ban on retention of  
15 transgender service members, enabling each branch of military service to reassess its own  
16 policies. (Dkt. No. 145 at ¶ 12; Dkt. No. 146 at ¶ 8.) In July 2015, then-Secretary of Defense  
17 Ashton Carter convened a group to evaluate policy options regarding openly transgender service  
18 members (the “Working Group”). (Dkt. No. 142 at ¶ 8.) The Working Group included senior  
19 uniformed officials from each branch, a senior civilian official, and various staff members. (Id.  
20 at ¶ 9.) It sought to “identify and address all relevant issues relating to service by openly  
21 transgender persons.” (Id. at ¶ 22.) To do so, it consulted with medical experts, personnel  
22 experts, readiness experts, and commanders whose units included transgender service members,  
23 and commissioned an independent study by the RAND Corporation to assess the implications of  
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1 allowing transgender people to serve openly (the “RAND Study”). (Id. at ¶¶ 10-11, 22-27.) In  
2 particular, the RAND Study focused on: (1) the health care needs of transgender service  
3 members and the likely costs of providing coverage for transition-related care; (2) the readiness  
4 implications of allowing transgender service members to serve openly; and (3) the experiences of  
5 foreign militaries that allow for open service. (Dkt. No. 144, Ex. B at 4.) The RAND Study  
6 found “no evidence” that allowing transgender people to serve openly would adversely impact  
7 military effectiveness, readiness, or unit cohesion. (Dkt. No. 144 at ¶ 14.) Instead, the RAND  
8 Study found that discharging transgender service members would reduce productivity and result  
9 in “significant costs” associated with replacing skilled and qualified personnel. (Dkt. No. 142 at  
10 ¶ 21.) The results of the RAND Study were published in a 113-page report titled “Assessing the  
11 Implications of Allowing Transgender Personnel to Serve Openly.” (See Dkt. No. 144, Ex. B.)

12       After reviewing the results of the RAND Study and other evidence, the Working Group  
13 unanimously agreed that (1) transgender people should be allowed to serve openly and (2)  
14 excluding them from service based on a characteristic unrelated to their fitness to serve would  
15 undermine military efficacy. (Dkt. No. 142 at ¶¶ 26-27.) On June 30, 2016, Secretary Carter  
16 accepted the recommendations of the Working Group and issued Directive-type Memorandum  
17 16-005 (the “Carter Policy”), which affirmed that “service in the United States military should be  
18 open to all who can meet the rigorous standards for military service and readiness.” (Dkt. No.  
19 144, Ex. C.) The Carter Policy provided that “[e]ffective immediately, no otherwise qualified  
20 service member may be involuntarily separated, discharged or denied reenlistment or  
21 continuation of service, solely on the basis of their gender identity,” and further provided that  
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1 transgender people would be allowed to accede into the military not later than July 1, 2017.<sup>2</sup> (Id.  
2 at 5.) Consistent with the Carter Policy, each branch of military service issued detailed  
3 instructions, policies, and regulations regarding separation and retention, accession, in-service  
4 transition, and medical care. (Dkt. No. 144 at ¶¶ 24-36, Exs. D, E, F; Dkt. No. 145 at ¶¶ 41-50,  
5 Exs. A, B; Dkt. No. 146 at ¶¶ 27-34, Ex. A.)

6 In reliance upon the Carter Policy and the DoD’s assurances that it would not discharge  
7 them for being transgender, many service members came out to the military and had been  
8 serving openly for more than a year when President Trump issued his Twitter Announcement  
9 and 2017 Memorandum. (Dkt. No. 144, ¶ 37; Dkt. No. 145 at ¶ 51; Dkt. No. 146 at ¶ 35.)

### 10 **III. Procedural History**

11 On August 28, 2017, Plaintiffs filed this lawsuit challenging the constitutionality of the  
12 Ban, as set forth in the Twitter Announcement and the 2017 Memorandum. (See Dkt. No. 1.)  
13 Plaintiffs include nine transgender individuals (the “Individual Plaintiffs”) and three  
14 organizations (the “Organizational Plaintiffs”). (Dkt. No. 30 at ¶¶ 7-18.) Individual Plaintiffs  
15 Ryan Karnoski, D.L., and Connor Callahan aspire to enlist in the military; Staff Sergeant  
16 Cathrine Schmid, Chief Warrant Officer Lindsey Muller, Petty Officer First Class Terece Lewis,  
17 Petty Officer Second Class Phillip Stephens, and Petty Officer Second Class Megan Winters  
18 currently serve openly in the military. (Id. at ¶¶ 7-13.) Individual Plaintiff Jane Doe currently  
19 serves in the military, but does not serve openly. (Id. at ¶ 14.) Organizational Plaintiffs include  
20 the Human Rights Campaign (“HRC”), the Gender Justice League (“GJL”), and the American  
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23 <sup>2</sup> On June 30, 2017, Secretary Mattis extended the effective date for accepting  
24 transgender recruits to January 1, 2018. (Dkt. No. 197, Ex. 3.)

1 Military Partner Association (“AMPA”). (Id. at ¶¶ 16-18.) Defendants include President Trump,  
2 Secretary Mattis, the United States, and the DoD. (Id. at ¶¶ 19-22.)

3 On November 27, 2017, the Court granted intervention to Washington, which joined to  
4 protect its sovereign and quasi-sovereign interests in its natural resources and in the health and  
5 physical and economic well-being of its residents. (See Dkt. No. 101.)

6 On December 11, 2017, the Court issued a nationwide preliminary injunction barring  
7 Defendants from “taking any action relative to transgender individuals that is inconsistent with  
8 the status quo that existed prior to President Trump’s July 26, 2017 announcement.”<sup>3</sup> (Dkt. No.  
9 103 at 23.) The Court found that Plaintiffs and Washington had standing to challenge the Ban  
10 and were likely to succeed on the merits of their claims for violation of equal protection,  
11 substantive due process, and the First Amendment. (Id. at 6-12, 15-20.)

12 On January 25, 2018, Plaintiffs and Washington filed separate motions for summary  
13 judgment.<sup>4</sup> (Dkt. Nos. 129, 150.) Both seek an order declaring the Ban unconstitutional and  
14 permanently enjoining its implementation. (Dkt. No. 129 at 28-29; Dkt. No. 150-1.)

15 On February 28, 2018, Defendants filed an opposition and cross-motion for partial  
16 summary judgment seeking dismissal of all claims brought against President Trump. (Dkt. No.  
17 194.)

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19 <sup>3</sup> Three other district courts also entered preliminary injunctions against the Ban. See  
20 Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017); Stone v. Trump, 280 F. Supp. 3d 747 (D.  
21 Md. 2017); Stockman v. Trump, No. 17-cv-1799-JGB-KK, Dkt. No. 79 (C.D. Cal. Dec. 22,  
22 2017).

23 <sup>4</sup> Plaintiffs are joined by amici the Constitutional Accountability Center (Dkt. No. 163,  
24 Ex. 1); Legal Voice (Dkt. No. 169); Retired Military Officers and Former National Security  
Officials (Dkt. No. 152, Ex. A); and the Commonwealths of Massachusetts and Pennsylvania,  
the States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, New Jersey,  
New Mexico, New York, Oregon, Rhode Island, Vermont, and the District of Columbia (Dkt.  
No. 170, Ex. A.)

1 On March 23, 2018, as these motions were pending and only days before the Court was  
2 set to hear oral argument, President Trump issued the 2018 Memorandum. (Dkt. No. 214, Ex.  
3 1.) On March 27, the Court ordered the parties to present supplemental briefing on the effect of  
4 the 2018 Memorandum and the Implementation Plan. (Dkt. No. 221.) That briefing has now  
5 been completed and this matter is ready for ruling. (See Dkt. Nos. 226, 227, 228.)

## 6 DISCUSSION

### 7 I. Legal Standard

8 Summary judgment is proper if “the movant shows that there is no genuine dispute as to  
9 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
10 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue  
11 of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To defeat a motion for  
12 summary judgment, the non-movant must point to facts supported by the record which  
13 demonstrate a genuine issue of material fact. Lujan v. National Wildlife Federation, 497 U.S.  
14 871, 888 (1990). Conclusory, non-specific statements are not sufficient. Id. Similarly, “a party  
15 cannot manufacture a genuine issue of material fact merely by making assertions in its legal  
16 memoranda.” S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc., 690  
17 F.2d 1235, 1238 (9th Cir. 1982).

### 18 II. Plaintiffs’ and Washington’s Motions for Summary Judgment

19 Plaintiffs and Washington contend that summary judgment is proper because the Ban is  
20 unsupported by any constitutionally adequate government interest as a matter of law, and  
21 therefore violates equal protection, substantive due process, and the First Amendment. (Dkt. No.  
22 129 at 15-28; Dkt. No. 150 at 13-23.) Defendants respond that disputes of material fact preclude  
23 summary judgment, including disputes as to (1) whether Plaintiffs’ and Washington’s challenges  
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1 are moot as a result of the 2018 Memorandum; (2) whether Plaintiffs and Washington have  
2 standing; and (3) whether the Ban satisfies the applicable level of scrutiny. (Dkt. No. 194 at  
3 5-24; Dkt. No. 226 at 3-11.) The Court addresses each of these issues in turn:

#### 4 **A. Mootness**

5 Defendants claim that Plaintiffs' and Washington's challenges are now moot, as the  
6 policy set forth in the 2017 Memorandum has been "revoked" and replaced by that in the 2018  
7 Memorandum. (Dkt. No. 226 at 3-7.) Defendants claim the "new policy" has "changed  
8 substantially," such that it presents a "substantially different controversy." (*Id.* at 6 (citations  
9 omitted.)) Plaintiffs and Washington respond that there is no "new policy" at all, as the 2018  
10 Memorandum and the Implementation Plan merely implement the directives of the 2017  
11 Memorandum. (Dkt. No. 227 at 2; Dkt. No. 228 at 7-8.)

12 "The burden of demonstrating mootness 'is a heavy one.'" Los Angeles County v. Davis,  
13 440 U.S. 625, 631 (1979) (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632-33  
14 (1953)). The Ninth Circuit has explained that a case is not moot unless "subsequent events make  
15 it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to  
16 recur," McCormack v. Herzog, 788 F.3d 1017, 1024 (9th Cir. 2015) (quoting Friends of the  
17 Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)), such that "the  
18 litigant no longer ha[s] any need of the judicial protection that is sought." Jacobus v. Alaska,  
19 338 F.3d 1095, 1102-03 (9th Cir. 2003) (quoting Adarand Constructors, Inc. v. Slater, 528 U.S.  
20 216, 224 (2000)). Accordingly, courts find cases moot only where the challenged policy has  
21 been completely revoked or rescinded, not merely voluntarily ceased. See Davis, 440 U.S. at  
22 631 (holding that a case is moot only where "there can be no reasonable expectation" that the  
23 alleged violation will recur and "interim relief or events have completely and irrevocably  
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1 eradicated the effects of the alleged violation”); City of Mesquite v. Aladdin’s Castle, Inc., 455  
2 U.S. 283, 289 (1982) (holding that “a defendant’s voluntary cessation of a challenged practice  
3 does not deprive a federal court of its power to determine the legality of the practice”); see also  
4 McCormack, 788 F.3d at 1025 (noting that a case is not moot where the government never  
5 “repudiated . . . as unconstitutional” the challenged policy).

6 The Court finds that the 2018 Memorandum and the Implementation Plan do not  
7 substantively rescind or revoke the Ban, but instead threaten the very same violations that caused  
8 it and other courts to enjoin the Ban in the first place. The 2017 Memorandum prohibited the  
9 accession and authorized the discharge of openly transgender service members (the Accession  
10 and Retention Directives); prohibited the use of DoD and DHS resources to fund transition-  
11 related surgical procedures (the Medical Care Directive); and directed Secretary Mattis to submit  
12 “a plan for implementing” both its “general policy” and its “specific directives” no later than  
13 February 21, 2018. (Dkt. No. 149, Ex. 2 at §§ 1-3.) The 2017 Memorandum did not direct  
14 Secretary Mattis to determine *whether* or not the directives should be implemented, but instead  
15 ordered the directives to be implemented by specific dates and requested a plan for *how* to do so.

16 The Implementation Plan adheres to the policy and directives set forth in the 2017  
17 Memorandum with few exceptions: With regard to the Accession and Retention Directives, the  
18 Implementation Plan excludes from military service and authorizes the discharge of transgender  
19 people who “require or have undergone gender transition” and those “with a history or diagnosis  
20 of gender dysphoria” unless they have been “stable for 36 consecutive months in their biological  
21 sex prior to accession.” (Dkt. No. 224, Ex. 1 at 3-4.) With regard to the Medical Care Directive,  
22 the Implementation Plan provides that the military will, with few exceptions, no longer provide  
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1 transition-related surgical care (as people who “require . . . gender transition” will no longer be  
2 permitted to serve and those who are currently serving will be subject to discharge). (*Id.*)

3 Defendants claim that the 2018 Memorandum and the Implementation Plan differ from  
4 the 2017 Memorandum in that they do not mandate a “categorical” prohibition on service by  
5 openly transgender people and “contain[] several exceptions allowing some transgender  
6 individuals to serve.” (Dkt. No. 226 at 6-7). The Court is not persuaded. The Implementation  
7 Plan prohibits transgender people—including those who have neither transitioned nor been  
8 diagnosed with gender dysphoria—from serving, unless they are “willing and able to adhere to  
9 all standards associated with their biological sex.” (Dkt. No. 224, Ex. 1 at 4, Ex. 2 at 7.)  
10 Requiring transgender people to serve in their “biological sex”<sup>5</sup> does not constitute “open”  
11 service in any meaningful way, and cannot reasonably be considered an “exception” to the Ban.  
12 Rather, it would force transgender service members to suppress the very characteristic that  
13 defines them as transgender in the first place.<sup>6</sup> (*See* Dkt. No. 143 at ¶ 19 (“The term  
14 ‘transgender’ is used to describe someone who experiences any significant degree of  
15

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16 <sup>5</sup> The Court notes that the Implementation Plan uses the term “biological sex,” apparently  
17 to refer to the sex one is assigned at birth. This is somewhat misleading, as the record indicates  
18 that gender identity—“a person’s internalized, inherent sense of who they are as a particular  
19 gender (*i.e.*, male or female)”—is also widely understood to have a “biological component.”  
(*See* Dkt. No. 143 at ¶¶ 20-21.)

20 <sup>6</sup> While the Implementation Plan contains an exception that allows current service  
21 members to serve openly and in their preferred gender and receive “medically necessary”  
22 treatment for gender dysphoria, the exception is narrow, and applies only to those service  
23 members who “were diagnosed with gender dysphoria by a military medical provider after the  
24 effective date of the Carter [P]olicy” (*i.e.*, June 30, 2016) but “before the effective date” of the  
policy set forth in the Implementation Plan. (Dkt. No. 224, Ex. 2 at 7-8.) Further, this exception  
is severable from the remainder of the Implementation Plan. (*Id.* at 7 (“[S]hould [the 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.”).)

1 misalignment between their gender identity and their assigned sex at birth.”); Dkt. No. 224, Ex. 2  
2 at 9 n.10 (“[T]ransgender” is “an umbrella term used for individuals who have sexual identity or  
3 gender expression that differs from their assigned sex at birth.”)

4 Therefore, the Court concludes that the 2018 Memorandum and the Implementation Plan  
5 do not moot Plaintiffs’ and Washington’s existing challenges.

## 6 **B. Standing**

7 Defendants claim that Plaintiffs and Washington lack standing to challenge the Ban, and  
8 that the 2018 Memorandum and Implementation Plan “have significantly changed the analysis.”  
9 (Dkt. No. 194 at 6-12; Dkt. No. 226 at 7.)

10 Standing requires (1) an “injury in fact”; (2) a “causal connection between the injury and  
11 the conduct complained of”; and (3) a likelihood “that the injury will be redressed by a favorable  
12 decision.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal quotation  
13 marks and citations omitted). An “injury in fact” exists where there is an invasion of a legally  
14 protected interest that is both “concrete and particularized” and “actual or imminent, not  
15 conjectural or hypothetical.” Id. at 560 (internal quotation marks and citations omitted).

16 While the Court previously concluded that both Plaintiffs and Washington established  
17 standing at the preliminary injunction stage (Dkt. No. 103 at 7-12), their burden for doing so on  
18 summary judgment is more exacting and requires them to set forth “by affidavit or other  
19 evidence ‘specific facts’” such that a “fair-minded jury” could find they have standing. Id. at  
20 561; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

21 The Court considers standing for the Individual Plaintiffs, the Organizational Plaintiffs,  
22 and Washington in turn:

## 1. Individual Plaintiffs

Each of the Individual Plaintiffs has submitted an affidavit detailing the ways in which they have already been harmed by the Ban, and would be further harmed were it to be implemented. (See Dkt. Nos. 130-138.) While Defendants claim that “Plaintiffs are obviously not suffering any harm from the revoked 2017 Memorandum,” and “would neither sustain an actual injury nor face an imminent threat of future injury” as a result of the 2018 Memorandum, the Court disagrees and concludes that each of the Individual Plaintiffs has standing to challenge the Ban.

Karnoski, D.L, and Callahan have “taken clinically appropriate steps to transition” and would be excluded from acceding under the Implementation Plan. (Dkt. No. 130 at ¶ 10; Dkt. No. 132 at ¶ 8; Dkt. No. 137 at ¶ 8.) Whether they could have acceded under the Carter Policy and whether they might be able to obtain “waivers,” as Defendants suggest, are irrelevant. (See Dkt. No. 226 at 8.) As the Court previously found, their injury “lies in the denial of an equal *opportunity* to compete, not the denial of the job itself,” and the Court need not “inquire into the plaintiff’s qualifications (or lack thereof) when assessing standing.” (Dkt. No. 103 at 10 n.3 (citing *Shea v. Kerry*, 796 F.3d 42, 50 (D.C. Cir. 2015)) (emphasis in original).)

Doe does not currently serve openly, but was intending to come out and to transition surgically before President Trump’s Twitter Announcement. (Dkt. No. 138 at ¶¶ 8-11.) The Ban unambiguously subjects her to discharge should she seek to do either. (See Dkt. No. 224, Ex. 1.) Schmid, Muller, Lewis, Stephens, and Winters have been diagnosed with gender dysphoria, and likewise would be subject to discharge under the Ban.<sup>7</sup> (Dkt. No. 131 at ¶ 9; Dkt. No. 133 at

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<sup>7</sup> Defendants claim that the currently serving Plaintiffs were “diagnosed with gender dysphoria within the relevant time period” and “therefore would be able to continue serving in their preferred gender, change their gender marker, and receive all medically necessary

1 ¶ 15; Dkt. No. 134 at ¶ 10; Dkt. No. 135 at ¶ 10; Dkt. No. 136 at ¶ 10.) The threat of discharge  
2 facing Doe, Schmid, Muller, Lewis, Stephens, and Winters is “actual or imminent, not  
3 conjectural or hypothetical,” and clearly gives rise to standing. See Lujan, 504 U.S. at 560  
4 (internal quotation marks and citation omitted).

5       Importantly, even if each of the Individual Plaintiffs were granted waivers or otherwise  
6 not excluded, discharged, or denied medical care, there can be no dispute that they would  
7 nevertheless have standing to challenge the Ban. This is because the Ban already has denied  
8 them the opportunity to serve in the military on the same terms as others; has deprived them of  
9 dignity; and has subjected them to stigmatization. (See Dkt. No. 103 at 8.) Policies that  
10 “stigmatiz[e] members of [a] disfavored group as ‘innately inferior’ . . . can cause serious  
11 non-economic injuries to those persons who are personally denied equal treatment solely because  
12 of their membership in a disfavored group.” Heckler v. Mathews, 465 U.S. 728, 737-740 (1984)  
13 (citation omitted). Such stigmatic injury, when identified in specific terms, is “one of the most  
14 serious consequences of discriminatory government action and is sufficient in some  
15 circumstances to support standing.” Allen v. Wright, 468 U.S. 737, 755 (1984), abrogated on  
16 other grounds, 134 S. Ct. 1377 (2014).

17  
18 treatment” under the Implementation Plan’s narrow exception. (Dkt. No. 226 at 8.) The record  
19 does not support this claim. As noted previously, the exception applies only to current service  
20 members who “were diagnosed with gender dysphoria by a military medical provider *after* the  
21 effective date of the Carter [P]olicy” (*i.e.*, June 30, 2016) but “before the effective date” of  
22 the policy set forth in the Implementation Plan. (See supra, n.6; Dkt. No. 224, Ex. 2 at 7-8  
23 (emphasis added).) The record suggests that many, if not all, of the currently serving Plaintiffs  
24 were diagnosed *before* June 30, 2016. For example, Schmid was diagnosed “approximately four  
years ago.” (Dkt. No. 131 at ¶ 9.) Muller was diagnosed “approximately six years ago.” (Dkt.  
No. 133 at ¶ 15.) Lewis, Stephens, and Winters were diagnosed “approximately three years  
ago,” “approximately two and a half years ago,” and “approximately two years ago”  
respectively. (Dkt. No. 134 at ¶ 10; Dkt. No. 135 at ¶ 10; Dkt. No. 136 at ¶ 10.) There is also no  
indication that any of the currently serving Plaintiffs received their diagnosis from a “military  
medical provider.”

1 Each of the Individual Plaintiffs has detailed the stigmatic injuries they have suffered  
2 through affidavits. For example, Karnoski has explained that the Ban has caused him “great  
3 distress, discomfort, and pain.” (Dkt. No. 130 at ¶ 21.) Schmid has explained that the Ban’s  
4 “abrupt change in policy and implicit commentary on [her] value to the military and competency  
5 to serve has caused [her] to feel tremendous anguish,” and that since it was announced, she has  
6 lost sleep and suffered “an immense amount of anxiety.” (Dkt. No. 131 at ¶¶ 23-24, 26.) Muller  
7 has explained that the Ban was “devastating” and “wounded [her] more than any combat injury  
8 could.” (Dkt. No. 133 at ¶¶ 30-31.) Doe has explained that the Ban precludes her from  
9 expressing her authentic gender identity, and that as a result, she has not come out. (Dkt. No.  
10 138 at ¶¶ 10-11.) Doe’s self-censorship alone is a “constitutionally sufficient injury,” as it is  
11 based on her “actual and well-founded fear” of discharge. See Cal. Pro-Life Council, Inc. v.  
12 Getman, 328 F.3d 1088, 1095 (9th Cir. 2003) (holding that a person’s “actual and well-founded  
13 fear that [a] law will be enforced against him or her” may give rise to standing to bring  
14 pre-enforcement claims under the First Amendment and that “self-censorship is ‘a harm that can  
15 be realized even without an actual prosecution’”) (quoting Virginia v. Am. Booksellers Ass’n,  
16 484 U.S. 383, 393 (1988)).

17 Therefore, the Court concludes that each of the Individual Plaintiffs has standing.

## 18 **2. Organizational Plaintiffs**

19 As each of the Individual Plaintiffs has standing, so too do the organizations they  
20 represent. An organization has standing where “(a) its members would otherwise have standing  
21 to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s  
22 purpose; and (c) neither the claim asserted nor the relief requested requires the participation of  
23 individual members in the lawsuit.” Hunt v. Wash. State Apple Advert. Comm’n, 432 U.S. 333,  
24

1 343 (1977). Each of the Organizational Plaintiffs satisfies these requirements. Karnoski and  
2 Schmid are members of HRC, GJL, and AMPA, and Muller, Stephens, and Winters are also  
3 members of AMPA. (Dkt. No. 130 at ¶ 3; Dkt. No. 131 at ¶ 5; Dkt. No. 133 at ¶ 5; Dkt. No. 135  
4 at ¶ 4; Dkt. No. 136 at ¶ 4; Dkt. No. 140 at ¶ 3.) The interests each Organizational Plaintiff seeks  
5 to protect are germane to their organizational purposes, which include ending discrimination  
6 against lesbian, gay, bisexual, transgender and queer (“LGBTQ”) individuals (HRC and GJL)  
7 and supporting families and allies of LGBT service members and veterans (AMPA). (Dkt. No.  
8 139 at ¶ 2; Dkt. No. 140 at ¶ 2; Dkt. No. 141 at ¶ 2.)

9 Therefore, the Court concludes that each of the Organizational Plaintiffs has standing.

### 10 3. Washington

11 Defendants claim that “Washington has not even attempted to satisfy its burden to  
12 demonstrate standing,” and that “in granting Washington’s motion to intervene, the Court  
13 expressly declined to decide whether Washington possessed standing to sue.” (Dkt. No. 194 at  
14 12.) To the contrary, the Court explicitly found that Washington had standing in its own right,  
15 and not merely as an intervenor. (Dkt. No. 103 at 11-12.)

16 A state has standing to sue the federal government to vindicate its sovereign and quasi-  
17 sovereign interests. See Massachusetts v. E.P.A., 549 U.S. 497, 518-520 (2007). Sovereign  
18 interests include a state’s interest in protecting the natural resources within its boundaries. Id. at  
19 518-19. Quasi-sovereign interests include its interest in “the health and well-being—both  
20 physical and economic—of its residents,” and in “securing residents from the harmful effects of  
21 discrimination.” Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 607,  
22 609 (1982).

1 Washington contends that the Ban will impede its ability to protect its residents and  
2 natural resources and will undermine the efficacy of its National Guard. (Dkt. No. 150 at 9-10.)  
3 Washington is home to approximately 60,000 active, reserve, and National Guard members, and  
4 the military is the second largest public employer in the state. (Id. at 9.) Washington is also  
5 home to approximately 32,850 transgender adults, and its laws protect these residents against  
6 discrimination on the basis of sex, gender, and gender identity. (Id. at 9-10); RCW §§ 49.60.030;  
7 49.60.040(25)-(26).

8 Washington relies on the National Guard to assist with emergency preparedness and  
9 disaster recovery planning, and to protect the state’s residents and natural resources from  
10 wildfires, landslides, flooding, and earthquakes. (Dkt. No. 150 at 9.) When the Governor  
11 deploys the National Guard for state active duty, Washington pays its members’ wages and  
12 provides disability and life insurance benefits for injuries they may sustain while serving the  
13 state. (Id.); RCW § 38.24.050. The state also oversees recruitment efforts and exercises  
14 day-to-day command over Guard members in training and most forms of active duty. (Dkt. No.  
15 170, Ex. A at 20.) Further, the Governor must ensure that the Guard conforms to both federal  
16 and state laws and regulations, including the state’s anti-discrimination laws and, were the Ban to  
17 be implemented, conflicting DoD policies regarding accession and retention. (Dkt. No. 150 at  
18 9-10; Dkt. No. 170, Ex. A at 21-22.) Thus, in addition to diminishing the number of eligible  
19 members for the National Guard, the Ban threatens Washington’s ability to (1) protect its  
20 residents and natural resources in times of emergency and (2) “assur[e] its residents that it will  
21 act” to protect them from “the political, social, and moral damage of discrimination.” See  
22 Snapp, 458 U.S. at 609. Defendants have not offered any contrary evidence with respect to  
23  
24

1 Washington’s sovereign and quasi-sovereign interests. Therefore, the Court concludes that  
2 Washington has standing.

### 3 C. Constitutional Violations

4 Plaintiffs contend that the Ban violates equal protection, substantive due process, and the  
5 First Amendment. (Dkt. No. 129 at 15-28.) Washington contends that the Ban violates equal  
6 protection and substantive due process. (Dkt. No. 150 at 13-23.) Before it can reach the merits  
7 of these constitutional claims, the Court must determine (1) the applicable level of scrutiny and  
8 (2) the applicable level of deference owed to the Ban, if any. The Court addresses each of these  
9 issues in turn:

#### 10 1. Level of Scrutiny

11 At the preliminary injunction stage, the Court found that transgender people were, at  
12 minimum, a quasi-suspect class. (Dkt. No. 103 at 15-16.) In light of additional evidence before  
13 it at this stage, the Court today concludes that they are a suspect class, such that the Ban must  
14 satisfy the most exacting level of scrutiny if it is to survive.

15 In determining whether a classification is suspect or quasi-suspect, the Supreme Court  
16 has observed that relevant factors include: (1) whether the class has been “[a]s a historical  
17 matter . . . subjected to discrimination,” Bowen v. Gilliard, 483 U.S. 587, 602 (1987); (2)  
18 whether the class has a defining characteristic that “frequently bears [a] relation to ability to  
19 perform or contribute to society,” City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432,  
20 440-41 (1985); (3) whether the class exhibits “obvious, immutable, or distinguishing  
21 characteristics that define [it] as a discrete group,” Bowen, 483 U.S. at 602; and (4) whether the  
22 class is “a minority or politically powerless.” Id.; see also Windsor v. U.S., 699 F.3d 169, 181  
23 (2d Cir. 2012), aff’d on other grounds, 570 U.S. 744 (2013). While “[t]he presence of any of the

1 factors is a signal that the particular classification is ‘more likely than others to reflect  
2 deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,’”  
3 the first two factors alone may be dispositive. Golinski v. U.S. Office of Pers. Mgmt., 824 F.  
4 Supp. 2d 968, 983 (N.D. Cal. 2012) (quoting Pyler v. Doe, 457 U.S. 202, 216 n.14 (1982)).

5 The Court considers each of these factors in turn:

6 **i. History of Discrimination**

7 The history of discrimination and systemic oppression of transgender people in this  
8 country is long and well-recognized. Transgender people have suffered and continue to suffer  
9 endemic levels of physical and sexual violence, harassment, and discrimination in employment,  
10 education, housing, criminal justice, and access to health care. (See Dkt. No. 169, Ex. A at  
11 9-12.) According to a nationwide survey conducted by the National Center for Transgender  
12 Equality in 2015, 48 percent of transgender respondents reported being “denied equal treatment,  
13 verbally harassed, and/or physically attacked in the past year because of being transgender” and  
14 47 percent reported being “sexually assaulted at some point in their lifetime.” (Id. at 10.)  
15 Seventy-seven (77) percent report being “verbally harassed, prohibited from dressing according  
16 to their gender identity, or physically or sexually assaulted” in grades K-12. (Id. at 10-11.)  
17 Thirty (30) percent reported being “fired, denied a promotion, or experiencing some other form  
18 of mistreatment in the workplace related to their gender identity or expression, such as being  
19 harassed or attacked.” (Id. at 11.) Finally, “it is generally estimated that transgender women  
20 face *4.3 times the risk* of becoming homicide victims than the general population.” (Id. at 10  
21 (emphasis in original).)

1                                   **ii. Contributions to Society**

2                   Discrimination against transgender people clearly is unrelated to their ability to perform  
3 and contribute to society. See Doe 1, 275 F. Supp. 3d at 209 (noting the absence of any  
4 “argument or evidence suggesting that being transgender in any way limits one’s ability to  
5 contribute to society”); Adkins v. City of New York, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015)  
6 (noting the absence of “any data or argument suggesting that a transgender person, simply by  
7 virtue of transgender status, is any less productive than any other member of society”). Indeed,  
8 the Individual Plaintiffs in this case contribute not only to society as a whole, but to the military  
9 specifically. For years, they have risked their lives serving in combat and non-combat roles,  
10 fighting terrorism around the world, and working to secure the safety and security of our forces  
11 overseas. (See, e.g., Dkt. No. 133 at ¶¶ 7-9; Dkt. No. 134 at ¶¶ 5-6; Dkt. No. 135 at ¶¶ 6-7; Dkt.  
12 No. 136 at ¶¶ 6-7.) Their exemplary service has been recognized by the military itself, with  
13 many having received awards and distinctions. (See Dkt. No. 131 at ¶ 15; Dkt. No. 133 at ¶ 12;  
14 Dkt. No. 134 at ¶ 7.)

15                                   **iii. Immutability**

16                   Transgender people clearly have “immutable” and “distinguishing characteristics that  
17 define them as a discrete group.” Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of  
18 Educ., 208 F. Supp. 3d 850, 874 (S.D Ohio 2016) (quoting Lyng v. Castillo, 477 U.S. 635, 638  
19 (1986)). Experts agree that gender identity has a “biological component,” and there is a  
20 “medical consensus that gender identity is deep-seated, set early in life, and *impervious to*  
21 *external influences.*” (Dkt. No. 143 at ¶¶ 21-22 (emphasis added).) In other contexts, the Ninth  
22 Circuit has held that “[s]exual orientation and sexual identity” are “immutable” and are “so  
23 fundamental to one’s identity that a person should not be required to abandon them.”

1 Hernandez-Montiel v. I.N.S., 225 F.3d 1087, 1093 (9th Cir. 2000), overruled on other grounds,  
 2 409 F.3d 1177 (9th Cir. 2005).

3 **iv. Political Power**

4 Despite increased visibility in recent years, transgender people as a group lack the  
 5 relative political power to protect themselves from wrongful discrimination. While the exact  
 6 number is unknown, transgender people make up less than 1 percent of the nation’s adult  
 7 population. (Dkt. No. 143, Ex. B at 3 (estimating 0.3 percent)); see also Doe 1, 275 F. Supp. 3d  
 8 at 209 (estimating 0.6 percent). Fewer than half of the states have laws that explicitly prohibit  
 9 discrimination against transgender people. (Dkt. No. 169, Ex. A at 12.) Further, recent actions  
 10 by President Trump’s administration have removed many of the limited protections afforded by  
 11 federal law. (Id. at 12-13.) Finally, openly transgender people are vastly underrepresented in  
 12 and have been “systematically excluded from the most important institutions of  
 13 self-governance.” SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 484 (9th Cir.  
 14 2014). There are no openly transgender members of the United States Congress or the federal  
 15 judiciary, and only one out of more than 7,000 state legislators is openly transgender. (Dkt. No.  
 16 169, Ex. A at 14); see also Adkins, 143 F. Supp. 3d at 140.

17 Recognizing these factors, courts have consistently found that transgender people  
 18 constitute, at minimum, a quasi-suspect class.<sup>8</sup> See, e.g., Doe 1, 275 F. Supp. 3d at 208-10;

19  
 20  
 21 <sup>8</sup> The Ninth Circuit applies heightened scrutiny to equal protection claims involving  
 22 discrimination based on sexual orientation. SmithKline, 740 F.3d at 484; Latta v. Otter, 771  
 23 F.3d 456, 468 (9th Cir. 2014). This reasoning further supports the Court’s conclusion as to the  
 24 applicable level of scrutiny, as discrimination based on transgender status burdens a group that  
 has in many ways “experienced even greater levels of societal discrimination and  
 marginalization.” Norsworthy, 87 F. Supp. 3d at 1119 n.8; see also Adkins, 143 F. Supp. 3d at  
 140 (“Particularly in comparison to gay people . . . transgender people lack the political strength  
 to protect themselves. . . . [A]lthough there are and were gay members of the United States

1 Stone, 280 F. Supp. 3d at 768; Adkins, 143 F. Supp. 3d at 139-40; Highland, 208 F. Supp. 3d at  
2 873-74; Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015). Today, the Court  
3 concludes that transgender people constitute a suspect class. Transgender people have long been  
4 forced to live in silence, or to come out and face the threat of overwhelming discrimination.

5 Therefore, the Court GRANTS summary judgment in Plaintiffs’ and Washington’s favor  
6 as to the applicable level of scrutiny. The Ban specifically targets one of the most vulnerable  
7 groups in our society, and must satisfy strict scrutiny if it is to survive.

## 8 **2. Level of Deference**

9 Defendants claim that “considerable deference is owed to the President and the DoD in  
10 making military personnel decisions,” and that for this reason, Plaintiffs’ and Washington’s  
11 constitutional claims necessarily fail. (Dkt. No. 194 at 16.)

12 The Court previously found that the Ban—as set forth in President Trump’s Twitter  
13 Announcement and 2017 Memorandum—was not owed deference, as it was not supported by  
14 “any evidence of considered reason or deliberation.” (Dkt. No. 103 at 17-18.) Indeed, at the  
15 time he announced the Ban, “all of the reasons proffered by the President for excluding  
16 transgender individuals from the military were not merely unsupported, but were actually  
17 *contradicted* by the studies, conclusions, and judgment of the military itself.” Doe 1, 275 F.  
18 Supp. 3d at 212 (emphasis in original); see also Rostker v. Goldberg, 453 U.S. 57, 67-72 (1981)  
19 (concluding that deference is owed to well-reasoned policies that are not adopted “unthinkingly”  
20 or “reflexively and not for any considered reason”); Goldman v. Weinberger, 475 U.S. 503,  
21 507-08 (1986) (concluding that deference is owed where a policy results from the “professional  
22

23 \_\_\_\_\_  
24 Congress . . . as well as gay federal judges, there is no indication that there have ever been any  
transgender members of the United States Congress or federal judiciary.”)

1 judgment of military authorities concerning the relative importance of a particular military  
2 interest”); compare Owens v. Brown, 455 F. Supp. 291, 305 (D.D.C. 1978) (concluding that  
3 deference is not owed where a policy is adopted “casually, over the military’s objections and  
4 without significant deliberation”).

5 Now that the specifics of the Ban have been further defined in the 2018 Memorandum  
6 and the Implementation Plan, whether the Court owes deference to the Ban presents a more  
7 complicated question. Any justification for the Ban must be “genuine, not hypothesized or  
8 invented post hoc in response to litigation.” United States v. Virginia, 518 U.S. 515, 533 (1996).  
9 However, the Court is mindful that “complex[,] subtle, and professional decisions as to the  
10 composition . . . and control of a military force are essentially professional military judgments,”  
11 reserved for the Legislative and Executive Branches. Gilligan v. Morgan, 413 U.S. 1, 10 (1973).  
12 The Court’s entry of a preliminary injunction was not intended to prevent the military from  
13 continuing to review the implications of open service by transgender people, nor to preclude it  
14 from *ever* modifying the Carter Policy.

15 Defendants claim that the military has done just that, and that the Ban—as set forth in the  
16 2018 Memorandum and the Implementation Plan—is now the product of a deliberative review.  
17 In particular, Defendants claim the Ban has been subjected to “an exhaustive study” and is  
18 consistent with the recommendations of a “Panel of Experts” convened by Secretary Mattis to  
19 study “military service by transgender individuals, focusing on military readiness, lethality, and  
20 unit cohesion,” and tasked with “conduct[ing] an independent multi-disciplinary review and  
21 study of relevant data and information pertaining to transgender Service members.” (See Dkt.  
22 No. 226 at 9-10; Dkt. No. 224, Ex. 2 at 19.) Defendants claim that the Panel was comprised of  
23 senior military leaders who received “support from medical and personnel experts from across  
24

1 the [DoD] and [DHS],” and considered “input from transgender Service members, commanders  
2 of transgender Service members, military medical professionals, and civilian medical  
3 professionals with experience in the care and treatment of individuals with gender dysphoria.”  
4 (Dkt. No. 224, Ex. 2 at 20.) “Unlike previous reviews on military service by transgender  
5 individuals,” Defendants claim that the Panel’s analysis was “informed by the [DoD]’s own data  
6 obtained since the new policy began to take effect last year.” (Dkt. No. 224, Ex. 1 at 3.) The  
7 Panel’s findings are set forth in a 44-page “Report and Recommendations on Military Service by  
8 Transgender Persons,” which concludes that “the realities associated with service by transgender  
9 individuals are far more complicated than the prior administration or RAND had assumed,” and  
10 that because gender transition “would impede readiness, limit deployability, and burden the  
11 military with additional costs . . . the risks associated with maintaining the Carter [P]olicy . . .  
12 counsel in favor of” the Ban. (Dkt. No. 224, Ex. 2 at 46.)

13       Having carefully considered the Implementation Plan—including the content of the  
14 DoD’s “Report and Recommendations on Military Service by Transgender Persons”—the Court  
15 concludes that whether the Ban is entitled to deference raises an unresolved question of fact.  
16 The Implementation Plan was not disclosed until March 29, 2018. (See Dkt. No. 224, Exs. 1, 2.)  
17 As Defendants’ claims and evidence regarding their justifications for the Ban were presented to  
18 the Court only recently, Plaintiffs and Washington have not yet had an opportunity to test or  
19 respond to these claims. On the present record, the Court cannot determine whether the DoD’s  
20 deliberative process—including the timing and thoroughness of its study and the soundness of  
21 the medical and other evidence it relied upon—is of the type to which Courts typically should  
22 defer. See Fed. R. Civ. P. 56(e)(1).

1           Accordingly, the Court DENIES summary judgment as to the level of deference due.  
2     The Court notes that, even in the event it were to conclude that deference is owed, it would not  
3     be rendered powerless to address Plaintiffs’ and Washington’s constitutional claims, as  
4     Defendants seem to suggest. “‘The military has not been exempted from constitutional  
5     provisions that protect the rights of individuals’ and, indeed, ‘[i]t is precisely the role of the  
6     courts to determine whether those rights have been violated.’” Doe 1, 275 F. Supp. 3d at 210  
7     (quoting Emory v. Sec’y of Navy, 819 F.2d 291, 294 (D.C. Cir. 1987)); Chappell v. Wallace,  
8     462 U.S. 296, 304 (1983) (“This Court has never held, nor do we now hold, that military  
9     personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the  
10    course of military service.”); Rostker, 453 U.S. at 70 (“[D]eference does not mean abdication.”).  
11    Indeed, the Court notes that Defendants’ claimed justifications for the Ban—to promote  
12    “military lethality and readiness” and avoid “disrupt[ing] unit cohesion, or tax[ing] military  
13    resources”— are strikingly similar to justifications offered in the past to support the military’s  
14    exclusion and segregation of African American service members, its “Don’t Ask, Don’t Tell”  
15    policy, and its policy preventing women from serving in combat roles. (Dkt. No. 224, Ex. 1 at  
16    2-4; see also Dkt. No. 163, Ex. 1 at 8-16.)

### 17                           **3. Equal Protection, Due Process, and First Amendment Claims**

18           A policy will survive strict scrutiny only where it is motivated by a “compelling state  
19    interest” and “the means chosen ‘fit’ the compelling goal so closely that there is little or no  
20    possibility that the motive for the classification was illegitimate . . . prejudice or stereotype.”  
21    Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (citation omitted). In making this determination,  
22    the Court must carefully evaluate “the importance and the sincerity of the reasons advanced” by  
23    the government for the use of a particular classification in a particular context. Id. at 327.  
24

1 Whether Defendants have satisfied their burden of showing that the Ban is constitutionally  
2 adequate (i.e., that it was sincerely motivated by compelling state interests, rather than by  
3 prejudice or stereotype) necessarily turns on facts related to Defendants’ deliberative process.  
4 As discussed previously, these facts are not yet before the Court. (See supra, § II.C.2.) Further,  
5 Defendants’ responsive briefing addresses only the constitutionality of the Interim Guidance, a  
6 document that has never been, and is not now, the applicable policy before the Court. (See Dkt.  
7 No. 194 at 19-24.)

8 For the same reasons it cannot grant summary judgment as to the level of deference due  
9 at this stage, the Court cannot reach the merits of the alleged constitutional violations.  
10 Accordingly, the Court DENIES summary judgment as to Plaintiffs’ and Washington’s equal  
11 protection, due process, and First Amendment claims.

#### 12 **IV. Defendants’ Motion for Partial Summary Judgment**

13 Defendants contend that the Court is without jurisdiction to impose injunctive or  
14 declaratory relief against President Trump in his official capacity, and move for partial summary  
15 judgment on all claims against him individually. (Dkt. No. 194 at 25-27.) Plaintiffs and  
16 Washington do not oppose summary judgment as to injunctive relief, but respond that  
17 declaratory relief against President Trump is proper. (Dkt. No. 207 at 8-10; Dkt. No. 209 at 6-8.)

18 The Court is aware of no case holding that the President is immune from declaratory  
19 relief—Rather, the Supreme Court has explicitly affirmed the entry of such relief. See Clinton v.  
20 City of New York, 524 U.S. 417, 425 n.9 (1998) (affirming entry of declaratory judgment  
21 against President Clinton stating that Line Item Veto Act was unconstitutional); NTEU v. Nixon,  
22 492 F.2d 587, 609 (1974) (“[N]o immunity established under any case known to this Court bars  
23 every suit against the president for injunctive, declaratory or mandamus relief.”); see also Hawaii  
24

1 v. Trump, 859 F.3d 741, 788 (9th Cir. 2017) (vacating injunctive relief against President Trump,  
2 but not dismissing him in suit for declaratory relief), vacated as moot, 874 F.3d 1112 (9th Cir.  
3 2017).

4 The Court concludes that, not only does it have jurisdiction to issue declaratory relief  
5 against the President, but that this case presents a “most appropriate instance” for such relief.  
6 See NTEU, 492 F.2d at 616. The Ban was announced by President Trump (@realDonaldTrump)  
7 on Twitter, and was memorialized in the 2017 and 2018 Presidential Memorandums, which were  
8 each signed by President Trump. (Dkt. No. 149, Exs. 1, 2; Dkt. No. 224, Ex. 3.) While  
9 President Trump’s Twitter Announcement suggests he authorized the Ban “[a]fter consultation  
10 with [his] Generals and military experts” (Dkt. No. 149, Ex. 1), Defendants to date have failed to  
11 identify even one General or military expert he consulted, despite having been ordered to do so  
12 repeatedly. (See Dkt. Nos. 204, 210, 211.) Indeed, the *only* evidence concerning the lead-up to  
13 his Twitter Announcement reveals that military officials were entirely unaware of the Ban, and  
14 that the abrupt change in policy was “unexpected.” (See Dkt. No. 208, Ex. 1 at 9 (General  
15 Joseph F. Dunford, Chairman of the Joint Chiefs of Staff stating on July 27, 2017 “Chiefs, I  
16 know yesterday’s announcement was unexpected . . .”); Dkt. No. 152, Ex. A at 11-12 (“The Joint  
17 Chiefs of Staff were not consulted at all on the decision . . . The decision was announced so  
18 abruptly that White House and Pentagon officials were unable to explain the most basic of  
19 details about how it would be carried out.”).) Even Secretary Mattis was given only one day’s  
20 notice before President Trump’s Twitter Announcement. (Id.; Dkt. No. 163, Ex. 1 at 26.) As no  
21 other persons have ever been identified by Defendants—despite repeated Court orders to do so—  
22 the Court is led to conclude that the Ban was devised by the President, and the President alone.  
23  
24



1 relative to transgender people that is inconsistent with the status quo that existed prior to  
2 President Trump's July 26, 2017 announcement.

3 6. The Court's ruling today eliminates the need for Plaintiffs and Washington to  
4 respond to Defendants' Motion to Dissolve the Preliminary Injunction (Dkt. No. 223), which is  
5 hereby STRICKEN.

6 7. The parties are directed to proceed with discovery and prepare for trial on the  
7 issues of whether, and to what extent, deference is owed to the Ban and whether the Ban violates  
8 equal protection, substantive due process, and the First Amendment.

9  
10 The clerk is ordered to provide copies of this order to all counsel.

11 Dated April 13, 2018.

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14 Marsha J. Pechman  
15 United States District Judge  
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