UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*, **Plaintiffs,** **v.** **DONALD J. TRUMP, *et al.*,** **Defendants.**	**Civil Action No. 17-cv-1597 (CKK)**

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISSOLVE THE PRELIMINARY INJUNCTION

TABLE OF CONTENTS

INTRODUCTION

A year after a significant change to longstanding military policy, the Department of Defense ("DoD") in June 2017 began an extensive review of the issue of military service by transgender individuals. That months-long process, involving a panel of senior military officials who thoroughly studied various aspects of the question, culminated in a new policy announced by Secretary of Defense James Mattis in March 2018. Under this new policy, individuals who suffer from the medical condition of gender dysphoria would be presumptively disqualified from service (subject to various exceptions), but transgender individuals without this condition would be eligible to serve in their biological sex. Immediately after issuance of the new policy, Defendants moved to dissolve the preliminary injunction entered by the Court on October 30, 2017 with respect to the President's August 2017 Memorandum concerning military service by transgender persons.

Plaintiffs' opposition to the motion to dissolve mischaracterizes the nature of the military's new policy and its differences from the August 2017 Memorandum enjoined by the Court. In particular, they fail to recognize that DoD's new policy is in many respects consistent with the policy adopted by then-Defense Secretary Ashton Carter ("Carter Policy"), currently in place as a result of preliminary injunctions in this and the related cases. Both policies presumptively disqualify individuals with gender dysphoria. Both policies permit transgender individuals without gender dysphoria to serve in their biological sex. And both polices contain exceptions allowing some transgender individuals who have previously been diagnosed with gender dysphoria to serve. The difference between the two policies comes down to the scope of their exceptions—a matter that is well within the discretion owed to the nation's senior military leadership.

Plaintiffs likewise fail to cast doubt on the process DoD used to develop its new policy or the justifications underlying it. The policy is the result of an independent, extensive review by a panel of military experts, and is rooted in the understanding that both historically and today, the military has

not permitted individuals to serve if they have medical conditions that may excessively limit their deployability, pose an increased risk of injury to themselves or others, or otherwise require measures that threaten to impair the effectiveness of their unit. In DoD's professional military judgment, these criteria are met for the medical condition of gender dysphoria, particularly when a person requires or has undergone gender transition to treat this condition. As Secretary Mattis observed, generally allowing service by such individuals poses "substantial risks" and threatens to "undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." Mattis Mem. 2, Dkt. 96-1. This conclusion is based on "the Department's best military judgment," the recommendations of the panel of military experts who thoroughly studied the issue, and the Secretary's "own professional judgment." *Id.* Plaintiffs' experts may disagree with these conclusions, but their opinions are not on equal footing with the judgments of current military leaders. The Constitution allocates military decision-making authority to the political branches, not to expert witnesses in lawsuits.

For these reasons, the Court should dissolve the preliminary injunction with respect to the policies enjoined in that motion in order to permit the new DoD policy to take effect.

ARGUMENT

I. Plaintiffs Have Not Demonstrated A Likelihood Of Success On The Merits of Their Challenge to Prior Policy or Challenge to the New DoD Policy.[1]

A. The New DoD Policy Moots the Basis for Court's Preliminary Injunction.

Because the President has revoked his August 2017 Memorandum originally challenged in this case "and any other directive" he "may have made with respect to military service by transgender

[1] As set forth in Defendants' Opening Motion to Dissolve the Preliminary Injunction, "dissolution should depend on the same considerations that guide a judge in deciding whether to grant or deny a preliminary injunction in the first place"—*i.e.*, "[t]he familiar quartet" of "likelihood of success, the threat of irreparable injury to the party seeking interim relief, the equities and the public interest." *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*, 15 F.3d 1222, 1225 (1st Cir. 1994); *see also* Defs.' Mot. 10, Dkt. 96.

individuals," 2018 Memorandum 1, Dkt. 95-1, Plaintiffs' claims related to the President's 2017 Memorandum and statement on Twitter—and thus the basis for the Court's preliminary injunction, *see* Op., Dkt. 61—are now moot. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("[A] suit becomes moot, when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." (citation omitted)). Accordingly, the Court should dissolve the preliminary injunction.

1. The New DoD Policy Substantially Departs From The President's 2017 Memorandum and Statement on Twitter.

Plaintiffs' filings rest on the faulty premise that DoD's new policy is substantively the same as the policies allegedly set forth in the President's Twitter statement and Memorandum issued in July and August 2017, respectively. *See* Pls.' Opp. 7–11, Dkt. 130; Pls.' Mot. 17–22, Dkt. 132. But even a passing review of the new DoD policy reveals that it is substantially different from the President's 2017 Memorandum and the statement on Twitter that preceded it.

On its face, the new policy—which indisputably permits some transgender individuals to serve, including in their preferred gender—fails to effectuate the President's Twitter statement that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military." Op. 1, Dkt. 61. Nor does the policy implement, or even reflect, the approach taken by the President's 2017 Memorandum. That memorandum ordered the military to "return" to its "longstanding policy"—adhered to by the armed forces under every administration until June 2016—of generally disqualifying individuals from military service on the basis of their "transgender" status. 2017 Mem. The military's new policy differs from that pre-Carter framework in at least two critical respects. First, the new policy, like the Carter policy, turns not on transgender status, but on a medical condition (gender dysphoria) and a related medical treatment (gender transition). DoD Report and Recommendations on Military Service by Transgender Persons ("Report") 4–6, Dkt. 96-2. In other words, the new policy allows transgender individuals without a history or diagnosis of gender dysphoria to serve, a possibility that was generally unavailable during

the pre-Carter era. Second, the new policy categorically permits individuals with gender dysphoria to serve in their preferred gender (and receive transition-related treatment) as they did under the Carter policy, *id.* at 43, an option that likewise did not exist before June 2016, *id.* at 174. Thus, rather than implement a "return" to the pre-Carter policy, 2017 Mem., the new policy substantially departs from it. This is why Secretary Mattis had to recommend that the President "revoke" his 2017 Memorandum in order to "allow[]" the military to implement its preferred framework. Mattis Mem. 3. If the new policy simply implemented the pre-Carter policy addressed in the 2017 Memorandum, there would have been no need for the Secretary to have made this recommendation or for the President to have "revoke[d]" that memorandum "and any other directive [he] may have made with respect to military service by transgender individuals." 2018 Mem.

2. The New Policy Does Not Ban Service By Transgender Individuals.

In the face of the new policy's plain terms setting forth a framework that turns on gender dysphoria and its attendant treatment, Plaintiffs nevertheless maintain their assertion that the new policy targets "transgender people as a class." Pls.' Opp. 10; Pls.' Mot. 6. They argue that because the new policy requires some transgender individuals to serve in their birth sex, and, "[b]y definition, transgender people do not identify or live in accord with their assigned sex at birth," the policy discriminates on the basis of transgender status. Pls.' Mot 6; Pls.' Opp. 10. They likewise quote the *Karnoski* Court's statement that requiring any transgender individuals to serve in their biological sex would "force transgender service members to suppress the very characteristic that defines them as transgender in the first place." Pls.' Mot. 6 (quoting *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *6, *12 (W.D. Wash. Apr. 13, 2018), *appeal filed,* No. 18-35347 (9th Cir. Apr. 30, 2018)). Pls.' Opp. 24. But Plaintiffs' arguments necessarily fail. As the RAND Report explained, only "a subset" of transgender individuals "choose to *transition*, the term used to refer to the act of living and working in a gender different from one's sex assigned at birth." RAND Report 6, Dkt. 13-4, Exh. B.

In other words, while all transgender individuals "identify with a gender different from the sex they were assigned at birth," only some choose to live and work in accordance with that identity. *Id.* In fact, although an estimated 8,980 servicemembers identify as transgender according to one study, to date only 937 of them have taken advantage of the Carter policy's framework for gender transition in the nearly two years of its existence. Report 7 n.10, 32.

Plaintiffs also fail to acknowledge that a central focus of their challenge—the new policy's requirement that some transgender individuals serve in their biological sex—is consistent with the Carter policy currently in place. Under both the Carter policy and DoD's new policy, transgender persons who have not transitioned may serve only in their biological sex. *Id.* at 15; *see* DoDI 1300.28 at 4, 8, Dkt. 128-7 ("recogniz[ing] a Service member's gender by the member's gender marker in the DEERS," which may be changed *only* after a "military medical provider determines that a Service member's gender transition is complete").[2]

Plaintiffs also fail to recognize that considering a prospective servicemember's history of a medical condition like gender dysphoria is a standard military practice—and one used with respect to gender dysphoria under the Carter Policy—and that servicemembers are presumptively disqualified based on a history of many different medical conditions. *See* DoDI 6130.03, Dkt. 138-3 (setting "medical standards for appointment, enlistment, or induction into the military services"); *see also* Report 8–13 (discussing medical standards for accessions, including discussing disqualifying conditions, such as a history of chest or genital surgery or most mental health conditions). Especially in light of the "considerable scientific uncertainty concerning whether [transition-related] treatments

[2] Here, Plaintiffs' reliance on a rhetorical extreme underscores the weakness of their case. They compare the new policy to a rule allowing Muslims to serve only if they renounce their faith, Pls.' Mot. 7–8; Pls.' Opp. 10, but that scenario does not involve a medical condition, let alone a medical condition which has the potential to impact military readiness, and which plainly is the focus of DoD's new policy.

fully remedy … the mental health problems associated with gender dysphoria," Report 32, it is unsurprising that the military would craft a policy which takes into account past gender dysphoria diagnoses and past transition treatments.

In sum, Plaintiffs provide no basis on which to conclude that DoD's new policy constitutes a complete ban on transgender service, or that it turns on anything other than a medical condition and its associated treatment.

3. The New Policy Is Based On The Professional, Independent Judgment of The Military.

Perhaps recognizing that the content of the new DoD policy departs substantially from the President's statement on Twitter, the 2017 Memorandum subject to the Court's injunction, and any alleged total ban on transgender service, Plaintiffs instead cite to statements across various documents, contending that they show that DoD lacked independent discretion in formulating the new policy. Plaintiffs point to language from the 2017 Memorandum directing Secretary Mattis to submit "a plan for implementing" that memorandum, as well as to statements by Secretary Mattis that (1) DoD will "carry out the President's policy direction"; (2) it will "comply with" the 2017 Memorandum; (3) it will "develop[] an Implementation Plan … to effect the policy and directives" in the 2017 Memorandum; (4) it will assemble a panel of experts to "conduct an independent multidisciplinary review and study of relevant data and information . . . planned and executed to inform the implementation plan"; and (5) that panel will "recommend updated accessions policy guidelines to reflect currently accepted medical terminology." Pls.' Mot. 18–20; Pls.' Opp. 8–9; *see* Terms of Reference 1, Dkt. 115-4; 2017 Mem.

But none of this remotely demonstrates that the new DoD policy was not based on independent judgment. Notably, Plaintiffs only tell half the story and carefully omit statements that "[t]he Panel made recommendations based on each Panel member's independent military judgment," Report 4; or that the new DoD policy is, in Secretary Mattis's words, the product of the Panel's

"professional military judgment," "the Department's best military judgment," and his "own professional judgment," Mattis Mem. 1–2. Plaintiffs discuss none of these statements, and do not even attempt to explain why representations by senior military leadership, including the Secretary of Defense himself, should be called into question. Nor do Plaintiffs dispute that the statements they cite are entirely consistent with the 2017 Memorandum's direction to the military to conduct "further study" and maintain the pre-Carter accession policy while doing so. *See* 2017 Mem. §§ 1(a), 2(a)); *see generally* Pls.' Opp., Dkt. 130; Pls.' Mot., Dkt. 132. Plaintiffs also overlook the President's instruction to the Secretary of Defense to "advise [him] at any time, in writing, that a change to this policy is warranted," 2017 Mem., as well as the Secretary's reliance on that fact in recommending that the President revoke his 2017 Memorandum, *see* Mattis Mem. 1. Instead, Plaintiffs claim that the Secretary of Defense had "no authority to develop a policy that diverged from the policy directives in" the 2017 Memorandum, Pls.' Opp. 8 (quoting Op. 37, Dkt. 61). But that position cannot be squared with other statements by the President and Secretary of Defense, nor with the new DoD policy's content, which as explained above differs fundamentally from both the President's statement on Twitter and his 2017 Memorandum. Accordingly, Plaintiffs' attempt to challenge the new DoD policy by focusing on now revoked policies should be rejected.

Plaintiffs also ignore the fact that DoD's new policy was the product of a significantly different process than the one preceding the President's 2017 Memorandum. In its preliminary injunction opinion, the Court characterized the 2017 Memorandum as the product of neither "study and evaluation" nor the "considered professional judgment" of military officials. Op. 67 n.11, 70, Dkt. 61 (citations omitted). The Government of course respectfully continues to disagree with the Court's view of this initial judgment by the Commander-in-Chief to maintain a longstanding military policy while DoD conducted a further review. But regardless, there is no disputing that the new policy was the result of an extensive and independent deliberative process by military experts, as reflected in the

new policy itself, Secretary Mattis's memorandum, DoD's 44-page report, and the more than 3,000-page administrative record. In sum, even if it could be said that the military "implemented" the August 2017 Memorandum by studying the issue and advising the President that a new and different policy was appropriate, there is simply no reason to doubt that DoD applied its considered, independent judgment to the issues at hand.

4. The Preliminary Injunction Is Not Preserved Under The Voluntary Cessation Doctrine.

Plaintiffs assert that the Court's preliminary injunction is not moot in light of the voluntary cessation doctrine, but that argument is meritless. Pls.' Mot. 43. In particular, Plaintiffs question Defendants' reliance on *Clarke v. United States*, 915 F.2d 699, 705 (D.C. Cir. 1990), for the proposition that the voluntary cessation doctrine is of limited applicability when members of a coordinate branch of government change a policy in good faith. But again Plaintiffs' argument is unavailing. Pls.' Opp. 12. Plaintiffs contend that the voluntary cessation doctrine has nothing to do with whether it would be improper to impute an intention to evade judicial review to another branch of government, *id.*, but the D.C. Circuit, sitting *en banc* in *Clarke*, said precisely the opposite. *See* 915 F.2d at 705 ("[I]t would seem inappropriate for the courts either to impute such manipulative conduct to a coordinate branch of government, or to apply against that branch a doctrine that appears to rest on the likelihood of a manipulative purpose."). The Court should hold that the voluntary cessation doctrine is inapplicable in this case and that the basis for the Court's preliminary injunction as to the August 2017 Memorandum is now moot.

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

As one of the "'complex, subtle, and professional decisions as to the composition … of a military force,' which are 'essentially professional military judgments,'" the Department's 2018 policy is subject to a highly deferential form of review. *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). After all, decisions about who should serve "are based on judgments concerning military

operations and needs, and the deference unquestionably due the latter judgments is necessarily required in assessing the former as well." *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) (internal citation omitted).

Plaintiffs argue that the military context here is essentially irrelevant in determining and applying the appropriate level of constitutional scrutiny, asserting instead that "careful scrutiny of the government's evidence and arguments is required." Pls.' Opp. 25; Pls.' Mot. 12. That argument is flatly inconsistent with Supreme Court precedent and is not supported by the cases Plaintiffs cite. As discussed below, the Court should afford substantial deference in evaluating the constitutionality of DoD's new policy, which on its face deals with the composition, training, equipping, and control of the armed forces.

Plaintiffs first point to this Court's preliminary injunction opinion and note that "[t]his Court has already held that 'discrimination on the basis of someone's transgender identity is a quasi-suspect form of classification that triggers heightened scrutiny.'" Pls.' Opp. 23 (quoting Op. 61, Dkt. 61). However, this Court's holding did not apply to the new DoD policy; instead, it rested on the conclusion that the President's now-rescinded Memorandum of August 25, 2017 directed the wholesale exclusion of transgender individuals from the military. Op. 59–64, Dkt. 61. By contrast, the new DoD policy turns not on transgender status, but on the medical condition of gender dysphoria and the corresponding medical treatment for that condition.[3] In any event, this Court never held that deference was not owed to military personnel decisions, but rather that such deference was overcome at that stage because the "reasons proffered by the President for excluding transgender individuals from the military in this case were not merely unsupported, but were actually *contradicted* by the studies,

[3] Because the new DoD policy is based on medical considerations and issues arising from gender dysphoria and gender transition, under well-established constitutional principles, it does not classify on the basis of a suspect classification and is subject to rational basis review even if principles of military deference did not apply. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365–68 (2001).

conclusions and judgment of the military itself." Op. 67 (citing the RAND Report), Dkt. 61. Here, there can be no legitimate dispute that the new policy is the result of an extensive review by senior military leaders and is based on the considered judgment of the Department of Defense. Thus, the Court's prior reasoning cannot fairly be applied to the new DoD policy. [4]

Plaintiffs also cite several cases they claim support the notion that deference is not owed to military decisions. Pls.' Mot. 11–15; Pls.' Opp. 24–28. But none of the cases support that novel proposition. Indeed, *Rostker v. Goldberg* —the primary Supreme Court precedent Plaintiffs rely on— actually undermines their argument; *Rostker* rested on the Court's determination that "[t]he case ar[ose] in the context of Congress' authority over national defense and military affairs, and [that] perhaps in no other area has the Court accorded Congress greater deference." 453 U.S. at 64–65. Thus, *Rostker* mandates that deference be extended to the judgments reflected in the new DoD policy.[5]

Plaintiffs additionally cite *United States v. Virginia*, 518 U.S. 515 (1996), but there Court there did not even discuss military deference, and for good reason: the policy in that case was justified based on pedagogical interests, not military concerns. *Id.* at 549. And even if military concerns had been at issue, they would have been Virginia's concerns, not the concerns of the political branches of the federal government, which, unlike the states, hold constitutional powers related to the regulation and

[4] This Court should not follow the *Karnoski* Court's recent decision to subject the Department's new policy to strict scrutiny. *See* 2018 WL 1784464, at *11. That court did not cite a single example of another decision concluding that a policy that classified on the basis of transgender status was subject to strict scrutiny, let alone a military policy turning on gender dysphoria adopted after a substantial review process. *Id.* And, in any event, the Plaintiffs in this case argue that the new DoD policy is subject at most to intermediate scrutiny. Pls.' Mot. 22; Pls.' Opp. 23–24.

[5] The Court in *Rostker* also expressly held that "Congress was certainly entitled, in the exercise of its constitutional powers to raise and regulate armies and navies, to focus on the question of military need rather than 'equity.'" *Id.* at 80. The Department's new policy is derived from the same constitutional authority to raise and regulate the military, and it too may focus on military need over equity, even where a civilian employer might be required to make accommodations for a civilian employee in the civilian context. *See* 10 U.S.C. § 532; *see also* 32 C.F.R. § 66.6 (b)(5).

command of the military. *See Goldman*, 475 U.S. at 507.

Plaintiffs next claim that *Schlesinger v. Ballard,* 419 U.S. 498 (1975) (upholding a statutory scheme under which male and female naval officers were subject to different discharge criteria), did not, as Defendants contend, involve a *post hoc* rationale for the policy challenged in that case. Pls.' Mot. 15. But Plaintiffs overlook that the Court there expressly justified the challenged gender classification by hypothesizing that "Congress *may* [] quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts," 419 U.S. at 508 (emphasis added). Indeed, the dissent in *Ballard* chided the majority for "go[ing] far to conjure up a legislative purpose" for which it could find "nothing in the statutory scheme or the legislative history to support." *Id.* at 511 (Brennan, J.). In any event, there is nothing *post hoc* about the rationale supporting DoD's new policy; DoD adopted a nuanced framework following a careful process of agency deliberation and a careful application of professional military judgment.

Plaintiffs next argue that because the military policy at issue in *Goldman v. Weinberger*, *supra*, was facially neutral, that decision has little relevance here. Pls.' Mot. 16; Pls.' Opp. 27. On the contrary, even assuming, *arguendo,* that the new DoD policy could be viewed as a facial classification, the deference to the military's decision in *Goldman* was not based on whether the particular constitutional challenge involved a facially neutral policy, but rather on the fact that "the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy." 475 U.S. at 508 (citation omitted). In any event, under the framework for free-exercise claims in place at the time, the facially neutral policy at issue in *Goldman* would have triggered strict scrutiny had it arisen in the civilian context. *See* 475 U.S. at 506 (citing cases).[6]

[6] Plaintiffs' citations to out-of-circuit precedent are equally unpersuasive. *Crawford v. Cushman*, 531 F.2d 1114, 1123 (2d Cir. 1976), rested on the untenable premise that "military decisions are accorded no presumption of validity in an inquiry on the merits," and the Second Circuit has since rejected that premise in light of *Rostker*. *Mack v. Rumsfeld*, 784 F.2d 438, 439 (2d Cir. 1986) (per curiam); *see also id.* (noting that this "portion of *Crawford* . . . was specifically rejected by us"). As for *Witt v. Department of*

C. The Military Is Entitled to Deference Because the New Policy Concerns the Make-up and Composition of the Armed Forces.

Plaintiffs' further argument that the military is not entitled to deference because DoD did not follow an independent process is not only wrong but misapprehends the nature of military deference. Pls.' Mot. 17; Pls.' Opp. 28. Military deference stems from the Supreme Court's recognition that control of the armed forces is vested in the Executive and Legislative branches by the text of the Constitution itself. *See Rostker*, 453 U.S. at 67 ("[T]he Constitution itself requires such deference."). Article I gives Congress the power to raise and support armies, to provide and maintain a navy, to make rules regulating the armed forces, and to declare war. *See* U.S. Const. art. I. Article II makes the President the Commander in Chief of the armed forces. *See id.* art. II. As the Supreme Court has explained, "military interests do not always trump other considerations, and [the Court has] not held that they do[,]" but courts must "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Winter*, 555 U.S. at 24–26 (citing *Goldman*, 475 U.S. at 507). There is no question that a lower court should apply military deference, or that the Supreme Court has mandated that it must. Rather, the only relevant question is whether other interests override military concerns despite mandatory deference.

Thus, military deference is not something the Court may decide to follow based on whether it agrees that the military followed an independent process. Instead, it is a constitutionally mandated prerequisite derived from the fact that the text of the Constitution itself commits control over the military to the Executive and Legislative branches. To apply deference, Article III courts look only to whether the decision at issue involves "the composition, training, equipping, and control of the

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Air Force, 527 F.3d 806, 821 (9th Cir. 2008), that case involved an as-applied challenge and remand solely to develop an evidentiary record regarding the application of the Government's justifications to the plaintiff—not to test the evidentiary underpinnings of the proffered justifications as a general matter. *Id.* at 821. Indeed, *Witt* agreed that "judicial deference … is at its apogee" when military judgments by the political branches are at issue. *Id.* (quoting *Rostker*, 453 U.S. at 70).

military force[.]" *Gilligan* v. *Morgan*, 413 U.S. 1, 10. (1973). If so, then deference is applied. *See Winter*, 555 U.S. at 27 (reversing the issuance of a preliminary injunction because the "lower courts failed properly to defer to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's SOCAL training exercises."). Here, because this case undisputedly involves the composition of the military force both through accessing new troops into the armed forces and retaining those already in, deference must be applied and no further inquiry into the robustness of that deliberative process is required or appropriate.

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

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

On the merits, Plaintiffs primarily argue that the policy they expected DoD to announce—one banning all transgender individuals from military service—fails intermediate scrutiny. Pls.' Opp.

1 ("The Mattis Plan . . . bars transgender individual from joining or serving in our nation's military."). But, as explained above, even a cursory review of the terms of the new policy confirms that the new DoD policy is not a "transgender ban" as Plaintiffs repeatedly characterize it, and instead turns on the medical condition of gender dysphoria and its related treatment. Once the pretense that the 2018 DoD policy merely implements a "transgender ban" is set aside, it is clear that the military's judgment survives constitutional review under any standard.[7]

1. The New DoD Policy Promotes Military Readiness.

As DoD explained, service by individuals with gender dysphoria, and especially those who need or have undergone gender transition, poses at least two significant risks to military readiness. *First*, DoD was concerned that the unique stresses of military life could exacerbate the symptoms of gender dysphoria. Report 21, 40. Indeed, servicemembers suffering from "[a]ny DSM-5 psychiatric disorder with residual symptoms" that "impair social or occupational performance[] require a waiver … to deploy," as the military must consider the "risk of exacerbation if the individual were exposed to trauma or severe operational stress." *Id.* at 34. Particularly given "the absence of evidence on the impact of deployment on individuals with gender dysphoria," DoD concluded that this condition posed readiness risks. *Id.*; *see id.* at 42.

As preliminary evidence from DoD's experience with the Carter policy reveals, servicemembers with gender dysphoria were eight times more likely to attempt suicide and nine times more likely to have mental-health encounters than servicemembers as whole. *Id.* at 21–22. In fact, over a two-year period of study, the nearly 1000 active servicemembers with gender dysphoria accounted for 30,000 mental-health visits. *Id.* at 22. This data, which was unavailable to DoD when

[7] Plaintiffs emphasize that they "bring a facial challenge to the Mattis Plan under the equal protection and due process guarantees of the Fifth Amendment." Pls.' Mot. 6. Accordingly, under well-established principles, they must show "that no set of circumstances exists under which" DoD's new policy is unconstitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Plaintiffs are unable to meet this high standard.

the Carter policy was first announced, was also consistent with data concerning individuals with gender dysphoria more generally, a group that suffers from high rates of suicidal ideation, attempts, and completion, as well as other mental-health conditions such as anxiety, depression, and substance-abuse disorders. *Id.* at 21. Given recent evidence that military service can be a contributor to suicidal thoughts, DoD had legitimate concerns that generally allowing those with gender dysphoria to serve would subject them and their comrades to unacceptable risks. *Id.* at 19, 21.

Second, even if it were guaranteed that the risks associated with gender dysphoria could be fully addressed by gender transition, it remains the case that transition-related medical treatment—namely, cross-sex hormone therapy and sex-reassignment surgery—could render transitioning servicemembers "non-deployable for a potentially significant amount of time." *Id.* at 35. Some commanders, for example, reported that transitioning servicemembers under their authority would be non-deployable for up to two to two-and-a-half years. *Id.* at 34. More generally, Endocrine Society guidelines recommend "quarterly bloodwork and laboratory monitoring of hormone levels during the first year" of therapy, meaning that if "the operational environment does not permit access to a lab for monitoring hormones," then the transitioning servicemember "must be prepared to forego treatment, monitoring, or the deployment," each of which "carries risks for readiness." *Id.* at 33. That period of potential non-deployability only increases for those who obtain sex-reassignment surgery, which in addition to a recommended "12 continuous months of hormone therapy … prior to genital surgery," comes with "substantial" recovery time even without complications. *Id.*

In addition to being inherently problematic, these limits on deployability would have harmful effects on transitioning servicemembers' units as a whole. As DoD explained, any increase in non-deployable servicemembers will require those who can deploy to bear "undue risk and personal burden," which itself "negatively impacts mission readiness." *Id.* at 35. On top of these personal costs, servicemembers deployed more frequently to "compensate for" their unavailable comrades face

risks to family resiliency as well. *Id.* And when servicemembers with conditions do deploy but then fail to meet fitness standards in the field, "there is risk for inadequate treatment within the operational theater, personal risk due to potential inability to perform combat required skills, and the potential to be sent home from the deployment and render the deployed unit with less manpower." *Id.* at 34. All of this, DoD concluded, posed a "significant challenge for unit readiness." *Id.* at 35.

Plaintiffs' challenge to DoD's judgment that the new DoD policy promotes military readiness rests largely on their legally and factually unsupported view that the policy is a ban on transgender individuals. *See, e.g.*, Pls.' Mot. 23 ("Banning individuals from military service because they are transgender undermines military readiness."); Pls.' Opp. 30 (same). But as explained in detail above, the new DoD policy does not ban individuals because they are transgender; like numerous other medical conditions that could impede military readiness, the new DoD policy focuses on the medical challenges associated with gender dysphoria. Accordingly, Plaintiffs' argument that a complete ban on transgender service members undermines military readiness has no relevance to the actual DoD policy at issue in this case.

Plaintiffs further contend that the new policy is inconsistent with how the military treats other medical conditions of servicemembers or prospective servicemembers. Pls.' Mot. 23; Pls.' Opp. 30. As an initial matter, the bulk of this argument is again predicated on the false premise that a policy based on a medical condition and medical treatments extends to all transgender individuals. That argument can be dismissed with a plain reading of the text of the policy itself.

Moreover, the military presumptively disqualifies accessions based on a host of medical conditions, of which gender dysphoria is just one. *See* DoDI 6130.03. After examining new data from servicemembers diagnosed and treated for gender dysphoria, the Secretary of Defense, informed by the recommendation of the Panel of Experts, determined that such a presumptive disqualification was necessary for the condition of gender dysphoria and its related treatment. *See* Mattis Memorandum at

2. DoD found that gender dysphoria resulted in lost duty and deployment time, Report at 33; raised concerns about adaptation to the military environment and aggravation of the condition in such an environment, *id.* at 34; and resulted in geographic area limitations, *id.* at 34.

Plaintiffs' remaining objections also fall short. For instance, they argue that DoD "irrationally excludes transgender people from universal deployment standards that already mandate the discharge of service members who are nondeployable 'for more than 12 consecutive months, for any reason.'" Pls.' Mot. 25; Pls.' Opp. 32. But this argument rests on the false premise that under the new DoD policy, transgender individuals would be held to something different than the military's preexisting universal deployment standard. On the contrary, DoD's universal deployment standard itself states that "[p]regnant and post-partum Service members are the only group automatically excepted from this policy." DoD Retention Policy for Non-Deployable Service Members, Dkt. 128-39. The military's general deployment standard applies in a neutral fashion with respect to specific medical conditions (of which gender dysphoria is one of many) which DoD has determined generally cannot be accommodated in a forward-deployed environment. *See, e.g.*, USCENTCOM Minimal Deployment Standards, March 23, 2017, Dkt. 138-5. Thus, for deployability purposes, those with gender dysphoria would be treated no differently under DoD's new policy than the military currently treats those with any other medical condition.[8]

Further, Plaintiffs contend that because the military already has policies in place which prevent individuals with a history of suicidality, depression, and anxiety from enlisting, there is no need for the new policy. Pls.' Mot. 24; Pls.' Opp. 30. But just because gender dysphoria may have some similarities

[8] Plaintiffs contend that the military does not exclude all women or African Americans from service despite the fact that these groups have elevated incidence of depression and/or anxiety as compared to white people and males. Pls.' Mot. 24–25; Pls.' Opp. 31. But these examples simply undermine Plaintiffs' argument that the new DoD policy is unconstitutional. The new DoD policy is focused on a specific medical condition—gender dysphoria—and does not purport to exclude all transgender individuals from serving in the armed services. The treatment of anxiety and depression by DoD is no different.

to other conditions that can preclude enlistment does not mean that DoD cannot have a policy that addresses the separate medical condition of gender dysphoria. DoD has reasonably determined that gender dysphoria is "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning," Report 13 (quoting the DSM-V), and that a typical treatment for this condition—gender transition—is unlike any other form of treatment in that it requires a permanent exception from the standards that apply to the patient's biological sex (and remains the subject of "considerable scientific uncertainty"), *id.* at 32. And, while gender dysphoria differs in significant ways from suicidality, depression, or anxiety, it is sufficiently associated with high rates of those conditions, even after treatment, to justify the risk-mitigating approach adopted by DoD specifically for that condition. *Id.* at 21–26. Moreover, Plaintiffs' argument that the new policy is unnecessary because the military has preexisting policies addressing suicidality, depression, and anxiety would apply with equal force to the Carter policy they prefer (and which currently is in place based on the Court's preliminary injunction), which likewise limits accession based on gender dysphoria and transition.

Plaintiffs also contend that under the Carter policy, newly enlisted servicemembers do not present a deployability problem because in order to access to the military, they must establish that they are no longer transitioning. Pls.' Mot. 24; Pls.' Opp. 31–32. But DoD concluded that completing transition does not eliminate all deployability concerns. As DoD's Report explains, "there is considerable scientific uncertainty concerning whether [transition-related] treatments fully remedy … the mental health problems associated with gender dysphoria," Report 32, and "[i]n managing mental health conditions, while deployed, providers must consider the risk of exacerbation if the individual were exposed to trauma or severe operational stress. These determinations are difficult to make in the absence of evidence on the impact of deployment on individuals with gender dysphoria." Report

34. The fact that Plaintiffs or their experts may disagree with these judgments is of no legal significance. *See Goldman*, 475 U.S. at 509.

Finally, Plaintiffs argue that the new policy irrationally creates a special rule requiring discharge of any servicemember who "require[s] transition" as part of their medical care rather than relying on medical retention standards that already apply to all servicemembers. Pls.' Mot. 26; Pls.' Opp. 32. This argument is not supported by the text of the new policy. The policy is silent as to if or how a servicemember who requires transition would be discharged from the service, and it certainly does not state that such a discharge would be outside of the normal medical retention policies. Thus, Plaintiffs argument is based entirely upon speculation.[9]

2. The New DoD Policy Promotes Good Order, Discipline, Leadership, and Unit Cohesion.

Apart from readiness concerns, DoD determined that exempting individuals with gender dysphoria who need or have undergone gender transition—whether through hormones, surgery, or simply living and working in their preferred gender—from the military's longstanding sex-based standards would inevitably undermine the critical objectives served by those rules, namely, "good order, discipline, steady leadership, unit cohesion, and ultimately military effectiveness and lethality." Report 28. As DoD observed, "[g]iven the unique nature of military service," servicemembers must often "live in extremely close proximity to one another when sleeping, undressing, showering, and using the bathroom." *Id.* at 37. To protect reasonable expectations of privacy, the military has therefore "long maintained separate berthing, bathroom, and shower facilities for men and women

[9] Plaintiffs also claim that DoD's decision to include a reliance exemption for current servicemembers who relied on the Carter policy undermines its military readiness concerns. Pls.' Mot. 34; Pls.' Opp. 40. But this criticism is unfounded. In balancing the need for a new policy to further military readiness against the interests of servicemembers who had relied on the Carter policy, DoD reasonably determined that it would exempt certain servicemembers but not others. *See* Report at 6. DoD's balancing of these interests through an exemption clause in no way undermines its conclusion that the new policy is necessary to promote readiness, and on this issue the Court should defer to the military's judgment.

while in garrison," including on deployments. *Id.* In DoD's judgment, allowing individuals who retain some, if not all, of the anatomy of their biological sex to use the facilities of their preferred gender "would invade the expectations of privacy" of the other servicemembers sharing those facilities. *Id.* Combined with the significant limits on deployability, DoD determined that the Carter policy's departure from military uniformity poses "a direct threat to unit cohesion and will inevitably result in greater leadership challenges without clear solutions." *Id.* at 37.

Plaintiffs question DoD's reliance on its interest in maintaining sex-based standards, arguing that "[c]ourts have rejected the use of Defendants' rationale to justify discrimination against transgender individuals in other settings." Pls.' Mot. 30; Pls.' Opp. 36. However, as Plaintiffs appear to acknowledge, none of the cases they cite occurred in the military context. Plaintiffs nevertheless diminish the unique concerns of our nation's armed forces by comparing the military to "schools, workplaces, [and] public accommodations[.]" *Id.* Plaintiffs' argument misunderstands the nature of the military, where sex-based standards are necessary to maintain an integrated force and are integral to daily life, applying to, among others things, physical fitness and height and weight standards; berthing, showering, and restroom facilities; and contact sports and combat training. Report 28–29. Comparisons to experience in civilian life or to case law from the civilian context are inapposite.

Plaintiffs further claim that to the "extent…there is anything unique about the military justifying a departure from this established precedent, that argument is belied by the military's successful implementation of extensive guidance and training since the adoption of the open service policy." Pls.' Mot. at 30; Pls.' Opp. 37. But DoD is not obligated to adhere to one policy approach that it now judges to be inadequate. Indeed, the guidance Plaintiffs are referring to itself acknowledged the unique military challenges associated with a departure from sex-based standards for a subset of servicemembers. The prior administration's implementation handbook for the Carter policy repeatedly stressed the need to respect the "privacy interests" and "rights of Service members who

are not comfortable sharing berthing, bathroom, and shower facilities with a transitioning Service member," and urged commanders to try to accommodate competing interests to the extent that they could. Implementation Handbook 38, Dkt. 13-6, Exh. D; *see id.* at 22, 29, 33, 60–61, 63–64; *see also* Report 38 (discussing some of "[t]he unique leadership challenges arising from gender transition" that "are evident in the Department's handbook"). The RAND report also acknowledged these challenges, particularly as they apply to austere and deployed environments. As RAND observed, "[t]here do appear to be some limitations on the assignment of transgender personnel, particularly in combat units. Because of the austere living conditions in these types of units, necessary accommodations may not be available for Service members in the midst of a gender transition. As a result, transitioning individuals are typically not assigned to combat units." RAND Report at 56. Nothing forecloses DoD from reaching a different policy judgment for dealing with these undisputed concerns than that taken by the Carter policy.

Plaintiffs also assert that DoD's Report lacks sufficient examples of problems arising related to sex-based standards. Pls.' Mot. 30; Pls.' Opp. 37. But DoD in fact examined at length problems related to facilities and training, as well as dueling equal opportunity complaints under the Carter policy. Report 37–38. Its concerns are consistent with reports from officers in the Canadian military that "they would be called on to balance competing requirements" by meeting a transitioning servicemember's "expectations … while avoiding creating conditions that place extra burdens on others or undermined the overall team effectiveness" in areas such as "communal showers[] and shipboard bunking." *Id.* at 40. These examples "illustrate the significant effort required of commanders to solve [the] challenging problems posed by the implementation of the [Carter Policy]."

Id. at 38. DoD is not otherwise required to satisfy a numeric or mathematical formula in order to implement the judgment of the military in this area.[10]

Given that "[l]eaders at all levels already face immense challenges in building cohesive military units," *id.* at 37-38, DoD reasonably concluded that it would be unwise to maintain a policy that "will only exacerbate those challenges and divert valuable time and energy from military tasks," *id.* at 38. Plaintiffs have provided no reason why that military judgment regarding matters of discipline should be cast aside.[11]

3. The New DoD Policy is Supported by Concerns about Disproportionate Costs.

Plaintiffs also contest DoD's reliance on cost as a justification for the new policy. Pls.' Mot. 33–34; Pls.' Opp. 38–39. They claim that "[b]ecause the military already provides substantially the same medically necessary surgical and other care for other conditions, Defendants have no sufficient cost-related justification" for the new policy. Pls.' Mot. 34; Pls.' Opp. 39. But Plaintiffs first ignore the fact that since the Carter policy's implementation, the medical costs for servicemembers with

[10] Plaintiffs claim that this case is similar to the statutory prohibition on women serving on Navy warships that was struck down in *Owens v. Brown*, 55 F. Supp. 291, 309–10 (D.D.C. 1978); Pls.' Mot. 31; Pls.' Opp. 37. But that case offers a significant contrast to the policy at issue here. In *Owens*, the Navy did not support the challenged provision because it restricted its ability to make military assignment decisions. As the district court explained, "the broad sweep and absolute terms of section 6015 have effectively thwarted military authorities in their attempt to expand female utilization." *Id.* at 298. The effect of the court's ruling was to increase the executive branch's control over the military, not to reduce it. Indeed, the *Owens* Court emphasized that the effect of its decision was "to restore to the military an area of discretion that the 80th Congress unreasonably withheld." *Id.* at 309–10. Here, the Department's new policy is derived from the professional military judgment of the Secretary of Defense and some of the most senior members of the military and reflects their judgment that exempting individuals with a history or diagnosis of gender dysphoria "from well-established mental health, physical health, and sex-based standards, which apply to all Service members, including transgender Service members without gender dysphoria, could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." Mattis Mem. at 2.

[11] Plaintiffs also err in claiming that no law supports DoD's reasonable concerns about legal risks. Pls.' Mot. 29 n.9; Pls.' Opp. 36 n.13; *see, e.g.*, *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 686–89 (N.D. Tex. 2016) ("sex" in Title IX excludes gender identity).

gender dysphoria "have increased nearly three times" compared to servicemembers without this condition. Report 41. And that is "despite the low number of costly sex reassignment surgeries that have been performed so far"—34 non-genital procedures and one genital surgery—which likely would only increase as more servicemembers avail themselves of these measures. *Id.* Notably, 77 percent of the 424 treatment plans available for study "include requests for transition-related surgery" of some kind. *Id.*

Several commanders also reported that providing servicemembers in their units with transition-related treatment "had a negative budgetary impact" due to the use of "operations and maintenance funds to pay for … extensive travel throughout the United States to obtain specialized medical care." *Id.* at 41. This is not surprising given that transition-related treatments "require[] frequent evaluations" by both a mental-health professional and an endocrinologist, and most military treatment facilities "lack one or both of these specialty services." *Id.* at 41 n.164. Transitioning servicemembers consequently "may have significant commutes to reach their required specialty care," with those "stationed in more remote locations fac[ing] even greater challenges." *Id.*

The prior administration recognized these same challenges, but determined that servicemembers and their command could plan around the challenges. *See, e.g.,* The Navy's Transgender and Gender Transition Commanding Officer's Toolkit at 12, Dkt. 138-6 ("Timing of a Transition Plan should include consideration of a Sailor's planned rotation date (PRD) and planned deployment/operational requirements."). Given the military's interest in maximizing efficiency through minimizing costs, Report 3, and the fact that the prior administration dramatically underestimated the number of servicemembers who would seek transition-related health care services,[12] it was certainly reasonable for DoD to now come to a different conclusion.

[12] The RAND report estimated that between 29 and 129 active duty servicemembers would seek transition-related health care annually. RAND Report xi. In reality, 937 servicemembers had been diagnosed with gender dysphoria in the approximately eighteen months between June 30, 2016 and

* * *

In sum, even considering Plaintiffs' inappropriate reliance on outside experts, their challenges to the justifications underlying DoD's new policy fall short. The new DoD policy plainly furthers the Government's interests in ensuring military readiness; maintaining order, discipline, leadership, and unit cohesion; and minimizing military costs, and thus satisfies the highly deferential form of review applicable here. Plaintiffs have accordingly failed to demonstrate that they are likely to succeed on the merits of their challenge.[13]

II. The Equities Favor Dissolving the Preliminary Injunction.

Rather than articulate how DoD's new policy might in fact cause them any harm (let alone irreparable harm), Plaintiffs instead resort to quoting the Court's earlier opinion issuing a preliminary injunction, and resting on what they consider "the Court's prior findings on irreparable injury." *See* Pls.' Opp. 40–41 (citing Op. 71, Dkt. 61). Plaintiffs' argument is merely a continuation of their strategy to deny that DoD's new policy differs significantly from the President's 2017 Memorandum and has fundamentally changed the issues in this case.

Plaintiffs do not even attempt to explain how implementation of the new policy could cause them irreparable harm (or any harm, for that matter), and it is clear that it would not. Six of the current servicemember Plaintiffs qualify for the policy's reliance exemption—and thus, if the new policy were implemented, they would be able to continue serving in their preferred gender, obtain commissions if qualified, and receive medical treatment. *See* Report 43; Defs.' Reply 10–14, Dkt. 138. As for the remaining servicemember Plaintiff, Jane Doe 6, she would qualify for the reliance exemption as soon as she seeks medical care and is diagnosed with gender dysphoria by a military

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when the panel of experts conducted its review—nearly five times the upper bound of RAND's estimate. Report 32.

[13] Plaintiffs are also not likely to succeed on the merits in this case because they each lack standing to challenge DoD's new policy. *See* Defs.' Reply 10–17, Dkt. 138.

medical provider. *See* Barna Decl. ¶ 6, Dkt. 138-2. For the prospective servicemembers who have already undergone gender transition, the new policy would not injure them because it treats them like any other individual who seeks to join the military with a preexisting medical condition. For example, the military presumptively disqualifies individuals with preexisting mental health conditions, *see* DoDI 6130.03 at 44-46, endocrine and metabolic conditions, including many that require hormone treatments, *see id.* at 39-41, and prior surgical treatments, *see id.* at 12, 14, 15, 17, 21, 23, 29, 33, 39. And as for Dylan Kohere, he has failed to respond to any of ROTC's requests to discuss enrollment and has not applied for a scholarship, Heenan Decl. ¶ 2, Dkt. 138-4; Burns Decl. ¶ 8, Dkt. 45-3, so implementation of DoD's new policy would not affect him. In contrast to Plaintiffs, the military's inability to implement its new policy is causing significant, ongoing, and irreparable harm to military readiness and lethality, conclusions which merit the Court's deference. *See Winter*, 555 U.S. at 27.

Additionally, the *Karnoski* Court's recent expansion of its preliminary injunction to cover the new policy on a nationwide basis, *see* 2018 WL 1784464, at *14, means that dissolving the preliminary injunction here would have no practical effect on Plaintiffs. To be sure, the Government has appealed the *Karnoski* Court's decision and moved to stay the district court's extension of the preliminary injunction to the new DoD policy pending appeal. *See Karnoski v. Trump*, No. 18-35347 (9th Cir.), Dkt. 3-1. But regardless of the ultimate resolution of that stay motion and appeal, this Court should not leave its preliminary injunction in place. If, for example, the Ninth Circuit stays or dissolves the preliminary injunction, that would only further support Defendants' motion to dissolve here. And if the stay is ultimately denied, the nationwide injunction in the *Karnoski* case would remain in place, thereby protecting Plaintiffs from any alleged harm.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Defendants' motion, the Court should dissolve the preliminary injunction.

June 6, 2018

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Certificate of Service

I hereby certify that on June 6, 2018, I electronically filed the foregoing Reply in Support of Defendants' Motion to Dissolve the Preliminary Injunction using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: June 6, 2018

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