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 DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT, AND OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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.

Plaintiffs' filings mischaracterize the nature of the military's new policy. 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.

In any event, the Court need not reach the merits of DoD's new policy because none of the Plaintiffs have met their burden to establish standing to challenge that policy. Their failure is especially apparent in light of the fact that Plaintiffs repeatedly attempt to show injury-in-fact through declarations that were executed before the new DoD policy was developed, and that do not mention any harms arising from the new policy. Moreover, Plaintiffs' claims against the President are not redressable, as discussed in Defendants' present motion and pending motion for partial judgment on the pleadings, Dkt. 115; Dkt. 90, and as confirmed by this Court's recent decision in *Lovitky v. Trump*, No. 17-450, 2018 WL 1730278, *7 (D.D.C. Apr. 10, 2018) (Kollar-Kotelly, J.).

For these reasons and those that follow, the Court should deny Plaintiffs' cross-motion for summary judgment and either dismiss this case or grant summary judgment for Defendants.

BACKGROUND

Given the stakes of warfare, DoD "has historically taken a conservative and cautious approach" in setting standards for military service. DoD Report ("Report") 3, Dkt. 96-2. DoD has long disqualified individuals with "physical or emotional impairments that could cause harm to themselves or others, compromise the military mission, or aggravate any current physical or mental

health conditions that they may have" from entering military service. *Id.* at 9. And it has taken a particularly cautious approach with respect to mental-health standards in light of "the unique mental and emotional stresses of military service." *Id.* at 10. "Most mental health conditions" are "automatically disqualifying" for entry into the military absent a waiver, even when an individual no longer suffers from that condition. *Id.* at 20. In general, the military has aligned these disqualifying conditions with the ones listed in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), published by the American Psychiatric Association (APA). *Id.* at 10. Military standards for decades therefore presumptively disqualified individuals with a history of "transsexualism," consistent with the inclusion of that term in the third edition of the DSM. *Id.* at 7, 10–11.

In 2013, the APA published a new edition of the DSM, which replaced the term "gender identity disorder" (itself a replacement for "transsexualism") with "gender dysphoria." *Id.* at 10, 12. In doing so, the APA explained that it no longer considered identification with a gender different from one's biological sex (*i.e.*, transgender status) to be a disorder. *Id.* at 12. It stressed, however, that a subset of transgender people suffer from the medical condition of gender dysphoria, a "marked incongruence between one's experience/expressed gender and assigned gender, of at least 6 months duration," that is "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning." *Id.* at 12–13, 20–21. Individuals diagnosed with gender dysphoria sometimes transition genders—through cross-sex hormone therapy, sex-reassignment surgery, or simply living and working in their preferred gender—in an attempt to treat this condition. *Id.* at 22; RAND Report 6–7, 21, Dkt. 13-4, Exh. B.

In 2015, then-Secretary of Defense Ashton Carter ordered the creation of a working group to study "the policy and readiness implications of welcoming transgender persons to serve openly," Statement by Secretary Carter 1 (July 13, 2015), Dkt. 115-2, and instructed it to "start with the presumption that transgender persons can serve openly without adverse impact on military

effectiveness and readiness," Exh. 1, Memorandum from Secretary Carter (July 28, 2015). As part of this review, DoD commissioned the RAND National Defense Research Institute to conduct a study. Report 13. The resulting RAND report concluded that the proposed policy change would have "an adverse impact on health care utilization and costs, readiness, and unit cohesion," but that these harms would be "'negligible' and 'marginal' because of the small estimated number" of transgender servicemembers relative to the size of the armed forces as a whole. Report 14.

Following this review, in June 2016, then-Secretary Carter ordered the armed forces to adopt a new policy on military service by transgender individuals. Report 14; DTM 16-005, Dkt. 13-6, Exh. B. Under the Carter policy, transgender servicemembers could transition genders at government expense if they received a diagnosis of gender dysphoria from a military medical provider. Report 14-15; *see* DTM 16-005 Attach. at 2; DoDI 1300.28 at 7, Dkt. 128-7. In addition, the military had until July 1, 2017, to revise its accession standards to allow transgender individuals, including those who had already transitioned, to enter military service if they met certain medical criteria. DTM 16-005 Attach. at 1. Specifically, a "history of gender dysphoria" would be disqualifying unless an applicant provided a certificate from a licensed medical provider certifying that the applicant had been "stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months." *Id.* A "history of medical treatment associated with gender transition"—including "sex reassignment or genital reconstruction surgery"—would likewise be disqualifying absent certification that the applicant had completed all transition-related medical treatment and had been stable or free of complications for 18 months. *Id.* at 1–2. Finally, transgender individuals who lacked a history or diagnosis of gender dysphoria, whether they were currently serving or seeking to serve, could not be disqualified on the basis of their transgender status, but were required, like everyone else, to meet all of the standards associated with their biological sex. *Id.*; Report 4.

On June 30, 2017, the day before the Carter accession standards were set to take effect, Secretary Mattis, on the recommendation of the Service Chiefs and in the exercise of his discretion, decided that it was "necessary to defer" those standards until January 1, 2018, so that the military could "evaluate more carefully" the effect of accessions by transgender individuals "on readiness and lethality." Accessions Deferral Memorandum, Dkt. 96-4; *see* Report 4. Without "presuppos[ing] the outcome," he ordered a five-month study that would "include all relevant considerations" and give him "the views of the military leadership and of the senior civilian officials who are now arriving in the Department." Accessions Deferral Memorandum.

While this study was ongoing, the President stated on Twitter on July 26, 2017, that the government "will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military." Op. 1, Dkt. 61. He then issued a memorandum in August 2017 explaining that former-Secretary Carter had "failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy"—which generally disqualified transgender individuals from service—"would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." 2017 Mem., 82 Fed. Reg. 41319 (Aug. 25, 2017). The President therefore called for "further study" to ensure that implementation of the Carter policy "would not have those negative effects." *Id.*

In the interim, the President directed a "return to the longstanding policy" on service by transgender individuals "until such time as a sufficient basis exists upon which to conclude that terminating [it] would not have the negative effects discussed." *Id.* at 41319–20. He ordered the Secretary of Defense to craft a "plan for implementing" this directive by February 2018 that would "determine how to address transgender individuals currently serving." *Id.* The President stressed, however, that the Secretary of Defense, after consultation with the Secretary of Homeland Security, "may advise [him] at any time, in writing, that a change to this policy is warranted." *Id.* at 41319.

In September 2017, Secretary Mattis established a panel of experts to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." Terms of Reference 2, Dkt. 115-4. The panel consisted of "senior uniformed and civilian Defense Department and U.S. Coast Guard leaders," including "combat veterans." Mattis Mem. 1. Given "their experience leading warfighters," "their expertise in military operational effectiveness," and their "statutory responsibility to organize, train, and equip military forces," these senior military leaders were "uniquely qualified to evaluate the impact of policy changes on the combat effectiveness and lethality of the force." Report 18. This panel was instructed "to provide its best military advice, based on increasing the lethality and readiness of America's armed forces, without regard to any external factors." Mattis Mem. 1.

The panel drew on experts across DoD and the Department of Homeland Security, including three groups dedicated to issues involving personnel, medical treatment, and military lethality. Report 18. These groups provided "a multi-disciplinary review of relevant data" and information about medical treatment as well as standards for accession and retention, developed a set of policy recommendations, and responded to "numerous queries for additional information and analysis." *Id.*

In 13 meetings over 90 days, the panel met with military and civilian medical professionals, commanders of transgender servicemembers, and transgender servicemembers themselves. *Id.* It reviewed information regarding gender dysphoria, its treatment, and the impact of this condition on military effectiveness, unit cohesion, and resources. *Id.* And unlike prior reviewers, the panel relied on the "the Department's own data and experience obtained since the Carter policy took effect." *Id.* After "extensive review and deliberation," which included consideration of evidence that supported and cut against its proposals, the panel "exercised its professional military judgment" and presented its recommendations to the Secretary. *Id.*

After considering these recommendations and additional information, Secretary Mattis, with the agreement of the Secretary of Homeland Security, sent the President a memorandum in February 2018 proposing a new policy, consistent with the panel's conclusions, that differed from both the Carter policy and the longstanding policy addressed in the 2017 Memorandum, along with a 44-page report explaining DoD's position. *See* Mattis Mem.; Report. Noting that the President had "made clear" that the Secretary "could advise" him "at any time, in writing, that a change to [the pre-Carter] policy is warranted," Secretary Mattis recommended that the President "revoke" his 2017 Memorandum, "thus allowing" the military to adopt the new policy. Mattis Mem. 1, 3.

Like the Carter policy before it, DoD's new policy turns on the medical condition of gender dysphoria, not transgender status. Under each policy, transgender individuals without a history or diagnosis of gender dysphoria may serve if they meet the standards associated with their biological sex, whereas those with gender dysphoria are presumptively disqualified. Report 4–6. The main difference between the two policies is the nature of the exceptions to that presumptive disqualification.

Under the 2018 policy, individuals with a history or diagnosis of gender dysphoria may join or remain in the military if they neither need nor have undergone gender transition, are willing and able to adhere to the standards associated with their biological sex, and can meet additional criteria. Report 5. For accession into the military, they must show 36 months of stability (*i.e.*, absence of gender dysphoria) before applying, while for retention in the military, they may remain if they meet deployability standards. *Id.* These exceptions rest on DoD's judgment that "a history of gender dysphoria should not alone" be disqualifying given evidence that the presence of this condition in children does not always persist into adulthood and the military's interest in retaining those in whom "it has made substantial investments." *Id.* at 42.

By contrast, individuals with gender dysphoria who require or have undergone gender transition are disqualified absent a waiver. *Id.* at 5. "In the Department's military judgment," this is a

"necessary departure from the Carter policy" because service by these individuals was "not conducive to, and would likely undermine, the inputs—readiness, good order and discipline, sound leadership, and unit cohesion—that are essential to military effectiveness and lethality." *Id.* at 32, 41. This judgment rests on numerous military concerns, including evidence that individuals with gender dysphoria continued to have higher rates of psychiatric hospitalization and suicidal behavior even after transition, evidence that transition-related treatment could render servicemembers non-deployable for a significant time, the creation of irreconcilable privacy demands that would create friction in the ranks, the safety risks and perceptions of unfairness arising from having training and athletic standards turn on gender identity, the frustration of other servicemembers who also wish to be exempted from uniform and grooming standards, and disproportionate transition-related costs. *Id.* at 19–42.

Recognizing, however, that a number of individuals with gender dysphoria had "entered or remained in service following the announcement of the Carter policy," DoD included a categorical reliance exemption in its 2018 policy. *Id.* at 43. Specifically, those servicemembers "who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy, may continue to receive all medically necessary treatment" as well as "serve in their preferred gender, even after the new policy commences." *Id.* DoD has since confirmed that this exemption will extend to any servicemember "who was diagnosed with gender dysphoria prior to the effective date of the Carter policy and has continued to serve and receive treatment pursuant to the Carter policy after it took effect." *See* Exh. 2, Declaration of Stephanie A. Barna ¶ 6. It has likewise confirmed that the exemption will cover any servicemember diagnosed with gender dysphoria while the preliminary injunctions in this or the related cases are in place. *Id.* In DoD's judgment, its "substantial investment" in and "commitment to" these particular servicemembers "outweigh the risks" associated with service by individuals with gender dysphoria who need or have undergone gender transition more generally. Report 43.

The following chart summarizes the relevant military policies:

	Issue	Pre-Carter Policy	Carter Policy	2018 Policy
No History or Diagnosis of Gender Dysphoria	*Accession*	Generally disqualified	May serve in biological sex	May serve in biological sex
	Retention	Generally disqualified	May serve in biological sex	May serve in biological sex
	Funded Transition	Unavailable	Unavailable	Unavailable
History or Diagnosis of Gender Dysphoria	*Accession*	Generally disqualified	If no history of gender transition, disqualified unless stable for 18 months	If no history of gender transition, disqualified unless stable for 36 months
			If history of gender transition, disqualified unless stable in preferred gender and no complications for 18 months	If history of gender transition, disqualified absent waiver
	Retention	Generally disqualified	May serve in biological sex or in preferred gender upon completing transition	If no history of gender transition, may serve in biological sex if meet deployability standards
				If history of or need for gender transition, may serve in preferred gender under reliance exemption
	Funded Transition	Unavailable	Available if medically necessary	Available under reliance exemption if medically necessary

On March 23, 2018, the President "revoke[d]" his 2017 Memorandum "and any other directive [he] may have made with respect to military service by transgender individuals," thereby allowing the Secretaries of Defense and Homeland Security to "exercise their authority to implement any appropriate policies concerning military service by transgender individuals." 2018 Memorandum 1, Dkt. 95-1. In light of the President's revocation of his 2017 Memorandum and DoD's public release

of its new policy, Plaintiffs amended their complaint. Dkt. 106. Defendants moved to dissolve the Court's previously entered preliminary injunction, Dkt. 116, and moved to dismiss the new complaint, or, in the alternative, for summary judgment, Dkt. 115. Plaintiffs then cross-moved for summary judgment. Dkt. 131–32.

ARGUMENT

I. Plaintiffs Have Not Established Standing To Challenge The New DoD Policy.

Because the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Thus, on summary judgment, "the plaintiff can no longer rest on [] 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts'" establishing standing. *Id.* (citation omitted).

A. Plaintiffs Have Not Shown An Injury In Fact.

The Court should resolve each Plaintiff's standing to challenge the new policy. As the Supreme Court has recognized, "a plaintiff must demonstrate standing for each claim" and "'for each form of relief sought.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (quotation and citation omitted). Thus, at a minimum, to maintain a challenge to both the retention and accession directives set forth in the DoD policy, at least one Plaintiff must have standing to challenge each directive.

Current Servicemembers With Diagnoses of Gender Dysphoria. As a preliminary matter, Plaintiffs Jane Doe 2, Jane Doe 3, Jane Doe 4, Jane Doe 5, John Doe 1, and Regan Kibby—all current service members allowed to continue serving under the new DoD policy [1]—fail to address, let alone

[1] Plaintiff Regan Kibby is a midshipman at the U.S. Naval Academy, who is treated as a current servicemember under the DoD policy. Plaintiffs concede that standing for Midshipman Kibby should be analyzed in the same way as standing for the current servicemembers. *See* Pls.' Opp. 14 n.6, Dkt. 130.

rebut, Defendants' argument that their allegations that they are "forced to serve under a cloud of uncertainty" about continued service and health care are far too speculative to constitute a "certainly impending" injury for standing purposes. *See* Defs.' Mot. 6–9 (emphasis omitted), Dkt. 115; *see generally* Pls.' Opp., Dkt. 130; Pls.' Mot., Dkt. 132.

Lacking any cognizable injury, Plaintiffs instead argue that the DoD policy "places them in an inferior class and sends a clear message that they should not be part of the military" and thus imposes a stigmatic injury. Pls.' Opp. 15; *see also* Pls.' Mot. 40–41. But an alleged injury arising from discrimination "accords a basis for standing only to those persons who are *personally denied equal treatment* by the challenged discriminatory conduct." *Allen v. Wright*, 468 U.S. 737, 755 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (emphasis added and citation omitted). As "*Allen* and its progeny make clear[,] . . . exposure to a discriminatory message, without a corresponding denial of equal treatment, is insufficient to plead injury in an equal protection case." *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017); *see also NAACP v. Horne*, 626 F. App'x 200, 201 (9th Cir. 2015) (finding that "stigmatic injury caused by being a target of official discrimination is not itself a personal denial of equal treatment"). In short, stigmatic injury alone is insufficient to confer standing; it is "the denial of a benefit . . . that is a basis for standing." *Kurtz v. Baker*, 829 F.2d 1133, 1141 (D.C. Cir. 1987).

The D.C. Circuit rejected a similar claim of injury brought by Navy chaplains who alleged that non-liturgical Protestant chaplains were being denied benefits and opportunities on account of their religion. *See In re Navy Chaplaincy*, 534 F.3d 756, 760-61 (D.C. Cir. 2008). There, the named plaintiffs conceded that they had not been denied such benefits, but argued that the "Navy's 'message' of religious preference" toward Catholic chaplains conferred standing on them as non-liturgical Protestant chaplains. *Id.* The court rejected their stigmatic standing theory, holding that "their exposure to the Navy's alleged 'message' of religious preference" did not confer standing. *Id.* at 761.

Plaintiffs' assertion that the Mattis Memorandum sends a "clear message" that "they should not be part of the military," *see* Pls.' Opp. 15, is likewise insufficient to establish standing, *see In re Navy Chaplaincy*, 534 F.3d at 760–61.

Plaintiffs seek to bolster their stigmatic-standing argument by invoking *Heckler v. Mathews*, 465 U.S. 728 (1984), *see* Pls.' Opp. at 16–17, but their reliance on that decision is misplaced. In *Heckler*, a male plaintiff alleged that the Social Security Act denied him Social Security benefits that were afforded to similarly-situated women, in violation of his equal protection rights. 465 U.S. at 735. The plaintiff's injury at the hands of the agency was concrete: "as a nondependent man, he receive[d] fewer benefits than he would if he were a similarly situated woman." *Id.* at 738. Accordingly, *Heckler* "clearly [did] not dispense with the injury requirement" of Article III. *Biszko v. RIHT Fin. Corp.*, 758 F.2d 769, 773 (1st Cir. 1985). To be sure, *Heckler* includes "broad language concerning the stigmatizing injuries suffered by a denial of equal protection," but that language "appears in response to the defendant's argument that the plaintiff in *Heckler* lacked standing because one possible outcome of his suit would have been to strike down the discriminatory benefits provision entirely, denying benefits to everyone including the plaintiff." *NAACP v. Horne*, No. CV 13-01079, 2013 WL 5519514, at *5 (D. Ariz. Oct. 3, 2013). *Heckler* "explained that such a possibility did not deprive the plaintiff of standing because he was in fact 'personally denied equal treatment' in the benefits awards." *Id.* (citation omitted). In short, alleged "stigmatic" injuries alone are insufficient to establish standing; rather, a party must still establish that it is suffering an actual concrete injury.[2] *See Kurtz*, 829 F.2d at 1141 (stating that

[2] Plaintiffs' reliance on the non-binding Third Circuit case *Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015), also misses the mark. *See* Pls.' Opp. 17. The plaintiffs in *Hassan* did not rely on a theory of stigmatic injury alone, but rather claimed that an alleged police surveillance program had broadly infiltrated their communities, by having officers collect photographs and videos, record license plate numbers, and pose as members of community organizations. *Hassan*, 804 F.3d at 285-86. The *Hassan* plaintiffs further alleged that because this surveillance program was widely publicized, it caused them financial harm by decreasing the value of their homes, scaring customers away from their businesses, and interfering with the organizational plaintiffs' fundraising efforts. *Id.* at 287–88. In short, unlike

"allegations of stigmatic injury will not suffice to link a plaintiff personally to the conduct he challenges unless, as in *Heckler*, the plaintiff personally has been denied a benefit").

Perhaps trying to avoid relying solely on stigmatic injury to establish standing, Plaintiffs speculate that they "face a substantial risk they will have reduced opportunities for assignments, promotion, training, and deployment, and be placed in harm's way by the eroded bonds of trust with their fellow servicemembers and leadership." Pls.' Opp. 15; Pls.' Mot. 41. But such speculation is likewise insufficient to establish standing. First, the only plaintiff to allege such harm is Jane Doe 2, who complains that she has "been on a detail that has [her] driving far from [her] base every day," which has prevented her from meeting "four or five other soldiers" she was supposed to be leading. Jane Doe 2 Decl. ¶ 15, Dkt. 40-2; Pls.' Opp. 15; Pls.' Mot. 41. Jane Doe 2 "believe[s] [that she is] being kept separated from the rest of the unit because [she] is transgender and because of the President's ban, as [she] never had any problems with this kind of treatment in [her] old unit and do[es] not know of any other reason why [she] would be treated this way." Jane Doe 2 Decl. ¶ 15, Dkt. 40-2. Jane Doe 2 made these statements in August 2017, well before DoD developed its new policy. *See id.* at 6. Therefore, she fails to allege any harm resulting from the new DoD policy.[3]

None of the other current servicemembers even claim to have suffered such harm. *See* Pls.' Opp. 14–17; Pls.' Mot. 40–41. Plaintiffs attempt to rely on speculation from former service secretaries and a professor regarding future injuries that might occur to Plaintiffs with respect to future

---

Plaintiffs in this case, the *Hassan* plaintiffs alleged non-speculative direct, personal, and concrete harms as a result of the governmental conduct being challenged.

[3] In any event, the fact that Jane Doe 2 admittedly speculates that she "do[es] not know of any other reason why [she] would be treated this way," Jane Doe 2 Decl. ¶ 15, Dkt. 40-2, is a far cry from meeting her burden of establishing that anyone in the Army has in fact treated her differently based on her transgender status. On summary judgment, such speculation is an insufficient basis to establish standing. Moreover, Jane Doe 2 was assigned her duties based upon her qualifications, rank, and needs of her unit, she often saw her assigned soldiers, and the Army did not treat her differently based on her transgender status. *See* Defs.' Resp. to Pls.' Statement of Undisputed Material Facts ¶ 94.

assignments, promotions, training, and deployments, Pls.' Opp. 15 n.7; Pls.' Mot. 41, but such speculation cannot confer standing, *see United Transp. Union v. ICC*, 891 F.2d 908, 911 (D.C. Cir. 1989) (stating that "an allegation of injury . . . that is too speculative will not 'suffice to invoke the federal judicial power'" (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976)); *see also id.* at 912 n.7 (contrasting "allegations based on the laws of physics" or "founded on economic principles," which are sufficient to demonstrate injury, with "predictions based only on speculation," which are not). Like Jane Doe 2's declaration, the declarations of the former service secretaries and the professor were created in October 2017, months before the development of DoD's new policy, and they specifically relate to alleged harms resulting from the August 2017 Presidential Memorandum.[4] *See* Mabus Supp. Decl., Dkt. 51-1; Fanning Supp. Decl., Dkt. 51-3; Eitelberg Decl., Dkt. 51-4. Therefore, they fail to allege any harms related to the new DoD policy. And even if Plaintiffs had alleged analogous harms related to the new policy, courts consistently have recognized in military cases that speculation about future harm is insufficient to establish a repressible injury. *See, e.g.*, *Singh v. Carter*, 185 F. Supp. 3d 11 (D.D.C. 2016); *Singh v. McConville*, 187 F. Supp. 3d 152 (D.D.C. 2016).

Current Servicemember Without a Diagnosis of Gender Dysphoria. Plaintiffs argue that "[u]nder the Mattis Plan, because Jane Doe 6 never received a diagnosis of gender dysphoria from a military physician, Jane Doe 6 faces discharge if she seeks gender transition." Pls.' Opp. 17; Pls.' Mot. 41; *see also* Jane Doe 6 Decl. ¶¶ 13, 18, 21, Dkt. 129 Exh. A (expressing fears of being discharged from the military). But that is plainly not true. If Jane Doe 6 seeks medical care and is diagnosed with gender dysphoria by a military medical provider, then she would qualify for the reliance exemption,

[4] For example, Raymond Mabus, the former Secretary of the Navy, opined that the uncertainty as to whether transgender servicemembers would be discharged on March 23, 2018 would affect their ability to deploy or make permanent change of station moves. Mabus Supp. Decl. ¶¶ 2–7, Dkt. 51-1. This alleged uncertainty is plainly no longer relevant under the express terms of the DoD policy, which allows currently serving servicemembers who have been diagnosed with gender dysphoria to "continue to serve." Mattis Mem. 2.

see Exh. 2, Barna Decl. ¶ 6, and would be able to "serve in [her] preferred gender and receive medically necessary treatment for gender dysphoria," Mattis Mem. 2.

Plaintiffs also argue that Jane Doe 6 could "remain in service and disavow who she is, or come out and face discharge," but, "[e]ither way, she faces injury." Pls.' Opp. 18. Plaintiffs assert that the injury she would face by "disclosing her trans-gender identity or seeking to transition" would be facing "overt bias and disruption that would result from serving in the military as a member of an officially inferior class." *Id.* But this argument is simply a reiteration of Plaintiffs' stigmatic injury argument. As demonstrated above, stigmatic injury alone is insufficient to confer standing. *See Allen*, 468 U.S. at 755; *Kurtz*, 829 F.2d at 1141; *Moore*, 853 F.3d at 250; *NAACP*, 626 F. App'x at 201. Rather, Plaintiffs must show that Jane Doe 6 personally would face the denial of a benefit if she sought medical care to obtain a diagnosis and treatment for gender dysphoria, which they have failed to do. Because Jane Doe 6 would not face injury if she sought this medical care, she is asserting an injury of her own making by failing to seek such care. Such self-inflicted harm cannot establish standing. *See Nat'l Family Planning & Reproductive Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006).

Prospective Servicemembers Who Have Undergone Gender Transition. Plaintiffs Jane Doe 7 and John Doe 2 argue that because they "both underwent gender transition years ago," they are "barred from enlistment" under the new DoD policy. Pls.' Opp. 19; Pls.' Mot. 41. But even if the preliminary injunctions were not in place and the DoD policy were to take effect, Jane Doe 7 and John Doe 2 would not be personally denied equal treatment. *Allen*, 468 U.S. at 755. Rather, they have not shown that they would be treated differently than 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* Exh. 3, 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. Because Jane Doe 7 and John Doe 2

will be treated just like other military applicants, they will not be personally denied equal treatment and thus do not have standing to challenge the DoD policy.[5]

First-Year College Student Who Appears No Longer Interested in ROTC. In an effort to further their narrative that the DoD policy is a "ban" on military service by transgender individuals, Plaintiffs argue that Plaintiff Dylan Kohere "is barred from joining his university's ROTC program because he is transgender." Pls.' Opp. 20; Pls.' Mot. 41. Citing to a declaration from Robert Burns, the Deputy Chief of Staff for Personnel in the U.S. Army Cadet Command, Plaintiffs further argue that "Defendants have already acknowledged that the accession ban prevents Kohere from enrolling as a cadet in his university ROTC program." Pls.' Opp. 20 (citing Burns Decl. ¶ 6, Dkt. 45-3). But Mr. Burns executed that declaration on October 4, 2017, well before DoD completed development of its new policy. *See* Burns Decl. 9, Dkt. 45-3. Under the new DoD policy, "[t]ransgender 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." Mattis Mem. 3. Far from being "categorically barred because he is transgender," Pls.' Mot. 41, under the new policy, Mr. Kohere would be allowed to serve in his biological sex, like every other servicemember.[6]

Plaintiffs also argue that Mr. Kohere is currently harmed by being deprived of educational opportunities, such as the ability to enroll in ROTC, receive leadership training, or apply for a scholarship. Pls.' Opp. 20; PSUMF ¶¶ 130–31, Dkt. 131-2. But since DoD's policy was announced

[5] In addition, Jane Doe 7 faces no imminent injury as she has stopped actively seeking to join the Coast Guard, and, even under the Carter policy, is not eligible to join the Coast Guard. *See* Defs.' Resp. to Pls.' Statement of Undisputed Material Facts ¶¶ 110–12; *see also Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166–67 (1972).

[6] Because Mr. Kohere does not allege that he has been diagnosed with gender dysphoria, even under the Carter policy, he would be allowed to serve only in his biological sex. *See* DTM 16-005; Report 4, 15. Thus, the relief Plaintiffs request—that DoD "revert[s] to the status quo with regard to accession and retention that existed before the August 25, 2017 issuance of the Presidential Memorandum"—would not redress any alleged harm Mr. Kohere would suffer under the new DoD policy by serving in his biological sex.

in March 2018, Mr. Kohere has failed to respond to any of the cadre's multiple requests to discuss his enrollment in ROTC and did not register for any ROTC classes in the upcoming fall semester. Exh. 4, Heenan Decl. ¶ 2. In addition, Mr. Kohere did not apply for a scholarship last year or this year. *Id.*; Burns Decl. ¶ 8, Dkt. 45-3. Because Mr. Kohere has failed to respond to any of the cadre's multiple requests to discuss his enrollment in ROTC, has not registered for ROTC courses for next fall, and has not applied for a scholarship, he does not have standing to challenge DoD's new policy. *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166–67 (1972) (holding that the plaintiff had no standing to challenge the club's racially discriminatory membership policies because he had never applied for membership); *Freedom from Religion Found., Inc. v. Lew*, 773 F.3d 815, 822 (7th Cir. 2014) (in analyzing *Moose Lodge*, finding that "[i]t apparently did not matter to the Court that such an application would have been futile because the club's bylaws only allowed Caucasians to become members. Futile or not, a request for membership was necessary to establish standing because, without it, no injury had occurred."); *Carroll v. Nakatani*, 342 F.3d 934, 941–43 (9th Cir. 2003) (finding that the plaintiff lacked standing to challenge the Office of Hawaiian Affairs' ("OHA") allegedly discriminatory business loan program because "[e]ven assuming [he] had a legitimate intention to apply for a loan, he has done essentially nothing to demonstrate that he is in a position to compete equally with other OHA loan applicants," as "[h]is application is materially deficient" and he "did not respond to OHA's request for additional information").

B. Plaintiffs' Claims Against the President Are Not Redressable.

Plaintiffs argue that "Defendants' extreme claim that the President is absolutely immune from suit should be rejected." Pls.' Opp. 21. But Plaintiffs continue to mischaracterize Defendants' argument. Defendants do not argue that the President is "absolutely immune from suit," *id.*, but rather that a court may not grant injunctive or declaratory relief against the President for his official, non-ministerial conduct particularly where, as here, relief granted against subordinate Executive officials

would provide full relief to Plaintiffs. *See* Defs.' Mot. 14, Dkt. 115; Dkt. 90 at 1, 7; Dkt. 94 at 1. Far from being "extreme," Pls.' Opp. 21, this argument is firmly rooted in Supreme Court and D.C. Circuit precedent. *See Mississippi v. Johnson*, 71 U.S. 475, 499–501 (1866); *Franklin v. Massachusetts*, 505 U.S. 788, 827–28 (1992)) (Scalia, J., concurring); *Newdow v. Roberts*, 603 F.3d 1002, 1012–13 (D.C. Cir. 2010).

Plaintiffs cite four cases in an attempt to show that "the President is not immune from declaratory relief."[7] Pls.' Opp. 21 (citing *Clinton v. City of New York*, 524 U.S. 417 (1998); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017); *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974)) ("*NTEU*"); Pls.' Mot. 45 n.12 (citing same); *see* Notice of Supp. Authority, Dkt. 137 (citing *Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 17-civ-5205, 2018 WL 2327290 (S.D.N.Y. May 23, 2018)). But all are distinguishable. First, as this Court recently recognized in *Lovitky*, 2018 WL 1730278, *7 (Kollar-Kotelly, J.), the Supreme Court in *Clinton* "found standing in a challenge to a President's statutory power, but did not concern his executive decisions." In this case, by contrast, Plaintiffs (inexplicably) continue to challenge the now-revoked executive decision by the President—the August 2017 Presidential Memorandum. Moreover, although the Supreme Court in *Clinton* and the Ninth Circuit in *Hawaii* permitted declaratory relief to be entered against the President, they did not analyze whether it was proper to do so. The Court may not infer from the silence of these courts that they found authority existed to issue a declaratory judgment against the President for his official conduct. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144–45 (2011); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 63, n.4 (1989); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). In addition, the district court in *Knight* found that the Presidential action there was ministerial rather than discretionary, stating that "the intrusion on executive prerogative presented by an injunction directing the unblocking of individual plaintiffs would be minimal" and "would not direct

[7] Plaintiffs also cite to the decision by the court in *Karnoski v. Trump*, Pls.' Opp. 21–22; Pls.' Mot. 45 n.12, but the Court should not rely on that decision for the reasons set forth in Defendants' summary judgment motion. *See* Defs.' Mot. 15–16, Dkt. 115.

the President to execute the laws in a certain way, nor would it mandate that he pursue any substantive policy ends." 2018 WL 2327290, at *23. There can be no question here that any Presidential action involving the formation of military policy involves "judgment, planning, or policy decisions" and is not ministerial. *See Beatty v. Wash. Metro. Area Transit Auth.*, 860 F.2d 1117, 1127 (D.C. Cir. 1988) (defining discretionary, non-ministerial duties). Finally, Plaintiffs continue to rely on *NTEU*, but both this Court and the D.C. Circuit have questioned whether *NTEU* remains good law after *Franklin*. *See Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996); *Lovitky*, 2018 WL 1730278, at *7. It is unlikely that *NTEU* remains good law considering that "as of 2010, the D.C. Circuit opined that 'a court—whether via injunctive or declaratory relief—*does not* sit in judgment of a President's executive decisions.'" *Lovitky*, 2018 WL 1730278, at *7 (quoting *Newdow*, 603 F.3d at 1012).

II. 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 2017. *See* Pls.' Opp. 7–11; Pls.' Mot. 17–22. But even a passing review of the new policy reveals that it is substantially different from the President's 2017 Memorandum and 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). Report 4–6. 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, 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.

III. 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.' Mot 6; Pls.' Opp. 10. 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)); 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. 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.

In addition, Plaintiffs 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 ("recogniz[ing] a Service member's gender by the member's gender marker in the [Defense Enrollment Eligibility Reporting System]," which may be changed *only* after a "military medical provider determines that a Service member's gender transition is complete"). Plaintiffs insist that the Carter policy is different because it generally allows transgender individuals to transition while in service and thereafter be held to the standards associated with their transitioned gender. Pls.' Mot. 9–10. But Plaintiffs overlook that transition treatment and its corresponding change in gender marker are available under the Carter policy only to those servicemembers who are both diagnosed with gender dysphoria and prescribed a treatment plan that includes gender transition. *See* Report 15; DoDI 1300.28. For all other transgender servicemembers, the Carter policy requires service according to biological sex. In any event, under DoD's new policy, servicemembers who have already transitioned, or will transition in the future pursuant to the new policy's reliance exemption, will be allowed to serve

according to their transitioned gender. Indeed, the reliance exemption covers nearly 1,000 servicemembers already. Report 7 n.10.[8]

Plaintiffs next argue that DoD's new policy discriminates on the basis of transgender status because it disqualifies any transgender individual "who requires or has undergone gender transition," regardless of "whether they have gender dysphoria." Pls.' Mot. 7. As an initial matter, Plaintiffs again ignore the fact that under DoD's new policy, many individuals "who require[] or ha[ve] undergone gender transition" may serve pursuant to its reliance exemption. But more fundamentally, the contention that a history of, or need for, gender transition could be considered in a manner wholly divorced from gender dysphoria is unfounded. Gender transition is a medical treatment for the medical condition of gender dysphoria, meaning that those who require or have undergone gender transition likely either currently suffer, or at one point suffered, from gender dysphoria. *See* Report 7–8, 20–21. And even if there were a Plaintiff who did not have a history of gender dysphoria but "requires or has undergone gender transition," a policy that turns on a history of, or need for, gender transition still does not apply based on transgender *status*. Again, not all transgender people are diagnosed with gender dysphoria, and not all transgender people with gender dysphoria choose to transition. RAND Report 6; Mattis Mem. 1.

Plaintiffs also complain that DoD's new policy bars accession by transgender individuals who no longer have gender dysphoria because they have successfully transitioned. Pls.' Mot. 7. But Plaintiffs fail to acknowledge that considering a prospective servicemember's history of a medical condition is a standard military practice—and one used with respect to gender dysphoria under the

[8] Here, Plaintiffs' reliance on rhetorical extremes underscores the weakness of their case. They compare the new policy to a rule allowing Muslims to serve only if they renounce their faith or a claim "that laws limiting marriage only to male-female couples did not discriminate against gay people because a gay person could marry a person of the opposite sex." Pls.' Mot. 7–8; Pls.' Opp. 10. Neither of those two scenarios 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.

Carter Policy. Indeed, prospective servicemembers are presumptively disqualified based on a history of many different medical conditions. *See* Exh. 3, DoDI 6130.03 (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 fully remedy . . . the mental health problems associated with gender dysphoria," Report 32, it is unsurprising that the military would take into account past transition treatments, and doing so does not turn DoD's new policy into a categorical transgender ban.

Finally, Plaintiffs attempt to cast DoD's new policy as a "unique standard that differs completely from the framework that applies to people with other treatable medical conditions." Pls.' Mot. 9. This contention is meritless. Just as the Carter policy and DoD's new both policy presumptively prohibit accession for those who suffer from gender dysphoria, the military presumptively prohibits accession for those suffering from dozens of other medical conditions, ranging from diabetes to rheumatoid arthritis to sleep apnea. *See* Exh. 3, DoDI 6130.03 at 39–40, 43. Nor is DoD's new policy unique with respect to separation and retention. Plaintiffs point to the Carter policy, asserting that it permits "separation, discharge, or denial of reenlistment or continued service 'under existing processes . . . but not due solely to [a servicemember's] gender identity or an expressed intent to transition genders.'" Pls.' Mot. 9 (citation omitted). But the same is true of DoD's new policy. Under the new policy, neither possessing a particular gender identity nor expressing an intent to transition genders is grounds for separation or discharge. 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.

IV. The New Policy Is Based On The 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, 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; 2017 Mem.

But none of this remotely demonstrates that the new DoD policy was not based on independent judgment. Notably, Plaintiffs 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 explicit 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 was legally bound to present "a policy consistent with the President's directive." Pls.' Mot. 19–21. 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.[9]

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 (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

[9] Plaintiffs make the baseless contention that DoD's development of the new policy was in some way tainted by a slideshow presentation shown to a working group supporting the panel of experts. Pls.' Mot. 20. One slide from this presentation lists the President's August 2017 Memorandum and Secretary Mattis's September 2017 Interim Guidance and Terms of Reference under the heading "Guidance," *see* Dkt. 128-26 at USDOE00063228, and another slide reproduces the text of the President's July 2017 statement on Twitter under the heading "Policy Guidance," *id.* at USDOE00063234. Plaintiffs draw from these slides (which were not even shown to the panel of experts) the inference that DoD's new policy is nothing less than a total ban on transgender service. Of course, in presenting this theory, Plaintiffs ignore the fact that the new policy differs significantly from the President's statement on Twitter and 2017 Memorandum, and neglect to mention that the same slide show also includes (under the heading "Guidance") the following quote by General Joseph F. Dunford, the Chairman of the Joint Chiefs of Staff: "I believe any individual who meets the physical and mental standards, and is worldwide deployable and is currently serving, should be afforded the opportunity to continue to serve." *Id.* at USDOE00063228.

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.

V. Plaintiffs' Challenge To The President's 2017 Memorandum Is Moot.

Because the President has revoked his 2017 Memorandum "and any other directive" he "may have made with respect to military service by transgender individuals," 2018 Memorandum, Dkt. 95-1, Plaintiffs' claims related to the President's 2017 Memorandum and statement on Twitter 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, to the extent Plaintiffs' Second Amended Complaint still seeks to challenge those policies, it should be dismissed and summary judgment should be granted to Defendants.

Plaintiffs respond that their challenge to those polices remains live under the voluntary cessation doctrine, but they do not explain how that could be so. Pls.' Mot. 43. Aside from the fact that the new policy is substantially different from the 2017 Memorandum, this doctrine is of limited applicability when members of a coordinate branch of government change a policy in good faith. *Clarke v. United States*, 915 F.2d 699, 705 (D.C. Cir. 1990). It would be inconsistent with the presumption of regularity, *see Am. Fed'n of Gov't Emps.*, 870 F.2d at 727, and inappropriate under the separation of powers, *see Clarke*, 915 F.2d at 705, for courts to imply that the head of the Executive Branch revoked an order to avoid judicial review, especially where, as here, there is no evidence to support such a charge, and where that order came at the request of the military so that the military could implement its own policy.

VI. 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,'" DoD'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 this case's military context is irrelevant in determining and applying the appropriate level of constitutional scrutiny, and that "the same demanding level of scrutiny [applies] regardless of the context in which it occurs[.]" 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 this Court "held that disparate treatment of transgender people is 'at least a quasi-suspect classification,'" and applied an intermediate level of scrutiny. Pls.' Mot. 10–11 (quoting Op. 59, 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. 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. 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, conclusions and judgment

of the military itself." Op. 67 (citing the RAND Report). 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 DoD. Thus, the Court's prior reasoning cannot fairly be applied to the new DoD policy.

Next, Plaintiffs cite to several cases where heightened scrutiny has been applied to transgender classifications in the civilian context. Pls.' Mot. 11; *see also* Notice of Suppl. Authority, Dkt. 137 (citing *Grimm v. Gloucester County School Board*, No. 15-cv-00054, (E.D. Va. May 22, 2018)). In addition to being inapplicable to cases arising in the military context such as this one, the cases Plaintiffs cite are inapposite because the new DoD policy is based on medical considerations and issues arising from gender dysphoria and gender transition. Accordingly, under well-established constitutional principles, DoD's policy does not classify on the basis of a suspect classification, and thus 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).

Plaintiffs continue by citing several cases they claim support their argument that deference is not owed to military decisions. Pls.' Mot. 11-15; Pls.' Opp. 24–28. None of those cases support that novel proposition. Indeed, *Rostker*—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.[10] In light of the Court's

[10] Plaintiffs incorrectly assert that the policy in *Rostker* was not justified based on concerns about administrative burdens. Pls.' Mot. 13. But the Court upheld male-only draft registration not only because women could not be drafted for combat roles, but also because "assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans." 453 U.S. at 81. Those "'administrative problems,'" it explained, could not be dismissed "as insignificant in the context of military preparedness." *Id.*

significant and repeatedly stated deference to a coordinate branch in *Rostker*, that case cannot support Plaintiffs' unfounded contention that deference should not apply here. On the contrary, *Rostker* mandates that deference be extended to the judgments reflected in the new DoD policy.[11]

Plaintiffs next cite *Frontiero v. Richardson*, 411 U.S. 677, 688-90 (1973), the only Supreme Court case they point to involving military personnel where the Court applied heightened scrutiny. However, that case did not involve a military decision at all, much less one that involves "the composition, training, equipping, and control of a military force[.]" *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Rather, *Frontiero* involved disparate pay benefits between men and women in the armed forces, set by statute. 411 U.S. at 688-90. Far from relying on professional military judgments concerning matters of readiness and lethality of the armed forces, the Government in *Frontiero* conceded that the differential treatment accorded men and women under the statutes at issue served no purpose other than mere "administrative convenience." *Id.* at 688. Similarly, the Court in *United States v. Virginia*, 518 U.S. 515 (1996), did not even discuss military deference, and for good reason: the policy in that case was justified based on pedagogical interests, not military concerns. *Id.* at 549. And even if military concerns had been at issue, they would have been 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 command of the military. *See Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

Likewise, Circuit precedent is no help to Plaintiffs. *Emory v. Sec'y of Navy* dealt only with questions of justiciability and merely held that a federal court can review a military promotion claim

[11] 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 (citation omitted). DoD's new policy is derived from the authority granted to it by Congress pursuant to the same constitutional authority to raise and regulate the military, and it too may focus on military need, 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).

involving a constitutional challenge. 819 F.2d 291, 294 (D.C. Cir. 1987). The court in *Emory* also noted that "deference is 'at its highest when the military, pursuant to its own regulations, effects personnel changes through the promotion or discharge process,'" *id.* (quoting *Dilley v. Alexander*, 603 F.2d 914, 920 (D.C. Cir. 1979)), thus contradicting Plaintiffs' argument here that the military context is irrelevant. Plaintiffs next cite to a footnote in *Steffan v. Perry* to support their argument that deference does not apply, but ignore the text of the opinion itself, which plainly states the opposite. *Compare Steffan v. Perry*, 41 F.3d 677, 686 (D.C. Cir. 1994) ("The special deference we owe the military's judgment necessarily affects the scope of the court's inquiry into the rationality of the military's policy."), *with* Pls.' Mot. at 12.

District court precedent is similarly unavailing. Plaintiffs cite the district court's opinion in *Adair v. England*, 183 F. Supp. 2d 31, 50–51 (D.D.C. 2002) (citing *Goldman*, 475 U.S. 503). Although the district court in *Adair* determined that relaxed scrutiny would not apply in a case involving a decision to hire, retain, and promote Chaplains, it did so only by reasoning that because Chaplains are hired to support the religious needs of Navy servicemembers, personnel decisions involving that particular subset of military officers were about quality of life issues and had no specific "operational, strategic, or tactical objective." *Id.* at 50. By contrast, the new DoD policy specifically hinges on matters of military readiness and lethality that are well articulated by the Secretary of Defense. Further, assuming the reasoning of *Adair* was correct even in that setting, other courts in this district have specifically rejected the argument that *Adair* requires lesser deference to the military outside of the specific circumstances present in that case. *See Havens v. Mabus*, 146 F. Supp. 3d 202, 215 n.10 (D.D.C. 2015); *Foster v. Mabus*, 103 F. Supp. 3d 95, 110 n.8 (D.D.C. 2015).

The district court in *Owens v. Brown* struck down a congressionally-imposed prohibition to females serving on Navy warships. 455 F. Supp. 291 (D.D.C. 1978). But the effect of that ruling was to increase the Executive Branch's control over the military, not to reduce it. Indeed, the *Owens* court

noted that the effect of invalidating the statue was "to restore to the military an area of discretion that the 80th Congress unreasonably withheld," *id.* at 309–10, and that "nothing in [its] decision is meant to shape the contours of Navy policy concerning the utilization of female personnel," *id.* at 310. The court characterized such policy decisions as "essentially military decisions that are entrusted to executive authorities," *id.*, and expressed no view on what their outcome should be. In any event, Congress had not engaged in the sort of robust review process DoD undertook in this case; rather the *Owens* court concluded that "when Congress carved out the disputed exception to the Navy's ability to use women aboard Navy vessels, it acted without serious deliberation, against the expressed judgment of the military and, by foreclosing the Navy's discretion regarding women well beyond the legitimate demands of military preparedness and efficiency, it acted arbitrarily." *Id.* at 309. Here, the new policy was created after an extensive review conducted by some of the most senior and experienced members of the military and represents their views on military readiness and the lethality of the force.[12]

Plaintiffs' attempts to distinguish the cases cited by Defendants fare no better. Plaintiffs 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

[12] 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 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).

"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).

VII. The Constitution Requires Deference To The Military's New Policy.

Plaintiffs' 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, "[m]ilitary interests do not always trump other considerations, and the Court has not held that they do, but courts must give deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Winter*, 555 U.S. at 9 (citing *Goldman*, 475 U.S. at 507). There is no question that a lower court should apply military deference here, 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 military force[.]" *Gilligan*, 413 U.S. at 10. 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.

VIII. DoD'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. at 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. *See* Pls.' Mot. 22 ("The Mattis Plan bans military service by transgender individuals."); 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.[13]

[13] 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.

A. 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 is 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 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 has 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 again 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 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. *See supra*, Section III.

Further, Plaintiffs' repeated assertion that no other condition excludes individuals from military service has no basis in fact. *See, e.g.,* Pls.' Mot. 1, 17, 23, 24, 27. The military presumptively disqualifies accessions based on a host of other medical conditions. *See* DoDI 6130.03. In doing so, the military considers several factors: whether the condition may reasonably be expected to require excessive time lost from duty for necessary treatment or hospitalization; whether the condition would allow a servicemember to complete required training and an initial period of contracted service; whether the condition is medically adaptable to the military environment without geographical area limitations; whether the person is medically capable of performing duties without aggravating existing physical defects or medical conditions; and whether the condition involves a contagious disease that may endanger the health of others. *Id.* at 4–5. 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 the condition of gender dysphoria and its related treatment met several of these factors. *See* Mattis Mem. 2. 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.*, Exh. 5, USCENTCOM Minimal Deployment Standards (Mar. 23, 2017). 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.[14]

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 to other conditions that can preclude enlistment does not mean that DoD cannot have a policy that

[14] 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.

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, 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, 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.[15]

B. DoD's 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 while in garrison," including on deployments. *Id.* In DoD's judgment, allowing individuals who retain

[15] 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 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.

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.*

Aside from these privacy-related considerations, DoD also was concerned that exempting servicemembers from sex-based standards in training and athletic competition on the basis of gender identity would generate perceptions of unfairness. *Id.* at 36. Moreover, DoD was concerned that exempting servicemembers from uniform and grooming standards on the basis of gender identity would create additional friction in the ranks. For example, allowing someone with male physiology but a female gender identity "to adhere to female uniform and grooming standards" could frustrate male servicemembers who are not transgender but who "would also like to be exempted from male uniform and grooming standards as a means of expressing their own sense of identity." *Id.* at 31. 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 "Courts 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.

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.[16]

C. 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. 35; Pls.' Opp. 39. But Plaintiffs first ignore the fact that since the Carter policy's implementation, the medical costs for servicemembers with 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

[16] 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).

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.* 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.,* Exh. 6, The Navy's Transgender and Gender Transition Commanding Officer's Toolkit at 12. ("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,[17] it was certainly reasonable for DoD to now come to a different conclusion.

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 and thus satisfies the highly deferential form of review applicable here.

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

IX. The New Policy Is Consistent With Substantive Due Process.

Plaintiffs next assert that DoD's new policy "is arbitrary and has no reasonable relationship to any legitimate governmental objectives." Pls.' Mot. 37. As discussed in detail above, that plainly is not so. The new policy is rationally related to the military's legitimate objectives in promoting military readiness; ensuring order, discipline, leadership, and unit cohesion; and in reducing military costs. Nor does the new DoD policy infringe on what Plaintiffs term their "fundamental right to live in accord with a basic component of their identity." *Id.* As a general matter, there is no constitutional right to serve in the military, nor to receive tax-payer funded sex-reassignment surgery or cross-sex hormone therapy. *Cf. Spadone v. McHugh*, 842 F. Supp. 2d 295, 304 (D.D.C. 2012) ("[T]here is no protected property interest in continued military service." (citation omitted)). But even assuming, *arguendo*, that the substantive component of the Fifth Amendment's Due Process Clause protected an individual's right to a particular gender identity, DoD's new policy applies on the basis of a medical condition and its associated treatment. The new policy also does not violate due process by revoking rights relied on by transgender servicemembers. *See* Pls.' Mot. 39. Even if such a reliance theory were cognizable under the Due Process Clause (it is not), the new policy's reliance exemption ensures that the expectations of all servicemembers who took advantage of the Carter policy are protected. In any event, Plaintiffs' reliance theory is simply a repackaged form of their estoppel claim, *see* Am. Compl. ¶¶ 101–108, Dkt. 9, which this Court already has dismissed, *see* Op. 4, 55–58.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Defendants' motion, the Court should grant Defendants' motion, deny Plaintiffs' cross-motion for summary judgment, and dismiss Plaintiffs' Second Amended Complaint, or, in the alternative, grant summary judgment for Defendants.

June 6, 2018

Respectfully Submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

BRINTON LUCAS
Counsel to the Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ *Andrew E. Carmichael*
ANDREW E. CARMICHAEL
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 514-3346
Email: andrew.e.carmichael@usdoj.gov

Counsel for Defendants

Certificate of Service

I hereby certify that on June 6, 2018, I electronically filed the foregoing Reply in Support of Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, or in the Alternative, for Summary Judgment, and Opposition to Plaintiffs' Cross-Motion for Summary Judgment using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: June 6, 2018

/s/ *Andrew E. Carmichael*
ANDREW E. CARMICHAEL
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 514-3346
Email: andrew.e.carmichael@usdoj.gov

Counsel for Defendants