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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AIDEN STOCKMAN, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 5:17-cv-1799-JGB-KK

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

Hearing
Date: November 20, 2017
Time: 9:00 a.m.
Courtroom: 1

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INTRODUCTION

Plaintiffs' assertions that they have standing and that their claims are ripe rest primarily on the same faulty assumption: that the President has mandated that transgender individuals who are currently serving in the military be discharged after March 22, 2018. Although Plaintiffs acknowledge that the President has charged the Secretary of Defense with studying the issue, they contend that the scope of the Secretary's study is limited and the outcome preordained.[1] From this premise, Plaintiffs argue that their discharge from the military is definite and imminent, and that this establishes not only their Article III standing but the ripeness of their claims.

Plaintiffs are wrong—their claim that currently serving transgender individuals face certain discharge is contrary to the Presidential Memorandum and the Secretary of Defense's response to it. The Memorandum directs Secretary Mattis to study future service by transgender individuals and does not predetermine the outcome of that study. In response, Secretary Mattis has convened a panel of senior officials with combat and deployment experience to analyze all relevant data over a period of several months and provide him with recommendations. This panel would be unnecessary if, as Plaintiffs argue, the Secretary was charged only with deciding how and when to discharge current transgender service members. Because Secretary Mattis is still studying the issue, it remains uncertain whether Plaintiffs will suffer a cognizable injury.

Plaintiffs' claim of stigmatic injury, which hinges on the same erroneous assumption, does not remedy this deficiency. Plaintiffs are being treated the same as other service members under the Interim Guidance, and the speculation of third parties regarding injuries Plaintiffs may face cannot confer standing. Similarly, the

[1] As addressed further below, this incorrect reading of the Presidential Memorandum is the central basis for the preliminary injunction entered by the district court in *Doe v. Trump,* --- F.Supp.3d ----, 2017 WL 4873042 (D.D.C. Oct. 30, 2017).

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Plaintiffs who are prospective service members have not established standing where they have not been denied accession into the military or a medical waiver.

Finally, even if this Court had jurisdiction, Plaintiffs have failed to state claims upon which relief can be granted. They have not stated an equal protection claim for the reasons set forth in Defendants' opening brief, including because currently serving transgender individuals are subject to the same standards as other service members under the Interim Guidance. In addition, it is plainly permissible for the military to undertake further study before pending changes in policy take effect, particularly when the longstanding policy concerning accession into the military by transgender persons, examined under the deference appropriately due the military, has a reasoned basis. Plaintiffs' substantive due process claim fails for similar reasons, and because Plaintiffs have not alleged the deprivation of a property or liberty interest. Finally, Plaintiffs' First Amendment claim fails because the policy they seek to challenge does not regulate speech at all, much less based on its content. For these reasons, the Court should grant Defendants' motion to dismiss.

ARGUMENT

I. Plaintiffs Lack Standing.

Plaintiffs bear the burden of establishing standing to bring their claims, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and have not met that burden here. Plaintiffs' claim that they face imminent harm disregards the operative policy, misreads the Presidential Memorandum, relies on the speculation of third parties, and addresses claims of stigma that are unmoored from an actual adverse action that has been taken against them or which is imminent.

A. Plaintiffs Do Not Face Imminent Discharge from the Military.

Plaintiffs' primary claim to standing is based on a misreading of the President's August 25, 2017 Memorandum regarding military service by transgender individuals. Although Plaintiffs acknowledge that the President directed Secretary Mattis to study the issue, they argue that, "[u]nless the Court intervenes, beginning on March 23, 2018,

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current service member Plaintiffs will become subject to discharge simply for being transgender." ECF No. 47 at 4. The Court in *Doe v. Trump* recently accepted a similar argument. 2017 WL 4873042, at *17. But Plaintiffs' argument is inconsistent with the plain language of the Presidential Memorandum and Secretary Mattis's response to that directive.

In the first section of the August 25 Memorandum, the President stated that, in his judgment, "there remain meaningful concerns that further study is needed to ensure … that terminating the Departments' longstanding policy and practice [regarding military service by transgender individuals] would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources… ." Presidential Memorandum, 82 FR 41319. Based on his conclusion that further study was needed, the President directed the Secretaries of Defense and Homeland Security to maintain the currently effective policy regarding accession of transgender individuals into the military. *Id.* He then directed the Secretary of Defense, in consultation with the Secretary of Homeland Security, to submit an implementation plan by February 21, 2018. *Id.*

The President explicitly granted the Secretary of Defense broad discretion over the conclusions and content of the implementation plan: "The implementation plan shall adhere to the determinations of the Secretary of Defense, made in consultation with the Secretary of Homeland Security, as to what steps are appropriate and consistent with military effectiveness and lethality, budgetary constraints, and applicable law." *Id.* Critically, the President directed the Secretary of Defense to "determine how to address transgender individuals currently serving in the United States military" and stated unequivocally that, "[u]ntil the Secretary has made that determination, no action may be taken against such individuals" because of their transgender status. *Id.* The notion advanced by Plaintiffs (and the Court in *Doe*) that this directive mandates the discharge of currently serving transgender persons is therefore incorrect. Indeed, that theory would render the exception to surgery

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directive a nullity: If, as Plaintiffs contend, transgender service members will be discharged come March 23, 2018, there would have been no need to include an exception for certain sex reassignment surgical procedures that would apply after that date. The Memorandum itself shows that Secretary Mattis has not been limited to studying only when and how transgender service members should be discharged and that the outcome of the study has not been predetermined.

Secretary Mattis's response to the Presidential Memorandum further undercuts Plaintiffs' argument. After receiving the Memorandum, Secretary Mattis announced that he was assembling a panel of experts who would bring "mature experience, most notably in combat and deployed operations, and seasoned judgment" to the task of providing advice and recommendations regarding future policies concerning military service by transgender individuals. Statement of Secretary Jim Mattis, Release No: NR-312-17.[2] Secretary Mattis also explained that the panel would "thoroughly analyze all pertinent data, quantifiable and non-quantifiable." *Id.* There would be no need to convene a panel of military experts with combat and deployment experience or to thoroughly analyze quantifiable and non-quantifiable data if Secretary Mattis was charged only with recommending how and when transgender service members should be discharged from the military.

In addition, on September 14, 2017, Secretary Mattis issued a Memorandum and Interim Guidance regarding military service by transgender individuals.[3] In that Memorandum, Secretary Mattis stated that, "[c]onsistent with military effectiveness and lethality, budgetary constraints, and applicable law, the implementation plan will

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[2] The August 29, 2017 Statement of Secretary Jim Mattis, Release No: NR-312-17, is available online at: https://www.defense.gov/News/News-Releases/News-Release-View/Article/1294351/ (last visited on Nov. 13, 2017).

[3] Secretary Mattis's September 14, 2017 Memorandum and the accompanying Interim Guidance are available at: https://www.defense.gov/Portals/1/Documents/PDFs/Military-Service-By-Transgender-Individuals-Interim-Guidance.pdf (last visited November 13, 2017).

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establish the policy, standards and procedures for transgender individuals serving in the military." *Id.* Secretary Mattis also noted that the Deputy Secretary of Defense and Vice Chairman of the Joint Chiefs of Staff, supported by the panel of military experts, would provide him with recommendations "supported by appropriate evidence and information." *Id.* And he stated that the Interim Guidance would take effect immediately and "will remain in effect until I promulgate DoD's final policy in this matter." In short, Secretary Mattis has initiated a full policy-making process that is being led by some of the most senior officials at the Departments of Defense and Homeland Security.

The *Doe* Court's reliance on statements that the President made on Twitter several weeks before issuing his Memorandum is misplaced. *See Doe*, --- F.Supp.3d ---, 2017 WL 4873042, *17. The actual *action* taken by the President is set forth in his August 25 Memorandum, which directs Secretary Mattis to conduct a fulsome study. If there is any doubt as to what that direction entails, the Court should look at DoD's response to that Memorandum and not statements made prior to its issuance. It is apparent from the scope of DoD's review that it is not limited to determining when and how to discharge currently serving transgender persons. Regardless of how the Plaintiffs or the Court in *Doe* read the text of the Presidential Memorandum, the *Defendants*—who issued and are carrying out the policy—have *not* determined that currently serving transgender persons will be discharged as of March 23, 2018. In these circumstances, Plaintiffs have failed to establish an imminent threat of future injury.

B. Speculative Denial of Military Accession Does Not Establish Standing.

Plaintiffs Stockman, Talbott, and Reeves, also allege that they face imminent harm because they will be denied accession into the military. ECF No. 47 at 11. But these plaintiffs have not shown that the injuries they anticipate are imminent because none has actually been denied accession into the military based on a diagnosis of

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gender dysphoria or transgender status and denied a medical waiver. Plaintiffs' argument that there is no medical waiver process for transgender individuals, *see id.*, is wrong; the Interim Guidance states unequivocally that the procedures set forth in DoD Instruction 6130.03, "which generally prohibit the accession of transgender individuals into the Military Service, remain in effect because current or history of gender dysphoria or gender transition does not meet medical standards, subject to the normal waiver process." Interim Guidance, *supra* note 3. Speculation by third parties regarding the effect of the Interim Guidance does not change its plain language. *See* ECF No. 47 at 11-12 (relying on declarations from third parties to argue that, under the Interim Guidance, medical waivers are not available to transgender individuals.)

Here, Plaintiffs may be denied accession into the military for any number of reasons unrelated to gender dysphoria or transgender status or they may be granted a medical waiver and allowed to serve. Speculation that Plaintiffs will be denied both accession into the military because of their transgender status and a medical waiver is insufficient to present the Court with an actual case and controversy, especially in the context of a challenge to military medical standards.

C. Speculative Denial of Medical Care Does Not Establish Standing.

Plaintiffs' claim that they will be deprived of medical treatment in the future is likewise speculative and insufficient to establish their standing. As an initial matter, it is clear from the Interim Guidance that no Plaintiff is currently being denied medical treatment. Plaintiffs argue, instead, that Plaintiffs John Doe 1 and John Doe 2 have taken steps "to plan for gender transition surgery" and will be prohibited from having those surgeries after March 2018. ECF No. 47 at 8. Plaintiffs base this argument on the direction in the Presidential Memorandum to "halt all use of DoD and DHS resources to fund sex reassignment surgical procedures for military personnel," after March 22, 2018, "except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex." Presidential

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Memorandum, 82 FR 41319. But John Doe 1 and John Doe 2 have submitted declarations stating that they have both begun a course of treatment to reassign their sex. ECF Nos. 47-6 at ¶2, 47 at ¶2. Both Plaintiffs would, therefore, potentially fall within the exception to the funding directive. At this point, it is not clear whether the military will pay for John Doe 1's and John Doe 2's transition-related surgeries after March 2018, but uncertainty is not enough to establish standing or to present the Court with a ripe question of law. If John Doe 1 and John Doe 2 are ultimately informed that the military will not pay for specific surgeries, they can bring suit at that time. Until that time, the risk that they may be harmed by the sex reassignment surgery directive in the future is not sufficient to establish standing. *Cf. Doe*, 2017 WL 4873042, at *24 (holding that the plaintiffs lacked standing to pursue their medical treatment claims because "the risk of being impacted by the Sex Reassignment Surgery Directive is not sufficiently great to confer standing").

D. Plaintiffs' Claims of Stigma Fail to Establish Standing.

Plaintiffs' general allegations that they are experiencing "professional stigma and negative public perception" are similarly insufficient to establish standing. ECF No. 47 at 6-7, 19-20. As Defendants explained in their motion to dismiss, the Supreme Court has stated that a stigmatic injury "accords a basis for standing only to those persons who are personally denied equal treatment." *Allen v. Wright*, 468 U.S. 737, 755 (1984); *see* ECF No. 36 at 13. "[S]tigmatic injury… requires identification of some concrete interest with respect to which respondents are personally subject to discriminatory treatment," and "[t]hat interest must independently satisfy the causation requirement of standing doctrine." *Allen,* at 757 n.22.[4] Plaintiffs, however, have not identified a concrete injury resulting from their alleged stigmatic injury.

The Interim Guidance, the current operative policy, specifically prohibits the military from treating service members differently on the basis of their transgender

[4] Despite Defendants' reliance on *Allen*, ECF No. 36 at 13, Plaintiffs fail to address or even mention it in their Opposition brief. ECF No. 47, Table of Cases.

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status. Interim Guidance, *supra* note 3. Plaintiffs are not being singled out for differential treatment under the interim policy and they have not alleged any specific instances of present differential treatment, only that they fear such treatment in the future. Without such allegations, they cannot rely upon claims of stigmatic harm to meet their burden of establishing standing under Article III.

II. Plaintiffs' Claims Are Not Ripe.

In addition to lacking standing, Plaintiffs have brought claims that are not ripe for adjudication. In their Opposition, Plaintiffs again rely on an assumption that a final decision has already been made and that current service members will surely be subject to discharge in March 2018. ECF No. 47 at 16 ("[T]he current service member Plaintiffs each will be forced to choose between resigning their commissions to find another means of self-support in anticipation of the ban's effective date, or risk discharge with no means of support while a post-enforcement challenge proceeds."). Again, that assertion is simply wrong.

Plaintiffs' assumption that discharges are preordained runs contrary to the well-established rule that "[m]ilitary officers, like other public officials, are presumed to 'discharge their duties, correctly, lawfully, and in good faith.'" *Hoffman v. United States,* 894 F.2d 380, 385 (Fed. Cir. 1990). Indeed, courts have made clear that it takes "well-nigh irrefragable proof" to defeat this presumption. *Schism v. United States*, 315 F.3d 1259, 1302 (Fed. Cir. 2002). Plaintiffs' speculation about the outcome of DoD's study is insufficient to meet that demanding standard.

Further, the Ninth Circuit has traditionally required service members to exhaust military corrective measures before a district court may review a military decision, except where exhaustion would be futile. *Meinhold v. US Dep't of Def.*, 34 F.3d 1469, 1473-74 (9th Cir. 1994) ("[S]trict application of exhaustion requirements in military discharge cases helps maintain the balance between military authority and federal court intervention[.]"). Here, it is quite clear that not only have Plaintiffs not exhausted their

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military remedies, in most cases they do not even know what those remedies will be or what adverse personnel action, if any, they could be subject to in the future.

Plaintiffs respond that exhaustion of military remedies is not required because they have raised substantial constitutional questions. ECF No. 47 at 16. In support, they cite *Muhammad v. Sec'y of Army*, 770 F.2d 1494, 1495 (9th Cir. 1985), which explains that the "Fifth Circuit has noted four circumstances in which exhaustion will not be required," one of them being if substantial constitutional questions are raised. But the Ninth Circuit has specifically cautioned against ruling on constitutional questions prematurely. *See Meinhold,* 34 F.3d at 1474 (holding that it is error to rule on an avoidable constitutional claim). Here, the service member Plaintiffs may never face an adverse personnel action, and deciding whether or not a speculative action based on their transgender status would be in compliance with the Constitution could be unnecessary. Plaintiffs who wish to join the military in the future may be denied accession on grounds unrelated to their transgender status or they may have their medical waivers granted. The Court should therefore require Plaintiffs to exhaust those remedies and decline to issue an advisory opinion on possible constitutional theories.

III. Plaintiffs Have Failed to State Claims Upon Which Relief Can Be Granted.

Even if Plaintiffs had standing and their claims were ripe, they have failed to state plausible claims for relief. Executive decisions regarding military matters are entitled to substantial deference, and Plaintiffs have not stated plausible claims that the President's decision to maintain the status quo while Secretary Mattis studies military service by transgender individuals violates equal protection, due process, or the First Amendment.

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A. Plaintiffs Have Failed to State an Equal Protection Claim.

1. The President's Decision Regarding Military Policy Is Entitled to Substantial Deference.

Notwithstanding clear precedent, Plaintiffs argue that "deference does not apply" to the President's determination that further study was needed before the military departed from longstanding policies regarding transgender military service. ECF No. 47 at 21. To the contrary, "[c]ourts have traditionally shown the utmost deference to Presidential responsibilities" in the field of "military and national security affairs." *Dep't of Navy v. Egan*, 484 U.S. 518, 529–30 (1988) (citation omitted). After all, "[t]he complex[,] subtle, and professional decisions as to the composition … of a military force are … subject always to civilian control of the Legislative and Executive Branches"; indeed, "[i]t is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Of course, "the government is not 'free disregard the Constitution when it acts in the area of military affairs,'" ECF No. 47 at 21 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981)), but the military's constitutional role requires unique—and more deferential—scrutiny.

Plaintiffs attempt to distinguish cases where deference was afforded to Congressional and Executive judgments regarding military matters by asserting that courts only defer to judgements that "are the product of a deliberative process that draws upon the considered judgment of military professionals, informed by relevant evidence and expertise." ECF No. 47 at 21-22. Plaintiffs then assert that "such study and evaluation of evidence warranting judicial deference is completely absent from the current record." *Id.* at 22 (citation omitted). In these circumstances, Plaintiffs' effort to distinguish authority like *Rostker* is meritless and, indeed, somewhat ironic. For example, in *Rostker*, the Supreme Court gave considerable deference to the judgment of Congress and the military on the question of male-only draft registration after careful study of that issue. Here, the very action Plaintiffs challenge is the President's

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determination that more time is needed to carefully consider changes to longstanding military policies before they go into effect. Where deference is due the military after it has studied an issue and acted, deference is certainly due to a decision not to implement changes to longstanding policy until a policy process now underway is completed.

The President's decision to maintain the status quo while military leaders carefully consider the issues raised in the Presidential Memorandum is certainly entitled to substantial deference, just as the outcome of that process would be. *See Egan*, 484 U.S. at 529–30; *see also Loving v. United States*, 517 U.S. 748, 768 (1996) (it "would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority."). After all, "[t]he complex[,] subtle, and professional decisions as to the composition … of a military force are … subject always to civilian control of the Legislative and Executive Branches"; indeed, "[i]t is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (emphasis in original).

Moreover, the fact that the previous administration decided to change the longstanding policy regarding accessions into the military by transgender individuals does not undercut the deference due the President's determination that current policy should be maintained and that additional study is needed before implementing those changes. *See* ECF No. 47 at 22. As previously explained, policymakers cannot bind their successors to a decision simply by conducting a study, and the rules of deference due the military are not tossed aside merely because current military officials are revisiting an issue that was studied by previous officials. Even in the civilian context, an agency's decision "is not instantly carved in stone. On the contrary, the agency must consider … the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal

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citation, quotations, and ellipsis omitted). The President's decision that additional study by experienced military experts was needed before the military changes its longstanding policies regarding military service by transgender service members is entitled to substantial deference.

2. Operative Policy Does Not Violate the Equal Protection Clause.

Plaintiffs also fail to explain how they can maintain an equal protection claim when the Interim Guidance, which is the currently operative policy, explicitly directs that "transgender service members are subject to the same standards as any other Service member of the same gender." Interim Guidance, *supra* note 3. Plaintiffs have not alleged that they have been treated unequally under the Interim Guidance, and their speculation that they will be treated unequally in the future is insufficient to state a plausible claim upon which relief can be granted.

3. The Accessions Policy Does Not Violate Equal Protection.

Likewise meritless is Plaintiffs' claim that equal protection is violated by maintenance of the longstanding accessions policy until such time as the President hears from his military leaders and determines whether a change is warranted. The President determined that because there were meaningful concerns regarding military effectiveness and lethality, unit cohesion, and the use of military resources, further study was needed before the military changed its longstanding policy. Presidential Memorandum, 82 FR 41319. The military is currently studying the issues the President has identified and the outcome of its study has not been predetermined. Plaintiffs argue that issues identified by the President—medical concerns, deployability, cost, and unit cohesion—do not justify the actions taken in the Presidential Memorandum. ECF No. 47 at 28-31. But the President has simply identified the issues that he believes merit more study, and his actions in that regard do not violate Equal Protection.

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Plaintiffs argue, without any support, that the President's decision that further study was needed before the military changed its longstanding policy "is inexplicable by anything other than bias toward transgender people." ECF No. 47 at 31. But almost a month before the President made the statements on Twitter to which the Plaintiffs object, Secretary Mattis "approved a recommendation by the services to defer accessing transgender applicants into the military" until January 1, 2018, so that the services could "review their accession plans and provide input on the impact to the readiness and lethality of our forces." Department of Defense, Release No. NR-250-17 (June 30, 2017).[5] The Presidential Memorandum extends that deadline indefinitely unless and until there appears a sufficient basis to abandon the longstanding accessions policy. Presidential Memorandum, § 1(b). That reasonable, non-disruptive decision to maintain a longstanding policy while the issue is under consideration cannot fairly be characterized as evidence of animus.

At bottom, Plaintiffs' challenge on this front is a disagreement with where the military has currently "drawn the line." *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986). Plaintiffs' preferred accessions policy—the one former Secretary Carter proposed—would presumptively exclude transgender individuals from military service unless they could show that they have avoided medical complications for an 18-month period. *See* ECF No. 1 at ¶ 32; Directive-type (DTM) 16-006,[6] Sections (2)(a)(1), (2)(a)(2). The longstanding accessions policy, which the President decided to maintain pending further review, likewise presumptively excludes transgender individuals unless they apply for and receive a waiver. *See* Interim Guidance, *supra* note 3. In other words,

[5] Department of Defense, Release No. NR-250-17 (June 30, 2017) is available at: https://www.defense.gov/News/News-Releases/News-Release-View/Article/1236145/statement-by-chief-pentagon-spokesperson-dana-w-white-on-transgender-accessions/ (last visited Nov. 13, 2017).

[6] DTM 15-005 is available at: https://www.defense.gov/Portals/1/features/2016/0616_policy/DTM-16-005.pdf (last visited Nov. 13, 2017).

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Plaintiffs' equal protection claim reduces to a desire for a categorical exception rather than an individualized one. But such policy decisions about whether to adopt rules or standards or where to draw the line are matters of military discretion.

B. Plaintiffs Have Failed to State a Plausible Due Process Claim.

Plaintiffs' due process claim similarly fails because transgender individuals who currently serve in the military are not subject to discharge based on their transgender status under the Interim Guidance and may not be affected by the final policy that is ultimately adopted by Secretary Matthis. Moreover, Plaintiffs have not stated a due process claim because, as Defendants explained in their opening brief, ECF No. 36 at 32, Plaintiffs do not possess a cognizable property right to continued employment in the military. *See Christoffersen v. Wash. State Air Nat'l Guard*, 855 F.2d 1437, 1443 (9th Cir. 1988).

In their Opposition, Plaintiffs attempt to reframe the interest they seek to vindicate as "the freedom to live in accordance with one's gender identity." ECF No. 47 at 32. But Plaintiffs' still have not met the requirement that they provide "a careful description of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997); *see Chavez v. Martinez*, 538 U.S. 760, 776 (2003) ("[V]ague generalities . . . will not suffice."). The specific interest Plaintiffs appear to be asserting in this case is their interest in being permitted to serve in the military, even if they do not meet military medical standards because they have been diagnosed with gender dysphoria or have a history of gender transition. Neither the Supreme Court nor the Ninth Circuit has recognized that type of interest as a fundamental constitutional right. *See Christoffersen,* 855 F.2d at 1443. Indeed, when the development and regulation of military personnel is at issue, there is "perhaps . . . no other area" where the Supreme Court has shown the political branches "greater deference." *Rostker*, 453 U.S. at 64-65.

Contrary to Plaintiffs' arguments, the heightened level of scrutiny applied by the Ninth Circuit in *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th 2008), does not apply

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here. ECF No. 47 at 33. In their Opposition, Plaintiffs state explicitly that their claims are facial challenges. *See e.g., id.* at 14 ("because this is a facial constitutional challenge, further factual development is irrelevant in assessing whether the ban offends the guarantees of the Fifth and First Amendments."). But in *Witt*, the Ninth Circuit held that its heightened scrutiny analysis applied only to as-applied, not facial, challenges. *Witt*, 527 F.3d at 819 ("In addition, we hold that this heightened scrutiny analysis is as-applied rather than facial."). The Court then stated that as-applied analysis "'is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments.'" *Id.* (quoting *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 447 (1985)). As Plaintiffs have brought a facial, rather than as-applied, due process challenge, the heightened scrutiny analysis from *Witt* does not apply.

In addition, in *Witt*, the plaintiff had been discharged from the Air Force, and the Court had a final decision that it could review in adjudicating the plaintiff's claims. *See id.* at 527. Here, none of the Plaintiffs have been discharged from the military, had their applications to access into the military denied, or been refused transition-related medical care. Thus, there is no final decision for the Court to review here. Instead, Plaintiffs speculate that they may be harmed by a future policy that is still being studied. Plaintiffs have not stated a plausible facial challenged based on speculation about future harms that might deprive them a fundamental right or liberty. The Court should, therefore, dismiss their premature facial challenge and await any as-applied claim if the Plaintiffs are actually injured by the military's future policy.

Finally, Plaintiffs argue that they have stated a facial due process claim because the military is estopped from further study of changes to military personnel policies that were issued by the past administration. ECF No. 47 at 35. As an initial matter, the Supreme Court has expressed substantial skepticism that such a claim can ever be brought against the Government. *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984) ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as

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a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant."). But even assuming that Plaintiffs could claim estoppel against the Government, such an argument rests on the erroneous assumption that Plaintiffs will be discharged based on their transgender status. In all events, Plaintiffs' generic assertions of reliance on the former policy are insufficient to state a plausible due process claim. *See Doe*, 2017 WL 4873042, at *26 ("Allowing estoppel claims to go forward based on such generalized theories of reliance would seem to implicate the reasonable concerns other courts have raised about government estoppel.").

C. Plaintiffs Have Failed to State a Plausible First Amendment Claim.

Plaintiffs have also failed to state a First Amendment claim upon which relief can be granted. The challenged policy does not regulate speech at all, much less on the basis of its content. Nothing in the Presidential Memorandum restricts expression, directly or indirectly; it directs a further review of the basis for revisions to longstanding policy, and expressly reserves for the military the ability to address the treatment of current service members. Likewise, for current service members, the operative Interim Guidance not only allows expression of transgender status, but *prohibits* any disparate treatment based on that expression. *See* Interim Guidance, *supra* note 3. Similarly, the accession policy is not directed at restricting the content of expression, but instead simply requires disclosure of information relating to medical conditions that may bear upon accession into the military service.

Even assuming *arguendo* that the First Amendment were implicated, the Government's decision to maintain the status quo while it further studies military service by transgender individuals meets the deferential standard of review that applies to regulation of speech in the military context, *see Weinberger*, 475 U.S. at 507, because it "restrict[s] speech no more than is reasonably necessary to protect [a] substantial government interest," *Brown*, 444 U.S. at 355. And the scope of that policy—which

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does not impede expression by current transgender service members or those seeking accession into the military—is reasonably drawn to serve those interests.

CONCLUSION

For the reasons set forth above and in Defendants' opening motion, the Court should grant Defendants' motion to dismiss Plaintiffs' Amended Complaint.

Dated: November 13, 2017

Respectfully submitted,

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