IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*,

Defendants.

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT, OR, IN THE ALTERANTIVE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants move pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for the Court to dismiss Plaintiffs' Second Amended Complaint. In the alternative, Defendants move pursuant to Rule 56 for the Court to grant summary judgment in their favor. In support of this motion, the Court is respectfully referred to Defendants' accompanying memorandum of points and authorities.

May 11, 2018

Respectfully Submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT, OR, IN THE ALTERNATIVE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Although the President expressly revoked the Memorandum he issued in August 2017 and any preceding directives concerning military service by transgender individuals, Plaintiffs refuse to recognize that the circumstances of this case have changed significantly since they filed their original complaint last summer. Military officials within the Department of Defense ("DoD") have conducted an extensive study, exercised their independent judgment, and developed a new policy that replaces with a nuanced regime based on medical diagnoses of gender dysphoria the previous policies relating to military service by transgender individuals. Nonetheless, Plaintiffs persist in alleging that there is a "transgender service member ban."

The Court should reject Plaintiffs' characterization of the new DoD policy and dismiss their second amended complaint, or, in the alternative, grant summary judgment for Defendants. Any continued challenge to the revoked Presidential Memorandum issued in August 2017 ("2017 Memorandum") is moot, and none of the Plaintiffs have standing to challenge the new policy. Even if Plaintiffs can surpass these jurisdictional thresholds, the new policy withstands constitutional scrutiny.

BACKGROUND

I. History of Policies Concerning Transgender Military Service Before 2017

For decades, military standards presumptively barred the accession and retention of transgender individuals. DoD Report and Recommendations on Military Service by Transgender Persons ("Report") 7, Dkt. 120-2. That approach was consistent with the third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association (APA), which treated "transsexualism" as a disorder. *Id.* at 10.

In 2013, the APA published the fifth edition of the DSM, which replaced the term "gender identity disorder" (itself a replacement for "transsexualism" in the fourth) with "gender dysphoria."

Id. at 10, 12. The change reflected the APA's conclusion that, by itself, identification with a gender different from one's biological sex—*i.e.*, transgender status—was not a mental disorder. *Id.* at 12. As the APA stressed, "not all transgender people suffer from gender dysphoria." *Id.* at 20 (brackets omitted). Likewise, not all transgender people "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." AR114 (RAND Report 6).[1] The fifth edition of the DSM defines "gender dysphoria" as indicated by 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.

In July 2015, then-Secretary of Defense Ashton Carter announced that the Department's longstanding policy concerning transgender service was "outdated, confusing, [and] inconsistent." Exh. 1, Statement by Secretary of Defense Carter on DOD Transgender Policy, Release No. NR-272-15 (July 13, 2015) ("2015 Statement").[2] He then ordered the creation of a working group in July 2015 "to study the policy and readiness implications of welcoming transgender persons to serve openly," and instructed it to "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness." Report 13. In the meantime, no service member could be discharged on the basis of gender identity or gender dysphoria without approval from the Under Secretary of Defense for Personnel and Readiness. *Id.*

The Department then commissioned the RAND Corporation to study the issue. *Id.* The

[1] Because this case is now a challenge to an agency action, it should be reviewed on the administrative record pursuant to the Administrative Procedure Act. *See* Defs.' Mot. 5–6, Dkt. 121; Defs.' Reply 5–6, Dkt. 146. Accordingly, the Government filed the administrative record on April 20, 2018. *See* Dkt. 133. The administrative record is numbered "Administrative_Record_000001—003075," but this brief cites to the record as "AR__", followed by the document's title in parentheses.

[2] *Available at* https://www.defense.gov/News/News-Releases/News-Release-View/Article/612778/, last accessed May 3, 2018.

resulting RAND report concluded that allowing transgender service members to serve in their preferred gender would limit deployability, impede readiness, and impose costs on the military, but dismissed these burdens as "negligible," "marginal," or "minimal."[3] AR103, 145–48, 152–53, 172–73 (Rand Report at xii, 39–42, 46–47, 69–70).

After this review, Secretary Carter ordered the Defense Department on June 30, 2016, to implement various changes to its policies (hereinafter, the "Carter policy"). First, DoD had until July 1, 2017, to revise its accession standards. Report 14. Under this revision, a history of "gender dysphoria," "medical treatment associated with gender transition," or "sex reassignment or genital reconstruction surgery" would remain disqualifying unless an applicant provided a certificate from a licensed medical provider that the applicant had been stable or free from associated complications for 18 months.[4] *Id.* at 15. Second, and effective immediately, current service members could not be discharged "solely on the basis of their gender identity" or their "expressed intent to transition genders," AR323 (DTM 16-005 at Attachment ¶ 1), but instead, if diagnosed with gender dysphoria, could transition genders, Report 14. Transgender service members who did not meet the clinical criteria for gender dysphoria, however, had to continue to serve in their biological sex. *Id.* at 15.

II. Development of the Department's New Policy

Before the Carter accession standards took effect on July 1, 2017, Secretary of Defense Mattis, on the recommendation of the Services, directed the Services to assess their readiness to begin

[3] RAND has recently explained that it was "not ask[ed] . . . to recommend whether" the pre-Carter policy should be abandoned, but simply to answer seven specific questions. Agnes Gereben Schaefer, *On RAND's Research Findings Regarding Transgender Military Personnel Policy*, COMMENTARY (THE RAND BLOG) (Mar. 27, 2018), Exh. 2. It has also stressed that when it conducted its review, "there was limited data available" and that it "highlighted and caveated those limitations throughout the report so that DoD could understand the limitations and factor them into its decision making process." *Id.*

[4] The Carter policy's 18-month period of stability for accessions had "no analog with respect to any other mental condition listed in [the accession standards]." Report 42. Indeed, "persons with a history of depressive disorder" are currently subject to a 36-month period of stability requirement. *Id.*

accessing transgender individuals into the military. *See* AR326 (Memorandum from James N. Mattis, Secretary of Defense, *Accession of Transgender Individuals into the Military Services* (June 30, 2017) ("Deferral Memorandum")). "Building upon that work and after consulting with the Service Chiefs and Secretaries," Secretary Mattis "determined that it [was] necessary to defer the start of [these] accessions" so that the military could "evaluate more carefully the impact of such accessions on readiness and lethality." *Id.* Based on the recommendation of the Services and in the exercise of his independent discretion, he therefore delayed the implementation of the new accession standards on June 30, 2017 until January 1, 2018. *Id.* He also ordered the Under Secretary of Defense for Personnel and Readiness to lead a review, which would "include all relevant considerations" and last for five months, with an end date of December 1, 2017. *Id.* Secretary Mattis explained that this study would give him "the benefit of the views of the military leadership and of the senior civilian officials who are now arriving in the Department," and that he "in no way presupposes the outcome of the review." *Id.*; *see* Report 17.

While that review was ongoing, the President stated on Twitter on July 26, 2017, that "the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military." Op. 10, Dkt. 85. The President then issued a memorandum on August 25, 2017, ordering "further study" into the risks of maintaining the Carter policy and adherence to current accession standards while that review was ongoing. AR327–28 (2017 Memorandum §§ 1(a), 2(a)).[5]

On September 14, 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." Report 17. The Panel consisted of senior military members who had "the statutory responsibility to organize, train, and equip military forces" and were "uniquely qualified

[5] This filing does not describe the Memorandum and ensuing litigation given this Court's familiarity.

to evaluate the impact of policy changes on the combat effectiveness and lethality of the force." *Id.* at 18; *see also* AR330 (Terms of Reference). The Panel was chaired by the Under Secretary of Defense for Personnel and Readiness and included the Under Secretaries of the Military Departments, the Armed Services' Vice Chiefs, and Senior Enlisted Advisors (or officials performing those duties). AR330 (Terms of Reference).

In 13 separate meetings over the span of 90 days, the Panel met with military and civilian medical professionals, commanders of transgender service members, and transgender service members. Report 18; *see* AR2821–47 (Panel Meeting Minutes); AR2848, 2857, 2881–82, 2905–06, 2942, 2965, 2977, 2998, 3056–58 (Panel Meeting Agendas); AR3059 (Action Memo). It reviewed information regarding gender dysphoria, its treatment, and its impact on military effectiveness, unit cohesion, and military resources. Report 18; *see* AR2821–47 (Panel Meeting Minutes); AR2848, 2857, 2881–82, 2905–06, 2942, 2965, 2977, 2998, 3056–58 (Panel Meeting Agendas). It received briefing from three separate working groups or committees dedicated to issues involving personnel, medical treatment, and military lethality. Report 18; *see* AR2906 (Panel Meeting Agenda); AR2907–10 (Non-deployable Working Group Information Briefing). It drew on the military's experience with the Carter policy to date and considered evidence that both favored and opposed its recommendations. Report 18, 40; *see* AR2821–47 (Panel Meeting Minutes); AR3059 (Action Memo). And, in contrast to the development of the Carter policy, it did not "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness," but made "no assumptions" at all. Report 19. Exercising its professional military judgment, the Panel provided Secretary Mattis with a set of recommendations. *Id.*; AR3059–60 (Action Memo).

After considering the Panel's recommendations, along with 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. *Id.*; *see* Military

Service by Transgender Individuals (Feb. 22, 2018) ("Mattis Mem."), Dkt. 120-1. The memorandum was accompanied by a 44-page report setting forth in detail the bases for the Department of Defense's recommended new policy. Mattis Mem. 3.

III. The Department's New Policy

In his memorandum, Secretary Mattis explained why departing from certain aspects of the Carter policy was necessary. "Based on the work of the Panel and the Department's best military judgment," the Department had concluded "that there are substantial risks associated with allowing the accession and retention of individuals with a history or diagnosis of gender dysphoria and require, or have already undertaken, a course of treatment to change their gender." Mattis Mem. 2. In addition, the Department had found "that exempting such persons from well-established mental health, physical health, and sex-based standards, which apply to all Service members, including transgender Service members without gender dysphoria, could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." *Id.*

Although the prior administration had concluded otherwise largely on the basis of the RAND report, the Department of Defense found "that study contained significant shortcomings." *Id.* Among other defects, it relied on "limited and heavily caveated data to support its conclusions, glossed over the impacts of healthcare costs, readiness, and unit cohesion, and erroneously relied on the selective experiences of foreign militaries with different operational requirements than our own." *Id.* "In short, this policy issue has proven more complex than the prior administration or RAND assumed." *Id.*

"[I]n light of the Panel's professional military judgment and [his] own professional judgment," Secretary Mattis thus proposed a policy that continued some aspects of the Carter policy and departed from others. *Id.*; *see id.* at 2–3; Report 4–6, 33–43. Like the Carter policy, the new policy does not

draw lines on the basis of transgender status, but presumptively disqualifies from service individuals with a certain medical condition, gender dysphoria. *Compare* Report 4–6, 19, *with* AR320–25 (DTM 16-005). The key difference between the policies is the scope of the exceptions to that presumptive disqualification.

To start, under the new policy, as under the Carter policy, individuals who "identify as a gender other than their biological sex" but who do not suffer clinically significant "distress or impairment of functioning in meeting the standards associated with their biological sex"—and therefore have no history or diagnosis of gender dysphoria—may serve if "they, like all other persons, satisfy all standards and are capable of adhering to the standards associated with their biological sex." Report 4; *see also* AR323 (DTM 16-005 at Attachment ¶¶ 1–2).

By contrast, individuals who both are "diagnosed with gender dysphoria, either before or after entry into service," and "require transition-related treatment, or have already transitioned to their preferred gender," are presumptively "ineligible for service." Report 5. This presumptive bar is subject to both individualized "waivers or exceptions" that generally apply to all Department and Service-specific standards and policies as well as a categorical reliance exception for service members who took advantage of the Carter policy. *Id.* Specifically, service members "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," including those who entered the military "after January 1, 2018," "may continue to receive all medically necessary care, to change their gender marker in the Defense Enrollment Eligibility Reporting System (DEERS), and to serve in their preferred gender, even after the new policy commences." *Id.* at 5–6.

In addition, individuals who "are diagnosed with, or have a history of, gender dysphoria" but who neither require nor have undergone gender transition are likewise "generally disqualified from accession or retention." *Id.* at 5. This presumptive disqualification is subject to the same exceptions

discussed above as well as two new categorical ones. *Id.* With respect to accession, individuals with a history of gender dysphoria may enter the military if they (1) can demonstrate "36 consecutive months of stability (i.e., absence of gender dysphoria) immediately preceding their application"; (2) "have not transitioned to the opposite gender"; and (3) "are willing and able to adhere to all standards associated with their biological sex." *Id.* With respect to retention, those diagnosed with gender dysphoria after entering the military may remain so long as they (1) can comply with Department and Service-specific "non-deployab[ility]" rules; (2) do "not require gender transition"; and (3) "are willing and able to adhere to all standards associated with their biological sex." *Id.*

On March 23, 2018, the President issued a new memorandum that revoked the 2017 Memorandum "and any other directive" the President "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." Military Service by Transgender Individuals (Mar. 23, 2018) ("2018 Memorandum"), Dkt. 119-1.

IV. Plaintiffs' Second Amended Complaint

Following the revocation of the 2017 Memorandum, Plaintiffs filed their second amended complaint, Dkt. 148. Plaintiffs are six current service members (Brock Stone, Kate Cole, John Doe 1, Seven Ero George, Teagan Gilbert, Tommie Parker), six prospective service members (Teddy D'Atri, Ryan Wood, Niko Branco, John Doe 2, Jane Roe 1, and John Doe 3, by his next friends and mother and father, Jane Roe 2 and John Doe 4), and one organization (American Civil Liberties Union of Maryland, Inc. ("ACLU")). *See* Second Am. Compl. ¶¶ 17–106. Plaintiffs allege that the "Transgender Service Member Ban," as it was "formalized . . . in a [2017 Presidential] Memorandum" and in the so-called "Implementation Plan" submitted by Secretary of Defense James Mattis to the President in February 2018, violates the Due Process Clause of the Fifth Amendment in various

respects. *Id.* ¶¶ 8, 11, 205–40.

ARGUMENT

I. The Court Should Dismiss Plaintiffs' Second Amended Complaint for Lack of Jurisdiction.

Plaintiffs' second amended complaint should be dismissed for lack of jurisdiction. Plaintiffs have not suffered the kind of concrete injury necessary to establish standing, nor do they face an imminent threat of future injury that is traceable to the new DoD policy concerning military service by transgender individuals. In addition, to the extent that they continue to challenge the 2017 Memorandum (and any preceding statements made by the President), that claim is moot. But even if the Court finds it possesses jurisdiction, the Court should nevertheless dismiss Plaintiffs' claims against the President because any alleged injury caused by the President is not redressable.

A. Plaintiffs Have Not Met Their Burden to Establish Standing to Challenge the New DoD Policy.

To establish standing, Plaintiffs must satisfy three elements: (1) they must have suffered an injury in fact, *i.e.*, a judicially cognizable injury that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) the injury must be "fairly . . . trace[able] to the challenged action of the defendant;" and (3) "it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (citation omitted). "[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).

A court's standing inquiry should be "especially rigorous when reaching the merits of the dispute" would compel it "to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (citation omitted). Because Plaintiffs have brought a constitutional challenge to DoD's policy concerning military service by transgender individuals, *see* Second Am. Compl. ¶¶ 205–240, the Court

should conduct an "especially rigorous" inquiry into whether Plaintiffs have standing, *Clapper*, 568 U.S. at 408.

1. Plaintiffs Have Not Met Their Burden of Showing an Injury in Fact that is Fairly Traceable to Any Action by Defendants or that an Injury Would Be Redressed by a Favorable Decision.

Each of the Plaintiffs bear the burden of establishing that they have standing in their own right to pursue their claims. *See Klayman v. Obama*, 142 F. Supp. 3d 172, 184 (D.D.C. 2015). An examination of the facts of this case, however, shows that that none of the Plaintiffs have standing.

Current Service Members. Plaintiffs Stone, Cole, Doe 1, George, Gilbert, and Parker are current service members who have received medical treatment as part of their gender transition. *See* Second Am. Compl. ¶¶ 17–61. Under the new DoD policy, current service members who have been diagnosed with gender dysphoria by a military medical provider "since the previous administration's policy took effect and prior to the effective date of this new policy" will be permitted to "continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria." Mattis Mem. 2. Because these Plaintiffs may continue to serve in the military in their preferred gender and receive medically necessary treatment, *see id.*, they have not suffered an actual injury.

These six Plaintiffs attempt to meet their burden to establish standing on allegations of possible future harm. Citing to a severability provision in the Report, these six Plaintiffs claim that because "Defendants can withdraw" the exemption allowing their continued military service, Second Am. Compl. ¶ 186, they "*face[] the prospect* that [they] will be forced out of the [military]," *id.* ¶¶ 187–92 (emphasis added). Plaintiff Cole also alleges that if she is discharged from the military, she "will no longer be eligible for tuition assistance." *Id.* ¶ 197. But Plaintiffs' admitted uncertainty of future harm is wholly insufficient to establish standing; as the Supreme Court has repeatedly held, a "threatened injury must be *certainly impending* to constitute injury in fact." *Clapper*, 568 U.S. at 409 (quotation omitted); *DaimlerChrysler*, 547 U.S. at 345.

In *Clapper*, the Supreme Court rejected a theory of standing that rested on speculative future harm. *See* 568 U.S. at 410. The plaintiffs in that case challenged a provision in the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1881a, that allows the Attorney General and the Director of National Intelligence to, after seeking approval from the Foreign Intelligence Surveillance Court, jointly authorize the "surveillance of individuals who are not 'United States persons' and are reasonably believed to be located outside the United States." *Id.* at 401 (quoting 50 U.S.C. § 1881a). The plaintiffs claimed that because their work "requires them to engage in sensitive international communications with individuals who they believe are likely targets of surveillance," there is "an objectively reasonable likelihood that their communications will be acquired under § 1881a at some point in the future." *Id.* Thus, the plaintiffs argued, they had established that they would suffer a future injury sufficient to give them standing. *Id.*

The Supreme Court entirely rejected that argument, finding that the plaintiffs' "theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be certainly impending." *Id.* (citation omitted). For the plaintiffs to suffer an actual injury, the Supreme Court reasoned, a "highly attenuated chain of possibilities" would have to occur, some of which would require members of the Executive and Judicial Branches to exercise their independent judgment in a certain manner. *See id.* at 410–14. After "declin[ing] to abandon [its] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors," the Supreme Court concluded that the plaintiffs' "speculative chain of possibilities does not establish that injury based on potential future surveillance is certainly impending or is fairly traceable to § 1881a." *Id.* at 414.

These six Plaintiffs in this case also speculate that the severability provision in the Report means that their discharge is certainly impending. *See* Second Am. Compl. ¶ 186. But this reading is not consistent with the language of the provision, which provides: "While the Department believes

that its commitment to these Service members, including the substantial investment it has made in them, outweigh the risks identified in this report, should its decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption is and should be deemed severable from the rest of the policy." Report 43. Thus, for these six Plaintiffs to be discharged from the military on the basis of their medical condition (gender dysphoria), the following would have to occur: First, a court would have to rule that (1) the entire DoD policy was unlawful due to the reliance exemption, (2) the entire DoD policy would be lawful but for that exemption, and (3) that exemption should therefore be severed from the rest of the policy. Second, that decision would have to be upheld upon any further judicial review. *See id.* Third, assuming the reliance exemption were severed, officials within DoD would then have to make the independent decision to discharge current service members who have been diagnosed with gender dysphoria. *See id.* Finally, these six Plaintiffs would have to be processed for discharge on that basis. *See id.*

As in *Clapper*, this highly attenuated chain of events requires members of the Executive and Judicial Branches to exercise their independent judgment in a certain manner and is insufficient to establish an injury in fact. *See Clapper*, 568 U.S. at 413–14; *see also Attias v. CareFirst, Inc.*, 865 F.3d 620, 628 (D.C. Cir. 2017) (stating that in *Clapper*, "[t]he harm also would not have arisen unless a series of independent actors, including intelligence officials and Article III judges, exercised their independent judgment in a specific way"). If Plaintiffs are involuntarily discharged in the future they will likely have standing to challenge that discharge, but at this point Plaintiffs' challenge to their assumed future discharge is entirely premature and based purely on speculation of what may occur months or even years from now. *Lujan*, 504 U.S. at 564 n.2 ("Where there is no actual harm, however, its imminence (though not its precise extent) must be established.").

These six Plaintiffs also argue that they may be discharged from the military based on DoD's worldwide deployability requirement. Plaintiffs allege that the "Report cautions that transgender

service members 'may not be deemed to be non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months)' or may face removal from the military, without providing any detail as to how such policies will be interpreted and applied." Second Am. Compl. ¶ 186 (quoting Report 43). Plaintiffs further speculate that the "Report's discussion of hormones *suggests* that transgender service members receiving hormones *may be* considered non-deployable, even though that is not how the military treats individuals prescribed hormones for other reasons." *Id.* (emphasis added). Not only are these allegations of future harm too speculative to be considered a "certainly impending" injury, *Clapper*, 568 U.S. at 410, but they are also not traceable to Plaintiffs' challenge to DoD's policy concerning military service by transgender individuals and would not be redressed by a favorable decision, *see Lujan*, 504 U.S. at 560–61.

The deployability requirement is separate from DoD's new transgender policy, and is set forth in the DoD Retention Policy for Non-Deployable Service Members ("Retention Policy"). *See* AR32–33 (Retention Policy). The Retention Policy applies to *all* service members, and states that "[s]ervice members who have been non-deployable for more than 12 consecutive months, for any reason, will be processed for administrative separation . . . or will be referred into the Disability Evaluation System."[6] AR32 (Retention Policy).

If any of these six Plaintiffs are discharged in the future because they are not deployable for more than 12 months, their discharge would be pursuant to the Retention Policy, *not* DoD's new policy concerning military service by transgender individuals. *See id.* Thus, any injuries they face would not be "fairly . . . trace[able] to the challenged action" (*i.e.*, the 2017 Memorandum and the new DoD policy). *Lujan*, 504 U.S. at 560–61. Moreover, any injuries Plaintiffs would face by being discharged

[6] "Pregnant and post-partum Service members are the only group automatically excepted from this policy," though the Services may "grant a waiver to retain in service a Service member whose period of non-deployability exceeds the 12 consecutive months limit." AR32 (Retention Policy).

pursuant to the Retention Policy would not be redressed if the Court were to grant Plaintiffs' requested declaratory judgment and injunction against the 2017 Memorandum and the new DoD policy. *See id.*

These six Plaintiffs' claims of standing as they relate to uncertainty over "medically necessary treatment" are also speculative. *See* Second Am. Compl. ¶¶ 193–95. They allege that they "may be denied medically necessary treatment" and that it is "unclear what care will still be provided." *Id.* ¶¶ 193, 194. These assertions are far too speculative to establish a "certainly impending" injury. *See Clapper*, 568 U.S. at 410–11. The sole basis for Plaintiffs' allegation is that the Report "provides no details as to what will be considered 'medically necessary' or the process that will govern requests for such care." Second Am. Compl. ¶ 194. But neither the Mattis Memorandum nor the Report purport to change the policies governing the medical treatment of gender dysphoria for current service members covered by the exemption. *See generally* Mattis Mem.; Report. Thus, Plaintiffs' claim that they "may" be denied medically necessary treatment is not only speculative, it is baseless as well.

Plaintiffs George and Gilbert also allege that they may not be permitted to commission as officers (*i.e.*, going from an enlisted soldier to an officer).[7] *See* Second Am. Compl. ¶¶ 190, 198. But these claims are also too speculative to confer standing. *See Lujan*, 504 U.S. 560–61. Neither individual has applied for a commission, nor provided anything more than a vague description of future intent.

Finally, these six Plaintiffs allege that they have been harmed by a "stigma" resulting from the alleged "ban on transgender individuals from open service and the singling out [of] their medical care for a ban on coverage." Second Am. Compl. ¶¶ 199, 216. Not only is that assertion inaccurate,[8] but

[7] Specifically, George serves in the Air National Guard and states that he intends to pursue a commission into the Army Nurse Corps in May 2018. Second Am. Compl. ¶¶ 43, 47, 48, 190. Gilbert serves in the Naval Reserve and states that she intends to apply for Officer Candidate School and commission as an officer after completing another year of coursework at Arizona State University. *Id.* ¶¶ 51, 55, 198.

[8] As stated above, the six Plaintiffs who are currently serving in the military "may continue to serve in their preferred gender and receive medically necessary treatment." Mattis Mem. 2. And in any event,

that sort of stigmatic injury "accords a basis for standing only to those persons who are personally denied equal treatment." *Allen v. Wright*, 468 U.S. 737, 755–56 (1984) (citation omitted), *abrogated on other grounds, Lexmark Int'l, Inc. v. Static Control Components, Inc.* 134 S.Ct. 1377 (2014). Plaintiffs have not shown that they have been subject to discriminatory treatment, and therefore cannot claim stigmatic injury to establish standing. Instead, "stigmatic injury . . . requires identification of some concrete interest with respect to which respondents are personally subject to discriminatory treatment," and "[t]hat interest must independently satisfy the causation requirement of standing doctrine." *Id.* at 757 n.22. No such interest exists here.

Although these six Plaintiffs argue that they have been stigmatized because "the Commander-in-Chief has announced that their service is unwanted and unwelcome," Second Am. Compl. ¶ 214, and because the Report "contains unsubstantiated allegations that can be used to blame transgender service members for poor unit performance," *id.* ¶ 216, these allegations are insufficient to amount to an injury. 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 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 2017 Memorandum and the Report send a message that their "service is unwanted

limitations on military service based on a medical condition hardly constitute a stigmatic injury. After all, as the Report noted, the "vast majority of Americans from ages 17 to 24—that is, 71%—are ineligible to join the military without a waiver for mental, medical, or behavioral reasons. Transgender persons with gender dysphoria are no less valued members of our Nation than all other categories of persons who are disqualified from military service." Report 6.

and unwelcome," Second Am. Compl. ¶ 214, is likewise insufficient to establish standing. *See In re Navy Chaplaincy*, 534 F.3d at 760–61.

Prospective Service Members Who Do Not Meet the Accessions Standards Under the Carter Policy. Plaintiffs D'Atri, Doe 2, and Roe 1, who are not currently serving in the military but intend to enlist, claim that they will be harmed by the new DoD policy because they will not be allowed to join the military. Second Am. Compl. ¶ 202. But these three Plaintiffs would not be permitted to access into the military under the Carter policy. Plaintiffs D'Atri, Doe 2, and Roe 1 assert that they have recently had surgery connected with their gender transition, will soon have surgery, or both. *Id.* ¶¶ 64, 66, 85, 87, 93–95. Under the Carter policy, individuals who have had medical treatment associated with gender transition are disqualified from military service unless they have completed all medical treatment associated with their gender transition, have been stable in their preferred gender for 18 months, and, if they are receiving cross-sex hormone therapy, have been stable on the hormones for 18 months. AR323 (DTM 16-005 at Attachment ¶ 2). A "history of sex reassignment or genital reconstruction surgery" is also disqualifying under the Carter policy, unless 18 months have elapsed since the date of the most recent surgery, no functional limitations or complications persist, and no additional surgery is required. AR324 (DTM 16-005 at Attachment ¶ 2). Because they would not meet the Carter policy's accession standards, any alleged injury they would suffer by not being able to join the military under the new DoD policy would not be redressed by an order enjoining the implementation of the new DoD policy. *See Lujan*, 504 U.S. at 560–61.

Prospective Service Members Who Have Undergone Gender Transition. Plaintiffs Wood and Branco, who are not currently serving in the military but are in the process of enlisting, claim that they will be harmed by the new DoD policy because they will not be allowed to join the military. Second Am. Compl. ¶ 202. Although they allege that they have undergone gender transition and that they would be eligible to join the military under the Carter policy, *id.* ¶¶ 73, 74, 79, 80, Defendants

have submitted declarations from their recruiters stating that, based on the paperwork Plaintiffs Branco and Wood have submitted thus far in the process, they do not meet the Carter policy's accessions standards, *see* Decl. of Sergeant First Class Donald D. Osburn II ¶¶ 3, 7–8, Exh. 3; Decl. of Major Ricardo S. Flores ¶¶ 2, 13–16, Exh. 4. Because their records currently indicate that they would not meet the Carter policy's accession standards, any alleged injury they would suffer by not being able to join the military under the new DoD policy would not be redressed by an order enjoining the implementation of the new DoD policy. *See Lujan*, 504 U.S. at 560–61.

In addition, although under the new DoD policy "[t]ransgender persons who require or have undergone gender transition are disqualified from military service," Mattis Mem. 2, applicants who are denied accession on the basis of gender transition may seek a "waiver or exception to [the] policy," Report 5. "[E]ach accession standard may be waived in the discretion of the accessing Service based on that Service's policies and practices, which are driven by the unique requirements of different Service missions, different Service occupations, different Service cultures, and at times, different Service recruiting missions." *Id.* at 10. Thus, even if these two Plaintiffs are denied accession under the new DoD policy on the basis of gender transition, they still would lack standing because they have not sought a waiver and had their waiver applications denied. Future possible denials of waiver applications resulting in these Plaintiffs' inability to join the military are speculative and insufficient to give rise to a "certainly impending" injury. *See Clapper*, 568 U.S. at 410–11.

Prospective Service Member Who Is a Minor Child. Plaintiff John Doe 3 is a 15-year old boy who claims that he will be harmed by the new DoD policy because he will not be allowed to join the military. Second Am. Compl. ¶¶ 97, 201–04. Doe 3 states that he intends to join the Coast Guard when he becomes of age. *Id.* ¶ 100. Individuals cannot join the Coast Guard until they are 18 years old (or 17 with parental consent). 10 U.S.C. § 505(a). Therefore, Doe 3 may not seek to join the military for several years. This is far too attenuated a claim of injury to support standing today. It is

certainly possible that in three years or more, Doe 3 may not want to, or be eligible to, commission for reasons unrelated to the new policy. *Cf. McConnell v. FEC*, 540 U.S. 93, 226 (2003) (more than four-year gap between challenge and alleged injury "too remote temporally to satisfy Article III"), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010).

In addition, when he is of age to join the Coast Guard, if Doe 3 is disqualified from accession on the basis of a gender dysphoria diagnosis or gender transition, he may seek a waiver at that time. *See* Report 5. Thus, even if Doe 3 is denied accession under the new DoD policy several years from now, he still would not suffer a cognizable injury at that time unless his waiver application was denied. A possible denial of a waiver application resulting in Doe 3's inability to join the military several years in the future is speculative and insufficient to give rise to a "certainly impending" injury. *See Clapper*, 568 U.S. at 410–11.

Organization Whose Member Lacks Standing. The lack of the individual Plaintiffs' standing also defeats ACLU's claim to associational standing. To establish associational standing, ACLU must show: "(1) its own members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief sought requires the participation of individual members in the lawsuit." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) (quotation omitted). In addition, "an organization must 'make specific allegations establishing that at least one *identified member* had suffered or would suffer harm.'" *Id.* (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009)). The only member of the ACLU identified in Plaintiffs' Second Amended Complaint is Plaintiff Stone. Second Am. Compl. ¶ 25. As shown above, as a current service member, Plaintiff Stone will not suffer any harm because he will continue to serve in the U.S. Navy and will receive medically necessary treatment. Mattis Mem. 2. Thus, because ACLU has failed to identify a member who has suffered an injury-in-fact, it lacks associational standing. *S. Walk*, 713 F.3d at 184.

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

Although Plaintiffs raise claims and seek a declaratory judgment against the President, he is not a proper defendant in this case. Plaintiffs may not obtain—and the Court may not grant—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. Because any injury caused by the President is not redressable, the Court should dismiss all of Plaintiffs' claims against the President. *See DaimlerChrysler*, 547 U.S. at 352 (requiring that a plaintiff "demonstrate standing separately for each form of relief sought" (quotation omitted)).

It is well-established that courts lack authority to issue injunctive relief against the President for non-ministerial actions that he has taken in his official capacity.[9] *See Mississippi v. Johnson*, 71 U.S. 475, 499 (1866); *Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992)). With respect to Executive Branch officials, a "declaratory judgment is the functional equivalent of an injunction," *Comm. on the Judiciary of the U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (citing *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985)), because "it must be presumed that federal officers will adhere to the law as declared by the court," *Sanchez-Espinoza*, 770 F.2d at 208 n.8. Therefore, "similar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [a] request for a declaratory judgment." *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996); *Lovitky v. Trump*, No. 17-cv-00450, 2018 WL 1730278 at *5 n.5 (D.D.C. Apr. 10, 2018) (Kollar-Kotelly, J.); *see also Sanchez-Espinoza*, 770 F.2d at 208 n.8 (The "equivalence of [the] effect" of injunctive and declaratory relief directed at Executive branch officials "dictates an

[9] Perhaps in recognition of this well-established principle, Plaintiffs no longer seek injunctive relief against the President. *Compare* Am. Compl. at 41, Dkt. 39 (requesting injunctive relief against all Defendants, including the President), *with* Second Am. Compl. at 56 (requesting the Court enter a permanent injunction against all Defendants other than the President). But as explained in the text, the same principle applies to dismissing claims for declaratory relief against the President.

equivalence of criteria for issuance."). As Justice Scalia explained in *Franklin*:

> I think we cannot issue a declaratory judgment against the President. It is incompatible with his constitutional position that he can be compelled personally to defend his executive actions before a court . . . . The President's immunity from such judicial relief is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."

505 U.S. at 827–28 (Scalia, J., concurring) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982)). Following *Franklin*, the D.C. Circuit determined that "declaratory relief" against the President for his non-ministerial conduct "is unavailable." *Newdow v. Roberts*, 603 F.3d 1002, 1012–13 (D.C. Cir. 2010). This is because "a court—whether via injunctive or declaratory relief—does not sit in judgment of a President's executive decisions." *Id.* at 1012 (emphasis added) (citing *Mississippi*, 71 U.S. at 499).

Although the court in the related case *Karnoski v. Trump* recently determined that it has "jurisdiction to issue declaratory relief against the President" and that "this case presents a 'most appropriate instance' for such relief," those findings were in error. No. 17-1297, 2018 WL 1784464, at *13 (W.D. Wash. Apr. 13, 2018) (quoting *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir. 1974) ("*NTEU*")). The *Karnoski* Court relied upon a 1974 case from the D.C. Circuit, *NTEU*, but the D.C. Circuit has "questioned whether [*NTEU*] remains valid after *Franklin*." *Lovitsky*, 2018 WL 1730278 at *7 (citing *Swan*, 100 F.3d at 978). Even if *NTEU* remains good law, it is readily distinguishable in two ways. First, as the D.C. Circuit repeatedly acknowledged, *NTEU* involved a Presidential action that allegedly was "ministerial" and not discretionary. 492 F.2d at 591, 601, 602, 605, 606 n.42. A ministerial duty is "a simple, definite duty" that is "imposed by law" where "nothing is left to discretion." *Mississippi*, 71 U.S. at 498; *see also Swan*, 100 F.3d at 977. 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 duties).

Second, in *NTEU*, the D.C. Circuit found that there were no other defendants the plaintiffs

could sue in lieu of the President. 492 F.2d at 614–15. That is not the case here. Plaintiffs may challenge the constitutionality of the policy governing military service by transgender individuals being carried out by the subordinate Executive officials who are defendants in this case and, if successful, the Court may redress Plaintiffs' injuries by issuing relief against those officials. As the Supreme Court has repeatedly recognized, because the President often acts through subordinate Executive officials, courts ordinarily can rule on the legality of the President's actions and rectify a plaintiff's injuries by issuing injunctive or declaratory relief against those subordinate officials. *Franklin*, 505 U.S. at 803 (concluding that the "injury alleged is likely to be redressed by declaratory relief against the Secretary [of Commerce] alone"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–89 (1952) (holding that the President's order was unconstitutional and affirming the district court's decision enjoining the Secretary of Commerce from carrying out the order, even though the President was not a defendant in the case). Providing relief in this fashion would avoid the fundamental separation-of-powers intrusion that arises with the Judiciary entering declaratory relief against the head of the Executive Branch. *See Swan*, 100 F.3d at 978–79. Entering declaratory relief against the President would be especially inappropriate in this case, as the new policy was developed by and issued by DoD, rather than the President.

Accordingly, regardless of whether the Court dismisses the case in its entirety, it nevertheless should dismiss the President as a defendant because any injuries caused by the President are not redressable by the Court. *See Lovitsky*, 2018 WL 1730278 at *4 (where the plaintiff sought a declaratory judgment against the President, finding that "even if there were injury-in-fact, and it were fairly traceable to [the President's] conduct, it is clear that Plaintiff's injury would not be redressable").

B. Any Challenge to the 2017 Memorandum is Moot.

Although Plaintiffs amended their complaint to challenge the new DoD policy, they nevertheless continue to allege that the 2017 Memorandum is unconstitutional and seek declaratory

and injunctive relief against the 2017 Memorandum. *See* Second Am. Compl. ¶¶ 207, 209–14, 217–19, 221, 223, 226–28, 234–35, 237; *id.* at 55–56. Plaintiffs' claims against the 2017 Memorandum should be dismissed because they are moot. "A claim becomes moot 'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Grutzmacher v. Howard Cty.*, 851 F.3d 332, 349 (4th Cir.) (quoting *Cty. of L.A. v. Davis*, 440 U.S. 625, 631 (1979)). The 2017 Memorandum has been revoked. *See* 2018 Mem. Any challenge to the constitutionality of the 2017 Memorandum is therefore moot. *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 640 (4th Cir. 2017), *vacated and remanded sub nom. Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017) (noting that an Executive Order that "revoked the earlier order . . . rendered moot the challenge to the earlier order"). A decision finding that the 2017 Memorandum is unconstitutional would amount to an impermissible advisory opinion. *Williams v. Ozmint*, 716 F.3d 801, 809 (4th Cir. 2013) ("[F]ederal courts have 'no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)).

Nor can Plaintiffs find refuge in the doctrine that "a defendant's voluntary cessation of a challenged practice" does not necessarily moot the case. *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982). When the government repeals and replaces one of its policies, the relevant question is "whether the new [policy] is sufficiently similar to the repealed [one] that it is permissible to say that the challenged conduct continues," or, put differently, whether the policy "has been 'sufficiently altered so as to present a substantially different controversy from the one . . . originally decided.'" *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993). When a new policy has "changed substantially," the voluntary cessation exception does not apply, as there is "no basis for concluding that the challenged conduct [is] being repeated." *Id.*

Any dispute over the new policy "'present[s] a substantially different controversy'" than

Plaintiffs' challenge to the 2017 Memorandum. *Id.* In contrast to any alleged categorical "ban" on military service by transgender individuals that the Court preliminarily stated "did not emerge from any policy review," Op. 43, DoD's new policy turns on a medical condition (gender dysphoria), contains several exceptions allowing some transgender individuals to serve, and is the product of independent military judgment following extensive study. The replacement of the 2017 Memorandum with a nuanced policy developed by DoD renders any challenge to the 2017 Memorandum moot. *See Dep't of Treasury v. Galioto*, 477 U.S. 556, 559 (1986) (per curiam) (finding that because Congress amended a statute during the pendency of the appeal, the constitutional issue was rendered moot).

II. The Court Should Dismiss the Second Amended Complaint Because Plaintiffs Have Failed to State a Plausible Claim for Relief, or, in the Alternative, Grant Summary Judgment for Defendants.

Plaintiffs fail to state a claim because the new DoD policy, which is the product of considered military judgment and promotes the interests of military readiness, unit cohesion, and minimizing costs, survives the highly deferential review warranted for military decisions concerning the composition of the fighting force.

A. The Department's New Policy is Subject to Highly Deferential Review.

On its face, DoD's new policy triggers rational basis review in connection with Plaintiffs' equal protection challenge. *See* Second Am. Compl. ¶¶ 205–230. That policy, like the Carter policy before it, draws lines on the basis of a medical condition (gender dysphoria) and an associated treatment (gender transition), not transgender status. *Compare* Report 3–5, *with* AR323–24 (DTM 16-005 at Attachment 1–2). Such classifications receive only rational basis review. *See, e.g.*, *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365–68 (2001). Given that courts should be "reluctant to establish new suspect classes"—a presumption that "has even more force when the intense judicial scrutiny would be applied to the 'specialized society' of the military"—there is no basis for departing from rational basis review here. *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc). That reluctance is

especially warranted in this challenge given the American Psychiatric Association's conclusion that gender dysphoria is a medical condition "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning," Report 13, which is surely a relevant consideration in determining who may serve, *see id.* at 9 ("[T]he military would be negligent in its responsibility if its military standards permitted admission of applicants 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.").

But even assuming *arguendo* that DoD's new policy would trigger intermediate scrutiny outside of the military context, that context, unquestionably present here, requires a far less searching form of review. While all agree that the Government is not "free to disregard the Constitution" when acting "in the area of military affairs," it is equally true that "the tests and limitations to be applied may differ because of the military context." *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). In short, "constitutional rights must be viewed in light of the special circumstances and needs of the armed forces," and "[r]egulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities." *Beller v. Middendorf*, 632 F.2d 788, 810–11 (9th Cir. 1980) (Kennedy, J.), *overruled on other grounds by Witt v. Dep't of Air Force*, 527 F.3d 806, 820–21 (9th Cir. 2008).

This different, and highly deferential, form of review is necessary not only because the Constitution itself commits military decisions to "the political branches directly responsible—as the Judicial Branch is not—to the electoral process," but also because "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see Rostker*, 453 U.S. at 65–66. That is particularly true with respect to the "complex, subtle, and professional decisions as to the composition … of a military force, which are essentially professional military judgments." *Winter v. NRDC*, 555 U.S. 7, 24 (2008) (quotation omitted).

Indeed, the Supreme Court has expressly refused to attach a "label[]" to the standard of review

applicable to military policies alleged to trigger heightened scrutiny, *Rostker*, 453 U.S. at 70, and several features of its decisions in this area demonstrate that rational basis review most closely describes its approach in practice. First, even though the Court generally has declined "to hypothesize or invent governmental purposes for gender classifications post hoc in response to litigation," *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1697 (2017) (citation omitted), it has done so when military deference is required. In *Rostker*, the Supreme Court rejected an equal protection challenge to a statute exempting women from the requirement to register for the draft. 453 U.S. at 83. Even though the challenge had been filed in 1971, the Court relied on Congress's analysis of the issue nine years later, when it declined to amend the statute to allow the conscription of women. *See id.* at 60–63. The Court expressly rejected the argument that it "must consider the constitutionality of the [relevant statute] solely on the basis of the views expressed by Congress in 1948, when the [law] was first enacted in its modern form." *Id.* at 74. Instead, because Congress in 1980 had "thoroughly reconsider[ed] the question of exempting women from [the draft], and its basis for doing so," its views from that time were "highly relevant in assessing the constitutional validity of the exemption." *Id.* at 75.

And the Court reached this conclusion despite the challengers' claim that the 1980 legislative record amounted to "litigation-inspired afterthoughts" that "are constitutionally inadmissible in defending laws classifying by gender." Br. for Appellees at 31–32, *Rostker*, 453 U.S. 57 (No. 80-251), 1980 WL 339849, at *31–32. As the record in *Rostker* demonstrated, a representative of the Department of Justice had testified before the relevant Senate Subcommittee that "the constitutionality of an all male draft" was "currently in litigation"; that the "legislative history" of the 1948 Act "has been totally unhelpful to the government in defending its constitutionality" thus far because it was "replete[] only with the kind of sexual stereotypes . . . that the Court has subsequently held will not support the constitutionality" of a sex-based classification; and that if Congress chose to reject President Carter's proposal, it "should speak out clearly and formulate the kind of record" that

"will be helpful rather than hurtful in the litigation." Joint Appendix at 218, 220–21, *Rostker*, 453 U.S. 57 (No. 80-251), quoted in Brief of Amici Curiae Congressman Robert W. Kastenmeier, et al. at 20 n.14, *Rostker*, 453 U.S. 57 (No. 80-251), 1981 WL 390368, at *20 n.14.

Second, while the Court has rejected certain proffered bases for sex-based classifications in the civilian context, *see, e.g.*, *Craig v. Boren*, 429 U.S. 190, 199–204 (1976), it has deferred to the political branches on military matters even in the face of significant evidence to the contrary, including evidence from former military officials. In *Goldman v. Weinberger*, for example, the Court rejected a free-exercise challenge to the Air Force's prohibition of a Jewish officer from wearing a yarmulke while working as a psychologist in an Air Force base hospital, even though that claim would have triggered strict scrutiny at the time had it been raised in the civilian context. 475 U.S. 503, 510 (1986). Likewise, the Court in *Rostker* declined to overrule the judgment of the political branches in the military context, even in the face of disagreement within those branches. Specifically, President Carter had provided "testimony of members of the Executive Branch and the military in support of [his] decision" to urge Congress to allow the registration of women for the draft. 453 U.S. at 79. Relying on this testimony, the lower court held that Congress's refusal to do so was unconstitutional because "'military opinion, backed by extensive study, is that the availability of women registrants would materially increase flexibility, not hamper it.'" *Id.* at 63 (citation omitted). But the Supreme Court reversed, noting that the lower court had "palpably exceeded its authority" in "relying on this testimony," as Congress had "rejected it in the permissible exercise of its constitutional responsibility." *Id.* at 81–82.

Third, whereas concerns about "administrative convenience" ordinarily cannot be used to survive intermediate scrutiny, *e.g.*, *Califano v. Goldfarb*, 430 U.S. 199, 205 (1977), they play a significant role in cases involving military judgments. In *Rostker*, Congress "did not consider it worth the added burdens of including women in draft and registration plans," as "training would be needlessly burdened by women recruits who could not be used in combat," and additional "administrative

problems such as housing and different treatment with regard to dependency, hardship and physical standards would also exist." 453 U.S. at 81 (quotation omitted). The Court reasoned that it was not its place "to dismiss such problems as insignificant in the context of military preparedness." *Id.*

Fourth, the political branches enjoy significant latitude to choose "among alternatives" in furthering military interests. *Id.* at 71–72 (majority opinion); *see also Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 67 (2006). Again, in *Rostker*, President Carter and military leadership urged a sex-neutral alternative to draft registration that they believed "would materially increase [military] flexibility, not hamper it"'—namely, requiring both sexes to register—but Congress rejected that proposal in favor of retaining its sex-based approach. 453 U.S. at 63, 70 (citation omitted). Invoking the "deference due" Congress in this area, the Court refused "to declare unconstitutional [that] studied choice of one alternative in preference to another." *Id.* at 71–72. All of this indicates an application of a rational basis type review rather than intermediate scrutiny. *See Nguyen v. INS*, 533 U.S. 53, 77–78 (2001) (O'Connor, J., dissenting) ("[T]hat other means are better suited to the achievement of governmental ends … is of no moment under rational basis review," whereas "under heightened scrutiny, the availability of sex-neutral alternatives to a sex-based classification is often highly probative").

Finally, arguable inconsistencies resulting from line-drawing have not been enough to render military decisions invalid. In *Goldman*, the Court acknowledged that the Air Force had an "exception . . . for headgear worn during indoor religious ceremonies" and gave commanders "discretion" to allow "visible religious headgear . . . in designated living quarters." 475 U.S. at 509. Service members could also "wear up to three rings and one identification bracelet," even if those items "associate[d] the wearer with a denominational school or a religious or secular fraternal organization" and thereby served as "emblems of religious, social, and ethnic identity." *Id.* at 518 (Brennan, J., dissenting). Yet the Court deferred to the Air Force's judgment that creating an exception for a psychologist who

wanted to wear religious headgear in a hospital on base "would detract from the uniformity sought by [its] dress regulations." *Id.* at 510 (majority opinion). Had this case occurred in the civilian context and strict scrutiny been applied, it is doubtful that the challenged decision would have been sustained.

Given the Court's substantial departure from core aspects of intermediate and even strict scrutiny in cases involving military deference, the most appropriate description of the applicable standard is rational basis review. But at a minimum, even if the Court prefers to label the standard a peculiar form of "intermediate scrutiny," Op. at 43–44, its substantive analysis of the new policy should track the Supreme Court's highly deferential approach in this area. *See Rostker*, 453 U.S. at 69–70 (disavowing the utility of traditional scrutiny labels in cases involving military deference). Put differently, regardless of the standard of review the Court employs, the basic elements of traditional intermediate scrutiny should not apply.

B. The Department's New Policy Survives Highly Deferential Scrutiny.

As DoD has explained, allowing service by individuals with a history or diagnosis of gender dysphoria, or who require or have already undertaken a course to change their gender, would create unacceptable risks to military readiness, undermine good order and discipline as well as unit cohesion, and impose disproportionate costs. Mattis Mem. 2. There should be no dispute that avoiding those harms is at least an important interest. Indeed, courts must "'give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest,'" *Winter*, 555 U.S. at 24, and here, DoD has concluded that minimizing these risks is "absolutely essential to military effectiveness," Mattis Mem. 2; *accord* Report 41. Thus, the only issue is whether this Court should defer to the military's independent, professional judgment that the new policy is "necessary" to effectuate that critical interest. *E.g.*, Report 32. That should not be a close question.

1. Military Readiness

In DoD's professional military judgment, allowing individuals who require or have undergone

gender transition to serve poses at least two significant risks to military readiness. First, in light of "evidence that rates of psychiatric hospitalization and suicide behavior remain higher for persons with gender dysphoria, even after treatment"—including sex-reassignment surgery—as compared to others, as well as the "considerable scientific uncertainty" over whether gender transition "treatments fully remedy … the mental health problems associated with gender dysphoria," DoD found that "[t]he persistence of these problems is a risk for readiness." Report 32. In the military's view, it was "imperative" that it "proceed cautiously" in adopting "accession and retention standards for persons with a diagnosis or history of gender dysphoria" in light of "the scientific uncertainty surrounding the efficacy of transition-related treatments." *Id.* at 27.

This risk-based assessment—grounded in an extensive review of evidence, including materials unavailable at the time the Carter policy was adopted—is a classic military judgment entitled to deference. *See id.* at 19–27. For example, the Centers for Medicare and Medicaid Services issued a study in August 2016, over a month after the Carter policy was announced, concluding that there was "'not enough high quality evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria.'" *Id.* at 24 (quoting AR1092 (CMS Report 65)); *see* AR1028–1177 (CMS Report). Although this study was primarily concerned with Medicare beneficiaries, it "conducted a comprehensive review" of "the universe of literature regarding sex reassignment surgery," which consisted of "over 500 articles, studies, and reports" addressing a more general population. Report 24; *see* AR1034–36 (CMS Report 7–9). Of these materials, only "33 studies" were "sufficiently rigorous to merit further review," and "[o]verall, the quality and strength of evidence" in even these studies "were low." Report 24; *see* AR1089 (CMS Report 62). In fact, there were only "six studies" that provided "'useful information'" on the efficacy of sex reassignment surgery as a general matter, and "'the four best designed and conducted studies . . . did not demonstrate clinically significant changes or differences in psychometric test results'" following the procedure.

Report 24 (quoting AR1089 (CMS Report 62)). And "one of the most robust" of those six, a Swedish "'nationwide population-based, long-term follow-up'" of individuals who had undergone sex-reassignment surgery, *id.* at 25 (quoting AR503 (Swedish Study 6))—which the study noted was "'a unique intervention not only in psychiatry but in all of medicine,'" *id.* at 22 (quoting AR498–505 (Swedish Study 1–8))—"found increased mortality [due to suicide and cardiovascular disease] and psychiatric hospitalization for patients who had undergone sex reassignment surgery as compared to a healthy control group," *id.* at 25 (citing AR503–04 (Swedish Study 6–7)). According to that study, "'post[-]surgical transsexuals are a risk group that need long-term psychiatric and somatic follow-up,'" and "'[e]ven though surgery and hormonal therapy alleviates gender dysphoria, it is apparently not sufficient to remedy the high rates of morbidity and mortality found among transsexual persons.'" *Id.* at 26 (quoting AR504 (Swedish Study 7)).

In DoD's judgment, the need to "proceed cautiously" in this area is particularly compelling given the uniquely stressful nature of a military environment. *Id.* at 27. Although none of the available studies "account for the added stress of military life, deployments, and combat," *id.* at 24, preliminary data show that service members with gender dysphoria are "eight times more likely to attempt suicide" and "nine times more likely to have mental health encounters" than service members as a whole, *id.* at 21–22; *see* AR3000 (Data Extracts opening slide); AR3017–19 (Health Data slides 7–9). Thus, in Secretary Mattis's judgment, DoD should not risk "compounding the significant challenges inherent in treating gender dysphoria with the unique, highly stressful circumstances of military training and combat operations." Mattis Mem. 2.

In short, DoD concluded that the military risks stemming from the uncertain efficacy of a particular medical treatment for a particular medical condition outweighed the possible benefits of allowing individuals with that condition to serve generally. That is the type of analysis DoD must perform with respect to all medical accession or retention standards, and the cautious approach it took

here is hardly out of the norm. *See* Report 3 ("Given the life-and-death consequences of warfare, [DoD] has historically taken a conservative and cautious approach in setting the mental and physical standards for the accession and retention of Service members."). Indeed, even the Carter policy implicitly acknowledged that gender dysphoria or gender transition could impede military readiness by requiring applicants with a history of that condition and/or treatment to demonstrate that they had been stable or had avoided complications for an 18-month period. *See* AR323–24 (DTM 16-005 at Attachment ¶ 2). Given that even administrative convenience concerns cannot be dismissed in this context, *see Rostker*, 453 U.S. at 81, the military's assessment of the tolerable level of risk from a medical condition and its treatment should not be second-guessed.

Second, even if it were guaranteed that the risks associated with gender dysphoria could be fully addressed by gender transition, "most persons requiring transition-related treatment could be non-deployable for a potentially significant amount of time." Report 35; *see* AR3008 (Data Extract slides 8). In the military's view, that limitation on deployability constituted a separate "readiness risk." Report 33. After documenting the restrictions on deployability associated with cross-sex hormone therapy and sex-reassignment surgery—including reports by some commanders that transitioning service members under their authority would be non-deployable for two to two-and-half-years—DoD made a military assessment that these burdens on military readiness were unacceptable. *Id.* at 33–35; *see* AR164, 181 (Rand Report 59, 80); AR316 (*Military Medicine* article 1184); AR463–97 (Endocrine Society Guidelines 3869–3903); AR655–79 (University of California, San Francisco Guidelines 129–53); AR2823 (Panel Meeting Minutes 3); AR2924–27 (Medical and Surgical Treatment for Gender Dysphoria slides 14–17); AR2982–85 (Time to Return to Full Duty slides); AR2989, 2991–93 (Admin Data Presented During Panel Meetings, version 2, at 4, 6–8); AR3008 (Data Extract slides 8).

Deployability limitations harm units as a whole. As DoD explained, any "'increase in the number of non-deployable military personnel places undue risk and personal burden'" on those who

are "'qualified and eligible to deploy.'" Report 35 (quoting AR10 (DoD Fiscal Year 2016 Report 10)). Additionally, service members who are deployed "to backfill or compensate for non-deployable" ones may face risks to family resiliency. *Id.* And when those individuals with limitations deploy, but fail to "'meet medical deployment fitness standards'" in the field, they may "'be sent home'" and leave "'the deployed unit with less manpower.'" *Id.* at 34 (quoting AR2506–07 (Institute for Defense Analyses Report 60–61)). Each of these situations poses a "significant challenge for unit readiness." *Id.* at 35.

These are not new concerns. Secretary Carter acknowledged that "[g]ender transition while serving in the military presents unique challenges associated with addressing the needs of the Service member in a manner consistent with military mission and readiness needs." AR324 (DTM 16-005 at Attachment ¶ 3). So did the RAND Report, which concluded that the relevant limitations on deployability would "have a negative impact on readiness." Report 34–35; *see* AR145–49 (RAND Report 39–43). Although RAND dismissed this harm as "minimal" due to its estimation of the "exceedingly small number of transgender Service members who would seek transition-related treatment," Report 34–35 (citing AR 148 (RAND Report 42)), in DoD's judgment, that was the wrong question: "The issue is not whether the military can absorb periods of non-deployability in a small population," but "whether an individual with a particular condition can meet the standards for military duty and, if not, whether the condition can be remedied through treatment that renders the person non-deployable for as little time as possible." *Id.* at 35. After all, "by RAND's standard, the readiness impact of many medical conditions that the Department has determined to be disqualifying—from bipolar disorder to schizophrenia—would be minimal because they, too, exist only in relatively small numbers." *Id.* (citing AR2620–24 (National Institute of Mental Health: "Bipolar Disorder")); AR2625–27 (National Institute of Mental Health: "Schizophrenia")). Put differently, RAND "failed to analyze the impact" on "unit readiness" at "the micro level" by taking a "macro" view of the entire military. Report at 14. Given that even Congress may reject the military's judgment based on

legislative concerns about deployability, then military leadership between administrations should be able to differ over what limitations on deployability are acceptable. *See Rostker*, 453 U.S. at 82 (noting concern that absorbing female inductees into noncombat positions would impede deployability of combat-ready soldiers); *cf. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (even in the civilian context, the government must review "the wisdom of its policy on a continuing basis, for example, in response to . . . a change in administrations") (internal citation omitted).

In fact, this is what Secretary Carter contemplated when he issued the accessions standards described in DTM 16-005. In conjunction with the issuance of the new accessions standards for individuals with a history of gender dysphoria or medical treatment related to gender dysphoria, Secretary Carter directed that those standards would be reviewed "no later than 24 months from the effective date of this memorandum [June 30, 2016] and may be maintained or changed, as appropriate, to reflect applicable medical standards and clinical practice guidelines, ensure consistency with military readiness, and promote effectiveness in the recruiting and retention policies and procedures of the Armed Forces." AR324 (DTM 16-005 at Attachment ¶ 2). DoD conducted a review of these standards, as originally directed by Secretary Carter, in the timeframe he originally anticipated, using medical data from service members diagnosed with gender dysphoria that was unavailable to RAND or Secretary Carter in 2016. Based on a review of that data, DoD concluded that RAND underestimated the limitations on deployability associated with gender transition.[10] Report 31. Given that RAND's conclusions were predictive, based on available evidence from a small sample size from foreign militaries and the civilian population, *see* AR145–53 (RAND Report Chapter 6), it is reasonable

[10] For example, RAND estimated that "as an upper bound," a total of 140 service members would seek "transition-related hormone therapy." AR102 (RAND Report xi). In reality, of the 424 approved treatment plans that the Panel had available for study, 388 of those—over 91%—include such treatment. Report 31.

for the current panel to reach a different conclusion when it reviewed actual medical data of a much greater sample size from the U.S. military population.[11]

2. Order, Discipline, Leadership, and Unit Cohesion

The Department similarly disagreed with RAND's analysis of "the intangible ingredients of military effectiveness"—namely, "leadership, training, good order and discipline, and unit cohesion." Report 3. While the RAND Report agreed that "unit cohesion" was "a critical input for unit readiness" and a "key concern" in any analysis of transgender service, it concluded that accommodating gender transition would likely have "no significant effect" based on the experiences of four foreign militaries that had "fairly low numbers of openly serving transgender personnel." AR150–51 (RAND Report 44–45). In DoD's judgment, however, by adopting this approach, RAND failed to "examine the potential impact on unit readiness, perceptions of fairness and equity, personnel safety, and reasonable expectations of privacy"—"all of which are critical to unit cohesion"—"at the unit and sub-unit levels." Report 14. Aside from the potential harms to unit cohesion associated with limits on deployability, accommodating gender transition would undermine the objectives served by the military's sex-based standards—"good order, discipline, steady leadership, unit cohesion, and ultimately military effectiveness and lethality"—in several respects. *Id.* at 28.

First, DoD concluded that any accommodation policy that does not require full sex-reassignment surgery threatens to "erode reasonable expectations of privacy that are important in maintaining unit cohesion, as well as good order and discipline." *Id.* at 37. As DoD explained, "[g]iven the unique nature of military service," service members must frequently "live in extremely close proximity to one another when sleeping, undressing, showering, and using the bathroom." *Id.* To

[11] RAND itself acknowledged this limitation in its findings. RAND notes several times in its report that the lack of data on the transgender population serving in the military was a "critical limitation" and as a result states that its findings should be "interpreted with caution." *See, e.g.*, AR111–12, 145 (RAND Report 3–4, 39).

protect its service members' reasonable expectations of privacy, the Department "has long maintained separate berthing, bathroom, and shower facilities for men and women while in garrison." *Id.* This is hardly a suspect practice. The Supreme Court has acknowledged that it is "necessary to afford members of each sex privacy from the other sex in living arrangements," *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996), and "[i]n the context of recruit training, this separation is even mandated by Congress," Report 37; *see* 10 U.S.C. §§ 4319, 4320, 6931, 6932, 9319, 9320.

Accommodating gender transition, DoD reasoned, at least with respect to those individuals who have not undergone a complete sex reassignment, would "undermine" these efforts to honor service members' "reasonable expectations of privacy." Report 36. Allowing transgender service members "who have developed, even if only partially, the anatomy of their identified gender" to use the facilities of either their identified gender or biological sex "would invade the expectations of privacy" of the non-transgender service members who share those quarters. *Id.* at 37; *see* AR2823 (Panel Meeting Minutes).

Absent the creation of separate facilities for transgender service members, which could be "logistically impracticable for the Department," not to mention unacceptable to transgender service members, the military would face irreconcilable privacy demands. Report 37. For example, the Panel of Experts received a report from one commander who faced dueling equal opportunity complaints under the Carter policy over allowing a transgender service member who identified as a female but had male genitalia to use the female shower facilities—one from the female service members in the unit and one from the transgender service member. *Id.*; *see* AR2823 (Panel Meeting Minutes). And even DoD's handbook for implementing the Carter policy described the "unique leadership challenges" created by that policy with respect to expectations of privacy. Report 38; AR2872 (DoD Handbook 13). These concerns are consistent with reports from commanding officers in the Canadian military that "'they would be called on to balance competing requirements'" by "'meeting

[a] trans individual's expectations … while avoiding creating conditions that place extra burdens on others or undermined the overall team effectiveness.'" Report 40 (quoting AR2810 ("Gender Identity in the Canadian Forces" article 8).

In DoD's judgment, such collisions of privacy demands "are a direct threat to unit cohesion and will inevitably result in greater leadership challenges without clear solutions." *Id.* at 37. Accommodating gender transition would mean the "routine execution of daily activities" could be a recurring source of "discord in the unit" requiring commanders "to devote time and resources to resolve issues not present outside of military service." *Id.* at 38. And any delayed or flawed solution to these conflicts by commanders "can degrade an otherwise highly functioning team," as any "appearance of unsteady or seemingly unresponsive leadership to Service member concerns erodes the trust that is essential to unit cohesion and good order and discipline." *Id.*

In addition, accommodating gender transition, at least in the context of basic recruiting, would be in tension with other federal statutory law. As DoD observed, Congress has "required by statute that the sleeping and latrine areas provided for 'male' recruits be physically separated from the sleeping and latrine areas provided for 'female' recruits during basic training and that access by drill sergeants and training personnel 'after the end of the training day' be limited to persons of the 'same sex as the recruits' to ensure 'after-hours privacy for recruits during basic training.'" *Id.* at 29 (citing 10 U.S.C. §§ 4319, 4320 (Army); *id.* §§ 6931, 6932 (Navy); *id.* §§ 9319, 9320 (Air Force)). Accommodating the gender transition of recruits, drill sergeants, or training personnel in the context of basic recruit training places DoD in jeopardy of contravening those statutory mandates. The new policy advances the military's interest in avoiding that legal risk.

Second, DoD concluded that accommodating gender transition creates safety risks for, and perceptions of unfairness among, service members by applying "different biologically-based standards to persons of the same biological sex based on gender identity, which is irrelevant to standards

grounded in physical biology." *Id.* at 36. For example, "pitting biological females against biological males who identify as female, and vice versa," in "physically violent training and competition" could pose "a serious safety risk." *Id.* Moreover, both male and female service members who are not transgender would likely be frustrated by a "biological male who identifies as female" but "remain[s] a biological male in every respect" and yet is "governed by female standards" in "training and athletic competition," which tend to be less exacting than male training and athletic standards. *Id.*; *see, e.g.*, AR1674 (U.S. Military Academy Physical Program Whitebook 13) (setting different times for men and women to meet on the Indoor Obstacle Course Test).

Again, these are legitimate military concerns, as both Congress and the Supreme Court have recognized that it is "necessary" to "adjust aspects of the physical training programs" for service members to address biological differences between the sexes. *Virginia*, 518 U.S. at 550 n.19 (citing statute requiring standards for women admitted to the service academies to "be the same as those . . . for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals"). Especially given that "physical competition[] is central to the military life and indispensable to the training and preparation of warriors," Report 36; *see also* AR2628 (General Douglas MacAuthur quotation), DoD's concerns about the risks in this area are reasonable and entitled to deference.

Third, DoD was concerned that exempting transgender service members from uniform and grooming standards associated with their biological sex would create additional friction in the ranks. For example, "allowing a biological male to adhere to female uniform and grooming standards" would "create[] unfairness for other males who would also like to be exempted from male uniform and grooming standards as a means of expressing their own sense of identity." Report 31. This is likely to be particularly true when non-transgender service members are barred from expressing core aspects of their identity. And in the military's judgment, policies "creating unfairness, or perceptions thereof,"

threaten to "adversely affect unit cohesion and good order and discipline." *Id.* at 36.

Given these concerns, DoD concluded that accommodating gender transition "risks unnecessarily adding to the challenges faced by leaders at all levels, potentially fraying unit cohesion, and threatening good order and discipline." *Id.* at 40. And because of "the vital interests at stake—the survivability of Service members, including transgender persons, in combat and the military effectiveness and lethality of our forces"—DoD decided to take a cautious approach to accommodating gender transition. *Id.* at 40–41.

That careful military judgment merits significant deference. "Not only are courts ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have, but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy." *Goldman*, 475 U.S. at 507–08 (citation omitted); *see also Thomasson*, 80 F.3d at 926 (in finding that courts owe deference to military decisions, stating that "[j]udicial interference with the subordinate decisions of military authorities frustrates the national security goals that the democratic branches have sought to achieve"). That is particularly true given that military assessments regarding leadership, training, good order and discipline, and unit cohesion "cannot be easily quantified," but instead are based on "necessarily subjective" military judgments "acquired from hard-earned experience leading Service members in peace and war." Report 3; *see also Thomasson*, 80 F.3d at 926 (stating that "[t]he need for deference also derives from the military's experience with the particular exigencies of military life," among which "is the attainment of unit cohesion").

Accordingly, the Supreme Court has repeatedly deferred to similar judgments. One of its bases for upholding the sex-based statute in *Rostker*, for instance, was that it could not dismiss concerns about "problems such as housing and different treatment with regard to . . . physical standards" in the "context of military preparedness." 453 U.S. at 81 (internal quotation omitted).

Likewise, in *Goldman*, the Court deferred to the Air Force's view that "the wearing of religious apparel such as a yarmulke … would detract from the uniformity sought by the dress regulations." 475 U.S. at 509–10. And the Court did so even though others, including current and former military officials, disagreed. *See id.* at 509. There is no basis for treating the military's judgments here any differently.

3. Disproportionate Costs

Finally, DoD explained that under its experience with the Carter policy, accommodating gender transition was "proving to be disproportionately costly on a per capita basis." Report 41. Specifically, since the Carter policy's implementation, the medical costs for service members with gender dysphoria have "increased nearly three times" compared to others. *Id.*; AR2962 (Additional Administrative Data slides 19). And that is "despite the low number of costly sex reassignment surgeries that have been performed so far"—"only 34 non-genital sex reassignment surgeries and one genital surgery"—which is only likely to increase as more service members with gender dysphoria avail themselves of these procedures. Report 41; *see* AR2823 (Panel Meeting Minutes 3); AR2884, 2895 (Health Data slides 2, 13); AR3000, 3006 (Data Extracts opening slide & slide 6). Notably, "77% of the 424 Service member treatment plans available for review"—*i.e.*, approximately 327 plans—"include requests for transition-related surgery" of some kind. Report 41; *see* AR2990 (Admin Data Presented during Panel Meetings, version 2, at 5); AR3000, 3005 (Data Extracts opening slide & slide 5); AR3025 (Health Data slide 15).

The Department's Report adds that several commanders also reported that providing transition-related treatment for service members in their units "had a negative budgetary impact because they had to use operations and maintenance funds to pay for the Service members' extensive travel throughout the United States to obtain specialized medical care." Report 41; *see* AR2823 (Panel Meeting Minutes); *see also* AR317 (*Military Medicine* article 1185). This is not surprising given that "'gender transition requires frequent evaluations'" by both a mental health professional and an

endocrinologist, and most military treatment facilities "'lack one or both of these specialty services.'" Report 41 n.164 (quoting AR317 (*Military Medicine* article 1185)). Service members therefore "'may have significant commutes to reach their required specialty care,'" and those "'stationed in more remote locations face even greater challenges of gaining access to military or civilian specialists within a reasonable distance from their duty stations.'" *Id.* (quoting AR317 (*Military Medicine* article 1185)).

In light of the military's general interest in maximizing efficiency through minimizing costs, DoD concluded that its disproportionate expenditures on accommodating gender transition could be better devoted elsewhere. *See id.* at 3, 41. Again, such a conclusion is owed deference. Even when the alleged constitutional rights of service members are involved, judgments by the political branches as to whether a benefit "consumes the resources of the military to a degree . . . beyond what is warranted" are entitled to significant respect. *Middendorf v. Henry*, 425 U.S. 25, 45 (1976) (no due process right to counsel at summary courts-martial).

* * *

In sum, DoD had significant concerns that "accommodating gender transition could impair unit readiness; undermine unit cohesion, as well as good order and discipline, by blurring the clear lines that demarcate male and female standards and policies where they exist; and lead to disproportionate costs." Report 5. It therefore made a "military judgment" that no longer providing a general accommodation for gender transition was "a necessary departure from the Carter policy." *Id.* at 32. In doing so, it was "well aware that military leadership from the prior administration, along with RAND, reached a different judgment on these issues." *Id.* at 44. But DoD's latest review of the issue had revealed that "the realities associated with service by transgender individuals are more complicated than the prior administration or RAND had assumed." *Id.* In fact, even RAND had "concluded that allowing gender transition would impede readiness, limit deployability, and burden the military with additional costs," but dismissed "such harms [as] negligible in light of the small size

of the transgender population." *Id.* But given "the various sources of uncertainty in this area, and informed by the data collected since the Carter policy took effect," DoD was "not convinced that these risks could be responsibly dismissed or that even negligible harms" (at the macro level) "should be incurred given [its] grave responsibility." *Id.* It therefore "weighed the risks associated with maintaining the Carter policy against the costs of adopting a new policy that was less risk-favoring," and concluded that "the various balances struck" by the new policy "provide the best solution currently available." *Id.* That careful cost-benefit analysis by DoD easily survives the highly deferential form of review applicable here.

C. The New Policy Does Not Violate Due Process.

Plaintiffs' due process claim fails for essentially the same reasons as their equal protection claim, but for additional reasons as well.

First, Plaintiffs claim the 2017 Memorandum and the new policy is "arbitrary and inconsistent with available data, serves no legitimate government interest, and therefore violates Plaintiffs' rights to substantive due process." Second Am. Compl. ¶ 233. But that is not the case for the reasons explained above—viz., that the new policy is constitutional under the highly deferential form of review applied to military policies. *See George Washington Univ. v. Dist. of Columbia*, 391 F. Supp. 2d 109, 114 (D.D.C. 2005) (noting that the rational basis tests under equal protection and due process "are almost indistinguishable").

Second, Plaintiffs claim that their "reli[ance]" on the "Open Service Directive" created a protected interest in various "opportunities and benefits," such as an opportunity to serve in the military, receive medical care, and earn promotions, that Defendants are threatening to take away. Second Am. Compl. ¶¶ 234, 239. But that fails for a number of reasons.

To begin, any alleged reliance interest is already protected by the new policy's categorical reliance exception for service members who took advantage of the Carter policy. *See* Report 4. This

includes the six Plaintiffs in this case who are currently in the military. *See* Second Am. Compl. ¶¶ 21, 30, 39, 45, 53, 60. As set forth above, these service members will continue to serve in the military in their preferred gender, receive medically necessary care, and be considered for promotions and commissions without regard to their transgender status. Mattis Mem. 2; *see also* Report 43 ("The reasonable expectation of these Service members that the Department would honor their service on the terms that then existed cannot be dismissed.").

Moreover, Plaintiffs' Second Amended Complaint fails to indicate that Plaintiffs have been deprived of a cognizable liberty or property interest. *See Abdelfattah v. DHS*, 787 F.3d 524, 540 (D.C. Cir. 2015) (concluding that plaintiff's due process claim failed because he "has not alleged facts suggesting he has been deprived—arbitrarily or otherwise—of a cognizable liberty or property interest."); *George Washington Univ. v. D.C.*, 318 F.3d 203, 206 (D.C. Cir. 2003), *as amended* (Feb. 11, 2003). It is well established that "there is no protected property interest in continued military service." *Spadone v. McHugh*, 842 F. Supp. 2d 295, 304 (D.D.C. 2012) (citation omitted); *Guerra v. Scruggs*, 942 F.2d 270, 278 (4th Cir. 1991) (finding no property interest in continued military service).[12] Also, "there is no right to enlist" in the military. *Lindenau v. Alexander*, 663 F.2d 68, 74 (10th Cir. 1981); *Holdiness v. Stroud*, 808 F.2d 417, 424 (5th Cir. 1987) (finding that the plaintiff "did not have a property or liberty interest protected by the due process clause in continued military service in the National Guard, nor did he have a constitutionally protected right to re-enlist"); *Mangino v. Dep't of Army*, 818 F. Supp. 1432, 1435 (D. Kan. 1993), *aff'd*, 17 F.3d 1437 (10th Cir. 1994) (stating that because "it is clearly established law that there is no right to enlist or reenlist in the armed forces, plaintiff cannot state a claim based upon some property interest in being employed by the Army"). Thus, no Plaintiff can maintain a due

[12] *See also Hanson v. Wyatt*, 552 F.3d 1148, 1158 (10th Cir. 2008); *Christoffersen v. Wash. State Air Nat'l Guard*, 855 F.2d 1437, 1443 (9th Cir. 1988); *MacFarlane v. Grasso,* 696 F.2d 217, 222 (2d Cir. 1982); *Woodard v. Marsh*, 658 F.2d 989 (5th Cir. 1981); *Ampleman v. Schlesinger*, 534 F.2d 825 (8th Cir. 1976); *Pauls v. Sec'y of the Air Force*, 457 F.2d 294, 297 (1st Cir. 1972).

process claim based on the alleged uncertainty as to his or her future employment status with the military. *See, e.g.*, Second Am. Compl. ¶¶ 185–92, 202–04, 234, 239.

Finally, even if a fundamental liberty interest were cognizable in the military context, Plaintiffs have failed to indicate how Defendants have intruded upon such interest. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). As explained above, Plaintiffs have not been discharged from the military, denied the right to enlist or reenlist, or refused transition-related health care. And as discussed, there is no fundamental right to serve in the military, much less receive taxpayer-funded sex-reassignment surgery or cross-sex hormone therapy. Therefore, Plaintiffs' substantive due process claim should be dismissed.

D. The New Policy Addresses This Court's Prior Reasoning.

The Department's new policy also addresses all of the concerns that this Court held justified enjoining the enforcement of its understanding of the directives in the 2017 Memorandum. None of the reasons the Court gave for either eschewing a deferential form of review or for deeming those directives to be likely unconstitutional should apply to this new policy.

In reviewing the 2017 Memorandum, this Court declined to adopt a deferential standard of scrutiny due to its conclusion that the President's directives "did not emerge from any policy review . . . [or] identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest." Op. 43. The Court also found that the directives were "unlikely to survive rational review" owing to the "lack of any justification for the abrupt policy change, combined with the discriminatory impact to a group of our military service members." *Id.* at 44. Defendants respectfully disagree with those conclusions as they were applied to the 2017 actions, but, in any event, neither charge can be leveled against the military's new policy. The Department received extensive evidence on the issue, and, as it had done under former Secretary Carter, chose a policy option that would best promote military readiness and lethality, provide for unit

cohesion, and not impose disproportionate costs. *See generally* Report. And that choice rested on the considered "professional judgment" of multiple military experts, many with combat experience, including the Secretary of Defense himself. *See* Mattis Mem. 2–3; Report 18, 41, 44. Accordingly, there is no basis for declining to give DoD's decision appropriate deference.

In addition, far from being abruptly announced, the new policy was accompanied by the "methodical and systematic review by military stakeholders qualified to understand the ramifications of policy changes" that this Court expected. *See* Op. 50. The Department's independent reexamination of the Carter policy—begun at the recommendation of the Services, without any direction from the President, and well before his July 26, 2017 statement on Twitter—was an extensive deliberative process lasting over seven months and involving many of DoD's high-ranking officials as well as experts in a variety of subjects. *See* Mattis Mem. 1–2; Report 17–18. The Department considered evidence that both supported and cut against its approach, including the materials underlying, and the military's experience with, the Carter policy itself, and thoroughly explained why it was departing from that policy to some extent. *See, e.g.*, Report 18, 44. In short, although some may deeply disagree with DoD's ultimate conclusions, they cannot fairly contest that those good-faith judgments were "'driven by genuine concerns regarding military efficacy.'" Op. 43 (quoting *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 213 (D.D.C. 2017)).

E. The New Policy is Not the Final Version of a "Transgender Service Member Ban."

Rather than engage with the substance of the new policy, Plaintiffs dismiss it as the implementation of the "transgender service member ban" set forth in the 2017 Memorandum presumably in an attempt to argue that the military's judgment merits no deference. Second Am. Compl. ¶¶ 8, 13, 158–64, 176–80. In doing so, they echo the *Karnoski* Court, which dismissed DoD's policy as simply a more detailed version of "the 'Ban'" announced by the President last year. 2018 WL 1784464, at *1 n.1. Whatever rhetorical appeal this strategy may have, it does not square with the

facts or the law.

On the facts, one cannot fairly maintain that DoD's new policy, with its various exceptions permitting some transgender individuals to serve, is the same as, or even implements, the 2017 Memorandum, especially as that document was understood by this Court and Plaintiffs (at least before their latest complaint). Both this Court and Plaintiffs understood that Memorandum as "prohibit[ing] transgender individuals from entering or seeking a commission in the military solely on the basis of their transgender status." Op. 31; *see, e.g.*, Am. Compl. ¶¶ 40, 144–46. Likewise, this Court and Plaintiffs understood that those service members who relied on the Carter policy will be involuntarily "discharged on the basis of their transgender status." Am. Compl. ¶ 8; *see, e.g.*, Op. 30 (stating that the Retention Directive "subjects all of the individual Plaintiffs to the threat of discharge"). By contrast, the new policy, like the Carter policy before it, limits the service of only some transgender individuals on the basis of gender dysphoria, and permits those with gender dysphoria who relied on the Carter policy to continue to serve.

Of course, the 2017 Memorandum did require the military to maintain the pre-Carter accession policy while it conducted further study of the issue, but that policy differs significantly from the new one proposed by DoD. While the pre-Carter policy generally disqualified individuals on the basis of transgender status, DoD's new policy, like the Carter policy, turns on gender dysphoria (and the accompanying treatment of gender transition), a medical condition affecting only a subset of transgender individuals. Report 10, 12–13, 20–21. In addition, the new policy categorically allows some transgender individuals to continue to serve in their preferred gender, an option that was generally unavailable in the pre-Carter era. Indeed, Secretary Mattis recommended 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 2017 Memorandum, there would have been no need for him to have made that recommendation or for the President to have

revoked that Memorandum. *Cf.* Op. 39 ("The only uncertainties are how, not if, the policy will be implemented and whether, in some future context, the President might be persuaded to change his mind and terminate the policies he is now putting into effect.").

Rather than address the differences between the pre-Carter policy and DoD's new policy, the *Karnoski* Court invoked two September 2017 memoranda from Secretary Mattis confirming that (1) DoD will "carry out the President's policy and directives"; (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; and (4) the 2017 Memorandum "directs DoD to maintain the policy currently in effect, which generally prohibit[s] accession of transgender individuals into the military services." Mem. from Secretary Mattis, "Interim Guidance" (Sept. 14, 2017), Dkt. 60-5; AR330–31 (Terms of Reference 1–2); *see Karnoski*, 2018 WL 1784464, at *2, 6. None of those statements account for the significant difference between DoD's new policy and the pre-Carter framework. Rather, they reflect the fact, as Defendants consistently have explained, that the 2017 Memorandum directed the military to conduct "further study" and maintain the pre-Carter accession policy while doing so. AR327–28 (2017 Memorandum §§ 1(a), 2(a)). As Secretary Mattis explained in recommending the new policy to the President, the 2017 Memorandum had "made clear that we could advise you 'at any time, in writing, that a change to [the pre-Carter] policy is warranted,'" and that is exactly what he did. Mattis Mem. 1. In short, one could say that the military "implemented" the 2017 Memorandum by studying the issue and advising the President that a new and different policy was appropriate, but nothing about that renders the new policy unlawful.

Nor do the efforts by the *Karnoski* Court to cast DoD's new policy as a "'categorical' prohibition on service by openly transgender people" withstand scrutiny. 2018 WL 1784464, at *6. To start, that court never reconciled its claim that the new policy is "categorical" with the existence of the reliance "exception," other than to dismiss it as "narrow" and "severable." *Id.* at *6 n.6. A policy

with even a narrow "exception" is by definition not a "categorical" one, and in any event this exception is hardly insignificant. As this Court's earlier opinion illustrates, one of the key features of the litigation over the 2017 Memorandum was the concern that those service members who had relied on the Carter policy would be discharged. *See, e.g.*, Op. 30–31 (discussing the possibility that Plaintiffs would be involuntarily discharged from the military based on their transgender status). Unless that concern was itself a trivial consideration, an exception addressing it cannot be characterized as a minor one.

The *Karnoski* Court's only explanation for why the new policy was a categorical ban was that it would disqualify "transgender people—including those who have neither transitioned nor been diagnosed with gender dysphoria—from serving, unless they are 'willing and able to adhere to all standards associated with their biological sex,'" and thereby "force [them] to suppress the very characteristic that defines them as transgender in the first place." 2018 WL 1784464, at *6. But the same could be said about the Carter policy the *Karnoski* Court ordered the military to maintain, as that policy likewise requires transgender individuals who have not "been diagnosed with gender dysphoria . . . to adhere to all standards associated with their biological sex." *Id.*; *see* Report 15; AR323 (DTM 16-005 at Attachment ¶¶ 1–2).

On the law, even if this Court believes that no daylight exists between the policy set forth in the 2017 Memorandum and the one recommended by DoD, it should still defer to the military's judgment. Although Plaintiffs suggest that the process here was a *post hoc* effort with a preordained result, that is not the case. To the contrary, DoD's review of the issue of transgender service began at the initiative of Secretary Mattis nearly a month *before* the President made his statement on Twitter. After the 2017 Memorandum was issued, Secretary Mattis then ordered the creation of a Panel of Experts to engage in "an *independent* multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." AR331 (Terms of Reference 2) (emphasis added). Secretary Mattis "charged the Panel to provide its best military advice … without regard to

any external factors." Mattis Mem. 1. Following this review, "[t]he Panel made recommendations based on each Panel member's independent military judgment." Report 4. After considering "those recommendations and the information underlying them, as well as additional information," DoD conducted an analysis that did not "start with [a] presumption" in favor of an outcome, but "ma[de] no assumptions" at all. *Id.* at 18–19. The resulting policy, in Secretary Mattis's words, was the product of "the Panel's professional military judgment," "the Department's best military judgment," and his "own professional judgment." Mattis Mem. 2, 3; *see also* 2018 Memorandum (noting that these are "the policies on this issue that the Secretary of Defense, in the exercise of his independent judgment, has concluded should be adopted"). The Court should credit the unambiguous statements of senior military leadership, and categorically reject any argument that the new policy does not reflect the independent, professional judgment of the United States military. *Cf. Philadelphia & Trenton R. Co. v. Stimpson*, 39 U.S. (14 Pet.) 448, 458 (1840) (presumption of regularity applies *a fortiori* to Cabinet Secretaries and the President); *Serrano v. United States*, 612 F.2d 525, 532 (Ct. Cl. 1979) ("There is a presumption of regularity that is given administrative decisions made by a secretary of an executive department of the Government.").

Nor does the fact that DoD's new policy postdates the 2017 Memorandum change the analysis. Again, because the new policy differs from the one set forth under any reading of the 2017 Memorandum, Defendants are not merely supporting an existing policy with after-the-fact evidence. But even if that were the case, consideration of such materials would be appropriate in this context. As discussed above, the Supreme Court has repeatedly considered evidence and rationales produced after the adoption of a military policy, even if the same policy would trigger heightened scrutiny in the civilian sphere. In fact, the Court has even gone so far as rely on theories as to what "Congress may . . . quite rationally have believed" to sustain a sex-based classification concerning military affairs. *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

That willingness to rely on *post hoc* explanations in the military context makes sense. Even if a decision concerning military matters originally rested on constitutionally impermissible reasons, it would be imprudent to hold that courts should ignore (or even discount) a subsequent judgment by military experts that the decision itself was in fact good for national defense. Again, *Rostker* is instructive: Even though Congress's original exemption of women from the requirement to register was apparently based on impermissible stereotypes, the Supreme Court refused to ignore Congress's later justification of that rule on military grounds. Yet under Plaintiffs' approach, those legitimate concerns about national defense should have been disregarded simply because they were raised after the law's enactment.

Likewise, even the *Karnoski* Court declined an invitation to reject DoD's new policy as an irrelevant post hoc justification, but instead "carefully considered" the military's documents. 2018 WL 1784464, at *12. Although that court wrongly went on to rule that discovery into DoD's "deliberative process" was necessary, it at least refused to dismiss the new policy out of hand.

Moreover, the Carter policy—which courts have kept in place through preliminary injunctions—itself was the product of *post hoc* decisionmaking. The deliberative process leading up to that policy began with then-Secretary Carter's statement that the current policy was "outdated, confusing, [and] inconsistent," 2015 Statement, Exh. 1, an effective moratorium on gender-identity-based discharges, and an instruction to the working group to "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness, except where objective practical impediments are identified," Report 13. Yet no one would contend that in a challenge to the Carter policy, courts should disregard the RAND Report, which was produced thereafter.

At bottom, Plaintiffs' position is that, due to the President's actions last summer, the military must adhere to the Carter policy (or some variant of it) going forward. But, as the *Doe* Court

recognized, "the military's previous study of transgender service cannot forever bind future administrations from looking into the issue themselves" and "[i]f the President had" ordered "that additional studies be undertaken and that [the Carter] policy be reevaluated" before deciding that a different policy "was beneficial to the various military objectives cited, this would be a different case." 275 F. Supp. 3d at 215; *see also Karnoski*, 2018 WL 1784464, at *12 ("The Court's entry of a preliminary injunction was not intended to prevent the military from continuing to review the implications of open service by transgender people, nor to preclude it from *ever* modifying the Carter policy."). That describes the situation now. It makes no difference that the military finished its study *after* the 2017 Memorandum was issued. This is especially true when military experts within the Department of Defense, including the Secretary of Defense himself, have exercised their professional military judgment to reach the policy that, in their considered opinions, best promotes military readiness and lethality, prevents disruption to unit cohesion, and minimizes disproportionate costs.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiffs' Second Amended Complaint, or, in the alternative, grant summary judgment for Defendants.

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