

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

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

Plaintiffs,

v.

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

Defendants.

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

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. On May 11, 2014, then-Secretary of Defense Chuck Hagel announced that the military's policy on transgender service "should be reviewed." He also indicated that he was

“open” to having transgender people serve.¹ Secretary Hagel said that “[e]very qualified American who wants to serve our country should have an opportunity if they fit the qualifications and can do it.”²

2. On August 5, 2014, the Department of Defense re-issued Department of Defense Instruction (DODI) 1332.18, entitled “Disability Evaluation System (DES).” DODI 1332.18 “[e]stablishes policy, assigns responsibilities, and provides procedures for referral, evaluation, return to duty, separation, or retirement of Service members for disability” The updated version of DODI 1332.18 eliminated “sexual gender and identity disorders, including sexual dysfunctions and paraphilias” as conditions that automatically triggered administrative separation.³

3. Secretary Hagel was succeeded as Secretary of Defense by Ashton B. Carter, who had served previously as Deputy Secretary of Defense, Under Secretary of Defense for Acquisition, Technology and Logistics, Assistant Secretary of Defense for International Security Policy.

4. In July 2015, Secretary Carter directed that “decision authority in all administrative discharges for those diagnosed with gender dysphoria or who identif[ied] themselves as transgender [would] be elevated to Under Secretary Carson, who [would] make determinations on all potential separations.”⁴

¹ Milgroom Decl. Ex. A ‘*This Week*’ Transcript: Defense Secretary Chuck Hagel, Sen. Marco Rubio (May 11, 2014), <https://abcnews.go.com/ThisWeek/week-transcript-defense-secretary-chuck-hagel-sen-marco/story?id=23667691>.

² *Id.*

³ See Milgroom Decl. Ex. B DODI 1332.38, *Physical Disability Evaluation*, Enclosure 5, ¶ 1.3.9.6 (cancelled August 5, 2014); see also Milgroom Decl. Ex. C Diane H. Mazur, *Military Services Have Failed to Comply with New Defense Department Rules on Transgender Personnel*, PALM CENTER (Nov. 2014), <http://archive.palmcenter.org/files/services%20out%20of%20compliance%20memo.pdf> (explaining the effect of the August 2014 changes to DODI 1332.38 on transgender military policy).

⁴ Dkt. 115-2 *Statement by Secretary Ash Carter on DOD Transgender Policy*, Release No. NR-272-15 (July 13, 2015), <https://www.defense.gov/News/News-Releases/News-Release-View/Article/612778/>.

5. Secretary Carter also announced that the Department of Defense would “create a working group to study over the next six months the policy and readiness implications of welcoming transgender persons to serve openly” (the “Working Group”).⁵

6. The Working Group consisted of “[t]he leadership of the armed services, the Joint Chiefs of Staff, the service secretaries, [Secretary Carter], [and] personnel, training, readiness and medical specialists from across the Department of Defense.”⁶

7. The Working Group “got input from transgender service members, from outside expert groups, and from medical professionals outside of the department.”⁷ The Working Group also looked to the experiences of “allied militaries that already allow transgender service members to serve openly” and “the private sector.”⁸

8. The members of the Working Group “sought to identify any possible issues related to open military service of transgender individuals.”⁹

9. The Department of Defense also commissioned the RAND Corporation “[t]o assist in identifying the potential implications” of allowing military service by transgender people.¹⁰

10. The RAND Corporation began as “Project RAND—an organization formed immediately after World War II to connect military planning with research and development decisions.”¹¹ Today, RAND “is a nonprofit institution that helps improve policy and

⁵ *Id.*

⁶ Milgroom Decl. Ex. D *Department of Defense Press Briefing by Secretary Carter on Transgender Service Policies in the Pentagon Briefing Room* (June 30, 2016), <https://www.defense.gov/News/Transcripts/Transcript-View/Article/822347/departments-of-defense-press-briefing-by-secretary-carter-on-transgender-service/>; *see also* Dkt. 61 at 7.

⁷ *Id.*

⁸ *Id.*

⁹ Dkt. 61 at 8 (citing Carson Decl. at ¶ 22).

¹⁰ *See* Dkt. 13-4 (“RAND Study”) at p. iii.

¹¹ *See* Milgroom Decl. Ex. E RAND CORPORATION: OUR HISTORY, <https://www.rand.org/about/history.html> (last visited May 10, 2018).

decisionmaking through research and analysis . . . As a nonpartisan organization, RAND is widely respected for operating independent of political and commercial pressures.”¹²

11. As part of the process initiated by Secretary Carter, the RAND Corporation was specifically tasked with “(1) identify[ing] the health care needs of the transgender population, transgender service members’ potential health care utilization rates, and the costs associated with extending health care coverage for transition-related treatments; (2) assess[ing] the potential readiness implications of allowing transgender service members to serve openly; and (3) review[ing] the experiences of foreign militaries that permit transgender service members to serve openly.”¹³

12. The resulting study, titled “Assessing the Implications of Allowing Transgender Personnel to Serve Openly” (the “RAND Study”) and issued in May 2016, “found no evidence that allowing transgender individuals to serve would have any effect on ‘unit cohesion,’ and concluded that any related costs or impacts on readiness would be ‘exceedingly small,’ ‘marginal’ or ‘negligible.’”¹⁴

13. The RAND Study reported that the “main types of gender transition-related treatments are psychosocial, pharmacologic (primarily but not exclusively hormonal), and surgical.”¹⁵ It stated that “[b]oth psychotherapy and hormone therapies are available and regularly provided through the military’s direct care system.”¹⁶ Further, “[r]econstructive breast/chest and genital surgeries are currently performed on patients who have had cancer, been in vehicular and other accidents, or been wounded in combat. The skills and competencies required to perform

¹² *Id.*

¹³ RAND Study at iii.

¹⁴ *Id.* at xi—xii, 39-47, 69-70.

¹⁵ *Id.* at 6.

¹⁶ *Id.*

these procedures on transgender patients are often identical or overlapping.”¹⁷ Finally, “the services have requirements and manpower authorizations for specialists who can perform reconstructive plastic surgery.”¹⁸

14. For the “large majority” of transgender service members’ medical care needs, the Military Health System (MHS) “provid[es] the same or substantially similar services to other service members.”¹⁹

15. The RAND Study concluded that health care costs for transgender service members would represent “an exceedingly small proportion of . . . overall DoD [Department of Defense] health care expenditures.”²⁰

16. The Working Group concluded that “banning service by openly transgender persons would require the discharge of highly trained and experienced service members, leaving unexpected vacancies in operational units and requiring the expensive and time-consuming recruitment and training of replacement personnel.”²¹

17. The Working Group further concluded that “banning service by openly transgender persons would harm the military by excluding qualified individuals based on a characteristic with no relevance to a person’s fitness to serve.”²²

18. By April 2016, the Working Group had “unanimously concluded that transgender people should be allowed to serve openly in the military.”²³

19. Approximately one year after Secretary Carter’s July 2015 announcement, on June 30, 2016, Secretary Carter announced that the Department of Defense would “eliminate[e]

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Dkt. 13-13 Wilmoth Decl. at ¶ 14.

²⁰ RAND Study at xi-xii.

²¹ *See* Dkt. 13-3 Carson Decl. at ¶ 25.

²² *See id.* at ¶ 26.

²³ *See* Dkt. 61 at 8; *see also* Dkt. 13-3 Carson Decl. at ¶ 27; Dkt. 13-9 Mabus Decl. at ¶ 28; Dkt. 13-7 Fanning Decl. at ¶ 32.

policies that [could] result in transgender members being treated differently from their peers based solely upon their gender identity, rather than upon their ability to serve.”²⁴ Secretary Carter stated: “[e]ffective immediately, transgender Americans may serve openly. They can no longer be discharged or otherwise separated from the military just for being transgender.”²⁵

20. Secretary Carter further stated, “the Defense Department and the military need to avail ourselves of all talent possible in order to remain what we are now, the finest fighting force the world has ever known.”²⁶

21. In his June 30, 2016 announcement, Secretary Carter explained that the open service policy was based on a number of considerations, including: the need to “recruit[] and retain[] the soldier, sailor, airman, or Marine who can best accomplish the mission” of our nation’s Armed Forces; the fact that thousands of “talented and trained” transgender people are already serving and that the military has already invested “hundreds of thousands of dollars to train and develop each” transgender service member; the benefits to the military of retaining individuals who are already trained and who have already proven themselves; the need to provide both transgender service members and their commanders with “clear[] and consistent guidance” on questions such as deployment and medical treatment; and the principle that “Americans who want to serve and can meet our standards should be afforded the opportunity to compete to do so.”²⁷

22. Also on June 30, 2016, Secretary Carter issued Directive-Type Memorandum (DTM) 16-005, titled “Military Service of Transgender Service Members.”²⁸

²⁴ Milgroom Decl. Ex. D *Department of Defense Press Briefing by Secretary Carter on Transgender Service Policies in the Pentagon Briefing Room*.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Dkt. 13-10 Ex. C DTM 16-005.

23. The DTM states: “The policy of the Department of Defense is that service in the United States military should be open to all who can meet the rigorous standards for military service and readiness. Consistent with the policies and procedures set forth in this memorandum, transgender individuals shall be allowed to serve in the military. These policies and procedures are premised on my conclusion that open service by transgender Service members while being subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability, and retention, is consistent with military readiness and with strength through diversity.”²⁹

24. DTM 16-005 states that it is “the Department’s position, consistent with the U.S. Attorney General’s opinion, that discrimination based on gender identity is a form of sex discrimination.”³⁰

25. Regarding separation and retention, the DTM states: “Transgender Service members will be subject to the same standards as any other Service member of the same gender; they may be separated, discharged, or denied reenlistment or continuation of service under existing processes and basis, but not due solely to their gender identity or an expressed intent to transition genders.”³¹

26. Also regarding separation and retention, the DTM states: “A Service member whose ability to serve is adversely affected by a medical condition or medical treatment related to their gender identity should be treated, for purposes of separation and retention, in a manner consistent with a Service member whose ability to serve is similarly affected for reasons unrelated to gender identity or gender transition.”³²

²⁹ *Id.* at 2.

³⁰ *Id.* at Attachment ¶ 5.

³¹ *Id.* at Attachment ¶ 1(b).

³² *Id.* at Attachment ¶ 1(c).

27. Regarding accessions, the DTM states that a history of gender dysphoria would no longer disqualify an applicant from acceding into the military if that applicant was certified by a licensed medical provider as “stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months.”³³

28. Also regarding accessions, the DTM stated that a history of medical treatment associated with gender transition would no longer be disqualifying if a medical provider certified the applicant had “completed all medical treatment associated with the applicant’s gender transition,” “been stable in the preferred gender for 18 months,” and, if the applicant was “receiving cross-sex hormone therapy post-gender transition, [that] the individual [had] been stable on such hormones for 18 months.”³⁴

29. Finally, regarding accessions, the DTM established that a history of sex reassignment surgery or genital reconstruction surgery would no longer be disqualifying if a licensed medical provider certified that “a period of 18 months [had] elapsed since the date of the most recent of any such surgery; and [] no functional limitations or complications persist[ed], nor [was] any additional surgery required.”³⁵

30. The Carter policy for accessions as outlined in DTM 16-005 was scheduled to take effect on July 1, 2017.³⁶

31. In accordance with DTM 16-005, the Acting Assistant Secretary of Defense for Health Affairs issued a memorandum entitled “Guidance for Treatment of Gender Dysphoria for

³³ *Id.* at Attachment ¶ 2(a)(1).

³⁴ *Id.* at Attachment ¶ 2.

³⁵ *Id.* at Attachment ¶ 3.

³⁶ *Id.* at Attachment ¶ 2(a).

Active and Reserve Component Service Members” to “provide [] guidance for the medical care of transgender Service members.”³⁷

32. On June 30, 2016, the Office of the Undersecretary of Defense for Personnel and Readiness issued “DoD Instruction 1300.28—In-Service Transition for Transgender Service Members.”

33. The effective date for the Instruction was October 1, 2016.³⁸

34. The Instruction “implement[ed] the policies and procedures in [DTM] 16-005,” including by providing details on “Gender Transition in the Military” and “Continuity of Medical care” for transgender service members.³⁹

35. DODI 1300.28 established that once a “military medical provider determine[d] that a Service member’s gender transition [was] complete . . . the member’s gender marker [would be] changed in DEERS [Defense Enrollment Eligibility Reporting System] and the Service member [would] be recognized in the preferred gender.”⁴⁰

36. Under 1300.28, all service members, regardless of whether they had changed their DEERS gender marker, were required to meet all standards “[c]oincident with [their] gender marker.”⁴¹

37. In September 2016, the Department of Defense issued an implementation handbook entitled “Transgender Service in the United States Military” (the “Handbook”). The 71-page document set forth guidance and instructions to both military service members and

³⁷ Milgroom Decl. Ex. F GUIDANCE FOR TREATMENT OF GENDER DYSPHORIA FOR ACTIVE AND RESERVE COMPONENT SERVICE MEMBERS (June 29, 2016) at 1.

³⁸ Milgroom Decl. Ex. G DOD INSTRUCTION 1300.28—IN-SERVICE TRANSITION FOR TRANSGENDER SERVICE MEMBERS (2016).

³⁹ *Id.* at 1; 7.

⁴⁰ *Id.* at 4.

⁴¹ *Id.* at 3.

commanders about how to implement and understand the new policies regarding transgender service members and how to address any service level issues that would arise.⁴²

38. The Handbook instructs all service members: “The cornerstone of DoD values is treating every Service member with dignity and respect. Anyone who wants to serve their country, upholds our values, and can meet our standards, should be given the opportunity to compete to do so. Being a transgender individual, in and of itself, does not affect a Service member’s ability to perform their job.”⁴³

39. Between October 2016 and June 2017, the services conducted training of the force based on detailed guidance and training materials regarding the Carter policy on transgender military service.⁴⁴

40. On November 29, 2016, the Department of Defense revised “DoD Directive 1020.02E—Diversity Management and Equal Opportunity in the DoD,” amending the definition of “unlawful discrimination” to include discrimination “on the basis of . . . sex (including gender identity).”⁴⁵

⁴² See Dkt. 13-6 Handbook.

⁴³ *Id.* at 31.

⁴⁴ See, e.g., Milgroom Decl. Ex. H Deposition of Martha Soper at 151:21-22 (“Q: So all the airmen received [transgender awareness] training? A: Yes, ma’am.”); Milgroom Decl. Ex. I Deposition of Martha Soper, Ex. 12 Transgender Awareness Training (All Airmen); Milgroom Decl. Ex. J USDOE00004098-USDOE00004114 Air Force Policy Memorandum for In-Service Transition for Airmen Identifying as Transgender; Milgroom Decl. Ex. K Deposition of Mary Krueger at 52:3-13 (more than one million people in the Army trained on transgender awareness); Milgroom Decl. Ex. L USDOE00020163-USDOE00020173 SECNAV INSTRUCTION 1000.11 at Enclosure 1 ¶ 1(g) (“The training of Sailors and Marines across the DON [Department of the Navy] shall be completed no later than 1 July 2017.”).

⁴⁵ Milgroom Decl. Ex. M DODI 1020.02E DIVERSITY MANAGEMENT AND EQUAL OPPORTUNITY IN THE DoD, Enclosure 2 at 2(b)(1); 2(b)(5) and Glossary Part II at definition of “MEO.”

The Ban on Transgender Service members

41. On June 30, 2017, the day before the policy permitting transgender people to accede to the military was to take effect, Secretary Mattis announced that he had “determined that it [was] necessary to defer the start of accessions for six months.”⁴⁶

42. On July 26, 2017, President Trump announced in a series of tweets that “After consultation with my generals and military experts, please be advised that the United States government will not accept or allow transgender individuals to serve in any capacity in the U.S. military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.]”⁴⁷

43. The same day the President issued his tweets, the Office of the Secretary of Defense issued guidance to “pause surgeries and gender marker changes.”⁴⁸

44. Senator John McCain, Chairman of the Senate Armed Services Committee and a decorated combat veteran of the Navy, said in a statement that “there [was] no reason to force servicemembers who are able to fight, train, and deploy to leave the military—regardless of their gender identity.”⁴⁹ A spokesperson for Senator Joni Ernst, another Republican member of the Senate Armed Services Committee and a combat veteran who served in the Iowa National Guard,

⁴⁶ Milgroom Decl. Ex. N USDOE00083276, MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS, CHAIRMAN OF THE JOINT CHIEFS OF STAFF: ACCESSION OF TRANSGENDER INDIVIDUALS INTO THE MILITARY SERVICES (June 30, 2017).

⁴⁷ Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), <https://twitter.com/realdonaldtrump/status/890193981585444864?lang=en>; Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realdonaldtrump/status/890196164313833472?lang=en>; Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:08 AM), <https://twitter.com/realdonaldtrump/status/890197095151546369>.

⁴⁸ See Milgroom Decl. Ex. O USDOE00001416 Email dated August 7, 2017 from Mary Krueger.

⁴⁹ Milgroom Decl. Ex. P *Statement By SASC Chairman John McCain On Transgender Americans In The Military* (July 26, 2017), <https://www.mccain.senate.gov/public/index.cfm/2017/7/statement-by-sasc-chairman-john-mccain-on-transgender-americans-in-the-military>.

told the Des Moines Register that the Senator believes “Americans who are qualified and can meet the standards to serve in the military should be afforded that opportunity.”⁵⁰

45. General Joseph Dunford, the Chairman of the Joint Chiefs of Staff and the President’s most senior uniformed military advisor, said that the President’s announcement was “unexpected” and that that he “was not consulted.”⁵¹

46. After the President issued his Tweets on July 26, 2017, the Office of the Secretary of Defense (OSD) began “develop[ing] COAs [Courses of Action] in response to the tweet anticipating OSD being asked for policy recommendations.”⁵²

47. Shortly after the President’s tweeted announcement, fifty-six former generals and admirals issued a public statement denouncing the new policy.⁵³

48. On August 25, 2017, the President released a memorandum (“August 25 Memorandum”) containing a formal directive to the Secretary of Defense and the Secretary of Homeland Security. It directed the military “to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016,” effective March 23, 2018.⁵⁴

49. The August 25 Memorandum required the ban on accessions to be extended indefinitely beyond January 1, 2018 and halted all use of government resources to “fund sex-reassignment surgical procedures for military personnel, except to the extent necessary to

⁵⁰ Milgroom Decl. Ex. Q Jason Noble, *Ernst Breaks with Trump on Transgender Military Ban*, DES MOINES REGISTER (July 26, 2017), <https://www.desmoinesregister.com/story/news/2017/07/26/joni-ernst-breaks-trump-transgender-military-ban/512830001/>.

⁵¹ See Milgroom Decl. Ex. R USDOE00037695 Email dated July 7, 2017 from Gen. Joseph Dunford.

⁵² Milgroom Decl. Ex. S USDOE00003207 Email dated Aug. 2, 2017 from Martha Soper.

⁵³ Dkt. 13-2.

⁵⁴ Milgroom Decl. Ex. T PRESIDENTIAL MEMORANDUM FOR THE SECRETARY OF DEFENSE AND THE SECRETARY OF HOMELAND SECURITY: MILITARY SERVICE BY TRANSGENDER INDIVIDUALS (August 25, 2017), 82 C.F.R. 41319 §§ 1(b); 3 (2017).

protect the health of an individual who has already begun a course of treatment to reassign his or her sex,” effective March 23, 2018.⁵⁵

50. The August 25 Memorandum also required the Secretary of Defense, in consultation with Homeland Security, to “submit to [the President] a plan for implementing both the general policy set forth in . . . this memorandum and the specific directives set forth in . . . this memorandum” by February 21, 2018.⁵⁶

51. The August 25 Memorandum reversed the policies that had gone into effect in June 2016, 2017 regarding transgender military service.⁵⁷

52. On August 29, 2017, Secretary Mattis issued Release No. NR-312-17, stating that the Department of Defense will “carry out the president’s policy direction, in consultation with the Department of Homeland Security.”⁵⁸

53. On October 30, 2017, this Court issued a preliminary injunction that ordered Defendants to “revert to the status quo with regard to accession and retention that existed before the [August 25, 2017] issuance of the Presidential Memorandum.”⁵⁹ Pursuant to that order, the Armed Forces began permitting openly transgender people to accede to the services beginning on January 1, 2018.⁶⁰

The Interim Guidance and the Review Process

54. On September 14, 2017, Secretary of Defense Mattis issued a Memorandum. In that document, Secretary Mattis affirmed: “DoD will carry out the President’s policy and

⁵⁵ *Id.* at § 1(a).

⁵⁶ *Id.* at § 3.

⁵⁷ See Dkt. 61 at 4.

⁵⁸ Milgroom Decl. Ex. U *Statement by Secretary of Defense Jim Mattis on Military Service by Transgender Individuals*, Release No. NR-312-17 (Aug. 29, 2017), <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1294351/statement-by-secretary-of-defense-jim-mattis-on-military-service-by-transgender/>.

⁵⁹ Dkt. 60.

⁶⁰ See Milgroom Decl. Ex. V Department of Defense Policy Memorandum 2-5, “Transgender Applicant Processing” at 1 (“Implementation of the new standard, effective January 1, 2018, is mandatory.”).

directives” and will “comply with” the President’s August 25 Memorandum.⁶¹ Mattis stated: “[n]ot later than February 21, 2018, [he would] present the President with a plan to implement the policy and the directives in the Presidential Memorandum.”⁶²

55. In a separate Memorandum entitled “Terms of Reference – Implementation of Presidential Memorandum on Military Service by Transgender Individuals” (“Terms of Reference”), also issued on September 14, 2017, Secretary Mattis “direct[ed] the Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff to lead the [Department] in developing an Implementation Plan on military service by transgender individuals, to effect the policy and directives in Presidential Memorandum, Military Service by Transgender Individuals, dated August 25, 2017.”⁶³

56. The Terms of Reference required that the Deputy Secretary and Vice Chairman would be “supported by a panel” comprised of “the Military Department Under Secretaries, Service Vice Chiefs, and Service Senior Enlisted Advisors” and chaired by the Under Secretary of Defense for Personnel and Readiness.⁶⁴

57. The Terms of Reference also directed that the panel would conduct an “independent multidisciplinary review and study of relevant data and information ... to inform the Implementation Plan.”⁶⁵

58. The Terms of Reference explained that “[t]he Presidential Memorandum directs that the Department return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016.”⁶⁶

⁶¹ Milgroom Decl. Ex. W USDOE00002100 “Military Service by Transgender Individuals – Interim Guidance” (Sept. 14, 2017) at 1.

⁶² *Id.*

⁶³ Milgroom Decl. Ex. X USDOE00003230 “Terms of Reference – Implementation of Presidential Memorandum on Military Service by Transgender Individuals” (Sept. 14, 2017) at 1.

⁶⁴ *Id.*

⁶⁵ *Id.* at 2.

⁶⁶ *Id.*

59. The Terms of Reference states: “The Presidential Memorandum directs DoD to maintain the policy currently in effect, which generally prohibits accession of transgender individuals into military service.”⁶⁷

60. The Terms of Reference further states: “The Presidential Memorandum halts the use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel . . . The [Panel’s] implementation plan will enumerate the specific surgical procedures associated with sex reassignment treatment that shall be prohibited from DoD or DHS resourcing unless necessary to protect the health of the Service member.”⁶⁸

61. In conjunction with Secretary Mattis’ Implementation Memorandum, Anthony Kurta (Performing the Duties of Under Secretary of Defense for Personnel and Readiness) issued a Memorandum entitled “Military Service by Transgender Individuals – Panel of Experts.” In this Memorandum, Acting Under Secretary Kurta enlisted three Working Groups to support the Panel.⁶⁹

62. Acting Under Secretary Kurta instructed that the Working Groups would assist the Panel to “gather the information and promote the analysis” that Secretary Mattis had directed in the Terms of Reference Memorandum.⁷⁰

63. The Working Groups were: 1) Medical and Personnel Executive Steering Committee (MEDPERS); 2) Retention & Non-Deployability Working Group; and 3) Transgender Personnel Policy Working Group.⁷¹

⁶⁷ *Id.*

⁶⁸ Milgroom Decl. Ex. Y USDOE00003231 MILITARY SERVICE BY TRANSGENDER INDIVIDUALS – PANEL OF EXPERTS (Sept. 2017).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

64. An agenda and slides prepared for the Transgender Personnel Policy Working Group's kickoff meeting reproduced the text of President Trump's tweet stating that the government "will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military" and identified it as "Policy Guidance."⁷²

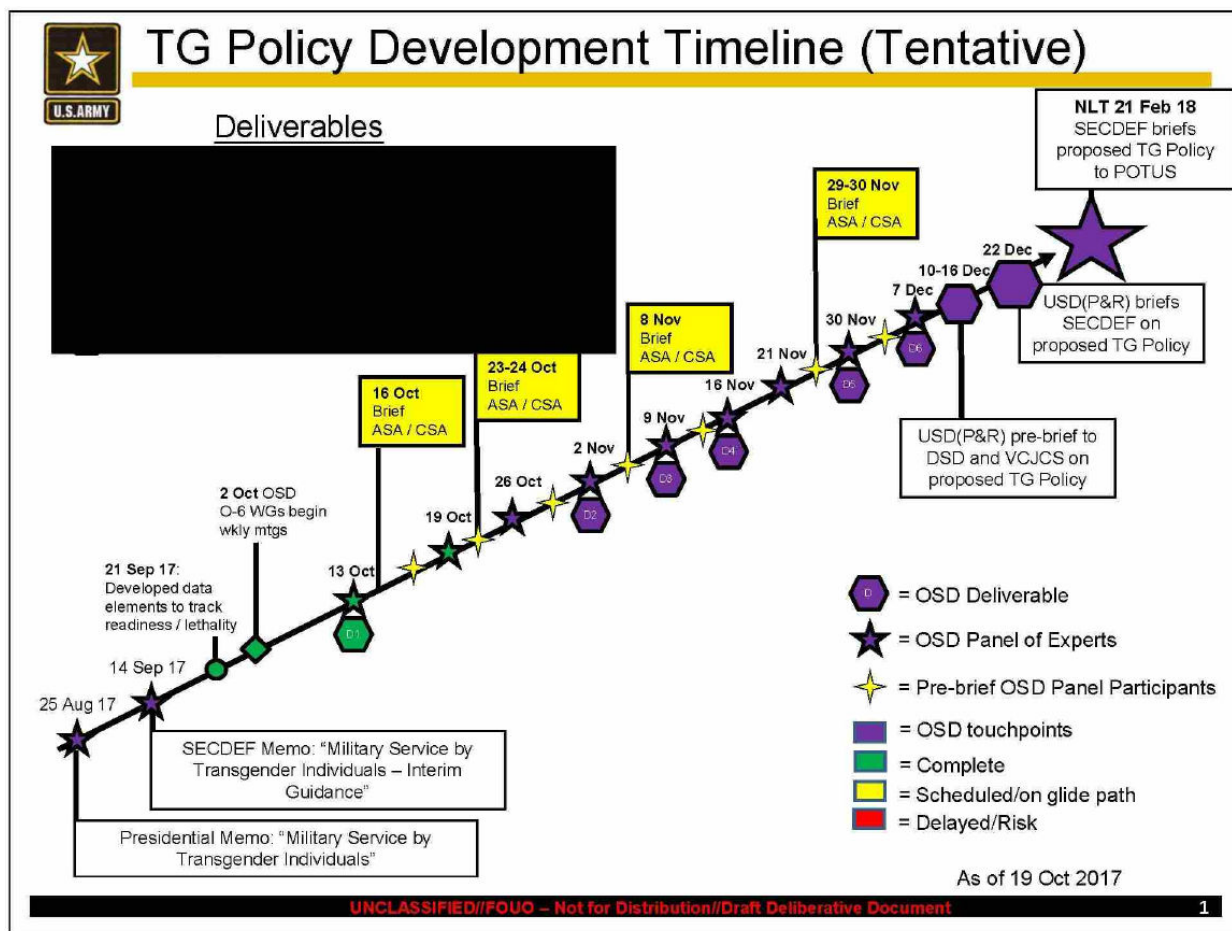
65. In October 2017, the recommendation of the MEDPERS subgroup regarding the changes to DoDI 6130.03 "was forwarded to the Transgender Panel of Experts" and "the POE also unanimously recommended adoption and forwarded to the SECDEF and White House for decision."⁷³

66. The Panel met eight times, from October 13, 2017 to November 30, 2017, before meeting again to vote on December 7, 2017.

⁷² See Milgroom Decl. Ex. Z USDOE00063224-USDOE00063257 Presentation Slides from the Transgender Personnel Policy Working Group at USDOE00063234.

⁷³ Milgroom Decl. Ex. AA USDOE00063450 Email dated Oct. 20, 2017 from Capt. Marc Franzos.

67. An internal Department of Defense document dated October 20, 2017 shows a straight line connecting the August 25 Presidential Memorandum, the Panel meetings, and the Secretary of Defense briefing to the President on transgender policy, under the title “T[ransgender] Policy Development Timeline,” as shown below:⁷⁴



68. The Defendants have entirely redacted or withheld the Panel meeting minutes from Panel Meeting VI (November 16, 2017), Panel Meeting VII (November 21, 2017), Panel Meeting VIII (November 30, 2017), and Panel Meeting IX (December 7, 2017).

69. On January 11, 2018, Robert Wilkie, who chaired the Panel, issued an “Action Memo,” addressed to Secretary Mattis. The Memo summarized the scope of the Panel’s

⁷⁴ Milgroom Decl. Ex. BB USDOE00101839-USDOE00101845 Army Presentation at USDOE00101839.

responsibilities as follows: “On September 14, 2017, you directed the establishment of a Panel of Experts to review and recommend changes to Department of Defense policies regarding the service of transgender individuals . . . in accordance with direction from the President on August 25, 2017.”⁷⁵

70. According to the Action Memo, the Panel recommended that transgender persons should be permitted to serve “only in their biological sex and without receiving cross-sex hormone therapy or surgical transition support.”⁷⁶

The 2018 Mattis Plan and Report

71. On February 22, 2018, Secretary Mattis sent a Memorandum to the President (“Mattis Plan”) endorsing policies set out in an attached report entitled “Department of Defense Report and Recommendations on Military Service by Transgender Persons” (the “Report”). The February 22 Memorandum and the attached Report were released to the public on March 23, 2018.⁷⁷

72. In a Memorandum dated March 23, 2018, President Trump confirmed receipt of the Mattis Plan and Report and revoked his August 25 Memorandum.⁷⁸

73. The Mattis Plan and the Report set forth policies relating to transgender individuals.⁷⁹

74. The policies require transgender individuals to serve in “their biological sex.”⁸⁰

75. The policies exclude from military service any “transgender persons who require or have undergone gender transition.”⁸¹

⁷⁵ Milgroom Decl. Ex. CC Action Memo at 1.

⁷⁶ *Id.* at 2.

⁷⁷ Milgroom Decl. Ex. DD (“Mattis Plan”); Milgroom Decl. Ex. EE (“Report”).

⁷⁸ Milgroom Decl. Ex. FF MILITARY SERVICE BY TRANSGENDER INDIVIDUALS (Mar. 23, 2018).

⁷⁹ See Milgroom Decl. Ex. DD Mattis Plan; Milgroom Decl. Ex. EE Report.

⁸⁰ Milgroom Decl. Ex. DD Mattis Plan at 3; Milgroom Decl. Ex. EE Report at 5-6.

⁸¹ Milgroom Decl. Ex. DD Mattis Plan at 2; *see also* Milgroom Decl. Ex. EE Report at 5-6.

76. No other military policy excludes a class of persons from an equal opportunity to enlist or serve in the U.S. Armed Forces based on their identity.

77. The Mattis Plan and the Report contain a provision that permits currently serving service members diagnosed with gender dysphoria by military medical personnel since the Carter policy took effect in July 2016 and before the effective date of the Mattis policy to “continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria.”⁸²

78. Neither the Mattis Plan nor the Report defines what care is “medically necessary.”

79. During the process leading up to the Mattis Plan and Report, one or more of the Working Groups considered “what specific surgical procedures should not be resourced from DoD or DHS funding.”⁸³ Col. Mary Krueger testified that “there’s been discussions of what would be funded and what wouldn’t be funded.”⁸⁴ Col. Krueger was instructed not to answer the question of what “different options were under consideration.”⁸⁵

80. The Report states that “should its decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption instead is and should be deemed severable from the rest of the policy.”⁸⁶

81. The American Psychological Association responded to the February 22 Memorandum and the attached Report, stating that it was “alarmed by the administration’s misuse of psychological science to stigmatize transgender Americans and justify limiting their ability to serve in uniform and access medically necessary health care.”⁸⁷

⁸² Milgroom Decl. Ex. DD Mattis Plan at 2; Milgroom Decl. Ex. EE Report at 5-6.

⁸³ Milgroom Decl. Ex. K at 156:12-16.

⁸⁴ *Id.* at 156:21-23.

⁸⁵ *Id.* at 157:15-21.

⁸⁶ Milgroom Decl. Ex. EE Report at 6.

⁸⁷ Milgroom Decl. Ex. GG *APA Statement Regarding Transgender Individuals Serving in the Military* (March 26, 2018), <http://www.apa.org/news/press/releases/2018/03/transgender-military.aspx>.

82. The American Medical Association also responded, stating that “there is no medically valid reason—including a diagnosis of gender dysphoria—to exclude transgender individuals from military service” and stating that the Mattis Plan “mischaracterized and rejected the wide body of peer-reviewed research on the effectiveness of transgender medical care.”⁸⁸

83. On March 30, the Department of Defense issued an updated version of Department of Defense Instruction 6130.03: “Medical Standards for Appointment, Enlistment, or Induction into the Military Services.” The Instruction became effective on May 6, 2018.⁸⁹

84. DODI 6130.03 states that it is the policy of the Department of Defense of to use “common medical standards for appointment, enlistment or induction of personnel”⁹⁰ that screen for medical and mental health conditions to ensure that individuals are “medically capable of performing duties,” including screening for suicidality, anxiety, and depression.”⁹¹

85. In April 2018, each of the military service chiefs of staff testified before Congress, stating that military service by transgender people had not caused any issues of unit cohesion, discipline, or morale in their respective services.⁹²

⁸⁸ Milgroom Decl. Ex. HH James L. Madara, MD, AMA LETTER (April 3, 2018), <https://www.politico.com/f/?id=00000162-927c-d2e5-ade3-d37e69760000>.

⁸⁹ Milgroom Decl. Ex. II DODI 6130.03 MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION INTO THE MILITARY SERVICES (2018).

⁹⁰ *Id.* at 1.2(b).

⁹¹ *Id.* 1.2(c)(5).

⁹² Milgroom Decl. Ex. JJ HEARING TO RECEIVE TESTIMONY ON THE POSTURE OF THE DEPARTMENT OF THE AIR FORCE IN REVIEW OF THE DEFENSE AUTHORIZATION REQUEST FOR FISCAL YEAR 2019 AND THE FUTURE YEARS DEFENSE PROGRAM (Apr. 24, 2018) at 72:8-9, https://www.armed-services.senate.gov/imo/media/doc/18-43_04-24-18.pdf; Milgroom Decl. Ex. KK HEARING TO RECEIVE TESTIMONY ON THE POSTURE OF THE DEPARTMENT OF THE NAVY IN REVIEW OF THE DEFENSE AUTHORIZATION REQUEST FOR FISCAL YEAR 2019 AND THE FUTURE YEARS DEFENSE PROGRAM (Apr. 19, 2018) at 82:7-12; 82:16-21, https://www.armed-services.senate.gov/imo/media/doc/18-42_04-19-18.pdf; Milgroom Decl. Ex. LL HEARING TO RECEIVE TESTIMONY ON THE POSTURE OF THE DEPARTMENT OF THE ARMY IN REVIEW OF THE DEFENSE AUTHORIZATION REQUEST FOR FISCAL YEAR 2019 AND THE FUTURE YEARS DEFENSE PROGRAM (Apr. 12, 2018) at 100:2-6, https://www.armed-services.senate.gov/imo/media/doc/18-37_04-12-18.pdf.

86. Admiral John Richardson, from the Navy, testified that he was “not aware of any issues” of “unit cohesion, disciplinary problems, or issues with morale resulting from open transgender service.”⁹³

87. General Robert Neller, from the Marine Corps, testified that he had not heard of any problems with “discipline” or “cohesion of the force.”⁹⁴

88. General Mark Milley, from the Army, testified that he had “received precisely zero reports . . . of issues of cohesion, discipline, morale, and all those sorts of things.”⁹⁵

89. Under current Department of Defense policy, “[s]ervice members who have been non-deployable for more than 12 consecutive months, for any reason, will be processed for administrative separation”⁹⁶

The Plaintiffs

90. Plaintiffs in this lawsuit are five active duty service members in the United States military who serve openly as transgender people; one active duty service member who has not yet disclosed her transgender status; and four transgender people who seek admission to the military, either through the process of enlistment or through an academic program that leads to a commission. All plaintiffs have a history or diagnosis of gender dysphoria or have undergone the process of gender transition.

91. Jane Doe 2 has been enlisted in the National Guard since 2003 and has been on active duty in the United States Army since 2006.⁹⁷

⁹³ Milgroom Decl. Ex. KK HEARING TO RECEIVE TESTIMONY ON THE POSTURE OF THE DEPARTMENT OF THE NAVY IN REVIEW OF THE DEFENSE AUTHORIZATION REQUEST FOR FISCAL YEAR 2019 AND THE FUTURE YEARS DEFENSE PROGRAM at 82:4-12.

⁹⁴ *Id.* at 82:21.

⁹⁵ Milgroom Decl. Ex. LL HEARING TO RECEIVE TESTIMONY ON THE POSTURE OF THE DEPARTMENT OF THE ARMY IN REVIEW OF THE DEFENSE AUTHORIZATION REQUEST FOR FISCAL YEAR 2019 AND THE FUTURE YEARS DEFENSE PROGRAM at 100:2-6.

⁹⁶ Milgroom Decl. Ex. MM DoD RETENTION POLICY FOR NON-DEPLOYABLE SERVICE MEMBERS (Feb. 14, 2018) at 1.

⁹⁷ Dkt. 15 #3 Ex. B Decl. of Jane Doe 2 at ¶¶ 3; 5.

92. Jane Doe 2 notified her command that she was transgender after the United States Department of Defense announced in June 2016 that it would allow transgender service members to serve openly in the military.⁹⁸ She was diagnosed with gender dysphoria by a military health care provider.⁹⁹

93. Jane Doe 2 began to seek medical treatment relating to her gender transition in September 2016.¹⁰⁰

94. After President Trump issued his August 25 Memorandum, Jane Doe 2 was placed on an assignment that required her to drive far from base that kept her from supervising soldiers she was assigned to mentor and train.¹⁰¹ The Defendants have offered no explanation for her separation from the other soldiers.¹⁰²

95. Jane Doe 3 has served in the United States Army since 2015.¹⁰³

96. In or around June 2016, Jane Doe 3 notified her command that she was transgender. She was diagnosed with gender dysphoria by a military health provider.¹⁰⁴

97. After the President's July 26 tweets regarding transgender military service, Jane Doe 3 heard other service members "remark[] people who kill transgender people should not be punished¹⁰⁵."

98. Jane Doe 3 has obtained a transition plan that includes surgery.¹⁰⁶ She has not yet undergone any transition-related surgery.¹⁰⁷

⁹⁸ *Id.* at

⁹⁹ *Id.* at ¶ 13.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at ¶ 15.

¹⁰² See Dkt. 48 Decl. of Cpt. Elizabeth Gomez (Pertaining to Plaintiff Jane Doe 2) (failing to respond to Jane Doe 2's allegation that she was "being kept separated from the rest of [her] unit because she [was] transgender and because of the President's ban").

¹⁰³ Dkt. 15 #4 Ex. C Decl. of Jane Doe 3 at ¶ 3.

¹⁰⁴ *Id.* at ¶¶ 7-9.

¹⁰⁵ *Id.* at ¶ 15.

¹⁰⁶ *Id.* at ¶¶ 9; 14.

¹⁰⁷ *Id.* at ¶ 13.

99. Jane Doe 4 has served in the United States Army since 2000.¹⁰⁸

100. In or around June 2016, Jane Doe 4 met with her commanding officer to identify herself as transgender.¹⁰⁹

101. Jane Doe 4's current contract with the military extends through June 2018.¹¹⁰ She has re-enlisted to complete two additional years of service following the expiration of her current contract¹¹¹ so that she can reach twenty years of service and receive retirement benefits.¹¹²

102. Jane Doe 6 joined the Army in 2014.¹¹³

103. Jane Doe 6 has received hundreds of hours of specialized training, above the basic training required for her position, in joint target development, joint battle assessment, unmanned aerial surveillance, and computer science.¹¹⁴

104. Jane Doe 6 is transgender.¹¹⁵

105. Jane Doe 6 had made a behavioral health appointment to obtain a transition plan when President Trump tweeted his announcement on July 26.¹¹⁶

106. Concerned by the tweets, Jane Doe 6 never came out to her doctors or chain of command as transgender, nor did she receive a diagnosis of gender dysphoria.¹¹⁷

107. Jane Doe 6 is concerned that if she notifies her command that she is transgender and seeks health care for the distress she experiences from having to serve in a manner inconsistent with her gender identity, she will face separation from the military.¹¹⁸

¹⁰⁸ Dkt. 15 #5 Ex. D Decl. of Jane Doe 4 at ¶ 1.

¹⁰⁹ *Id.* at ¶ 13.

¹¹⁰ *See* Dkt. 48 Decl. of SGM Roberta Osman (Pertaining to Plaintiff Jane Doe 4) at ¶ 2.

¹¹¹ *Id.* at ¶ 2.

¹¹² Dkt. 15 #5 Ex. D Decl. of Jane Doe 4 at ¶ 16.

¹¹³ Cambier Decl. Ex. A Declaration of Jane Doe 6 at ¶ 3.

¹¹⁴ *Id.* at ¶ 6.

¹¹⁵ *Id.* at ¶ 1.

¹¹⁶ *Id.* at ¶ 11.

¹¹⁷ *Id.* at ¶ 13.

¹¹⁸ *Id.*

108. Jane Doe 6's separation from service would have serious negative repercussions for her career and livelihood.¹¹⁹

109. Jane Doe 6 is also concerned that, to avoid separation, she must forego transition-related health care and live inconsistently with her gender identity.¹²⁰

110. Jane Doe 7 is a transgender woman who had begun seeking to join the Coast Guard when the Mattis Plan and Report were released to the public on March 23, 2018.¹²¹

111. Jane Doe 7 went through the process of gender transition seven years ago.¹²²

112. Unless the policy set forth in the Mattis Plan and Report is enjoined, Jane Doe 7 will be unable to join the Coast Guard.

113. John Doe 1 was a Reserve Officers' Training Corps ("ROTC") cadet from 2014 to 2016 and has served as a Second Lieutenant in the United States Army since July 2016.¹²³

114. John Doe 1 advised his superiors in ROTC that he is transgender.¹²⁴

115. John Doe 1 was commissioned as a Second Lieutenant shortly after the Department of Defense announced that transgender people would be permitted to serve openly.¹²⁵

116. John Doe 1 notified his command that he was transgender.¹²⁶

117. After the President's tweets, John Doe 1's transition-related care was subject to delays.¹²⁷

118. John Doe 2 is a transgender man who was in the process of enlisting in the Army when the Mattis Plan and Report were released to the public on March 23, 2018.¹²⁸

¹¹⁹*Id.* at ¶ 20.

¹²⁰*Id.* at ¶ 21.

¹²¹ Cambier Decl. Ex. B Declaration of Jane Doe 7 at ¶ 1; 10.

¹²²*Id.* at ¶ 1.

¹²³ Dkt. 15 #6 Ex. E Decl. of John Doe 1 at ¶ 1.

¹²⁴*Id.* at ¶ 6.

¹²⁵*Id.* at ¶ 12.

¹²⁶*Id.* at ¶ 17.

¹²⁷*Id.* at ¶ 24.

¹²⁸ Cambier Decl. Ex. C Decl. of John Doe 2 at ¶ 1.

119. John Doe 2 went through the process of gender transition almost a decade ago.¹²⁹

120. John Doe 2 began working with a recruiter to enlist in the Army as soon as transgender people became eligible to accede in January 2018.¹³⁰

121. John Doe 2 has submitted all his enlistment paperwork and is presently awaiting an enlistment date.¹³¹

122. If John Doe 2 is unable to join the Army, he will not be able to support himself and his family while completing school, and is therefore unlikely to achieve his goal of becoming an Army surgeon.¹³²

123. Regan V. Kibby is a midshipman at the United States Naval Academy.¹³³

124. Mr. Kibby disclosed to the Naval Academy that he is transgender.¹³⁴

125. Mr. Kibby was approved for a medical leave of absence so that his transition would be complete in time for him to receive his commission in the U.S. Navy upon graduation.¹³⁵

126. Mr. Kibby has continued to obtain transition-related treatment.¹³⁶

127. Dylan Kohere is a college student.¹³⁷

128. Mr. Kohere is transgender.¹³⁸

129. After President Trump's tweets, Mr. Kohere was informed that, "due to his self-identification as transgender, [] he could not formally enroll in ROTC."¹³⁹

¹²⁹ *Id.* at ¶ 3.

¹³⁰ *Id.* at ¶ 11.

¹³¹ *Id.*

¹³² *Id.* at 14.

¹³³ Dkt. 13-14 Decl. of Reagan Kibby at ¶ 1.

¹³⁴ *Id.* at ¶ 15.

¹³⁵ *Id.* at ¶ 26.

¹³⁶ *Id.* at ¶ 28.

¹³⁷ Dkt. 13-15 Decl. of Dylan Kohere at ¶ 4.

¹³⁸ *Id.* at ¶ 1.

¹³⁹ Dkt. 45-3 Decl. of Robert Burns (Relating to Plaintiff Dylan Kohere) at ¶ 8(a).

130. If Mr. Kohere is not allowed to enroll in ROTC, he will “lose educational and career opportunities . . . including extensive leadership training not available to other college students.”¹⁴⁰

131. If Mr. Kohere is not allowed to enroll in ROTC, he will also be ineligible to apply for a ROTC scholarship.¹⁴¹

¹⁴⁰ Dkt. 13-15 Decl. of Dylan Kohere at ¶ 17.

¹⁴¹ *Id.* at ¶ 18.

May 11, 2018

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

JANE DOE 2 *et al.*,

Plaintiffs,

V.

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

Defendants.

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

PROPOSED ORDER

Upon Consideration of Plaintiffs' Cross-Motion for Summary Judgment, the Court hereby orders:

- Plaintiffs' Cross-Motion for Summary Judgment is **GRANTED**;
- Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, or, in the Alternative, Defendants' Motion for Summary Judgment, Dkt. 115, is **DENIED**;
- Defendants and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with Defendants who receive actual notice of this Order, excepting Defendant Donald J. Trump, are **PERMANENTLY ENJOINED** from excluding otherwise qualified individuals, including Plaintiffs, from an equal opportunity to enter military service on the basis that they are transgender (including because a person has undergone gender transition);
- Defendants and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with Defendants who receive actual notice of this Order, excepting Defendant Donald J. Trump, are **PERMANENTLY ENJOINED** from separating, denying reenlistment, demoting, denying promotion, denying medically

necessary treatment on a timely basis, or otherwise subjecting any service member, including Plaintiffs, to adverse treatment or differential terms of service on the basis that they are transgender (including because they have undergone or require gender transition); and

- Defendants' policy of excluding transgender people from military service is **DECLARED** unconstitutional and violates the Equal Protection and Due Process guarantees of the Fifth Amendment.

So ORDERED this _____ day of _____, 2018.

COLLEEN KOLLAR-KOTELLY
U.S. DISTRICT JUDGE