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20 **UNITED STATES DISTRICT COURT**
21 **CENTRAL DISTRICT OF CALIFORNIA**

22 AIDEN STOCKMAN; NICOLAS
TALBOTT; TAMASYN REEVES;
23 JAQUICE TATE; JOHN DOES 1-2;
24 JANE DOE; and EQUALITY
CALIFORNIA,

25 Plaintiffs,

26 v.

27 DONALD J. TRUMP, et al.

28 Defendants.

CASE NO. 5:17-CV-01799-JGB-KK

**PLAINTIFFS' JOINT
OPPOSITION TO MOTION TO
DISSOLVE THE PRELIMINARY
INJUNCTION**

Assigned to The Hon. Jesus G. Bernal

Date: May 14, 2018

Time: 9:00 a.m.

Place: Courtroom 1

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STATE OF CALIFORNIA,
Plaintiff-Intervenor,
v.
DONALD J. TRUMP, et al.
Defendants.

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1 **I. INTRODUCTION**

2 Following this Court’s Order (the “Order,” Dkt. No. 79) preliminarily
 3 enjoining Defendants from excluding transgender individuals from military service,
 4 on March 23, 2018, Defendants announced a plan to implement that ban (the
 5 “Implementation Plan,” Dkt. No. 83-1), and filed a motion to dissolve the
 6 preliminary injunction (“Motion,” Dkt. No. 82). The Implementation Plan is not a
 7 “new” policy. It is a plan for implementing the very ban this Court enjoined.

8 In their Motion, Defendants contend that *Plaintiffs* have the burden to
 9 establish their continuing entitlement to preliminary injunctive relief. That is
 10 incorrect. Under well-settled law, a party seeking to dissolve a preliminary
 11 injunction must show that as a result of changed circumstances the underlying bases
 12 for the injunction no longer exist.

13 Far from making that required showing, Defendants’ Motion confirms that
 14 nothing has changed. As the District Court for the Western District of Washington
 15 recently concluded, “the 2018 Memorandum and the Implementation Plan do not
 16 substantively rescind or revoke the Ban [set forth in the August 25 Trump
 17 Memorandum¹], but instead threaten the very same violations that caused it and other
 18 courts to enjoin the Ban in the first place.” *Karnoski v. Trump*, No. C17-1297-MJP,
 19 2018 WL 1784464, at *6 (W.D. Wash. Apr. 13, 2018). Defendants have shown no
 20 reason why maintaining the status quo—which has been in place for current service
 21 members for nearly two years—would cause them any significant harm, or indeed
 22 any harm at all, while this litigation proceeds. Defendants’ Motion should be denied.

23 **II. RELEVANT BACKGROUND**

24 **A. The Transgender Service Member Ban**

25 In June 2016, the United States Department of Defense (“DOD”) adopted a
 26 policy permitting transgender people to serve in the military. (Dkt. 23-3.) This
 27

28 ¹ *Military Service by Transgender Individuals*, 82 Fed. Reg. 41319 (Aug. 30,
 2017) (“August 25 Trump Memorandum”) (Dkt. No. 28-7).

1 policy followed a lengthy review process by senior civilian and uniformed military
2 leaders, which included extensive discussions with commanders and service
3 members, a study by the RAND Corporation, and consideration of the experiences
4 of other nations that allow service by transgender individuals. (*See, e.g.*, Dkt. No 26
5 ¶ 10.) The DOD review determined that there was no valid reason to exclude
6 qualified personnel from military service simply because they are transgender. (*See,*
7 *e.g., id.* ¶¶ 19-20.)

8 In July 2017, President Donald J. Trump announced via Twitter that “the
9 United States Government will not accept or allow . . . Transgender individuals to
10 serve in any capacity in the U.S. Military.” (*See* Dkt. No. 28-6.) In August 2017,
11 President Trump formalized the ban into an executive directive. (*See* August 25
12 Trump Memorandum, Dkt. 28-7.)

13 On September 5, 2017, Plaintiffs filed this lawsuit challenging the
14 constitutionality of the ban and moved for a preliminary injunction to prevent its
15 implementation. (Dkt. Nos. 1, 15.) Plaintiffs alleged that the ban denies them equal
16 protection of the laws, their right to liberty and privacy, and their right to freedom
17 of expression in violation of the United States Constitution. Plaintiffs argued that
18 Defendants lacked any rational basis for imposing the ban—much less a basis that
19 would survive the heightened scrutiny applicable to discrimination against
20 transgender people. (Dkt. No. 15 at 15-22.) In response, Defendants argued that the
21 President’s decision was entitled to deference. (Dkt. No. 36 at 25.) Defendants also
22 argued that Plaintiffs’ claims were not ripe for adjudication, because “the policy
23 Plaintiffs assail is still being studied, developed, and implemented.” (*Id.* at 15, 23.)

24 In December 2017, this Court—along with three other federal courts—ruled
25 that Plaintiffs had established a likelihood of success on their claim that President
26 Trump’s ban violates equal protection, that Plaintiffs would be irreparably harmed
27 absent preliminary injunctive relief, and that the public interest and balance of
28 hardships weighed in favor of granting injunctive relief. (Order, Dkt. No. 79 at 21.)

1 The Court rejected Defendants’ contention that the case was not ripe for review,
2 holding that “President Trump has unambiguously stated his policy intentions, then
3 formalized those intentions into an operative Presidential Memorandum.” (*Id.* at
4 17.)

5 The Court preliminarily enjoined Defendants from “excluding individuals . .
6 . from military service on the basis that they are transgender” and confirming that
7 “[n]o current service member may be separated, denied reenlistment, demoted,
8 denied promotion, denied medically necessary treatment on a timely basis, or
9 otherwise subjected to adverse treatment or differential terms of service on the basis
10 that they are transgender.” (*See* Order, Dkt. No. 79 at 21.) The effect of the Order
11 is to keep in place the status quo that existed before the President’s tweets and the
12 August 25 Trump Memorandum.

13 **B. The Implementation Plan And President Trump’s March 23**
14 **Memorandum**

15 The August 25 Trump Memorandum ordered Secretary of Defense James
16 Mattis to submit “a plan for implementing” the President’s directive by February 21,
17 2018. (Dkt. No. 28-7.) Secretary Mattis delivered his proposed Implementation
18 Plan to the President on February 22, 2018. (Implementation Plan, Dkt. No. 83-1 at
19 1.)

20 The Implementation Plan (1) requires transgender individuals to serve only
21 “in their biological sex,” and (2) bans transgender persons from military service if
22 they “require or have undergone gender transition.” (Implementation Plan, Dkt. No.
23 83-1, at 2-3.)

24 In accordance with the President’s instruction to “determine how to address
25 transgender individuals currently serving in the United States military” (August 25
26 Trump Memorandum, Dkt. No. 28-7, § 3), the Implementation Plan also contains a
27 “grandfather” clause, which permits service members diagnosed with gender
28 dysphoria by military medical personnel since the open service policy went into

1 effect in July 2016 and before the effective date of the Implementation Plan, to
2 “continue to serve in their preferred gender and receive medically necessary
3 treatment for gender dysphoria.” (Implementation Plan, Dkt. No. 83-1 at 3.)
4 Defendants have reserved the right to rescind this provision, stating that “should
5 [DOD’s] decision to exempt these Service members be used by a court as a basis for
6 invalidating the entire policy, this exemption is and should be deemed severable
7 from the rest of the policy.” (DOD Report, Dkt. No. 83-2 at 43.)

8 President Trump accepted the Implementation Plan in a memorandum issued
9 on March 23, 2018, in which he also “revoked” his August 25 Memorandum.
10 (March 23 Trump Memorandum at 1, Dkt. No. 83-3.) Defendants now move to
11 dissolve this Court’s preliminary injunction in order to enforce the Implementation
12 Plan.

13 **III. ARGUMENT**

14 It is the “party seeking modification or dissolution of an injunction” who
15 “bears the burden of establishing that a *significant change* in facts or law warrants
16 revision or dissolution of the injunction.” *Sharp v. Weston*, 233 F.3d 1166, 1170
17 (9th Cir. 2000) (emphasis added); *see also Knapp Shoes, Inc. v. Sylvania Shoe Mfg.*
18 *Corp.*, 15 F.3d 1222, 1229 (1st Cir. 1994) (cited by Defendants, Motion at 7)
19 (explaining that a “decision to vacate an existing preliminary injunction” is “a
20 substantial change in the status quo”).

21 Defendants cannot meet that burden here. Defendants contend that Plaintiffs’
22 claims are moot because the August 25 Trump Memorandum has been revoked and
23 replaced by a “new” policy set forth in the Implementation Plan. (Motion at 7.) That
24 is wrong: the Implementation Plan and the ban on military service by openly
25 transgender persons it prescribes are the fulfillment of the President’s directive, not
26 a departure from it. *See Karnoski*, 2018 WL 1784464, at *11-14.

27 Defendants also contend that, even if Plaintiffs’ claims are not moot, the
28 purportedly “new” policy withstands constitutional scrutiny because it is supported

1 by the justifications set forth in the DOD Report. But as explained in Section B
2 below, the government’s asserted justifications cannot survive even rational basis
3 review, much less the heightened scrutiny that applies in this case.

4 **A. Plaintiffs’ Claims Are Not Moot**

5 “The burden of demonstrating mootness ‘is a heavy one.’” *Los Angeles*
6 *County v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W.T. Grant Co.*,
7 345 U.S. 629, 632-33 (1953)). Defendants fail to carry their burden, for two reasons.
8 First, the Implementation Plan continues the same unconstitutional policy that the
9 Court’s Order enjoined. The Implementation Plan is part of a seamless course of
10 conduct following from the President’s 2017 tweets and the August 25 Trump
11 Memorandum.

12 Second, even if the Implementation Plan were entirely independent of the
13 President’s orders, this action still would not be moot. It is well settled that a
14 defendant’s voluntary cessation of a challenged policy does not moot a claim unless
15 it “is absolutely clear that the allegedly wrongful behavior could not reasonably be
16 expected to recur.” *McCormack v. Herzog*, 788 F.3d 1017, 1024 (9th Cir. 2015)
17 (internal citations omitted). In the specific context here—where a government
18 defendant issues a new policy to replace one that is the subject of a legal challenge—
19 a case is not moot if the “new” policy still “disadvantage[s]” the plaintiffs “in the
20 same fundamental way” as the original policy. *Ne. Fla. Chapter of Assoc. Gen.*
21 *Contr. of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993). Here, the
22 Implementation Plan enacts substantially the same prohibition as the August 25
23 Trump Memorandum, is unconstitutional for the same reasons, and, if enforced,
24 would inflict substantially the same injuries this Court’s Order sought to prevent.

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1 **1. *The Implementation Plan Is The Same Ban Enjoined by This***
 2 ***Court***

3 Defendants argue that Plaintiffs’ claims are moot because the Implementation
 4 Plan constitutes a “new” policy that is separate and distinct from the August 25
 5 Trump Memorandum. Both the process by which the Implementation Plan was
 6 developed and the substance of the policy it proposes rebut that claim.

7 a. The Purpose Of The Review Process Was To Develop A
 8 Plan For Banning Military Service By Transgender
 9 Persons And To Identify Justifications For Doing So

10 From the time President Trump announced his intention to reinstate a ban on
 11 military service by transgender people in July 2017, through the submission of the
 12 Implementation Plan on February 22, 2018, the government’s actions and statements
 13 have shown that the purpose of the review process was—just as President Trump
 14 ordered—to develop a plan for excluding transgender people from military service
 15 and to identify justifications for doing so.

16 The August 25 Trump Memorandum directed Secretary of Defense Mattis to
 17 submit to the President, by February 21, 2018, “a plan for implementing” the policies
 18 and directives set out in the memorandum—*i.e.*, a prohibition on military service by
 19 transgender persons. (Dkt. 28-7.) Secretary Mattis responded that the Department
 20 had “received the [August 25, 2017] Presidential Memorandum” and that it would
 21 “carry out the President’s policy direction.” (Decl. of Adam Sieff in Supp. of Pls.’
 22 Opp. to Mot. to Dissolve (“Sieff Decl.”), Ex. A).

23 Shortly thereafter, Secretary Mattis affirmed that DOD “will carry out the
 24 President’s policy and directives” and will “comply with the Presidential
 25 Memorandum.” (*Id.*) Secretary Mattis directed his staff to “develop[] an
 26 Implementation Plan on military service by transgender individuals, *to effect the*
 27 *policy and directives in [the] Presidential Memorandum.*” (Sieff Decl., Ex. B
 28 (emphasis added).) Secretary Mattis described the process that DOD would

1 undertake to develop the plan in a September 14, 2017 memorandum setting forth
2 “Terms of Reference” for “Implementation of [the] Presidential Memorandum on
3 Military Service by Transgender Individuals” (“Terms of Reference”). (*Id.*) The
4 Terms of Reference directed the Deputy Secretary of Defense and the Vice
5 Chairman of the Joint Chiefs of Staff to assemble a panel drawn from the DOD and
6 the Department of Homeland Security in order to conduct an “independent multi-
7 disciplinary review and study of relevant data and information . . . to inform the
8 *Implementation Plan.*” (*Id.* (emphasis added).)

9 The Terms of Reference instructed the panel to comply with the directives in
10 the August 25 Trump Memorandum. (*Id.*) In defining the panel’s assignment with
11 respect to enlistment, Secretary Mattis did not ask for a recommendation as to
12 whether accession of transgender individuals should be allowed, but rather informed
13 his subordinates that DOD had been “direct[ed]” to prohibit accessions. (*Id.*) The
14 panel was asked to consider only how the “guidelines” for such a policy should be
15 updated “to reflect currently accepted medical terminology.” (*Id.*) Similarly, with
16 respect to service by transgender individuals, the panel was told that DOD was
17 required to “return to the longstanding policy and practice . . . that was in place prior
18 to June 2016,” *i.e.*, a ban. (*Id.*)

19 In February 2018, the DOD completed the process—on precisely the timeline
20 directed by the August 25 Trump Memorandum—and Secretary Mattis submitted a
21 plan to implement the President’s directive.

22 b. The Implementation Plan Bans Transgender People From
23 Military Service

24 The Implementation Plan, which addresses “Military Service by Transgender
25 Persons,” does not constitute a new or different policy. It prevents transgender
26 individuals from serving consistent with their gender identity—including by
27 excluding anyone who has who “require[s] or ha[s] undergone gender transition,”
28 and by requiring proof that an applicant is “stable” in their birth sex.

1 (Implementation Plan, Dkt. 83-1 at 2-3.) It is a prohibition against transgender
2 persons serving in the military in both name and substance; it does not apply to non-
3 transgender individuals at all.

4 Defendants' claim that the Implementation Plan is not a ban because it permits
5 transgender people to serve in their birth sex has no merit. Just as a policy allowing
6 Muslims to serve in the military if they renounce their faith would be a ban on
7 military service by Muslims, a policy requiring transgender individuals to serve in
8 their birth sex *is* a ban on transgender service. *See Christian Legal Soc'y v. Martinez*,
9 561 U.S. 661, 689 (2010) (rejecting purported distinction between targeting same-
10 sex intimate conduct and discriminating against gay people).

11 Defendants' argument to the contrary is similar to the specious claim,
12 uniformly rejected by courts, that laws limiting marriage only to male-female
13 couples did not discriminate against gay people because a gay person could marry a
14 person of the opposite sex. *See, e.g., In re Marriage Cases*, 183 P.3d 384, 440-441
15 (Cal. 2008) (rejecting as "sophistic" the claim that such a law does not discriminate
16 because "the marriage statutes permit a gay man or a lesbian to marry someone of
17 the opposite sex, because making such a choice would require the negation of the
18 person's sexual orientation"); *Kitchen v Herbert*, 961 F. Supp. 2d 1181, 1200 (D.
19 Utah 2013) (finding that "plaintiffs' asserted right to marry someone of the opposite
20 sex is meaningless"). The Implementation Plan thus puts into operation exactly what
21 the President, on July 26, 2017, announced that he intended to do: It bars transgender
22 individuals from serving consistent with their gender identity, thereby barring them
23 from serving.

24 Defendants' attempt to portray the Implementation Plan as a "new" policy
25 based on a medical condition (gender dysphoria) does not withstand scrutiny. "The
26 Implementation Plan prohibits transgender people—including those who have
27 neither transitioned nor been diagnosed with gender dysphoria—from serving,
28 unless they are 'willing and able to adhere to all standards associated with their

1 biological sex.” *Karnoski*, 2018 WL 1784464, at *13. The Implementation Plan
2 does not exclude those with gender dysphoria; rather, regardless of whether a person
3 has gender dysphoria, it excludes both service members and potential recruits who
4 do not live in their birth sex—*i.e.*, people who are transgender. For example, the
5 Implementation Plan bars accession by transgender people who no longer have
6 gender dysphoria because they have successfully transitioned, while permitting
7 service by persons with gender dysphoria so long they do not transition. In every
8 instance, the operative consideration is not whether a person has gender dysphoria,
9 but rather whether a person lives in their birth sex. For this reason, as the district
10 court in *Karnoski* concluded, the Implementation Plan is no less a ban on military
11 service by transgender people than the Presidential directive it implements:

12 Requiring transgender people to serve in their “biological
13 sex” does not constitute “open” service in any meaningful
14 way, and cannot reasonably be considered an “exception”
15 to the Ban. Rather, it would force transgender service
members to suppress the very characteristic that defines
them as transgender in the first place.

16 *Karnoski*, 2018 WL 1784464, at *12.

17 The Implementation Plan’s limited exception for some current transgender
18 service members does not change this mootness analysis because it, too, is a
19 continuation of ban. The August 25 Trump Memorandum specifically recognized
20 that the Implementation Plan might treat currently serving transgender service
21 members differently, stating that, “[a]s part of the implementation plan,” the
22 Secretary “shall determine how to address transgender individuals currently serving
23 in the United States military.” (Dkt. 28-7.) Unlike other service members, this small
24 group is permitted to serve only on sufferance—that is, only based on the military’s
25 conditional exception to its policy of generally deeming transgender people unfit to
26 serve. *See also infra* § III.C (explaining why this exception does not even spare the
27 current service members it applies to from suffering irreparable injuries).

28

1 **2. *Even If The Implementation Plan Were A New Policy, This***
2 ***Action Would Not Be Moot***

3 As shown above, the Implementation Plan is not a newly adopted policy. It
4 was created as part of a process established in the August 25 Memorandum,
5 implements the prohibition directed by the Memorandum, harms Plaintiffs in
6 substantially the same ways, and suffers from the same constitutional
7 defects. Accordingly, the President’s “revocation” of the August 25 Trump
8 Memorandum has no legal or practical significance. Contrary to Defendants’
9 argument, it does not moot Plaintiffs’ claims. However, even if—contrary to all
10 available evidence—the Implementation Plan *were* a new policy that was
11 independently adopted to replace the August 25 Trump Memorandum, this case
12 would not be moot. A defendant’s voluntary cessation of a challenged policy does
13 not moot the plaintiff’s claim unless it “is absolutely clear that the allegedly
14 wrongful behavior could not reasonably be expected to recur.” *McCormack v.*
15 *Herzog*, 788 F.3d 1017, 1024 (9th Cir. 2015) (internal citations omitted). Here the
16 allegedly wrongful behavior will predictably recur because the Implementation
17 Policy discriminates “in the same fundamental way” as the August 25 Trump
18 Memorandum. *City of Jacksonville*, 508 U.S. at 662; *see, e.g., Nat. Res. Def. Council*
19 *v. Cty. of Los Angeles*, 840 F.3d 1098, 1102 (9th Cir. 2016) (holding that action
20 alleging violations of County’s 2001 pollution discharge permit was not moot in
21 light of revocation of 2001 Permit and replacement by a new 2012 Permit “because
22 the County Defendants are still subject to receiving water limitations, which are
23 substantially the same as the limitations in the 2001 Permit”); *Assoc’d. Gen.*
24 *Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep’t of Transp.*, 713 F.3d 1187,
25 1194 (9th Cir. 2013) (holding that equal protection action challenging Caltrans’
26 affirmative action program was “not moot” despite revocation and replacement of
27 program because “Caltrans’ new preference program is substantially similar to the
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1 prior program and is alleged to disadvantage AGC's members 'in the same
2 fundamental way' as the previous program”).

3 Defendants' attempted reliance on *Department of Treasury v. Galioto*, 477
4 U.S. 556 (1986) (per curiam) is unavailing. In *Galioto*, the district court enjoined a
5 federal law barring certain former patients from buying firearms, with no avenue for
6 seeking individualized relief, while providing an avenue for such relief for convicted
7 felons. *Id.* at 558. While the government's appeal was pending, Congress amended
8 the law to permit anyone barred from buying firearms, for any reason, to seek
9 individualized relief. *Id.* The Supreme Court held that the plaintiff's challenge was
10 moot, since the disparate treatment of former patients had been entirely eliminated
11 by the new law. *Id.* at 558-59. In contrast, the Implementation Plan presents the
12 *same* equal protection issue and inflicts the *same* constitutional injury as the policy
13 originally challenged by Plaintiffs and enjoined by this Court.

14 **B. The Implementation Plan Cannot Withstand Constitutional**
15 **Scrutiny**

16 This Court has already determined that Plaintiffs are likely to succeed on their
17 claim that excluding transgender people from military service violates the equal
18 protection component of the Fifth Amendment's Due Process Clause.² Defendants
19 seek to undermine that holding by arguing, as they did in opposing Plaintiffs' motion
20 for a preliminary relief, that the Implementation Plan should be subject only to
21 rational basis review and by claiming that their justifications are sufficient under that
22 minimal standard. Neither argument has merit.

23 **1. The Implementation Plan Requires Heightened Scrutiny**

24 This Court has already held that “discrimination on the basis of one's
25 transgender status is subject to intermediate scrutiny.” Order, Dkt. No. 79 at 19; *see*
26

27 ² The Court has not yet addressed Plaintiffs' other claims. Though not pertinent
28 here, Plaintiffs expressly reserve and maintain that they are independently entitled
to full relief on the basis of each of these claims, as well.

1 *also Doe I v. Trump*, 275 F. Supp. 3d 167, 208 (D.D.C. 2017) (same); *Stone v.*
 2 *Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017) (same); *Karnoski v. Trump*, 2017
 3 WL 6311305, at *7 (W.D. Wash. Dec. 11, 2017) (same); *cf. Karnoski*, 2018 WL
 4 1784464, at *20-24 (concluding upon further examination that such discrimination
 5 warrants strict scrutiny). Defendants have not shown any valid reason for this Court
 6 to reverse that ruling now.

7 Defendants claim that *Schlesinger v. Ballard*, 419 U.S. 498 (1975) supports
 8 their argument for a lower standard of review because it shows that *post hoc*
 9 justifications for sex-based discrimination are sufficient in military cases. (Motion
 10 at 11.) But *Schlesinger* held no such thing.³ The Court based its opinion on its
 11 determination that, *at the time the statute at issue in the case was enacted*, Congress
 12 sought to compensate for the fact “that women line officers had less opportunity for
 13 promotion than did their male counterparts.” *Id.* at 508. Far from relying on a *post*
 14 *hoc* justification, the Court looked to whether a sufficient justification for the law
 15 existed at the time of its enactment.

16 Defendants also claim that the Court is more deferential to the government’s
 17 evidence in military cases. Specifically, Defendants contrast the Court’s rejection
 18 of the government’s evidence in *Craig v. Boren*, 429 U.S. 190 (1976) with its
 19 deference to the government’s experts in *Goldman v. Weinberger*, 475 U.S. 503, 507
 20 (1986). That argument misses the mark. *Craig* involved an equal protection
 21 challenge to a *facial* classification based on sex, while *Goldman* involved a First
 22 Amendment challenge to the application of a *facially neutral* military regulation
 23 regarding dress and appearance. As such, *Goldman* has little bearing on the equal
 24 protection question presented here.

25 Under controlling precedent, military policies that discriminate based on sex
 26 are subject to the same heightened scrutiny applied in other settings. *See Rostker v.*

27 _____
 28 ³ Even if Defendants’ *post hoc* justifications could be considered, they would
 not justify the policy challenged in this case. *See infra* § III.B.2.

1 *Goldberg*, 453 U.S. 57, 69-71 (1981) (declining “to apply a different equal
2 protection test because of the military context”); *see also United States v. Virginia*,
3 518 U.S. 515, 531 (1996) (carefully scrutinizing the extensive statistical and expert
4 evidence about gender-based differences proffered by the government to justify its
5 exclusion of women from the Virginia Military Institute). The Ninth Circuit has also
6 subjected the government’s evidence to rigorous scrutiny when a military regulation
7 infringes a due process right. *See Witt v. Dep’t of Air Force*, 527 F.3d 806, 821 (9th
8 Cir. 2008) (remanding due process challenge for development of an evidentiary
9 record on whether Don’t Ask, Don’t Tell statute “significantly furthers the
10 government’s interest and whether less intrusive means would achieve substantially
11 the government’s interest”); *Log Cabin Republicans v. United States*, 716 F. Supp.
12 2d 884, 911-23 (C.D. Cal. 2010), *vacated on other grounds as moot* 658 F.3d 1162
13 (9th Cir. 2011) (concluding that Don’t Ask Don’t Tell statute violated substantive
14 due process after carefully examining both plaintiffs’ and the government’s
15 evidence).

16 Defendants also claim that *Rostker* upheld a discriminatory law based on mere
17 “administrative convenience.” (Motion at 13.) In fact, however, the statute survived
18 only because the Court found that the exclusion of women from the draft was
19 “closely related to Congress’ purpose” of registering only persons who would be
20 eligible for combat. 453 U.S. at 79. Nothing in *Rostker* suggests that administrative
21 convenience alone would have sufficed.

22 Defendants also contend that “the political branches have significant latitude
23 to choose among alternatives in furthering military interests.” (Motion at 12-14.)
24 But in *Rostker*, the Court deferred to Congress only because Congress based its
25 decision on extensive evidence about alternative policies. 453 U.S. at 72-73. Here,
26 the only evidence the military considered was about how to justify and implement a
27 preexisting ban. President Trump did not order the military to “choose among
28 alternatives”; rather, he ordered the military to *implement his decision*. They have

1 now done so, and their Implementation Plan is entitled to no more deference than
2 the President’s original decree.

3 Finally, Defendants note that the Supreme Court tolerated “inconsistencies
4 resulting from line-drawing” in *Goldman*. Again, however, in *Goldman*, the Court
5 deferred to the Air Force’s judgment about whether to create an exception to a
6 facially neutral rule. In contrast, the policy here is facially discriminatory. On its
7 face, it is a “transgender” policy and applies only to transgender people. As this
8 Court has already determined, such a policy requires, and likely fails, heightened
9 scrutiny.

10 **2. *The Justifications For The Implementation Plan Are Not***
11 ***Rationally, Much Less Substantially, Furthered by Barring***
Transgender People from Military Service

12 Under the heightened review this Court has concluded applies, the transgender
13 military ban must at least be substantially related to an exceedingly persuasive
14 justification. *Virginia*, 518 U.S. at 533. “The justification must be genuine, not
15 hypothesized or invented post hoc in response to litigation.” *Id.* As an initial matter,
16 the justifications in the DOD Report fail that test because they were manufactured
17 after the fact to justify an existing ban.

18 In addition, even in the ordinary equal protection case calling for the most
19 deferential standard of review, there must minimally be a rational relationship
20 between the classification and the object to be served. *Heller v. Doe by Doe*, 509
21 U.S. 312, 321 (1993); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432,
22 450 (1985). The DOD Report is so rife with misstatements, internal inconsistencies,
23 and distortions that the Implementation Plan fails even that minimal test, as set forth
24 in the attached affidavits and more fully addressed below. But even taking the
25 statements in the DOD Report at face value, the Implementation Plan cannot survive
26 constitutional scrutiny under any level of review because the required connection
27 between the interests asserted and the drastic solution of barring an entire group of
28 persons from military service simply does not exist.

1 The Defendants claim that barring transgender service members advances
2 three interests: (1) promoting military readiness, based on purported concerns about
3 the deployability of transgender troops; (2) promoting unit cohesion, based on
4 concerns about maintaining sex-based standards; and (3) lowering costs. None of
5 these asserted interests justifies a special rule that applies only to transgender
6 persons.

7 a. Banning Otherwise Qualified Transgender People From
8 Military Service Does Not Further Military Readiness

9 Even on its own terms, the DOD Report shows that the Implementation Plan
10 does not further the government’s interest in military readiness. The DOD Report
11 claims that barring transgender people is warranted because the medical treatments
12 for gender transition result in reduced deployability. (Dkt. 83-2 at 34-37.) While
13 deployability is an important concern, it does not justify a categorical bar of
14 transgender people. The military already has universal deployment standards that
15 service members must meet. (*See* Sieff Decl., Ex. C (Memorandum, Under
16 Secretary of Defense, Personnel and Readiness, DOD Retention Policy for Non-
17 Deployable Service Members (February 14, 2018)).) Those standards result in
18 discharge where a service member is nondeployable “for more than 12 consecutive
19 months, for any reason.” (*Id.*) In light of that objective and generally applicable
20 rule, there is no legitimate, much less important, reason for applying a special rule
21 to transgender people based on “uncertain” predictions of future nondeployability.
22 (*See* DOD Report, Dkt. No. 83-2 at 34).

23 As Plaintiffs’ expert explains, “If a transgender service member’s limited
24 period of non-deployability complies with those generally applicable standards,
25 there is no reason why the service member should be automatically discharged
26 simply because they were receiving surgery for gender dysphoria as opposed to a
27 different medical condition.” (Decl. of Dr. George Brown in Supp. of Pls.’ Opp. to
28 Mot. to Dissolve (“Brown Decl.”) ¶ 40)

1 Singling out transgender people for service based on speculation that some
 2 transgender people may become nondeployable is both dramatically overinclusive—
 3 excluding many people whose medical treatment will not render them
 4 nondeployable, possibly even for any time—and dramatically underinclusive in
 5 failing to recognize that many non-transgender people have medical needs that may
 6 result in extended periods of nondeployment. *See Crawford v. Cushman*, 531 F.2d
 7 1114, 1123 (2d Cir. 1976) (“Why the Marine Corps should choose, by means of the
 8 mandatory discharge of pregnant Marines, to insure its goals of mobility and
 9 readiness, but not to do so regarding other disabilities equally destructive of its goals,
 10 is subject to no rational explanation.”); *In re Levenson*, 587 F.3d 925, 933 (9th Cir.
 11 2009) (Reinhardt, J.) (rejecting classification that was “drastically underinclusive”).

12 The DOD Report’s assertion that transgender people are more prone to
 13 suicidality and other mental health conditions including anxiety and depression
 14 suffers from the same logical flaw. (*See* Dkt. 83-2 at 23.) Under generally
 15 applicable enlistment criteria, all prospective military service members must
 16 undergo a rigorous examination to identify any preexisting mental health diagnoses
 17 that would preclude enlistment. Accordingly, there is no reason to single out
 18 transgender people for unique treatment because the military directly screens for
 19 those conditions. Anyone with a history of suicidal behavior—whether transgender
 20 or not—is barred from enlisting. (*See* DOD Instruction 6130.03 at Encl. 4.29(n).4
 21 (Apr. 28, 2010) (“DODI 6130.03”)⁵.) Anyone with a history of anxiety or
 22 depression—whether transgender or not—is barred from enlisting unless, *inter alia*,
 23 they have been stable and without medical treatment for 24 consecutive months or
 24 36 consecutive months respectively. (*See id.* at Encl. 4.29(f), (p).) As a result, any

25 _____
 26 ⁴ On March 30, 2018, DOD issued new regulations, which will go into effect
 27 on May 6, 2018. This new regulation provides similar screens for anxiety,
 28 depression, and suicidality.

⁵ DODI 6130.03 is accessible at: http://www.med.navy.mil/sites/nmotc/nami/arwg/Documents/WaiverGuide/DODI_6130.03_JUL12.pdf.

1 enlistee, whether transgender or not, is screened for these conditions. As above,
2 concerns about deployment cannot justify singling out transgender individuals for
3 exclusion when universal policies that screen for these concerns are already in
4 place.⁶

5 The absence of a rational—much less substantial—connection between the
6 ban and military readiness is underscored by the Implementation Plan’s reversal of
7 policy authorizing enlistment for transgender individuals who have completed
8 gender transition and have no need of any further medical care beyond the same
9 routine hormone therapy required by many other service members. (*See*
10 Implementation Plan at 3, Dkt. No. 83-1.) To the extent the military is purportedly
11 concerned about the deployability of transgender service members who may require
12 transition-related surgeries, it makes no sense to exclude those who have already
13 completed gender transition and have no need for such care.

14 These fatal defects in fit between Defendants’ asserted interest in military
15 readiness and the exclusion of transgender people are sufficient to show that the
16 Implementation Plan cannot withstand constitutional review. In addition, however,
17 the DOD Report is riddled with misstatements, internal inconsistencies, and
18 distortions. For example, the DOD Report cites data from a military study for the
19 proposition that service members with gender dysphoria are “eight times more likely
20 to attempt suicide than Service members as a whole.” (DOD Report, Dkt. No. 83-2
21 at 23.) As Dr. Brown explains, “In fact, the underlying data refer to “suicidal
22 ideation,” not actual suicide attempts. (Brown Decl. ¶ 21, Ex. H at 9.)

23 In addition, the DOD Report states that transgender people who undergo
24 surgery may be nondeployable for extended periods of time, “perhaps even a year”

25
26 ⁶ In response to the Implementation Plan and the DOD Report, the American
27 Psychological Association stated that it “is alarmed by the administration’s misuse
28 of psychological science to stigmatize transgender Americans and justify limiting
their ability to serve in uniform and access medically necessary health care.” (*See*
Brown Decl., Ex. C (APA Statement).)

1 and then cites as support for that conclusion typical recovery times for transition-
2 related surgeries that range between only 2 weeks and 6 months. (DOD Report, Dkt.
3 No. 83-2 at 35.) In fact, “there is no medical basis” for the Report’s assertion that
4 treatment for gender transition “could render a transgender service member non-
5 deployable for a full twelve months.” (Brown Decl. ¶ 41.)

6 Similarly, the DOD Report distorts evidence regarding the efficacy of
7 treatments for gender transition. For example, the DOD Report cites a recent
8 decision by the U.S. Department of Health & Human Services Center for Medicare
9 and Medicaid Services (“CMS”) for the proposition that there is “insufficient
10 scientific evidence to conclude that [transgender medical] surgeries improve health
11 outcomes for persons with gender dysphoria.” (DOD Report, Dkt. No 83-2 at 26
12 n.82.) But to the contrary, the CMS report found that “surgical care to treat gender
13 dysphoria is safe, effective, and not experimental.” (Brown Decl. ¶ 17 (citing Ex. F
14 to same).) Consistent with standard medical practice, the CMS report endorsed
15 individualized treatment plans to treat gender dysphoria, the same approach
16 currently in place. (Brown Decl., Ex. F.)

17 The DOD Report also misconstrues guidelines issued by the Endocrine
18 Society regarding protocols for hormone therapy. (DOD Report, Dkt. No. 83-2 at
19 35.) The DOD Report states that “[t]ransition-related treatment that involves cross-
20 sex hormone therapy could render a servicemember nondeployable for a year.” *Id.*
21 According to one of the authors of the Endocrine Society guidelines who was
22 consulted by the panel assembled by Secretary Mattis, “the initiation of hormone
23 therapy or being on harmony therapy would not prevent a servicemember from
24 carrying out their military duties.” (See Decl. of Joshua D. Safer, MD, FACP in
25 Supp. of Pls. Opp. to Mot. to Dissolve (“Safer Decl.”) ¶ 17.) In fact, transgender
26 people—like other service members who receive prescription medication on
27 deployment—have been deploying across the globe for decades, and have been able
28 to do so openly while receiving medical treatment for the past year and a half. (See

1 Decl. of Brad R. Carson in Supp. of Pls.’ Opp. to Mot. to Dissolve (“Carson Decl.”)
2 ¶ 20.)

3 These misrepresentations are particularly egregious in light of the
4 overwhelming medical consensus that the treatments for gender transition are highly
5 effective. As the American Medical Association explained, “there is no medically
6 valid reason—including a diagnosis of gender dysphoria—to exclude transgender
7 individuals from military service,” and the DOD Report “mischaracterized and
8 rejected the wide body of peer-reviewed research on the effectiveness of transgender
9 medical care.” (See Brown Decl., Ex. D (AMA Letter to Secretary James Mattis).)

10 b. Banning Transgender People Is Not Rationally, Much
11 Less Substantially, Related To Maintaining Sex-based
12 Standards

13 Defendants’ claim that permitting military service by transgender people is
14 “incompatible with sex-based standards” fares no better. Permitting transgender
15 men to serve as men and transgender women to serve as women does not disrupt the
16 military’s maintenance of sex-based standards in the few areas where they exist.
17 Under the open service policy that went into effect in July 2016, a service member’s
18 sex for all purposes while in the military is determined by the DEERS marker.
19 Changing the DEERS marker requires demonstration of completion of gender
20 transition and requires a commander’s approval, consistent with that commander’s
21 evaluation of “expected impacts on mission and readiness.” (Dkt. No. 28-4 at
22 1.29(f).) This rigorous process creates a bright line rule that ensures the military can
23 maintain sex-based standards, when appropriate, including with regard to the
24 transgender men and women to whom the same standards also apply.

25 Defendants’ argument boils down to a claim that, simply by existing as such,
26 transgender people undermine sex-based standards. But if that claim were sufficient
27 to justify barring all transgender people from military service, it would also justify
28 their exclusion from any, and all, institutions that maintain sex-based criteria for

1 facilities, including schools, workplaces, public accommodations, and beyond. In
2 effect, Defendants' claim would banish transgender people from public life.

3 Courts have overwhelmingly rejected the use of Defendants' rationale to
4 justify discrimination against transgender individuals in other settings. *See Whitaker*
5 *v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046-47 (7th Cir.
6 2017); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 724-26 (D. Md.
7 2018); *Doe v. Boyertown Area Sch. Dist.*, 2017 WL 3675418, at *52-53 (E.D. Pa.
8 Aug. 25, 2017), *appeal docketed*, No. 17-3113 (3d Cir. Sept. 28, 2017); *Students &*
9 *Parents for Privacy v. U.S. Dep't of Educ.*, 2016 WL 6134121, at *28-29 (N.D. Ill.
10 Oct. 18, 2016), report and recommendation adopted by 2017 WL 6629520 (N.D. Ill.
11 Dec. 29, 2017). As these courts have recognized, permitting transgender individuals
12 to live in accord with their gender identity does not undermine the existence of sex-
13 based activities or facilities, nor does it threaten the privacy or safety interests of
14 others.⁷ The same analysis applies here.

15 To the extent Defendants claim there is anything different or unique about the
16 military justifying a departure from this established precedent, that argument is
17 belied by the military's successful implementation of extensive guidance and
18 training since the adoption of the open service policy. (*See Carson Decl.* ¶ 29.) With
19 nearly two years of experience integrating openly transgender people into the
20 service, it is notable that Defendants present no evidence in support of their claims
21 and rely instead on hypothetical and speculative rather than actual concerns. (*Id.*)

22 Tellingly, the "best illustration" Defendants can muster is a single commander
23 who "was confronted with dueling equal opportunity complaints" arising from a
24

25
26 ⁷ This Court should reject Defendants' claim that allowing transgender people
27 access to sex-based facilities based on the sex designated by their DEERS marker
28 exposes the military to liability. Not a single case supports that claim despite
thousands of schools, employers, and public accommodations providing transgender
men and women access to facilities consistent with their identities in jurisdictions
with similar laws authorizing access to facilities based on sex.

1 conflict between a transgender woman and a non-transgender woman. (Motion at
 2 19.) However, if the mere existence of a single conflict or complaint were sufficient
 3 to justify the exclusion of an entire group of people, then many other groups—
 4 including women, gay people, religious minorities, and many racial and ethnic
 5 groups—would likely be unable to serve.

6 c. Banning Transgender People From Military Service Is
 7 Not Rationally, Much Less Substantially, Related To
 8 Saving On Costs

9 Finally, the Defendants’ cost-based justifications cannot survive review.
 10 Fatally, the report fails to demonstrate that there is any rational reason, much less a
 11 substantial one, to treat the medical costs incurred by transgender service members
 12 differently from the costs incurred by non-transgender service members. *See, e.g.,*
 13 *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (where interest in “cost savings
 14 and reducing administrative burdens” “depend[s] upon distinguishing between
 15 homosexual and heterosexual employees, similarly situated,” it “cannot survive
 16 rational basis review”). For this reason, even accepting *arguendo* that the cost
 17 analysis in the Implementation Plan were accurate (*cf.* Carson Decl. ¶¶ 22-23), it
 18 cannot justify the categorical bar of transgender people from military service.

19 Defendants also cannot show how the cost of transition-related treatment
 20 could justify a ban on transgender enlistees who have already transitioned. And yet
 21 the Implementation Plan completely excludes such enlistees from eligibility.

22 **C. Defendants Have Failed To Demonstrate Any Significant Change**
 23 **In The Harms Plaintiffs Face**

24 This Court has already determined that the ban would cause Plaintiffs to suffer
 25 irreparable harms. Enforcement of the implementation plan would cause Plaintiffs
 26 to suffer substantially the same harms.

27 Under the Implementation Plan, the Plaintiffs who are seeking to join the
 28 military are barred from doing so. Each of those Plaintiffs has gone through gender

1 transition and lives in accord with their gender identity, not with their assigned birth
2 sex. The Implementation Plan excludes them from joining the military and thus
3 harms them “in the same fundamental way” as the August 25 Trump Memorandum.
4 *See City of Jacksonville*, 508 U.S. at 662; Implementation Plan, Dkt. 82-3 at 3.
5 “[L]oss of opportunity to pursue one’s chosen profession constitutes irreparable
6 harm.” *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017).

7 In addition, Plaintiffs include currently serving members who are transgender
8 and who wish to come out, but who have refrained from doing so for fear of being
9 discharged. (*See* Dkt. 20 ¶ 4.) If enforced, the Implementation Plan would put them
10 in the lose-lose situation of having to choose between military discharge and denial
11 of appropriate medical care, facing irreparable injury either way.

12 Finally, the Plaintiffs who came out in reliance on the former policy and who
13 are currently serving would suffer irreparable injury even if permitted to remain in
14 the military. Defendants erroneously contend these Plaintiffs would not be harmed
15 because the Implementation Plan creates an “exception” that permits their continued
16 service. (*See* Implementation Plan, Dkt. 83-1 at 3.) But even if these Plaintiffs were
17 permitted to remain, they would be serving on fundamentally unequal terms, thereby
18 subjecting them to an irreparable constitutional harm. In addition, their service
19 would be diminished by the ban under which they serve. The Implementation Plan
20 rests on military policy that deems transgender people burdensome, unstable, and
21 generally unfit to serve. As this Court already concluded, “[t]here is nothing any
22 court can do to remedy a government-sent message that some citizens are not worthy
23 of the military uniform simply because of their gender. A few strokes of the legal
24 quill may easily alter the law, but the stigma of being seen as less-than is not so
25 easily erased.” (Order at 20, Dkt. No. 79.)

26 In addition, even on its face, the Implementation Plan makes clear that any
27 security Plaintiffs may enjoy under that exception is conditional and limited. Unlike
28 all non-transgender service members, these Plaintiffs serve subject to a severance

1 policy that permits Defendants to terminate their service at any time in the event that
 2 it becomes disadvantageous to Defendants' litigation position in this and related
 3 matters. (*See* DOD Report, Dkt. 83-2 at 45 (explaining that the grandfathering
 4 provision "is and should be deemed severable from the rest of the policy" in the
 5 event that it is "used by a court as a basis for invalidating the entire policy").) A
 6 "protection" that is contingent on litigation outcomes and subject to revocation at
 7 any time does not extinguish Plaintiffs' concrete and irreparable injuries, but
 8 prolongs them indefinitely. *See McCormack*, 788 F.3d at 1024 (holding that
 9 revocable conditional offer of immunity from prosecution under Idaho statute did
 10 not moot plaintiff's constitutional challenge to that statute because threatened
 11 injuries continued) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC),*
 12 *Inc.*, 528 U.S. 167, 189 (2000)).⁸

13 **D. Defendants Have Failed To Establish That The Equities And The**
 14 **Public Interest Now Counsel Against Enjoining The Ban**

15 Plaintiffs sought the existing preliminary injunction to preserve the status quo
 16 allowing transgender persons to serve in the military on equal terms with
 17 others. This Court agreed that the balance of equities favored Plaintiffs, given that
 18 "Plaintiffs already feel the stigma attached to" the ban. Order, Dkt. No. 79 at 20;
 19 *see also Stone*, 280 F. Supp. 3d at 769 (concluding that there was "considerable
 20

21 ⁸ Also, unlike other service members, Plaintiffs do not have the security of
 22 knowing they will be provided with any medically needed care. The DOD Report
 23 states that transgender service members who have a military-issued medical
 24 diagnosis of gender dysphoria "may continue to receive all medically necessary
 25 treatment." (Dkt. No. 83-2 at 45.) However, other provisions reject mainstream
 26 medical views on the standard of care for gender transition and the efficacy of that
 27 case, particularly for transition-related surgeries. (DOD Report, Dkt No. 83-2 at 24-
 28 27 (noting the purported "uncertainty surrounding efficacy of transition-related
 treatments").) In light of those provisions and of the express intent to deny coverage
 for transition-related surgeries after March 23, 2018 in the August 25 Trump
 Memorandum, Plaintiffs have reason to fear that they will be denied some or all
 medically necessary care.

1 evidence that . . . the discharge and banning of such individuals” would negatively
2 impact the military) (citing *Doe 1*, 2017 WL 4873042, at *33); *Doe 1 v. Trump*, 2017
3 WL 6553389, at *3 (D.C. Cir. Dec. 22, 2017) (finding that the ban is “counter to the
4 public interest” because it “would directly impair and injure the ongoing educational
5 and professional plans of transgender individuals and would deprive the military of
6 skilled and talented troops.”).

7 Defendants have not shown that the balance of equities has changed.
8 Plaintiffs continue to face irreparable injury under the Implementation Plan, under
9 which “most transgender individuals either cannot serve or must serve under a false
10 presumption of unsuitability, despite having already demonstrated that they can and
11 do serve with distinction.” (PALM Center, Statement of Fifty-Six Retired Generals
12 and Admirals (Aug. 1, 2017), Dkt. No. 28-15 at 2); *see also Doe 1*, 2017 WL
13 6553389, at *3 (“[I]n the balancing of equities, it must be remembered that all
14 Plaintiffs seek during this litigation is to serve their Nation with honor and
15 dignity[.]”). In contrast, Defendants will not be harmed should the injunction be
16 maintained. Transgender service members and recruits will remain subject to the
17 same standards as others, and the negative impacts of discharging qualified service
18 members, including the cost of recruiting and training replacements, will be avoided
19 while the case proceeds. Defendants cannot identify any specific harms that
20 maintaining the status quo would cause, nor do any exist.

21 **IV. CONCLUSION**

22 Because the Implementation Plan discriminates in the same way as the August
23 25 Trump Memorandum it executes, Defendants have not and cannot satisfy their
24 burden to establish significant changes in circumstance warranting dissolution of the
25 preliminary injunction. Defendants’ Motion should thus be denied.

26
27
28

1 Dated: April 25, 2018

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ATTESTATION

Pursuant to Civil Local Rule 5-4.3.4(a)(2)(i), I attest under penalty of perjury that I have obtained concurrence and authorization from Enrique Monagas of the California Department of Justice, to affix his electronic signatures to this filing.

Dated: April 25, 2018

By: /s/ Amy C. Quartarolo
Amy C. Quartarolo