

1 LATHAM & WATKINS LLP  
Marvin S. Putnam (SBN 212839)  
2 [marvin.putnam@lw.com](mailto:marvin.putnam@lw.com)  
Amy C. Quartarolo (SBN 222144)  
3 [amy.quartarolo@lw.com](mailto:amy.quartarolo@lw.com)  
Adam S. Sieff (SBN 302030)  
4 [adam.sieff@lw.com](mailto:adam.sieff@lw.com)  
Harrison J. White (SBN 307790)  
5 [harrison.white@lw.com](mailto:harrison.white@lw.com)  
355 South Grand Avenue, Suite 100  
6 Los Angeles, California 90071-1560  
Telephone: +1.213.485.1234  
7 Facsimile: +1.213.891.8763

8 National Center for Lesbian Rights  
Shannon P. Minter (SBN 168907)  
9 [sminter@nclrights.org](mailto:sminter@nclrights.org)  
Amy Whelan (SBN 2155675)  
10 [awhelan@nclrights.org](mailto:awhelan@nclrights.org)  
870 Market Street, Suite 360  
11 San Francisco, CA 94102  
Telephone: +1.415.392.6257  
12 Facsimile: +1.415.392.8442

GLBTQ Legal Advocates & Defenders  
13 Jennifer Levi (*pro hac vice*)  
[jlevi@glad.org](mailto:jlevi@glad.org)  
14 Mary L. Bonauto (*pro hac vice*)  
[mbonauto@glad.org](mailto:mbonauto@glad.org)  
15 30 Winter Street, Suite 800  
Boston, MA 02108  
16 Telephone: +1.617.426.1350  
Facsimile: +1.617.426.3594

17 *Attorneys for Plaintiffs Aiden Stockman, Nicolas  
18 Talbott, Tamasyne Reeves, Jaquice Tate, John  
19 Does 1-2, Jane Doe, and Equality California*

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

**TABLE OF CONTENTS**

1			
2			<b>Page</b>
3	I.	INTRODUCTION.....	1
4	II.	RELEVANT BACKGROUND.....	1
5		A. The Transgender Service Member Ban .....	1
6		B. The Implementation Plan And President Trump’s March 23 Memorandum .....	3
7			
8	III.	ARGUMENT .....	4
9		A. Plaintiffs’ Claims Are Not Moot .....	5
10		1. The Implementation Plan Is The Same Ban Enjoined By This Court.....	6
11		a. The Purpose Of The Review Process Was To Develop A Plan For Banning Military Service By Transgender Persons And To Identify Justifications For Doing So .....	6
12			
13		b. The Implementation Plan Bans Transgender People From Military Service .....	7
14			
15		2. Even If The Implementation Plan Were A New Policy, This Action Would Not Be Moot.....	10
16			
17	B.	The Implementation Plan Cannot Withstand Constitutional Scrutiny .....	11
18		1. The Implementation Plan Requires Heightened Scrutiny.....	11
19			
20		2. The Justifications For The Implementation Plan Are Not Rationally, Much Less Substantially, Furthered by Barring Transgender People from Military Service .....	14
21			
22		a. Banning Otherwise Qualified Transgender People From Military Service Does Not Further Military Readiness.....	15
23			
24		b. Banning Transgender People Is Not Rationally, Much Less Substantially, Related To Maintaining Sex-based Standards .....	19
25			
26		c. Banning Transgender People From Military Service Is Not Rationally, Much Less Substantially, Related To Saving On Costs .....	21
27			
28			

1 C. Defendants Have Failed To Demonstrate Any Significant  
 2 Change In The Harms Plaintiffs Face..... 21  
 3 D. Defendants Have Failed To Establish That The Equities  
 4 And The Public Interest Now Counsel Against Enjoining  
 The Ban. .... 23  
 5 IV. CONCLUSION ..... 24

6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**Page(s)**

**CASES**

*Ariz. Dream Act Coal. v. Brewer*,  
855 F.3d 957 (9th Cir. 2017)..... 22

*Assoc’d. Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal.  
Dep’t of Transp.*,  
713 F.3d 1187 (9th Cir. 2013)..... 10

*Christian Legal Soc’y v. Martinez*,  
561 U.S. 661 (2010) ..... 8

*City of Cleburne v. Cleburne Living Ctr., Inc.*,  
473 U.S. 432 (1985) ..... 14

*Craig v. Boren*,  
429 U.S. 190 (1976) ..... 12

*Crawford v. Cushman*,  
531 F.2d 1114 (2d Cir. 1976)..... 16

*Department of Treasury v. Galioto*,  
477 U.S. 556 (1986) ..... 10, 11

*Diaz v. Brewer*,  
656 F.3d 1008 (9th Cir. 2011)..... 21

*Doe 1 v. Trump*,  
2017 WL 6553389 (D.C. Cir. Dec. 22, 2017)..... 23, 24

*Doe 1 v. Trump*,  
275 F. Supp. 3d 167 (D.D.C. 2017) ..... 11, 23

*Doe v. Boyertown Area Sch. Dist.*,  
2017 WL 3675418 (E.D. Pa. Aug. 25, 2017), *appeal docketed*, No.  
17-3113 (3d Cir. Sept. 28, 2017)..... 19

*Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*,  
528 U.S. 167 (2000) ..... 23

1 *Goldman v. Weinberger*,  
 2 475 U.S. 503 (1986) ..... 12

3 *Heller v. Doe by Doe*,  
 4 509 U.S. 312 (1993) ..... 14

5 *Karnoski v. Trump*,  
 6 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017)..... 11

7 *Karnoski v. Trump*,  
 8 No. C17-1297-MJP, 2018 WL 1784464 (W.D. Wash. Apr. 13,  
 2018).....*passim*

9 *Kitchen v Herbert*,  
 10 961 F. Supp. 2d 1181 (D. Utah 2013) ..... 8

11 *Knapp Shoes, Inc. v. Sylvania Shoe Mfg. Corp.*,  
 12 15 F.3d 1222 (1st Cir. 1994) ..... 4

13 *In re Levenson*,  
 14 587 F.3d 925 (9th Cir. 2009)..... 16

15 *Log Cabin Republicans v. United States*,  
 16 716 F. Supp. 2d 884 (C.D. Cal. 2010), *vacated on other grounds as*  
*moot* 658 F.3d 1162 (9th Cir. 2011)..... 13

17 *Los Angeles County v. Davis*,  
 18 440 U.S. 625 (1979) ..... 5

19 *M.A.B. v. Bd. of Educ. Of Talbot Cnty.*,  
 20 286 F. Supp. 3d 704 (D. Md. 2018) ..... 19

21 *In re Marriage Cases*,  
 22 183 P.3d 384 (Cal. 2008)..... 8

23 *McCormack v. Herzog*,  
 24 788 F.3d 1017 (9th Cir. 2015)..... 5, 10, 23

25 *Nat. Res. Def. Council v. Cty. of Los Angeles*,  
 26 840 F.3d 1098 (9th Cir. 2016)..... 10

27 *Ne. Fla. Chapter of Assoc. Gen. Contr. of Am. v. City of Jacksonville*,  
 28 *Fla.*,  
 508 U.S. 656 (1993) ..... 5, 10, 21

1 *Rostker v. Goldberg*,  
 2 453 U.S. 57 (1981) ..... 12, 13  
 3 *Schlesinger v. Ballard*,  
 4 419 U.S. 498 (1975) ..... 12  
 5 *Sharp v. Weston*,  
 6 233 F.3d 1166 (9th Cir. 2000) ..... 4  
 7 *Stone v. Trump*,  
 8 280 F. Supp. 3d 747 (D. Md. 2017) ..... 11, 23  
 9 *Students & Parents for Privacy v. U.S. Dep’t of Educ.*,  
 10 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016)), *report and*  
 11 *recommendation adopted by* 2017 WL 6629520 (N.D. Ill. Dec. 29,  
 12 2017)..... 20  
 13 *United States v. Virginia*,  
 14 518 U.S. 515 (1996) ..... 12, 14  
 15 *United States v. W.T. Grant Co.*,  
 16 345 U.S. 629 (1953) ..... 5  
 17 *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*,  
 18 858 F.3d 1034 (7th Cir. 2017)..... 19  
 19 *Witt v. Dep’t of Air Force*,  
 20 527 F.3d 806 (9th Cir. 2008)..... 13  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28

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 Memorandum<sup>1</sup>], 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 <sup>1</sup> *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.

25  
26  
27  
28

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 Pan 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  
28

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.<sup>2</sup> 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 <sup>2</sup> 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 1 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.<sup>3</sup> 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 <sup>3</sup> 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”)<sup>5</sup>.) 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 <sup>4</sup> 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.

<sup>5</sup> DODI 6130.03 is accessible at: [http://www.med.navy.mil/sites/nmotc/nami/arwg/Documents/WaiverGuide/DODI\\_6130.03\\_JUL12.pdf](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.<sup>6</sup>

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 <sup>6</sup> 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.<sup>7</sup> 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 <sup>7</sup> 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 Env'tl. Servs. (TOC),*  
 12 *Inc.*, 528 U.S. 167, 189 (2000)).<sup>8</sup>

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 <sup>8</sup> 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

LATHAM & WATKINS LLP  
Marvin S. Putnam  
Amy C. Quartarolo  
Adam S. Sieff  
Harrison J. White

2  
3  
4  
5 By: /s/ Amy C. Quartarolo  
Amy C. Quartarolo

6 *Attorneys for Plaintiffs*  
7 *Aiden Stockman, Nicolas Talbott, Tamasyne*  
8 *Reeves, Jaquice Tate, John Does 1-2, Jane*  
9 *Doe, and Equality California*

10 CALIFORNIA DEPT. OF JUSTICE  
Xavier Becerra  
11 Mark R. Beckington  
12 Gabrielle D. Boutin  
Enrique A. Monagas

13 By: /s/ Enrique A. Monagas  
14 Enrique Monagas

15 *Attorneys for Plaintiff-Intervenor*  
16 *State of California*

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**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