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

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

Plaintiffs,

v.

DONALD J. TRUMP, et al.

Defendants.

CASE NO. 5:17-CV-01799-JGB-KK
**PLAINTIFFS' SUPPLEMENTAL
 BRIEF RE MINUTE ORDER OF
 NOVEMBER 16, 2017**

1 **I. INTRODUCTION**

2 Plaintiffs submit this supplemental brief in response to the Court’s Minute
3 Order issued on November 16, 2017 [ECF No. 66] (the “Minute Order”). The
4 Minute Order asks the parties to address whether Plaintiffs John Doe 1 and John Doe
5 2 have demonstrated injury-in-fact arising from the President’s August 25, 2017
6 directive that no federal resources may be used for sex-reassignment surgical
7 procedures after March 22, 2018, “except to the extent necessary to protect the health
8 of an individual who has already begun a course of treatment to reassign his or her
9 sex” (the “Surgery Directive”).

10 Plaintiffs John Doe 1 and John Doe 2 have established an injury-in-fact
11 sufficient to confer standing to challenge the Surgery Directive because each has
12 received a diagnosis of gender dysphoria and a medical treatment plan for gender
13 transition that calls for sex-reassignment surgeries after March 22, 2018 and each is
14 facing denial of medical care because of the Surgery Directive. *See Stone v. Trump*,
15 No. CV MJG-17-2459, 2017 WL 5589122, at *13 (D. Md. Nov. 21, 2017) (holding
16 that transgender plaintiffs with medical transition plans that include surgical
17 procedures after March 22, 2018 had standing to challenge ban). The Surgery
18 Directive is part of an overall scheme to expel transgender individuals from the
19 military, and basic canons of construction yield no interpretation that affords
20 Plaintiffs any safe harbor from its clear instruction.

21 **II. FACTUAL BACKGROUND**

22 The DOD’s policy on gender transition for current service members is set
23 forth in Department of Defense Instruction (“DoDI”) 1300.28. (*See* Declaration of
24 Adam S. Sieff (“Sieff Decl.”), Ex. D [ECF No. 28-4].) Under that policy, “[g]ender
25 transition begins when a Service member receives a diagnosis from a military
26 medical provider indicating that gender transition is medically necessary, and
27 concludes when the Service member’s gender marker in [the Defense Enrollment
28 Eligibility Reporting System (“DEERS”)] is changed and the member is recognized

1 in the preferred gender.” (*Id.* at § 3.1(b).) Service members with gender dysphoria
2 “must consult with a military medical service provider concerning their diagnosis
3 and proposed treatment, and must notify their commanders.” (*Id.* at § 3.1(a)(2).)
4 That notification must “identify all medically necessary care and treatment that is
5 part of the Service member’s medical treatment plan and a projected schedule for
6 such treatment.” (*Id.* at §§ 3.1(a)(3), 3.2(a)(2).) Under DoDI 1300.28, “[a]ny
7 medical care and treatment provided to an individual Service member in the process
8 of gender transition will be provided in the same manner as other medical care and
9 treatment.” (*Id.* at § 1.2(d).) Thus, a service member is eligible for surgical
10 procedures that are identified as medically necessary elements of the member’s
11 treatment plan for gender transition. (*See* Declaration of George Richard Brown
12 (“Brown Decl.”) [ECF No. 27], ¶¶ 37-38; Declaration of Brad R. Carson [ECF No.
13 26], ¶ 13.)

14 The President’s August 25th directive expressly changes that policy to limit
15 the medical care and surgical procedures that may be provided to transgender service
16 members with a diagnosis of gender dysphoria after March 22, 2018. (Sieff Decl.,
17 Ex. G [ECF No. 28-7].) On March 23, 2018, the Secretaries of Defense and
18 Homeland Security must “halt all use of DoD or DHS resources to fund sex-
19 reassignment surgical procedures for military personnel, *except to the extent*
20 *necessary to protect the health of an individual who has already begun a course of*
21 *treatment to reassign his or her sex.*” (*Id.* at §§ 2(b), 3 (emphasis added).)

22 Plaintiffs John Doe 1 and John Doe 2 each have received a diagnosis of gender
23 dysphoria from a military medical provider. (Supplemental Declaration of John Doe
24 1 (“John Doe 1 Supp. Decl.”) [ECF No. 47-6], ¶ 2; Declaration of John Doe 2 (“John
25 Doe 2 Decl.”) [ECF No. 29-3], ¶ 21; Supplemental Declaration of John Doe 2 (“John
26 Doe 2 Supp. Decl.”) [ECF No. 47-7], ¶ 2.) Each has worked with his military
27 medical provider to develop a transition plan that includes surgical procedures that
28 are projected to occur after the Surgery Directive takes effect on March 23, 2018.

1 (See John Doe 1 Supp. Decl., ¶ 4; John Doe 2 Decl., ¶ 22; John Doe 2 Supp. Decl.,
 2 ¶ 4.) Plaintiff John Doe 2’s transition plan currently includes a projected surgery
 3 date of April 2018, with the specific date to be selected based on surgeon availability.
 4 (John Doe 2 Supp. Decl., ¶ 4.) Similarly, John Doe 1’s transition plan contemplates
 5 one surgery in mid-2018, with a second surgery in or about 2020. (John Doe 1 Supp.
 6 Decl., ¶¶ 4-5.)

7 **III. ARGUMENT**

8 **A. The Surgery Directive Establishes a Facially Discriminatory** 9 **Policy That Denies Transgender Service Members Equal Access** 10 **to Medical Care.**

11 The Surgery Directive is not a freestanding provision, but rather a component
 12 of President Trump’s directive that transgender persons will not be permitted to
 13 serve in the military “in any capacity” after March 22, 2018. (Sieff Decl., Ex. F
 14 [ECF No. 28-6].) Read in the context of the overall directive as well as other statutes
 15 and policies governing service members’ health care, the language of the Surgery
 16 Directive reflects that it is intended to deny coverage of any sex-reassignment
 17 surgeries except those that fall into a narrow category of surgeries “necessary to
 18 protect the health” of a transgender service member *for a reason unrelated to gender*
 19 *transition*. Therefore, unless sex reassignment surgery became necessary for a
 20 reason unrelated to their gender transition, Plaintiffs John Doe 1 and John Doe 2 will
 21 be ineligible to receive the surgeries set forth in their current transition plans.

22 **1. The Surgery Directive is a Component of the President’s** 23 **Directive to Exclude Transgender People from Military** 24 **Service and is Consistent with that Purpose.**

25 The Surgery Directive is not an isolated change in policy issued by DOD in
 26 response to any identified problem relating to the provision of medical services to
 27 service members. It is part of a larger policy directive by the President to exclude
 28 transgender people from military service. The President’s directive recognizes that
 ridding the armed forces of transgender people will take some period of time. *See*
Doe 1 v. Trump, No. CV 17-1597 (CKK), 2017 WL 4873042, at *18 (D.D.C. Oct.

1 30, 2017). Accordingly, it includes a plan for implementation, part of which restricts
2 the medical care available to transgender service members during that period.

3 The restriction imposed by the Surgery Directive is unique to transgender
4 service members; no comparable restriction on medically necessary treatment is
5 imposed on any other class of service members. In fact, to the contrary, by statute,
6 a member of the military “is entitled to medical and dental care in any facility of any
7 uniformed service.” 10 U.S.C. § 1074. The purpose and effect of this unique
8 restriction on medically necessary care are to hasten the departure of transgender
9 individuals from the military, both by sending a clear message that they are
10 unwelcome and by causing some current service members to leave military service
11 because they cannot obtain needed medical care. As such, the Surgery Directive is
12 consistent with the broader policy intended by the directive: to eliminate transgender
13 people from military service.

14 **2. *The Most Reasonable Construction of the Surgery Directive is***
15 ***that it Prevents Payment for any Sex-Reassignment Surgeries***
16 ***Except Those Necessary to Protect Health for a Reason***
Unrelated to Gender Transition.

17 Current military policy authorizes transgender service members who have
18 received a medical transition plan to obtain sex-reassignment surgeries through their
19 military health care providers. (Sieff Decl., Ex. D [ECF No. 28-4].) The President’s
20 directive that such surgeries will not be paid for after March 22, 2018, “except to the
21 extent necessary to protect the health of an individual who has already begun a
22 course of treatment to reassign his or her sex,” imposed a new restriction on the
23 availability of such surgeries.

24 The most reasonable construction of this new policy is that it serves to limit
25 the access that service members have to sex-reassignment surgeries under the June
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27
28

1 2016 policy established by Directive-Type Memorandum (“DTM”) 16-005.¹ Unlike
2 under the 2016 policy, which provides that transgender persons can obtain medically
3 needed care for the purpose of gender transition, sex-reassignment surgery will now
4 be provided only when necessary to protect the health of an individual *for a reason*
5 *unrelated to gender transition*, such as repair of complications from earlier sex-
6 reassignment procedures.

7 By its plain language, the use of the different and narrower term “necessary
8 to protect the health of an individual,” compared to the broader language “medically
9 necessary” which appears in current policy including DoDI 1300.28, indicates that
10 the directive imposes a new restriction intended to limit sex-reassignment surgeries
11 to a narrower set of cases than those provided for under DoDI 1300.28. Similar
12 “necessary to protect the health of an individual” language has been used in other
13 contexts to impose additional restrictions on federal funding of medical care beyond
14 the requirement of medical necessity. *See, e.g., Massachusetts v. Departmental*
15 *Grant Appeals Bd. of U.S. Dep’t of Health & Human Servs.*, 815 F.2d 778, 780 (1st
16 Cir. 1987) (describing various versions of Hyde Amendment, which prohibited use
17 of federal Medicaid funds to pay for medically necessary abortion, except in limited
18 circumstances which at times included “where necessary to protect the health of the
19 mother”).

20 In contrast, to construe “necessary to protect the health of an individual” to
21 mean that sex-reassignment surgeries will continue to be available whenever
22 medically necessary, including as part of a gender transition plan, would render the
23 Surgery Directive a nullity with no practical impact. Such a reading would violate
24 well-established canons of construction and “essentially nullify the Directive and
25 contravene President Trump’s premise about the cost of surgical care.” *Stone*, 2017

27 ¹ Defense Department Directive-Type Memorandum 16-005 is available online at:
28 https://www.defense.gov/Portals/1/features/2016/0616_policy/DTM-16-005.pdf
(last visited November 28, 2017).

1 WL 5589122, at *13; *see Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016) (“When
2 Congress amends legislation, courts must ‘presume it intends [the change] to have
3 real and substantial effect.’” (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)));
4 *United Cook Inlet Drift Ass’n v. Nat’l Marine Fisheries Serv.*, 837 F.3d 1055, 1064
5 n.2 (9th Cir. 2016) (same), *cert. denied sub nom. Alaska v. United Cook Inlet Drift*
6 *Ass’n*, No. 16-1044, 2017 WL 844012 (U.S. Oct. 2, 2017); *cf. Gill v. Villagomez*,
7 140 F.3d 833, 836 (9th Cir. 1998) (“As a principle of statutory construction, we
8 assume from statutory amendments a purpose to change existing law.”) (applying
9 California law); *see also Somers v. Digital Reality Trust, Inc.*, 850 F.3d 1045, 1050
10 (9th Cir. 2017) (rejecting interpretation that would “all but read” a term “out of the
11 statute” since courts “should try to give effect to all statutory language”) (citing
12 *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (rejecting a statutory construction that
13 would render a term “insignificant, if not wholly superfluous”)).

14 Here, as in *Stone*, “if the exception were to be interpreted under the broad
15 terms proposed by Defendants, the ‘exception’ would essentially nullify the
16 Directive and contravene President Trump’s premise about the cost of surgical care
17 . . . Defendants ‘may not evade judicial review by advancing (or, in this case, weakly
18 suggesting) an interpretation of the challenged action that both is implausible and
19 would fatally undercut the President’s announced policy.’” *Stone*, 2017 WL
20 5589122, at *13 (citation omitted) (finding that plaintiffs met their burden to
21 demonstrate standing to challenge the Surgery Directive).

22 Defendants have not offered an alternative construction that guarantees that
23 Plaintiffs John Doe 1 and John Doe 2 will be eligible to receive surgery after March
24 22, 2018. They have said only that, because they have begun a course of treatment
25 for gender transition, these Plaintiffs “*potentially* fall within the exception to the
26 funding directive.” (ECF No. 61 at 7 (emphasis added).) But Defendants at no point
27 “commit that the exception would apply to Plaintiffs.” *Stone*, 2017 WL 5589122, at
28 *13.

1 **B. Plaintiffs John Doe 1 and John Doe 2 Have Standing to Challenge**
2 **the Military Ban.**

3 A plaintiff establishes injury-in-fact by showing that she or he faces a
4 substantial risk of an “invasion of a legally protected interest” that is “concrete and
5 particularized” and “actual or imminent.” *Lujan v. Defenders of Wildlife*, 504 U.S.
6 555, 560 (1992) (internal citation omitted); *Susan B. Anthony List v. Driehaus*, 134
7 S.Ct. 2334, 2341 (2014) (a plaintiff has standing *inter alia* where “there is a
8 ‘substantial risk’ that the [alleged] harm will occur”) (internal citation omitted).

9 Both John Doe 1 and John Doe 2 have “begun a course of treatment to reassign
10 [their] sex.” (Sieff Decl., Ex. G [ECF No. 28-7] at §§ 2(b), 3; John Doe 1 Decl.,
11 ¶17; John Doe 2 Decl., ¶ 21.) Both have developed medical transition plans with
12 their military medical providers. John Doe 2 has begun hormone replacement
13 therapy as part of that plan, and John Doe 1 expects to begin such therapy upon
14 receipt of “a final stamp of approval, which is not in doubt.” *Stone*, 2017 WL
15 5589122, at *13; John Doe 1 Supp. Decl., ¶ 3; John Doe 2 Supp. Decl., ¶ 3. Both
16 Plaintiffs’ treatment plans include surgical procedures that will not occur before
17 March 23, 2018. (*See* John Doe 1 Supp. Decl., ¶ 4; John Doe 2 Decl., ¶ 22; John
18 Doe 2 Supp. Decl., ¶ 4.) Therefore, “there is no lack of certainty regarding when
19 transition treatment will begin for [these Plaintiffs] since treatment has already
20 begun, and [these Plaintiffs’] surgeries are endangered by the Directive’s deadline.”
21 *Stone*, 2017 WL 5589122, at *13.

22 Plaintiffs’ imminent loss of medical care puts them at substantial risk of a
23 concrete invasion of a legally protected interest. Defendants’ assertion that Plaintiffs
24 John Doe 1 and John Doe 2 “*potentially* fall within the exception to the funding
25 directive” does not change that. (ECF No. 61 at 7 (emphasis added).) Indeed,
26 Defendants’ concession that Plaintiffs John Doe 1 and John Doe 2 may or *may not*
27 fall within the exception confirms that, at a minimum, those Plaintiffs face a
28 “substantial risk” of being denied the surgeries they have been scheduled to receive,

1 a risk sufficient to demonstrate injury-in-fact. *See Susan B. Anthony List*, 134 S. Ct.
2 at 2341.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the Court should deny Defendants’ motion to
5 dismiss and grant Plaintiffs’ motion for a preliminary injunction, including with
6 respect to the Surgery Directive.

7 Dated: December 1, 2017

Respectfully submitted,

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13 By /s/ Adam S. Sieff

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