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10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 12 RIVERSIDE DIVISION

14 **AIDEN STOCKMAN, et al.,**
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 Plaintiffs,
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 v.
 17
DONALD J. TRUMP, in his official
capacity as President of the United
States, et al.,
 18
 Defendants.
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5:17-CV-01799-JGB-KK

STATE OF CALIFORNIA'S
SUPPLEMENTAL BRIEF RE
NOVEMBER 16, 2017 ORDER
 [Dkt. No. 66]

Date: December 11, 2017
 Time: 9:00 a.m.
 Courtroom: 1
 Judge: Hon. Jesus G. Bernal

21 **STATE OF CALIFORNIA,**
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 Plaintiff-Intervenor,
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DONALD J. TRUMP, in his official
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States, et al.,
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1 Plaintiff-Intervenor State of California respectfully submits this supplemental
2 brief addressing “whether Plaintiffs John Doe 1 and John Doe 2 have separately
3 demonstrated injury-in-fact pertaining to the Sex Reassignment Surgery Directive.”
4 Dkt. No. 66 at 2.

5 INTRODUCTION

6 Plaintiffs John Doe 1 and John Doe 2 are transgender service members
7 currently serving in the United States Air Force and the United States Army,
8 respectively. Each has taken affirmative steps to begin his medical transition.
9 Prior to President Trump’s directive barring transgender individuals from military
10 service, their planned gender-affirming surgical procedures would have been
11 covered by the military. This is no longer the case. The Sex Reassignment Surgery
12 Directive directly harms Plaintiffs by defunding their planned surgeries and thereby
13 preventing or delaying their transition. The harm Plaintiffs will suffer if the
14 Sex Reassignment Surgery Directive becomes effective on March 23, 2018 is
15 concrete and real. As a consequence, they have demonstrated injuries in fact
16 conferring standing to challenge the Sex Reassignment Surgery Directive.

17 FACTUAL BACKGROUND

18 I. THE “SEX REASSIGNMENT SURGICAL” DIRECTIVE

19 On August 25, 2017, President Trump issued a memorandum to the
20 Secretaries of Defense and Homeland Security directing them to bar transgender
21 individuals from serving openly in the military. *See Military Service by*
22 *Transgender Individuals*, 82 Fed. Reg. 41319, 2017 WL 3714470 (Aug. 25, 2017)
23 (hereinafter the “August 25 Memorandum”). The August 25 Memorandum further
24 bans the use of Department of Defense and Department of Homeland Security
25 funds to provide certain medical procedures for transgender service members unless
26 service members are already in the process of receiving such treatment and the
27 treatment is necessary to protect the health of an individual. Specifically, section 2,
28 subdivision (b) of the August 25 Memorandum provides in relevant part:

1 Directives. The Secretary of Defense, and the Secretary of Homeland
2 Security with respect to the U.S. Coast Guard, shall: . . . (b) halt all use
3 of DoD or DHS resources to fund sex-reassignment surgical procedures
4 for military personnel, except to the extent necessary to protect the health
5 of an individual who has already begun a course of treatment to reassign
6 his or her sex.

7 *Id.* (hereafter, the Sex Reassignment Surgery Directive). The Sex Reassignment
8 Surgical Directive “shall take effect on March 23, 2018.” *Id.*

9 **II. PLAINTIFFS INTEND TO MEDICALLY TRANSITION AFTER MARCH 2018**

10 Plaintiff John Doe 1 currently serves as a Non-Commissioned Officer E-5
11 Staff Sergeant in the United States Air Force. Dkt. No. 29-2 (John Doe 1 Decl.)
12 at 2, ¶ 1. In April 2017, he came out to his chain of command as transgender and
13 received his medical transition plan. *Id.* at 4, ¶ 17. Under his transition plan,
14 John Doe 1 intends to commence hormone replacement therapy later this year and
15 plans to undergo top surgery in mid-2018. Dkt. No. 47-6 (John Doe 1 Supp. Decl.)
16 at 2, ¶¶ 3-4. In or about 2020, he intends to complete his transition. *Id.* at 2, ¶ 5.
17 Because funding for his gender-affirming surgical procedures will be halted before
18 he is able to have the surgeries, the implementation of the Sex Reassignment
19 Surgery Directive will deny John Doe 1 the transition-related medical care he
20 needs. Dkt. No. 29-2 at 5, ¶ 21; *see also* Dkt. No. 47-6 at 2, ¶ 6.

21 Plaintiff John Doe 2 currently serves as an E-4 Specialist Operator-Maintainer
22 in the United States Army. Dkt. No. 29-3 (John Doe 2 Decl.) at 2, ¶ 1. He has
23 openly identified as transgender since high school. *Id.* at 4, ¶ 16. In 2016, he came
24 out to his chain of command and received his medical transition plan. *Id.* at 5,
25 ¶¶ 20-22. He plans to have top surgery in April 2018, and to complete his medical
26 transition by 2021. Dkt. No. 47-7 (John Doe 2 Supp. Decl.) at 2, ¶¶ 4-5. Like
27 John Doe 1, the March 23, 2018 implementation of the Sex Reassignment Surgery
28 Directive will deny John Doe 2 the transition-related medical care he needs. *See id.*
at 2, ¶ 4.; Dkt. No. 29-3 at 7, ¶ 35.

LEGAL STANDARD

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2 The judicial power of the United States is restricted by the requirement found
3 in Article III of the U.S. Constitution that confines federal courts' jurisdiction
4 "to the resolution of cases and controversies." *Valley Forge Christian Coll. v.*
5 *Ams. United for Separation of Church & State*, 454 U.S. 464, 471 (1982) (internal
6 quotation marks omitted). A plaintiff's standing is "an essential and unchanging
7 part of the case-or-controversy requirement." *Lujan v. Def. of Wildlife*, 504 U.S.
8 555, 560 (1992). "As an aspect of justiciability, the standing question is whether
9 the plaintiff has alleged such a personal stake in the outcome of the controversy as
10 to warrant his invocation of federal-court jurisdiction and to justify exercise of the
11 court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99
12 (1975) (internal quotation marks and citations omitted).

13 A plaintiff's standing is made of three separate elements: (1) he must allege an
14 injury in fact; (2) he must be able to trace the causation of his injury to the named
15 defendant; and (3) the federal court must have the ability to redress the plaintiff's
16 grievance. *Lujan*, 504 U.S. at 560-61. At issue in this supplemental brief is
17 whether Plaintiffs John Doe 1 and John Doe 2 (collectively, the Doe Plaintiffs)
18 "have separately demonstrated injury-in-fact pertaining to the Sex Reassignment
19 Surgery Directive." Dkt. No. 66 at 2.

20 "To establish injury in fact, a plaintiff must show that he or she suffered 'an
21 invasion of a legally protected interest' that is 'concrete and particularized' and
22 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136
23 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560). "For an injury to be
24 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id.*
25 For an injury to be "concrete," it "must be 'de facto'; that is, it must actually exist."
26 *Id.* To that end, even just "the risk of real harm" satisfies the requirement of
27 concreteness. *Id.* at 1549. Further, at the pleading stage, plausible factual
28 allegations may suffice to demonstrate injury in fact. *See id.* at 1547

ARGUMENT

I. IT IS PLAUSIBLE THAT THE DIRECTIVE'S EXCEPTION WILL NOT APPLY

The Sex Reassignment Surgical Directive bans “the use of [military] resources to fund sex-reassignment surgical procedures” after March 23, 2018, *unless* affected service members have “already begun a course of treatment to reassign his or her sex” *and* the surgical procedures requested are “necessary to protect the health of an individual.” The August 25 Memorandum does not address or define the meaning of the phrases “necessary to protect the health of an individual” or “begun a course of treatment to reassign his or her sex.” But read in context with the larger ban on military service by transgender individuals, these undefined phrases may provide for an exceedingly narrow exception to the Sex Reassignment Surgical Directive.

The Directive aims to further the President’s belief, as articulated in the August 25 Memorandum, that “permitting transgender individuals to serve openly in the military . . . [will] hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources.” *Military Service by Transgender Individuals*, 2017 WL 3714470. It follows that the Directive’s exception must be read in the same context, with an express mandate to prevent open military service by transgender individuals and conserve federal funds.

This exception is unlikely sufficient to encompass transgender individuals who have received medical transition plans, but who have not yet begun surgical procedures before March 23, 2018. Indeed, reading the exception to encompass such individuals could be seen to “essentially nullify the Directive and contravene President Trump’s premise about the cost of surgical care” and his expressed desire to ban open service by transgender individuals. *Stone, et al. v. Trump, et al.*, No. 17-cv-02459-MJG, 2017 WL 5589122, at *13 (D. Md. Nov. 21, 2017). Defendants have not argued otherwise, stating that the Doe Plaintiffs would, at best, “potentially fall within the exception to the funding directive.” Dkt. No 61 at 9.

1 Instead, the exception may likely be read¹ narrowly to cover only those
2 individuals who have *begun* surgical procedures to transition and where stopping
3 the gender-affirming surgery before completion will harm the individual, or where
4 complications arise from a surgery completed before March 23, 2018, requiring
5 additional surgical procedures after March 2018. *See* World Professional
6 Association for Transgender Health, *Standards of Care*, 63 (observing that certain
7 gender-affirming surgeries require more than one operation, and that surgeries are
8 susceptible to complications).²

9 Because neither Doe Plaintiff will have undertaken their gender-affirming
10 surgeries before March 23, 2018, there is a real risk that they are outside the reach
11 of the Sex Reassignment Surgical Directive’s exception. *See* Dkt. No. 47-6 at 2,
12 ¶¶ 3-4 (John Doe 1 plans to undergo top surgery in mid-2018, and intends to
13 complete his medical transition by 2020); Dkt. No. 47-7 at 2, ¶¶ 4-5 (John Doe 2
14 has scheduled top surgery for April 2018, and will complete his medical transition
15 by 2021).

16 At this stage of the litigation, the real risk of falling outside the scope of the
17 exception is sufficient to demonstrate injury in fact. *Spokeo*, 136 S. Ct. at 1547,
18 1549; *see also Stone*, 2017 WL 5589122, at *14 (observing “that it is at the very
19 least plausible that the exception would not apply” and finding “[t]hat conclusion is
20 sufficient at this juncture to raise Plaintiffs’ right to relief above the speculative and
21 to the plausible level.”).

22
23
24 ¹ The August 25 Memorandum directs the Secretaries of Defense and
25 Homeland Security to implement, and thereby interpret, its directives. The
26 Secretary of Defense has indicated he will “implement the policy and directives in
27 the Presidential Memorandum . . . [c]onsistent with military effectiveness and
28 lethality, budgetary constraints, and applicable law. . . .” Interim Guidance,
available at <https://defense.gov/Portals/1/Documents/PDFs/Military-Service-By-Transgender-Individuals-Interim-Guidance.pdf> (last visited Dec. 1, 2017).

27 ² World Prof’l Ass’n for Transgender Health, *Standards of Care*, *available at*
28 www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351&pk_association_webpage=3926 (last visited Dec. 1, 2017).

1 **II. PLAINTIFFS HAVE MET THEIR BURDEN TO DEMONSTRATE STANDING**

2 Both Doe Plaintiffs have specific plans to undergo gender-affirming surgeries
3 after the Sex Reassignment Surgical Directive’s effective date of March 23, 2018:
4 John Doe 1’s medical transition plan, prepared in consultation with his doctor,
5 “contemplates top surgery in mid-2018” (Dkt. No. 47-6 at 2, ¶¶ 2, 4); John Doe 2
6 has “a projected top surgery date of April 2018, on a specific date selected based
7 on surgeon availability.” Dkt. No. 47-7 at 2, ¶ 4. These medically prescribed
8 surgeries are endangered by the Directive’s March 2018 deadline. This concrete
9 and particularized harm constitutes injury in fact and confers standing to challenge
10 the Directive. *See Spokeo*, 136 S. Ct. at 1548-49.

11 Indeed, on November 21, 2017, the United States District Court for the
12 District of Maryland reached the same conclusion on a comparable factual record.
13 *Stone*, 2017 WL 5589122, at *12-14. Considering a challenge to the transgender
14 military ban at issue here, the district court concluded that the plaintiffs had
15 demonstrated an injury in fact conferring standing to challenge the Sex
16 Reassignment Surgical Directive. *Id.*

17 In reaching its decision, the court distinguished *Doe v. Trump*, No. CV 17-
18 1597 (CKK), 2017 WL 4873042, *23-24 (D.D.C. Oct. 30, 2017), where the United
19 States District Court for the District of Columbia determined that the plaintiffs in
20 that case had insufficient “risk of being impacted by the Sex Reassignment Surgery
21 Directive . . . to confer standing.”

22 In contrast, the *Stone* Plaintiffs had obtained, respectively, “a final, approved
23 medical plan [calling] for two additional surgeries,” and “a near-final treatment
24 plan that calls for two surgeries, needing only a final stamp of approval, which is
25 not in doubt.” *Stone*, 2017 WL 5589122, at *12-13. Unlike the plaintiffs in *Doe v.*
26 *Trump*, the court found that the *Stone* plaintiffs were “highly unlikely to complete
27 their medically-necessary surgeries before the effective date of the Directive” and
28

1 that “there is no lack of certainty regarding when transition treatment will begin for
2 [plaintiffs] since treatment has already begun.” *Id.* at *13.

3 The same holds true in the present action—because Plaintiffs John Doe 1 and
4 John Doe 2 have each taken affirmative steps to begin and schedule their gender-
5 affirming surgeries, which will occur after March 23, 2018, and because the Sex
6 Reassignment Surgical Directive threatens to defund and thereby prevent these
7 medically prescribed surgical procedures, the Doe Plaintiffs have met their burden
8 to demonstrate standing to challenge the Sex Reassignment Surgery Directive.

9 **CONCLUSION**

10 For the foregoing reasons, Plaintiffs John Doe 1 and John Doe 2 have
11 separately demonstrated injury in fact pertaining to the Sex Reassignment
12 Surgery Directive.

13 Dated: December 1, 2017

Respectfully submitted,

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