

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

BROCK STONE, et al.,  
Plaintiffs,

vs.

DONALD J. TRUMP, et al.,  
Defendants.

Case No. 1:17-cv-02459-GLR

Hon. George Levi Russell, III

**PLAINTIFFS' RESPONSE TO  
DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY**

Plaintiffs respectfully submit this Response to Defendants' Notice of Supplemental Authority regarding the D.C. Circuit's unpublished, per curiam order vacating without prejudice the preliminary injunction in *Doe 2 v. Shanahan*, No. 18-5257 (D.C. Cir. Jan. 4, 2019) ("Order").

According to the D.C. Circuit, the district court in *Doe 2* erred in finding that (i) the 2018 Implementation Plan was not a "new policy" (*id.* at 2); and (ii) the 2018 Implementation Plan was "equivalent" to a "blanket ban" on transgender military service because "all transgender individuals either (1) have gender dysphoria or (2) transition to their preferred gender" (*id.*). But the continued viability of this Court's preliminary injunction does not depend on either of those factual premises.

*First*, Plaintiffs have never disputed that there are some factual differences between Secretary Mattis's Implementation Plan and the original terms of President Trump's original directives. But the undisputed evidence in the preliminary injunction record in this case shows, at a minimum, that the Implementation Plan was meaningfully constrained by the decision the President had made in adopting the 2017 Ban, whether or not the outcome was entirely "foreordained." Order at 3; *see* Pls.' Opp'n to Defs.' Motion to Dissolve (ECF 139) at 6, 9–12 &

Exs. 4, 6, 9. At the very least, the parties dispute the extent to which Secretary Mattis exercised independent judgment in developing the Implementation Plan. *See Stone v. Trump*, No. CV GLR-17-2459, 2018 WL 6305131, at \*7 (D. Md. Nov. 30, 2018) (recognizing that evidence about the Department of Defense’s deliberative process “is highly relevant to the lawsuit because it may explain why the Government changed its policy on transgender service members and whether that policy change was motivated by a legitimate government interest”); *see also, e.g.*, ECF 163-16 (Rule 56(d) affidavit), ¶¶ 32, 36, 39–53. Although Defendants continue to conceal information about that issue under the cloak of “deliberative process” privilege (*see* ECF 209, 216), the existing record provides ample evidence that the Implementation Plan should be preliminarily enjoined as an outgrowth of the Ban.

*Second*, the D.C. Circuit rejected the argument that the Implementation Plan was a “blanket ban” of 100% of transgender individuals because it disagreed with the factual premise that “all transgender individuals either (1) have gender dysphoria or (2) transition to their preferred gender.” Order at 2. But Plaintiffs do not need to show that every single transgender individual has gender dysphoria or transitions to establish that the Implementation Plan facially discriminates based on transgender status. As this Court has recognized, “[p]rohibiting transgender persons who have undergone transition clearly discriminates on the basis of transgender identity,” and “requiring transgender persons who have not undergone transition to serve in their biological sex forces them to suppress the very characteristic that defines them as transgender in the first place.” *Stone*, 2018 WL 6305131, at \*5 (internal quotation marks omitted). Some transgender individuals may voluntarily choose not to transition, just as some gay people may choose to be closeted or celibate. But the now-repealed “Don’t Ask, Don’t Tell” policy—which required gay people to be closeted and celibate in order to serve in the military—

discriminated against gay people as a class. *Cf. Christian Legal Soc. v. Martinez*, 561 U.S. 661, 689 (2010) (“Our decisions have declined to distinguish between status and conduct in this context.”). Similarly, prohibiting transgender people from transitioning in order to serve in the military discriminates against transgender people as a class, even if some transgender individuals are willing and able to comply with the discriminatory policy.

*Third*, as explained in Plaintiffs’ previous submissions, the facially discriminatory Implementation Plan should remain enjoined regardless of whether it is evaluated as a continuation of President Trump’s directives or (counterfactually) as a new policy. Although the D.C. Circuit recited the general need for deference to professional military judgments (Order at 3–4), as this Court has already recognized, the decisions in *Goldman v. Weinberger*, 475 U.S. 503 (1986) and *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), do not require deference here because the policies at issue in those cases were facially neutral. *See Stone*, 2018 WL 6305131, at \*7; *see also* ECF 139 at 16–18 (explaining why the conditions for deference in *Rostker v. Goldberg*, 453 U.S. 57 (1981), remain absent). Moreover, the manifest flaws in the Implementation Plan render it unconstitutional irrespective of the degree of deference applied. *See* ECF 139 at 18–31; *see also* Pls.’ Cross-Motion for Summary Judgment (ECF 163-2), at 32–33 & n.9.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of January, 2019, a copy of the foregoing was served via CM/ECF on all counsel of record.

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