[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 17-5267

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JANE DOE 1 et al.,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States, et al.
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANTS' EMERGENCY MOTION FOR ADMINISTRATIVE STAY AND PARTIAL STAY PENDING APPEAL

CHAD A. READLER
Principal Deputy Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

BRINTON LUCAS
Counsel to the Assistant Attorney General

MARLEIGH D. DOVER
CATHERINE H. DORSEY
TARA S. MORRISSEY
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7236
950 Pennsylvania Ave., NW
Washington, DC 20530

INTRODUCTION

For decades, the military has presumptively barred transgender individuals from accession into the armed forces. Last year, however, then-Secretary of Defense Ashton Carter ordered the revision of this accession policy to allow some transgender individuals to enter the military starting on July 1, 2017. On June 30, 2017, Secretary of Defense James Mattis deferred that revision until January 1, 2018, so that the services could assess the Carter policy's effect on military readiness. The President then issued a memorandum on August 25, 2017, directing Secretary Mattis to maintain the current accession policy past January 1, in order to study whether the Carter policy would harm military readiness and to provide the President with an independent recommendation. Consistent with that directive, the military is studying the issue and will make its recommendation by February 21, 2018.

The court below ended this orderly process. On October 30, 2017, it issued a preliminary injunction forbidding the military from implementing the President's directive to defer revising the accession policy past January 1, as well as a separate directive concerning the retention of transgender service members. On November 27, the district court clarified that its injunction also precludes Secretary Mattis from exercising his independent discretion to defer the January 1 "deadline" for a limited period of time, as he did in June 2017. Thus, by January 1, the military must implement the Carter policy before its study is complete and before it has adequate time to train personnel responsible for applying accession standards.

The government seeks a stay pending appeal of the portion of the injunction concerning accessions and an administrative stay until the Court resolves this motion.[1] Without this relief, the military will be forced to implement a significant change to its standards for the composition of the armed forces before it decides how to resolve this issue. As military leadership has explained, this timetable will place extraordinary burdens on our armed forces and may harm military readiness. Conversely, the two plaintiffs who claim that the accession directive will affect them are years away from trying to commission, and hence will suffer no harm from a stay.

The simplest way for this Court to prevent the irreparable injury to the government is through a stay that narrows the scope of the injunction in either of two respects. First, it could rule that there is no basis for preventing Secretary Mattis from exercising his own discretion to defer adopting the Carter policy for a limited time while the military completes its study or implements the change, as he did in June 2017. Second, it could hold that the nationwide scope of the district court's injunction is inappropriate when only two of the plaintiffs claim that the accession directive will affect them (eventually). Of course, the Court could also stay the entire portion of the injunction dealing with accessions, as that order rests on legal errors concerning jurisdiction, the equities, and the merits.

[1] The government does not seek a stay with respect to the retention directive, which will not take effect until March 23, 2018, because the military is not taking any action with respect to current service members, Add. 94, nor does it have any immediate plans to do so. Instead, it is currently determining its policy on retention.

The government requested a stay from the district court, which it denied. Add. 1-9. The government respectfully asks this Court to grant a partial stay pending appeal.[2] Specifically, this Court should (1) stay the injunction insofar as it prohibits Secretary Mattis from exercising his independent authority to defer revising the accession policy; (2) stay the application of the injunction concerning the accession directive to individuals other than the plaintiff the district court found to have standing; and/or (3) stay the portion of the injunction precluding enforcement of the accession directive. Without a stay, the military will, at the risk of harming its readiness posture, have to rush to provide the requisite training to the tens of thousands of service members across the country responsible for implementing accession standards. The government therefore respectfully asks this Court to issue an immediate administrative stay pending consideration of this motion. In the alternative, the government respectfully requests that the Court issue a decision as soon as possible.

BACKGROUND

1. To ensure that service members are "capable of performing duties," free of conditions that "may require excessive time lost from duty for necessary treatment or hospitalization," and "adaptable to the military environment without the necessity of geographical area limitations," the military maintains accession standards that presumptively exclude individuals with certain medical conditions from serving, subject

[2] Under D.C. Circuit Rule 8(a)(2), the government contacted Mr. Paul Wolfson, plaintiffs' counsel, who opposes this motion.

to an individualized waiver process. Dep't of Defense Instruction 6130.03, at 2, 7 (Apr. 28, 2010). For decades, these standards have presumptively barred transgender individuals from entering the military. *Id.* at 27, 48.

In June 2016, then-Secretary Carter ordered the Defense Department to revise its accession standards by July 1, 2017. Add. 97-102. Under this revision, a history of "gender dysphoria," "medical treatment associated with gender transition," or "sex reassignment or genital reconstruction surgery" would be disqualifying unless an applicant could obtain a certificate from a licensed medical provider that the applicant had been stable or free from associated complications for 18 months. Add. 100-01.

2. The Carter policy was never implemented because on June 30, 2017, Secretary Mattis "approved a recommendation by the services to defer" the revision until January 1, 2018. Add. 96. The deferral was designed to allow the branches to "review their accession plans and provide input on the impact to the readiness and lethality of our forces." *Id.* Secretary Mattis's action was never challenged in court.

Nearly a month later, on July 26, the President stated on Twitter that the government "will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military." Add. 25. On August 25, the President then issued an official memorandum addressing the accession and retention of transgender service members as well as government funding for their sex-reassignment surgeries. Add. 90-92. With respect to accession standards, the President found that former-Secretary Carter had "failed to identify a sufficient basis to conclude" that his revision "would not hinder

military effectiveness and lethality, disrupt unit cohesion, or tax military resources." Add. 90 (Mem. § 1(a)). In the President's view, "further study is needed to ensure that continued implementation of last year's policy change would not have those negative effects." *Id.* Accordingly, the President directed the Secretaries of Defense and Homeland Security to "maintain the currently effective policy regarding accession of transgender individuals" past January 1, 2018, until the Secretary of Defense, after consultation with the Secretary of Homeland Security, "provides a recommendation to the contrary that I find convincing." Add. 91 (§ 2(a)). The President also ordered Secretary Mattis to submit an implementation plan to him by February 21, 2018. Add. 91 (§ 3).

In response, Secretary Mattis promised to "develop a study and implementation plan" that will address, *inter alia*, "accessions of transgender individuals." Add. 95. In the meantime, the rule "generally prohibit[ing] the accession of transgender individuals" would "remain[] in effect because current or history of gender dysphoria or gender transition does not meet medical standards." Add. 94.

3. Plaintiffs—six currently serving transgender individuals and two students who allege they will try to commission more than two years from now—sought a preliminary injunction of the memorandum's various directives. Without holding argument, the district court enjoined the government "from enforcing the … directives of the Presidential Memorandum" concerning the accession and retention of transgender individuals. Add. 88.

As relevant here, the court ruled that one of the student plaintiffs had standing to challenge the accession directive, Add. 54-58; applied intermediate scrutiny and concluded that plaintiffs' equal protection challenge to that directive was likely to succeed, Add. 69-83; and held that the remaining factors counseled in favor of a preliminary injunction, Add. 83-86. The court therefore issued an order designed "to revert to the *status quo* with regard to accession … that existed before the issuance of the Presidential Memorandum—that is, the … accession polic[y] established in the June 30, 2016 Directive-type Memorandum as modified by Secretary of Defense James Mattis on June 30, 2017." Add. 89.

4. After noticing an appeal on November 21, the government asked the district court to clarify that its injunction does not prohibit Secretary Mattis from exercising his independent discretion to defer implementing the Carter policy past January 1, for a limited time, to study the policy change further or to implement the revision. Doc. 67. On November 27, the court clarified that its injunction barred Secretary Mattis from deferring the January 1 "deadline." Add. 10. As it explained, the "*status quo*" before the President's memorandum was that the government had to "allow[] for the accession of transgender individuals into the military beginning on January 1, 2018." Add. 11.

5. On December 6, 2017, the government requested a stay from the district court, Doc. 73, accompanied by a declaration from the Acting Deputy Assistant Secretary of Defense for Military Personnel Policy explaining that complying with the court's January 1 deadline would "impose extraordinary burdens" on the Defense

Department and have a "harmful impact" on "the military, its missions, and readiness." Add. 104-05. The district court denied the stay. Add. 1-9.

ARGUMENT

The Court should stay the portion of the district court's injunction requiring the military to alter its accession policy by January 1, 2018. In considering whether to grant a stay pending appeal, a court must balance four factors: (1) the applicant's likelihood of success on the merits; (2) whether the applicant will suffer irreparable injury; (3) the balance of hardships to other parties interested in the proceeding; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). This Court reviews a grant of a preliminary injunction for abuse of discretion, but legal conclusions are reviewed de novo. *Davis v. Pension Benefit Guar. Co.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009). Here, the government is likely to establish that the district court abused its discretion, as that court's analysis was infected by a number of serious legal errors. Unless stayed, that injunction will irreparably harm the government (and the public) by, *inter alia*, compelling the military to scramble to revise its policies at the risk of harming readiness and disrupting an ongoing process that is only a few months away from completion. A stay, by contrast, would preserve the status quo and not injure any of the plaintiffs, as the only ones who could arguably be affected by the accession directive will not even try to commission until May 2020 at the earliest.

I. The Government Is Likely To Succeed On The Merits.

A. Secretary Mattis Has Independent Authority To Defer Revising The Accession Policy.

The government is likely to succeed in arguing that the district court erred in enjoining Secretary Mattis from exercising his independent discretion to defer the January 1 deadline for a limited time to study the issue further or to implement the Carter policy. Neither plaintiffs nor the district court have suggested that the Secretary of Defense lacks independent authority to delay policy changes regarding the composition of the armed forces, nor could they. *See, e.g.*, 10 U.S.C. § 136(b) (recognizing his authority over "the areas of military readiness, total force management, [and] military and civilian personnel requirements"). Plaintiffs hence never sought to limit Secretary Mattis's discretion to defer implementation of the Carter policy, even though he had previously done so in June. Instead, plaintiffs asked the district court only to stop the military "from implementing President Trump's" directives. Doc. 13, at 1. Because plaintiffs challenged the President's directives, it is unsurprising that the text of the preliminary injunction never addressed Secretary Mattis's own authority to delay revising accessions standards. Instead, that injunction prohibits the government only "from enforcing … directives of the Presidential Memorandum." Add. 88-89.

Similarly, the district court's justifications for enjoining the accession directive concern the President and his memorandum alone. Specifically, the court concluded that plaintiffs' challenge was likely to succeed because (1) the "Presidential

Memorandum's" directives are "overbroad"; (2) the military had previously rejected the concerns "underlying the President's decision"; and (3) "the circumstances surrounding the announcement of the President's policy" suggest that his action "was not driven by genuine concerns regarding military efficacy." Add. 76-80. None of those reasons supports enjoining Secretary Mattis from making an independent decision to defer implementing the Carter policy for a limited time to study the issue further or to avoid the harms of rushing to comply with the January 1 deadline. *See infra* Part I.C.2.

Instead, extending the injunction to cover Secretary Mattis's authority renders the order internally inconsistent. As the district court explained, its injunction was designed to "revert to the *status quo* … that existed before the issuance of the Presidential Memorandum—that is, the … accession polic[y] established in the June 30, 2016 Directive-type Memorandum *as modified by Secretary of Defense James Mattis on June 30, 2017*." Add. 89 (emphasis added). As that order indicates, the "status quo" before the memorandum was that the Secretary could exercise his independent authority to delay implementation of the Carter policy. But there is no meaningful difference between the decision of June 30, 2017, and a renewed, independent decision by Secretary Mattis to extend the deadline for a limited period past January 1 so that the military can complete its study of the issue or take the necessary measures to implement the Carter policy. The district court provided no explanation for how or when Secretary Mattis lost his own authority to defer the Carter accessions policy, and we are aware of none.

B. This Court Should Stay The Preliminary Injunction Insofar As It Grants Nationwide Relief.

Even though only two plaintiffs claim that the accession directive might affect them, and even then not until May 2020 at the earliest, the district court entered a preliminary injunction categorically barring implementation of the accession directive nationwide. In doing so, it gave no explanation for why such broad relief was necessary to redress those alleged injuries. Nor could it. That injunction violates principles of Article III and exceeds the court's equitable authority.

To establish standing, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). "[S]tanding is not dispensed in gross," and a plaintiff must establish standing "separately for each form of relief sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). "The remedy" sought therefore must "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v Casey*, 518 U.S. 343, 357 (1996).

Equitable principles likewise require that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 765 (1994); *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163 (2010) (narrowing injunction in part because the plaintiffs "do not represent a class, so they could not seek to enjoin such an order on the ground that it might cause harm to other parties"). And these constitutional and equitable limits

apply with special force to injunctions concerning military policies. *See U.S. Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993) (staying injunction against Defense Department policy to the extent it conferred relief on anyone other than plaintiff).

Here, the district court concluded that one of the plaintiffs—Midshipman Regan Kibby, a U.S. Naval Academy student who anticipates graduating and attempting to commission in May 2020—would be injured by the accession directive. Add. 54-57. But in entering its preliminary injunction, the court did not limit its remedy to that plaintiff's injuries; instead, it barred application of the accession directive nationwide. Such wide-ranging relief cannot be reconciled with constitutional demands or equitable principles, and is unnecessary to remedy the alleged injuries of a single individual.

A limited stay of the preliminary injunction pending appeal would pose no harm to plaintiffs. A narrow injunction barring the government from applying the accession directive to Midshipman Kibby—or at most, both student plaintiffs—would provide plaintiffs with full relief. And to the extent that other applicants believe they have cognizable injuries, they are free to bring their own challenges—as some have done. *See, e.g., Stone v. Trump*, No. 17-cv-02459 (D. Md. filed Aug. 28, 2017).

C. The Injunction Of The Accession Directive Should Be Vacated.

Finally, the injunction of the accession directive rests on several legal errors.

1. To start, neither of the two plaintiffs who claim they will be affected by the accession directive has standing to challenge that order. Where, as here, a challenge would require this Court "to decide whether an action taken by one of the other two

branches of the Federal Government was unconstitutional," its "standing inquiry [must be] especially rigorous," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Here, the two student plaintiffs will not even try to commission until they potentially graduate from college in May 2020 or Spring 2021, making their standing to challenge the accession directive dependent on the threat of a future uncertain injury. *See* Add. 57, 110-18. But a "threatened injury must be *certainly impending*"—or at least pose a "substantial risk" of occurring—to be sufficiently imminent for Article III purposes. *Clapper*, 568 U.S. at 409, 414 n.5.

The risk that the accession directive will injure either of the student plaintiffs several years from now—an allegation that rests "on a highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410—cannot meet that threshold. To begin, plaintiffs assume that the current accession policy will remain in effect come 2020, but the military is currently studying this issue and will present the President with a recommendation early next year. It is possible that, following this review, Secretary Mattis will recommend ending the current policy and the President will find that proposal convincing, Add. 91 (Mem. § 2(a)), thereby eliminating the only threatened injury. And even if the accession policy has not changed by 2020 or 2021, the student plaintiffs may not want to, or be eligible to, commission at that time for reasons unrelated to the directive. *Cf. McConnell v. FEC*, 540 U.S. 93, 226 (2003) (more than four-year gap between challenge and alleged injury "too remote temporally to satisfy Article III").

The district court reached the contrary conclusion by speculating that the directive would injure Midshipman Kibby in May 2020. Add. 54-57. Based solely on the President's prior statements on Twitter, the court incorrectly concluded that "the only basis" for thinking that the current accession policy might be terminated "is the ever-present reality that every law is subject to change." Add. 57. But in doing so, the court overlooked the President's order to study the issue and Secretary Mattis's compliance with that directive, which might result in a change in accession standards. And although the court acknowledged that Midshipman Kibby faced "potential impediments" to graduating, it thought that those barriers would "likely" be overcome. App. 56-57. But this chain of speculation cannot establish a "certainly impending injury," particularly under the "especially rigorous" standard applicable here. *Clapper*, 568 U.S. at 408, 410.

The district court did not determine whether the other student plaintiff Dylan Kohere has standing, Add. 57 n.6, and it is clear that Kohere does not. As a first-year college student and member of his school's Reserve Officers' Training Corps (ROTC), Kohere will not be eligible to apply for an officer's commission until 2021. Am. Compl., Doc. 9 ¶ 39; Add. 117. Moreover, the district court's suggestion that Kohere may suffer harm absent an injunction was incorrect. *See infra* p. 16.

2. The district court also abused its discretion in weighing the equities—*i.e.,* the balance of hardships, the public interest, and the likelihood of irreparable harm—to conclude that a preliminary injunction was warranted. Even though "great deference"

is owed "to the professional judgment of military authorities concerning the relative importance of a particular military interest" in weighing these factors, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), that court significantly discounted the hardship to the military imposed by its injunction.

As military leadership has explained, compliance with the district court's January 1 deadline "will impose extraordinary burdens" on the military and have a "harmful impact" on "its missions[] and readiness." Add. 104-05. Despite the "implementation efforts made to date," the military will "not be adequately and properly prepared to begin processing transgender applicants" by January 1. Add. 108. Specifically, it will have to ensure that the "tens of thousands" of service members "dispersed across the United States" responsible for implementing accession policies "have a working knowledge or in-depth medical understanding of the standards." Add. 106. These service members include over 1,000 medical personnel, officers and providers; personnel at nine military entrance training locations; and 20,367 recruiters who assist applicants in completing their medical history forms. Add. 106-07. Further complicating matters is the fact that "[n]o other accession standard has been implemented that presents such a multifaceted review of an applicant's medical history" as the Carter policy. Add. 107. Thus, if the military is "compelled to execute transgender accessions by January 1," then "applicants may not receive the appropriate medical and administrative accession screening necessary for someone with a complex

medical condition" and thereby enter the military even though they are "not physically or psychologically equipped to engage in combat/operational service." Add. 108.

The preliminary injunction further harms the military by forcing it to implement a significant change to its accession standards before it even completes its study of the issue. Forcing the military to take some applicants it might have rejected had it been given more time to complete its study and implement its final policy is a significant injury in itself, in addition to the fact that an erroneous accession decision as to an individual could adversely affect the other members of his unit. *Id.* But beyond that, short-circuiting the deliberative process both undercuts the ongoing work of the leadership studying the issue and threatens the military with two burdensome implementation processes—one to comply with the district court's order and another to execute a new policy (if the military adopts a new one following the study) or return to the old one (if the military adheres to its standards and the injunction is set aside on appeal). Add. 108-09. Imposing "duplicative" implementation costs, "sowing confusion in the ranks," and mandating personnel policy while military experts are still studying the issue are all significant harms. Add. 109. And because these injuries—whether to the fisc or to the defense of the nation—will be passed on to citizens more generally, a stay would obviously be in the public interest.

Against those serious harms to the government and the public, plaintiffs cannot show any irreparable injury. Only two plaintiffs allege harm stemming from the accession directive, and both of them are over two years away from seeking a

commission. Nor is there any basis to conclude, as the district court did, Add. 8, that plaintiffs are likely to suffer irreparable injury in the meantime. Plaintiff Kohere is allowed to continue participating in basic course academic classes through his freshman and sophomore year; any impact beyond that point "[d]epend[s] on the outcome of the final accessions policy," and thus "is difficult, if not impossible, to assess." Add. 117. Likewise, Midshipman Kibby's claims rest on speculative assumptions regarding the Secretary's future plan and its potential impact on Kibby. *See* Add. 120. In any event, any potential harm is not irreparable. *See, e.g.*, *Guerra v. Scruggs*, 942 F.2d 270, 274 (4th Cir. 1991) (holding that general discharge from the military does not constitute irreparable injury, even where plaintiff alleged that discharge procedures were unconstitutional). Finally, the district court cited abstract stigmatic injuries to plaintiffs, Add. 84; Add. 8, but such injuries fail to confer standing on plaintiffs, much less establish irreparable harm. *See Allen v. Wright*, 468 U.S. 737, 750 (1984) (stigmatic injury "accords a basis for standing only to those persons who are personally denied equal treatment") (quotation marks omitted).

3. On the merits, the district court further erred by failing to apply the appropriately deferential standard of review. Although the armed forces are subject to constitutional constraints, "the tests and limitations to be applied may differ because of the military context." *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). For instance, judicial "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian

society." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). The same is true for "decisions as to the composition … of a military force." *Rostker*, 453 U.S. at 65; *see also, e.g.*, *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994) (en banc) ("It is hard to imagine a more deferential standard than rational basis, but when judging the rationality of a regulation in the military context, we owe even more special deference"). Thus, even when military regulations trigger heightened scrutiny, courts have upheld them in light of the significant deference due to the political branches' judgments in this area. *See, e.g.*, *Rostker*, 453 U.S. at 69–72 (excluding women from having to register for the draft).

The accession directive easily survives this deferential form of review. Given the President's concerns that departing from the military's longstanding accession policy without "further study" risked, among other things, harm to "military effectiveness," he ordered the armed forces to retain this standard while Secretary Mattis and his team conducted their own review of the issue. Add. 90-91 (Mem. §§ 1, 2(a)). A decision to maintain the status quo for several months while the military conducts an additional study of a policy change of this magnitude survives any standard of review. Indeed, Secretary Mattis made a similar decision in June 2017 by delaying the Carter policy until January 1, 2018, while the military continued to examine the issue, and neither the court below nor plaintiffs have ever suggested that his decision was unconstitutional.

The district court never grappled with this problem, other than to assume (incorrectly) that the current accession policy would necessarily remain. *See supra* Part I.C.1. But even if that were true, the President's directive would still be constitutional

given the deference due his assessment as Commander in Chief that abandoning that policy could "hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." Add. 90 (Mem. § 1(a)); *see, e.g.*, *Department of Navy v. Egan*, 484 U.S. 518, 529–30 (1988) ("'courts have traditionally shown the utmost deference to Presidential responsibilities' … in military and national security affairs" (citation omitted)).

The district court reached a different judgment only because it incorrectly applied intermediate scrutiny without the deference traditionally afforded military decisions. It justified this decision on the ground that former-Secretary Carter and his team had already "studied and rejected" the "military concerns" raised by the President. Add. 78. But even in the civilian context, the government must review "the wisdom of its policy on a continuing basis, for example, in response to … a change in administrations," *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citation, quotation marks, and ellipsis omitted).

In any event, the suggestion that the President's concerns were baseless withers under scrutiny. The study underlying the Carter policy explicitly concluded that allowing transgender individuals to serve would limit deployability, impede readiness, and impose costs on the military; it simply dismissed these burdens as "negligible." Doc. 13-3, Ex. B, at 39–42, 46, 69, 70. And the Carter policy itself implicitly acknowledged that gender dysphoria or gender transition could impede military readiness by requiring applicants to demonstrate that they had been stable or had

avoided complications for an 18-month period. In other words, the key difference between the longstanding accession policy and the Carter policy is the scope of the exception to the presumptive ban on accession by transgender individuals. Under the former, a transgender individual was presumptively disqualified absent a waiver. Under the latter, a transgender individual was presumptively disqualified absent a demonstration of stability or avoidance of complications for 18 months. Plaintiffs' objection here thus reduces to a preference for one exception over another; put differently, they disagree with where the military "has drawn the line." *Goldman*, 475 U.S. at 510. But such policy decisions as to how to best ensure that medical standards are met, and where to draw the appropriate line, are matters for military discretion.

Finally, even if dispensing with deference were justified, the district court erred in applying intermediate scrutiny. *See, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227-28 (10th Cir. 2007) (heightened scrutiny does not apply to civilian classifications based on transgender status). And for the reasons above, the accession directive *a fortiori* survives rational-basis review even in the absence of military deference.

II. The Remaining Factors Favor A Stay.

As explained, there is no basis for enforcing a preliminary injunction against the accession directive when plaintiffs will not even try to commission until May 2020 at the earliest, and, absent a stay, the government (and the public) will suffer irreparable harm. *See supra* Part I.C.2. And although the district court construed its relief as preserving the status quo, its order does no such thing. Instead, the current accession

policy—and the Secretary of Defense's independent authority to defer revisions to that policy—is the status quo, and it has been for decades. The injunction here upends that state of affairs by compelling the military to dramatically alter its longstanding policy without sufficient time for either thorough study or proper implementation. This is precisely the kind of situation where a stay is warranted to allow for effective appellate review *before* such drastic changes must occur. *See Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014) (stays are designed to "preserve the status quo" pending further adjudication).

Finally, although the district court rejected the government's need for a stay in part because the court "expected Defendants to act with more alacrity," Add. 9, the government had to make a collective decision regarding Secretary Mattis's independent authority to defer the January 1 deadline, and then seek clarification regarding that authority. After the court issued its clarification order on November 27, the government promptly filed its stay motion on December 6.

CONCLUSION

The government respectfully requests that this Court enter a partial stay pending appeal of the district court's preliminary injunction. Because that injunction commands the military to revise its accession policy by January 1, 2018, the government also requests that the Court enter an immediate administrative stay pending consideration of this motion. Alternatively, the government asks this Court to issue a decision as soon as possible.

Respectfully submitted,

CHAD A. READLER
Principal Deputy Assistant Attorney General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
BRINTON LUCAS
Counsel to the Assistant Attorney General
MARLEIGH D. DOVER
s/Catherine H. Dorsey
CATHERINE H. DORSEY
TARA S. MORRISSEY
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7236
950 Pennsylvania Ave., NW
Washington, DC 20530
202-514-3469

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,172 words. This Motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ Catherine H. Dorsey
Catherine H. Dorsey

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2017, I filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Catherine H. Dorsey
Catherine H. Dorsey

CERTIFICATE AS TO PARTIES AND AMICI CURIAE

Pursuant to D.C. Circuit Rule 28(a)(1)(A), the undersigned counsel certifies as follows:

Plaintiffs-appellees are Dylan Kohere, Regan V. Kibby, and six pseudonym plaintiffs (Jane Doe 1, Jane Doe 2, Jane Doe 3, Jane Doe 4, Jane Doe 5, and John Doe 1).

Defendants-appellants are the Defense Health Agency; the United States Coast Guard; the United States Department of the Air Force; the United States Department of the Army; the United States Department of the Navy; the United States of America; Donald J. Trump, in his official capacity as President of the United States; Elaine C. Duke, in her official capacity as Secretary of Homeland Security; Heather A. Wilson, in her official capacity as Secretary of the Air Force; James N. Mattis, in his official capacity as Secretary of Defense; Joseph F. Dunford, Jr., in his official capacity as Chairman of the Joint Chiefs of Staff; Raquel C. Bono, in her official capacity as Director of the Defense Health Agency; Richard V. Spencer, in his official capacity as Secretary of the Navy; and Ryan D. McCarthy, in his official capacity as Secretary of the Army.

The following states, as well as the District of Columbia, participated in district court as amici curiae in support of plaintiffs: Massachusetts, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, and Vermont.

The following organizations moved to participate as amicus curiae in district court: American Academy of Family Physicians, American Academy of Nursing, American College of Physicians, American Medical Women's Association, American Nurses Association, Association of Medical School Pediatric Department Chairs, Endocrine Society, GLMA: Health Professionals Advancing LGBT Equality, National Association of Social Workers, Pediatric Endocrine Society, World Professional Association for Transgender Health, Trevor Project, National Center for Transgender Equality, Tennessee Transgender Political Coalition, TGI Network of Rhode Island, Transgender Allies Group, Transgender Legal Defense & Education Fund, TransOhio, Transgender Resource Center of New Mexico, and Southern Arizona Gender Alliance. The district court has not yet ruled on their requests.

Undersigned counsel is currently unaware of any amici in this Court.

s/ Catherine H. Dorsey
Catherine H. Dorsey