IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, JANE DOE 2, JANE DOE 3, JANE DOE 4, JANE DOE 5, JOHN DOE 1, REGAN V. KIBBY, and DYLAN KOHERE, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States; 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; the UNITED STATES DEPARTMENT OF THE ARMY; MARK T. ESPER, in his official capacity as Secretary of the Army; the UNITED STATES DEPARTMENT OF THE NAVY; RICHARD V. SPENCER, in his official capacity as Secretary of the Navy; the UNITED STATES DEPARTMENT OF THE AIR FORCE; HEATHER A. WILSON, in her official capacity as Secretary of the Air Force; the UNITED STATES COAST GUARD; KIRSTJEN NIELSEN, in her official capacity as Secretary of Homeland Security; the DEFENSE HEALTH AGENCY; RAQUEL C. BONO, in her official capacity as Director of the Defense Health Agency; and the UNITED STATES OF AMERICA, Defendants.	Civil Action No. 17-cv-1597 (CKK)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

INTRODUCTION

The government's motion fails to carry its heavy burden of justifying a stay of this Court's preliminary injunction against the bar on accession of transgender people into military service. The Secretary of Defense determined in June 2016 that the military would no longer categorically ban accession by transgender people, effective July 1, 2017. The Secretary ordered the Department of Defense and the military departments to prepare for the accession of transgender people as of that date. The Department immediately began taking the necessary steps—including training relevant personnel—to prepare to implement the new policy by July 1, 2017, substantially completing its preparations well before that date. *See* Declaration of Secretary of the Navy Ray Mabus ¶ 3 ("Mabus Decl."); Declaration of Dr. George R. Brown ¶ 5 ("Brown Decl.") (both filed herewith). In addition, because Secretary Mattis had already extended the deadline to January 1, 2018, the government has had nearly six additional months to prepare.

It has been nearly six weeks since this Court held that the accession ban may not be enforced as of January 1, 2018. The government cannot credibly claim that it will be irreparably harmed by implementing a policy that it was on track to implement almost six months ago.

A stay of the injunction would inflict serious irreparable harms on Plaintiffs. Allowing the military to exclude transgender people from accessions while this case proceeds would subject all of the Plaintiffs, including those who are currently serving, to irreparable constitutional and other harms, including by "brand[ing] and stigmatiz[ing] Plaintiffs as less capable of serving in the military [and by] reduc[ing] their stature among their peers and officers." Op. 73 (Dkt. 61). It will affect Plaintiff Regan Kibby even more directly, because he

will be unable to complete his final two years at the Naval Academy if he is deemed ineligible to receive a commission based on his transgender status.

With respect to Plaintiffs' likelihood of success on the merits, the government has provided no new argument or authority that would warrant this Court's reconsideration of its prior conclusions. This Court has thoroughly examined the legal issues in this case and concluded that Plaintiffs are likely to succeed. The public interest likewise strongly supports a denial of the requested stay.

Finally, the government's delay in seeking a stay undermines its contentions. This Court issued its preliminary injunction on October 30, 2017. If the government was concerned that complying with that order would be unduly burdensome, it could and should have moved for a stay immediately. Its delay in doing so strongly suggests that the government's claims of harm should not be credited. Defendants' motion should be denied.

ARGUMENT

To justify a partial stay of the preliminary injunction, the government bears the burden of succeeding on factors substantially similar to those this Court has already considered and found to weigh in Plaintiffs' favor: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken* v. *Holder*, 556 U.S. 418, 434 (2009). A stay pending appeal is available "only under extraordinary circumstances," and the government has not met its "heavy burden" to warrant a stay here. *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers) (internal quotation marks omitted).

I. THE GOVERNMENT IS UNLIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL

The government claims that it is likely to prevail on the merits of its appeal because this Court erred in ruling that Plaintiffs have standing, that the Secretary of Defense has no "independent authority" to extend the ban on accession, that the ban likely violates the Fifth Amendment, and that the government may not enforce the ban against any transgender individuals. This Court already carefully considered and rejected each of those arguments in denying the government's motion to dismiss, in finding that Plaintiffs are likely to succeed on the merits of their claims, and in clarifying the scope of the injunction. Nothing in the government's motion justifies reversing this Court's well-reasoned conclusions on each of those points. Indeed, the government's arguments on the merits are so threadbare that the stay motion warrants denial on that ground alone.

A. Plaintiffs Have Standing To Challenge The Accession Ban

The government contends that because Plaintiff Kibby will not be eligible for accession until he graduates from the Naval Academy in May 2020, his harms are too speculative to establish injury in fact. The Court decisively rejected that argument, and the government provides no basis to conclude that the court of appeals is likely to disagree.

As the Court recognized, Kibby "demonstrated that he is substantially likely to attempt to accede, and to encounter a competitive barrier at the time of his accession due to his status as a transgender individual." Op. 47. That his accession will not happen on January 1, 2018 does not make his substantial risk of injury any less imminent, the Court explained, because "there is no reason to believe that this directive will change by the time Plaintiff Kibby is ready to apply for accession." Op. 41. Nothing in the government's motion alters that conclusion.

B. The Secretary Of Defense Has No Independent Authority To Impose An Unconstitutional Ban

The government next argues that the Court erred in enjoining an exercise of the Secretary of Defense's "independent authority" to extend the accession ban. As an initial matter, Defendants failed to raise this argument in opposing the preliminary injunction or in their motion to dismiss and thus are precluded from doing so now. *See Kittner v. Gates*, 783 F. Supp. 2d 170, 173 (D.D.C. 2011) ("Because Plaintiff had the opportunity to, but did not, raise this preemption argument in briefing on the Motion to Dismiss, she has waived it and cannot raise it at this time."). In any event, the argument is meritless. Having found that the ban was likely unconstitutional, the Court enjoined all Defendants—including the Secretary—from taking steps to effectuate it, regardless of the authority under which they purport to operate. Moreover, the government offers no explanation why a ban on accession by transgender people would be any less unconstitutional if it were imposed by the Secretary based on his own initiative rather than at the direction of the President.

C. The Ban Is Subject To And Cannot Withstand Heightened Scrutiny

The government does not dispute this Court's determination that discrimination against transgender people generally warrants heightened equal protection review, both because transgender people meet the criteria for a suspect or quasi-suspect class and because discrimination based on a person's transgender status also discriminates based on sex. Op. 59-64. Rather, the government urges application of a highly deferential form of review simply because this case involves the military. But as the D.C. Circuit held 30 years ago, "[t]he military has not been exempted from constitutional provisions that protect the rights of individuals." *Emory v. Secretary of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987).

The government has pointed to cases emphasizing the need for deference to professional military judgments and to decisions made by the political branches about the composition of the military. As this Court already explained, however, those cases are inapplicable here because, among other things, the "study and evaluation of evidence that the … Court found warranted judicial deference is completely absent from the current record." Op. 70. To the contrary, the military carefully studied the issue of transgender service and determined that military readiness strongly favored *allowing* accession and continued service by transgender service members. In the face of that meticulous examination and planning, the President's abrupt and unjustified turnabout can be explained only by "negative attitudes," "fear," and an "instinctive … guard[ing] against people who appear to be different … from ourselves"—which cannot survive *any* level of review. *See City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

D. The Injunction Is Not Overbroad

The government objects that "the Court erred by entering a worldwide injunction," where "only two Plaintiffs are challenging the accession provision of the Presidential Memorandum." Stay Mem. 7. That argument is wrong on both the facts and the law.

As an initial matter, *all* of the Plaintiffs are challenging both the accession and retention bans, which function together to exclude transgender individuals from military service based solely on their transgender status. All Plaintiffs, including those who are currently serving, suffer serious constitutional and other harms from the continuation of a ban on accessions that singles out transgender individuals as an inferior class of people and calls into question the legitimacy of their military service. *See Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963) ("The very nature of the rights appellants seek to vindicate requires that the decree run to the benefit not only of appellants but also for all persons similarly situated."); *City of Chicago v.*

Sessions, No. 17-cv-5720, 2017 WL 4572208, at *4 (N.D. Ill. Oct. 13, 2017) ("[A] nationwide injunction is necessary to provide complete relief from the likely constitutional violation at issue here."). An injunction limited to the two Plaintiffs seeking accession would not address those injuries. Broader relief is necessary to redress the harm that the ban works on all the Plaintiffs.

As they did in opposing the preliminary injunction, Defendants argue that equitable relief should "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). But, as Plaintiffs explained, the usual remedy for a facially unconstitutional policy is to enjoin its enforcement entirely. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) ("[I]f the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is 'proper.'"); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977) ("[I]f there has been a systemwide impact … there [may] be a systemwide remedy."). Indeed, such categorical relief is the "*ordinary* result" whenever a plaintiff successfully challenges a rule of general applicability, like the facially unconstitutional ban on transgender accessions. *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) (emphasis added); *see, e.g.*, *Doe v. Rumsfeld*, 341 F. Supp. 2d 1, 17-19 (D.D.C. 2004) (preliminarily enjoining enforcement of Department of Defense's involuntary anthrax inoculation program); *Huynh v. Carlucci*, 679 F. Supp. 61, 67 (D.D.C. 1988) (preliminarily enjoining Department of Defense from enforcing rule that would deny security clearances to certain recently naturalized U.S. citizens based on country of origin).

E. The Court Did Not Abuse Its Discretion In Weighing The Equities

Finally, without analysis, the government asserts that "the Court abused its discretion in weighing the equities to decide that a preliminary injunction was warranted." Stay Mem. 5. The Court was plainly correct in its conclusion that each preliminary injunction factor weighed in

favor of Plaintiffs. Defendants offer nothing to suggest that the court of appeals would conclude that this Court abused its discretion.

II. DEFENDANTS WILL NOT BE IRREPARABLY HARMED BY COMPLYING WITH THE JANUARY 1 DATE FOR NONDISCRIMINATORY ACCESSIONS

The principal thrust of the government's stay motion is that Defendants will be irreparably harmed by authorizing accessions of transgender people on January 1, 2018. The government's proffered support for that argument lacks credibility.

The history shows that on June 30, 2016, the Secretary of Defense issued DTM 16-005, which provided for the accession of transgender applicants no later than July 1, 2017. This timeline was supported by the Joint Chiefs of Staff. *See* Remarks of Sec'y Carter 3-5 (June 30, 2016) (Lamb Decl. Ex. F (Dkt. 13-2)). During the following year—from July 1, 2016 through June 30, 2017—the Department of Defense prepared extensively for accession to ensure a smooth transition, issuing a comprehensive implementation handbook in September 2016 and training military personnel "to ensure the seamless transition and full implementation of DoD policy." Myers, *Amid Uncertainty About Transgender Policy, Army Continues Rolling Out Training to Soldiers*, Army Times (June 17, 2017) (quoting Army National Guard representative); *see also* Dep't of Defense, *Transgender Service in the U.S. Military: An Implementation Handbook* (Sept. 30, 2016) (Fanning Decl. Ex. F (Dkt. 13-8)) ("*Handbook*"). Former Secretary of the Navy Mabus testified that by the time he left office almost a year ago, the military's preparations for open accessions had largely been completed. Mabus Decl. ¶¶ 1, 3; *see also* Brown Decl. ¶ 5 (describing one training conducted May 2, 2017). Shortly before the July 1, 2017 deadline, the military press likewise reported that the Department of Defense was "preparing for the final phase of the integration timeline" set out in DTM 16-005. Myers, *supra*.

On June 30, 2017—one day before the accession policy was set to go into effect, after a full year of planning and execution—Secretary Mattis announced that the Department would defer the deadline to January 1, 2018. Secretary Mattis's announcement in no way suggested that the Armed Forces were unprepared for accession by transgender applicants. Rather, he explained that the delay was occasioned by the services' "review [of] their accession plans," so that they could provide further "input on the impact to the readiness and lethality of our forces." Dep't of Defense, Release No. NR-250-17 (June 30, 2017) (Lamb Decl. Ex. C (Dkt. 13-2)).

Given that background, it is hard to credit the government's assertions that it is imminently facing a task of extraordinary difficulty and complexity that it cannot possibly complete in the weeks remaining before January 1. To the contrary, until the President's July 2017 tweets announcing his intent to bar service by transgender persons, nothing prevented the military from implementing the accession policy—and the government points to nothing suggesting that the military in fact was slowing or stopping its preparations at that time. The testimony of Secretary Mabus as well as Dr. George Brown, who was personally involved in training military personnel, is that the military was actively working to meet its July 1, 2017 deadline. Mabus Decl. ¶ 3; Brown Decl. ¶ 5. The government offers no reason now why the military would not have been prepared to do so on that date—much less on January 1, 2018, six months later. The former service secretaries involved in planning for accession have concluded the opposite—that "after 2.5 years of study and preparation," the military is "read[y] to move forward with transgender accessions." Palm Center, *DoD Is Ready to Accept Transgender Applicants* 2 (Dec. 2017), http://www.palmcenter.org/wp-content/uploads/2017/12/DOD-Is-Ready-to-Accept-Transgender-Applicants.pdf.

The government's declaration about the preparations needed for the open accession policy is vague and generalized, and ignores the DTM's specifications for accession of transgender recruits. First, the government complains about the cost of "promulgat[ing] new, complex, and interdisciplinary medical standards" and "train[ing] 'tens of thousands' of geographically dispersed personnel," but the government had been preparing in that very manner for a year until the President announced the transgender ban. The injunction does not impose any new obligation on Defendants except to meet a deadline for implementing policy that the military itself set. In light of that history, the government's claims that implementing the accession policy by January 1, 2018 will impose "extraordinary burdens" (Stay Mem. 3) are unpersuasive and contrary to testimony by those familiar with the military's implementation efforts prior to July 2017. Mabus Decl. ¶ 2; Brown Decl. ¶¶ 7-10.

Second, Defendants' complaint about the need for more time due to the "complexity" of preparing to allow accessions of transgender individuals who may "enter the military even though they are 'not physically or psychologically equipped to engage in combat/operational service'" is also unpersuasive. Stay Mem. 8. This Court already found that Defendants' professed concern that "'some' transgender individuals 'could' suffer from medical conditions that impede their duties" are "hypothetical" and "appear … to be based on unsupported, 'overbroad generalizations about the different talents, capacities, or preferences' of transgender people." Op. 65-66. DTM-16-005 provides that transgender service members will be "*subject to the same standards and procedures as other members* with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability, and retention," and that such service "is consistent with military readiness and with strength through diversity." DTM-16-005 at 2 (Fanning Decl. Ex. C (Dkt. 13-8)) (emphasis added). Indeed, the military has recognized that

"there are transgender service members in uniform today." *Handbook* 10. The government's complaints also conflict with the finding made by the military itself in June 2016 in directing a nondiscriminatory accession policy and with this Court's findings in granting the preliminary injunction. As this Court explained, the military conducted a thorough review before issuing the policy and concluded that "there were no barriers that should prevent transgender individuals from serving in the military." Op. 67.

With respect to accessions, the only limitation imposed by DTM-16-005 is that a transgender individual must obtain "certifi[cation] by a licensed medical provider" that their transition is complete and they have been stable for 18 months in their "preferred gender," with no "clinically significant distress or impairment in social, occupational, or other important areas of functioning," and since any surgery. DTM-16-005, at 1; Brown Decl. ¶ 8. Contrary to the government's declarant, *see* Hebert Decl. ¶ 6 (Dkt. 73-1) (arguing that accession standards are "complex" and require "multifaceted review of applicant's medical history"), these criteria simplify, not complicate, the government's task, and Defendants offer no reason to believe they cannot implement those criteria efficiently and effectively. Indeed, allowing accession by transgender individuals is "not a complicated process … in light of the highly complex strategic, technical, personnel and medical issues that the military addresses day in and day out." Mabus Decl. ¶ 2; *see also* Palm Center, *supra*, at 3-5.

Defendants' claim that a stay is warranted because some transgender individuals may not be physically or psychologically equipped to serve should be rejected as "hypothetical and extremely overbroad." Op. 65. As this Court explained, such concerns "could be raised about *any* service members" and do not explain the need to "deny accession to *all* transgender people who meet the relevant physical, mental and medical standards for service." Op. 66. The military

has already determined that there will be "'minimal readiness impacts from allowing transgender servicemembers to serve openly.'" Remarks of Sec'y Carter 3. The government has offered nothing to suggest the contrary.

Defendants further argue that allowing accession of transgender individuals starting on January 1, 2018 would result in "significant duplicate costs and administrative burdens" and "sow[] confusion in the ranks," because the "high-level review of military service by transgender individuals that is scheduled to conclude in the next few weeks … could result in an accession policy that differs from the one that the Court has ordered the military to implement." Stay Mem. 9. Defendants do not suggest that any new accession policy would differ materially from the categorical ban the President already directed and this Court enjoined. And even if they had, the possibility that Defendants' review will result in a new accession policy that might pass constitutional muster is pure speculation that cannot give rise to irreparable harm. *See Toxco Inc.* v. *Chu*, 724 F. Supp. 2d 16, 30 (D.D.C. 2010) (rejecting speculative assertions as basis for establishing irreparable harm).

Finally, if Defendants were concerned that the preliminary injunction would impose an intolerable administrative burden, they could and should have moved for a stay immediately and appealed quickly. They did neither—strongly suggesting that their assertions about burden should not be credited. *Ruckelshaus*, 463 U.S. at 1317 (Blackmun, J., in chambers). Having waited six weeks to ask this Court for a stay, Defendants can hardly claim now that they face an impossible task in meeting a deadline about which they have known for all that time, and for which they had been preparing for over a year before the President's announcement. Such self-imposed costs, to the extent they even exist, should not be considered in the government's favor, particularly where Plaintiffs continue to suffer constitutional injury every day the ban on

transgender accessions continues. *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003) ("self-inflicted wounds are not irreparable injury"); *Mott Thoroughbred Stables, Inc. v. Rodriguez*, 87 F. Supp. 3d 237, 246 & n.11 (D.D.C. 2015).

III. PLAINTIFFS WILL BE HARMED BY A STAY OF THE INJUNCTION

In granting the preliminary injunction, the Court held that Plaintiffs "will suffer a number of harms that cannot be remediated," explaining that "[t]he impending ban brands and stigmatizes Plaintiffs as less capable of serving in the military, reduces their stature among their peers and officers, stunts the growth of their careers, and threatens to derail their chosen calling or access to unique educational opportunities." Op. 73. The Court also held that Plaintiffs would suffer irreparable constitutional injury as a result of Defendants' equal protection violations. Those constitutional and stigmatic harms flow just as much from the accession ban as the retention ban: A policy that neither allows additional transgender individuals to accede nor sets a timeline for their accession sends a clear message to currently serving transgender individuals that they are second-class servicemembers whose continued presence in the military is an anomaly. Defendants do not address these serious constitutional and stigmatic harms, which is fatal to their analysis of the stay factors.

The only argument Defendants make is that Plaintiffs Kibby and Kohere will not be harmed by a temporary stay of the preliminary injunction, because neither will be eligible to enter into military service until at least May 2020. Op. 6. Even aside from the stigma and uncertainty that Kibby and Kohere will suffer if the injunction is stayed, both Kibby and Kohere will suffer immediate and actual harm if Defendants are allowed to postpone the accession of transgender individuals indefinitely. Because midshipmen at the Naval Academy must be eligible to be commissioned, Kibby will be ineligible to attend the Naval Academy as long as transgender individuals are not permitted to accede. Kibby Decl. ¶ 36 (Dkt. 13-14); Mabus Decl.

¶ 5. Likewise, as Defendants admit, the accession ban prevents Kohere from enrolling as a cadet in his university ROTC program. Burns Decl. ¶ 6 (Dkt. 45-3). It is therefore irrelevant that "Defendants' appeal will be decided long before either Plaintiffs Kibby or Kohere seek to commission into the military." Stay Mem. 6. The two Plaintiffs face immediate harm if the preliminary injunction is stayed, even temporarily.

IV. A STAY OF THE PRELIMINARY INJUNCTION IS NOT IN THE PUBLIC INTEREST

Defendants argue that it would not be in the public interest to force the military to access transgender individuals before it has time to issue appropriate medical standards and conduct training. As discussed above, however, Defendants' claims about the difficulty of issuing new accession standards are belied by the military's previous conclusions and are inconsistent with the court's equal protection analysis. *See supra* pp. 9-10. Unlike Defendants' speculative harms, a delay in the accession date will deprive the military of capable and committed transgender individuals who are ready to serve—just as those before them have served for years. Moreover, granting the stay would prolong the unconstitutional effect of the President's discriminatory accession ban, which "is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). And the government does not actually allege any harm that would flow from enlisting qualified transgender people. Nor could it. As this Court found after carefully reviewing "the record before [it], there is absolutely no support for the claim that the ongoing service of transgender people would have any negative effect on the military at all. In fact, there is considerable evidence that it is the discharge and banning of such individuals that would have such effects." Op. 75. The public interest thus unequivocally lies in keeping the injunction in place.

CONCLUSION

The government's motion for a partial stay of the preliminary injunction should be denied.

December 8, 2017

Respectfully submitted,

/s/ Paul R.Q. Wolfson

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