[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' REPLY IN SUPPORT OF THEIR MOTION FOR ADMINISTRATIVE STAY AND PARTIAL STAY PENDING APPEAL

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INTRODUCTION

The district court's injunction forcing the military to alter its accession policy by January 1, 2018, dramatically alters a decades-long status quo, interferes with an ongoing study led by military experts, and threatens military readiness. Plaintiffs' response effectively urges this Court to improperly discount "the professional judgment of military authorities concerning" these issues and the burdens it will face, despite the Supreme Court's command that the military is entitled to "great deference" in this area. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Against these significant harms to the government (and to the public), only two plaintiffs assert injury from the accession policy and will suffer no irreparable harm if this Court grants a partial stay of the injunction pending appeal. Indeed, without even addressing whether the injunction was appropriate as applied to those two plaintiffs, this Court could redress the government's imminent injury simply by entering a stay that would either permit Secretary Mattis to exercise his independent discretion to delay the January 1 deadline or confirm that nationwide relief is unwarranted to grant those two individuals full relief.

ARGUMENT

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

Plaintiffs insist that Secretary Mattis cannot exercise his independent authority to defer the January 1 deadline for implementing the Carter accession policy. But

plaintiffs only challenged, and the district court's injunction only addressed, the President's directives. Mot. 8-9. The court explained that its injunction was designed to "revert to the *status quo*," which is the policy established by former Secretary Carter "as modified by Secretary of Defense James Mattis," Add. 89; Add. 11, and thus acknowledged the Secretary's independent authority to defer the deadline. Only after the government filed a notice of appeal in this case and sought clarification did the district court "clarify" that its injunction prohibits Secretary Mattis from exercising his discretion to defer the January 1 deadline. Add. 10-11. That "clarification" thus expanded the scope of the injunction and amounts to an impermissible modification. *See Washington Metro. Area Transit Comm'n v. Reliable Limousine Serv., LLC*, 985 F. Supp. 2d 23, 30 (D.D.C. 2013) ("[A] court's authority to modify or clarify an injunction while on appeal is limited to preserving the status quo[.]"). For that reason alone, the injunction should not be understood to prohibit the Secretary from independently deferring the deadline, as he did in June 2017.

Plaintiffs offer two implausible explanations for why the Secretary cannot order another deferral. First, they note that the district court "enjoined *all* Defendants—including the Secretary—from taking steps to effectuate" the "Presidential Memorandum." Opp. 10-11. But the government has never argued that Secretary Mattis is not "bound by the district court's injunction," Opp. 10; just that he may exercise his independent authority apart from the directives. *See* Mot. 8-9.

Second, plaintiffs insist that "any delay" would not be an "independent exercise of the Secretary's judgment" because he wants to complete the "same study" required by the Memorandum. Opp. 11. In doing so, they incorrectly assume that the Secretary's decision to undertake the same study would not be independent. But the Memorandum forbade the Secretary from implementing the Carter policy unless he studied the issue and convinced the President otherwise. Add. 91 (§ 2(a)). Wholly apart from that directive, Secretary Mattis can exercise his independent authority and determine that the military should study the issue before implementing a significant policy change to longstanding accession standards. Indeed, Secretary Mattis exercised that authority in June 2017, when he deferred the Carter policy until January 1 so that the military could further study the issue. Plaintiffs neither challenged that action nor explain why another deferral, to review the issue further, would be any less constitutional. Mot. 8.

Nor does the reasoning underlying the district court's injunction support its "clarification" that the Secretary may not defer the Carter policy. A critical factor was the court's conclusion that the President's policy was *not* the product of military judgment. *See, e.g.,* Add. 76-79. That factor obviously does not apply when the Secretary of Defense himself exercises his judgment to order a study prior to implementing a substantial policy change.

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

Plaintiffs do not dispute that a limited stay of the preliminary injunction, narrowing its application to the one challenger found to have standing, Add. 54-57, would provide that litigant with complete relief as to that injury. They nevertheless contend (Opp. 11-12) that nationwide relief is appropriate because that is purportedly the norm in civil-rights suits involving an individual plaintiff.

That is wrong as a matter of both law and logic, especially in cases where the federal government is a party. Instead, as the Ninth Circuit held in reversing a "nation-wide injunction" of a Defense Department policy, in the absence of "a class action," "[e]ffective relief can be obtained by directing the [military] not to apply its regulation to [the individual plaintiff]." *Meinhold v. U.S. Dep't of Defense*, 34 F.3d 1469, 1480 (9th Cir. 1994); *see also U.S. Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993) (staying injunction against military policy conferring relief on anyone other than plaintiff). By contrast, making nationwide relief the standard would flout Article III standing requirements, ignore basic principles of equity, end-run the requirements of class-actions, and "have a detrimental effect" on the law "by foreclosing adjudication by a number of different courts and judges," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).[1]

[1] *See also, e.g.*, *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664–65 (9th Cir. 2011) ("national injunction was too broad" because order declaring regulation facially invalid and enjoining enforcement against plaintiff "would have afforded the plaintiff complete relief"); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996) ("[I]njunctive relief generally … limited to apply only to named plaintiffs where

Plaintiffs insist that relief beyond the one (or two) student plaintiffs is necessary here because "all [p]laintiffs" are stigmatized by the directive. Opp. 12. But stigma is not a cognizable injury unless *plaintiffs* are being treated unequally, which they cannot show, Mot. 16. *See Allen v. Wright*, 468 U.S. 737, 750 (1984); *In re Navy Chaplaincy*, 534 F.3d 756, 760-61 (D.C. Cir. 2008). And plaintiffs obviously lack standing to raise an alleged stigma claim based on the treatment of others.

Plaintiffs also argue (Opp. 11-12) that the "facial[]" nature of their challenge demands nationwide relief, but that confuses the nature of their merits claim with the proper scope of relief. The fact that a court concludes a federal law is unconstitutional in all of its applications does not entitle a plaintiff to an injunction barring the law's application to non-parties, because those unlawful applications do not injure the plaintiff. In this case, because an injunction limited to the injured plaintiffs would afford them full relief, there is no basis for the district court to prevent the government from enforcing its policy against non-parties nationwide, especially since other courts are considering the same issue and the government would be deprived of the benefit of a victory in those cases. *See, e.g., Va. Soc'y for Human Life v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001) (nationwide injunction against FEC regulation unnecessary to remedy plaintiff's injury and "preclude[ed] other circuits from ruling" on issue).

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there is no class certification."); *Conservation Law Foundation of New England, Inc. v. Reilly*, 950 F.2d 38, 43 (1st Cir. 1991) ("[b]ecause plaintiffs have ties to only a few federal facilities," they lacked injury-in-fact sufficient for nationwide relief).

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

A. Plaintiffs fail to satisfy the "especially rigorous" standing inquiry applicable here. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). As they acknowledge, Midshipman Kibby "will not be eligible to commission into service until … May 2020," and Kohere "until Spring 2021." Opp. 13. These students' claims of future injury rest on a "highly attenuated chain of possibilities," *Clapper*, 568 U.S. at 410, including assumptions that they will graduate and seek a commission; that they will be otherwise eligible for accession at that time; that the policy then in effect will bar their accession; and that they will not qualify for a waiver. Article III demands more.

Plaintiffs' claims of "immediate harms" are unconvincing. Opp. 13 (emphasis omitted). They argue that "the government has provided no assurances" that the current accession policy will not prevent Kibby from remaining at the Naval Academy. Opp. 13. But it is the plaintiffs' burden to establish standing by showing the policy will have this effect; the government has no obligation to disprove it. *Clapper*, 568 U.S. at 412 n.4. In any event, the Academy has discretion to continue a midshipman's enrollment despite a failure to satisfy medical standards. *See, e.g.*, U.S. Naval Academy Instruction 6130.1B(6)(c) (Apr. 5, 2017).[2] Thus, any alleged injury is speculative and far from "immediate," as Kibby is currently on a year-long medical leave. SA96. Even

[2] https://www.usna.edu/AdminSupport/_files/documents/instructions/6000-6999/USNAINST-6130.1B-Processing-Midshipman-Medical-Evaluation-Boards-and-Commissioning-Decisions.pdf#search=6130.1B.

assuming an injury, moreover, it would not be redressed by a favorable decision, as Kibby's treatment plan—which includes hormone therapy and surgery, SA95-96—may preclude accession even under the Carter policy. *See* Add. 100-01 (requiring 18 months' stability post-surgery).

Plaintiffs also claim that the accession directive "prevents Kohere from enrolling *now* as a cadet in ROTC." Opp. 13. But as explained by the Deputy Chief of Staff for Personnel at the U.S. Army Cadet Command, Kohere may continue ROTC classes and "could still be eligible for entry into the ROTC program," "[d]epending on the outcome" of the current study. Add. 177. Since Kohere may take ROTC classes, plaintiffs have not shown that any inability to *enroll* in ROTC imposes an injury in fact. In any event, plaintiffs point to no allegation that Kohere—who is currently developing a treatment plan, SA103—would be eligible to enroll under the Carter policy, such that the injunction would redress this supposed injury.

B. Turning to the balance of the equities, the injunction significantly harms the military, and plaintiffs cannot even establish an immediate harm that would confer standing, much less an irreparable injury from a stay pending appeal. *See supra* Part III.A; Mot. 16. In response, plaintiffs offer several reasons for discounting "the professional judgment of military authorities" in assessing the injunction's harms to the military, *Winter*, 555 U.S. at 24, but none holds water.

They first dismiss the military's need for more time because it has had "nearly 18 months" to implement the Carter policy. Opp. 17. But plaintiffs overlook that the

implementation process was put on hold on August 25, 2017, "pending completion of the study directed by the President." Add. 108. At that time, the military could not have foreseen that more than two months later, a district court would order a nationwide implementation of the Carter policy by January 1, and then rule nearly a month thereafter that Secretary Mattis could not independently defer that deadline. In addition, "key personnel involved in" the development and implementation of accession standards "have rotated in the past several months," further complicating the judicially-ordered scramble facing the military. *Id.*

Plaintiffs next seize on the fact that the military has announced it will obey the injunction as evidence of a lack of harm. Opp. 17-18. But the military's rushed compliance with a court order says nothing about whether this process will unduly burden it by, for example, resulting in the accession of individuals who are not prepared for the rigors of military duties and operations. *See* Mot. 14-15.[3]

Relying on supporting declarations, plaintiffs second-guess the military's judgment regarding the complications of a rushed implementation of the Carter policy. Opp. 18. But the Supreme Court has held that the "considered professional judgment" of "appropriate military officials" cannot be ignored even when "contradicted by expert testimony." *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986).

[3] Plaintiffs dismiss this risk as "unfounded," Opp. 19, but if the military is forced to meet the January 1 deadline, those responsible for applying accession standards could admit individual applicants who do not satisfy even the Carter policy because of improper training. *See* Mot. 14-15; Add. 105-08.

Plaintiffs likewise err in dismissing the threat of duplicative implementation costs as "speculation." Opp. 20. They repeat the district court's error in overlooking the possibility that the military may revise the current accession policy early next year. *See* Mot. 12-13. And if the military decides to retain that policy, it would reinstate that accession standard if the government prevails on the merits of its appeal.

Finally, plaintiffs contend that the military's asserted harms "should not be credited" because the government did not "immediately" seek a stay. Opp. 20. But in the wake of the injunction, the government had to consider whether Secretary Mattis would exercise his independent authority to defer the January 1 deadline and whether the injunction barred him from doing so. In an abundance of caution, the government sought clarification from the district court in the hope that doing so would obviate the need for a stay. And after the district court erroneously rejected the requested clarification, the government appropriately sought a stay, supported by a declaration from military leadership explaining the harms. When the district court again denied relief, the government filed a stay with this Court the same day. The decision to engage in a deliberative process and exhaust all options in an attempt to obviate the need for an appeal is not a basis for denying relief.

C. On the merits, plaintiffs contend that the accession directive "cannot survive *any* level of review." Opp. 16. But they never explain how a decision to preserve the status quo for several months while new military leadership conducts further review of a significant policy change violates equal protection. *See* Mot. 17. Instead, they cast the

accession directive as an indefinite extension of the current policy and claim that such a decision "can be explained only by" an irrational "fear." Opp. 16.

Plaintiffs cannot plausibly characterize as irrational the current accession policy—a rule that, until 2016, was upheld by military leadership under every president for decades. The mere fact that this policy was "recent[ly] reject[ed]" by former-Secretary Carter, Opp. 14 (quoting Add. 14), cannot foreclose Secretary Mattis and President Trump from reconsidering its validity. Indeed, the study underlying the Carter policy found that allowing transgender individuals to serve would impede military readiness, but dismissed that harm as "negligible," Mot. 18—a cost-benefit judgment that the military is entitled to reweigh.[4] Moreover, as plaintiffs do not dispute, the Carter policy itself presumptively excludes transgender individuals from serving, but uses a different exception than the current policy. Mot. 18-19. Plaintiffs characterize the current policy as "barring transgender individuals from *ever* serving in the military," and suggest that the possibility of a waiver is a sham. Opp. 16 n.6. Yet as Secretary Mattis recently confirmed, the current policy "generally" precludes "the accession of transgender individuals" but is "subject to the normal waiver process." Add. 94. The dispute here thus reduces to the scope of an exception to accession standards, which is a question of military policy, not constitutional principle.

[4] Contrary to plaintiffs' claim (Opp. 16 n.5), the government made this point below. *See* Doc. 45, at 10, 37.

CONCLUSION

This Court should grant the government's motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply in support of Appellants' Motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 2,549 words. This Reply 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 18, 2017, I filed the foregoing Reply 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 who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Catherine H. Dorsey
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