No. 17-36009

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,
Plaintiffs-Appellees,

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

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. On the mistaken understanding that the accession policy was revised in June 2016, the district court failed to recognize that its injunction upset the status quo and consequently erred in dismissing the government's harms about implementing a policy that the court believed had already taken effect. Properly credited, these significant harms to the government (and to the public) outweigh any asserted injury to plaintiffs, who 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 to 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 accession deadline or confirm that nationwide relief is unwarranted to grant the four relevant individual plaintiffs full relief.

ARGUMENT

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

Plaintiffs insist that Secretary Mattis cannot exercise 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. 5-6. Indeed, plaintiffs seek only "a preliminary injunction that returns them to the status quo" before the President's actions, K-Opp. 9,[1] a time when Secretary Mattis indisputably possessed (and exercised) authority to defer the Carter policy.

Plaintiffs contend that any deferral by Secretary Mattis would not be independent of the President's action because the Secretary wants to complete the same "study mandated by President Trump." K-Opp. 8; *see also* W-Opp. 6. But the Memorandum belies this argument, as it forbade the Secretary from implementing the Carter policy unless he studied the issue and convinced the President otherwise. Add.25 (§ 2(a)). And it is undisputed that the Secretary had already made an independent decision to further study the policy. Add.30. Plaintiffs' argument also contradicts the district court's rationale, which emphasized that the President's policy was *not* the product of military judgment, *e.g.*, Add.16-18—a rationale that does not apply when the Secretary independently orders a study prior to implementing a substantial policy change.

Washington mistakenly asserts that this Court cannot evaluate a "theoretical exercise" of the Secretary's authority. W-Opp. 6. But the government requested clarification that the injunction permits Secretary Mattis to exercise his independent authority to defer the Carter accession policy for specific reasons. Doc. 106. There

[1] Plaintiffs' stay opposition is referred to as "K-Opp" and Washington's as "W-Opp."

would have been no need to seek clarification—or a stay of the injunction on this basis—if the Secretary would not exercise that authority, if permitted.[2]

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

Plaintiffs do not dispute that an injunction must be "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs[.]" *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011). They nevertheless contend, K-Opp. 17-19, that nationwide relief is appropriate in facial civil-rights suits even if they involve a lone plaintiff.

That is wrong both as a matter of law and logic. This Court reversed a district court's "nation-wide injunction" in a facial civil-rights challenge to a Defense Department policy, explaining that because the challenge was "not a class action," "[e]ffective relief [could] be obtained by directing the [military] not to apply its regulation to [the individual plaintiff]." *Meinhold v. U.S. Dep't of Def.*, 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 as to anyone other than plaintiff). Making nationwide relief the standard would flout Article III standing requirements, ignore basic principles of equity, end-run class-action requirements, encourage forum-shopping, and "have a

[2] Contrary to Washington's claim (W-Opp. 7), the government has not tried to "leapfrog" the district court. A party may seek a stay from this Court if, *inter alia*, the district court "fail[s] to afford the relief requested," or seeking relief in district court "would be impracticable." Fed. R. App. P. 8(a)(2)(A)(i)-(ii). As previously explained, waiting for a ruling would be impracticable given the January 1 deadline. Mot. 2, 6.

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); *see also Railway Labor Execs.' Ass'n v. ICC*, 784 F.2d 959, 964 (9th Cir. 1986) ("It is standard practice for an agency to litigate the same issue in more than one circuit and to seek to enforce the agency's interpretation selectively on persons subject to the agency's jurisdiction in those circuits where its interpretation has not been judicially repudiated.").

Here, because an injunction limited to the allegedly injured plaintiffs would provide full relief, there is no basis for the court to prevent the government from applying its policy to non-parties across the nation, especially as other courts consider the same issue. *See, e.g., United States v. AMC Entm't, Inc.*, 549 F.3d 760, 770-71 (9th Cir. 2008) (reversing nationwide injunction as abuse of discretion and noting that court "must be mindful" of other circuits).

Plaintiffs suggest, K-Opp. 17-18, that the "facial[]" nature of their challenge demands nationwide relief, but that confuses the nature of their claims with the proper scope of relief. A court's conclusion that "no application" of a federal law would be constitutional, *see Sabri v. United States*, 541 U.S. 600, 609 (2004), does not require an injunction barring the law's application to non-parties. *E.g.*, *Meinhold*, 34 F.3d at 1480. While plaintiffs respond that *Meinhold* was not a facial challenge, K-Opp. 19, the plaintiff in that case sought a declaration that the challenged policy was facially unconstitutional, yet requested relief only as to himself. 34 F.3d at 1473.

Nor can Washington's participation justify an injunction "across the world." W-Opp. 24. Washington does not claim that its purported injuries afflict every resident; appropriate relief therefore should be limited to those who are injured, if any. While Washington speculates (W-Opp. 25) that it would be difficult to tailor an injunction in that way, that argument only underscores that Washington has not identified any residents who are injured.

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

A. Plaintiffs—who now rely on the standing of four individual plaintiffs and Washington, K-Opp. 10-13; W-Opp. 9-14—fail to satisfy the "especially rigorous" standard applicable here. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

Plaintiffs Karnoski, D.L., Callahan, and Schmid suggest that an alleged competitive disadvantage to accession is sufficient to establish standing, K-Opp. 11, but they ignore Article III's redressability requirement. Even assuming plaintiffs alleged a cognizable injury, they must show it is redressable, which plaintiffs can do only if they would be *eligible* to access under the Carter policy. They fail to make that showing. Mot. 12. Instead, they note that *one* plaintiff, Callahan, "completed" "clinically appropriate steps to transition" in 2015. K-Opp. 11. But that statement says nothing about whether Callahan can presently satisfy the medical prerequisites for eligibility under the Carter policy. Add.34-35. It is plaintiffs, therefore, who ask the Court to "speculate," K-Opp. 11, that they have standing.

Plaintiffs argue that applying for accession would be "futile" under the current policy. K-Opp. 11. But plaintiffs offer no reason to doubt that the preexisting waiver process would be applied in good faith. *See* Add.28 (Secretary Mattis confirmed that current policy "generally" precludes "the accession of transgender individuals," but is "subject to the normal waiver process").

Plaintiffs contend that they have cognizable stigma-based injuries, but the only plaintiff they allege to have been denied equal treatment is Schmid. K-Opp. 10-11, 12-13. Even if Schmid had a cognizable injury on the basis of purportedly being denied an appointment as a warrant officer, plaintiffs fail to provide any evidence that Schmid would be eligible for accession under the Carter policy, K-Opp. 10-11, and thus do not meet their burden of establishing traceability and redressability.

Washington confirms that the alleged injury to its "sovereign interests in protecting its territory" is wholly speculative. It hypothesizes that if transgender individuals are ineligible to serve in the Washington National Guard, Washington may lose "potential qualified" applicants, which may "impact[]" its "ability to respond to and mitigate harms to its territory." W-Opp. 10-11. But it does not suggest that the State lacks, or would lack, sufficient qualified applicants under the current policy. *See also* Doc. 55 at 7. And as its cited authority confirms, "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 610 n.16 (1982).

B. As to the equities, the reasons plaintiffs offer to discount military leadership's assessment of the significant harm the armed forces will suffer under the injunction are meritless.[3]

Plaintiffs repeat the district court's assertion that, because the Carter policy took effect in June 2016, the government "will face no serious injustice in maintaining" that policy. K-Opp. 6 (quoting Add.21). That argument rests on a manifest factual error. The Carter policy was never implemented; Secretary Mattis "approved a recommendation by the services to defer" implementation until January 1, 2018, to allow the branches to "review their accession plans and provide input on the impact to the readiness and lethality of our forces." Add.30. The injunction therefore does not "maintain[]" the status quo that existed prior to the injunction. It instead requires the military to depart from a decades-long status quo and adopt a policy that it is unprepared to implement without further study. As military leadership has attested, compelling the military to implement a new policy before its study is complete would impose "extraordinary burdens" on the military and have a "harmful impact" on "its missions[] and readiness." Add.38-40. This Court owes that judgment "great deference" in balancing the equities. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

[3] Contrary to plaintiffs' assertion (K-Opp. 20), the government argued that an injunction would impose hardship on the military, Doc. 69 at 37; *see also* Doc. 106.

Plaintiffs dismiss the military's need for more time, contending (K-Opp. 19) that the military has had "nearly 18 months" to implement the Carter policy. But plaintiffs overlook that implementation was put on hold on August 25, 2017, "pending completion of the study directed by the President." Add.42. The military could not have foreseen that more than two months later, a district court would order a nationwide implementation of that policy by January 1. In addition, "key personnel involved in" the development and implementation of accession standards "have rotated in the past several months," further complicating this judicially-ordered scramble. *Id.* And while plaintiffs rely (K-Opp. 21) on their own declarations to second-guess the military's judgment regarding the complications of a rushed implementation, the Supreme Court has cautioned against ignoring the "considered professional judgment" of "appropriate military officials," even in the face of countervailing testimony cited by adverse parties. *Goldman v. Weinberger*, 475 U.S. 503, 508-09 (1986).

Plaintiffs posit (K-Opp. 20) that the military's announcement that it will obey the injunction demonstrates a lack of harm. 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.

Plaintiffs likewise err (K-Opp. 20) in dismissing the threat of duplicative implementation burdens as "speculative." They overlook both the prospect that the military may revise its accession policy early next year and that, even with the

"implementation efforts made to date," the military will still have to take significant steps to meet the unexpected deadline. Add.42. Those efforts would be wasted if the government prevails on the merits of its appeal and the military either retains its current accession policy or adopts a new one that differs from both the current and Carter policies.

Finally, the suggestion (W-Opp. 22) that the court should dismiss the military's asserted harms because the government did not seek an immediate stay of a similar injunction in *Doe v. Trump*, No. 17-5267 (D.C. Cir.), should be rejected. After that injunction was issued, the government had to consider whether Secretary Mattis would exercise independent authority to defer the deadline and whether the injunction barred such action. The government then sought clarification from that court, as it did here, in the hope that doing so would obviate the need for a stay. When that failed, the government sought emergency relief from the court of appeals. The decision to engage in a deliberative process and exhaust all options in an attempt to avoid an unnecessary appeal is not a basis for denying relief.

Plaintiffs will suffer no irreparable injury from a stay. Mot. 15. Given that none of the individual plaintiffs whom the court found to have standing has shown eligibility to access under the Carter policy, a stay pending appeal cannot injure them. In any event, any employment-related or abstract stigmatic injuries are not irreparable. Mot. 15.

C.1. On the merits, plaintiffs contend that the accession directive is irrational and violates equal protection under any level of scrutiny. K-Opp. 15-17. 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 is unconstitutional. *See* Mot. 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 revised by former-Secretary Carter cannot foreclose Secretary Mattis and President Trump from reconsidering its validity. Indeed, the Carter policy itself presumptively excludes transgender individuals from serving, but uses a different exception than the current policy. Mot. 17-18.[4] The current policy "generally" precludes "the accession of transgender individuals" but is "subject to the normal waiver process." Add.28. The dispute here thus reduces to the scope of an exception to accession standards, which is a question of military policy, not constitutional principle.

2. With regard to their substantive due process claim, plaintiffs now disclaim any fundamental right to serve in the military. K-Opp. 14. But the district court based its due-process analysis on its conclusion that the directive deprived plaintiffs "of

[4] Although plaintiffs characterize the current policy as a "categorical" ban, K-Opp. 20, there is no reason to assume that the waiver process will be applied in bad faith. *See supra* p. 6.

employment and career opportunities," Add.18-19, and the opportunity at issue is military service. There would be no limit to the reach of the substantive due process clause if plaintiffs could redefine their asserted right at the high level of generality they seek. K-Opp. at 14. Likewise, plaintiffs are wrong to suggest that the accession directive is a content-based regulation of speech, as it does not restrict the content of anyone's speech. Mot. 19.

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 2,531 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 20, 2017, I filed the foregoing Reply with the Clerk of the Court for the United States Court of Appeals for the Ninth 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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