The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

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

NOTE ON MOTION CALENDAR:
December 29, 2017

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INTRODUCTION

Defendants' motion for clarification and for a partial stay of the preliminary injunction should be denied. First, there is no need for clarification: this Court's preliminary injunction restores the status quo that existed before President Trump's exclusion of transgender people from the military, and that status quo was one in which transgender people could join the military by January 1, 2018. Defendants' suggestion that Secretary of Defense James Mattis may nevertheless exercise "independent" authority to further defer accessions hinges on a factual assumption never proven: that he would have done so but for President Trump's action. That factual showing is a necessary predicate for the exercise of authority that is *independent* of President Trump's action—which three other federal district courts, in addition to this one, have now enjoined as incurably tainted with profound constitutional violations. Defendants have failed to make any such showing. In any event, the constitutional defects in the accession ban cannot be cured by merely having another government official re-authorize its extension, even if acting on a supposedly independent basis.

Second, Defendants fail to meet any of the requirements for a stay, let alone show that this Court abused its discretion in granting a preliminary injunction. They cannot show a likelihood of success on appeal, because this Court correctly concluded that Plaintiffs are likely to succeed on the merits of their equal protection, due process, and First Amendment claims. Defendants wholly failed to carry their burden of substantiating their proffered governmental justifications, and they cannot cure that deficiency by introducing evidence *after* the preliminary injunction has issued. A stay would also deny an entire class of Americans the ability to serve their country on equal terms as others, a harm of enormous constitutional significance.

The thrust of the government's motion to stay is that it will supposedly suffer irreparable harm if it is not permitted to continue discriminating against transgender people who wish to join the military. That claim is belied by the facts. After commencing an extensive process of deliberative review in July 2015, the military concluded in June 2016 that there was no basis for excluding transgender people from its ranks. The military then took steps over the course of the next year to prepare for the accession of transgender people by July 1, 2017, which was

subsequently extended another six months to January 1, 2018. The military has thus collectively spent *years* studying the end of its policy of overt discrimination against transgender people who merely wish to serve their country on equal terms as others. As confirmed by military leaders directly involved in preparing for accessions, Defendants' belated claim that the most sophisticated military in the world cannot stop discriminating against a small minority group rings hollow. Both the D.C. and Fourth Circuit Courts of Appeal agree, having now denied similar stay requests, and a stay is equally unwarranted here.

BACKGROUND

On June 30, 2016, following a process of comprehensive review, then Secretary of Defense Ashton Carter issued a formal directive ending the exclusion of transgender people from the military. Dkt. No. 48, Ex. C. This directive allowed transgender people currently serving to do so openly and created a deadline for the accession of transgender people into the military. *Id.* Accessions were initially set to take effect on July 1, 2017, but on June 30, 2017, Secretary of Defense Mattis deferred the effective date by six months to January 1, 2018. Dkt. No. 34-3. President Trump's July 26, 2017 tweets and August 25, 2017 Presidential Memorandum (the "Ban") then indefinitely deferred that date. On December 11, this Court preliminarily enjoined the Ban, returning the parties to the "*status quo*" that existed "prior to President Trump's July 26, 2017 announcement." Dkt. 103 ("Order") at 23.

On December 15, Defendants filed this motion seeking "clarification" of the Order as to whether Secretary Mattis has "independent discretion" to postpone the January 1 accessions deadline or, alternatively, for a partial stay of the preliminary injunction as to accessions. Dkt. 106 ("Mot."). In their motion, Defendants claim, *for the first time* in this case, that they are unprepared to begin accessions of transgender applicants by the January 1 deadline. Without waiting for this Court to rule, Defendants filed an "emergency" stay motion with the Ninth Circuit. *See* No. 17-36009, Dkt. 3-1. Although the Ninth Circuit has yet to decide that motion, both the D.C. and Fourth Circuit Courts of Appeal have now denied similar stay motions. Decl. of Samantha Everett, Exs. 1–3.

ARGUMENT

A. Defendants' Request to "Clarify" the Scope of the Preliminary Injunction Should Be Rejected.

In the guise of a motion for "clarification," Defendants ask this Court for permission to implement a policy this Court has already enjoined. Defendants' request to evade the Court's preliminary injunction should be denied.

This Court's preliminary injunction enjoined "Defendants from taking any action relative to transgender individuals that is inconsistent with the *status quo* that existed prior to President Trump's July 26, 2017 announcement." Order at 23. As set forth in the Presidential Memorandum, the *status quo* before the Ban "permitt[ed] accession of [transgender individuals] after July 1, 2017," which Secretary Mattis extended to January 1, 2018. Dkt. 34-7 at 1. Thus, under the *status quo ante*, there was an operative January 1 deadline to permit the accession of transgender people into the military. *Id.*; *see also Doe v. Trump*, No. 17-1597, Order at 1-2 (D.D.C. Dec. 11, 2017) (explaining that the *status quo ante* "allowed for the accession of transgender individuals into the military beginning on January 1, 2018") (attached as Everett Decl., Ex. 1). Plainly, any hypothetical decision by the Secretary of Defense to extend the accession deadline past January 1 is inconsistent with that *status quo*.

Defendants' assertion that Secretary Mattis nonetheless possesses "independent" residual authority to further defer accessions is unsupported. Defendants fail to introduce any evidence that Secretary Mattis would have done so but for the Ban. That deficiency is fatal to their motion. *See Doe v. Trump*, No. 17-5267, Order at 4 (D.C. Cir. Dec. 22, 2017) (holding that Defendants failed to substantiate that Secretary Mattis "would make a decision, wholly independent of the Presidential Memorandum or directive, to extend the January 1, 2018, deadline for accession" and observing that his authority is also necessarily subject to the President's direction) (attached as Everett Decl., Ex. 2).

Indeed, Defendants' motion and accompanying declaration make clear that that the deferral they seek grows directly out of the Ban. The deferral sought would not serve the purpose of preparing for accessions but instead serve the "study" mandated by President Trump. Dkt. No.

106 (requesting delay "to further study" accessions); Dkt. No. 107 ¶ 4 (requesting delay because "the study directed by the President remains ongoing"). But deferring accessions pending "further study" is *precisely* what this Court already enjoined. *See* Dkt. No. 34-7 at 3–4 (Presidential Memorandum directing Secretary of Defense to maintain the current accessions ban while conducting "further study"). Similarly, any supposed administrative inconvenience to the government from proceeding with accessions is a product of the Ban itself. Dkt. No. 107 ¶ 9 (admitting that the government deferred preparing for accessions because of President Trump's actions on August 25, 2017). Because the preliminary injunction returned Plaintiffs to the *status quo ante*, Defendants cannot rely on President Trump's actions—directly or indirectly—as a basis for perpetuating discrimination in accessions.

At bottom, there is no way to harmonize Defendants' proposed "clarification" with the preliminary injunction, and there is thus nothing for the Court to clarify. What Defendants truly seek is not clarification but reconsideration—without any support to meet that rigorous standard. *See* Local Rule 7(h) ("Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence."). This Court has already considered and rejected Defendants' requested "clarification": the preliminary injunction enjoined the Presidential Memorandum's directives, including its order to delay accessions pending "further study." And no "clarification" is needed to enjoin Secretary Mattis from taking precisely the same unconstitutional action based on his own "discretion." *See infra* II.B.

B. Defendants Fail to Meet the High Standard for a Stay Pending Appeal of a Preliminary Injunction.

Defendants' request, in the alternative, that this Court stay the preliminary injunction as to accessions should also be denied. Defendants' motion faces a doubly demanding burden: not only do they request the extraordinary remedy of a stay pending appeal, but the underlying order they appeal—the grant of a preliminary injunction—is subject to appellate review only for abuse of discretion.

A stay pending appeal "is an intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal citation and quotation marks omitted). It is therefore "not a matter of right, even if irreparable injury might otherwise result." *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) (internal citation and quotation marks omitted). In determining whether to grant a stay, a court considers (1) whether the government "has made a *strong showing* that [it] is likely to succeed on the merits, (2) whether the [government] 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." *Id.* (emphasis added).

Defendants' burden to show that they are likely to succeed on the merits of their appeal is elevated in turn by the relevant standard of review on appeal for preliminary injunctions. A district court order granting preliminary relief "will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). "[U]nless the district court's decision relies on erroneous legal premises," "the appellate court will reverse only if the district court abused its discretion." *Id.* "Review of an order granting or denying a preliminary injunction is therefore much more limited than review of an order involving a permanent injunction where all conclusions of law are freely reviewable." *Id.*

1. Defendants Fail to Make the Required Strong Showing of a Likelihood of Success on the Merits to Justify a Stay.

Defendants' request for a stay fails at the outset, coming nowhere close to a "strong showing" that they are "likely to succeed on the merits." *Washington*, 847 F.3d at 1164. Instead, Defendants offer only a perfunctory recitation of arguments this Court has already considered and rejected, in many cases without any supporting argument or authority.

Defendants first argue that they are likely to succeed on the merits based on the premise that Secretary Mattis retains authority independent of the Ban to defer the accession of transgender people into the military beyond January 1, 2018. Mot. at 6. But, as explained above, they fail to show that such authority would be "independent." In any event, no government

official has the authority to perpetuate an unconstitutional policy. Certainly, if the President lacks that authority, so too do his subordinates, including the Secretary of Defense. This Court correctly held that the exclusion of transgender Americans from military service is subject to—and fails—heightened scrutiny under Plaintiffs' equal protection, due process, and First Amendment claims. *See* Order at 15–20. Other federal district courts have come to the same conclusion, holding that the Ban, including its discriminatory accession policy, is unconstitutional. *See Doe v. Trump*, No. 17-1597, 2017 WL 4873042, at *28–30 (D.D.C. Oct. 30, 2017) (holding that the Ban fails intermediate scrutiny); *Stone v. Trump*, No. 17-2459, 2017 WL 5589122, at *15–16 (D. Md. Nov. 21, 2017) (holding that the Ban is "unlikely to survive even a rational review"); *Stockman v. Trump*, No. 17-1799-JGB, Order at 19 (C.D. Cal. Dec. 22, 2017) (holding that "Defendants' justifications do not pass muster") (attached as Everett Decl., Ex. 3).

The accessions ban would be no more permissible were it to derive from Secretary Mattis, rather than the President himself. Although Defendants attempt to cast this Court's decision as revolving solely around the President's tweets announcing the Ban, this Court found that the reasons offered by the government for "excluding transgender individuals from the military are not merely unsupported, but are actually contradicted by the studies, conclusions, and judgment of the military itself." Order at 16 (brackets omitted). Those defects run to the policy itself. For instance, the findings and conclusions of the Working Group and the RAND study would remain unchanged, even if the accessions ban were simply re-adopted under the authority of another government official. Defendants' argument that Secretary Mattis could constitutionally continue extending the accessions ban, even if he were exercising "independent" authority, is therefore meritless.

Defendants next argue that this Court erred in facially enjoining the accessions ban, rather than enjoining it with respect only to the individual Plaintiffs. This Court already dispensed with this argument in its Order, and Defendants' undeveloped, one-sentence argument offers no analysis of how this Court supposedly abused its discretion. This Court had both the authority and the obligation to afford relief commensurate to the full scope of the constitutional injuries at

issue. *See Hawaii v. Trump*, 859 F.3d 741, 786 (9th Cir. 2017) ("[T]he scope of injunctive relief is dictated by the extent of the violation established.") (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)), *vacated as moot*, No. 16-1540 (Nov. 2, 2017). Confronted with a facially unconstitutional scheme in the Ban, this Court properly enjoined enforcement of the scheme as a whole. *See, e.g.*, *Hawaii*, 859 F.3d at 787–88 (rejecting attempt to limit injunctive relief to only the named plaintiffs); *Latta v. Otter*, 771 F.3d 456, 476–77 (9th Cir. 2014) (requiring injunctive relief for all otherwise qualified same-sex couples wishing to marry, not merely the named plaintiffs). Moreover, Defendants' argument ignores the organizational Plaintiffs who, with thousands of members nationwide, have concrete interests in protecting all of their members—including those outside Washington—from the Ban's irreparable harms.

Defendants also claim the Court erred in concluding that any Plaintiff had standing to challenge the accessions ban or faced a likelihood of irreparable harm from its enforcement, arguing that no Plaintiff has applied for accession and speculating that the individual Plaintiffs would be unable to meet the criteria for accession. But, as this Court properly held, whether the Plaintiffs applied or would otherwise be eligible for accession is irrelevant to standing: "Plaintiffs' injury lies in the denial of an equal *opportunity* to compete, not the denial of the job itself, and thus the Court does not inquire into plaintiffs' qualifications (or lack thereof)." Order at 10 & n.3 (citations and quotation marks omitted). The Ban subjects Plaintiffs Karnoski, D.L., and Callahan to "a credible threat of being denied opportunities to compete for accession on equal footing with non-transgender individuals," and Plaintiff Schmid has likewise "been refused consideration for appointment as a warrant officer and faces a credible threat of being denied opportunities for career advancement." *Id.* at 4.[1] Nothing more is required to establish standing. *Id.* at 20–21.

Furthermore, independent of any particular Plaintiff's ultimate accession into the military, Plaintiffs also suffer injuries from being branded and stigmatized as presumptively unfit to serve

[1] While the law does not require a futile gesture to establish standing, the record shows that some of the Plaintiffs have even approached military recruiters—only to be rebuffed. *See* Dkt. No 37 ¶ 6 ("When I disclosed to the recruiter that I am transgender, the recruiter stopped communicating with me.") (declaration of Plaintiff D.L.). Furthermore, Defendants' claim that none of the Plaintiffs could satisfy the proposed accession criteria is plainly refuted by the record. Dkt. No. 42 ¶ 11 (declaration of Plaintiff Callahan)

their country, as well as from being penalized for expressing their gender identity. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 482–83 (9th Cir. 2014) (recognizing dignitary injury as "itself a harm of great constitutional significance"); *Klein v. City of San Clemente*, 584 F.3d 1196, 1207 08 (9th Cir. 2009) (loss or chilling of First Amendment rights "for even minimal periods of time[] unquestionably constitutes irreparable injury") (internal citation and quotation marks omitted).[2]

Finally, Defendants assert in conclusory fashion—without any citation at all—that "the Court erred on the merits, particularly by reaching substantial constitutional questions and by not applying the appropriate level of deference" and that "the Court abused its discretion in weighing the equities." Mot. at 7. The Court already considered and rejected all of these arguments, and Defendants do not even purport to explain why this Court—and every other court to consider these issues—are supposedly wrong.

2. Defendants Cannot Show They Will Suffer Irreparable Harm, While a Stay Would Harm Plaintiffs and the Public Interest.

Although the Court need not consider the remaining factors for a stay, *see Federal Trade Comm'n v. Neovi, Inc.*, 2016 WL 9076233, *5 (S.D. Cal. May 27, 2016) ("Movant's failure to satisfy one prong of the standard for granting a stay pending appeal dooms the motion.") (internal citation omitted), Defendants fail the rest too. They cannot meet their burden of showing that they will suffer irreparable harm absent a stay of the preliminary injunction as to accessions. Meanwhile, a stay would harm Plaintiffs and the public interest.

First, Defendants claim that an accessions implementation date of January 1 would impose unspecified burdens on the military, but Defendants concede that implementation efforts have already been made. *See* Dkt. No. 107 ¶ 9. Indeed, Defendants have studied this issue since 2015, and they have had since June 2016 to undertake preparation, training, and implementation of the

[2] The Court also properly found that Washington state has suffered a likelihood of irreparable harm to its sovereign and quasi-sovereign interests through being forced to "expend its scarce resources to support a discriminatory policy when it provides funding or deploys its National Guard," and "that its ability to recruit and retain service personnel for the Washington National Guard may be irreparably harmed." Order at 21. These are not speculative, as Defendants assert, because Washington is not immune from the nationwide harms inflicted by the Ban.

proposed accession policy.[3] The implementation efforts to date include a Department of Defense (DoD) memorandum, dated December 8, providing direction and guidance on the accession of transgender persons into the military. Everett Decl., Ex. 5; *see also Doe* Order at 3 (observing that this memorandum "document[s] concrete plan already in place govern accessions") (attached as Everett Decl., Ex. 2). Similarly, on December 11, DoD publicly announced that "it will begin processing transgender applicants for military service on January 1, 2018," evidencing both its preparation and readiness for accessions by that date. Everett Decl., Ex. 6. Furthermore, Defendants' professed unpreparedness—after nearly 18 months—is contradicted by the testimony of former service secretaries and a psychiatrist who directly trained medical personnel on the accession policy; they attest that the services had nearly completed preparation to access transgender service members as of January 2017, that the process is not complicated, and there are no "unique complexities or burdens." *See generally* Mabus Decl.; James Decl.; Brown Decl. (filed herewith); Everett Decl., Exs. 7–9.

Defendants' sole declaration in support of a stay—which they failed to submit when opposing the preliminary injunction motion—is a far cry from evidence "sufficient to establish a likelihood of irreparable harm." *Herb Reed Enterprises, LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1251 (9th Cir. 2013). To begin, this Court had no ability to consider this argument or evidence when issuing the preliminary injunction, and it is therefore waived. *See K.W. ex. rel. D.W. v. Armstrong*, 789 F.3d 962, 974 (9th Cir. 2015) (holding that Defendant waived irreparable harm argument "by failing to raise it before the district court"). Furthermore, the declaration ignores the fact that substantial implementation has taken place and fails to explain what work remains in order to begin accessions by January 1. The declaration includes speculative and conclusory assertions about the "possibility" of harm—and, even then, only if the government *chooses* not to devote adequate "guidance, resources, and training" to accessions—which does not establish the requisite *likelihood* of harm. Dkt. 107, ¶ 8.[4] Both the

[3] Defendants have thus already incurred implementation costs, a purported "harm" they face. Their claim regarding "'duplicative' implementation costs" if the military implements an unspecified "new policy" is unavailing, Mot. at 4, as Defendants have not shown what that new policy would be.

[4] Similarly, Defendants' claim that staff rotations in "the past several months" prevent implementation of the

district court and the D.C. Circuit in *Doe* identified many of these same shortcomings in Defendants' evidence as well. *See* Everett Decl., Exs. 1–2.

Second, Defendants' attempt to portray accession screening for transgender troops as involving "a complex medical condition," Mot. at 3, is unfounded. The "accessions criteria for transgender people are straightforward" and "no more complex than other accessions criteria." Brown Decl. ¶¶ 7–8. The proposed accession policy—approximately one page long—sets forth the requirement that transgender individuals must demonstrate that they have been stable for 18 months following medical treatment associated with gender transition. Dkt. No. 48-3. Gender dysphoria is also a medical diagnosis that "medical professionals should already be familiar" with given the military training already provided, and it thus involves no "unique complexities or burdens." Brown Decl. ¶ 8.

Third, under the accessions policy, military service is open to "all who can meet the rigorous standards for military service and readiness." Dkt. No. 48-3 There is accordingly no permissible basis for excluding transgender people who can already meet these "rigorous" standards. Of course, as the Court found, "*all* service members might suffer from medical conditions," but this does not justify excluding all transgender people from military service. Order at 17 (italics in original).

In stark contrast to Defendants' bare assertions of harm, this Court has already found that Plaintiffs face a variety of irreparable harms, including "denial of career opportunities," "stigmatic injury, and impairment of self-expression." *Id.* at 12. Plaintiff Schmid has been refused consideration for appointment as a warrant officer. *Id.* at 7. Plaintiffs Karnoski, D.L., and Callahan are also denied opportunities to compete for accession on equal footing with others. *Id.* These are not abstract injuries for Plaintiffs, but rather injuries that "deprive[] them of dignity," label them as "innately inferior," "marginalize" and stigmatize them, and communicate to them (and everyone else) that transgender Americans are "second-class citizens." Order at 8; Dkt. No. 35 ¶ 21; Mabus Decl. ¶ 4.

accessions policy is a non-starter, Dkt No. 107 ¶ 9, as the military system "anticipates routine staff turnover," Brown Decl. ¶ 9.

These irreparable injuries outweigh any purported administrative burden that compliance with the injunction could impose upon Defendants. If a stay is granted, Plaintiffs will continue to suffer injuries, including deprivation of their constitutional rights. *See* Order at 22 ("[I]t 'is always in the public interest to prevent the violation of a party's constitutional rights.") (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)). For all these reasons, the balance of equities and public interest tip decidedly in Plaintiffs' favor and against a stay.

CONCLUSION

Plaintiffs respectfully request that the motion be denied.

Dated: December 27, 2017

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on December 27, 2017.

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