IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Case No. 1:17-cv-02459

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

Three weeks ago, this Court enjoined all three directives comprising President Trump's ban on military service by men and women who are transgender. The injunction states that Defendants "shall not enforce or implement," *inter alia*, President Trump's directive that "the Secretary of Defense . . . shall . . . maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense . . . provides a recommendation to the contrary that [President Trump] find[s] convincing." *See* Dkt. 84. Defendants now seek expedited "clarification" about whether the Court's ruling permits Secretary Mattis to exercise his alleged "independent discretion" to indefinitely suspend new accessions beyond January 1, 2018, *see* Dkt. 91, while the Department of Defense ("DoD") "carr[ies] out the study directed by the President," *see* Dkt. 91-1 ¶ 4. In the alternative, Defendants request a stay of the accessions ruling pending appeal. *See* Dkt. 91.[1]

[1] Defendants seek this expedited relief despite having filed substantively identical motions in a different court several weeks ago. *See* Exs. 1, 2. All exhibits are attached to the declaration of Marianne F. Kies, filed herewith.

No clarification is necessary. The Court's injunction does not prevent Secretary Mattis from taking some hypothetical action that is independent of, and unrelated to, the President's unconstitutional directives, but the injunction also unambiguously prohibits Secretary Mattis from taking the specific action described in Defendants' motion. While Defendants argue that a deferral would constitute an exercise of "independent authority," Dkt. 91, the declaration they submit in support of their motion shows that the deferral they contemplate would be directly tied to the enjoined directive and, thus, directly contrary to the terms of the preliminary injunction, *see* Dkt. 91-1. There is no factual dispute on this point. The declaration makes clear that the deferral Defendants seek would not be for the purpose of further preparing for accessions, but "to carry out the study directed by the President." *Id.* ¶ 4. If the Court chooses to "clarify" that the injunction does not prohibit Secretary Mattis from exercising "independent discretion," the Court should also clarify that the injunction *does* prohibit the Secretary from delaying accession based on the reasons provided in Defendants' motion.

The Court should also deny Defendants' motion to partially stay the preliminary injunction. In *Doe v. Trump*, Civ. A. No. 17-1597 (CKK) (D.D.C.), the U.S. District Court for the District of Columbia rejected a similar stay request, finding that the government had failed to establish irreparable injury, or any of the other factors required to support issuance of a stay pending appeal. *See* Ex. 3. Among other things, the *Doe* court carefully reviewed the declaration the government submitted there and found it vague and conclusory, disregarding significant steps the military has already taken to prepare for transgender accessions and failing to specify what steps allegedly remain to be completed to begin accessions. Notably, Defendants submit a virtually identical declaration in this case, without addressing any of the deficiencies identified by the *Doe* court, or adding any of the specifics that court found wanting. Defendants'

resubmission of the near-identical declaration here amounts to an admission that they have no answer and nothing more to say.

As the *Doe* court explained, the military has had almost a year and a half to prepare for accessions of men and women who are transgender, and the Services in fact did considerable work to prepare prior to President Trump's abrupt declaration that transgender persons would not be allowed to serve. Defendants provide no specific evidence that the Services will be unable to handle the accessions process for what is likely to be a very small number of transgender persons seeking to accede in early 2018. They also fail to demonstrate that this Court erred in its earlier ruling on Plaintiffs' standing or their likelihood of success on their equal protection and substantive due process claims. The balance of equities and the public interest likewise weigh against issuance of a stay.

ARGUMENT

I. Defendants' Motion to "Clarify" the Scope of the Preliminary Injunction Should Be Rejected.

Defendants' motion for clarification seeks permission to effectuate a directive that the Court has enjoined. They ask the Court to "clarify" that it did not enjoin the Secretary of Defense from exercising his discretion to defer the January 1, 2018 effective date for the accessions provisions of the Open Service Directive for "a limited period of time," but with no end date. Dkt. 91, at 2.

Defendants do not say that the Secretary has in fact decided to defer the accessions date, but if the Secretary does, it presumably would be for the reasons set forth in the declaration Defendants submit in support of their motion. That declaration, by Lernes Hebert, Acting Deputy Assistant Secretary of Defense for Military Personnel Policy, makes clear that a deferral would be, not for the purpose of preparing for accessions, but for the purpose of continuing the

"study" that President Trump ordered in August. *See* Dkt. 91-1 ¶ 4 ("The review being undertaken by the Panel of Experts appointed by the Secretary on September 14, 2017, *to carry out the study directed by the President* remains ongoing. The Panel's work is expected to result in recommendations to the Secretary of Defense early next year. The Department would also establish the policy, standards, and procedures to support those Panel recommendations adopted by the Secretary." (emphasis added)). This is the *very same* "study" that the Court rightly dismissed as non-independent, *i.e.*, with a foreordained conclusion. *See* Dkt. 85, at 50 ("[T]he Court finds that the President's Memorandum is not a request for a study but an order to implement the Directives contained therein.").

On its face, deferral of the accessions date in this manner would be directly contrary to the terms of the injunction. The Court ordered that Defendants "shall not enforce or implement the [] policies and directives encompassed in President Trump's Memorandum . . . dated August 25, 2017." Dkt. 84, at 1. The directive relating to accessions was to "maintain the current[] [bar] regarding accession of transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense . . . provides a recommendation to the contrary that [President Trump] find[s] convincing." *Id.* at 2. Defendants' proposal to delay accessions beyond January 1, to provide time for the DoD to conduct a "study" and provide a recommendation to the President, is exactly what the injunction prohibits.

The Court need not resolve any factual dispute on this issue. Defendants' own declaration makes clear that the "study" that is the purported reason for further delay of accessions is not independent of the enjoined directive. *See* Dkt. 91-1 ¶¶ 4, 9, 10 (all referring to the "study" directed by the President). It is evident from their own papers that Defendants seek permission for the Secretary to effectuate a directive the Court has enjoined.

The only arguably "independent" reason Defendants offer for delaying accessions is their suggestion that the military needs more time to conduct the training necessary to prepare for accessions. *See* Dkt. 91, at 2. Even if that were true, *but see infra*, Defendants do not suggest that they intend to engage in any training or communication regarding accessions policy during any period of deferral.

To be sure, if Defendants could make a persuasive showing that they are currently working vigorously to complete preparations for accessions but nevertheless face some insurmountable obstacle, they are not without recourse. Defendants could return to this Court to seek *modification* of the injunction to complete specified steps required for accessions to begin, or to take additional time to process individuals who begin the accessions process in early 2018. At this point, though, there is simply no basis for such a modification. The only appropriate *clarification* at this time, if any is warranted at all, is to reiterate that Defendants may not postpone accessions beyond January 1, 2018 with no end date; that Defendants may not postpone accessions in order to continue the "study" ordered by President Trump; and to make clear that simply characterizing such a delay as based on Secretary Mattis's "independent authority" is insufficient to circumvent the terms of the injunction.

II. Defendants Have Not Met Their Burden to Show That They Are Entitled to the Partial Stay They Request.

Defendants' request for a stay of this Court's preliminary injunction is "extraordinary relief for which [they] bear[] a heavy burden." *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 558 (E.D. Va. 2016) (citation and internal quotation marks omitted). In considering whether to grant this extraordinary relief, a court considers four factors similar to those it analyzed in determining whether to grant the preliminary injunction: (1) whether the movant has made a strong showing that he is likely to succeed on the merits; (2) whether the movant 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. *Hilton v. Braunskill*, 481 U.S. 770, 776, (1987).[2] Here these factors all militate against a stay.

A. Defendants Will Not Be Irreparably Harmed Absent a Stay.

Defendants' primary argument for a stay is that they will be irreparably harmed if they must honor the January 1, 2018 start date for accessions because the military is unprepared to begin accepting transgender recruits on that date. This position is implausible. As the record reflects, the military began planning for accessions of men and women who are transgender almost a year and a half ago (June 30, 2016), when then-Secretary Carter reversed the military's bar on accessions of transgender individuals and issued detailed accessions criteria "designed to ensure that transgender individuals who enlist in the military do not have any medical needs that would make them medically unfit to serve or interfere with their deployment." Dkt. 40-32 ¶ 65; *see also* Dkt. 85, at 7-8. Secretary Carter designated July 1, 2017 as the start date for accessions of transgender individuals, and directed the military in the meantime to "expeditiously develop and promulgate education and training materials to provide relevant, useful information for . . . commanders, the force, and medical professionals regarding DoD policies and procedures on transgender service." Dkt. 40-4, at 7. Training materials were to be "disseminate[d] . . . to all Military Departments and the Coast Guard not later than October 1, 2016," and "implementing

[2] Defendants' burden is heavier than they suggest. *See* Dkt. 91, at 4 n.3. Because the Court has already ruled that Plaintiffs are likely to succeed on the merits, in moving for a stay pending appeal Defendants "must make *at least as strong* a showing" that they are likely to succeed on the merits — "and certainly not a lesser showing — as compared to a party moving for a preliminary injunction." *Ohio Valley Envtl. Coal., Inc. v. Pruitt*, 2017 WL 1712527 at *3 (S.D. W. Va. May 2, 2017) (rejecting the "serious questions" standard because to adopt such a standard would "betray[] the fact that the trial court has already weighed the evidence before it and rendered a decision on the merits, which the moving party lost." (citing *Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Eng'rs*, 890 F. Supp. 2d 688, 692–93 (S.D. W. Va. 2012))).

guidance and a written force training and education plan" were to be issued by each Military Department "[n]ot later than November 1, 2016." *Id.*

Pursuant to these orders, DoD promptly "began training throughout the branches to meet the target date of July 1, 2017 for implementation." Decl. of G. Brown ¶ 5 (attached hereto). In September 2016 DoD issued a comprehensive, 71-page "implementation handbook" on "transgender service in the U.S. military" — which, among other things, provided guidance to the Force and its Commanders regarding open transgender service, outlined the framework for bringing medical care for transgender individuals into the Military Health System, and addressed the effect of DoD's transgender service policy on admission to accessions programs, like the Reserve Officers Training Corps ("ROTC"). Dkt. 40-9; *see also* Dkt. 73, at 7. Subsequent implementation steps included training hundreds of medical personnel working in the Military Entrance Processing Stations ("MEPS"). Brown Decl. ¶ 5. Notably, when Secretary Mattis postponed the start date on June 30, 2017, only one day before accessions of transgender individuals were to begin, he did not cite lack of readiness as the reason, but rather only that he wanted to "personally" receive "the views of the military leadership and of the senior civilian officials who are now arriving in the Department." Dkt. 40-11.

Former Secretaries of the Navy, Air Force, and Army have all explained that, *as of January 2017*, "the Services had already completed almost all of the necessary preparation for lifting the accession ban." Decl. of R. Mabus ¶ 3 (attached hereto); *see* Decl. of D. James ¶ 2 (attached hereto); Press Release, *Former Army Secretary Questions Trump Administration Claim that Military is Not Ready to Accept Transgender Applicants*, Palm Ctr. (Dec. 7, 2017) (Ex. 4)

(Fanning).[3] Indeed, just this week, the Pentagon issued a statement to the media indicating that it was preparing to comply with the January 1 accessions start date. *See* Tom Vanden Brook, *Pentagon to Begin Accepting Transgender Troops Jan. 1 After Court Order*, USA Today (Dec. 11, 2017, 5:00PM) (Ex. 6) ("'The Department of Defense will begin processing transgender applicants for military service on January 1, 2018, as mandated by a recent court order,' said Army Maj. David Eastburn, a Pentagon spokesman.").

Dr. George Brown, who participated in training numerous DoD medical personnel on the accessions criteria in May 2017, explains in his declaration that the medical accessions criteria for transgender persons are straightforward, that DoD personnel should be able to apply them as readily as they apply other medical accessions criteria, and that routine turnover in personnel should not affect this ability. Brown Decl. ¶ 8. Dr. Brown also notes that, in view of the small number of transgender persons in the overall population, it is unlikely that many transgender individuals will seek to enlist on or after January 1. *Id.* ¶ 10.

Moreover, in view of the stringent accessions standards for transgender individuals set out in the 2016 Open Service Directive, which the military developed after a lengthy "systematic" review and determined were "consistent with military readiness," Dkt. 85, at 2-3; Dkt. 40-4, at 2, any claim of harm from the addition or promotion of those individuals is not credible. Those stringent accessions standards provide that a history of gender dysphoria, medical treatment associated with gender transition, and a history of sex reassignment or genital reconstruction surgery are disqualifying unless, among other things, the individual has been stable for 18 months. *See* Dkt. 85, at 7-8; Dkt. 40-4, at Attach. § 2. Defendants do not attempt to

[3] *See also* Alan Bishop, et al., *DoD Is Ready to Accept Transgender Applicants*, Palm Ctr. (Dec. 2017) (Ex. 5) (military professors rejecting assertion that military is not prepared to begin transgender accessions on January 1).

argue — nor could they — that the accessions of those individuals would cause irreparable harm to the military. And they certainly could not argue that proceeding in early 2018 with commissions for existing service members who are transgender and prepared to commission (like Plaintiff George) would harm the military.

Instead, Defendants submit the declaration of an Acting Deputy Assistant Secretary of Defense for Military Personnel Policy in an effort to establish that the accessions criteria for transgender enlistees are complex and that the military needs more time to prepare for that policy change, to provide training, and to communicate. *See* Dkt. 91-1. But the statements in Mr. Hebert's declaration are highly general and conclusory. The *Doe* court characterized his statements in a nearly identical declaration as "vague," unsupported, and otherwise insufficient to meet the requisite showing of irreparable harm. Ex. 3, at 5. That court carefully reviewed the Hebert declaration and identified at least the following flaws:

- "Although Mr. Hebert's declaration contains a lengthy discussion of the administrative difficulties associated with implementing a new accession policy in general, it fails to acknowledge the considerable amount of time Defendants have already had to prepare for the implementation of this particular policy." *Id.* at 3 (emphasis added).

- "Moreover, Mr. Hebert's declaration glosses over the fact that considerable work has been done already [to prepare for transgender accessions] during this lengthy period." *Id.* at 4 (emphasis added).

- "Instead of acknowledging what has already been done, Mr. Hebert's declaration uses sweeping and conclusory statements to support his assertion that there is an unmanageable amount of work left to do. . . . Mr. Hebert fails to explain what *precisely* needs to be completed . . . in order for Defendants to be prepared to begin transgender accessions." *Id.* at 5 (first emphasis added).

- And, although "Mr. Hebert states that 'the Department will be twice burdened if it is required to implement [the start of transgender accessions] by January 1, 2018, and then potentially a different policy after the Department concludes its study and finalizes a policy,' . . . Defendants fail to provide the Court with any insight at

> all into what the [new] policy might be." *Id.* at 5-6 (alteration and emphasis added).[4]

Incredibly, despite this ruling, Defendants here re-submit Mr. Hebert's declaration essentially unchanged. Moreover, in their motion they fail to address any of the deficiencies the *Doe* court identified. Defendants' utter failure to respond to the *Doe* court's criticisms demonstrates that they have no adequate response.

Finally, Defendants' delay in bringing this motion (and their similar delay in seeking a stay of the injunction issued in the *Doe* case) undermines their contention that they will suffer irreparable harm. This Court entered its preliminary injunction on November 21, 2017 — over one month before the January 1 start date for accessions. *See* Dkt. 84. The preliminary injunction in this case followed an earlier order in the *Doe* case that preliminarily enjoined, *inter alia*, the bar on accessions. *See Doe v. Trump*, No. 17-1597 (CKK), 2017 WL 4873042 (D.D.C. October 30, 2017). The government waited three weeks before moving to clarify the *Doe* court's order and over a month before moving to stay the accessions portion of the *Doe* preliminary injunction, *see* Exs. 1, 2. Despite the fact that both the *Doe* order and the Order issued by this Court enjoined the same directive, it was only after the *Doe* court denied the partial motion to stay in that case that Defendants filed their motion for clarification and partial stay in this Court — less than three weeks before the January 1 transgender accessions start date. *See* Dkt. 91. The portions of the injunctions directed at accessions were similar enough to warrant concurrent review, so if Defendants had a genuine need for relief from the January 1 date, they would at least have sought immediate assistance from this Court shortly after the preliminary injunction

[4] The *Doe* court also noted that "[t]here is no evidence in the record that would suggest that the number of transgender individuals who might seek to accede on January 1, 2018 would be overwhelmingly large." Ex. 3, at 5 n.3.

issued, in parallel with their motions in *Doe*. *See Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers) (denying application for stay in part because movant failed to act expeditiously, which tended to "blunt his claim of urgency and [counseled] against the grant of a stay." (citing *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers))). Defendants' delay in seeking a stay from this Court provides strong support for the conclusion that they will not suffer irreparable harm from denial of a stay. *See Montrose Parkway Alternatives Coal. v. U.S. Army Corps of Engineers*, 405 F. Supp. 2d 587, 600 n.4 (D. Md. 2005); *cf. also Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (delay indicates lack of irreparable harm to support preliminary injunction).

B. Plaintiffs Will Suffer Irreparable Harm if the Stay Is Granted.

In arguing that Plaintiffs will not suffer irreparable injury from a stay, Defendants repeat the same factually incorrect assertions about Plaintiff George that this Court has already rejected. Defendants falsely assert that Airman George plans to wait until 12-18 months to obtain a bachelor's degree before commissioning as an officer. Dkt. 91, at 6. In fact, as this Court explained in its opinion, Plaintiff George intends to commission as soon as his application to change his DEERS marker is processed, which should happen imminently. *See* Dkt. 85, at 19; *see also* Dkt. 66-9, at 6. And, even if Plaintiff George is not in a position to commission for several more months, the date is so close that he will suffer direct harm from anything more than a minimal delay in the accessions start date — and he will certainly be harmed if the date is delayed indefinitely.

In addition to the concrete harm to Airman George, the Court has already held that, "in the absence of an injunction, [Plaintiffs] will suffer irreparable harm" because "the Directives in the President's Memorandum set apart transgender service members to be treated differently

from all other military service members." *See* Dkt. 85, at 42-43, 45. Despite Defendants' assertions, *see* Dkt. 91, at 6-7, a stay of the preliminary injunction with respect to accessions would cause all Plaintiffs to suffer the stigmatic injury the Court described. If Defendants are permitted to extend the accessions ban indefinitely past January 1, it will send a clear message to all those serving in the armed forces that transgender service members are second class citizens. As the *Doe* court explained, "Plaintiffs [are] being injured every day the Presidential Memorandum's directive preventing accessions [is] in force." *See* Ex. 3, at 7-8. This stigmatic injury, which Defendants wholly fail to address, would affect each Plaintiff.

C. Defendants Are Not Likely to Succeed on the Merits of Their Appeal.

Defendants have failed to demonstrate that they are likely to succeed on the merits of their appeal. They merely reiterate the arguments that this Court considered and rejected in issuing the preliminary injunction.

Specifically, Defendants characterize as error the Court's standing analysis with respect to accessions, its weighing of the equities, and its purported lack of deference to the military. *See* Dkt. 91, at 8. But the Court carefully considered all of Defendants' arguments on these points and resolved them in favor of Plaintiffs. *See* Dkt. 85, at 31-33 (standing); *id.* at 45-46 (equities); *id.* at 43 (deference). For example, the Court recognized the importance of deference to the military, but decided that "this is not a case where deference is warranted, in light of the absence of any considered military policymaking process, and the sharp departure from decades of precedent on the approach of the U.S. military to major personnel policy changes." *Id.* at 43 (quoting Corrected Br. of Retired Military Officers & Former Nat'l Sec. Officials as Amici Curiae in Support of Pls.' Mot. for Prelim. Inj. & Opp'n to Defs.' Mot. to Dismiss, Dkt. 65-1).

Defendants also again argue that the Court erred in entering an injunction that blocks the Transgender Military Service Ban in its entirety rather than blocking the application of that Ban

to the named Plaintiffs. However, they concede that injunctions should be broad enough in scope "to provide complete relief to plaintiffs." Dkt. 91, at 8. As this Court recognized, all Plaintiffs are harmed by, among other things, "the stigma associated with being singled out as unfit for service" — a harm for which the appropriate remedy is to enjoin the ban completely. Dkt. 85, at 31. Moreover, Plaintiffs brought a facial challenge on constitutional grounds, for which the appropriate remedy is an injunction directed to enforcement of the provision. *See* Dkt. 66, at 33-34 (collecting cases); Ex. 3, at 7 (same).

Finally, Defendants contend that "the Court will have erred if it enjoins the Secretary of Defense from exercising his independent authority to extend the effective date of the new accessions policy." Dkt. 91, at 7. But, for the reasons discussed above, *see supra* Part I, in denying Defendants' motion for clarification, the Court would be doing no such thing. Defendants' own filing supports the conclusion that any delay of the accessions start date would be based, not on Secretary Mattis' independent authority, but on the August 25 directive issued by President Trump and enjoined by this Court, *see id.*

D. The Public Interest Does Not Favor a Stay.

Finally, it is not in the public interest to issue a stay that would merely prolong the ongoing injury to Plaintiffs' constitutional rights, s*ee Elrod v. Burns*, 427 U.S. 347, 373 (1976), and deprive the armed forces of capable transgender individuals ready to serve their country. In fact, the accessions directive would *harm* military readiness. *See* Dkt. 40-17, at 2 (fifty-six retired generals and admirals stating that the "ban, if implemented, would . . . deprive the military of mission-critical talent, [which] would degrade readiness").

Defendants barely argue the public interest point. Their argument that the public interest weighs in favor of a stay because the military has not had the opportunity to issue appropriate medical standards and conduct training disregards the fact that medical standards for accessions

of transgender men and women were issued in 2016, and that DoD has already conducted extensive training. *See supra* Part II.A. Moreover, as explained above, Defendants have had almost a year and a half to prepare for the start of accessions, and any injury due to unpreparedness is the result of Defendants' own actions. *See id.* Courts have made clear that self-inflicted injuries should garner far less weight in a balancing of harms. *See Par Pharm., Inc. v. TWI Pharm., Inc.*, No. CIV. CCB-11-2466, 2014 WL 3956024, at *5 (D. Md. Aug. 12, 2014) ("In sum, TWi would not face the same kind of structural harm if the status quo is maintained that Par would suffer if it is not. Instead, it will suffer delayed revenue that it can recover through damages. Further, some of its harms are self-inflicted. Accordingly, the balance of the harms weighs in favor of granting a stay."); *cf. also Ledo Pizza Sys., Inc. v. Singh*, 983 F. Supp. 2d 632, 640 (D. Md. 2013) ("Here, any hardship caused to Singh by a preliminary injunction is self-inflicted. [. . .] Accordingly, the balance of equities tips in Ledo's favor, despite any economic hardship Singh may suffer.").

Like other individuals entering the military, transgender recruits are subject to rigorous medical fitness standards. Dkt. 40-4, at 2 ("[T]ransgender 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"). The record in this case lacks any support for the proposition that military readiness or lethality will be negatively affected by permitting transgender individuals to enlist beginning on January 1. *See* Dkt. 40-35, at xi-xii, 31, 70; Dkt. 40-38 ¶ 23. Indeed, Defendants do not attempt to argue that those who satisfy the stringent accessions standards scheduled to become effective on January 1 — *i.e.*, who have demonstrated stability for 18 months despite a history of gender dysphoria or who have completed all medical treatment and surgeries at least 18 months prior to accession, *see*

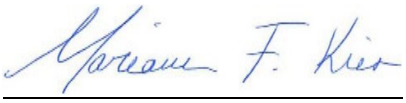
Dkt. 85, at 7-8 — pose any such risk. Rather, the public interest weighs strongly in favor of welcoming such individuals to military service and denying a stay of the injunction.

CONCLUSION

For the foregoing reasons, the Court should decline to allow Defendants to circumvent the preliminary injunction issued in this action by extending the start date for accessions of men and women who are transgender. It should accordingly deny Defendants' motion to clarify or partially stay the preliminary injunction pending appeal.

Dated: December 15, 2017

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Case No. 1:17-cv-02459

DECLARATION OF MARIANNE F. KIES IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR CLARIFICATION AND, IF NECESSARY, A PARTIAL STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

I, Marianne F. Kies, depose and say as follows:

1. I make this declaration in support of Plaintiffs' Opposition to Defendants' Motion For Clarification And, If Necessary, A Partial Stay Of Preliminary Injunction Pending Appeal. The following facts are based on my own personal knowledge, except those stated upon information and belief, and as to all such facts stated upon information and belief, I am informed and believe that the same are true.

2. I am an attorney with Covington & Burling LLP, and I represent Plaintiffs in the above-captioned matter.

3. Attached hereto as Exhibit 1 is a true and correct copy of Defendants' Motion for Clarification of the Court's October 30, 2017 Order in *Doe v. Trump*, No. 1:17-cv-01597-CKK (Dkt. 67) (D.D.C.).

4. Attached hereto as Exhibit 2 is a true and correct copy of Defendants' Motion for Partial Stay of Preliminary Injunction Pending Appeal, along with the Declaration of Lernes J. Hebert filed therewith in *Doe v. Trump*, No. 1:17-cv-01597-CKK (Dkt. 73 and 73-1) (D.D.C.).

5. Attached hereto as Exhibit 3 is a true and correct copy of the December 11, 2017 Order in *Doe v. Trump*, No. 1:17-cv-01597-CKK (Dkt. 75) (D.D.C.).

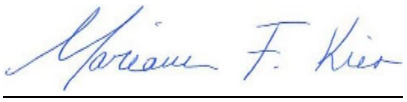
6. Attached hereto as Exhibit 4 is a true and correct copy of Press Release, *Former Army Secretary Questions Trump Administration Claim that Military is Not Ready to Accept Transgender Applicants*, Palm Ctr. (Dec. 7, 2017).

7. Attached hereto as Exhibit 5 is a true and correct copy of Alan Bishop, et al., *DoD Is Ready to Accept Transgender Applicants*, Palm Ctr. (Dec. 2017).

8. Attached hereto as Exhibit 6 is a true and correct copy of Tom Vanden Brook, *Pentagon to Begin Accepting Transgender Troops Jan. 1 After Court Order*, USA Today (Dec. 11, 2017, 5:00PM).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of December, 2017.



Marianne F. Kies

Exhibit 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, *et al.*, **Plaintiffs,** **v.** **DONALD J. TRUMP, *et al.*,** **Defendants.**	**Civil Action No. 17-cv-1597 (CKK)**

DEFENDANTS' MOTION FOR CLARIFICATION
OF THE COURT'S OCTOBER 30, 2017 ORDER

On October 30, 2017, the Court entered an Order granting in part and denying in part Defendants' motion to dismiss and granting in part and denying in part Plaintiffs' motion for a preliminary injunction. ECF No. 60. In its Order, the Court preliminarily enjoined Defendants from enforcing the "Accession and Retention Directives" in the President's August 25, 2017 Memorandum regarding military service by transgender individuals. *Id.* The Court also explained that "[t]he effect of the Court's Order is to revert to the *status quo* with regard to accession and retention that existed before the issuance of the Presidential Memorandum—that is, the retention and accession policies established in the June 30, 2016 Directive-type Memorandum as modified by Secretary of Defense James Mattis on June 30, 2017." *Id.*

Wholly apart from the enjoined directives in the Presidential Memorandum, the Secretary of Defense has independent authority to defer the effective date of the accessions provisions of Defense Department Directive-Type Memorandum ("DTM") 16-005, issued on June 30, 2016, for the purpose of further studying whether the DTM will impact military readiness and lethality. Indeed, as the Court noted, Secretary Mattis exercised that authority on June 30, 2017, when he

deferred the effective date for the accessions provisions of DTM 16-005 from July 1, 2017, to January 1, 2018. *See* Department of Defense, Release No. NR-250-17 (June 30, 2017).[1] Plaintiffs did not challenge the Secretary's exercise of that authority, nor have they suggested that the Secretary's action was unlawful in any respect. Instead, Plaintiffs have only sought prospective relief to enjoin the Secretary from implementing the President's Memorandum, which the President issued subsequent to the Secretary's exercise of his independent authority.

Accordingly, the Court's October 30, 2017 Order does not prohibit the Secretary of Defense from exercising his discretion to defer the January 1, 2018 effective date for the accessions provisions of DTM 16-005 for a limited period of time to further study whether the policy will impact military readiness and lethality or to complete further steps needed to implement the policy. Nor could the Court have enjoined the Secretary of Defense from exercising such discretion because Plaintiffs have not challenged the Secretary's exercise of his independent authority to study whether the DTM 16-005 will impact military readiness and lethality. Out of an abundance of caution, however, Defendants now seek clarification that, should the Secretary of Defense exercise such discretion, the Secretary's action would not violate the Court's October 30, 2017 Order.

Defendants will be prepared to address the clarification issue at the November 28, 2017 case management conference and respectfully request a ruling on this motion before December 1, 2017, so they may have sufficient time to consider seeking an emergency stay from the Court of Appeals prior to January 1, 2018, if the Court denies the motion.

[1] The Department of Defense Release is available online at: https://www.defense.gov/News/News-Releases/News-Release-View/Article/1236145/statement-by-chief-pentagon-spokesperson-dana-w-white-on-transgender-accessions/ (last visited Nov. 22, 2017).

Dated: November 22, 2017

Respectfully submitted,

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Counsel for Defendants

Exhibit 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, *et al.*, **Plaintiffs,** **v.** **DONALD J. TRUMP, *et al.*,** **Defendants.**	**Civil Action No. 17-cv-1597 (CKK)**

DEFENDANTS' MOTION FOR PARTIAL STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

On October 30, 2017, the Court entered an Order preliminarily enjoining Defendants from enforcing the accession and retention directives in the President's August 25, 2017 Memorandum regarding military service by transgender individuals. ECF Nos. 60, 70. Defendants have filed a timely notice that they are appealing the Court's Order, ECF No. 66, and now request a partial stay of the Court's preliminary injunction pending the outcome of their appeal. Specifically, Defendants request that the Court stay the portion of its preliminary injunction requiring Defendants to begin accessing transgender individuals into the military on January 1, 2018, pending a decision by the D.C. Circuit on Defendants' appeal. Because the January 1, 2018 deadline for complying with the accessions portion of the Court's preliminary injunction is quickly approaching, Defendants waive their right to file a reply to any opposition that Plaintiffs may file to this motion and respectfully request a decision on their motion by 12:00 pm on Monday, December 11, 2017. Defendants have submitted a Memorandum of Points and Authorities and Declaration in support of their motion. Defendants have also filed a proposed order with this motion.

Pursuant to Local Civil Rule 7(m), Defense counsel has conferred with Plaintiffs' counsel, and Plaintiffs' counsel has indicated that Plaintiffs oppose this motion.

Dated: December 6, 2017

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, *et al.*, **Plaintiffs,** **v.** **DONALD J. TRUMP, *et al.*,** **Defendants.**	**Civil Action No. 17-cv-1597 (CKK)**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

INTRODUCTION

On October 30, 2017, the Court entered an order preliminarily enjoining Defendants from enforcing the retention or accession provisions of the President's August 25, 2017 Memorandum regarding military service by transgender individuals. ECF No. 60. The Court later clarified that, with regard to the accessions provision, it had also enjoined the Secretary of Defense from exercising his independent authority to extend the effective date of the new accessions policy. As a result of these orders, Defendants must begin accessing transgender individuals into the military on January 1, 2018. ECF No. 70. Defendants filed a timely notice that they are appealing the Court's Order entering a preliminary injunction, ECF No. 66, and now move the Court to stay the accessions portion of its preliminary injunction for several reasons while the D.C. Circuit considers the merits of Defendants' appeal.

First, Defendants have submitted a declaration explaining that they will be seriously and irreparably harmed if forced to implement a new accessions policy on January 1, 2018. The Department of Defense is a large and complex agency with over 20,000 recruiters and 65 geographically dispersed Military Entrancing Processing Stations. Given the complex and multidisciplinary nature of the medical standards that need to be issued and the tens of thousands of geographically dispersed individuals that need to be trained, the military will not be adequately prepared to begin processing transgender applicants for military service by January 1, 2018, and requiring the military to do so may negatively impact military readiness. In addition, the Department of Defense has never before generally permitted transgender individuals to access into the military. Compelling the military to implement a new accessions policy while it is simultaneously completing a comprehensive study of military service by transgender individuals that may soon result in the adoption of different accessions standards would waste

significant military resources and sow unnecessary confusion among service members and applicants.

Second, Plaintiffs will not be harmed by a stay of the accessions portion of the Court's preliminary injunction pending the outcome of Defendants' appeal, as the only two Plaintiffs who seek to access into the military will not be eligible to do so until May 2020 and Spring 2021. *See* ECF No. 61 at 46.

Third, the public interest strongly favors allowing the military the time it needs to implement a significant change in its accessions policy in an orderly fashion.

Fourth, Defendants are likely to succeed on the merits of their appeal. The Court erred by entering a worldwide injunction, rather than providing relief tailored to the parties before it. In addition, the Court erred by finding that at least one Plaintiff had established standing to challenge—and would likely be irreparably harmed by—the accessions provision of the Presidential Memorandum, even though no Plaintiff will be eligible to commission as an officer for at least another two and a half years. This speculative, future harm does not outweigh the hardship that the injunction will impose on the military. The Court further erred by enjoining the Secretary of Defense from exercising his independent authority to extend the effective date of the new accessions policy, when Plaintiffs never challenged that authority and it was not before the Court. The Court also erred on the merits, in particular by reaching substantial constitutional questions and by not applying a deferential standard of review when the military is presently examining the policy at issue. Finally, the Court abused its discretion in weighing the equities to conclude that a preliminary injunction should be granted.

For these reasons, the Court should grant Defendants' motion.

BACKGROUND

The Court is familiar with the procedural history of this case, and Defendants will summarize it only briefly here. Plaintiffs filed this case on August 9, 2017, ECF No. 1, and amended their complaint on August 31, 2017, ECF No. 9. In their Amended Complaint, Plaintiffs sought "declaratory, preliminary, and permanent injunctive relief against the implementation of the President's directive to prohibit transgender individuals from enlisting or serving openly in the Armed Forces." ECF No. 9 ¶ 9. On August 31, Plaintiffs also moved for a preliminary injunction seeking the same relief. ECF No. 13. Defendants opposed Plaintiffs motion for preliminary relief and, in the same brief, moved to dismiss. ECF 45.

On October 30, 2017, the Court partially granted Defendant's motion to dismiss and partially granted Plaintiffs' motion for a preliminary injunction. ECF No. 60. The Court dismissed Plaintiffs' challenge to the surgical procedures provision of the Presidential Memorandum but allowed the remainder of their case to proceed. *Id.* It also entered an order preliminarily enjoining Defendants from enforcing the retention and accession provisions. *Id.* The Court explained that the "effect of the Court's Order is to revert to the *status quo* with regard to accession and retention that existed before the issuance of the Presidential Memorandum—that is, the retention and accession policies established in the June 30, 2016 Directive-type Memorandum as modified by Secretary of Defense James Mattis on June 30, 2017." *Id.*

On November 21, 2017, Defendants filed a notice of appeal. ECF No. 66. The following day, Defendants sought clarification regarding whether the Court's preliminary injunction prohibited Secretary Mattis from exercising his independent authority to extend the effective date of the new accessions policy past January 1, 2018. ECF No. 67. On November 27, the Court issued an Order stating that, under the *status quo* before the President issued his Memorandum,

policies were in place that "allowed for the accession of transgender individuals into the military beginning on January 1, 2018." ECF No. 70 at 2. "Any action by any of the Defendants that changes this status quo is preliminarily enjoined." *Id.* (emphasis in original).

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 62(c), a party may seek to stay a preliminary injunction pending an appeal. *See Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 11 (D.D.C. 2014). "In the D.C. Circuit, a court assesses four factors when considering a motion to stay and injunction pending appeal: (1) the moving party's likelihood of success on the merits of its appeal, (2) whether the moving party will suffer irreparable injury, (3) whether issuance of the stay would substantially harm other parties in the proceeding, and (4) the public interest." *Id.* (citing *Wash. Met. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).[1]

ARGUMENT

The Court should stay the accessions portion of the preliminary injunction until the D.C. Circuit decides Defendants' appeal.

[1] Following the Supreme Court's decision in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), "in this circuit, it remains an open question whether the likelihood of success factor is an independent, free-standing requirement, or whether, in cases where the three other factors strongly favor issuing an injunction, a plaintiff need only raise a serious legal question on the merits." *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014) (quotations omitted). "Given the uncertainty, courts in this jurisdiction have continued to analyze motions for preliminary injunctions under the sliding scale approach … ." *Akiachak Native Cmty,* 995 F. Supp. 2d at 11. Under that approach, a "motion to stay may be granted when a serious legal question is presented, when little if any harm will befall other interested persons or the public, and when denial of the order would inflict irreparable injury on the movant." *Id.*; *see Wash. Metro. Area Transit Comm'n*, 559 F.2d at 844.

I. Defendants Will Be Irreparably Harmed If They Are Forced to Implement a New Accessions Policy by January 1, 2018.

Defendants have submitted a declaration from Lernes J. Herbert ("Herbert Decl."), Acting Deputy Assistant Secretary of Defense for Military Personnel Policy, explaining that, in order to adequately prepare to access transgender individuals, the military will need to promulgate new, complex, and interdisciplinary medical standards that will necessarily require evaluation across several medical specialties, including behavior and mental health, surgical procedures, and endocrinology. Herbert Decl. ¶6. The military must then train "tens of thousands" of geographically dispersed personnel on the application of those complex medical standards. *Id.* ¶5. These personnel include 20,367 recruiters, 2,785 employees across 65 Military Entrance Processing Stations, 32 Service Medical Waiver Authorities, and personnel at nine (9) initial military entrance locations ("boot camps") and the associated medical hospitals that support them. *Id.*

Moreover, given the complexity of the interdisciplinary medical standards that need to be issued and the number of geographically dispersed individuals that need to be carefully trained on those standards, the Department would not be adequately and properly prepared to begin processing transgender applicants on January 1, 2018. *Id.* ¶¶6, 9. 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." *Id.* ¶8. Because Defendants are likely to suffer serious and irreparable harms if they are forced to begin accessing transgender individuals beginning on January 1, 2018, the Court should stay the accessions portion of its preliminary injunction until the D.C. Circuit decides Defendants' appeal.

The Department is also in the process of a high-level review of military service by transgender individuals that is scheduled to conclude in the next few weeks and could result in an accessions policy that differs from the one that the Court has ordered the military to implement by January 1, 2018. *Id.* ¶4, 10. In these circumstances, implementing a new accessions policy that would permit the accession of transgender individuals while the Department is in the process of concluding a comprehensive study that may ultimately lead to the implementation of a different policy would present not only the prospect of significant duplicative costs and administrative burdens but the high potential for sowing confusion in the ranks as well. *Id.* ¶10.

II. Plaintiffs Will Not Be Harmed by a Stay of the Accession Provision of the Court's Preliminary Injunction.

The Plaintiffs in this case who seek to access into the military will not be eligible to commission as officers until at least May 2020 and will not be harmed by a temporary stay of the portion of the Court's injunction dealing with accessions. As this Court recognized in its Opinion, Plaintiff Kibby is not scheduled to graduate from the Naval Academy and become eligible to accept a commission until May 2020. ECF No. 61 at 44, 46. Plaintiff Kohere is in his first semester of college and, based upon a four year program, will not graduate and become eligible to commission until spring 2021. ECF No. 45-3. Defendants' appeal will be decided long before either Plaintiffs Kibby or Kohere seek to commission into the military. They will not, therefore, be harmed by a stay of the accessions portion of the Court's injunction.

III. A Stay of the Accession Provision of the Court's Preliminary Injunction Is in the Public Interest.

In these circumstances, it is not in the public interest for the Court to compel the military to begin accessing transgender individuals before it has had an opportunity to issue the necessary medical standards and train its personnel on those standards to ensure that military applicants are properly screened. *See Gilligan v. Morgan*, 413 U.S. 1 at 10 ("The complex subtle, and

professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.").

III. Defendants Are Likely to Prevail on the Merits of Their Appeal.

Defendants can also show a likelihood of success on the merits of their appeal of the preliminary injunction. First, the Court erred by entering a worldwide injunction, particularly in light of the fact that only two Plaintiffs are challenging the accession provision of the Presidential Memorandum. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (explaining that equitable relief should "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.").

Second, the Court erred by concluding that at least one Plaintiff has established standing and a likelihood of irreparable harm from the accessions provision of the Presidential Memorandum, despite the fact that he will not be eligible to commission into the military until 2020. *See* ECF No. 45-2 ¶10 (explaining that Plaintiff Kibby is not scheduled to graduate from the Naval Academy until May 2020); *see also* ECF No. 45-3 ¶ 8(c) (explaining that, based on a four-year program, Plaintiff Kohere will not graduate from college until Spring 2021). This speculative, future harm does not outweigh the hardship that the injunction will impose on the military.

Third, the Court erred by enjoining the Secretary of Defense from exercising his independent authority to extend the effective date of the new accessions policy when the Secretary's authority has not been challenged in this case and was not properly before the Court.

Fourth, the Court erred on the merits, in particular by reaching substantial constitutional questions and not applying the appropriate level of deference when the military is presently examining the policy at issue.

Fifth, for the reasons given above, the Court abused its discretion in weighing the equities to decide that a preliminary injunction was warranted.

Accordingly, Defendants are likely to succeed on these issues in their appeal and have, at the very least, presented serious questions that are sufficient in light of the other factors to warrant a stay. *See Akiachak Native Cmty*, 995 F. Supp. 2d at 11.

CONCLUSION

For the reasons set forth above, the Court should stay the portion of its preliminary injunction dealing with accessions pending a decision by the D.C. Circuit on Defendants' appeal of the preliminary injunction.

Dated: December 6, 2017

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

Civil Action No. 17-cv-1597 (CKK)

DECLARATION OF LERNES J. HEBERT

I, Lernes J. Hebert, do hereby declare as follows:

1. I am currently the Acting Deputy Assistant Secretary of Defense, Military Personnel Policy, in the Office of the Under Secretary of Defense for Personnel and Readiness. In that capacity, I am responsible for overseeing the human resource policies impacting the sustainment of the all-volunteer-force for the Department of Defense ("DoD" or "the Department"), which consists of 1.4 million active duty military personnel and 1.1 million Guard and Reserve personnel. I have served in Military Personnel Policy since August 2003 and have led the Department through a number of major personnel initiatives and policy changes. Prior to my retirement from the United States Air Force in the rank of Colonel after 24 years of active service, I served at every level of the field of personnel management to include key assignments in the Office of the Secretary of Defense, the Air Staff, at the Air Force Personnel Center, and with Air Combat Command. I hold a Master of Science Degree in

National Security Strategy from the National War College and a Master of Arts degree in Management and Computer Resource Management from Webster University.

2. In the exercise of my official duties, I have been made aware of the above-referenced litigation pending in the U.S. District Court for the District of Columbia, as well as three additional suits by transgender individuals pending in other jurisdictions. Specifically, I am aware of the preliminary injunction entered by the Court in this action on October 30, 2017, with respect to two aspects of the Presidential Memorandum of August 25, 2017, including the provision directing DoD to maintain the Department's longstanding policy which generally prohibits accession of transgender individuals into military service. I have also been made aware of the Court's November 27, 2017 order in response to Defendants' motion to clarify. My understanding of the effect of the October 30 and November 27 orders is that January 1, 2018, is now the effective date of the accessions provisions of Defense Department Directive-Type Memorandum ("DTM") 16-005, issued on June 30, 2016, which allows for the accession of transgender individuals into the military.

3. I submit this declaration in support of Defendants' Motion for a Partial Stay of the Court's Preliminary Injunction Orders Pending Appeal. The purpose of this declaration is to provide the Court with my assessment, based on my experience and professional judgment, regarding the feasibility of implementing the court's orders by January 1, 2018, and the harmful impact to the military, its missions, and readiness if it is required to comply with the Court's orders that mandate the January 1, 2018 effective date for the accessions policy in DTM 16-005. The statements made herein are based on my personal knowledge and information available to me in the course of my official duties.

4. Secretary of Defense Mattis exercised his authority on June 30, 2017, to defer the effective date for the accessions provisions of DTM 16-005 from July 1, 2017, to January 1, 2018. *See* Department of Defense, Release No. NR-250-17 (June 30, 2017). Subsequently, the Presidential Memorandum of August 25, 2017, directed the Secretary of Defense (and the Secretary of Homeland Security with respect to the U.S. Coast Guard) to maintain the then-currently effective policy restricting accession by transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the President. The Presidential Memorandum also directed the Secretary of Defense to submit an implementation plan to the President by February 21, 2018, with respect to the policy set forth in the memorandum concerning accession and service by transgender individuals in the military. The Presidential Memorandum further directed that the implementation plan shall adhere to the determinations made by the Secretary as to what steps are appropriate and consistent with military effectiveness, lethality, budgetary constraints, and existing law. The review being undertaken by the Panel of Experts appointed by the Secretary on September 14, 2017, to carry out the study directed by the President remains ongoing. The Panel's work is expected to result in recommendations to the Secretary of Defense early next year. The Department would also establish the policy, standards, and procedures to support those Panel recommendations adopted by the Secretary. Thus, at present, the Department is studying revisions to policy concerning military service by transgender individuals, to be completed in early 2018, while at the same time preparing to operate under a judicial order to implement DTM 16-005 by January 1, 2018.

5. Implementing the Court's orders with respect to the accessions policy in DTM 16-005 by January 1, 2018, will impose extraordinary burdens on the Department and the

military services. For organizations as large and as complex as DoD and the military services, the study, development, and implementation of significant personnel policies is necessarily a substantial undertaking. As set forth below, there are considerable requirements associated with implementing this significant and complex policy change across the Department, considering that those personnel directly responsible for execution number in the tens of thousands and are geographically dispersed across the United States. Specifically, implementation of a new accession policy necessitates preparation, training, and communication to ensure those responsible for application of the accession standards are thoroughly versed in the policy and its implementation procedures. This requires that the following personnel have a working knowledge or in-depth medical understanding of the standards and identity validation requirements associated with processing an applicant under new requirements:

- 20,367 recruiters (responsible for resolving any gender identity conflict between an applicant's government identification documents and the gender in which they present themselves and assisting the applicant complete the Accession Medical Prescreen Report (DD Form 2807-2), including providing substantiating and supporting medical documents);
- 2,785 employees across 65 geographically dispersed Military Entrance Processing Stations (MEPS), including 568 medical division personnel, 102 Chief and Assistant Chief Medical Officers, and approximately 375 fee-based medical providers, all necessitating in-depth knowledge of the standards;
- 32 Service Medical Waiver Authorities authorized to grant medical waiver requests following a thorough evaluation of the applicant's medical history and recommendation from the MEPS Chief Medical Officer; and

- Personnel at the nine initial military entrance training locations ("boot camps") and the associated military hospitals that support them.

6. Beyond the sheer number of components and personnel involved, the implementation of accessions criteria is itself a complex undertaking. Accession criteria are based on service needs and are designed to ensure that those individuals accepted are "qualified, effective, and able-bodied persons" (10 U.S.C. § 505) who are capable of successfully performing military duties. Such duties involve a wide range of demands including exposure to danger, emotional stress, harsh environments, and the operation of dangerous, sensitive or classified equipment. Such demands are not normally found in civilian occupations. Further, all military members must be available for worldwide duty 24 hours a day without restriction or delay. This duty may be in remote areas lacking immediate and comprehensive medical support. An important objective of this thorough applicant screening is to ensure that persons accepted for the military are physically and psychologically qualified to withstand such isolation and rigors. These policies exist to protect both the individuals concerned, as well as members of their units and the overall readiness of the force. The accession screening process requires military and medical professionals well versed in the standards, and their applicability to military readiness, to ensure both the individual and the Department's best interests are served. In the case of the transgender accession standards, the standards themselves are complex, interdisciplinary standards necessitating evaluation across several systems of the body, to include behavioral and mental health (e.g. diagnosis of gender dysphoria or related comorbidities), surgical procedures (particularly thoracic and genital), and endocrinology (for the purposes of cross-sex hormone therapy). No other accession standard has been implemented that presents such a multifaceted review of an applicant's medical history.

7. It is also important to remember that this court-mandated policy change comes at a time when the military's operational tempo remains high and DoD's primary focus is on ongoing combat and contingency operations overseas.

8. If the Department is compelled to execute transgender accessions by January 1 absent sufficient guidance, resources, and training, the possibility exists that transgender applicants may not receive the appropriate medical and administrative accession screening necessary for someone with a complex medical condition. As a result, an applicant may be accessed for military service who is not physically or psychologically equipped to engage in combat/operational service.

9. In addition, although the Department was in the process of implementing DTM 16-005 after its issuance in June 2016, that process was first extended by the Secretary in June 2017, and then deferred further pending completion of the study directed by the President on August 25, 2017. In addition, key personnel involved in that accession enterprise have rotated in the past several months, necessitating additional preparation, training, and communication to ensure those responsible for application of the accession standards are thoroughly prepared. Thus, notwithstanding the implementation efforts made to date, the Department still would not be adequately and properly prepared to begin processing transgender applicants for military service by January 1, 2018.

10. Finally, especially given that this extensive and elaborate process of implementing the DTM 16-005 accessions policy is time-consuming and costly, the Department will be twice burdened if it is required to implement DTM 16-005 by January 1, and then potentially a different policy after the Department concludes its study and finalizes a policy. It is possible that the accession standards and the implementing procedures that result from that

ongoing policy review could be different from those that the Court has directed DoD to implement on January 1, 2018. Carrying out the implementation enterprise again, after the ongoing policy review is completed, would not only present the prospect of significant duplicative costs and administrative burdens, but the high potential for sowing confusion in the ranks as to the applicable policy.

Pursuant to 28 U.S.C. § 1746(2), I declare under the penalty of perjury that the foregoing is true and correct.

Executed on 12/06/17

Lernes J. Hebert

Exhibit 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, *et al.*,
Plaintiffs
v.
DONALD J. TRUMP, *et al.*,
Defendants

Civil Action No. 17-1597 (CKK)

ORDER
(December 11, 2017)

Presently before the Court is Defendants' Motion for a Partial Stay of the Court's Preliminary Injunction Pending Appeal. ECF No. 73 ("Defs.' Mot."). Defendants request a partial stay of the Court's October 30, 2017 preliminary injunction pending the outcome of their recently filed appeal to the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). Specifically, Defendants request that the Court stay the part of the injunction that prevents Defendants from enforcing the "Accession Directive" in President Donald J. Trump's August 25, 2017 Presidential Memorandum ("Presidential Memorandum"). Plaintiffs oppose Defendants' motion on various grounds.[1]

In summary form, the Accession Directive indefinitely extended a prohibition against transgender individuals entering the military (a process formally referred to as "accession"). As relevant to this motion, the effect of the Court's October 30, 2017 preliminary injunction was to revert to the *status quo* with regard to accession that existed before the issuance of the

[1] The Court's consideration has focused on the following documents: Defs.' Mot. for Partial Stay of Preliminary Injunction Pending Appeal and the attached Declaration of Lernes J. Hebert, ECF No. 73 (filed on December 6, 2017); Pls.' Opp'n to Defs.' Mot. for Partial Stay of Preliminary Injunction Pending Appeal and the attached Declarations of George Richard Brown, MD, DFAPA and Raymond Edwin Mabus, Jr., ECF No. 74 (filed on December 8, 2017).

Presidential Memorandum—that is, the accession policy established in a June 30, 2016 Directive-type Memorandum ("DTM"), as modified by Secretary of Defense James Mattis on June 30, 2017. That policy allowed for the accession of transgender individuals into the military beginning on January 1, 2018.[2]

The Court will not stay its preliminary injunction pending Defendants' appeal. "In the D.C. Circuit, a court assesses four factors when considering a motion to stay an injunction pending appeal: (1) the moving party's likelihood of success on the merits of its appeal, (2) whether the moving party will suffer irreparable injury, (3) whether issuance of the stay would substantially harm other parties in the proceeding, and (4) the public interest." *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 12 (D.D.C. 2014) (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). None of these factors justifies staying the Court's preliminary injunction.

[2] As the Court understands it, the policy that will go into effect on that date states:

> (1) A history of gender dysphoria is disqualifying, unless, as certified by a licensed medical provider, the applicant has been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months;
>
> (2) A history of medical treatment associated with gender transition is disqualifying, unless, as certified by a licensed medical provider: (a) the applicant has completed all medical treatment associated with the applicant's gender transition; and (b) the applicant has been stable in the preferred gender for 18 months; and (c) If the applicant is presently receiving cross-sex hormone therapy post-gender transition, the individual has been stable on such hormones for 18 months;
>
> (3) A history of sex reassignment or genital reconstruction surgery is disqualifying, unless, as certified by a licensed medical provider: (a) a period of 18 months has elapsed since the date of the most recent of any such surgery; and (b) no functional limitations or complications persist, nor is any additional surgery required.

Decl. of Deborah Lee James, ECF No. 13-5 ("James Decl."), Ex. B. Transgender applicants will also be subject to all of the same medical and physical requirements as all other applicants.

1. Irreparable Injury

The Court begins with the main focus of Defendants' motion: their argument that they will be "irreparably harmed" if they begin to accept transgender individuals into the military on January 1, 2018. In support of their motion, Defendants have submitted a declaration from Lernes J. Hebert, the Acting Deputy Assistant Secretary of Defense for Military Personnel Policy in the Office of the Under Secretary of Defense for Personnel and Readiness. *See* Decl. of Lernes J. Hebert, ECF No. 73-1 ("Hebert Decl."). Mr. Hebert states that "[i]mplementing the Court's orders with respect to the accessions policy . . . by January 1, 2018, will impose extraordinary burdens on the Department and the military services." *Id.* ¶ 5. This statement is apparently based on Mr. Hebert's assertions that "there are considerable requirements associated with implementing this significant and complex policy change," that "implementation of a new accession policy necessitates preparation, training, and communication to ensure those responsible for application of the accession standards are thoroughly versed in the policy and its implementation procedures," and that "the implementation of accessions criteria is . . . a complex undertaking." *Id.* ¶¶ 5-6. Mr. Hebert represents that "notwithstanding the implementation efforts made to date, the Department still would not be adequately and properly prepared to begin processing transgender applicants for military service by January 1, 2018." *Id.* ¶ 9.

The Court is not convinced by Mr. Hebert's declaration that Defendants will be irreparably harmed in the absence of a stay. Although Mr. Hebert's declaration contains a lengthy discussion of the administrative difficulties associated with implementing a new accession policy in general, it fails to acknowledge the considerable amount of time Defendants have already had to prepare for the implementation of this particular policy. The directive from the Secretary of Defense requiring the military to prepare to begin allowing accession of

transgender individuals was issued on June 30, 2016—nearly one and a half years ago. For more than a year preceding the summer of 2017, it was the policy and intention of the military that transgender individuals would soon begin to accede. Moreover, the Court issued the preliminary injunction in this case approximately six weeks ago, and since then Defendants have been on notice that they would be required to implement the previously established policy of beginning to accept transgender individuals on January 1, 2018. In other words, with only a brief hiatus, Defendants have had the opportunity to prepare for the accession of transgender individuals into the military for nearly one and a half years.

Moreover, Mr. Hebert's declaration glosses over the fact that considerable work has been done already during this lengthy period. With their opposition to Defendants' motion to stay, Plaintiffs have submitted the declaration of Dr. George Richard Brown, who has been part of the military's training program for the implementation of its transgender accession policy. Dr. Brown states that he "trained approximately 250 medical personnel working in Military Entrance Processing Stations (MEPS) throughout the military." Decl. of George Richard Brown, MD, DFAPA, ECF No. 74-1, ¶ 5. Plaintiffs have also submitted the declaration of former Secretary of the Navy Raymond Edwin Mabus, Jr., who states that nearly a year ago "the Services had already completed almost all of the necessary preparation for lifting the accession ban." *See* Decl. of Raymond Edwin Mabus, Jr., ECF No. 74-2 ("Mabus Decl."), ¶ 3.

The record that was before the Court when it considered Plaintiffs' motion for a preliminary injunction also demonstrates that considerable work has already been done to prepare for transgender accession. For example, that record shows that the Acting Under Secretary of Defense for Personnel and Readiness, Peter Levine, published an "implementation handbook" in 2016 entitled "Transgender Service in the U.S. Military." Decl. of Raymond

Edwin Mabus, Jr., ECF No. 13-9, Ex. F. That document is a lengthy, exhaustive "practical day-to-day guide" prepared to assist Service members and commanders in understanding and implementing the policy of open transgender military service. James Decl., ¶ 34. The record also indicates that each branch of the Armed Forces issued memoranda in 2016 for implementing the transgender accession policy.

Instead of acknowledging what has already been done, Mr. Hebert's declaration uses sweeping and conclusory statements to support his assertion that there is an unmanageable amount of work left to do. He states that Defendants "would not be adequately and properly prepared" to accept transgender individuals by January 1, 2018. Hebert Decl. ¶ 9. But Mr. Hebert fails to explain what *precisely* needs to be completed by this date in order for Defendants to be prepared to begin transgender accessions.[3] Especially in light of the record evidence showing, with specifics, that considerable work has already been done, the Court is not convinced by the vague claims in Mr. Hebert's declaration that a stay is needed.

Finally, Defendants also complain that they may suffer unnecessary costs and confusion by allowing transgender individuals to accede on January 1, only to later change to some other accession policy that they have indicated they are in the process of preparing. Mr. Hebert states that "the Department will be twice burdened if it is required to implement [the June 30, 2016 DTM] by January 1, 2018, and then potentially a different policy after the Department concludes its study and finalizes a policy." Hebert Decl. ¶ 10. Although they hint in their most recent pleading that a new policy proposal is forthcoming in the next few weeks, Defendants fail to

[3] There is no evidence in the record that would suggest that the number of transgender individuals who might seek to accede on January 1, 2018 would be overwhelmingly large. To the contrary, although the Court understands that there may be some dispute as to the amount of transgender individuals in the general population and in the military, the record thus far suggests that the number is fairly small.

provide the Court with any insight at all into what the policy might be. The Court is left to speculate. On the one hand, to the extent the policy Defendants foresee adopting in the future is a *ban* on accessions—which the Court has already concluded is likely to be proven unconstitutional—this is clearly not a reason to stay the injunction in this case. On the other hand, as the Court has already explained, there is no reason to conclude on the present record that Defendants intend to implement any sort of policy *allowing* for the accession of transgender individuals. Defendants have never given the Court any reason to conclude that this would be the case.

In sum, having carefully considered all of the evidence before it, the Court is not persuaded that Defendants will be irreparably injured by allowing the accession of transgender individuals into the military beginning on January 1, 2018.

2. Likelihood of Success on the Merits

The remaining factors that the Court assesses when considering whether to stay an injunction pending an appeal also weigh against Defendants' motion. Unsurprisingly, the Court does not agree with Defendants that they are likely to prevail on the merits of their appeal. All of Defendants' arguments on this factor have already been raised and rejected by the Court. Defendants argue that the Court erred by entering a "worldwide injunction," by finding that Plaintiffs had established standing and irreparable injury, by not allowing Secretary of Defense Mattis to violate the Court's injunction by "exercising his independent authority" to preclude transgender individuals from the military, by not applying the "appropriate level of deference" to the Presidential Memorandum, and by finding that the equities favored an injunction. Defs.' Mot. at 7-8. The Court has already explained its reasons for rejecting most of these arguments in its 76-page Memorandum Opinion granting Plaintiffs' motion for a preliminary injunction. *See*

Oct. 30, 2017 Mem. Op., ECF No. 61. It will not repeat those reasons again here, but instead incorporates the analysis in its previous Opinion into this Order as though restated in full.

The record before the Court has not changed in any significant way since it issued its preliminary injunction. The Court previously held that Plaintiffs are likely to succeed on their claim that the Accession Directive violates the Fifth Amendment based on a number of factors, "including the sheer breadth of the exclusion ordered by the directive[ ], the unusual circumstances surrounding the President's announcement of [it], the fact that the reasons given for [it] do not appear to be supported by any facts, and the recent rejection of those reasons by the military itself." Oct. 30, 2017 Mem. Op. at 3. These factors support enjoining the Accession Directive today as much as they did when the Court issued its injunction on October 30, 2017.

Finally, the Court notes that there was nothing improper about the scope of the preliminary injunction. Plaintiffs presented facial constitutional challenges to several directives in the Presidential Memorandum. The Court found that Plaintiffs were likely to succeed in demonstrating that some of those directives were unconstitutional, and accordingly barred Defendants from enforcing them. There was nothing improper about this course of action. *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.'"); *Harmon v. Thornburgh*, 878 F.2d 484, 495 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.").

3. Harm to Plaintiffs

Defendants' cursory argument that "Plaintiffs will not be harmed by a stay" is also unpersuasive. As the Court has already held, Plaintiffs were being injured every day the

Presidential Memorandum's directive preventing accession was in force. That directive "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." Oct. 30, 2017 Mem. Op. at 73. It also subjects them to a continuing alleged violation of their rights under the Fifth Amendment. *Id.* Moreover, there is evidence in the record suggesting that if the Accession Directive remains in effect, it would render Plaintiff Regan Kibby ineligible to attend the Naval Academy and prevent Plaintiff Dylan Kohere from enrolling as a cadet in his university's ROTC program. Mabus Decl. ¶ 5; Decl. of Mr. Robert O. Burns, ECF No. 45-3, ¶ 6. Put simply, the notion that Plaintiffs will suffer no harm by allowing the Accession Directive to remain in force pending Defendants' appeal is simply wrong.

4. Public Interest

Finally, Defendants' one-sentence argument about the "public interest" effectively restates their argument regarding irreparable injury. That argument has already been rejected above. The Court has previously explained why the public interest favors preliminary injunctive relief in this case. *See* Oct. 30, 2017 Mem. Op., at 74-75. To the extent Defendants argue that accepting transgender individuals on January 1, 2018 would harm military readiness, the Court directs Defendants to the Court's finding in its October 30, 2017 Memorandum Opinion that, on the record before the Court, there is absolutely no support for the claim that service of transgender individuals would have any negative effect on the military at all. *Id.* at 75. The factual record has not changed in any material way since the Court issued its prior Opinion.

5. Conclusion

For all of the above reasons, Defendants' motion for a partial stay of its preliminary injunction pending appeal is **DENIED**. As a final point, the Court notes that Defendants' portrayal of their situation as an emergency is belied by their litigation tactics. The Court issued its preliminary injunction requiring Defendants to comply with the January 1, 2018 deadline on October 30, 2017. Defendants did not file an appeal of that decision until November 21, 2017, and did not file the current motion for a stay of that deadline until December 6, 2017, requesting a decision by noon today, December 11, 2017. There is also no indication that Defendants have sought any sort of expedited review of their appeal, the first deadlines in which are not until January, 2018. If complying with the military's previously established January 1, 2018 deadline to begin accession was as unmanageable as Defendants now suggest, one would have expected Defendants to act with more alacrity.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

Exhibit 4

Former Army Secretary Questions Trump Administration Claim that Military Is Not Ready to Accept Transgender Applicants

www.palmcenter.org/former-senior-pentagon-official-disputes-trump-administration-claim-military-not-ready-for%e2%80%8b-transgender-applicants-2/

December 7, 2017

SAN FRANCISCO, CA – Eric Fanning, former Secretary of the U.S. Army, questioned the Trump administration's claim yesterday that the military is not ready to accept transgender applicants. According to Fanning, **"the Department of Defense was on track to lift the accession ban for transgender service effective July 1, 2017. This was one year after Secretary Carter ordered the Services to ensure that all Americans who could meet the standards should be afforded the opportunity to serve. I can see no reason why the Department should not be fully prepared to execute Secretary Carter's policy change, particularly after being afforded an extra six months due to the Department's delay earlier this year."** Fanning served as U.S. Army Secretary under President Obama.

Fanning's comments follow Brad Carson's observation yesterday that the military had already prepared for the lifting of the enlistment ban before President Trump took office. Carson, who served as acting Under Secretary of Defense for Personnel and Readiness in the Obama administration, said that, **"the Pentagon had already done most of the preparation and training in anticipation of the lifting of the accession ban before the presidential transition, so to claim that the military is not ready to lift the ban now seems a stretch."** Carson was responsible for personnel policy for all service members, and deployed to Iraq as a U.S. Navy officer. Both Fanning and Carson offered their remarks to Palm Center researchers in response to a Trump administration affidavit claiming that the military is not ready to accept transgender troops. A federal court has ordered the military to lift its enlistment ban by January 1, 2018.

According to Aaron Belkin, processing transgender applicants does not require anything different from what recruiters and examiners do every day. Belkin said that, **"there is nothing special about evaluating a transgender applicant for military service, as recruiters and examiners deal with medical documents for every candidate, and handle the confirmation of identity documents, name changes and the like on a regular basis."** Belkin is director of the Palm Center.

A comprehensive 2016 RAND Corporation study found that lifting the enlistment ban would require only minor regulatory revisions, which were finalized in June 2016. Belkin added that, **“The military was ready to lift the enlistment ban one year ago and it is ready to do so today.”**

Transgender troops have served openly in the U.S. military for the past 18 months, and have been widely praised by commanders. Eighteen foreign militaries allow transgender troops to serve openly, and none have reported any compromise to readiness.

###
Implementation

Exhibit 5

PALM CENTER

BLUEPRINTS FOR SOUND PUBLIC POLICY

DoD Is Ready to Accept Transgender Applicants

Alan Bishop, PhD*
Former Professor, U.S. Military Academy

Martin L. Cook, PhD*
Professor Emeritus, U.S. Naval War College

Mark J. Eitelberg, PhD*
Professor Emeritus, Naval Postgraduate School

George R. Lucas, PhD*
Professor, Naval Postgraduate School

Mark V. Mayer*
U.S. Air Force Academy, Transgender Veteran

Tammy S. Schultz, PhD*
Professor, U.S. Marine Corps War College

Marc J. Ventresca, PhD*
Former Research Associate Professor,
Graduate School of Business and Public Policy, Naval
Postgraduate School

December 2017

EXECUTIVE SUMMARY

1) On December 6, the Department of Justice submitted a written Declaration claiming that Pentagon compliance with a Court's order to allow transgender candidates to apply for enlistment as of January 1 would "impose extraordinary burdens" on a military that "would not be adequately and properly prepared to begin processing transgender applicants."

2) The Declaration, however, rewrites the history of transgender military policy and distorts the evidence, disregarding that the Court's order did not create new military policy, but only directed the military to return to its own policy on transgender enlistment as defined by the current Secretary of Defense.

3) Three former Service Secretaries and one former Acting Under Secretary of Defense for Personnel and Readiness have confirmed that the military had already completed many of the necessary preparations for the lifting of the enlistment ban by the time of the Presidential transition in January, 2017.

4) The Declaration's assertion that implementing the Court's order will impose "extraordinary burdens" because the military "would not be adequately and properly prepared" is incorrect.

5) The Declaration's assertion that transgender applicants for military service are uniquely complicated and difficult to evaluate is incorrect.

6) The Declaration's assertions that recruiters will not understand government identification documents that reflect changes in gender, and are not prepared to obtain supporting medical documents, are incorrect.

7) The Declaration's assertion that the Court's order will result in transgender applicants not receiving "the appropriate medical and administrative accession screening" is incorrect.

8) The Declaration's assertion that "key personnel" have "rotated" into different duties, therefore setting back the pace of implementation and requiring more time, is not a reason for delay.

On December 6, the Trump administration asked a federal court to stay its order that the military begin to accept qualified transgender applicants on January 1, 2018. This action came shortly after a Pentagon spokesperson stated that the military "is taking steps to be prepared to initiate accessions of transgender applicants for military service." In support of its motion for stay, the Department of Justice (DOJ) submitted a written declaration from a civilian defense official asserting that compliance with the Court's order would "impose extraordinary burdens" on a military that "would not be adequately and properly prepared to begin processing transgender applicants."

The Declaration, however, rewrites the history of transgender military policy and distorts the evidence. It disregards the fact that the Court's order did not create new military policy, but only directed the military to return to its own policy on transgender enlistment ("accession," in military personnel terms), as defined by the current Secretary of Defense prior to President Trump's tweets and directive reinstating the transgender ban.

This policy memo highlights assertions from the Declaration that run counter to the military's deliberation, policy, and experience, and it supplies evidence to correct those misleading statements.

1. The assertion that implementing the Court's order will impose "extraordinary burdens" because the military "would not be adequately and properly prepared" is incorrect.

The military has been preparing for accession of transgender Americans for more than two years. The Department of Defense (DOD) began a comprehensive study of transgender service in July 2015. In June 2016, DOD adopted fully inclusive policy that prohibited discrimination against transgender Americans in military service. It also published a detailed standard for evaluation of transgender applicants on the same day, to take effect a year later on July 1, 2017. But one day before the accession policy was to take effect—after two years of combined study and preparation—Defense Secretary James Mattis delayed implementation for another six months, setting January 1, 2018 as the date to begin transgender accession. This is the date the Court is enforcing, and the date that DOJ is attempting to avoid.

An order to follow the military's own plan for accession cannot impose "extraordinary burdens," particularly after 2.5 years of study and preparation. Former Secretary of the Army Eric Fanning stated this week that "the Department of Defense was on track to lift the accession ban" by July 2017, and he "can see no reason" why it isn't ready now, "particularly after being afforded an extra six months" this year. Brad Carson, a former Acting Under Secretary of Defense for Personnel and Readiness, added that "the Pentagon had already done most of the preparation and training in anticipation of the lifting of the accession ban before the presidential transition."

Former Secretary of the Air Force Deborah James spoke directly to the military's readiness to move forward with transgender accessions: "It is time to get on with it." Her comments in full show why:

> The Services were originally given one year to prepare for the enlistment of transgender applicants, and were then provided with another six months to get the job done. It took less than a year for the Services to successfully prepare for DADT repeal, and they have now had 18 months to get ready for transgender enlistment. When I left office in January, we had already done most of the work to prepare for this policy change, which is no more complicated than the myriad of issues that the military manages successfully every day. It is time to get on with it.

Former Secretary of the Navy Ray Mabus seconded his fellow Service Secretaries:

> Secretaries James and Fanning are correct. Allowing transgender candidates to apply for military service was not a complicated process to begin with, especially in light of the highly complex strategic, technical, personnel and medical issues that we address day in and day out. The Services had already completed almost all of the necessary preparation for the lifting of the enlistment ban when we left office almost a year ago. It's not the lifting of the ban that compromises readiness, good order and discipline. It's the Trump administration's whipsawing of military policy and its treatment of loyal transgender Americans as second-class citizens that are the true sources of disruption.

While the Declaration relies on assertions about a "large" and "complex" Defense Department, the difficulties of "significant" and "complex" personnel policy, and the burden of a "geographically dispersed" force as reasons to delay implementation, none of this distinguishes transgender policy from other personnel policies the military routinely implements. The military has had 2.5 years to study and prepare, and it is ready to implement the policy it established.

2. <u>The assertion that transgender applicants for military service are uniquely complicated and difficult to evaluate is incorrect.</u>

In June 2016, the military established specific qualification standards for applicants who have a history of gender dysphoria or treatment for gender dysphoria. Much of the standard was redundant to existing enlistment policy, as all applicants must demonstrate fitness under standards that assess all aspects of medical history. Yet the Declaration argues that transgender accession is unique: "No other accession standard has been implemented that presents such a multifaceted review of an applicant's medical history."

This assertion is wrong. Every applicant, transgender or not, undergoes the same multifaceted review of prior mental health care, medications, and surgical treatment. Under DOD Instruction 6130.03, which is organized by various body systems and functions, every applicant for military service must meet the standards set for each system and function. Accession examiners are not being asked to evaluate anything for transgender candidates that is different from what they evaluate for all candidates. Using a history of hormone medication as an example, if female candidates who are not

transgender have taken, or are taking, hormones to control various gynecological conditions, enlistment standards only require medical examiners to assess whether the condition is responsive to hormone treatment and unlikely to interfere with routine activities. The standard for evaluating hormone use in transgender candidates requires a stricter but similar assessment of whether hormone therapy has been stable for 18 months prior to accession.

Medical evaluation of transgender candidates is not novel or complex. Gender dysphoria is not new to enlistment examiners, because they have been identifying and excluding candidates on that basis. Any potential fitness concerns arising from gender dysphoria or its treatment are also not new to enlistment examiners, because those concerns are not unique to transgender people and are routinely assessed in non-transgender people during the accession process. Examiners will be making the same medical judgments they already make. The only difference is that now examiners will be applying existing standards and evaluation tools to people who used to be disqualified automatically. DOD has already conducted training for enlistment examiners on the transgender accession standard published 18 months ago in DTM 16-005, *Military Service of Transgender Service Members*.

3. The assertions that recruiters will not understand government identification documents that reflect changes in gender, and are not prepared to obtain supporting medical documents, are incorrect.

Recruiters are responsible for confirmation of information in identity documents, including immigration status, name changes, and similar issues more complicated than gender change. Recruiters also work with all applicants to disclose and document medical history. Nothing has changed.

4. The assertion that "key personnel" have "rotated" into different duties, therefore setting back the pace of implementation and requiring more time, is not a reason for delay.

Rotation into different duties is an inescapable aspect of military service. It is not an excuse for delay in policy implementation. People may rotate into different duties, retire, or separate, but the mission goes on.

5. The assertion that the Court's order will result in transgender applicants not receiving "the appropriate medical and administrative accession screening" is incorrect.

The only way to ensure transgender applicants are appropriately screened is to implement the June 30, 2016 accession policy that includes a screening standard. The transgender ban has never been effective in preventing transgender people from serving in the military. Under a ban, no screening at all takes place, and applicants are discouraged from making candid disclosures to enlistment examiners. In contrast, the military's accession standard set to go into effect January 1, 2018 will directly assess fitness and screen out those individuals whose medical needs would affect duty performance. DOJ is

working against the military's best interest by preventing enlistment examiners from openly evaluating transgender applicants and separating the medically fit from the unfit. For purposes of effective screening, continuing the ban is far worse than implementing a screening standard.

A recent Government Accountability Office (GAO) Report, *Military Personnel: Improvements Needed in the Management of Enlistees' Medical Early Separation and Enlistment Information* (GAO-17-527, July 2017), found that active screening of medical history produces better fitness decisions. GAO found that lack of disclosure by applicants is a significant problem, and verification by medical records encourages disclosure. The transgender accession standard DOJ is attempting to delay is consistent with these GAO recommendations: it encourages disclosure, it requires verification, and it establishes detailed and rigorous standards of fitness that must be met to qualify for service.

Continuation of the accession ban will result in "don't ask, don't tell" for transgender applicants and service members. It will discourage transgender applicants from being forthcoming at accession. It will also discourage candor after accession by putting personnel who require transition-related care after enlistment in the uncomfortable position of having to explain why they did not identify themselves at accession, even if at that time they did not identify as transgender. This, in turn, will encourage them to hide health conditions that, while not incompatible with military service, may require treatment. Like DADT, the effect would be to suppress the truth, raising Admiral Mike Mullen's concern about the gay ban, namely that he was "troubled by the fact that we have in place a policy which forces young men and women to lie about who they are in order to defend their fellow citizens."

It lacks credibility to argue that we have the most professional military force in the world, yet our service members cannot handle transgender integration as well as the eighteen foreign militaries that have done so, including some of our closest allies.

*The views and findings expressed here are those of the authors and should not be assumed to reflect an official policy, position or decision of the U.S. Military Academy, U.S. Air Force Academy, U.S. Marine Corps War College, U.S. Naval Postgraduate School or the U.S. Government. A previous version of this policy memo incorrectly omitted one of the co-authors.

Exhibit 6

Pentagon to begin accepting transgender troops Jan 1. after court order

Tom Vanden Brook

Pentagon to begin accepting transgender troops Jan 1. after court order

The Pentagon will begin accepting transgender troops Jan. 1, complying with court orders and backtracking on a pledged by President Trump to ban them.

Secretary of Defense Jim Mattis(Photo: Jacquelyn Martin, AP)

WASHINGTON — The Pentagon will begin accepting transgender troops Jan. 1, 2018, complying with a federal court order that overrules President Trump's pledge to ban them from the military.

The White House and Pentagon confirmed Monday that the military will put in place policies that permit the services to accept new recruits. Those plans had been formulated under the Obama administration, which had scheduled them to take effect July 1. White House Press Secretary Sarah Huckabee Sanders said the Pentagon would comply with federal court orders to accept new transgender troops.

"As of right now, they're simply complying with a court order and preparing to implement a previous policy to remain in compliance," Sanders said. "The Department of Justice is currently reviewing the legal options to ensure that the president's directive can be implemented."

The Defense Department delayed the implementation of the Obama-era plan, and Trump tweeted in late July that he wanted to ban transgender troops from serving. Those actions have triggered court challenges by advocates for transgender troops, and courts have generally sided with them.

The Pentagon, in a statement Monday, acknowledged that it would comply with an order from the U.S. District Court for the District of Columbia to implement policy on accepting transgender troops announced last year by then-Defense Secretary Ash Carter.

The Pentagon "and the Department of Justice are actively pursuing relief from those court orders in order to allow an ongoing policy review scheduled to be completed before the end of March," according to the statement.

"The Department of Defense will begin processing transgender applicants for military service on January 1, 2018, as mandated by recent court order," said Army Maj. David Eastburn, a Pentagon spokesman. At the same time, the Department of Justice is actively seeking relief from those orders."

In August, Trump ordered that the Pentagon reverse the Obama administration's policy for accepting new transgender troops as well as treating those already in uniform. The order stated that the Pentagon had failed to prove that terminating the previous ban on transgender troops, on the basis of health concerns, "would not hinder military effectiveness, lethality, disrupt unit cohesion or tax military resources."

Defense Secretary Jim Mattis has made readiness and lethality guiding principles of his tenure at the Pentagon.

In September, Mattis announced that the Pentagon would establish a new policy on transgender by Feb. 21, 2018. An expert panel and high-ranking Pentagon officials are

crafting recommendations for Mattis based on “appropriate evidence and information.”

Until that deadline, Mattis issued interim guidance that included a ban on accepting new transgender enlisted recruits and officers. That ban now has been lifted, and the new policy put in place Jan 1. The services had been developing their policy for accepting new transgender troops for several months under the Obama administration.

During the Obama administration, the Pentagon commissioned a study by the non-partisan RAND Corp. to examine issues regarding transgender service in the military. RAND estimated that there are a few to several thousand transgender troops on the active duty force of about 1.3 million. Treatment costs and effects on military readiness were deemed negligible.

The annual price tag for the troops’ treatment, ranging from counseling, hormone treatment and surgery, was estimated at between $2.4 million and $8.4 million, according to RAND.

This spring, the lack of a policy for accepting transgender troops affected two graduates, one each at the Air Force and Army academies. They were unable to join their fellow graduates as new officers.

The Obama-era policy called for transgender recruits and new officer candidates to be certified by a doctor as stable in their mew gender for 18 months before they can enter the military.

“Today's announcement that the U.S. military will accept transgender applicants as of January 1, 2018 reflects a simple reality: military and civil servants in the Pentagon have been preparing for accession for transgender Americans for more than two years," said Aaron Belkin, director of the Palm Center, which researches issues regarding sexual orientation issues in the military.

Contributing: Sara Sorcher

More: Court blocks Trump's ban on transgender troops

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al., *Plaintiffs,* v. DONALD TRUMP, et al., *Defendants.*	Case No. 17-cv-02459 (MJG)

EXPERT DECLARATION OF GEORGE RICHARD BROWN, MD, DFAPA IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

I, George R. Brown, declare as follows:

1. I make this declaration based on my own personal knowledge.

2. As set forth in my previous declaration, dated September 11, 2017 and submitted by me in this case in support of Plaintiffs' motion for preliminary injunctive relief, I am a Professor of Psychiatry and the Associate Chairman for Veterans Affairs in the Department of Psychiatry at the East Tennessee State University, Quillen College of Medicine. My responsibilities include advising the Chairman; contributing to administrative, teaching, and research missions of the Department of Psychiatry; consulting on clinical cases at the University and at Mountain Home Veterans Health Administration ("VHA") Medical Center, where I also hold an appointment; and acting as a liaison between the VHA Medical Center and the East Tennessee State University Department of Psychiatry. I served as a psychiatrist on active duty in the United States Air Force. The majority of my work involves research, teaching, and consulting about health care in the military and civilian transgender populations. My CV is attached to my earlier declaration.

3. I reviewed the declaration submitted in the case by Lernes Hebert, and I am responding to the statements set forth therein.

4. On June 30, 2016, the military changed its policy from one that categorically excluded transgender people from enlistment to one that authorizes the enlistment of qualified transgender individuals. The policy the military adopted and set forth in DTM 16-005 authorizes enlistment for individuals who have a diagnosis of gender dysphoria upon a demonstration that they have completed gender transition and have been stable in the newly assigned gender for 18 months. The target effective date for that policy was originally one year from the date of its announcement, or July 1, 2017. The day before July 1, 2017, that date was moved to January 1, 2018.

5. Following the adoption of DTM 16-005, the military began training throughout the branches to meet the target date of July 1, 2017 for implementation. As a contractor for the Department of Defense, I was part of that process and trained approximately 250 medical personnel working in Military Entrance Processing Stations (MEPS) throughout the military, including medical division personnel, chief and assistant chief medical officers, and fee-based medical providers on the accessions policy. That training took place in San Antonio, Texas on May 2, 2017.

6. I have in-depth familiarity both with the transgender enlistment policy and military enlistment policies as they relate to medical clearances and reviews for enlistees.

7. I do not agree that implementing the accessions policy in DTM 16-005 by January 1, 2018 will impose extraordinary burdens on the military. The implementation of accessions criteria for transgender enlistees is no more complex than other accessions criteria on which MEPS personnel are knowledgeable and regularly trained.

8. The accessions criteria for transgender people are straightforward and do not require extensive or detailed knowledge. To the contrary, it simply requires MEP personnel to identify applicants who have a diagnosis of gender dysphoria -- a diagnosis with which medical professionals should already be familiar. It also involves review of the individual's substantiating and supporting medical documentation to confirm that the period of stability (18 months) has been met. This process does not involve any unique complexities or burdens and is well within the capacity of military personnel involved in the enlistment review process.

9. Acting Deputy Assistant Secretary Hebert's statement that "personnel involved in that accession enterprise have rotated in the past several months" is not a legitimate reason to delay implementing the accessions policy for transgender people. Military personnel rotations are ordinary shifts that are expected and anticipated throughout the military. The military system anticipates routine staff turnover. Nothing about routine staff turnover should justify a delay of enlistment policy implementation.

10. Any minimal burden imposed on MEPS as a result of implementing the accessions policy for transgender people will be further reduced by the small number of transgender people who are likely to seek enlistment. Based on decades of medical experience and research, it is clear that only a very small percentage of the overall population is transgender. There is no reason to expect MEPS to receive a large number of enlistment applications from transgender enlistees on or after January 1. I personally have trained hundreds of MEPS personnel. The military system ensures backup availability to review enlistment materials should any ever be needed.

11. Based on my knowledge and experience, I do not agree that the military will be unprepared on January 1, 2018 to implement the transgender enlistment policy set forth in DTM 16-005.

DATED: December 12, 2017

George R. Brown, MD, DFAPA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al., *Plaintiffs*, v. DONALD J. TRUMP, et al., *Defendants*.	)	Civil Action No. 17-cv-2459 (MJG)

DECLARATION OF DEBORAH LEE JAMES IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR CLARIFICATION AND, IF NECESSARY, A PARTIAL STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

I, Deborah Lee James, declare as follows:

1. As noted in my previous declaration in this case signed and dated October 21, 2017, I served as the Secretary of the United States Air Force ("USAF") from December 20, 2013 to January 20, 2017. As Secretary, I was responsible for supervising the Department of the Air Force's participation in a working group convened by the Department of Defense in 2015 to identify the practical issues related to transgender Americans serving openly in the Armed Forces, and to develop an implementation plan that addressed those issues with the goal of maximizing military readiness (the "Working Group"). On June 30, 2016, then Secretary of Defense Ashton Carter announced that the military would allow transgender people to openly serve. Included within that announcement and change of policy was a direction that the military would adopt changes to the accessions policy to begin allowing accession by transgender people starting on July 1, 2017.

2. Based on my personal knowledge, the USAF had nearly completed the necessary preparations for implementing the change in accessions policy when I left office in January 2017.

3. The change in accessions to authorize transgender people to serve was consistent with the approach generally for authorizing people to serve with curable or treatable medical conditions. It included notifying and training medical personnel across the services regarding information relating to the underlying medical condition associated with some transgender individuals and the period of stability after treatment necessary for enlistment.

4. The preparations for implementing the change in policy could readily have been completed by the initial target date of July 1, 2017, well within the current target date of January 1, 2018.

I declare under the penalty of perjury that the foregoing is true and correct.

DATED: December 13th, 2017

Deborah Lee James

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al., *Plaintiffs*, v. DONALD J. TRUMP, et al., *Defendants*.	)	Civil Action No. 17-cv-2459 (MJG)

DECLARATION OF RAYMOND EDWIN MABUS, JR. IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR CLARIFICATION AND, IF NECESSARY, A PARTIAL STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

I, Raymond Edwin Mabus, Jr., declare as follows:

1. As set forth in my previous declaration in this case signed and dated October 19, 2017, I was part of a Working Group that comprehensively reviewed military policy with regard to transgender people serving across the service branches. It was based upon that review and the recommendations of that group that the Department of Defense announced in June 2016 that it would begin allowing transgender people to serve openly in the military and would begin on July 1, 2017 also allowing accession by transgender people.

2. Based on my experience in military personnel and operations, allowing transgender candidates to apply for military service was not a complicated process to begin with, especially in light of the highly complex strategic, technical, personnel and medical issues that the military addresses day in and day out.

3. Based on my personal knowledge, the Services had already completed almost all of the necessary preparation for lifting the accession ban when I left office almost a year ago. It is

inconsistent with my understanding of the status of those efforts and the workings of military personnel to conclude that the military would not be prepared almost a year later—and six months after the date on which the policy was originally scheduled to take effect—to permit accessions by transgender people.

4. As set forth in my previous declaration, it is not the lifting of the ban on accession by qualified transgender individuals that will compromise military readiness, good order, and discipline; it is the sudden reversal of military policy and the treatment of loyal transgender Americans as second-class citizens that are the true sources of disruption.

I declare under the penalty of perjury that the foregoing is true and correct.

DATED: December 12, 2017

Raymond E. Mabus, Jr.