

No. 18-5257

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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JANE DOE 2, et al.,

*Plaintiffs-Appellees,*

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

*Defendants-Appellants.*

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On Appeal from the United States District Court  
for the District of Columbia, No. 1:17-cv-01597-CKK,  
Before the Honorable Colleen Kollar-Kotelly

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**PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-  
APPELLANTS' MOTION FOR STAY PENDING APPEAL**

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## INTRODUCTION

On October 30, 2017, the district court issued a preliminary injunction directing the government “to revert to the *status quo* with regard to accession and retention that existed before the issuance of the Presidential Memorandum.”

JA188. The court found that (1) Plaintiffs are likely to succeed on their claim that the ban on military service by transgender persons violates the Fifth Amendment, (2) Plaintiffs would suffer irreparable injury in the absence of an injunction, and (3) the balance of equities and the public interest favor granting injunctive relief.

JA168. To comply with the injunction, the government was required only to comply with its own policies established in June 2016, which allowed for the accession and retention of transgender persons in the military beginning on January 1, 2018.

In the thirteen months since the injunction was entered, Defendants have repeatedly sought to dislodge it. Each time, the district court has concluded that the government is unlikely to prevail on the merits, the military does not face irreparable harm, Plaintiffs would be harmed by staying the injunction, and the public interest does not favor a stay. No intervening development in this case has diminished the strength of those findings.

Last week, the district court reaffirmed its conclusions, taking pains to provide a “fulsome discussion of the issues” and its reasons for, once again,

denying Defendants’ motion for a stay. Order at 26, *Doe 2 v. Mattis* No. 17-cv-01597 (D.D.C. Jan. 30, 2018), Dkt. 187.<sup>1</sup> First, because the Mattis Implementation Plan operates as a categorical ban based on transgender service, the district court’s initial conclusion that Plaintiffs are likely to succeed on their Fifth Amendment claim remains unchanged. *Id.* at 6-11. Second, even after thirteen months with the injunction in place, the government has offered no support for its conclusory claim that permitting transgender individuals to serve poses “substantial risks” to military readiness, lethality, or unit cohesion. *Id.* at 19-23. Third, Plaintiffs would suffer “grave harm” if a plan that brands transgender service members as inferior were allowed to proceed. *Id.* at 23-25. Fourth, as this Court has long held, “enforcement of an unconstitutional law is always contrary to the public interest.” *Id.* at 25-26 (citing *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)). Finally, a nationwide preliminary injunction is the only way to address fully Plaintiffs’ constitutional injury. *Id.* at 15.

Citing this Court’s December 2017 ruling denying a stay, the district court reminded Defendants “that all Plaintiffs seek during this litigation is to serve their Nation with honor and dignity, volunteering to face extreme hardships, to endure lengthy deployments and separation from family and friends, and to willingly

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<sup>1</sup> All citations to Dkt. are with respect to documents filed in *Doe 2 v. Mattis*, No. 17-cv-01597 (D.D.C.).

make the ultimate sacrifice of their lives if necessary to protect the Nation, the people of the United States, and the Constitution against all who would attack them.” Dkt. 187 at 3 (citing *Doe 1 v. Trump*, No. 17-5267, 2017 WL 6553389 at \*3 (D.C. Cir. Dec. 22, 2017)). With no material change in the factual record or the relevant circumstances, Defendants again seek to elude the lower court’s injunction and impose a bar on military service by transgender people. The motion should, again, be rejected.

### **BACKGROUND**

The government’s appeal from the district court’s order refusing to dissolve the preliminary injunction is fully briefed. We set out here only the procedural history relevant to the government’s current motion to stay the injunction.

1. On August 9, 2017, Plaintiffs, five active-duty transgender servicemembers and two transgender students pursuing military careers, brought this action challenging the accession and retention bans on equal protection grounds, among others. On October 30, 2017, the district court enjoined the President’s ban with respect to both the accession and retention of transgender individuals.

2. On November 21, 2017, Defendants appealed the court’s preliminary injunction and sought to stay the injunction as to accessions in order to complete a “further study.” Dkts. 66, 73. The district court refused to grant a stay, Dkt. 75, as

did this Court, explaining that Defendants had “failed to demonstrate that the study” required by Secretary Mattis “is motivated by any necessity separate and apart from compliance with the [2017] Presidential Memorandum,” and had “provided no non-conclusory factual basis or military justification for their apparent position that the extensive study already conducted prior to President Trump’s policy shift was inadequate or otherwise in need of supplementation,” *Doe 1*, 2017 WL 6553389, at \*2. Following that decision, Defendants voluntarily dismissed their appeal and the case proceeded to discovery. Dkt. 79-1.

3. On March 23, 2018, Defendants moved to dissolve the injunction, asserting that the recently announced Mattis Implementation Plan is a “new policy,” distinct from the enjoined directives of the President, that deserves deference as “the product of independent military judgment following an extensive study of the issue.” Dkts. 96 at 12, 116 at 11-12. The district court denied Defendants’ motion, concluding that the Mattis Implementation Plan “effectively implements [a ban on transgender service] by targeting proxies of transgender status.” JA52.<sup>2</sup> On August 27, 2018, Defendants again appealed to this Court, but

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<sup>2</sup> “To summarize: under the Mattis Implementation Plan, individuals who require or have undergone gender transition are absolutely disqualified from military service; individuals with a history or diagnosis of gender dysphoria are largely disqualified from military service; and, to the extent that there are any individuals who identify as ‘transgender’ but do not fall under the first two categories, they may serve, but only ‘in their biological sex.’ By definition, transgender persons do not identify or live in accord with their biological sex,

failed to request a stay at that time. *See* Dkt. 162. That appeal is now pending before the Court and oral argument has been scheduled for December 10, 2018.

4. Throughout, the district court has striven to steer the proceedings through discovery toward an adjudication on the merits. As the district court observed, “discovery has been consistently plagued by disputes and delays.” Dkt. 187 at 5.<sup>3</sup> Defendants have “strenuously resisted” any inquiry into the President’s decision, JA68, and have “withheld nearly all information concerning” Defendants’ review process and “study,” JA62. On November 13, 2018, the parties completed briefing several discovery motions and those motions are now pending before the district court. *E.g.*, Dkts. 169-171.

5. On November 21, 2018, Defendants filed a motion for a stay pending appeal in the district court. The district court denied that motion in an order filed on November 30, 2018.

## **ARGUMENT**

The decision to grant a stay is entrusted to the equitable discretion of the Court. *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 845 (D.C. Cir. 1977). A stay pending appeal is available “only under

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which means that the result of the Mattis Implementation Plan is that transgender individuals are generally not allowed to serve openly in the military.” JA53.

<sup>3</sup> The government has sought to stay discovery three separate times. *See* Dkt. 63, 72, and 80-1.

extraordinary circumstances,” and the “district court’s conclusion that a stay is unwarranted is entitled to considerable deference.” *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers). Where a party appeals the lower court’s denial of that motion, the Court reviews that decision for abuse of discretion, and any underlying legal conclusions de novo. *Katz v. Georgetown Univ.*, 246 F.3d 685, 688 (D.C. Cir. 2001); *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995).

The government fails to shoulder its heavy burden of justifying a stay of the district court’s preliminary injunction against the bar on military service by transgender people. Defendants’ motion comes too late and belabors the same unpersuasive arguments it has made in its prior failed attempts to undo the injunction. It should likewise be rejected.

#### **I. NONE OF THE STAY FACTORS FAVORS DEFENDANTS**

A party that moves for a stay pending appeal must show that the balance of four factors weighs in favor of the stay: (1) the likelihood that the party will prevail on the merits of the appeal; (2) the likelihood that the party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting a stay. *See Holiday Tours*, 559 F.2d at 842-43; *see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). In exercising its discretion whether to grant the stay, the Court must ultimately

balance all equities. *Holiday Tours*, 559 F.2d at 843. The traditional stay factors disfavor the government’s motion.

First, Defendants offer neither reasoning nor case law to suggest a likelihood of prevailing on the merits of the appeal. Rather, Defendants reprise (at 8) their prior argument that the Mattis Implementation Plan requires only rational-basis review because it merely discriminates on the basis of a medical condition and treatment and not on any suspect classification such as transgender status or gender. As the district court recognized—both in declining to dissolve the injunction and in denying Defendants’ most recent motion—the Mattis Implementation Plan facially discriminates based on transgender status. Dkt. 187 at 6-11. The Plan implicates all the concerns that prompt heightened constitutional scrutiny and rests on impermissible stereotypes and overbroad generalizations rather than an evenhanded approach towards qualifications to serve in the military. *See United States v. Windsor*, 570 U.S. 744, 770 (2013) (noting that “[d]iscriminations of an unusual character” suggest improper animus and require especially careful judicial consideration (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996))); *see also Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). Plaintiffs, not Defendants, are likely to succeed on the merits of their constitutional challenge.

Second, the government offers no support for its claim that it will be irreparably harmed if the preliminary injunction remains in place. Defendants argue (at 11) that allowing transgender individuals to serve openly poses “substantial risks” and threatens to “undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.” *See also* JA264. Yet, despite the injunction being in effect for over a year, with transgender individuals serving in the armed forces all that time, the government offers no evidence suggesting that allowing Plaintiffs (or anyone else) to serve in the military has harmed military lethality, effectiveness, or good order and discipline.

Defendants’ conclusory statements are outweighed by more convincing evidence that the greater harm to the public would follow not from upholding the injunction, but from staying it. For over a year, transgender individuals have been permitted to serve openly in the military. The policy they serve under was implemented after considerable “forethought, research, and planning.” Dkt. 187 at 22. Under this policy, transgender individuals are subject to the same combat-readiness standards as any other service member. As the district court has explained, the relief requested by Defendants would bar an otherwise combat-ready individual from serving based solely on that individual’s transgender status. Dkt. 187 at 21. Moreover, staying the injunction would lead the government to

impose its proposed ban, thus reversing established policy until adjudication of the merits of this case. If that adjudication finds Defendants' policy unconstitutional, the military would again be compelled to permit the service of transgender individuals. Contrary to the government's argument, permitting combat-ready individuals to serve their country under a stable policy regime redounds to the benefit, not the detriment, of the government. Defendants have not made the case that maintaining the injunction would harm the government.

Third, Defendants' cursory dismissal of Plaintiffs' injuries does little to refute what the lower court has repeatedly concluded: allowing the ban to take effect would inflict grave injury on Plaintiffs. Dkt. 187 at 25; *see also* JA96 and JA158-160. The record before the district court was replete with evidence from Plaintiffs themselves, as well as the former service secretaries and military experts, explaining the concrete, negative effects the ban would have on Plaintiffs were it allowed to go into effect. *E.g.*, JA885-86; JA889-90; JA894-900. In view of that evidence, the court concluded that the Mattis Implementation Plan singles out transgender service members "from all other service members and marks them as categorically unfit for military service." Dkt 187 at 24 (citing JA76-77). The court explained further:

It sends the message to their fellow service members and superiors that they cannot function in their respective positions. That they are mentally unstable. That their presence in the military is incompatible with military readiness, unit cohesion, good order, and discipline. In

sum, it is an express statement that these individuals' very presence makes the military weaker and less combat-ready. *Id.*

Defendants' bald assertion (at 12) does not render the court's determination here "unfounded."<sup>4</sup>

Fourth, because Plaintiffs are likely to succeed in establishing that the ban is unconstitutional, the public interest favors maintaining the injunction and preventing harm to others. *See Gordon*, 721 F.3d at 653 (noting that "enforcement of an unconstitutional law is always contrary to the public interest").

For all of the reasons the lower court offered in issuing the injunction, declining to dissolve it, and denying the Defendants' present motion, the likelihood of success on the merits has not changed, and the balance of equities still strongly favors Plaintiffs.

## **II. THE BALANCE OF EQUITIES CONTINUES TO SUPPORT THE SCOPE OF THE INJUNCTION**

Defendants challenge the scope of the injunction, arguing that it oversteps both equitable principles and principles of Article III standing. That challenge is untimely and inapt. Defendants had the opportunity to raise that issue a year ago,

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<sup>4</sup> Defendants' argument (at 12) that the mere presence of transgender individuals in the military causes "severe harm to the federal government" belies their attempts to minimize the injuries threatened by the ban. Transgender persons serving under the Mattis Implementation Plan, as Defendants' brief makes plain, would be harmed by an official policy branding them as unfit, unworthy, and a burden to the Nation they serve.

when the court issued the preliminary injunction. Indeed, Defendants unsuccessfully sought to stay the nationwide scope of the injunction, pending its first appeal raising that very issue (among others). *See* Emergency Stay Mot. 10-11, *Doe 1 v. Trump*, No. 17-5267 (D.C. Cir. Dec. 11, 2017). The government could have pressed its appeal on that issue at that time, even if it did not appeal from the injunction as to the individual Plaintiffs. The government decided not to do so and abandoned its appeal entirely. Defendants identify no changed circumstances that would warrant revisiting the issue now. *See Am. Council of the Blind v. Mnuchin*, 878 F.3d 360, 366 (D.C. Cir. 2017) (party seeking relief from an injunction bears the burden of establishing that changed circumstances warrant relief).

In any event, Defendants’ standing argument betrays a fundamental misapprehension of the injury suffered by Plaintiffs—a misapprehension that the district court has repeatedly taken pains to correct. JA74-86; JA141-162. Where a policy discriminates on the basis of an invidious classification, as the transgender ban does, it inflicts a profound constitutional injury.<sup>5</sup> As the district court recognized, the ban injures Plaintiffs “[b]y singling [them] out and stigmatizing

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<sup>5</sup> Defendants’ sow further confusion when they object to the district court’s characterization of the injury as “class-based” by invoking (at 9) Federal Rule of Civil Procedure 23. To be clear, class-based injuries under an equal protection analysis are not subject to Rule 23 certification requirements.

them as members of an inherently inferior class of service members.” JA77. That injury will persist if the ban is allowed to go into effect as to any other transgender individuals seeking to join or remain in the military, because the ban sends a direct, powerful message that transgender people, including Plaintiffs, are unworthy of service in the military.<sup>6</sup> Such stigmatization irreparably affects how Plaintiffs, including those currently deployed overseas, are viewed by their commanding officers and peers. It carries further risks of concrete harms to Plaintiffs’ career development in the form of reduced opportunities for assignments, promotion, training, and deployment. JA79. Accordingly, an injunction limited to Plaintiffs alone will not address the core constitutional injury that the ban inflicts or furnish complete relief. *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994)

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<sup>6</sup> Defendants have suggested elsewhere that *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), establishes that Plaintiffs do not face harm here. Appellants’ Opening Br. at 49. But as this Court noted in *Navy Chaplaincy*, if plaintiffs there “had alleged that the Navy discriminated against them on account of their religion, plaintiffs would have alleged a concrete and particularized harm sufficient to constitute injury-in-fact for standing purposes. But plaintiffs have conceded that they themselves did not suffer employment discrimination on account of their religion. They have conceded that the Navy did not deny them any benefits or opportunities on account of their religion.” *Id.* at 760. Furthermore, in *Navy Chaplaincy*, there was no direct discriminatory “message” from the government policy. Instead, the plaintiffs argued that the promotion quotas of the Navy Chaplaincy *implied* that certain religious groups were inferior. Here, by contrast, the message is direct, unambiguous, and explained in a 40-page report: transgender individuals are unfit to serve. And that message threatens to cause Plaintiffs concrete, particularized harms.

(equitable principles support an injunction that is “necessary to provide complete relief to the plaintiffs” (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979))).

The Mattis Implementation Plan’s grandfather clause does not mitigate that core constitutional harm and offers no shelter to these Plaintiffs, who are left to serve under a policy that brands them as inferior and a detriment to a military to which they have dedicated their lives. “The Mattis Implementation Plan sends a blatantly stigmatizing message to all members of the military hierarchy that has a unique and damaging effect on a narrow and identifiable set of individuals, of which Plaintiffs are members.” JA78. Sufferance to serve in a military that holds—as a matter of policy—that transgender service members “undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality,” Mattis Memorandum 2 (Dkt. 96-1), cannot be deemed adequate redress of Plaintiffs’ injuries.

Moreover, the government’s assertion (at 9) that principles of equity and orderly development of the law render a systemwide injunction “improper” does not make it so. Federal courts can unquestionably enjoin the federal government from enforcing an unconstitutional rule of broad applicability. *Nat’l Mining Ass’n v. United States Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (explaining that “[w]hen a reviewing court determines that agency regulations are

unlawful, the ordinary result is that the rules are vacated—not that the application to the individual petitioners is proscribed.”). Similarly, the Supreme Court has explained that “if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is ‘proper.’” *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 333 (2010)). The district court here rightly declined Defendants’ invitation to “condemn the use of a remedy that has been sanctioned by the D.C. Circuit as well as the Supreme Court.” Dkt. 187 at 13.

Finally, *Department of Defense v. Meinhold*, 510 U.S. 939 (1993), does not support Defendants’ contention (at 13) that the balance of equities weighs against facial relief. Unlike Plaintiffs here, Meinhold—a gay man serving in the military—raised an as-applied challenge to his discharge that turned on the particular facts of his case.<sup>7</sup> Because the challenged policy was held unlawful only

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<sup>7</sup> Meinhold was discharged after he stated during a television interview that he was gay. He was dismissed based on that statement alone and challenged his dismissal on the ground that it was unlawful to dismiss him without any evidence that he had actually engaged in any homosexual conduct. Meinhold’s challenge thus clearly implicated only the particular application of the military’s policy to the facts of his case. *See Meinhold v. DOD*, 34 F.3d 1469, 1479 (9th Cir. 1994) (discussing “effect of the regulation as applied in Meinhold’s case”); *id.* (holding that Meinhold’s discharge was unlawful because his statement “in the circumstances under which he made it manifests no concrete, expressed desire to commit homosexual acts”).

as applied to him, a broader injunction against the policy could not be maintained. Here, Plaintiffs' constitutional challenge to the Mattis Implementation Plan does not turn on their particular circumstances, but on the nature of the discrimination against transgender people as a group.

Defendants offer no basis for upsetting the district court's well-founded conclusions. This Court has previously rejected Defendants' repeated efforts to impede these proceedings and prevent Plaintiffs from obtaining relief. It should do so again.

### **III. DEFENDANTS' MOTION IS UNTIMELY**

The untimeliness of Defendants' motion is reason enough for it to be denied. Defendants have had two prior opportunities to seek a stay of the preliminary injunction, including a request for narrowing the injunction: when the injunction issued in October 2017 and Defendants first moved to appeal, and again in August 2018 when this Court denied the Defendants' motion to dissolve the injunction and Defendants again appealed. Defendants abandoned their first appeal in December 2017 and declined to seek a stay in August 2018.

Defendants do not explain why their need for a stay is so pressing *now*, after the injunction has been in place for more than a year. Nor do Defendants attempt to explain why their past failures to seek this emergency relief should be overlooked. To justify the stay of an injunction, a party must convincingly show

that its need for relief is urgent. *See United States v. Philip Morris USA, Inc.* 449 F. Supp. 2d, 998 990 (D.D.C. 2006); *Shays v. FEC*, 340 F. Supp. 2d 39, 44 (D.D.C. 2004); *see also Cuomo v. U.S. Nuclear Regulatory Comm’n*, 772 F.2d 972, 978 (D.C. Cir. 1985). Courts regularly deny belated stay applications like this one. *See, e.g., Lightfoot v. District of Columbia*, No. Civ. 01-1484 (CKK), 2006 WL 175222, at \*4 (D.D.C. Jan. 24, 2006) (Kollar-Kotelly, J.) (denying government defendants’ motion for a stay pending appeal and advising defendants to follow Shakespeare’s maxim: “Let’s lack no discipline, make no delay: For lords, tomorrow is a busy day”); *see also AARP v. EEOC*, 226 F. Supp. 3d 7, 22 (D.D.C. 2016) (“An unexcused delay in seeking extraordinary injunctive relief may be grounds for denial because such delay implies a lack of urgency and irreparable harm.” (citing *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005))); *cf. Oakland Tribune, Inc. v. Chronicle Publ’g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (citing party’s delay in seeking relief as basis for denying preliminary injunction); *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984) (same).

Here, Defendants’ only justification for its belated application is that it has filed a petition for writ of certiorari in the Supreme Court before this Court even hears argument on the appeal in this case. But that petition has no bearing on the merits of the untimely stay Defendants now requests. When Defendants filed their notice of appeal in this case in October 2018, they evidently did not see any

urgency necessitating a stay, because they did not ask for one, either from the district court or from the court of appeals. Instead, they requested only that the court of appeals expedite briefing on the appeal; the D.C. Circuit granted that request, briefing is complete, and oral argument will be held on December 10. While Defendants are now unsatisfied with the expedited schedule that they requested and obtained, that change of heart does not justify a stay of the preliminary injunction.

A stay pending appeal is fundamentally a matter of equity. *Shays*, 340 F. Supp. 2d at 44; *see also Holiday Tours*, 559 F.2d at 843. No equities justify giving Defendants a third bite at the apple. Many of the substantive arguments raised in Defendants' stay motion are now before the Court, which will hear argument in under a week. Defendants have received what they originally deemed sufficient to address any exigency—an expedited hearing on its appeal. Having forgone seeking a stay when they filed their appeal in October, and having produced nothing to suggest that circumstances have substantially changed since October, Defendants have forfeited any claim on the court's equitable discretion.

The preliminary injunction has been in place for over a year. Defendants have spent that year seeking not only to prevent this preliminary injunction from taking effect, but also to stymie the proceedings, including discovery, necessary to litigate this case to final judgment. The lower court rightly points out that “[i]f

Defendants are eager to rid themselves of the Court's preliminary injunction, Defendants should note that motions such as this one serve to slow litigation and only increase the time which Defendants must wait for the Court's final decision on the merits." Dkt. 187 at 6. Justice, it seems, would have a resolution of this dispute on the merits; Defendants appear to have other designs.

### **CONCLUSION**

The district court has considered all of the arguments presented here on repeated occasions. Each time, the district court exercised its equitable discretion to assess the four factors necessary to warrant a stay. Each time, the district court denied the Defendants' motion.

Defendants' motion to stay should be denied.

Respectfully submitted.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 4,232 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Alan E. Schoenfeld  
ALAN E. SCHOENFELD

December 6, 2018

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of December, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Alan E. Schoenfeld

ALAN E. SCHOENFELD