UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AIDEN STOCKMAN, *et al.*,
Plaintiffs-Appellees,

STATE OF CALIFORNIA,
Intervenor-Plaintiff-Appellee,

v.

DONALD J. TRUMP, in his official capacity as President of the U.S., *et al.*,
Defendants-Appellants.

Case No. 18-56539

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS' MOTION TO STAY THE PRELIMINARY INJUNCTION PENDING APPEAL

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I. INTRODUCTION

Nearly one year ago, on December 22, 2017, the district court "preliminarily enjoin[ed] the Accession, Retention, and Sex Reassignment Surgery Directives [(the "ban")] pending the final resolution of this lawsuit." *Stockman v. Trump*, No. 17-01799, 2017 WL 9732572 at *16 (C.D. Cal. Dec. 22, 2017). The court concluded 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. *Id.* at 15-16.

For nearly twelve months, Defendants have repeatedly sought to evade the injunction and enforce a ban on military service by transgender people. In each instance, the district court found that the government is unlikely to prevail on the merits, that Plaintiffs would be harmed by staying or dissolving the injunction, that the government does not face irreparable harm, and that the public interest is served by preserving the injunction. No intervening development in this case has diminished the strength of those findings. As the D.C. Circuit noted in denying the government's request for a stay in a similar case, "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 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." *Doe I v. Trump*, No. 17-5267, 2017 WL 6553389 at *3 (D.C. Cir. Dec. 22, 2017).

Defendants now seek emergency relief from this Court even as a near-identical motion, filed just five days earlier, pends before the district court. There is no urgency requiring this Court's consideration of the government's motion before

the district court has had a chance to rule. No material change in the facts or the law justifies Defendants' belated requests. Defendants' motion should be denied.

II. BACKGROUND

In July 2017, President Trump announced that transgender people would no longer be permitted to serve in the United States military. *Stockman*, No. 17-01799, Dkt. No. 28, Ex. F. On August 25, 2017, President Trump formally ordered the Department of Defense ("DOD") and Department of Homeland Security ("DHS") to develop a plan to reinstate a ban on military service by transgender individuals (the "August 25 Directive"). *Id.*, Ex. G. Plaintiffs – current and aspiring transgender service members and Equality California – brought this action challenging the ban on equal protection grounds, among others. *Stockman*, No. 17-01799, Dkt. No. 1. On November 16, 2017, the State of California was permitted to intervene to join Plaintiffs in challenging the ban. *Stockman*, No. 17-01799, Dkt. No. 66.

On December 22, 2017, the district court enjoined the government from reinstating a ban on military service by transgender people. *Stockman*, No. 17-01799, 2017 WL 9732572 at *16 (C.D. Cal. Dec. 22, 2017). The court concluded that Plaintiffs were likely to succeed in their equal protection challenge, that Plaintiffs were likely to suffer irreparable injury, and that the public interest weighed in favor of granting injunctive relief. *Id.* at *15-16. On February 22, 2018, Secretary of Defense James Mattis provided the President with a plan to implement the ban (the "Implementation Plan"). The government publicly released the plan on March 23, 2018, and moved to dissolve the injunction that same day. *Stockman*, No. 17-01799, Dkt. No. 82. On September 18, 2018, the district court denied the government's motion, finding that the government's plan to implement the ban would subject Plaintiffs to substantially the same constitutional injuries the preliminary injunction seeks to prevent, and that the balance of hardships and the public interest strongly favored keeping the injunction in place. *Stockman*, 331 F.

Supp. 3d 990, 1004 (C.D. Cal. 2018). The government appealed that ruling to this court, but chose not to seek a stay.

On November 20, 2018, the government filed a motion to hold the briefing schedule in abeyance pending the related appeal of *Karnoski v. Trump*, No. 18-35347 (9th Cir. oral argument heard Oct. 10, 2018) ("*Karnoski*"), and any further proceedings before the Supreme Court in that case. *Stockman*, No. 18-56539, Dkt. No. 11. This Court has not yet ruled on that motion. On December 11, 2018, this Court suspended the briefing on the appeal pending further order of this Court. *Stockman*, No. 18-56539, Dkt. No. 25.

On November 23, 2018, the Solicitor General filed a petition for a writ of certiorari before judgment in this case, as well as in *Karnoski* and *Doe 2, et al., v. Trump, et al.,* No. 17-01597 ("*Doe*"). *Stockman*, No. 18-678 (filed Nov. 23, 2018).

On November 28, 2018, the government filed in the district court a motion to stay the preliminary injunction pending appeal. *Stockman*, No. 17-01799, Dkt. No. 130. Although the district court has not yet ruled on that motion, the government now seeks the same relief in this Court, and, on December 13, 2018, also filed a further motion to stay in the Supreme Court of the United States. *Stockman*, No. 18-678.

III. ARGUMENT

A stay pending appeal is available "only under extraordinary circumstances." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983). To obtain that extraordinary relief, the government must show (1) that it is likely to prevail on the merits, (2) that it will suffer irreparable injury, (3) that staying the injunction will not cause hardship to other interested parties, and (4) that permitting the government to exclude otherwise fit and qualified transgender people from military service will serve the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The government cannot meet its "heavy burden" here. *Id.* at 439. In fact, Defendants do

not even attempt to explain their delay in seeking emergency relief, and none of the required factors supports their request.

A. The Government's Motion is Untimely

The government's motion is untimely and should be denied on that basis alone. Defendants have had two prior opportunities to seek a stay of the preliminary injunction, including a request to narrow the injunction: when the district court enjoined the ban on December 22, 2017 and Defendants first moved to appeal, and again on September 18, 2018 when the district court denied 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 September 2018. Rather than acting with the urgency they now claim is required, Defendants waited until the last day possible to file their appeal, a full two months later. *Stockman*, No. 17-01799, Dkt. No. 125.

Even then, the government did not request a stay. Instead, it filed a petition for certiorari before judgment with the Supreme Court of the United States. Only after filing its petition for certiorari did the government move to stay the preliminary injunction in the district court, *Stockman*, No. 17-01799, Dkt. No. 130, and then also in this Court, *Stockman*, No. 18-56539, Dkt. No. 23-1. Defendants' repeated delays in seeking a stay preclude the relief they seek. To obtain extraordinary injunctive relief, a party must show that its need for such relief is urgent. *See Garcia v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015) (holding that a delay in seeking emergency relief "undercut [plaintiff's] claim of irreparable harm"); *Oakland Trib., Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (holding that plaintiff's "delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm"); *Lopez v. Heckler, et al.*, 713 F.2d 1432, 1453 (holding that "unexplained delay" in government's decision to seek a stay pending appeal weighed against the government's claimed need for emergency relief).

Defendants do not attempt to explain why their past failures to seek emergency relief should be overlooked. Nor do they explain why their need for a stay is urgent now, after the injunction has been in place for nearly a year, and after the policy permitting open service by transgender people has been in place for more than two and a half years. In fact, Defendants make no attempt to justify their delay in seeking emergency relief. A stay pending appeal is a matter of equity. *Trump v. Int'l Refugee Assistance Project*, 137 S.Ct. 2080, 2087 (2017); *Nken*, 556 U.S. at 433. Having foregone two prior opportunities to seek a stay, Defendants have not shown any changed circumstances that would justify giving them a third bite at the apple. The only new circumstance is that Defendants have filed a petition for a writ of certiorari before judgment in the Supreme Court. But that petition has no bearing on the untimeliness or the lack of urgency of Defendants' current motion. Defendants have forfeited any claim on this Court's equitable jurisdiction, and their motion should be denied for that reason alone.

B. None of the Stay Factors Favors Defendants

None of the factors required to obtain a stay pending appeal support Defendants' request for a stay.

First, Defendants have failed to support their claim that the Implementation Plan merely draws lines based on a medical condition and does not discriminate against transgender people. (Mot. at 8.) As the district court held, that "characterization . . . does not match reality." (Addendum ("Add.") at 9.) The Plan facially targets transgender people and generally bars them from military service, with a limited exception for the small number of transgender service members who have completed or begun gender transition in reliance on the Carter open service policy. Apart from that small group, the Plan disqualifies individuals who require or have undergone gender transition, which is the defining characteristic of transgender people. And to eliminate any possible ambiguity, it requires that all

transgender servicemembers must serve only "in their biological sex." *Id.* As the district court correctly held, that requirement means that a transgender person must suppress being transgender in order to serve. *Id.* ("In short, the policy aims to eliminate a person's *trans*ness, and nothing else.").

Defendants have also failed to offer any new argument or case law to rebut the district court's conclusion that the Implementation Plan warrants heightened scrutiny. As the district court correctly held, the Implementation Plan is inherently based on gender and gender stereotypes and thus warrants the same heightened scrutiny applied to other sex-based characteristics. Independently, the Plan also warrants heightened scrutiny because it reverses existing military policy and eliminates rights previously granted to a particular group, was adopted under unusual circumstances, effectuates a class-based ban, and has the practical impact of excluding only individuals who are otherwise fit to serve. *See United States v. Windsor*, 570 U.S. 744, 770 (2013) (noting that "[d]iscriminations of an unusual character" require careful judicial consideration) (quoting *Romer v. Ev*ans, 517 U.S. 620, 633 (1996)). Under any level of meaningful review, the Plan violates the requirement of equal protection because it imposes a "special, *additional* exclusionary rule that precludes individuals who would otherwise satisfy the demanding standards applicable to all service members." *Doe 2 v. Trump*, 315 F.Supp.3d 474, 497 (D.D.C. August 6, 2018).

Second, the government has failed to show irreparable harm if a stay is denied. The government claims that allowing transgender individuals to serve in the military 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" (Mot. at 10-11), but it has offered no support for those conclusory statements.

The injunction has been in place for nearly a year, and transgender individuals have been permitted to serve openly in the military for more than two years. They serve under a policy implemented after significant "forethought, research, and planning," and the military has already completed "considerable work . . . to ensure that openly transgender individuals would be able to serve successfully in the military." *Doe 1*, No. 17-1597, Dkt. 187 at *20, 22. The relief requested by Defendants subjects transgender individuals—and only transgender individuals—to a unique exclusionary rule that is not applied to other people, who are evaluated under generally applicable standards for enlistment, retention, and deployability. As such, permitting Defendants to implement that rule would serve only to bar combat-ready individuals from serving based solely on their transgender status. *Id*. at *21. And if the Court stayed the injunction now, and Defendants' Plan was later found to be unconstitutional on the merits, the military would be required to again change its policy. "Such volatility and instability in the makeup of the military cannot benefit Defendants." *Id*. at *22.

Third, staying the injunction would subject Plaintiffs to irreparable harms, which Defendants do not even attempt to rebut. The record is replete with evidence from Plaintiffs, 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.*, *Stockman,* No. 17-01799, Dkt. Nos. 16-28, 102 (declarations in support of motion for preliminary injunction); *see also*, *Doe 1*, No. 17-1597, Dkt. No. 187 at 23-24. Under the Implementation Plan, Plaintiffs seeking to enlist would be absolutely barred from doing so. Transgender service members who have not yet publicly identified themselves or sought to transition would be forced to either suppress their transgender identity or face discharge. And those who have come out as transgender in reliance on the Carter policy would be required to serve on grossly unequal terms, subject to a policy that marks them as categorically

inferior and unfit. *Stockman,* No. 17-01799, Dkt. No. 79 at 20 (holding that "the ban sends a damaging public message that transgender people are not fit to serve in the military"). Defendants' bare assertion that these harms are "speculative" does not render the district court's determination unfounded.

Finally, the balance of hardships weighs strongly against a stay. As this Court has repeatedly held, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal citations and quotation marks omitted); *see also Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017). In addition, "maintaining the injunction pending appeal advances the public's interest in a strong national defense, as it allows skilled and qualified service members to continue to serve their country." *Karnoski*, No. 17-1297, Dkt. No. 283 at 5; *see also Doe 1*, No. 17-1597 at 26 ("Absent corroborating evidence, the Court is not prepared to find that allowing Plaintiffs to voluntarily serve and defend their country, while this country faces a prolonged period of warfare, is against the public interest.").

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

C. The Scope of the Injunction Is Necessary to Remedy the Class-Based Injury Inflicted on Plaintiffs by the Ban

Defendants' motion to narrow the scope of the injunction misconceives the class-based injury inflicted by the ban. When a policy unconstitutionally discriminates based on a characteristic shared by the members of a protected group, as the policy here does, it inflicts a class-based injury that can be remedied only by enjoining the policy in its entirety. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (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))). This Court has confirmed that district courts may enjoin federal policy where plaintiffs – as here – are injured by a rule of broad applicability. *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007) (affirming program-wide injunction against EPA because APA allows courts to "hold unlawful and set aside" flawed agency action), *rev'd on other grounds sub nom. Summers v. Earth Island Inst.*, 555 U.S. 488, 500-01 (2009). Further, "an injunction is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit – even if it is not a class action – if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996).[1]

Here, the policy injures Plaintiffs by forcing upon them "a negative stigma" that "sends a damaging public message that . . . some citizens are not worthy of the military uniform simply because of their gender." *Stockman*, No. 17-01799, 2017 WL 9732572 at *15. "This ban singles out transgender individuals for unequal treatment solely because of their transgender status." *Id.* That class-based injury will persist if the ban goes into effect at all, because the ban sends the "message that transgender people are not fit to serve in the military." *Id.* An injunction applied only to Plaintiffs would not alleviate the constitutional injury of being made to serve under a policy that deems Plaintiffs unfit. "Staying the nationwide scope of the Court's preliminary injunction would sanction the stigma created by

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[1] *Zepeda v. INS*, 753 F.2d 719 (1985) is not to the contrary. The plaintiffs in *Zepeda* challenged the INS' methods and practices of enforcing federal rules, not any federal rule itself. *Id.* at 722. In addition, the district did not certify the case as a class action because it involved monetary damages in addition to a request for injunctive relief. *Id.* As a result, the Ninth Circuit limited relief to the named plaintiffs in the lawsuit under ordinary equitable principles. Nothing in the case precludes broad relief where the failure to do so does not remedy plaintiffs' injury.

the ban, thus injuring Plaintiffs even if the preliminary injunction were still in effect as to them." *Doe*, No. 17-1597, Dkt. 187 at *19 (D.D.C. Nov. 30, 2018).

In addition to that core constitutional injury, allowing the ban to go into effect would undermine Plaintiffs' stature in the eyes of their commanding officers, peers, and subordinates and deprive them of opportunities for assignments, promotion, training, and deployment. For these reasons as well, an injunction limited to Plaintiffs alone would not address the injury that the ban inflicts or furnish them with complete relief.

Defendants' reliance on *United States Department of Defense v. Meinhold*, 510 U.S. 939 (1993) is misplaced. 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. 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. U.S. Dep't of Defense*, 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"). Because the challenged policy was held unlawful only as applied to him, a broader injunction against the policy could not be maintained.

Here, Plaintiffs' constitutional challenge to the Implementation Plan does not turn on their particular circumstances, but on the nature of the discrimination against transgender people as a group. *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.'"). Accordingly, the facial injunction is both proper and necessary to address the constitutional injury plaintiffs would suffer if the ban were allowed to go into effect as to any transgender enlistees or active service members.

IV. CONCLUSION

Defendants have failed to show the "extraordinary circumstances" that warrant a stay pending appeal. Thus, Defendants' motion should be denied.

Dated: December 13, 2018

Respectfully submitted,

/s/ Amy C. Quartarolo
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9th Circuit Case Number(s) 18-56539

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