IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2 *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Civil Action No. 17-cv-1597 (CKK)

PLAINTIFFS' RESPONSE TO DEFENDANTS' "ALTERNATIVE REQUEST" FOR A STAY (Dkt. 193)

On March 12, 2019, the government issued Directive-type Memorandum (DTM) 19-004 (DTM), ordering the Department of Defense to "implement" the Mattis Plan. The issuance, an official order directing a change in the government's policy regarding transgender service members, plainly violates this Court's injunction directing Defendants "to revert to the status quo with regard to accession and retention that existed before the issuance of the Presidential Memorandum." Dkt. 60 at 2. Now, having already issued the DTM despite this Court's injunction, and having permitted inadequate time for the Court to respond to its Notice of issuance, Defendants' Reply on March 15, 2019, asks in cursory fashion for post hoc ratification of its actions by "requesting" "in the alternative" that the Court stay the preliminary injunction.

Defendants' drive-by filing is not an appropriate means to seek a stay of a preliminary injunction. If Defendants want this Court to order relief from the injunction, the proper method to seek such relief is to a file a motion with this Court, as set forth in Federal Rule 7(b) and this Court's Local Rule 7. Such a motion would allow Plaintiffs to respond to the government's assertions in sufficient fashion, which is both necessary and appropriate in a case like this, where significant constitutional rights and Plaintiffs' livelihoods are at stake. By not raising their

request for relief until a reply filing, Defendants have deprived Plaintiffs of the opportunity to make an appropriate response.

Defendants' efforts to minimize the D.C. Circuit's decision to extend the time for filing a petition for rehearing and for issuance of the mandate are unavailing. Defendants argue (at 2) that the distinction between issuance of judgment and issuance of the mandate "is a technical one that matters for some purposes but not for others." But that argument fails to grapple with the cases, cited in Plaintiffs' response to Defendants' motion, holding that issuance of the mandate is the time when the court of appeals' decision takes effect. Nor do Defendants offer anything other than speculation for why the court of appeals denied their motion to stay the injunction pending appeal as moot. The fact remains that the court of appeals *denied* that motion, and it did so well aware that the mandate for its decision would not issue until after the time for rehearing had expired. *See Doe 2 v. Shanahan*, No. 18-5257, 2019 WL 102309, at *3 (D.C. Cir. Jan. 4, 2019).

Defendants' assertion that the status quo persists despite the DTM, because the military continues to maintain the Carter policy, is belied by the reality that the DTM immediately triggers implementation of the rule changes that effectuate the Mattis policy. Defendants could have waited to issue the DTM until "seven days after resolution of any timely petition for rehearing or petition for rehearing en banc," as the appellate rules and the court of appeals' decision provide. They deliberately chose not to do so, and thus they purposely chose to test the bounds of their authority in the face of an injunction.

Accordingly, the Court should deny Defendants' "alternative" "request" to stay the injunction. If Defendants wish to seek relief from the injunction, they should file a motion to that effect, to which Plaintiffs will respond.

March 15, 2019

Respectfully submitted,

/s/ Paul R.Q. Wolfson

Paul R.Q. Wolfson (D.C. Bar No. 414759)
Kevin M. Lamb (D.C. Bar No. 1030783)
WILMER CUTLER PICKERING
HALE & DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
Telephone: 202-663-6000
Fax: 202-663-6363

Alan E. Schoenfeld (*pro hac vice*)
WILMER CUTLER PICKERING
HALE & DORR LLP
7 World Trade Center
250 Greenwich St.
New York, New York 10007
Telephone: 212-230-8800
Fax: 212-230-8888

Adam M. Cambier (*pro hac vice*)
WILMER CUTLER PICKERING
HALE & DORR LLP
60 State Street
Boston, Massachusetts 02109
Telephone: 617-526-6000
Fax: 617-526-5000

Attorneys for Plaintiffs

Matthew E. Miller (*pro hac vice*)
Kathleen M. Brill (*pro hac vice*)
Michael Licker (*pro hac vice*)
Rachel C. Hutchinson (*pro hac vice*)
FOLEY HOAG LLP
155 Seaport Blvd.
Boston, Massachusetts 02210
Telephone: 617-832-1000
Fax: 617-832-7000

Theresa M. Roosevelt (D.C. Bar No. 1021853)
FOLEY HOAG LLP
1717 K Street NW
Washington, DC 20006
Telephone: 202-223-1200
Fax: 202-785-6687

Jennifer Levi (*pro hac vice*)
Mary L. Bonauto (*pro hac vice*)
GLBTQ LEGAL ADVOCATES & DEFENDERS
18 Tremont St., Ste. 950
Boston, Massachusetts 02108
Telephone: 617-426-1350
Fax: 617-426-3594

Shannon P. Minter (*pro hac vice*)
Amy Whelan (*pro hac vice*)
Chris Stoll (*pro hac vice*)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market St., Ste. 370
San Francisco, California 94102
Telephone: 415-392-6257
Fax: 415-392-8442