No. 17-36009

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,
Plaintiffs-Appellees,
v.

DONALD TRUMP, President of the United States, et al.
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR ADMINISTRATIVE STAY AND MOTION FOR STAY PENDING APPEAL

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CIRCUIT RULE 27-3 CERTIFICATE

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(2) Facts showing the existence and nature of the emergency

As set forth more fully in the motion, the district court entered a nationwide preliminary injunction requiring the Department of Defense to implement a policy permitting the accession of transgender individuals into the military by January 1, 2018, while the Department is still completing its study to determine the appropriate accession policy to adopt. The district court's preliminary injunction imposes irreparable harm on the defendants and the general public by forcing the military to implement a complicated accession policy on a rushed timetable and before the necessary personnel can be trained to properly implement that policy. Moreover, it requires the military to adopt a certain accession policy before it has made a final determination as to what, in the military's view, the appropriate policy should be. Due to the district court's injunction, the military may have to access some individuals who are not medically fit for service starting on January 1, 2018.

(3) When and how counsel notified

Counsel for defendants notified plaintiffs' counsel by email on December 15, 2017, of the defendants' intent to file this motion. Service will be effected by electronic service through the CM/ECF system.

(4) Submissions to the district court

The defendants requested a stay from the district court on December 15, 2017, which the district court has not yet acted upon.

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INTRODUCTION

For decades, the military has presumptively barred transgender individuals from accession into the armed forces. Last year, however, then-Secretary of Defense Ashton Carter ordered the revision of this accession policy to allow some transgender individuals to enter the military starting on July 1, 2017. On June 30, 2017, Secretary of Defense James Mattis deferred that revision until January 1, 2018, so that the services could assess the Carter policy's effect on military readiness. The President then issued a memorandum on August 25, 2017, directing Secretary Mattis to maintain the current accession policy past January 1, in order to study whether the Carter policy would harm military readiness and to provide the President with an independent recommendation. Consistent with that directive, the military is studying the issue and will make its recommendation by February 21, 2018.

The court below ended this orderly process. On December 11, 2017, it issued a preliminary injunction barring the military from implementing the President's directive to defer revising the accession policy past January 1, as well as separate directives concerning retention of transgender service members and funding for their sex-reassignment surgeries. On December 15, the government sought clarification that the district court's injunction does not preclude Secretary Mattis from exercising his independent authority to defer the January 1 "deadline" for a limited time, as he did in June 2017. In the alternative, the government sought a stay pending appeal of the injunction of the accession directive. The district court has yet to act on these requests.

Without the requested clarification (or a stay), the military must implement the Carter accession policy by January 1. In light of that impending deadline, and to give this Court adequate time to consider these issues, the government asks this Court for a stay pending appeal of the injunction insofar as it concerns accessions and an administrative stay until the Court resolves this motion.[1] *See* Fed. R. App. P. 8(a)(2)(A)(ii). Absent such relief, the military will be forced to implement a significant change to its accession standards before it decides how to resolve this issue. As military leadership has explained, this timetable will place extraordinary burdens on our armed forces and may harm military readiness. Conversely, the plaintiffs who claim that the accession directive will affect them will suffer no irreparable injury from a stay.

The simplest way for this Court to prevent the looming irreparable harm to the government is through a stay that narrows the injunction in one of two respects. First, the Court could rule that there would be no basis for enjoining Secretary Mattis from exercising his own discretion to defer implementing the Carter policy for a limited time while the military completes its study or implements the change, as he did in June 2017. Second, it could hold that the nationwide scope of the injunction is inappropriate and stay its prohibition on enforcing the accession directive with respect to applicants other

[1] The government does not seek a stay with respect to the retention directive or the sex-reassignment directive, neither of which takes effect until March 23, 2018. The military is not taking any action against current service members (nor does it have any immediate plans to do so), and it is continuing to fund their sex-reassignment surgeries. Add. 28. The military is currently determining its policy on these issues, and may seek a stay of these aspects of the injunction at a later date after a final policy determination.

than the individual plaintiffs found to have standing to challenge that order. Of course, the Court could also stay the entire portion of the injunction dealing with accessions, as that order rests on legal errors concerning jurisdiction, the equities, and the merits.

Without a stay, the military will, at the risk of harming its readiness posture, have to rush to provide the requisite training to the tens of thousands of service members across the country responsible for implementing accession standards and, as of January 1, could be forced to access some individuals who are not medically fit for service. The government therefore respectfully asks this Court to issue an immediate administrative stay pending consideration of this motion or grant a stay as soon as possible.

BACKGROUND

1. To ensure that service members are "capable of performing duties," are free of conditions that "may require excessive time lost from duty for necessary treatment or hospitalization," and are "adaptable to the military environment without the necessity of geographical area limitations," the military maintains accession standards that presumptively exclude individuals with certain medical conditions from serving, subject to an individualized waiver process. Dep't of Defense Instruction 6130.03, at 2, 7 (Apr. 28, 2010). For decades, these standards have presumptively barred transgender individuals from entering the military. *Id.* at 27, 48.

In June 2016, then-Secretary Carter ordered the Defense Department to revise its accession standards by July 1, 2017. Add. 31-36. Under this revision, a history of "gender dysphoria," "medical treatment associated with gender transition," or "sex

reassignment or genital reconstruction surgery" would be disqualifying unless an applicant could obtain a certificate from a licensed medical provider that the applicant had been stable or free from associated complications for 18 months. Add. 34-35.

2. The Carter accession policy was never implemented because on June 30, 2017, Secretary Mattis "approved a recommendation by the services to defer" the revision until January 1, 2018. Add. 30. The deferral was designed to allow the branches to "review their accession plans and provide input on the impact to the readiness and lethality of our forces." *Id.*

On July 26, the President stated on Twitter that the government "will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military." Add. 3. The President then issued an official memorandum on August 25 addressing the accession and retention of transgender service members as well as government funding for their sex-reassignment surgeries. Add. 24-26. With respect to accession standards, the President found that former-Secretary Carter had "failed to identify a sufficient basis to conclude" that his revision "would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." Add. 24 (Mem. § 1(a)). In the President's view, "further study is needed to ensure that continued implementation of last year's policy change would not have those negative effects." *Id.* Accordingly, the President directed the Secretaries of Defense and Homeland Security to "maintain the currently effective policy regarding accession of transgender individuals" past January 1, 2018, until the Secretary of Defense, after consultation with the Secretary of

Homeland Security, "provides a recommendation to the contrary that I find convincing." Add. 25 (§ 2(a)). The President also ordered Secretary Mattis to submit an implementation plan to him by February 21, 2018. Add. 25 (§ 3).

In response, Secretary Mattis promised to "develop a study and implementation plan" that will address, *inter alia*, "accessions of transgender individuals." Add. 29. In the meantime, the rule "generally prohibit[ing] the accession of transgender individuals" would "remain[] in effect because current or history of gender dysphoria or gender transition does not meet medical standards." Add. 28.

3. Plaintiffs—nine individuals, three organizations, and Washington State—sought a preliminary injunction of the memorandum's directives. As relevant here, the court ruled that four individual plaintiffs had standing to challenge the accession directive, Add. 7-8;[2] applied intermediate scrutiny and concluded that plaintiffs' equal protection, substantive due process, and First Amendment challenges to that directive were likely to succeed, Add. 15-20; and held that the remaining factors counseled in favor of a preliminary injunction, Add. 20-22. As it was "not convinced that reverting to the June 2016 Policy … which has been in place for over a year without documented negative effects, will harm Defendants," the court dismissed the government's concerns

[2] The district court also held that the three organizational plaintiffs and Washington State generally had standing to challenge the Presidential Memorandum, but did not specify *which* directive they had standing to challenge. Add. 10-12. In any event, the court held that the organizations' standing was derivative of that of the individual plaintiffs. Add. 10-11.

of irreparable harm. Add. 22. It then enjoined the government "from taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement." Add. 23.

4. The government appealed on December 14 and subsequently asked the district court to clarify that its injunction does not bar Secretary Mattis from exercising his independent discretion to defer implementing the Carter policy past January 1, for a limited time, to study the policy change further or to implement the revision. Doc. 106. In the alternative, the government sought a stay of the injunction of the accession directive, accompanied by a declaration from the Acting Deputy Assistant Secretary of Defense for Military Personnel Policy explaining that complying with the court's January 1 deadline would "impose extraordinary burdens" on the Defense Department and have a "harmful impact" on "the military, its missions, and readiness." Add. 38-39. The district court has not acted on that motion.

ARGUMENT

The Court should stay the district court's injunction insofar as it requires the military to alter its accession policy by January 1, 2018. In considering whether to grant a stay pending appeal, a court must balance four factors: (1) the applicant's likelihood of success on the merits; (2) whether the applicant will suffer irreparable injury; (3) the balance of hardships to other parties interested in the proceeding; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). This Court reviews a grant of a preliminary injunction for abuse of discretion, but legal conclusions are reviewed de

novo. *Aircraft Serv. Int'l, Inc. v. Int'l Bhd. of Teamsters*, 779 F.3d 1069, 1072 (9th Cir. 2015) (en banc). Here, the government is likely to establish that the district court abused its discretion, as that court's analysis was infected by a number of serious legal errors. Unless stayed (or clarified), that injunction will irreparably harm the government (and the public) by, *inter alia*, compelling the military to scramble to revise its policies at the risk of harming readiness and disrupting an ongoing process that is only a few months away from completion. A stay, by contrast, would preserve the status quo and not injure any of the plaintiffs.

I. The Government Is Likely To Succeed On The Merits.

A. Secretary Mattis Has Independent Authority To Defer Revising The Accession Policy.

The district court in *Doe v. Trump*, No. 17-1597 (D.D.C.), construed its injunction to prohibit Secretary Mattis from exercising his independent discretion to defer the January 1 deadline. In the event that the district court here follows suit, this Court should stay that aspect of the injunction.

The Secretary of Defense has independent authority to delay policy changes regarding the composition of the armed forces. *See, e.g.*, 10 U.S.C. § 136(b) (recognizing his authority over "the areas of military readiness, total force management, [and] military and civilian personnel requirements"). Plaintiffs therefore never sought to prohibit Secretary Mattis from independently deferring implementation of the Carter policy, even though he had previously done so in June. Instead, they asked the district court

only to stop defendants from "taking any action relative to transgender individuals … that is inconsistent with the *status quo* that existed on July 25, 2017," which was the day before the President's statement on Twitter. Doc. 32 at 31; *see also* Add. 2 (plaintiffs sought "preliminary injunction to prevent implementation of the policy set forth in the Presidential Memorandum"). Because plaintiffs challenged only the President's orders, it is unsurprising that the preliminary injunction preserved the status quo "prior to President Trump's July 26, 2017 announcement," Add. 23, but never addressed Secretary Mattis's own authority to delay revising accessions standards.

Similarly, the district court's justifications for enjoining the accession directive concern the President and his memorandum alone. Specifically, the court concluded that "the policy set forth in the Presidential Memorandum denies [plaintiffs] equal protection," Add. 15, rejected "'the reasons proffered by the President for excluding transgender individuals from the military,'" Add. 16, and declined to show the military any deference because the President's announcement "on Twitter" lacked "evidence of considered reason or deliberation." Add. 18. None of those reasons supports enjoining Secretary Mattis from making an independent decision to defer implementing the Carter policy for a limited time to study the issue further or to avoid the harms of rushing to comply with the January 1 deadline. *See infra* Part I.C.2.

Indeed, rather than preserve "the status quo that existed prior to President Trump's July 26, 2017 announcement," Add. 23, construing the injunction to restrict Secretary Mattis's authority would dramatically alter it. Under the status quo ante,

Secretary Mattis could exercise his own authority to defer implementing the Carter policy, as he did in June 2017 without any objection from plaintiffs or others. There is no meaningful difference between that decision in June and a renewed, independent decision by Secretary Mattis to extend the deadline for a limited period past January 1. Thus, in the absence of a prompt ruling by the district court that its injunction does not constrain Secretary Mattis's own authority to defer the Carter policy, this Court should stay the injunction to the extent it constrains the Defense Secretary's discretion.

B. This Court Should Stay The Preliminary Injunction Insofar As It Grants Nationwide Relief.

Although only four individual plaintiffs claimed that the accession directive may affect them, the district court entered a preliminary injunction barring implementation of that directive nationwide. In doing so, it gave no explanation for why such broad relief was necessary to redress those alleged injuries. Nor could it. That injunction violates principles of Article III and exceeds the court's equitable authority.

To establish standing, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). "[S]tanding is not dispensed in gross," and a plaintiff must establish standing "separately for each form of relief sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017). "The remedy" sought therefore must "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v Casey*, 518 U.S. 343, 357 (1996).

Equitable principles likewise require that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 765 (1994); *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163 (2010) (narrowing injunction in part because the plaintiffs "do not represent a class, so they could not seek to enjoin such an order on the ground that it might cause harm to other parties"). And these constitutional and equitable limits apply with special force to injunctions concerning military policies. *See U.S. Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993) (staying injunction against military policy to the extent it conferred relief on anyone other than plaintiff); *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994) (vacating injunction save to the extent it applied to plaintiff).

Here, the district court held that four individual plaintiffs had standing to challenge the accession directive. Add. 7-9. But in entering its preliminary injunction, the court did not limit its remedy to their injuries; instead, it barred application of the accession directive nationwide. Such wide-ranging relief cannot be reconciled with constitutional or equitable principles, nor is it necessary to remedy the alleged injuries of a handful of individuals.[3]

[3] The district court's holding that three organizations and Washington State had standing to challenge the Presidential Memorandum, generally, does not change the analysis. Add. 10-12. Even assuming *arguendo* that these plaintiffs had standing to challenge the accession directive, *but see infra* Part I.C.1, nationwide relief would be inappropriate. Based on plaintiffs' allegations, the only individuals with ties to Washington State or these organizations who may be affected by this directive are two individual plaintiffs (Karnoski and Schmid).

A limited stay pending appeal, by contrast, would pose no harm to plaintiffs. A narrow injunction, barring the application of the accession directive to these four plaintiffs would provide them with full relief. And to the extent that other applicants believe they have cognizable injuries, they are free to bring their own challenges—as some have done. *See, e.g., Doe v. Trump*, 2017 WL 4873042 (D.D.C. Oct. 30, 2017).

C. The Injunction Of The Accession Directive Should Be Vacated.

Finally, the injunction of the accession directive rests on several legal errors.

1. To start, none of the plaintiffs who claim they will be affected by the accession directive has standing to challenge that order. Where, as here, a challenge would require this Court "to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional," its "standing inquiry [must be] especially rigorous." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). The district court erred in holding that plaintiffs met that exacting standard.

The four relevant individual plaintiffs fail to satisfy Article III's demands. The district court first erred in holding that one of them, Schmid, had not yet been appointed as a warrant officer due to the accession directive and thus had standing. Add. 7. But plaintiffs failed to demonstrate that, even if this alleged injury were traceable to the directive, it was redressable by the court's injunction, as there is no basis to think that Schmid would be able to satisfy the demands of the Carter policy. *See* Add. 50 (Schmid requires future medical treatment, including surgery).

The district court further erred in holding that the three other plaintiffs—Karnoski, D.L., and Callahan—had standing from a competitive disadvantage under the accession directive. Add. 7-8. But these plaintiffs have not even applied to access, let alone established that they would otherwise be eligible to enter the military, Add. 47, 58-59, 63, rendering any "threatened injury" far from "*certainly impending*." *Clapper*, 568 U.S. at 409. Nor can they show that this alleged injury would be redressable by the injunction, as there is no claim that any of them could obtain the requisite certificate establishing 18 months' stability post-treatment under the Carter policy. Add. 45, 50, 57, 62.[4]

Nor can the organizational plaintiffs or Washington State challenge the accession directive under Article III. As the district court recognized, the organizations' standing turns on that of their members, so if Karnoski and Schmid cannot satisfy Article III, the organizations cannot either. Add. 10-11. Washington likewise has failed to show a cognizable injury traceable to the accession directive. The State's claim that the President's directive may harm its ability to recruit and retain members of the Washington National Guard is wholly speculative. Doc. 55 at 7 (directive "*may* result in diminished numbers of service members who can provide emergency response and

[4] The district court also held that an alleged stigma-based injury was sufficient to confer standing on these four individual plaintiffs. Add. 8, 10. But stigmatic injury "accords a basis for standing only to those persons who are personally denied equal treatment," *Allen v. Wright*, 468 U.S. 737, 750 (1984), which none of these plaintiffs has alleged.

disaster mitigation in emergent situations") (emphasis added). Nor does its claimed *parens patriae* interest in protecting its residents from an allegedly discriminatory federal policy confer standing. *See Massachusetts v. Mellon*, 262 U.S. 447, 478, 485-86 (1923).

2. The district court also abused its discretion in weighing the equities—*i.e.,* the balance of hardships, the public interest, and the likelihood of irreparable harm—to conclude that a preliminary injunction was warranted. Even though "great deference" is owed "to the professional judgment of military authorities concerning the relative importance of a particular military interest" in weighing these factors, *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), the court significantly discounted the hardship to the military imposed by its injunction.

As military leadership has explained, compliance with the district court's January 1 deadline "will impose extraordinary burdens" on the military and have a "harmful impact" on "its missions[] and readiness." Add. 38-39. Despite the "implementation efforts made to date," the military will "not be adequately and properly prepared to begin processing transgender applicants" by January 1. Add. 42. Specifically, it will have to ensure that the "tens of thousands" of service members "dispersed across the United States" responsible for implementing accession policies "have a working knowledge or in-depth medical understanding of the standards." Add. 40. These service members include over 1,000 medical personnel, officers and providers; personnel at nine military entrance training locations; and 20,367 recruiters who assist applicants in completing their medical history forms. Add. 40-41. And their training

will be complicated, as "[n]o other accession standard has been implemented that presents such a multifaceted review of an applicant's medical history" as the Carter policy. Add. 41. 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." Add. 42.

The preliminary injunction further harms the military by forcing it to implement a significant change to its accession standards before it completes its study. Forcing the military to take some applicants it might have rejected had it been given more time to finish its study and implement a final policy is a substantial injury in itself, in addition to the fact that an erroneous accession decision as to an individual could adversely affect other unit members. *Id.* But beyond that, short-circuiting the deliberative process both undercuts the ongoing work of the leadership studying the issue and threatens the military with two burdensome implementation processes—one to comply with the district court's order and another to execute a new policy (if the military adopts a new one following the study) or return to the old one (if the military adheres to its standards and the injunction is set aside on appeal). Add. 42-43. Imposing "duplicative" implementation costs, "sowing confusion in the ranks," and mandating personnel policy while military experts are still studying the issue are all significant harms. Add.

43. And because these injuries—whether to the fisc or to the defense of the nation—will be passed on to citizens more generally, a stay would be in the public interest.

The district court dismissed any harm to the government on the basis of a fundamental misunderstanding of the status quo that its injunction sought to protect. According to the court, it was "not convinced that reverting to the June 2016 Policy, … which had been in place for over a year without documented negative effects, will harm Defendants." Add. 22. But the June 2016 Policy, insofar as it concerned accessions, *never* took effect. Instead, that revision to accession standards has been continually deferred since it was announced, and therefore was *not* the status quo. The fact that there were no negative effects from a policy that was never implemented is hardly a legitimate reason to discount the serious harms its implementation would sow.

Against those serious harms, plaintiffs cannot show any irreparable injury. The individual plaintiffs whom the court found to have standing have not alleged that a stay is likely to affect them during the pendency of the appeal, which is unsurprising given that none has claimed an ability to satisfy the 18 months' stability requirement under the Carter policy. In any event, any potential employment-related harm is not irreparable. *See, e.g.*, *Hartikka v. United States*, 754 F.2d. 1516, 1518 (9th Cir. 1985) (lost income, lost retirement and relocation pay, and damage to reputation resulting from a less-than-honorable discharge did not constitute irreparable harm). Finally, the district court cited abstract stigmatic injuries to plaintiffs, Add. 20, but such injuries fail to confer standing on plaintiffs, much less establish irreparable harm. *See supra* Part I.C.1.

3.a. On the merits of their equal protection challenge, the district court erred by failing to apply the appropriately deferential standard of review. Although the armed forces are subject to constitutional constraints, "the tests and limitations to be applied may differ because of the military context." *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). For instance, judicial "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). The same is true for "decisions as to the composition … of a military force." *Rostker*, 453 U.S. at 65. Thus, even when military regulations trigger heightened scrutiny, courts have upheld them in light of the significant deference due to the political branches' judgments in this area. *See, e.g.*, *id.* at 69–72 (excluding women from draft registration).

The accession directive easily survives this deferential form of review. Given the President's concerns that departing from the military's longstanding accession policy without "further study" risked, among other things, harm to "military effectiveness," he ordered the armed forces to retain this standard while Secretary Mattis and his team conducted their own review of the issue. Add. 24-25 (Mem. §§ 1, 2(a)). A decision to maintain the status quo for several months while the military conducts an additional study of a policy change of this magnitude survives any standard of review. Indeed, Secretary Mattis made a similar decision in June 2017 by delaying the Carter policy until January 1, 2018, while the military continued to examine the issue, and neither the court below nor plaintiffs have ever suggested that his decision was unconstitutional.

The district court never grappled with this problem, other than to assume (incorrectly) that the current accession policy would necessarily remain. Add. 13. But even if that were true, the President's directive would still be constitutional given the deference due his assessment as Commander in Chief that abandoning that policy could "hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." Add. 24 (Mem. § 1(a)); *see, e.g.*, *Department of Navy v. Egan*, 484 U.S. 518, 529–30 (1988) ("'courts have traditionally shown the utmost deference to Presidential responsibilities' … in military and national security affairs" (citation omitted)).

The district court reached a different judgment only because it incorrectly applied intermediate scrutiny without the deference traditionally afforded military decisions. It justified this approach on the ground that the President's order lacked "evidence of considered reason or deliberation." Add. 18. But this suggestion that the President's concerns were baseless withers under scrutiny. The study underlying the Carter policy explicitly concluded that allowing transgender individuals to serve would limit deployability, impede readiness, and impose costs on the military; it simply dismissed these burdens as "negligible." Doc. 46-2 at 60-63, 67, 90, 91. And the Carter policy itself implicitly acknowledged that gender dysphoria or gender transition could impede military readiness by requiring applicants to demonstrate that they had been stable or had avoided complications for an 18-month period. In other words, the key difference between the longstanding accession policy and the Carter policy is the scope of the exception to the presumptive ban on accession by transgender individuals. Under the

former, a transgender individual was presumptively disqualified absent a waiver. Under the latter, a transgender individual was presumptively disqualified absent a demonstration of stability or avoidance of complications for 18 months. Plaintiffs' objection here thus reduces to a preference for one exception over another; put differently, they disagree with where the military "has drawn the line." *Goldman*, 475 U.S. at 510. But such policy decisions as to how to best ensure that medical standards are met, and where to draw the appropriate line, are matters for military discretion.[5]

b. The district court further erred in concluding that plaintiffs established a likelihood of success on their substantive due process and First Amendment claims. Add. 18-19. Although the district court committed the same errors with respect to these claims as it did with the equal protection one, these theories fail for additional reasons. With respect to substantive due process, the district court suggested that plaintiffs have a fundamental liberty right "to make decisions concerning bodily integrity and self-definition central to an individual's liberty," and that the accession directive interferes with such a right "by depriving them of employment and career opportunities." Add. 18-19. But there is no fundamental liberty right to serve in the

[5] Even if dispensing with deference were justified, the district court erred in applying intermediate scrutiny, *see, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227-28 (10th Cir. 2007) (heightened scrutiny does not apply to civilian classifications based on transgender status), and in ruling that the accession directive would unlikely survive even rational-basis review. In holding otherwise, the district court incorrectly relied on *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2002), which addressed a statutory claim rather than an equal protection one. *See* Add. 15-16. And if the accession directive can withstand intermediate scrutiny with deference, it can easily satisfy rational-basis review.

United States military. And contrary to the district court's conclusion, Add. 19, the accession directive is not a content-based regulation on speech. That directive does not prohibit individuals from expressing their gender identity or restrict the content of speech in any way; it simply requires disclosure of certain medical information.

II. The Remaining Factors Favor A Stay.

As explained, there is no basis for enforcing a preliminary injunction against the accession directive when none of the individual plaintiffs have even applied to access and, absent a stay, the government (and the public) will suffer irreparable harm. *See supra* Part I.C.2. That is particularly true where the district court misconstrued its injunction as preserving the status quo based on a misunderstanding that the Carter accession policy—which has never been implemented—had already "been in place for over a year." Add. 22. Instead, the current accession policy—and the Secretary of Defense's independent authority to defer revisions to that policy—is the status quo, and it has been for decades. Thus, the court's injunction upends that state of affairs by compelling the military to dramatically alter its longstanding policy without sufficient time for either thorough study or proper implementation. This is precisely the kind of situation where a stay is warranted to allow for effective appellate review *before* such drastic changes must occur.

CONCLUSION

The government respectfully requests that this Court enter an immediate administrative stay pending consideration of this motion or, as soon as possible, a stay pending appeal of the district court's preliminary injunction of enforcement of the accession directive.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,108 words. This Motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ Catherine H. Dorsey
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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2017, I filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Catherine H. Dorsey
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