No. 17-36009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,

Plaintiffs-Appellees,

STATE OF WASHINGTON,

Plaintiff-Intervenor-Appellee,

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
Case No. 2:17-cv-01297-MJP
The Honorable Marsha J. Pechman, District Judge.

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR ADMINISTRATIVE STAY AND MOTION FOR STAY PENDING APPEAL

Peter C. Renn
Natalie Nardecchia
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND. INC.
4221 Wilshire Blvd., Ste. 280
Los Angeles, CA 90010
(213) 382-7600

James F. Hurst, P.C.
Jordan M. Heinz
Scott Lerner
Vanessa Barsanti
Daniel Siegfried
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000

Counsel for Plaintiffs-Appellees

(Additional counsel listed on next page)

Additional Counsel

Camilla B. Taylor
Kara Ingelhart
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND. INC.
105 W. Adams, 26th Fl.
Chicago, IL 60603
(312) 663-4413

Tara L. Borelli
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND. INC.
730 Peachtree St., NE, Ste. 640
Atlanta, GA 30308
(404) 897-1880

Sasha Buchert
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND. INC.
1875 I St., NW 5th Fl.
Washington, DC 20006
(202) 740-0914

Carl Charles
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND. INC.
120 Wall St., 19th Fl.
New York, NY 10005
(212) 809-8585

Peter E. Perkowski
OUTSERVE-SLDN, INC.
445 S. Figueroa St., Ste. 3100
Los Angeles, CA 90071
(213) 426-2137

Derek A. Newman
Samantha Everett
NEWMAN DU WORS LLP
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

(Applications for attorneys not yet admitted forthcoming)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee Human Rights Campaign hereby files its corporate disclosure statement and certifies that Human Rights Campaign does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee Gender Justice League hereby files its corporate disclosure statement and certifies that Gender Justice League does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock. Gender Justice League further certifies that Gay City Health Project serves as the fiscal sponsor for Gender Justice League.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee American Military Partner Association hereby files its corporate disclosure statement and certifies that American Military Partner Association does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock.

INTRODUCTION

The thrust of the government's motion is that it will supposedly suffer irreparable harm if it is not permitted to continue discriminating against transgender people who wish to join the military. That claim is belied by the facts. After commencing an extensive process of deliberative review in July 2015, the military concluded in June 2016 that there was no basis for excluding transgender people from its ranks. The military then took steps over the course of the next year to prepare for the accession of transgender people by July 1, 2017, which was subsequently extended another six months to January 1, 2018. The military has thus collectively spent *years* studying the end of its policy of overt discrimination against transgender people who merely wish to serve their country on equal terms as others. As confirmed by military leaders directly involved in preparing for accessions, Defendants' belated claim that the most sophisticated military in the world cannot stop discriminating against a small minority group rings hollow.

The premise of Defendants' motion also hinges on another factual assumption never proven: that Secretary of Defense James Mattis would have deferred the accession of transgender people even if President Trump had never acted to purge them from the military. That factual showing is a necessary predicate for Secretary Mattis to exercise authority that is *independent* of President

Trump's action—which three federal district courts have enjoined as incurably tainted with profound constitutional violations. Defendants have failed to make any such showing. Whether because the government wishes to carry out the *post hoc* "study" mandated by President Trump, or because it improperly delayed implementation of January 1 accessions based on the study's preordained outcome, the motion reveals that the government's desired deferral of accessions is directly tied to the enjoined action by the President. Granting the motion would defeat the constitutional remedy required here: a preliminary injunction that returns Plaintiffs to the position they would have been in but for President Trump's exclusion of transgender people from military service ("the Ban"). In any event, the constitutional defects in the accession ban cannot be cured by merely having another government official re-authorize its extension, even if acting on a supposedly independent basis.

Defendants also fail to show any of the other requirements for a stay. The government cannot show that the district court abused its discretion in concluding that Plaintiffs were likely to succeed on the merits of their equal protection, due process, and First Amendment claims. Defendants wholly failed to carry their burden below of substantiating their proffered justifications for the Ban, and they cannot cure that deficiency by introducing evidence *after* the preliminary injunction has issued. A stay would also deny an entire class of Americans the

ability to serve their country on equal terms as others, a harm of enormous constitutional significance.

FACTUAL BACKGROUND

I. Background on Military Service by Transgender People

Transgender people have always served in the military, although they have had to serve in silence in the past. In July 2015, Secretary of Defense Ashton Carter ordered a working group of senior Department of Defense (DoD) personnel to identify practical issues related to transgender Americans serving openly and to develop a plan to address those issues and maximize military readiness ("Working Group"). SA28.[1] The Working Group considered the comprehensive advice of medical, personnel, and readiness experts, and a range of other individuals. SA28. The Working Group also commissioned the RAND Corporation to study the impact of allowing transgender individuals to serve openly. RAND found "no evidence" that allowing transgender people to serve openly would negatively impact unit cohesion, operational effectiveness, or readiness. SA30.

The Working Group concluded that barring service by transgender people "would harm the military by excluding qualified individuals based on a characteristic with no relevance to a person's fitness to serve." SA32. The Working Group, along with reviewing senior DoD personnel, ultimately concluded

[1] "SA" refers to Plaintiffs-Appellees' Supplemental Addendum.

that transgender individuals should be permitted to serve openly. SA32, 41.

On June 30, 2016, Secretary Carter issued a formal directive setting forth the policy "that service in the United States military should be open to all who can meet the rigorous standards for military service and readiness" and that "transgender individuals shall be allowed to serve in the military." Add. 32. The prior accession ban had treated transgender people irrationally (by excluding them from service based on a treatable condition that some transgender people experience) and inconsistently compared to non-transgender people with other curable conditions (who were not categorically barred from service). SA9-10. The military had thus excluded all transgender people from service even if they were mentally and physically capable of serving. *Id.* Secretary Carter's directive concluded that service by transgender people "is consistent with military readiness" and required that medical standards be updated to prevent disqualification solely based on transgender status. Add. 34. The standards require that the applicant demonstrate stability for 18 months following any medical treatment associated with gender transition. Add. 34-35.

The policy was designed to be implemented over the course of a year, with accessions of transgender troops to begin on July 1, 2017, which was subsequently extended on the eve of that deadline by six months to January 1, 2018. Add. 34. Each of the military services took steps to begin implementing the policy. SA23,

41-44, 58. Military leaders who oversaw the implementation of this policy attest that the services had nearly completed their preparation by January 2017, and that the military could readily have met the initial deadline of July 1, 2017, and certainly by the current date of January 1, 2018. SA23-25, 55-56, 58-59. Many medical personnel were trained for the accessions policy implementation on May 2, 2017. SA23.

II. President Trump's Ban on Military Service by Transgender People

On July 26, 2017, President Trump unexpectedly announced through a series of tweets that he would "not accept or allow transgender individuals to serve in any capacity in the U.S. Military." Add. 3. On August 25, 2017, the President issued a memorandum implementing this discriminatory policy (together with tweets, "the Ban"). Add. 24. In a complete reversal of the military's considered review and judgment, and Secretary Carter's directive, the Ban indefinitely bars the accession of transgender people into the military. The Ban also provides for the discharge of openly transgender service members and singles out the health care needs of transgender service members for adverse, discriminatory treatment.

III. Plaintiffs' Injuries from the Accessions Ban

Plaintiffs include nine individuals, three organizations, and the State of Washington. Add. 5. Of particular relevance to the proceedings here, Plaintiffs Ryan Karnoski, D.L., and Conner Callahan, united by their common desire to serve

our country, seek to pursue a military career. Add. 44, 56, 61. The accessions ban indefinitely closes their path forward to join the military. Plaintiff Staff Sergeant Catherine Schmid has served for twelve years in the Army and applied to become a warrant officer, but her application has been put on hold because of the accession ban, which not only excludes transgender people from enlistment but also from becoming officers. Add. 53.

IV. Procedural Background

On December 11, 2017, the district court enjoined the Ban in its entirety, including with regard to accessions. *See* Add. 22-23. The district court ruled that absent a preliminary injunction, Plaintiffs would continue to suffer injuries including deprivation of their constitutional rights, whereas Defendants "will face no serious injustice in maintaining the June 2016 Policy pending resolution of this action on the merits." *Id*. at 21. In opposing Plaintiff's preliminary injunction motion, Defendants did not argue or offer any evidence that they would be unprepared to meet the January 1 accessions deadline. On December 15, 2017, Defendants filed a motion for clarification or, alternatively, for a partial stay in the district court as to the accessions ruling. Mot. 1. Without awaiting the district court's ruling, Defendants filed the instant "emergency motion" with this Court.

ARGUMENT

I. Defendants Fail Meet the High Standard for a Stay Pending Appeal of a Preliminary Injunction.

Defendants' burden on this motion is heavy, both because they request the extraordinary remedy of a stay pending appeal, and because their appeal is of a preliminary injunction, which is subject to review for abuse of discretion.

A stay pending appeal "is an intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009). It is therefore "not a matter of right, even if irreparable injury might otherwise result." *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017). In determining whether to grant a stay, this Court considers (1) whether the government "has made a *strong showing* that [it] is likely to succeed on the merits, (2) whether the [government] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* (emphasis added).

The government's burden to show that it is likely to succeed on the merits of its appeal is in turn made higher by the standard of review this Court applies to orders granting preliminary injunctions. A district court order granting preliminary relief "will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). Rather, "unless

the district court's decision relies on erroneous legal premises," "the appellate court will reverse only if the district court abused its discretion." *Id.* "Review of an order granting or denying a preliminary injunction is therefore much more limited than review of an order involving a permanent injunction where all conclusions of law are freely reviewable." *Id.*

Defendants' burden to make a "strong showing" that its appeal is likely to succeed under these standards is thus a heavy one. Because the district court did not err in any event, Defendants' motion for stay should be denied.

II. Defendants Fail to Make the Required Strong Showing of a Likelihood of Success on the Merits to Justify a Stay.

A. Defendants Fail to Show an Independent Basis for Deferring Accessions, Which Would Be Unconstitutional In Any Event.

The premise of Defendants' motion is that Secretary Mattis retains authority independent of the Ban to defer the accession of transgender people into the military beyond January 1, 2018. But their motion and accompanying declaration make clear that that the deferral they seek grows directly out of the Ban, which the district court correctly enjoined. Their declaration reveals that a deferral would not serve the purpose of preparing for accessions but instead serve the "study" mandated by President Trump. Add. 39 (requesting delay because "the study directed by the President remains ongoing"). Similarly, any supposed administrative inconvenience to the government from proceeding with accessions

is a product of the Ban itself. Add. 42 (admitting that the government deferred preparing for accessions because of President Trump's actions on August 25, 2017). Because Plaintiffs are entitled to a preliminary injunction that returns them to the status quo ante, Defendants cannot rely on President Trump's actions—directly or indirectly—as a basis for perpetuating discrimination in accessions.

Furthermore, no government official has the authority to perpetuate an unconstitutional policy. Certainly, if the President lacks that authority, so too do his subordinates, including the Secretary of Defense. The district court correctly held that the exclusion of transgender Americans from military service is subject to—and fails—heightened scrutiny under Plaintiffs' equal protection, due process, and First Amendment claims. Add. 15-20; *see infra* Section II.C. Indeed, the district court held that the Ban could not survive even rational basis review. Add. 18. Other federal district courts have come to the same conclusion, holding that the Ban, including its discriminatory accession policy, is unconstitutional. *See Doe v. Trump*, No. 17-1597, 2017 WL 4873042, at *28-30 (D.D.C. Oct. 30, 2017) (holding that the Ban fails intermediate scrutiny); *Stone v. Trump*, No. 17-2459, 2017 WL 5589122, at *15-16 (D. Md. Nov. 21, 2017) (holding that the Ban is "unlikely to survive even a rational review").

The policy against accessing transgender troops would be no less unconstitutional were it to derive from Secretary Mattis, rather than the President

himself. Although Defendants attempt to cast the district court's decision as revolving solely around the President's tweets announcing the Ban, the district court held that the reasons offered by the government for "excluding transgender individuals from the military are not merely unsupported, but are actually contradicted by the studies, conclusions, and judgment of the military itself." Add. 16 (brackets omitted). Those defects run to the policy itself. For instance, the findings and conclusions of the Working Group and the RAND study would remain unchanged, even if the accessions ban were simply re-adopted under the authority of another government official. This undermines Defendants' assertion that the district court's "justifications for enjoining the accession directive concern the President and his memorandum *alone*." Mot. 8 (emphasis added). Defendants' argument that the status quo ante would constitutionally permit Secretary Mattis to continue extending the accessions ban, even if he were exercising "independent" authority, is therefore meritless.

B. The District Court Correctly Held That Plaintiffs Have Standing to Challenge the Accessions Ban.

Defendants also argue that Plaintiffs lack standing to challenge the accessions ban. But, as the district court correctly recognized, Plaintiffs Karnoski, D.L., and Callahan all face "a credible threat of being denied opportunities to compete for accession on equal footing with non-transgender individuals," and Plaintiff Schmid has likewise "been refused consideration for appointment as a

warrant officer and faces a credible threat of being denied opportunities for career advancement." Add. 7-8.

Defendants speculate that none of the individual Plaintiffs would be able to meet proposed criteria for accession, including that an applicant have completed medical treatment associated with gender transition 18 months before joining the military, unless a waiver is granted. First, courts have long recognized that loss of the ability to compete on equal terms as others constitutes injury. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("denial of equal treatment results from the imposition of the barrier, not the ultimate inability to obtain the benefit"). Thus, the ultimate outcome of Plaintiff Schmid's application to become a warrant officer, for example, does not defeat standing. Second, even if it were relevant, Defendants' claim that none of the Plaintiffs could satisfy the proposed accession criteria is plainly refuted by the record. For instance, Plaintiff Callahan testified that he "[took] clinically appropriate steps to transition, which were completed in 2015." Add. 62.

Defendants also argues that Plaintiffs lack standing to the extent that any of them have not formally applied to join the military. But the law does not require a futile gesture. That is why a potential job applicant suffers cognizable harm from a discriminatory hiring practice even if the applicant does not apply for the job in

question. *See Int'l Broth. of Teamsters v. U.S.*, 431 U.S. 324, 366 (1977) (loss of ability to compete on equal footing constitutes injury, even if individuals do not apply and "subject[] themselves to personal rebuffs"); *Gratz v. Bollinger*, 539 U.S. 244, 261 (2003) (finding injury in fact to challenge affirmative action policy even where plaintiff had not yet applied to university). Indeed, some of the Plaintiffs have even approached military recruiters—only to be rebuffed. For instance, Plaintiff D.L. previously contacted a recruiter, but when D.L. disclosed that he was transgender, the recruiter stopped communicating with him. Add. 57.

Furthermore, independent of any particular Plaintiff's ultimate accession into the military, Plaintiffs also suffer injuries from being branded and stigmatized as presumptively unfit to serve their country, as well as from being penalized for expressing their gender identity. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 482-83 (9th Cir. 2014) (recognizing dignitary injury as "itself a harm of great constitutional significance"); *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (loss or chilling of First Amendment rights "for even minimal periods of time unquestionably constitutes irreparable injury"). Defendants insist that stigmatic harms are only cognizable for those personally denied equal treatment; but that precisely describes the Plaintiffs, whose paths into the military have been blocked by Defendants' actions. Defendants' cited authority is not to the contrary. *Cf. Allen v. Wright*, 468 U.S. 737, 755 (1984)

(holding that parents of children attending *public* schools could not challenge tax treatment of *private* schools with racially discriminatory practices). Indeed, the Supreme Court has recognized that stigmatic injury caused by unequal treatment is "one of the most serious consequences of discriminatory government action." *Id.*

C. Defendants Fail to Make a Strong Showing They Are Likely to Succeed in Defending the Constitutionality of the Accession Ban.

Remarkably, even though Defendants failed to offer a shred of factual support to justify any aspect of the Ban in opposing a preliminary injunction, they nonetheless insist the district court abused its discretion and that they have demonstrated a strong showing of succeeding on the merits of their appeal. To the contrary, the district court correctly found that Plaintiffs showed a likelihood of success on the merits of their equal protection, due process, and First Amendment claims, each of which independently requires heightened scrutiny.

First, the district court correctly held that discrimination against transgender individuals requires heightened scrutiny because it necessarily discriminates based on sex, requiring intermediate scrutiny at a minimum. Add. 15; *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (holding that an attack against a transgender individual was based on sex, and that discrimination based on a perceived failure "to conform to socially-constructed gender expectations" is sex

discrimination).[2] The government thus had the burden of demonstrating an "exceedingly persuasive justification," which it failed to carry. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

Second, Defendants pay short shrift to the district court's substantive due process ruling, merely asserting that there is no fundamental right to serve in the military. But that is a straw man argument because the right at issue relates to the liberty and autonomy all individuals enjoy to define who they are on matters central to a person's identity, without undue government interference. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) ("The Constitution promises liberty to all within its reach, a liberty . . . to define and express their identity."). As the district court explained, the Ban "directly interferes" with this right by penalizing Plaintiffs for living openly as the men and women that they are and "depriving them of employment and career opportunities." Add. 19. This Court has similarly recognized that the discharge of a lesbian service member impermissibly burdened her liberty interest in having an intimate relationship with a person of the same sex and thus required heightened scrutiny. *Witt v. Dept. of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008).

Third, Defendants deny that the accessions ban is a content-based regulation

[2] Defendants attempt to distinguish *Schwenk* as involving a statutory claim, but statutory discrimination claims and equal protection claims "address the same wrong: discrimination." *Bator v. State of Hawaii*, 39 F.3d 1021, 1028 n.7 (9th Cir. 1994); *see also Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (applying *Schwenk* to equal protection claim).

of speech and insist that it merely requires disclosure of medical information. But that is belied by plain language of President Trump's memorandum, which specifically prohibits "*openly* transgender individuals from accession." Add. 24 (emphasis added); *cf. Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 926 (C.D. Cal. 2010) (holding that "Don't Ask, Don't Tell" facially discriminated against speech based on content, because "[h]eterosexual members are free to state their sexual orientation . . . while gay and lesbian members of the military are not."), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011). Because the Ban facially discriminates against speech based on its content, the district court did not err in holding that the First Amendment claim also required heightened scrutiny.

The district court correctly found that Defendants failed to show that there was even a rational, let alone substantial, relationship between the Ban and the government's asserted interests. Add. 16-18. Defendants failed to offer any evidence whatsoever in support of their asserted justifications based on military readiness, cost, or cohesion, and they cannot rectify that factual deficiency on appeal. Indeed, Defendants even recognize that the RAND study found any effects on these interests to be "negligible," yet inexplicably contend this somehow supports their position. Defendants also attempt to characterize the proposed accessions policy as simply "drawing the line" at a different place than the current

accessions ban, from which waivers are purportedly available, Mot. 17-18, but the two policies could not be further apart. The record shows that the current accessions ban is categorical in practice, because such waivers are never actually granted. SA9, 53.

The district court also did not err in holding that the Ban was not entitled to deference merely because it pertained to military affairs. The government is not "free to disregard the Constitution when it acts in the area of military affairs." *Rostker v. Goldberg,* 453 U.S. 57, 67 (1981). The district court specifically examined and rejected Defendants' reliance on *Rostker*, where the Supreme Court upheld a policy requiring only male citizens to register for the draft, which was adopted after extensive hearings, testimony, and debate. *Rostker v. Goldberg,* 453 U.S. 57, 73-74 (1981). The district court correctly found that such considered review did not precede this policy change. Add. 18. Indeed, the military's considered judgment is that a discriminatory policy actually *undermines* readiness. Add. 16 ("prohibiting open service would have negative impacts including loss of qualified personnel, erosion of unit cohesion, and erosion of trust in command").

Furthermore, even in cases where deference is warranted, deference does not suspend the application of heightened scrutiny. *See Rostker*, 453 U.S. at 69 (declining "any further 'refinement' in the applicable tests" for sex discrimination based on the military context); *Witt*, 527 F.3d at 821 (noting that "deference does

not mean abdication," and holding that even congressional findings failed to show that application of "Don't Ask, Don't Tell" satisfied heightened scrutiny). In sum, the district court correctly applied heightened scrutiny and found that Defendants failed to meet its burden under that standard.

D. The District Court Did Not Abuse Its Discretion in Granting Facial Relief to Redress a Facially Unconstitutional Policy.

Next, Defendants argue that the district court erred in facially enjoining the accessions ban, rather than enjoining its enforcement only as to the individual Plaintiffs. However, the district court had both the authority and obligation to afford relief commensurate to the full scope of the constitutional injuries at issue.

"[T]he scope of injunctive relief is dictated by the extent of the violation established." *Hawaii v. Trump*, 859 F.3d 741, 786 (9th Cir. 2017) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)), *vacated as moot*, No. 16-1540 (Oct. 24, 2017). When confronted with a facially unconstitutional scheme like the Ban, the appropriate remedy is not merely to surgically excise a handful of individuals from its reach; it is to enjoin enforcement of the scheme as a whole. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (refusing to stay injunctions to the extent they "covered not just [plaintiffs], but parties similarly situated to them" with a bona fide relationship to person or entity in the U.S.); *Hawaii*, 859 F.3d at 787-88 (rejecting attempt to limit injunctive relief to only the named plaintiffs); *Latta*, *v. Otter*, 771 F.3d 456, 476-77 (9th Cir. 2014)

(requiring injunctive relief for all otherwise qualified same-sex couples wishing to marry, not merely the named plaintiffs); *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981) (recognizing that challenged provisions "were not unconstitutional as to [plaintiff] alone, but as to any to whom they might be applied"); *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (preliminarily enjoining executive action regarding sanctuary jurisdictions that is "unconstitutional on its face, and not simply in its application to certain plaintiffs"); *Ariz. Dream Act Coal. v. Brewer*, 81 F. Supp. 3d 795, 810 (D. Ariz. 2015) (granting injunctive relief to all DACA recipients—particularly given harms faced by members of an organizational plaintiff—and rejecting the government's attempt to narrow relief to the named plaintiffs), *aff'd*, 855 F.3d 957 (9th Cir. 2017). To require otherwise would not only result in needless judicial inefficiency but also leave pervasive constitutional violations unremedied.

Defendants also argue that "standing is not dispensed in gross," and that parties must establish standing "separately for each form of relief sought." Mot. 9 (quoting *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017)). But *Town of Chester* held only that "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint," *e.g.,* damages or injunctive relief, 137 S. Ct. at 1650-51, and did not purport to limit district courts' authority to fully enjoin unconstitutional policies.

The fact that the constitutional violation here occurs in the military context does not warrant narrowing the scope of the preliminary injunction. Defendants' cited authority is not to the contrary, because the plaintiff there "sought only to have *his discharge* voided and to be reinstated," whereas Plaintiffs here seek facial relief. *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994) (emphasis added); *cf. Log Cabin Republicans*, 716 F. Supp. 2d at 888 (granting facial relief in facial challenge to "Don't Ask, Don't Tell" Act). The district court did not abuse its discretion in enjoining the Ban in full.

III. Defendants Fail to Show Irreparable Harm to the Government, While A Stay Would Harm Plaintiffs and the Public Interest.

Defendants cannot meet their burden of showing that they will suffer irreparable harm absent a stay of the preliminary injunction as to accessions. Meanwhile, a stay would harm Plaintiffs and the public interest.

First, Defendants claim that an accessions implementation date of January 1 would impose unspecified burdens on the military, but Defendants concede that "implementation efforts" have already been made. Mot. 13. Indeed, Defendants have studied this issue since 2015, and they have had since June 2016 to undertake preparation, training, and implementation of the proposed accession policy.[3] Defendants' last-minute claim to be unprepared—nearly 18 months after the policy

[3] Defendants have thus already incurred implementation costs, a purported "harm" they face. Their claim regarding "'duplicative' implementation costs" if the military implements an unspecified "new policy" is unavailing, Mot. 14, as Defendants have not shown what that new policy would be.

at issue was announced—is contradicted by the testimony of former service secretaries and a psychiatrist who directly trained medical personnel on the accession policy; they attest that the services had nearly completed preparation to access transgender service members as of January 2017. SA23-25, 55-56, 58-59, 70-84. Tellingly, in a recent statement, DoD publicly announced that "it will begin processing transgender applicants for military service on January 1, 2018." SA69. The military is thus preparing for accessions by January 1 and is able to do so.

Defendants' sole declaration in support of a stay (Add. 37)—which they failed to submit when opposing the preliminary injunction motion—is a far cry from evidence "sufficient to establish a likelihood of irreparable harm." *Herb Reed Enterprises*, *LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1251 (9th Cir. 2013). To begin, the district court cannot have abused its discretion by failing to consider an argument or evidence that Defendants never timely presented—and therefore waived. *See K.W. ex. rel. D.W. v. Armstrong*, 789 F.3d 962, 974 (9th Cir. 2015) (holding that Defendant waived irreparable harm argument "by failing to raise it before the District Court"). Furthermore, the declaration ignores the fact that substantial implementation has taken place and fails to explain what work remains in order to begin accessions by January 1. The declaration includes speculative assertions about the "possibility" of harm—and, even then, only if the government *chooses* not to devote adequate "guidance, resources, and training" to

accessions—which does not establish the requisite *likelihood* of harm.[4] Add. 42. The district court in *Doe* identified many of these same shortcomings in the government's declaration when denying Defendants' motion to stay the preliminary injunction as to accessions. SA62-63.

Second, Defendants' attempt to portray accession screening for transgender troops as "multifaceted" and involving "a complex medical condition" is unfounded. Mot. 14. The "accessions criteria for transgender people are straightforward" and "no more complex than other accessions criteria." SA23-24. The proposed accession policy—approximately one page long—sets forth the requirement that transgender individuals must demonstrate that they have been stable for 18 months following medical treatment associated with gender transition. Add. 34-35. Gender dysphoria is also a medical diagnosis that "medical professionals should already be familiar" with given the military training already provided, and it thus involves no "unique complexities or burdens." SA23-24.

Third, under the accessions policy, military service is open to "all who can meet the rigorous standards for military service and readiness." Add. 32. There is accordingly no permissible basis for excluding transgender people who can already meet these "rigorous" standards. Of course, as the district court found, "*all* service members might suffer from medical conditions," but this does not justify excluding

[4] Similarly, Defendants' claim that staff rotations in "the past several months" prevent implementation of the accessions policy is a non-starter, Add. 42, as the military system "anticipates routine staff turnover," SA24.

all transgender people from military service. Add. 17 (italics in original).

In stark contrast to Defendants' bare assertions of harm, the district court found that Plaintiffs face a variety of irreparable harms, including "denial of career opportunities," "stigmatic injury, and impairment of self-expression." Add. 12. Plaintiff Schmid has been refused consideration for appointment as a warrant officer. Add. 7. Plaintiffs Karnoski, D.L., and Callahan are also denied opportunities to compete for accession on equal footing with others. *Id*. These are not "abstract" injuries for Plaintiffs, but rather injuries that "deprive[] them of dignity," label them as "innately inferior," "marginalize" and stigmatize them, and communicate to them (and everyone else) that transgender Americans are "second-class citizens." Mot. 15; Add. 8; Add. 47; SA56.

These irreparable injuries cannot outweigh any purported administrative burden that compliance with the injunction could impose upon Defendants. Add. 12. If a stay is granted, Plaintiffs will continue to suffer injuries, including deprivation of their constitutional rights. Add. 21. "[I]t 'is always in the public interest to prevent the violation of a party's constitutional rights." Add. 22 (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)); *see also Hernandez v. Sessions*, 872 F.3d 976, 1000 (9th Cir. 2017) (irreparable harm "through a likely unconstitutional process far outweighs the minimal administrative burdens to the government of complying with the injunction while

this case proceeds"). For all these reasons, the balance of equities and public interest tips decidedly in Plaintiffs' favor and against a stay.

CONCLUSION

The motion should be denied.

Dated: December 19, 2017

Respectfully submitted,

Camilla B. Taylor
Tara L. Borelli
Peter C. Renn
Natalie Nardecchia
Sasha Buchert
Kara Ingelhart
Carl Charles
LAMBDA LEGAL DEFENSE AND EDUCATION FUND. INC.

By: s/ Peter C. Renn
Peter C. Renn

James F. Hurst, P.C.
Jordan M. Heinz
Scott Lerner
Vanessa Barsanti
Daniel Siegfried
KIRKLAND & ELLIS LLP

Peter E. Perkowski
OUTSERVE-SLDN, INC.

Derek A. Newman
Samantha Everett
NEWMAN DU WORS LLP

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,196 words. This brief complies with the typeface and the type style requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5)-(6) because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

s/ Peter C. Renn
Peter C. Renn

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 19, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Peter C. Renn
Peter C. Renn