NO. 17-36009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,

Plaintiffs-Appellees,

STATE OF WASHINGTON,

Intervenor-Plaintiff-Appellee,

v.

DONALD J. TRUMP, President of the United States, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE
No. 2:17-cv-01297
The Honorable MARSHA J. PECHMAN
United States District Court Judge

STATE OF WASHINGTON RESPONSE TO EMERGENCY MOTION FOR ADMINISTRATIVE STAY AND MOTION FOR STAY PENDING APPEAL

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I. INTRODUCTION

Defendants ask this Court to grant the extraordinary relief of an emergency stay, but their motion presents neither a true emergency nor even a true stay request. The Court should deny it.

Defendants ask this Court for a stay based on something that has not happened and may never happen. They want the Court to hold that *if* Secretary of Defense James N. Mattis seeks to delay accession of transgender individuals to the military beyond January 1, and *if* the district court holds that its injunction prevents such an order, then "this Court should stay that aspect of the injunction." Defs.' Emergency Motion (Mot.) at 7. But neither event has occurred. Defendants request an advisory opinion, not a stay.

There is also no emergency. Three courts have now enjoined President Trump's irrational, discriminatory policy change, which goes against the considered advice of the military itself. Though the first ruling was over six weeks ago, Defendants waited until late last week to seek an emergency stay. In the meantime, Defendants issued detailed guidance to the military on how to comply with the court rulings, guidance that will come as no surprise given that the military has been preparing to allow accession of transgender individuals for 18 months.

Even if Defendants sought a true stay and there was a true emergency, their motion would fail, because they cannot satisfy any part of the stay test. They are unlikely to succeed on appeal, will suffer no irreparable injury absent a stay, and are decisively on the wrong side of the equities and public interest. The Court should reject their motion.

II. BACKGROUND

In 2016, after a lengthy and extensive review process, the Department of Defense (DoD) determined that there was no basis for barring transgender individuals from accessing into the military or serving openly. Add. 4-5, 31-33. Based on this review and the formal recommendations that resulted, Secretary of Defense Ash Carter issued a directive declaring that "service in the United States military should be open to all who can meet the rigorous standards for military service and readiness." *Id.* at 32. This determination was made after a military-commissioned study concluded that open service by transgender service members did not have a negative impact on military effectiveness, readiness, or unit cohesion. WA Add. 56-167. On the contrary, the military is harmed by not allowing every qualified individual to serve. *Id.*; *see also* WA Add. 171-72. The directive set July 1, 2017, as the deadline by which the military would allow

accession by openly transgender recruits, Add. 34, which Secretary of Defense Mattis later delayed to January 1, 2018, Add. 30.

In the midst of this process, on July 26, 2017, President Trump made a surprise Twitter announcement that transgender individuals would be barred from serving in the military "in any capacity" (hereinafter the "Ban"). Add. 3. On August 25, 2017, President Trump issued a Memorandum titled "Military Service by Transgender Individuals," which provided specific directives for the military regarding accession. Add. 24-26. The Memorandum directs the military to "return" to its pre-2016 policy, which would bar the accession of transgender individuals, permit the discharge of openly transgender service members, and prohibit the funding of transition-related surgery. *Id.* Following the Memorandum, Secretary Mattis issued interim guidance allowing openly transgender service members to continue service while the military performed research and developed a plan to implement the Ban. Add. 27-28.

Four lawsuits, including this one, were filed challenging the constitutionality of the Ban. *See Doe 1 v. Trump*, No. 17-1597 (CKK) (D.D.C. Aug. 9, 2017); *Stone v Trump*, No. MJG-17-2459 (D. Md. Aug. 8, 2017); *Karnoski v. Trump*, No. 2:17-cv-1297-MJP (W.D. Wash. Aug. 28, 2017); *Stockman v. Trump*, No. 17-cv-1799-JGB-KK (C.D. Cal. Sept. 5, 2017). District

Courts for the Districts of Columbia, Maryland, and Western Washington issued preliminary injunctions suspending enforcement of the Ban in whole or in part. Add. 1-23; *Doe 1 v. Trump*, 2017 WL 4873042 (D.D.C. Oct. 30, 2017); *Stone*, 2017 WL 5589122 (D. Md. Nov. 21, 2017).

Preliminary injunctions have issued in three of the cases, and Defendants have sought emergency administrative stays of the portions of the injunctions covering the accession Ban.[1] [2] The first emergency motion was filed on December 11, 2017, almost six weeks after the District Court for the District of Columbia issued its preliminary injunction requiring Defendants to allow accession of transgender individuals into the military starting January 1, 2018. *See* Mot. for Administrative Stay and Partial Stay Pending Appeal, No. 1708433, *Doe v. Trump, et. al.*, No. 17-5267 (D.C. Cir. Dec. 11, 2017).

On December 8, 2017, three days before first moving for emergency appellate relief, the DoD issued "Policy Memorandum 2-5, Transgender Applicant Processing." WA Add. 43-49. The Policy is the DoD's directive and

[1] Defendants have not sought to stay other provisions of the injunctions, including provisions preliminarily enjoining the discharge of current transgender service members or the refusal to fund certain medical care. *See* Mot. at 2 n.1.

[2] Concurrent with this emergency motion, Defendants filed a request for a stay in the district court making the same arguments and requesting the same relief. Defendants noted that motion for December 29, 2017.

guide for accessing transgender individuals into the military starting January 1, 2018. *Id.* The Policy sets forth DoD accession standards and provides guidance for recruiters, the United States Military Entrance Processing Command (USMEPCOM), and individual Military Entrance Processing Stations (MEPS). *Id.* at 43. The Policy also provides directives for MEPS medical departments regarding accessing transgender individuals into military service. *Id.* at 46-48. In all, the Policy "establishes standard operating procedures and specific processing guidance that will be applied across the command" and supersedes any USMEPCOM or MEPS "policy or guidance inconsistent" with the Policy. *Id.* at 43. All military recipients are to implement the "mandatory" standard, "effective January 1, 2018." *Id.*

III. ARGUMENT

A. Defendants' Stay Motion Is Premature and Procedurally Improper

Defendants do not seek to stay the district court's injunction of "the change in policy announced by President Trump on Twitter and in his Presidential Memorandum." Add. 14. Instead, Defendants rest their emergency stay motion on the possibility that Secretary Mattis may exercise his "independent authority" to issue a new directive to again "defer[] implementation of the Carter policy." Mot. at 7. Emergency relief based on

hypothetical future action is premature, procedurally improper, and should be denied.

As a preliminary matter, it is unclear why Secretary Mattis would have the authority to supplant the Presidential Memorandum with his own judgment about a more-appropriate, "limited" version of the accession Ban. *Cf.* Mot. at 1. The President has unambiguously directed that Secretary Mattis "shall" maintain the Ban indefinitely, "until such time as the Secretary of Defense . . . provides a recommendation to the contrary that *I* find convincing." Add. 25 (emphasis added). Defendants nowhere explain how this directive is anything other than binding on Secretary Mattis, or where the Secretary locates the authority to ban accession for some "limited period" other than the indefinite period directed by the President. *Compare* Mot. at 9, *with* Add. 27 (Secretary Mattis's interim guidance confirming that "DoD will carry out the President's policy and directives"). There is simply no support for Defendants' notion that the Defense Secretary may make an "independent decision" that contradicts a Presidential directive. Mot. at 8.

Even assuming Secretary Mattis has the authority to re-tool Presidential policy, he has not exercised it. The basis for Defendants' emergency motion is a theoretical exercise of discretion that the Secretary should not be enjoined "from

making" between now and January 1. Mot. at 8. Should Secretary Mattis issue a supplemental directive, Defendants may ask the district court to stay (or modify) its preliminary injunction. *See* Fed. R. App. P. 8(a) (application for stay "must ordinarily" be made in the first instance in the district court; a motion to the appellate court must show either that moving first in the district court would be "impractical" or that the district court denied the motion or "failed to afford the relief requested"); *see* Fed. R. Civ. P. 62(c) (allowing district court to "suspend, modify, restore, or grant an injunction" while an appeal is pending).

The district court is well-equipped to evaluate its injunction in light of any new factual developments. *See, e.g.*, *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1124 (9th Cir. 2005) (court may modify preliminary injunction to "relieve inequities that arise after the original order") (quoting *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 337 (3d Cir. 1993)); *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000) ("revision or dissolution" of injunction may be warranted by "significant change in facts or law"). This Court should reject Defendants' attempt to leapfrog the district court and obtain a stay based on action that Secretary Mattis has not taken, and may never take.

B. Defendants Do Not Meet The Extraordinary Burden to Obtain a Stay

A stay pending appeal is available "only under extraordinary circumstances." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers). A stay is an "intrusion into the ordinary processes of administration and judicial review" and "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted); *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017), *cert. denied sub nom. Golden v. Washington*, No. 17-5424, 2017 WL 3224674 (U.S. Nov. 13, 2017). A stay is an "exercise of judicial discretion," and the party requesting a stay bears the burden of showing that the circumstances of the particular case justify an exercise of that discretion. *Nken*, 556 U.S. at 433-34; *Washington*, 847 F.3d at 1164.

In seeking a stay, Defendants bear the heavy burden of showing (1) a strong likelihood of success on the merits, (2) the likelihood of irreparable injury if relief is not granted, (3) a balance of hardships favoring Defendants, and (4) that reinstating the Ban is in the public interest. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). In assessing these factors, this Court reviews the district court order for abuse of discretion. *Am. Hotel & Lodging Assoc. v. Los Angeles*, 834 F.3d 958, 962 (9th Cir. 2016). Review is "limited and deferential, and does

not extend to the underlying merits of the case." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). "If the underlying constitutional question is close" the Court "should uphold the injunction and remand for trial on the merits." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664-65 (2004). The district court was well within its discretion to issue a nationwide preliminary injunction, and Defendants cannot make any of the necessary showings to stay it.

1. The Military Service Ban Is Unconstitutional and Defendants Cannot Show a Strong Likelihood of Success on the Merits

Defendants argue that Washington lacks standing to challenge the accession Ban, and argues that the Ban is constitutional as long as the Court applies an "appropriately deferential standard of review." Mot. at 16-17, 18. These arguments fail, and the district court correctly rejected them. Add. 11-12, 15-19.

a. Washington has standing to challenge the Ban

The district court found that Washington has standing to protect its sovereign interests and its residents from the harms triggered by the Ban. Add. 11-12. Defendants' claims to the contrary are meritless.

(1) Washington has standing to protect its sovereign interests

The accession Ban injures Washington's sovereign interests in protecting its territory and maintaining its antidiscrimination laws. WA Add. 40-42. A state has a sovereign interest in "preserv[ing] its sovereign territory." *Massachusetts v. EPA*, 549 U.S. 497, 518-19 (2007) (affirming that states have an "independent interest" in protecting the natural environments and resources within the state's boundaries) (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)).

The Washington National Guard is an integral part of Washington's emergency preparedness and disaster recovery planning and response, as well as a member of Washington's militia. WA Add. 40-42. Washington relies heavily on its National Guard to prevent and minimize damage caused by natural disasters. *Id.* Between 2007 and September 2017, Washington deployed its National Guard eight times to respond to emergencies including forest fires, flooding, and to provide rescue services in communities devastated by landslides. WA Add. 41. Recruitment for the Washington National Guard is subject to DoD policies governing accession into military service, including the accession Ban. WA Add. 42.

The Ban excludes transgender Washingtonians from the pool of candidates who can join the Washington National Guard, diminishing the number of individuals eligible to serve in emergency circumstances when Washington needs assistance the most. Further, implementing a discriminatory policy will discourage non-transgender individuals from serving in the Washington National Guard as they may favor working for an inclusive and nondiscriminatory employer. The Washington National Guard cannot afford to lose any potential qualified service members or applicants as each lost Guard member negatively impacts the State's ability to respond to and mitigate harms to its territory.

In addition to protecting the Washington National Guard, Washington has a sovereign interest in maintaining and enforcing its longstanding anti-discrimination laws. *See* Wash. Rev. Code § 49.60.010 (legislative finding that discrimination "menaces the institutions and foundation of a free democratic state"); WA Add. 40. "[T]he exercise of sovereign power . . . involves the power to create and enforce a legal code; both civil and criminal[.]" *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982). The accession Ban infringes on this core sovereign interest by permitting discrimination against Washingtonians. Even worse, the Ban requires Washington to discriminate

against *its own people* by forcing Washington to bar transgender people from joining its National Guard. *Contra* Wash. Rev. Code §§ 49.60.030; 49.60.040(26); 49.60.180 (guaranteeing a civil right to be free from sex or gender identity discrimination, including in employment). By permitting and even requiring discrimination, the accession Ban impairs Washington's unique interest in making and enforcing its civil rights protections. Washington has sovereign standing.

(2) Washington has standing to protect its residents against Defendants' facially discriminatory policy

Washington is home to approximately 60,000 active, reserve, and National Guard members, approximately 45,000 of whom are active duty service members. WA Add. 213. Each of these Washingtonians works for the military and is part of an organization that seeks to engage in discrimination against transgender individuals. As long as the accession Ban is in place, each of these Washington service members is impacted—regardless of whether he or she is transgender—because their service is governed by a policy that targets their colleagues and teaches them that the military is willing to discriminate against its own.

Washington is also home to approximately 32,850 transgender adults.[3] If the Ban is reinstated, each will be subject to a facially discriminatory government policy that singles them out for disfavored treatment. As such, the Ban subjects thousands of Washington residents to discriminatory stigma and restricted employment opportunities. *See* WA Add. 182-83, 188-92.

The Supreme Court has recognized that states have standing as *parens patriae* to protect residents from "the harmful effects of discrimination." *Snapp*, 458 U.S. at 609. Indeed, the Court held that protecting its residents from overt federal discrimination is squarely a state concern because the "Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils." *Id.* Here, the accession Ban clearly harms the "the health and well-being—both physical and economic—of [Washington] residents." *Snapp*, 458 U.S. at 607. This threat to Washingtonians' well-being is sufficient injury to confer *parens patriae* standing on Washington. *Id.* at 601-04 (explaining that "*parens patriae* is inherent in the supreme power

[3] *See* Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?*, The Williams Institute, June 2016, at 4, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf (last visited Dec. 19, 2017).

of every State . . . often necessary . . . for the prevention of injury to those who cannot protect themselves"). Washington may challenge the Ban.

b. The accession Ban violates Equal Protection

The district court correctly determined that "the policy distinguishes on the basis of transgender status, a quasi-suspect classification, and is therefore subject to intermediate scrutiny." Add. 15 (citing *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001)). In arriving at this conclusion, the district court followed clear precedent that gender discrimination, including discrimination based on a "socially-constructed gender expectation," is a form of sex discrimination. *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989)). *See also Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1048 (7th Cir. 2017) ("sex discrimination includes discrimination against a transgender person for gender nonconformity") (citation omitted); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (holding that "discrimination against a transgender individuals because of her gender-nonconformity is sex discrimination").

To prevail in their defense of the Ban's sex-based discrimination, Defendants will need to show an "exceedingly persuasive justification," serving "important governmental objectives," and that "the discriminatory means

employed" are "substantially related to the achievement of those objectives." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982); *United States v. Virginia*, 518 U.S. 515, 531 (1996). Defendants establish no likelihood—let alone a strong likelihood—of making this showing.

The district court rejected Defendants' bald assertions that allowing transgender individuals to join the military will harm military effectiveness, reduce unit cohesion, or impair military resources. Add. 16. Like other courts to consider them, the court below concluded that Defendants' proffered justifications were "not merely unsupported, but [are] actually *contradicted* by the studies, conclusions, and judgment of the military itself." *Id.* (quoting *Doe 1 v. Trump*, 2017 WL 4873042, at *30). The district court also noted that the military "concluded that *prohibiting* open service would have negative impacts including loss of qualified personnel, erosion of unit cohesion, and erosion of trust in command." *Id.*

Now, Defendants bring this Court the same threadbare assertions to this Court, which should reject them for the same reasons as the court below. A discriminatory policy that undermines the very interests it seeks to protect cannot be "substantially related" to important government objectives. *Hogan*, 458 U.S. at 723-24.

Recognizing that their arguments fail intermediate scrutiny, Defendants argue that the district court erred by applying any form of scrutiny at all. Mot. at 16-17. Defendants argue that the Court owes deference to President Trump's assessment, as Commander in Chief, that allowing open service by transgender individuals will hinder military effectiveness. Mot. at 17. The cases Defendants rely on undercut their position that the Ban may evade meaningful review.

In each case Defendants cite, courts deferred to well-reasoned policies or practices developed by military experts or the Legislature. *See Rostker v. Goldberg*, 453 U.S. 57, 74 (1981) (noting that the decision to exempt women from registration was not the accidental by-product of a traditional way of thinking about females but instead was the result of lengthy legislative consideration with a clearly expressed purpose and intent); *Goldman v. Weinberger*, 475 U.S. 503, 507 (noting that courts should give "deference to the professional judgment of military authorities concerning the relative importance of a particular military interest"); *Dept. of Navy v. Egan*, 484 U.S. 518, 527 (1988) (deferring to a longstanding military information and staffing classification system and noting the statutory scheme out of which the system arose).

The facts here are the polar opposite of *Rostker*, *Goldman*, and *Egan.* In issuing the Ban, President Trump ignored the multi-year deliberative process performed by military experts and civilian researchers regarding open military service by transgender individual. Add. 17-18. Instead, and contrary to the evidence before him, President Trump took "abrupt[ ]" action on a "major policy change[ ] that will gravely affect the lives of many Americans." *Doe 1*, 2017 WL 4873042, at *30. Precedent provides no support for a grant of special deference under these circumstances, and Defendants show no likelihood of prevailing against an Equal Protection challenge.

c. The Ban is unlikely to withstand Washington's Due Process challenge

Defendants argue that they are likely to succeed against Washington's substantive due process claims because "there is no fundamental liberty right to serve in the United States military." Mot. at 18-19. Defendants' argument is a strawman that misconstrues Washington's substantive due process claim.

Substantive due process protects fundamental liberty interests in "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015). Through its substantive due process claim, Washington seeks to ensure that its residents' self-determination, autonomy, and dignity are

not unduly infringed. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984) (noting that due process "safeguards the ability independently to define one's identity that is central to any concept of liberty"). The Ban infringes on those interests exactly as the district court found—"The policy directly interferes with [Washingtonians'] ability to define and express their gender identity, and penalizes [Washingtonians] for exercising their fundamental right to do so openly by depriving them of employment and career opportunities." Add. 19. Defendants have not provided this Court or the district court with evidence of a legitimate government interest that justifies this intrusion. Instead, Defendants arguments are contradicted by the military's own conclusions after careful research and study. *See* WA Add. 56-167, 171, 188-92. Defendants fail to show the Ban is likely to succeed against Washington's Due Process challenge.

2. Defendants Face No Irreparable Harm from a Developed Policy that They Are Well-Prepared to Implement

An applicant for a stay "must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal." *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers). An applicant's likelihood of success on the merits need not be considered if the applicant fails to show irreparable injury from the denial of the

stay. *Id.* at 1317-1318. Defendants claim that they will be irreparably harmed because they are not "adequately and properly prepared to begin processing transgender applicants" by January 1, 2018. Mot. at 13. Defendants' delay in appealing the injunctions, along with the DoD's most recent Policy directive, provide ample evidence that their claim of harm is not credible.

First, the DoD's December 8, 2017, Policy memorandum wholly undermines Defendants' claim that the military is ill-prepared to process transgender applicants. *See* WA Add. 43-49. Issued one week before Defendants filed this emergency motion, the Policy sets forth specific guidance regarding the processing of transgender applicants to all personnel and staff at USMEPCOM, the organization whose mission is to determine "the physical, mental and moral qualifications of every new member of the armed services."[4] In nine detailed pages, the Policy not only provides the standard for evaluating transgender applicants, but addresses even the most minute details of the application process. Among other things, it instructs USMEPCOM personnel and staff to indicate an applicant's preferred gender on official forms; verify an applicant's preferred gender using a birth certificate, court order, or U.S.

[4] U.S. Military Entrance Processing Command, "Freedom's Front Door," *available at* http://www.mepcom.army.mil/Command/.

passport; address applicants by their preferred gender name and pronoun; allow the applicant or medical provider to request a chaperone at any time; and ensure "the gender of the chaperone . . . be the same as the applicant's preferred gender." WA Add. 46. In other words, despite Defendants' claims to the contrary, the DoD has already ensured that the "tens of thousands" of service members responsible for implementing accession policies stand ready to process transgender applicants. *See* Mot. at 13.

Second, Defendants have had to prepare for transgender people to join the military. Then-Defense Secretary Carter first issued his formal directive on June 30, 2016. AR 31. Including current-Defense Secretary Mattis's decision to defer the effective date to January 1, 2018, *see* AR 30, Defendants have had nearly 18 months to prepare for transgender accessions. Although Defendants suggest that the June 2016 policy "never took effect," *see* Mot. at 15, Dr. George Brown, a military psychologist, submitted testimony that he began training military personnel on the provision of healthcare to transgender members as early as the spring of 2016. *See* WA Add. 196-97. Indeed, the testimony of one former service secretary suggests that the military branches would have been prepared to implement Secretary Carter's directive by the original July 1, 2017, deadline. *See* WA Add. 173 (describing the Navy's implementation of transgender

accession protocols as "straightforward," "low-key," and "no big deal"). *See also* WA. Add. 214-24 (Navy's Nov. 4, 2016 policy guidance for implementing transgender accessions), 225-96 (DoD's September 30, 2016, handbook entitled "Transgender Service in the Military," which provided a day-to-day guide for understanding and implementing the policy of open transgender military service). Defendants are well-prepared to accept transgender members beginning January 1, 2018.

Third, Defendants' claimed harm of "duplicative implementation costs" is unavailing. Mot. at 14. Defendants hint at a range of possible policy decisions that they may later take, claiming that one or more of them may veer from the December 8, 2017 Policy. But "[s]peculative injury cannot be the basis for a finding of irreparable harm." *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1097 (9th Cir. 2007). As Defendants' own motion admits, whether the military will develop or execute any particular, future policy is far from clear. *See* Mot. at 14 (observing Defendants may have to impose two different implementation processes "*if* the military adopts a new process after the study") (emphasis added). And, of course, the fate of any future policy depends on President Trump's satisfaction with the proposal Secretary Mattis develops. Add. 25. Any harm to Defendants from the flux in current policy is wholly self-inflicted, and

Defendants cannot credibly claim to be irreparably harmed by the abstract potential of duplicative implementation costs.

Finally, Defendants request for a stay is not urgent. Although the first court to enjoin Defendants from imposing the accession Ban did so on October 30, 2017, Defendants failed to seek an immediate stay of that injunction. Instead, six weeks later, Defendants filed an emergency motion to stay that injunction. *See* Mot. for Administrative Stay and Partial Stay Pending Appeal, Doc. No. 1708433, *Doe v. Trump, et. al.*, No. 17-5267 (D.C. Cir. Dec. 11, 2017). Defendants can hardly claim to need emergency relief from a deadline they have known about since October 30, 2017, at the latest, and had been working to meet for more than a year before the President's announcement. Defendants' urgency argument rings particularly hollow given the DoD's December 8, 2017 Policy showing Defendants are prepared for and capable of complying with the district court's order. Defendants have failed to show irreparable harm sufficient to merit a stay.

3. An Emergency Stay Is Contrary to Equity and Harmful to the Public Interest

The equities and public interest strongly favor denying Defendants' requested stay. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (noting the balance of equities and public interest always favor "prevent[ing] the

violation of a party's constitutional rights") (citations omitted). *See also Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) ("[U]pholding constitutional rights surely serves the public interest.").

Washington has detailed the serious harms that the accession Ban inflicts on its sovereign and quasi-sovereign interests. Staying the district court's ruling would reinstitute those harms, impair the State's ability to protect its territory and natural resources, and require the State to discriminate against its own residents. Washington residents, including the private plaintiffs in this action, will be stigmatized, denied the opportunity to serve in the military on the same terms as other service members, and deprived of their dignity. *See Heckler v. Mathews*, 465 U.S. 728, 739 (1984) (observing stigmatization can cause "serious non-economic injuries"). Together, these harms are more than sufficient to support keeping the injunction in place. *See Washington*, 847 F.3d at 1168-69 (quoting *Nken*, 556 U.S. at 434) (the public interest supports an injunction where resumption of an unlawful policy would "substantially injure the State[ ] and multiple 'other parties interested in the proceeding.' ").

Defendants nevertheless argue—in a single sentence—that transgender accession is against the public interest because it will harm the public fisc and national defense. Mot. at 15. But a bare invocation of "national defense" cannot

trigger a stay of a properly imposed injunction. *Hassan v. City of New York*, 804 F.3d 277, 306-07 (3d Cir. 2015) ("[I]t is often where the asserted interest appears most compelling that we must be most vigilant in protecting constitutional rights."). Since a stay will only permit Defendants to resume constitutional violations, the equities and public interest weigh strongly against a stay.

4. Nationwide Injunctive Relief Was Appropriate

"Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 24 (2008). "The purpose of such interim equitable relief is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Id.* (internal citation omitted).

In this case, the district court was well within its discretion to enter a nationwide injunction, which is necessary to protect Washington residents from the discriminatory accession Ban. Washingtonians serve in the military across the world and, if the injunction were limited to Washington State, Washington-based service members would be subject to the discriminatory Ban as soon as their service duties required them to travel out-of-state.

Although Defendants suggest limiting the preliminary injunction to individuals with ties to Washington State, Mot. at 10 n.3, they provide no workable way to implement and monitor such an injunction. This Court has rejected similarly unworkable geographic limitations on injunctions meant to protect state residents from the discriminatory policies and practices of the federal government. *See Washington*, 847 F.3d at 1166-67; *Hawaii v. Trump*, 871 F.3d 646 (9th Cir. 2017) (affirming nationwide injunction). The Court should decline again here.

IV. CONCLUSION

For the reasons above, the Court should deny Defendants emergency motion for an administrative stay.

RESPECTFULLY SUBMITTED this 19th day of December 2017.

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CERTIFICATE OF COMPLIANCE (FRAP 32(a)(7))

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached reply brief is proportionately spaced, has a typeface of 14 points or more and contains 5,090 words.

s/ La Rond Baker
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DECLARATION OF SERVICE

I hereby certify that on December 19, 2017, the forgoing document was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

Dated this 19th day of December 2017.

s/ La Rond Baker
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