No. 17-2398

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BROCK STONE, Petty Officer First Class, *et al.*,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR ADMINISTRATIVE STAY AND PARTIAL STAY PENDING APPEAL

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INTRODUCTION

Men and women who are transgender have long served our country in the Armed Forces. They have seen combat in distant theaters and performed critical roles at home. And since June 30, 2016, these individuals have been able to serve openly, when, after extensive study and review, the Department of Defense ("DoD") concluded that there was no justification to exclude from service someone who is ready, willing, and fit to serve merely because he or she is transgender.

As part of this thorough review, DoD developed rigorous fitness criteria that transgender individuals must meet to join the military (a process called "accession"). Under these stringent requirements, recruits must have completed their gender transition process, including all anticipated transition-related surgical treatment, at least 18 months ***before*** enlisting. These new recruits must also meet the same standards of physical fitness and deployability that apply to their fellow service members.

DoD also developed an implementation plan, starting with almost a year's worth of robust training and culminating on July 1, 2017, when transgender individuals could begin enlisting. On June 30, 2017 — the day before new accessions were set to commence — Secretary Mattis announced a further six-month delay of accessions to review personally the standards with incoming DoD leadership, without presupposing any outcome. Thus, the status quo last summer was that

qualified men and women who are transgender could serve openly, and new recruits could enlist in the military beginning on January 1, 2018.

President Trump disrupted all these efforts with three tweets. Acting without further study and catching DoD by surprise, President Trump announced that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military." Appellees' Supplemental Addendum ("SA") 192. The President asserted that he was "doing the military a great favor." SA 167. One month later, President Trump issued a directive formalizing this change (the "Transgender Service Member Ban" or "Ban"). With respect to accessions, the Ban ordered the military to "maintain the currently effective policy [i.e., the ban] regarding accession of transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense . . . provides a recommendation to the contrary that I [i.e., President Trump] find convincing" (the "Accessions Directive"). Appellant Add., 62 § 2(a).

The district court found that Plaintiffs are likely to prevail on their claim that the Transgender Service Member Ban violates the Constitution's equal protection guarantee under any level of scrutiny. After considering the irreparable harm to Plaintiffs, the balance of hardships, and the public interest, the district court entered a preliminary injunction to restore the status quo that existed before President

Trump upended years of study and his own administration's diligent preparations and review.

Incredibly, Defendants now claim that the district court "ended [an] orderly process." Mot. 1. Nothing could be further from the truth. It was the President's unconstitutional actions that ended an orderly process, and the district court's injunction that restored order. As a long list of retired military officers and national security officials pointed out, "the President's actions here represent[ed] a remarkable departure from decades of practice across multiple administrations regarding the proper approach to making major policy changes on personnel issues within the U.S. military." SA 365.

After waiting almost a month, Defendants now seek an "emergency" stay to preauthorize Secretary Mattis to "exercis[e] his independent authority to defer the effective date of the accessions provisions . . . for the purpose of further studying whether [it] will impact military readiness and lethality." Appellant Add., 88. But the hypothetical question Defendants raise — whether Secretary Mattis theoretically has "independent authority" to delay accessions — simply assumes the answer to the critical issue: is any purported need for delay truly "independent" of the unconstitutional directive? Defendants' motion and supporting declaration make clear that the "further study" they contemplate is not independent of the Ban at all. It is, rather, at the President's direction, and it is only "possible" that Secretary

Mattis will "recommend" a different policy that the President might theoretically "find . . . convincing." Mot. 12–13.

Although Defendants make conclusory assertions that they will suffer irreparable harm without a stay, they fail to tie those assertions to the injunction. Defendants state in general terms that the military must provide training before implementing a new accessions policy, but they do not explain why the months of training that have already occurred are insufficient, or offer an explanation of what training they believe remains necessary and how long it would take. They claim only that more time is needed to carry out the policy ordered by the President, which has nothing to do with training.

Defendants' request for a stay should be denied. The Accessions Directive is blatantly unconstitutional and must be enjoined while the case is pending. Our national defense will be strengthened, not threatened, if selfless volunteers like Airman Seven Ero George are allowed to apply for commissions or enlistment and seek to demonstrate that they can meet the fitness standards DoD itself developed. And Defendants provide no reason to doubt that the military, having had 18 months of training to implement DoD's rigorous accessions standards, will be ready to apply those standards on the date that Secretary Mattis previously ordered: January 1, 2018.

BACKGROUND

For years men and women who are transgender have served honorably in the Armed Forces. As of May 2014, transgender persons accounted for an estimated 8,800 active-duty service members, as well as 134,300 veterans and retirees from Guard or Reserve service. SA 86, 89. These individuals have served despite a DoD policy in effect from 1981 until mid-2016 that barred otherwise fit transgender persons from enlisting or remaining in the Armed Forces. *See* SA 208–13 (¶¶ 39–58); SA 244.

After an extensive review by a working group of high-ranking DoD and military officials, DoD concluded that the military should welcome the open service of transgender service members. *See* SA 338–43 (¶¶ 8–27). The review process included consideration of a study by the non-partisan RAND National Defense Research Institute ("RAND"). RAND concluded that the impact on military readiness from open service would be "negligible." SA 234–35, 274, 313. On the basis of all the evidence collected (including consultations with medical, personnel, and readiness experts and senior personnel who supervised transgender service members, and with service members themselves), the working group concluded that "[o]pen service by transgender service members would not impose any significant burdens on readiness, deployability, or unit cohesion" and that barring service by

transgender persons would reduce the pool of qualified recruits based on a status irrelevant to their fitness to serve. SA 355 (¶ 23).

The June 30, 2016 Open Service Directive directed that:

- Individuals would not be discharged from the military simply because of their transgender status;
- Individuals diagnosed with gender dysphoria would receive medically necessary care, as do other service members with medical conditions;[1] and
- Transgender individuals would need to meet stringent criteria in order to join the military.

See Appellant Add., 65–70.

Under these strict accession standards, a history of gender dysphoria disqualifies a transgender person from military service unless (1) the prospective enlistee has been stable without clinically significant distress for at least 18 months; (2) at least 18 months has passed since any sex reassignment or genital reconstruction surgery, no further surgery is required, and "no functional limitations or complications persists"; and (3) the enlistee has "completed all medical treatment" associated with transition, has been stable in the transition for 18 months, and is stable on any hormones for 18 months. *See* Appellant Add., 68–69 § 2.

[1] Because of the incongruence between their actual gender and the gender assigned to them at birth, some (but not all) transgender individuals experience clinically significant distress, which is diagnosed as gender dysphoria. SA 206 (¶¶ 26–28).

The accessions criteria are "straightforward and do not require extensive or detailed knowledge." SA 408 (¶ 8). New accessions were scheduled to begin by July 1, 2017, leaving a full year to ensure proper training. According to former service secretaries and others actually involved in the preparations, almost all necessary preparations for accessions were completed well in advance of that date. SA 407 (¶ 4); SA 411 (¶¶ 2, 4); SA 413–14 (¶ 3); *see also* SA 404–05. For example, approximately 250 medical personnel working in Military Entrance Processing Stations were trained in May 2017. SA 407 (¶ 5); *see also* SA 429–39.

The day before new enlistments were scheduled to begin, Secretary Mattis announced that it was "necessary to defer the start of accessions for six months" to January 1, 2018 — not to conduct further training, but to review "more carefully the impact of such accessions on readiness and lethality" and "personally" receive input from newly arriving military and civilian leadership. SA 165. He stressed that he was "in no way presuppos[ing] the outcome of the review." *Id.*

Less than a month later, President Trump abruptly announced on Twitter a categorical ban on transgender individuals serving in the military:

> After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.]

SA 192.

President Trump formalized this Transgender Service Member Ban in a Memorandum for the Secretary of Defense and the Secretary of Homeland Security dated August 25, 2017. Appellant Add., 61–63. The memorandum directed the military effective March 23, 2018 to treat transgender status as a basis for discharge (the "Retention Directive"), to deny funding for gender transition-related surgical care (the "Surgery Directive") beginning on that date, and to "maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense . . . provides a recommendation to the contrary that I find convincing" (the Accessions Directive). *Id.* at 62. The memorandum further directed the Secretary of Defense to submit an implementation plan to the President by February 21, 2018. *Id.*

Plaintiffs in this case are six men and women who are transgender and who have served and continue to serve in various branches of the U.S. military, and the American Civil Liberties Union of Maryland, Inc. on behalf of its members. Under the terms of President Trump's directives, all six individual Plaintiffs would be subject to discharge as of March 23; several would lose the opportunity to receive medically-necessary treatment after that date; and two who intend to commission as officers would be barred from commissioning by the Accessions Directive.

Most imminently, Seven Ero George, an Airman First Class in the Air National Guard, has taken significant steps to prepare to commission as an officer in the Army and intends to apply for a commission as soon as possible after the accessions ban is lifted. Appellant Add., 77–78 ¶¶ 3–8.

On November 21, 2017, the district court granted a preliminary injunction barring enforcement of the Ban, including the Accessions Directive. Appellant Add., 1–3. Three weeks later, on December 12, Defendants moved for clarification or, in the alternative, a partial stay. Appellant Add., 87–95. On December 13, the district court set an expedited briefing schedule and indicated that it would rule swiftly. Appellant Add., 103–04. Defendants filed the present motion without waiting for a decision.

ARGUMENT

I. Defendants' Motion Is Premature And Improperly Seeks An Advisory Opinion.

Under Federal Rule of Appellate Procedure 8(a), "[a] party must ordinarily move first in the district court" for a stay pending appeal, and must either show that filing in the district court is impracticable or state that a motion was made and denied. Defendants have not followed that rule. The urgency they invoke to justify this procedural shortcut is belied by their own conduct. The district court issued

its injunction on November 21. *See* Appellant Add., 1–3. Had Defendants timely sought the relief they seek now, the district court likely would have ruled already.[2]

The unusual relief Defendants request — a stay "in the event" that the district court "construes" its injunction a particular way (Mot. 8) — highlights the problem with their motion. Defendants have not said whether Secretary Mattis in fact intends to defer the accessions start date, described the reasons he would offer, or specified the length of any such deferral. Moreover, the hypothetical question Defendants raise — whether Secretary Mattis theoretically has "independent authority" to delay accessions — simply assumes the answer to the critical issue: is any purported need for delay truly "independent" of the unconstitutional directive?

The reasons Defendants proffered in the district court (*see* Appellant Add., 96–102) indicate that it is not. Although Defendants assert that they need more time to conduct additional training to implement the Open Service accessions policy, they do not suggest that they will provide any additional training while accessions are delayed. Instead, the declaration they submitted states that the delay they contemplate is "to carry out the study *directed by the President*." Appellant Add., 98 ¶ 4 (emphasis added). As the President has forbidden DoD from doing

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[2] Defendants knew on November 21 that, absent a stay in this case, they would be bound by the present injunction regardless of what happened in the related *Doe* case in the District of Columbia. If Defendants actually had reason to clarify the present injunction, they should have acted immediately.

anything other than ban accessions until he is personally "convinc[ed]" otherwise, there is no way that a delay to "study the issue further" (Mot. 8) could be independent of that directive. Appellant Add., 61–63; *see also id.*, 53 (district court finding that "the President's Memorandum is not a request for a study but an order to implement the Directives contained therein").[3]

If Defendants can make a persuasive showing that they are working vigorously to complete preparations for accessions but nevertheless have a reason they need relief unrelated to implementation of President Trump's directives, they should bring that specific concern to the district court. Nothing in the record now supports the advisory relief Defendants seek.

II. Defendants Have Not Established That They Will Suffer Irreparable Harm Absent A Stay.

Despite the vague and unsupported sense of alarm reflected in Defendants' motion, the record demonstrates that honoring the January 1 accessions start date that Secretary Mattis previously set will not irreparably harm the military. *Compare* Appellant Add., 96–102, *with* SA 404–15.

[3] Defendants' contention that "there is no meaningful difference" between Secretary Mattis's deferral of accessions on June 30, 2017 and "a renewed, independent decision" to extend the deadline beyond January 1 (Mot. 9) is flawed in two respects. First, it is impossible to evaluate a hypothetical decision the Secretary has not announced or justified. Second, the difference between a six-month deferral and an indefinite deferral is plainly meaningful; the only reason to indefinitely delay accessions is to implement the President's unconstitutional directive, with the outcome very much "presupposed."

First, although Defendants state in general terms that the accessions policy cannot be implemented without additional training, the declaration on which Defendants rely nowhere acknowledges DoD's extensive preparation beginning in mid-2016, and does not indicate what (if any) additional training must be completed for DoD to comply with the injunction. It is telling that the district court in *Doe* identified these shortcomings and Defendants' response was to file the very same declaration without any additional explanation. *See* SA 420–28 (Dkt. 75 in *Doe 1 v. Trump*, No. 17-1597 (D.D.C.)).

Second, although Defendants assert they will be harmed by the "'duplicative' implementation costs" of complying with the injunction (Mot. 15), costs associated with accepting transgender people into the military have already been incurred. The military began planning for accessions of recruits who are transgender on June 30, 2016. The Open Service Directive ordered the military to "develop and promulgate education and training materials" regarding DoD policies and procedures on transgender service by October 1, 2016, and it designated July 1, 2017 as the start date for accessions. Appellant Add., 65–70. Notably, much of the new process for transgender accessions was "consistent with standards already in place authorizing individuals with a range of medical conditions to accede to military service." SA 417 (¶ 3); *see also* SA 407–08 (¶¶ 7–8). DoD promptly "began training throughout the branches to meet the target date of July 1, 2017 for

implementation" of the accessions policy, SA 407 (¶ 5), and, as of January 2017, "the Services had already completed almost all of the necessary preparation for lifting the accession ban," SA 413–14 (¶ 3); *see also* SA 92–163 (September 30, 2016 Implementation Handbook); SA 429–39 (December 2017 Palm Center report).

III. Defendants Are Not Likely To Succeed On The Merits Of Their Appeal.

A. The President's Indefinite Ban on Accessions by Transgender Individuals Capable of Meeting DoD's Rigorous Fitness Standards Is Unconstitutional.

"The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013). This equal protection guarantee applies to men and women who volunteer to serve their country in the Armed Forces. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973). President Trump's decision to deny this opportunity to qualified transgender individuals — men and women able to meet the rigorous accession standards DoD itself developed — violates equal protection.

The President's discrimination against transgender individuals is subject to heightened scrutiny, as the district court recognized. *See, e.g.*, *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (applying heightened scrutiny to discrimination against transgender per-

sons); *see also G.G. v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729, 730 (4th Cir. 2017) (Davis, J., concurring) (transgender individuals are "a vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected"); *Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011) (firing employee because of her "intended gender transition" is sex discrimination). The Accessions Directive (and the rest of the Ban) also fails any level of scrutiny.

Despite having every opportunity below to proffer justifications for the Ban, Defendants adduced no support for President Trump's professed concern that open service by transgender persons "would limit deployability, impede readiness, and impose costs." Mot. 18; *see* Appellant Add., 46–47. They concede that the study DoD commissioned found such effects "negligible," a fact they believe somehow favors their argument. Mot. 18.

Even if "negligible" cost savings could theoretically justify the Ban, Defendants have no answer to the fact that there are much more substantial readiness, deployability, and cost issues associated with a range of medical conditions that the military regularly accommodates. RAND concluded that deployability effects from transgender service are not *only* negligible, but are "significantly smaller than the lack of availability due to [other] medical conditions." SA 289. Likewise, the most aggressive estimate of the cost associated with medical care for transgender service members amounts to one one-hundredth of one percent of the military's

health budget — and is a tenth of what the military spends on, for example, erectile dysfunction medication. SA 276–80, 313; SA 194–99. The meager justifications Defendants have proffered are "so underinclusive" that the real motive "must have 'rest[ed] on an irrational prejudice.'" *Bostic v. Schaefer*, 760 F.3d 352, 382 (4th Cir. 2014) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985)).

Defendants' asserted justifications are even more transparently deficient as applied to accessions because, under the Open Service Directive, not only must transgender enlistees meet the rigorous fitness standards to which all enlistees are subject, but they must also be stable in their gender and complete all anticipated transition-related surgical treatment at least 18 months ***before*** enlisting. Appellant Add., 68–69 § 2; *supra* p.6.[4] Given this fact, and the very small universe of transgender people who could actually enlist under the policy, blocking the Open Service accessions policy has no rational connection to any of the "tremendous medical costs and disruption" President Trump (erroneously) claimed to be associated with open transgender service, including with respect to the provision of surgery or other medical care. *See* SA 192.

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[4] The military has an effective system for distributing prescribed medications, including hormones, to deployed service members across the globe, even in combat settings. Only a few medications are inherently disqualifying for deployment, and none of them are used to treat gender dysphoria. SA 218–19 (¶¶ 81–83).

Notably, Defendants never explain what harm would occur if transgender people are allowed to enlist under the Open Service policy. Instead, they treat DoD's 2016 decision to impose strict accession requirements on transgender persons as *supporting* the categorical ban, reasoning that President Trump just disagreed about "where to draw the appropriate line." Mot. 18–19. This claim rests on an inaccurate characterization of the former policy, reinstated by the President, as "presumptiv[e] disqualif[ication] absent a waiver." Mot. 18. The unrebutted record evidence establishes that the pre-2016 ban on accessions was *absolute* (SA 208–10 (¶¶ 40–46)), and Defendants offer no reason to think the President's reinstatement of that policy — following on tweets that promised a categorical bar — will be any different. President Trump's decision to categorically deny accessions based on transgender *status*, irrespective of fitness, deployability, and medical needs, is not line-drawing; it is invidious discrimination.

Looking at the insubstantial justifications Defendants have mustered, President Trump's Transgender Service Member Ban is "inexplicable by anything but animus toward the class it affects." *Romer v. Evans*, 517 U.S. 620, 632 (1996). The circumstances of the Ban only confirm that conclusion. DoD conducted a careful, exhaustive study that rejected as factually baseless all the justifications President Trump asserted. *See, e.g.*, SA 338–43 (¶¶ 8–26). As a long list of retired military officers and national security officials pointed out, "the President's actions

here represent[ed] a remarkable departure from decades of practice across multiple administrations regarding the proper approach to making major policy changes on personnel issues within the U.S. military." SA 365. This extraordinary procedural irregularity belies the legitimacy of any governmental interest Defendants may assert. *See Int'l Refugee Assistance Project v. Trump ("IRAP I")*, 857 F.3d 554, 596 (4th Cir. 2017) (en banc) (proffered national security interest "is belied by evidence in the record that President Trump issued the First Executive Order without consulting the relevant national security agencies"), *vacated as moot sub nom. Trump v. IRAP*, 138 S. Ct. 353 (2017) (Mem.).[5]

Unable to mount any plausible defense, Defendants are left with a plea for deference. But the mere invocation of national security does not permit courts to "ignore evidence" and "circumscribe [their] own review" out of blind deference to executive action. *IRAP I*, 857 F.3d at 601 ("The deference we give the coordinate branches is surely powerful, but even it must yield in certain circumstances, lest we abdicate our own duties to uphold the Constitution.").

[5] Instead of consulting with military leadership, President Trump reportedly acted in response to an appeal from legislators with a history of animus and moral disapproval toward transgender persons. *See* SA 176–90. The Court need not rely on this unrebutted evidence to conclude that the Accessions Directive fails any level of scrutiny, but it is powerful confirmation that the paltry explanations Defendants offer are mere pretext.

The cases on which Defendants rely for an "appropriately deferential standard of review," Mot. 16–18, share a crucial element missing in this case: the exercise of "considered professional judgment," *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986). In *Rostker v. Goldberg*, for example, the Supreme Court found it important that in limiting the selective service to males "Congress did not act 'unthinkingly' or 'reflexively and not for any considered reason.'" 453 U.S. 57, 72 (1981); *see also Weinberger*, 475 U.S. at 508 (relying on Air Force's "considered professional judgment"); *Thomasson v. Perry*, 80 F.3d 915, 922–23 (4th Cir. 1996) (en banc) (military policy "dr[ew] on the combined wisdom of [an] exhaustive examination in the Executive and Legislative branches"). Here, by all accounts President Trump acted without consulting evidence or receiving or relying on new evidence, and in an announcement that startled the Defense Department — a fact Defendants have never disputed. *See* SA 51, 58, 75–76. The district court was entirely justified in concluding that this is not the sort of decision-making process owed deference, especially when equal protection is at stake.

B. Airman George Is Imminently Injured, and Will Be Irreparably Harmed, by the Accessions Directive.

Defendants attempt to avoid review of the President's Accessions Directive by claiming that Plaintiffs lack standing to challenge it. The district court correctly rejected that argument. Appellant Add., 34–35. Airman George's plans to seek a military commission in the Army could hardly be more "concrete," *Lujan v. Defs.*

of Wildlife, 504 U.S. 555, 564 (1992): he completed an application for conditional release from the Air National Guard, has confirmed a letter of recommendation from a recently-retired Lieutenant Colonel, and is prepared to finalize and submit his application for direct commission. Appellant Add., 76–79 ¶¶ 2–8. Plainly, Airman George will be irreparably harmed without an injunction. *See, e.g.*, *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017) ("[L]oss of opportunity to pursue one's chosen profession constitutes irreparable harm.").

Defendants address none of this. They assert that Airman George will not have standing until he applies and is denied, but "[t]he law does not require such a futile act" to establish standing. *Townes v. Jarvis*, 577 F.3d 543, 547 n.1 (4th Cir. 2009). Defendants also contend that "there is no reason to assume that George would be denied a waiver" from the categorical ban that President Trump ordered. Mot. 15. There is actually a very good reason for that conclusion: there is unrebutted record evidence that no waivers have ever been granted. SA 389 (¶ 17); SA 394 (¶ 13); SA 400 (¶ 15). And even if the possibility of waiver were not fanciful, the Accessions Directive obviously makes it more difficult for Airman George to commission than under the Open Service Directive. That in itself is injury-in-fact. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 666 (1993); *In re Navy Chaplaincy*, 697 F.3d 1171, 1174 (D.C. Cir. 2012).

For the first time on appeal, Defendants identify what they call a more "fundamental" problem with Airman George's standing, arguing that he is not eligible for commission under the Open Service Directive because he "underwent transition-related surgery in August 2016," less than 18 months before January 2018. Mot. 12. Defendants ignore the obvious point that the 18-month period *will* expire in February 2018.[6] Since Airman George will soon be eligible to commission, his harm is plainly imminent. Indeed, the President's directive establishes military policy to "indefinitely" deny new accessions, and Defendants do not request a one-month stay.

Finally, Defendants contend that Airman George's injury is "speculative" because "[i]t is possible" that Secretary Mattis will "recommend" a different policy, and President Trump might theoretically "find that proposal convincing." Mot. 12–13. Defendants, not Plaintiffs, are speculating. The President adopted a policy that is concretely injuring Airman George and others like him. The President may not evade review of that policy by saying he "might" change his mind. *See, e.g.*, *Am. Petroleum Inst. v. U.S. EPA*, 906 F.2d 729, 739–40 (D.C. Cir. 1990) ("If the

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[6] Moreover, contrary to Defendants' suggestion (Mot. 12), the unrebutted record evidence is that Airman George is "stable in [his] gender transition," as required by DoD's accession standards. Appellant Add., 76 ¶ 2.

possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely.”).[7]

C. The District Court Properly Enjoined Implementation of the Unconstitutional Accessions Directive.

Defendants contend that any injunction of the Accessions Directive should have been limited to Airman George, and that they should otherwise be free to discriminate. Mot. 11. The district court was not required to enter such a limited order. Notably, the Seventh Circuit recently declined to stay an injunction of a facially invalid policy, in the face of the government’s similar argument that it should be permitted to apply the unlawful policy to anyone other than the plaintiff. SA 440–41.

The scope of injunctive relief ordinarily rests within the “sound discretion” of the district court. *Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002). Here, Plaintiffs brought a facial challenge to President Trump’s directive, and the district court concluded that they were likely to succeed. When courts find a law, regulation, or order facially unconstitutional, they commonly enjoin the provision in its entirety, rather than limit relief to the plaintiff. *See, e.g.*, *IRAP I*, 857 F.3d at 605

[7] The district court also did not abuse its discretion in finding that the balance of equities and the public interest favored an injunction. The public interest and equity are served by proscribing unconstitutional acts, *see, e.g.*, *IRAP I*, 857 F.3d at 603, and the unrebutted evidence showed that the injunction would further the national defense. *See, e.g.*, SA 303–04.

("[B]ecause Section 2(c) likely violates the Establishment Clause, enjoining it only as to plaintiffs would not cure the constitutional deficiency, which would endure in all Section 2(c)'s applications."). Such a remedy is particularly appropriate where, as here, the challenged policy appears motivated by discriminatory intent. *See N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 238 (4th Cir. 2016).

Defendants' proposed narrowing of the injunction would also not "provide complete relief to plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). President Trump's discriminatory policy imposes the stigma of being singled out as a member of a class that is labeled unfit to serve. Enjoining implementation of the policy is the only remedy that would provide complete relief for this harm. An injunction that simply created a personalized exception, while the discriminatory policy otherwise remained in effect, would not redress this harm and "would only serve to reinforce the 'message' that plaintiffs are 'outsiders, not full members'" of the U.S. military. *IRAP I*, 857 F.3d at 605 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000)).

IV. The Remaining Factors Counsel Against A Stay.

The balance of hardships weighs firmly against a stay. The absence of harm to Defendants stands in sharp contrast to the harms Plaintiffs would face if a stay were granted. But for the unconstitutional directive, Airman George will soon be in a position to commission as an Army officer. Others like him will be denied the

opportunity to serve, without any valid justification. Finally, a stay would be contrary to the public interest because it would perpetuate a constitutional violation, prolong the stigma Plaintiffs are experiencing due to the discriminatory accessions policy, and deprive the military of individuals who are qualified and ready to serve.

CONCLUSION

The stay motion should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This opposition brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,200 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2017, I caused the foregoing Brief to be filed with the Clerk of the U.S. Court of Appeals for the Fourth Circuit using the appellate CM/ECF system and to be served upon all parties via the CM/ECF system.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Counsel for: American Civil Liberties Union of MD

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I certify that on 12/18/2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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