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

APPELLANTS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR ADMINISTRATIVE STAY AND PARTIAL STAY PENDING APPEAL

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INTRODUCTION

The district court's injunction forcing the military to alter its accession policy by January 1, 2018, dramatically alters a decades-long status quo, interferes with an ongoing study led by military experts, and threatens military readiness. Plaintiffs' response effectively urges this Court to improperly discount "the professional judgment of military authorities concerning" these issues, despite the Supreme Court's command that the military is entitled to "great deference" in this area. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Against these significant harms to the government (and to the public), only one plaintiff even asserts injury from the accession policy and will suffer no irreparable harm if this Court grants a partial stay of the injunction pending appeal. Indeed, without even addressing whether the injunction was appropriate as applied to that plaintiff, this Court could redress the government's imminent injury simply by entering a stay that would either permit Secretary Mattis to exercise his independent authority to delay the January 1 deadline or confirm that nationwide relief is unwarranted to grant that one individual full relief.

ARGUMENT

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

Plaintiffs agree that the injunction "does not prevent Secretary Mattis from taking some hypothetical action that is independent of, and unrelated to, the President's … directives," Doc. 95 at 2, but insist that any exercise of authority would not be

"independent," Mot. 10-11. Plaintiffs misunderstand the government's requests, which seek to permit an "independent" decision by Secretary Mattis to defer the January 1 deadline for a limited period of time, just as he did in June 2017. Mot. 8-9; Add. 88-89.[1]

Plaintiffs contend that any decision to delay the Carter accession policy for further study would not be "independent" because "the President has forbidden DoD from doing anything other than ban accessions until he is personally 'convinc[ed]' otherwise." Opp. 11. Wholly apart from that directive, however, Secretary Mattis can exercise independent authority to determine that the military should study the issue before implementing a significant policy change to longstanding accession standards. Indeed, Secretary Mattis exercised that authority in June 2017, when he deferred the Carter policy until January 1 for that very reason. SA 165. Rather than challenge that action, plaintiffs lauded it as an "evidence-based assessment of the military's enlistment policies." Doc. 40-2, at 26-27. Thus, they cannot credibly claim that any future action by Secretary Mattis to study that same issue is inextricably intertwined with the

[1] Contrary to plaintiffs' argument (Opp. 9-10), there was no need for the government to wait for the district court to rule on its stay motion before filing in this Court. A party may seek a stay from this Court if the district court "denie[s] the motion," if it "fail[s] to afford the relief requested," or if seeking relief in the district court "would be impracticable." Fed. R. App. P. 8(a)(2)(A)(i)-(ii). The district court here understood that the government intended to file a motion in this Court absent prompt relief, Add. 104, yet the court did not "afford the relief requested." Fed. R. App. P. 8(a)(2)(A)(i). Moreover, the government's motion explained that waiting any longer for a district court ruling would be impracticable in light of the January 1 deadline. *See* Mot. 2, 6, 20.

President's directives, such that the Secretary's exercise of his discretion would *never* be independent.

Plaintiffs further argue that, even if the June 2017 deferral were permissible, this Court should not permit the Secretary to extend the January 1 deadline for two reasons: (1) the Court cannot evaluate the legality of a "hypothetical decision," and (2) any deferral now would be "indefinite." Opp. 10, 11 n.3. Neither theory works.

First, the government is not asking this Court to rule on a hypothetical issue. To the contrary, it specifically requested clarification that the injunction permits Secretary Mattis to exercise his independent authority to defer the Carter accession policy, Add. 88-89; further, there would have been no need to seek clarification—or a stay of the injunction on this basis—if the Secretary would not exercise that authority, if permitted.

Second, there is no support for plaintiffs' theory that the constitutionality of the Secretary's independent authority to defer a significant policy change turns on a time limit, such that a six-month deferral would be permissible, but a longer period would not. In any event, the government's request for a stay is premised on an independent decision by Secretary Mattis to defer the Carter policy "for a limited time." *See, e.g.*, Mot. 1.

In addition, the district court's reasoning counsels against construing the injunction to prohibit the Secretary from exercising his independent authority. The decision below emphasizes the distinction between the President's directives and an independent decision of the Secretary. Indeed, the court reasoned that the President's

policy was *not* the product of military judgment, *see, e.g.,* Add. 46-47, a rationale that obviously would not apply to the Secretary's independent decision to defer a substantial policy change pending further study.

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

Plaintiffs do not dispute that a limited stay of the preliminary injunction, narrowing its application to a single plaintiff, Seven Ero George, would provide that litigant with complete relief. They nevertheless contend (Opp. 21-22) that "[t]he district court was not required to enter such a limited order," because the scope of relief is within the court's discretion.

That is wrong both as a matter of law and logic, especially in cases where the federal government is a party. Instead, as this Court determined in *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001), *overruled on other grounds by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012),"the district court abused its discretion by issuing a nationwide injunction" against enforcement of an FEC regulation, as that order was both "broader than necessary to afford full relief" to the plaintiff and "encroache[d] on the ability of other circuits to consider the constitutionality of" the regulation. *Id.* at 393. In doing so, this Court relied on a Ninth Circuit decision reversing a nationwide injunction because a "discharged serviceman challenging [the] ban on gays in the military was entitled only to reinstatement and an injunction prohibiting [the] military from applying the ban to him." *Id.* (citing *Meinhold*

v. U.S. Dep't of Def., 34 F.3d 1469, 1480 (9th Cir. 1994)); *see also U.S. Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993) (staying injunction conferring relief on anyone other than plaintiff). Nothing about this case requires a different result. By contrast, making nationwide relief the standard would flout Article III standing requirements, ignore basic principles of equity, end-run the requirements of class-actions, and "have a detrimental effect" on the law "by foreclosing adjudication by a number of different courts and judges," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).[2]

Plaintiffs insist that a nationwide injunction is necessary here because all plaintiffs are stigmatized by the directive. Opp. 22. But stigma is not a cognizable injury unless *plaintiffs* are being treated unequally, which they cannot show. *See Allen v. Wright*, 468 U.S. 737, 750 (1984); *In re Navy Chaplaincy*, 534 F.3d 756, 760-61 (D.C. Cir. 2008). And plaintiffs obviously lack standing to raise an alleged stigma claim based on the treatment of others.

Plaintiffs also suggest (Opp. 21-22) that the "facial" nature of their challenge demands nationwide relief, but that confuses the nature of their claim with the proper scope of relief. A court's conclusion that a federal law is unconstitutional in all of its

[2] *See also, e.g.*, *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664–65 (9th Cir. 2011) ("national injunction was too broad" because order declaring regulation facially invalid and enjoining enforcement against plaintiff "would have afforded the plaintiff complete relief"); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996) ("[I]njunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification."); *Conservation Law Foundation of New England, Inc. v. Reilly*, 950 F.2d 38, 43 (1st Cir. 1991) ("[b]ecause plaintiffs have ties to only a few federal facilities," they lacked injury-in-fact sufficient for nationwide relief).

applications does not entitle a plaintiff to an injunction barring the law's application to non-parties, because those unlawful applications do not injure the plaintiff. In this case, because an injunction limited to the injured plaintiff would afford that litigant full relief, the district court erred in preventing the government from enforcing its policy against non-parties nationwide, especially since other courts are considering the same issue and a nationwide injunction would deprive the government of a victory in those cases.

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

A. Plaintiffs—who now rely solely on Airman George to establish standing to challenge the accession directive, Opp. 18-20—fail to satisfy the "especially rigorous" standard applicable here. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Plaintiffs minimize the fact that George has not applied for accession or sought a waiver, claiming that there is no evidence that a waiver has ever been granted. Opp. 19. But while former military officials are "unaware of any instance" in which a waiver "was granted" to a transgender applicant, SA389; *accord* SA394, SA400, they do not cite one instance in which such an individual has ever applied for, and been denied, a waiver. *See* SA389, SA394, SA400. And there is no basis to credit plaintiffs' suggestion that a waiver is a "fanciful" possibility. Opp. 19. As Secretary Mattis recently confirmed, the current policy "generally" precludes "the accession of transgender individuals," but is "subject to the normal waiver process." Add. 58; *see also* Add. 61, § 1(a) (current accession policy "generally prohibit[s]" transgender applicants). Plaintiffs offer no reason to doubt that this waiver process will be applied in good faith.

Even assuming George asserted a cognizable injury, plaintiffs have failed to demonstrate that this injury could be redressed by a favorable decision. Plaintiffs do not dispute that even under the Carter policy, George is ineligible for accession until at least February 2018. Opp. 20. Even at that time, however, several additional hurdles remain; as plaintiffs acknowledge, applicants must satisfy "stringent requirements" under the Carter policy "*before* enlisting." Opp. 1. George must demonstrate stability "in the preferred gender" for 18 months, that "no functional limitations or complications persist," that "all medical treatment" is complete, and that no additional surgery is required. Add. 68-69. There is no record evidence that demonstrates George's present ability to satisfy these requirements, even though it is plaintiffs' burden to establish standing. *Clapper*, 568 U.S. at 412 n.4. In a footnote, plaintiffs quote George's own declaration, urging that the "unrebutted record evidence is that Airman George "*is* 'stable in [his] gender transition,'" Opp. 20 n.6 (quoting Add. 76), but the quoted statement has no bearing on this litigant's *present* medical fitness. To the contrary, George explained that when meeting with an army recruiter over a year ago, "I *was* … stable in my gender transition." Add. 76 (emphasis added). Plaintiffs have offered no medical evidence from which to conclude that George "will soon be eligible to commission" Opp. 20, or that any injury from the current policy could be redressed by a favorable decision.

B. Turning to the balance of the equities, the injunction significantly harms the military. Plaintiffs offer several reasons for discounting "the professional judgment of military authorities" regarding this harm, *Winter*, 555 U.S. at 24, but none has merit.

They first dismiss the military's need for more time, noting that it began "extensive preparation" to implement the Carter policy in 2016. Opp. 12. But plaintiffs overlook that that implementation was put on hold on August 25, 2017, "pending completion of the study directed by the President." Add. 101. The military could not have foreseen that nearly three months later the district court would order the nationwide implementation of the Carter policy within the span of six weeks. In addition, "key personnel involved in" the development and implementation of accession standards "have rotated in the past several months," further complicating the military's judicially-ordered scramble. *Id.*

Relatedly, plaintiffs err in dismissing the threat of duplicative implementation burdens as sunk costs. Opp. 12-13. They ignore the fact that even with the "implementation efforts made to date," the military will still have to take significant steps in order to meet an unexpected January 1 deadline, Add.101—efforts that will be meaningless if the government prevails on the merits of its appeal and if the military retains its current accession policy.

Finally, plaintiffs suggest that the military's asserted harms should not be credited because the government did not immediately seek a stay. Opp. 3-4, 9-10. But in the wake of the injunction, the government had to consider whether Secretary Mattis would

exercise his independent authority to defer the January 1 deadline and whether the injunction barred such action. In an abundance of caution, the government sought clarification from the district court in the hope that doing so would obviate the need for a stay. When the district court declined to rule quickly on the requested clarification, the government filed a stay with this Court the next day. The decision to engage in a deliberative process and exhaust all options to avoid needing to seek a stay from this Court is not a basis for denying relief.

Against these harms, plaintiffs will suffer no irreparable injury from a stay. Mot. 15-16. Plaintiffs ignore (Opp. 19) this Court's decision in *Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991), which held that a "higher requirement of irreparable injury should be applied in the military context" and made clear that a plaintiff's inability to serve in the military is not irreparable harm. *Id.* at 274 (general discharge from the military does not constitute irreparable injury).

C. On the merits, plaintiffs contend that the accession directive cannot survive *any* level of review. Opp. 14, 17 n.5. But they never explain how a decision to preserve the status quo for several months while new military leadership conducts further review of a significant policy change violates equal protection. *See* Mot. 17. Instead, they cast the accession directive as an indefinite extension of the current policy explained only by animus. Opp. 15-18.

Plaintiffs cannot plausibly characterize as irrational the current accession policy—a rule that, until 2016, was upheld by military leadership under every president

for decades. That this policy was recently "rejected" by former-Secretary Carter, Opp. 16, cannot foreclose Secretary Mattis and President Trump from reconsidering its validity. Indeed, the study underlying the Carter policy found that allowing transgender individuals to serve would impede military readiness, but dismissed that harm as "negligible," Mot. 18—a cost-benefit judgment that the military is entitled to reweigh. Furthermore, the Carter policy itself presumptively excludes transgender individuals from serving, but uses a different exception than the current policy. Mot. 18-19. In plaintiffs' own words, only a "very small universe of transgender people … could actually enlist under the [Carter] policy" given its "stringent requirements." Opp. 1, 15. The dispute here thus reduces to the scope of an exception to accession standards, which is a question of military policy, not constitutional principle.[3]

[3] Although plaintiffs describe the current policy as an "*absolute*" ban, Opp. 16, there is no reason to presume that the available waiver process will be applied in bad faith. *See supra* p. 6.

CONCLUSION

This Court should grant the government's motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply in support of Appellants' Motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 2,579 words. This Reply complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ Catherine H. Dorsey
Catherine H. Dorsey

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2017, I filed the foregoing Reply with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. All participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Catherine H. Dorsey
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