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' EMERGENCY MOTION FOR ADMINISTRATIVE STAY AND PARTIAL STAY PENDING APPEAL

CHAD A. READLER
Acting Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

BRINTON LUCAS
Counsel to the Assistant Attorney General

MARLEIGH D. DOVER
CATHERINE H. DORSEY
TARA S. MORRISSEY
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7236
950 Pennsylvania Ave., NW
Washington, DC 20530

INTRODUCTION

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

The court below ended this orderly process. On November 21, 2017, it issued a preliminary injunction barring the military from implementing the President's directive to defer revising the accession policy past January 1, as well as separate directives concerning the retention of transgender service members and funding for their sex-reassignment surgeries. The Carter accession policy thus will take effect on January 1.

The government has recently asked the district court to clarify that its injunction does not prohibit Secretary Mattis from exercising his independent discretion to defer the January 1 effective date for a limited time to further study the issue or to implement the Carter policy. Add. 87-95. In the alternative, the government requested a stay

pending appeal of the portion of the injunction concerning accessions. *Id.* Although that motion remains pending in district court, *see* Add. 103-04, a similar request for clarification was recently denied in *Doe v. Trump*, No. 17-cv-1597, Doc. 75 (D.D.C. Dec. 11, 2017), *appeal pending*, No. 17-5267 (D.C. Cir.). In light of the impending January 1 deadline, and to give this Court adequate time to consider these issues, the government asks this Court for a stay pending appeal of the portion of the injunction concerning accessions and an administrative stay until the Court resolves this motion. *See* Fed. R. App. P. 8(a)(2)(A); Fourth Cir. R. 8; *see also infra* pp. 6, 20.[1]

Absent further relief from this Court (or the court below), the military will be forced to implement a significant change to its accession standards before it decides how to resolve this issue. As military leadership has explained, this timetable will place extraordinary burdens on our armed forces and may harm military readiness. Conversely, the two plaintiffs who claim that the accession directive will affect them will suffer no irreparable injury from a stay.

The simplest way for this Court to prevent the looming irreparable harm to the government is through a stay that narrows the scope of the injunction in one of two respects. First, it could stay the order to the extent that the district court construes it

[1] The government does not seek a stay with respect to the retention directive or the sex-reassignment directive, neither of which takes effect until March 23, 2018. The military is not taking any action against current service members (nor does it have any immediate plans to do so), and it is continuing to fund their sex-reassignment surgeries. Add. 58. The military is currently determining its policy on these issues, and may seek a stay of these aspects of the injunction at a later date after a final policy determination.

to constrain Secretary Mattis from exercising his own discretion to defer implementation of the Carter policy. Second, it could hold that the nationwide scope of the injunction is inappropriate, and stay its prohibition on enforcing the accession directive to individuals other than the one plaintiff the district court found to have standing to challenge that order. Of course, the Court could also stay the entire portion of the injunction precluding enforcement of the accession directive pending appeal, as that order rests on legal errors concerning jurisdiction, the equities, and the merits.[2]

Without a stay, the military will, at the risk of harming its readiness posture, have to rush to provide the requisite training to the tens of thousands of service members across the country responsible for implementing accession standards. The government therefore respectfully asks this Court to issue an immediate administrative stay pending consideration of this motion or issue a decision as soon as possible.

BACKGROUND

1. To ensure that service members are "capable of performing duties," are free of conditions that "may require excessive time lost from duty for necessary treatment or hospitalization," and are "adaptable to the military environment without the necessity of geographical area limitations," the military maintains accession standards that presumptively exclude individuals with certain medical conditions from serving, subject to an individualized waiver process. Dep't of Defense Instruction 6130.03, at

[2] Under Fourth Circuit Rule 27(a), the government contacted counsel for plaintiffs, who intend to oppose this motion.

2, 7 (Apr. 28, 2010). For decades, these standards have presumptively barred transgender individuals from entering the military. *Id.* at 27, 48.

In June 2016, then-Secretary Carter ordered the Defense Department to revise its accession standards by July 1, 2017. Add. 65. Under this revision, a history of "gender dysphoria," "medical treatment associated with gender transition," or "sex reassignment or genital reconstruction surgery" would be disqualifying unless an applicant could obtain a certificate from a licensed medical provider that the applicant had been stable or free from associated complications for 18 months. Add. 68-69.

2. The Carter policy was never implemented because on June 30, 2017, Secretary Mattis "approved a recommendation by the services to defer" the revision until January 1, 2018. Add. 64. The deferral was to allow the branches to "review their accession plans and provide input on the impact to the readiness and lethality of our forces." *Id.*

On July 26, 2017, the President stated on Twitter that the government "will not accept or allow … Transgender individuals to serve in any capacity in the U.S. Military." Add. 13. The President issued an official memorandum on August 25 addressing the accession and retention of transgender service members as well as government funding for their sex-reassignment surgeries. Add. 61. With respect to accession standards, the President found that former-Secretary Carter had "failed to identify a sufficient basis to conclude" that his revision "would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." Add. 61, § 1(a). In the President's view, "further study is needed to ensure that continued implementation of last year's

policy change would not have those negative effects." *Id.* Accordingly, the President directed the Secretaries of Defense and Homeland Security to "maintain the currently effective policy regarding accession of transgender individuals" past January 1, 2018, until the Secretary of Defense, after consultation with the Secretary of Homeland Security, "provides a recommendation to the contrary that I find convincing." Add. 62, § 2(a). The President also ordered Secretary Mattis to submit an implementation plan to him by February 21, 2018. Add. 62, § 3.

In response, Secretary Mattis promised to "develop a study and implementation plan" that will address, *inter alia*, "accessions of transgender individuals." Add. 59. In the meantime, the rule "generally prohibit[ing] the accession of transgender individuals" would "remain in effect because current or history of gender dysphoria or gender transition does not meet medical standards." Add. 58.

3. Plaintiffs—six currently serving transgender individuals and the American Civil Liberties Union—sought a preliminary injunction of the memorandum's various directives. Two of the plaintiffs, Seven Ero George and Teagan Gilbert, claimed the accession directive would bar them from commissioning as officers. Add. 35.

The district court granted plaintiffs' request. Add. 1-2, 55. As relevant here, it held that one plaintiff, George, has standing to challenge the accession directive; that intermediate scrutiny applies; and that plaintiffs' equal protection challenge is likely to succeed, adopting the reasoning of the district court in *Doe, v. Trump*, 2017 WL 4873042 (D.D.C. Oct. 30, 2017). Add. 35-36, 46-47. It further held that the challenge is likely

to succeed even under rational-basis review and that the remaining factors counsel in favor of a preliminary injunction. Add. 47-49. The court therefore ordered that the government "shall not enforce or implement the … policies and directives encompassed in President Trump's Memorandum" concerning accession, retention, and sex-reassignment surgery. Add. 1-2.

4. After noticing an appeal on December 5, Doc. 86, the government asked the district court on December 12 to clarify that its injunction does not prohibit Secretary Mattis from exercising his independent discretion to defer implementing the Carter policy past January 1, for a limited time, to study the policy change further or to implement the revision, Add. 88. In the alternative, the government moved to stay the accessions portion of the preliminary injunction pending appeal. *Id.* In an accompanying declaration, the Acting Deputy Assistant Secretary of Defense for Military Personnel Policy explained that complying with the court's January 1 deadline would "impose extraordinary burdens" on the Defense Department and have a "harmful impact" on "the military, its missions, and readiness." Add. 97-98.

At a scheduling conference on December 13, the district court requested a response to the government's motion by December 15. The government advised the court that to give this Court sufficient time to issue a decision, the government would file an emergency stay motion in this Court on December 14. In a letter filed December 14, the district court confirmed this discussion. Add. 103-04. The

government will promptly notify this Court when the district court rules on the motion below.

ARGUMENT

This Court should stay the portion of the district court's injunction requiring the military to alter its accession policy by January 1, 2018. In considering whether to grant a stay pending appeal, a court must balance four factors: (1) the applicant's likelihood of success on the merits; (2) whether the applicant will suffer irreparable injury; (3) the balance of hardships to other parties interested in the proceeding; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). This Court reviews a grant of a preliminary injunction for abuse of discretion, but legal conclusions are reviewed de novo. *West Virginia Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009). Here, the government is likely to establish that the district court abused its discretion, as that court's analysis was infected by a number of serious legal errors. And unless stayed (or clarified), that injunction will irreparably harm the government, and the public, by, *inter alia*, compelling the military to scramble to revise its policies at the risk of harming readiness and disrupting an ongoing process that is only a few months away from completion. A stay, by contrast, would preserve the status quo and not irreparably harm the two plaintiffs who claim to be affected by the accession directive.

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

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

The district court in *Doe v. Trump* held its injunction prohibits Secretary Mattis from exercising his independent discretion to defer the January 1 deadline for a limited time to study the issue further or to implement the Carter policy. In the event that the district court here follows suit, and construes its injunction in a similar manner, this Court should stay that aspect of the injunction.

The Secretary of Defense has independent authority to delay policy changes regarding the composition of the armed forces. *See, e.g.*, 10 U.S.C. § 136(b) (recognizing his authority over "the areas of military readiness, total force management, [and] military and civilian personnel requirements"). In the present suit, plaintiffs therefore never sought to limit Secretary Mattis's discretion to defer implementation of the Carter policy, even though he had previously done so in June, but instead challenged the President's Memorandum alone. Doc. 39, at 4, 39-40. Indeed, plaintiffs argued there was a "stark" difference between the President's directive and the independent determination made by Secretary Mattis in June to undertake an "evidence-based assessment of the military's enlistment policies." Doc. 40-2, at 26-27.

Because plaintiffs challenged the President's directives alone, it is unsurprising that the preliminary injunction is limited to the "policies and directives encompassed in President Trump's Memorandum" and never addresses Secretary Mattis's authority to

delay revising accessions standards. *See* Add. 1-2. Likewise, the district court's justifications for enjoining the accession directive concern the President and his memorandum alone. In refusing to apply the usual deference that is owed to military decisions, the court emphasized "the circumstances surrounding the President's announcement" and the purported "absence of any considered military policymaking process." Add. 46. This reasoning does not support enjoining Secretary Mattis from making an independent decision to defer implementing the Carter policy for a limited time to study the issue further or to avoid the harms of rushing to comply with the January 1 deadline. *See infra* Part I.C.2.

An injunction that restricts Secretary Mattis's authority would dramatically alter the status quo, under which he could exercise his independent authority to delay implementation of the Carter policy. Under the injunction, the Carter accession policy is set to take effect on January 1—a date that reflects Secretary Mattis's deferral of the policy implementation. There is no meaningful difference between the decision of June 30, 2017, and a renewed, independent decision by Secretary Mattis to extend the deadline for a limited period past January 1. Thus, if the district court concludes that its injunction prohibits or limits Secretary Mattis's independent authority to defer the Carter accession policy, this Court should grant a stay of this aspect of the injunction.

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

Only two plaintiffs claim that the accession directive might affect them, and the district court addressed the standing of only one. Nevertheless, the court entered a preliminary injunction categorically barring implementation of the accession directive nationwide. In doing so, it gave no explanation for why such broad relief was necessary to redress those alleged injuries. Nor could it. That injunction violates principles of Article III and exceeds the court's equitable authority.

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

Equitable principles likewise require that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 765 (1994); *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163 (2010) (narrowing injunction in part because the plaintiffs "do not represent a class, so they could not seek to enjoin such an order on the ground that it might cause harm to other parties"). And these constitutional and equitable limits

apply with special force to injunctions concerning military policies. *See U.S. Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993) (staying injunction against Defense Department policy to the extent it conferred relief on anyone other than plaintiff).

Here, the district court concluded that one of the plaintiffs, George, has standing to challenge the accession directive. Add. 35-36. But in entering its preliminary injunction, the court did not limit its remedy to that litigant's injuries; instead, it barred application of the accession directive nationwide. Such wide-ranging relief cannot be reconciled with constitutional or equitable principles, nor is it necessary to remedy the alleged injuries of a single individual.

A limited stay pending appeal, by contrast, would pose no harm to plaintiffs. A narrow injunction barring the government from applying the accession directive to George—or at most, to both plaintiffs who claim harm from the policy—would provide plaintiffs with full relief. And to the extent that other applicants believe they have cognizable injuries, they are free to bring their own challenges—as some have done. *See, e.g., Doe*, 2017 WL 4873042.

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

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

1. To start, neither of the two plaintiffs who claim they will be affected by the accession directive has standing to challenge that order. Where, as here, a challenge would require this Court "to decide whether an action taken by one of the other two

branches of the Federal Government was unconstitutional," its "standing inquiry [must be] especially rigorous." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

The district court erred in finding that plaintiff George, who is currently serving in the Air National Guard and allegedly desires to pursue an active commission in the Army, has standing to challenge the accession directive. Add. 35-36; *see also* Add. 71-79. To begin, any future injury remains speculative, as George has never applied to become a commissioned officer. And even if such an application would fail to meet current medical standards, waivers are available under the Interim Guidance. Add. 58.

In any event, even if a waiver were unavailable, this claim suffers from a more fundamental problem: Contrary to the district court's conclusion, George has not demonstrated "eligib[ility] to commission as an officer." Add. 36. Instead, George underwent transition-related surgery in August 2016, *see* Add. 72, and thus would not be eligible to accede in January 2018 even under the Carter policy, which prohibits accession for 18 months after surgery, absent a waiver, Add. 69. Nor are there allegations that a medical provider would certify that George has "completed all medical treatment" and "has been stable in the preferred gender for 18 months." Add. 68; *see also* Add. 71-79.

At such time as George could demonstrate medical eligibility, the current accession policy might no longer be in effect. The military is currently studying this issue and will present the President with a recommendation early next year. It is possible that, following this review, Secretary Mattis will recommend ending the current

policy and the President will find that proposal convincing, Add. 62, § 2(a), thereby eliminating the only threatened injury. Moreover, because it is not clear that George would be eligible for a commission even under the Carter policy, any injury is neither "fairly traceable to the challenged action" of the President, nor is it "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (alterations and quotation marks omitted).[3]

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

As military leadership has explained, compliance with the district court's January 1 deadline "will impose extraordinary burdens" on the military and have a "harmful

[3] The district court did not rely on plaintiff Gilbert for standing purposes, Add. 35, and for good reason: Gilbert must earn a bachelor's degree to be eligible for commission, but is not scheduled to graduate until Spring 2019. Add. 85. The risk that the accession directive will injure Gilbert at that time is not sufficiently imminent for purposes of Article III. *Clapper*, 568 U.S. at 410. Additionally, there is no basis to assume that this litigant, who plans to seek "treatment, including gender confirmation surgery," will be eligible to commission even under the Carter policy. Add. 81.

impact" on "its missions[] and readiness." Add. 97-98. Despite the "implementation efforts made to date," the military will "not be adequately and properly prepared to begin processing transgender applicants" by January 1. Add. 101. Specifically, it will have to ensure that the "tens of thousands" of service members "dispersed across the United States" responsible for implementing accession policies "have a working knowledge or in-depth medical understanding of the standards." Add. 99. These service members include over 1,000 medical personnel, officers and providers; personnel at nine military entrance training locations; and 20,367 recruiters who assist applicants in completing their medical history forms. Add. 99-100. And their training will be complicated, as "[n]o other accession standard has been implemented that presents such a multifaceted review of an applicant's medical history" as the Carter policy. Add. 100. Thus, if the military is "compelled to execute transgender accessions by January 1," then "applicants may not receive the appropriate medical and administrative accession screening necessary for someone with a complex medical condition" and thereby enter the military even though they are "not physically or psychologically equipped to engage in combat/operational service." Add. 101.

The preliminary injunction further harms the military by forcing it to implement a significant change to its accession standards before it even completes its study of the issue. Forcing the military to accept some applicants it might otherwise have rejected had it been given more time to complete its study and implement its final policy is a significant injury in itself. Add. 101-02. And, of course, an erroneous accession

decision as to an individual could adversely affect the other members of his unit. Add. 100. But beyond that, short-circuiting the deliberative process both undercuts the ongoing work of the leadership studying the issue and threatens the military with two burdensome implementation processes—one to comply with the district court's order and another to execute a new policy (if the military adopts a new one following the study) or return to the old one (if the military adheres to its standards and the injunction is set aside on appeal). Add. 100-01. Imposing "duplicative" implementation costs, "sowing confusion in the ranks," and mandating personnel policy while military experts are still studying the issue are all significant harms. Add. 102. And because these injuries—whether to the fisc or to the defense of the nation—will be passed on to citizens more generally, a stay would be in the public interest.

Against those serious harms to the government and the public, plaintiffs cannot show that "irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. Even assuming that at least one plaintiff's speculative, future injury is sufficient for Article III standing, it would not rise to the level of irreparable harm. Instead, a "higher requirement of irreparable injury should be applied in the military context[,] given the federal courts' traditional reluctance to interfere with military matters." *Guerra v. Scruggs*, 942 F.2d 270, 274 (4th Cir. 1991). Plaintiff George has failed to demonstrate that it is likely that a preliminary injunction will prevent irreparable harm. As discussed in Part I.C.1, there is no reason to assume that George would be denied a waiver under the Interim Guidance or the final implementation plan, but nevertheless would be

medically eligible to commission under the Carter policy—much less be eligible to commission "before a decision on the merits can be rendered." *Winter*, 555 U.S. at 22 (quotation marks omitted). Plaintiff Gilbert's asserted injury is even more speculative, *supra* p. 13 n.3, and even less likely to occur before the court decides the merits, *Winter*, 555 U.S. at 22. In any event, this sort of employment-related harm is not irreparable, particularly in the military context. *See, e.g.*, *Guerra*, 942 F.2d at 271, 274 (holding that general discharge from the military does not constitute irreparable injury, even where plaintiff alleged that discharge procedures were unconstitutional).

3. On the merits, the district court further erred by failing to apply the appropriately deferential standard of review. Although the armed forces are subject to constitutional constraints, "the tests and limitations to be applied may differ because of the military context." *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). For instance, judicial "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). The same is true for "decisions as to the composition … of a military force." *Rostker*, 453 U.S. at 65; *see also, e.g.*, *Thomasson v. Perry*, 80 F.3d 915, 927 (4th Cir. 1996) (en banc) ("Ultimately, 'the special status of the military has required, the Constitution has contemplated, Congress has created, and the Supreme Court has long recognized' that constitutional challenges to military personnel policies and decisions face heavy burdens.") (brackets and citation omitted). Thus, even when military regulations trigger heightened scrutiny, courts have

upheld them in light of the significant deference due to the political branches' judgments in this area. *See, e.g.*, *Rostker*, 453 U.S. at 69–72 (excluding women from having to register for the draft).

The accession directive easily survives this deferential form of review. Given the President's concerns that departing from the military's longstanding accession policy without "further study" risked, among other things, harm to "military effectiveness," he ordered the armed forces to retain this standard while Secretary Mattis and his team conducted their own review of the issue. Add. 61-62, §§ 1, 2(a)). A decision to maintain the status quo for several months while the military conducts an additional study of a policy change of this magnitude survives any standard of review. Indeed, Secretary Mattis made a similar decision in June 2017 by delaying the Carter policy until January 1, 2018, while the military continued to examine the issue, and neither the court below nor plaintiffs have ever suggested that his decision was unconstitutional.

The district court never grappled with this problem, other than to assume (incorrectly) that the current accession policy would necessarily remain. *See* Add. 53; *supra* Part I.C.1. But even if that were true, the President's directive would still be constitutional given the deference due his assessment as Commander in Chief that abandoning that policy could "hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." Add. 61, § 1(a); *see, e.g.*, *Department of Navy v. Egan*, 484 U.S. 518, 529–30 (1988) ("'courts have traditionally shown the utmost deference to

Presidential responsibilities' … in military and national security affairs" (citation omitted)).

The district court reached a different judgment only because it refused to apply the deference traditionally afforded to military decisions. It justified this approach by adopting the *Doe* court's explanation that former-Secretary Carter and his team had already "studied and rejected" the "military concerns" raised by the President. 2017 WL 4873042, at *30; Add. 46-47. But even outside the military, the government must review "the wisdom of its policy on a continuing basis, for example, in response to … a change in administrations." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citation and quotation marks omitted).

In any event, the suggestion that the President's concerns were baseless withers under scrutiny. The study underlying the Carter policy explicitly concluded that allowing transgender individuals to serve would limit deployability, impede readiness, and impose costs on the military; it simply dismissed these burdens as "negligible." Doc. 1-2, at 39–42, 46, 69, 70. Indeed, the Carter policy itself implicitly acknowledged that gender dysphoria or gender transition could impede military readiness by requiring applicants to demonstrate that they had been stable or had avoided complications for an 18-month period. Add. 68-69. In other words, the key difference between the longstanding accession policy and the Carter policy is the scope of the exception to the presumptive ban on accession by transgender individuals. Under the former, a transgender individual was presumptively disqualified absent a waiver. Under the latter,

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

Finally, even if dispensing with deference were justified, the district court erred in applying intermediate scrutiny, *see, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227-28 (10th Cir. 2007) (heightened scrutiny does not apply to civilian classifications based on transgender status), and in holding that the accession directive is unlikely to survive even rational-basis review. If the directive can withstand intermediate scrutiny with deference, it can easily satisfy this lenient form of review.

II. The Remaining Factors Favor A Stay.

As explained, there is no basis for enforcing a preliminary injunction against the accession directive when plaintiffs are not likely to face irreparable injury and, absent a stay, the government (and the public) will suffer serious harm. *See supra* Part I.C.2. And although "[t]he principal function of a preliminary injunction is to maintain the status quo," *Di Biase v. SPX Corp.*, 872 F.3d 224, 231 (4th Cir. 2017), the district court's order does no such thing. Instead, the current accession policy—and Secretary Mattis's independent authority to defer revisions to that policy—is the status quo, and it has been for decades. The injunction here upends that state of affairs by compelling the

military to alter its longstanding policy without sufficient time for either thorough study or proper implementation. This is precisely the kind of situation where a stay is warranted to allow for effective appellate review *before* such drastic changes must occur.

Finally, and contrary to plaintiffs' claims, government officials have not "sat on their hands" since the district court issued a preliminary injunction on November 21. Doc. 92, at 1. The Department of Justice has been consulting with the Department of Defense to determine its approach with respect to each individual case. Following the district court's decision in *Doe*, the government had to make a collective decision regarding Secretary Mattis's independent authority to defer the January 1 deadline, seek clarification regarding that authority, and request a stay in the district court and in the D.C. Circuit. After undertaking an independent evaluation of the district court's decision in this case, the government determined that a similar course was warranted here. In the interests of time, the government combined its motion for clarification and its motion for a partial stay pending appeal in district court, which it filed on December 12, and filed this motion two days later.

CONCLUSION

The government respectfully requests that this Court enter a partial stay pending appeal of the preliminary injunction. Because that injunction commands the military to revise its accession policy by January 1, 2018, the government also requests that the Court enter an immediate administrative stay pending consideration of this motion or, in the alternative, issue a decision as soon as possible.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

BRINTON LUCAS
Counsel to the Assistant Attorney General

MARLEIGH D. DOVER

s/Catherine H. Dorsey
CATHERINE H. DORSEY
TARA S. MORRISSEY
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7236
950 Pennsylvania Ave., NW
Washington, DC 20530
202-514-3469

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,194 words. This Motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ Tara S. Morrissey
Tara S. Morrissey

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2017, I filed the foregoing motion 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 are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Tara S. Morrissey
Tara S. Morrissey