No. 18-676

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

v.

RYAN KARNOSKI, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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December 26, 2018

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QUESTION PRESENTED

In 2017, President Donald J. Trump suddenly and unexpectedly ordered a Ban on transgender military service. The district court entered a preliminary injunction preserving the status quo of open military service. The government did not appeal. In April 2018, the district court declined the government's request to dissolve the injunction. An appeal of that decision is pending. The question presented is:

Whether the district court's determination not to dissolve the preliminary injunction warrants an extraordinary writ of certiorari before judgment.

RULE 29.6 DISCLOSURE STATEMENT

Respondents certify that they do not have parent corporations and no publicly held corporation holds 10% or more of any of their stock. Gender Justice League further certifies that Gay City Health Project serves as the fiscal sponsor for Gender Justice League.

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STATEMENT

In 2017, President Trump stunned even his own military advisors with an unexpected Tweet announcing that he would reverse existing policy and bar transgender individuals from open military service. He followed up with a formal memorandum (the "Presidential Memorandum") ordering Secretary Mattis to implement his policy (the "Ban"). Four federal courts issued preliminary injunctions enjoining the Ban. The government failed to prosecute appeals of those preliminary injunctions.

In February 2018, Secretary Mattis delivered to the President precisely what the Presidential Memorandum had ordered: a plan implementing the Ban (the "Implementation Plan"). The government then moved to dissolve the preliminary injunctions. The district courts uniformly rejected these requests.[1] Appeals of those decisions are pending in the Courts of Appeals.

For the 13 months before the President's Tweet announcing the Ban, and for 17 additional months since then and under the injunctions now at issue, transgender service-members have served their country openly. The government *now*—for the first time and without pointing to any real-world urgency—seeks this Court's intervention, requesting that this Court remove the cases from the process of

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[1] The lower court adjudicating *Stone v. Trump*, No. 17-cv-2459 (D. Md.) has yet to rule on the government's motion to dissolve. *See* Pet. 9 n.2.

orderly appellate review through an extraordinary writ of certiorari before judgment.

I. The Status Quo and The Ban.

A. The Pre-Ban Status Quo.

1. *Exhaustive Studies Lead to the Open Service Status Quo.* In July 2015, on the heels of the military's successful experience following the repeal of Don't Ask, Don't Tell (governing gay and lesbian service members), a collection of peer-reviewed expert analyses concluded there existed no medically valid reasons for barring open service by transgender troops. *See, e.g.,* S.E.R. 257, 264.[2] Then-Secretary of Defense Ashton Carter convened an official working group to study transgender military service.

a. *The Working Group.* The Working Group, which consisted of senior Department of Defense uniformed and civilian personnel, was given the task of identifying any issues related to open transgender service, including how and whether such service was consistent with maximum "military readiness and lethality." Pet. 30a. It conducted a careful, "evidence-based assessment" of "all available scholarly evidence" and consulted with military commanders and experts in medicine, health insurance, and readiness. S.A. 728; S.A. 026.

Separately, the Working Group commissioned a study by RAND Corporation—a non-profit, non-

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[2] S.A., E.R., and S.E.R. cites refer to the Supplemental Appendix, Excerpts and Supplemental Excerpts of Record in the Ninth Circuit, No. 18-35347, Dkts. 22, 31, and 41.

partisan research institution with decades of experience advising the military. S.A. 026-027. RAND followed a multidisciplinary, detailed, and data-driven approach examining: (1) the health care needs of the transgender population; (2) the readiness implications of open service; and (3) the experiences of foreign militaries with open service.[3] S.A. 249. The RAND study found no evidence that would justify barring open service. Even under the "most extreme scenario," open service would impact active duty health care expenses by no more than 0.13%. S.A. 302. RAND also found "no evidence" that allowing open service would negatively impact unit cohesion, operational effectiveness, or readiness. S.A. 028.

Indeed, RAND found the maximum potential impact on available days for deployment would be "negligible"—a mere 0.0015% of available deployable labor-years—particularly in comparison to other conditions that routinely and temporarily limit service members' deployability. *Id.* On the other hand, RAND identified "significant costs" from a ban, including the loss of current and future transgender "personnel with valuable skills who are otherwise qualified" to serve. *Id.*[4]

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[3] Australia, Austria, Belgium, Bolivia, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Israel, Netherlands, New Zealand, Norway, Spain, Sweden, and the United Kingdom all allow transgender personnel to serve openly in their militaries. Pet. 43a-45a; S.A. 037-148.

[4] *Contra* Pet. 4, where the government asserts that the RAND Report "concluded that allowing transgender personnel to undergo gender transition and serve in their preferred gender would increase health-care costs and under-

The Working Group unanimously concluded that service by transgender people is "consistent with military readiness," and that a ban would actually "harm the military by excluding qualified individuals based on a characteristic with no relevance to a person's fitness to serve." S.A. 027; S.A. 030.

b. *The Carter Policy.* On June 30, 2016, Secretary Carter issued a formal open service directive, and ordered that the military "be open to all who can meet the rigorous standards for military service and readiness," including qualified transgender individuals (the "Carter Policy"). Specifically:

Transgender service members already in the military would no longer be "separated, discharged, or denied reenlistment . . . due solely to their gender identity or an expressed intent to transition genders." Pet. 91a. Those who sought to transition and completed any medically-necessary care related to

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mine military readiness and unit cohesion, but that those harms would be 'minimal' because only a small percentage of the 'total force would seek transition-related care,'" (citing E.R. 330–31, 408), what the RAND Report actually says is:

"[W]hen assessing the readiness impact of a policy change, we found that less than 0.0015 percent of total labor-years would be affected, based on estimated gender transition-related health care utilization rates. This is because even at upper-bound estimates, less than 0.1 of the total force would seek transition-related care that could disrupt their ability to deploy. Existing data also suggest a minimal impact on unit cohesion as a result of allowing transgender personnel to serve openly." E.R. 331.

transition could serve consistent with their gender identity. *See* Pet. 93a; DoDI 1300.28. Openly transgender recruits who had completed gender transition and thereafter demonstrated stability in their gender identity for at least 18 months could join the military. Pet. 92a.[5]

B. President Trump's Ban.

1. *The President Tweets The Ban.* On July 26, 2017, President Trump abruptly and unexpectedly reversed the open service policy. On Twitter via @realDonaldTrump, he announced, "the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military." Pet. 2a

He did not consult the Joint Chiefs before his Tweets. *See* S.A. 720–721 (Chairman of Joint Chiefs: "I know yesterday's announcement was unexpected"; "I was not consulted."). So far as the record shows (and so far as Respondents are aware), no deliberation or studies led to this Tweet.

2. *The President Formalizes The Ban Via The Presidential Memorandum And Orders An Implementation Plan.* President Trump formalized the Ban in a "Presidential Memorandum" dated August 25, 2017. The Presidential Memorandum ordered Secretary Mattis to bar openly transgender individuals from joining and serving in the military, and to

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[5] While the other directives took immediate effect, the Carter Policy directed that accessions begin by July 1, 2017 (a date deferred to January 1, 2018 by Secretary Mattis). *See* Pet. 96a.

prohibit funding for transition-related surgical care. *See* Pet. 2a.

The Presidential Memorandum commanded Secretary Mattis to submit to him, by February 21, 2018, a "plan for implementing both the general policy . . . and the specific directives" the memorandum contained. Pet. 101a. It also directed Secretary Mattis to determine "how to address transgender individuals currently serving." *Id.*

It did *not* contain a request for Secretary Mattis to "conduct an independent multi-disciplinary review and study," or for him to "exercise[] [his] professional military judgment," *contra* Pet. 7. *E.g., Stone v. Trump*, 280 F. Supp. 3d 747, 763 (D. Md. 2017) ("The Court cannot interpret the plain text of the President's Memorandum as being a request for a study to determine whether or not the directives should be implemented. Rather, it ordered the directives to be implemented by specific dates.").

3. *Secretary Mattis Follows the President's Orders And Provides the Ordered Implementation Plan.* Secretary Mattis acknowledged and implemented the President's orders. Four days after issuance of the Presidential Memorandum, Secretary Mattis issued a statement on "Military Service by Transgender Individuals," in which he stated that he had "received the Presidential Memorandum" and would "carry out the president's policy direction." Add. 107.[6] He subsequently issued two more memo-

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[6] Add. cites refer to the Addendum to Motion for Stay Pending Appeal in the Ninth Circuit (on May 14, 2018), No. 18-35347, Dkt. 3.

randa, one providing "Interim Guidance," and the other directing the development of an implementation plan. Secretary Mattis stated in the "Interim Guidance" that he would "comply with the Presidential Memorandum" and "present the president with a plan to implement the [Presidential Memorandum's] policy and directives" on the required timeline. Pet. 109a. In the second document, a "Terms of Reference," Secretary Mattis stated that he would convene "a panel of experts" to "develop[] an Implementation Plan on military service by transgender individuals, to effect the policy and directives in [the] Presidential Memorandum." Pet. 104a.

4. The Implementation Plan. On or about February 22, 2018, Secretary Mattis delivered to the President the ordered implementation plan, with the ordered contents, on the ordered timeline. *See* Pet. 100a. The Implementation Plan is longer and more intricate than a Tweet, but it still "prohibits transgender military service—just as was ordered in the [2017] Presidential Memorandum." Doe Stay Order at 10.[7] The Implementation Plan states that "transgender persons should not be disqualified from service solely on account of their transgender status," Pet. 149a—and then it proceeds to ban all open transgender service (with the exception of a limited "grandfather exception" for those that came out in reliance on the Carter Policy[8]), through three bars:

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[7] The "Doe Stay Order" cites refer to *Doe v. Mattis,* No. 17-cv-01597-CKK, Dkt. 187 (D.D.C. Nov. 30, 2018).

[8] The Presidential Memorandum explicitly contemplated this exception when it ordered Secretary Mattis to "determine

First, it generally bars anyone with a history of gender dysphoria. Pet. 198a.

Second, it bars from service anyone who undergoes or requires gender transition. Pet. 149a.

Third, "to the extent there are any individuals who identify as 'transgender' but do not fall under the first two categories," Doe Stay Order at 10, they are allowed to serve *only* in adherence with "the standards associated with their biological sex," Pet. 149a. *See also* Pet. 51a (noting that this would force "transgender service members to suppress the very characteristic that defines them as transgender in the first place.").

Collectively, these bars implement the policy that "openly transgender persons are generally not allowed to serve in conformance with their gender identity." Doe Stay Order at 10.

Notably, and contrary to the government's assertions, the Implementation Plan *does not* "tur[n] on a medical condition (gender dysphoria) . . . . "). This characterization, the lower courts found, "does not match reality." *Stockman*, Dkt. 124 at 5. The policy itself applies *only* to transgender persons. *See, e.g.,* Pet. 177a, 178a, 198a (applying policies to three categories of "Transgender Persons").[9] And even then,

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how to address transgender individuals currently serving in the United States military" as part of the Implementation Plan. *See* Pet. 101a.

[9] Indeed, the record documents announcing and implementing the Implementation Plan explicitly refer to military service of *transgender* individuals. Not one includes gender dysphoria in its subject line, compared with many references to transgender status. *See, e.g.*, DoD, *SUBJECT: Accession of*

"[a] diagnosis of gender dysphoria is neither necessary nor sufficient for a person to be excluded from the military under this new policy." *Stockman*, Dkt. 124 at 5. For example, those who had gender dysphoria but treated it through a gender transition (and thus no longer have gender dysphoria) cannot serve, period. Pet. 149a.

5. *President Trump Approves The Implementation Plan.* President Trump approved the Implementation Plan in a March 23, 2018 memorandum entitled "Military Service by Transgender Individuals," which acknowledges receipt of the Implementation Plan developed "[p]ursuant to [the President's] memorandum of August 25, 2017," and authorizes the Secretary of Defense to carry out the Implementation Plan. *See* Pet. 210a.[10]

Transgender Individuals into the Military Services (June 30, 2017), Add. 112; Presidential Memorandum, *Military Service by Transgender Individuals* (August 25, 2017), Add. 109-10; DoD, *SUBJECT: Terms of Reference—Implementation of Presidential Memorandum on Military Service by Transgender Individuals* (Sept. 15, 2017), S.A. 806; DoD, *Department of Defense Report and Implementation of Presidential Persons* (Feb. 2018), S.A. 747; DoD, *Memorandum for the President, SUBJECT: Military Service by Transgender Individuals* (Feb. 22, 2018), S.A. 852; White House Memorandum, *SUBJECT: Military Service by Transgender Individuals* (Mar. 23, 2018).

[10] This memorandum also purportedly "revoke[s]" the President's earlier policies. *See* Pet. 211a.

II. PROCEDURAL HISTORY

A. The District Court And Three Other Federal Courts Preliminarily Enjoin The Ban

1. *The Preliminary Injunctions.* On August 28, 2017, Respondents—nine transgender individuals currently serving or wishing to serve, and three organizations—filed suit challenging the Ban's constitutionality. D. Ct. Dkt. 1. Respondents—joined by the State of Washington as an intervenor—sought a preliminary injunction to maintain the status quo that existed before the Ban. D. Ct. Dkt. 32. The district court—as well as three others—granted a preliminary injunction maintaining the status quo under the Carter Policy. Pet. 1a; *see also Doe 1 v. Trump*, No. 17-1567, 2017 WL 6553389 (D.C. Cir. Dec. 22, 2017); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017); *Stockman v. Trump*, No. 17-cv-1799-JGB-KK, Dkt. 79 (C.D. Cal. Dec. 22, 2017).

The district court found the government's proffered reasons for the Ban were "not merely unsupported, but [were] actually contradicted" by the extensive study and judgment of military leaders in developing the Carter policy. Pet. 20a. The district court also rejected the government's argument that the Tweets and Presidential Memorandum were entitled to "military deference" under *Rostker v. Goldberg*, 453 U.S. 57 (1981), as they were announced "abruptly and without any evidence of considered reason or deliberation." Pet. 22a.

Balancing the equities, the court found that Respondents were exposed to irreparable harms, in-

cluding the violation of their constitutional rights and the loss of their careers, while the government would "face no serious injustice in maintaining the June 2016 Policy pending resolution of this action on the merits," especially since the Carter policy was "voluntarily adopted by DoD after extensive study and review." Pet 26a.

2. *The Government Declines Appellate Review.* Initially, the government filed appeals and sought *narrow* stays from the Courts of Appeals: Each stay motion asked the court only for permission to bar new transgender recruits (*i.e.*, bar accessions), without asking for permission to discharge currently serving individuals or deny them medical care. *See, e.g.*, No. 17-36009, Dkt. 3. The Fourth and D.C. Circuits rejected these motions, and the government then abandoned its Ninth Circuit stay request. *Stone v. Trump*, No. 17-2398, Dkt. 31 (4th Cir. Dec. 21, 2017); *Doe 1 v. Trump*, No. 17-5267, Doc. 1710359 (D.C. Cir. Dec. 22, 2017). At that point, the government voluntarily dismissed all three appeals. *Karnoski v. Trump*, No. 17-36009, Dkt. 21 (9th Cir. Dec. 29, 2017); *Stone v. Trump*, No. 17-2398, Dkt. 35 (4th Cir. Dec. 29, 2017); *Doe 1 v. Trump*, No. 17-5267, Doc. 1711023 (D.C. Cir. Dec. 29, 2017). The injunctions took effect, without the government ultimately prosecuting any appeals in the Courts of Appeals—much less seeking any intervention from this Court.

3. *The District Court Decision Now On Review.* On January 25, 2018, Respondents moved for summary judgment. On March 23, 2018, after briefing was complete, the government released the Im-

plementation Plan that President Trump had ordered. E.R. 158. Claiming the President had "revoked" his Presidential Memorandum ordering the Ban in favor of the Implementation Plan, the government moved to dissolve the preliminary injunction. The district court ordered supplemental briefing. After reviewing those briefs and "carefully consider[ing]" the issue, the district court rejected the government's request to dissolve the injunction. Pet. 66a–67a, 71a–72a.

As an integral part of its ruling, the court reached the fact-bound determination that the Implementation Plan was not a "new" policy, noting it was merely the implementation of the Presidential Memorandum—which "did not direct Secretary Mattis to determine *whether* or not the directives should be implemented, but instead ordered the directives to be implemented by specific dates and requested a plan for *how* to do so." Pet. 50a. The court also analyzed the "exceptions" supposedly distinguishing the Implementation Plan from the pre-Carter policy, and concluded that a purported exception for those serving in their "biological sex" "does not constitute 'open' service in any meaningful way, and cannot reasonably be considered an 'exception' to the Ban." Pet. 51a.

The government brought the same motions and made the same arguments in the other lower courts. And, on similar logic, the government lost those motions, too. *See Doe 2 v. Trump*, 315 F. Supp.

3d 474 (D.D.C. 2018); *Stockman v. Trump*, 331 F. Supp. 3d 990.[11]

4. *The Current Appeal*. The government subsequently appealed the district court's denial of its motion to dissolve the preliminary injunction. It likewise sought a stay pending appeal, which both the district court (on June 15, 2018) and the Ninth Circuit (on July 18, 2018) denied. Pet. 75a, 82a. The government did not seek review in this Court—nor would it for another four months (via this petition). The Ninth Circuit expedited the argument, which was held on October 10, 2018, and there is no suggestion it will not likewise decide the case on an expedited basis. On November 23, 2018, the government filed this petition.

Despite the government's petition, discovery and other proceedings continue in the district court as the parties prepare for an April 2019 trial. The government has recently disclosed experts to offer testimony in support of the Ban and similarly served discovery on Respondents, to which Respondents timely responded on December 17, 2018. Respondents are likewise developing the record in support of their claims via discovery and experts.

REASONS FOR DENYING THE PETITION

Parties are not entitled to treat the Supreme Court of the United States as a court of first review. Rather, to obtain the extraordinary remedy of certio-

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[11] The *Stone* court has yet to rule on the government's pending motion to dissolve in that case.

rari before judgment, the petitioner must make "a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. *See also Coleman v. Paccar Inc.*, 424 U.S. 1301, 1304 n.* (1976) (REHNQUIST, J.) (in chambers) ("the exercise of such power by the Court is an *extremely rare occurrence*.") (emphasis added).

All parties have offered fulsome briefing in interlocutory appeals currently pending in the lower courts. The government does not contend that the United States Courts of Appeals for the Ninth and District of Columbia Circuits are incapable of grappling with these issues appropriately in the first instance. Accordingly, rather than asking the Court to make an unnecessary and potentially fruitless foray into a premature petition involving a plethora of procedural and factual disputes, the government should trust the Courts of Appeals to play their proper roles in focusing the issues that this Court might ultimately review. At this stage, there is no reason for this Court to intervene, for three reasons.

First, there is no urgency. Indeed, the government's own actions show as much. The preliminary injunctions the government challenges have been in effect for *more than a year*. The government did not seek this Court's intervention at any point during this period, despite numerous opportunities to do so. The government's claimed urgency is precisely the same as it would have been a year ago, when it declined to seek this Court's intervention

and voluntarily dismissed its appeals. Or this summer, when it similarly failed to pursue its most recent stay motions to this Court. In any event, the government does not point to any evidence of actual problems with open service warranting urgent review—the actual evidence is to the contrary. *See, e.g.*, S.A. 983 (Testimony to Congress by Army Chief of Staff (and recently named Chairman-designee of the Joint Chiefs) Gen. Mark Milley) ("I have received precisely zero reports . . . of issues of cohesion, discipline, morale, and all those sorts of things.").

Second, even if review were otherwise warranted (which it is not), a messy procedural posture, unresolved factual issues, and an incomplete record make this case a poor vehicle for review. Moreover, instead of aiding this Court's review, certiorari before judgment would create additional vehicle issues that could well obscure the merits. Contested factual and procedural issues abound.

And third, the district courts were correct on the merits.

The Court should deny this extraordinary and unwarranted request.

A. There Is No Urgency Warranting This Court's Immediate Intervention.

The government rests its argument for certiorari before judgment on a nebulous and ill-defined need for immediate review it never precisely articulates—much less grounds in any concrete (as opposed to hypothetical) harm. But there is no urgency war-

ranting the extraordinary relief the government seeks.

1. First, it is impossible to square the government's sudden claim of an urgent need to obtain this Court's review with its actions to-date in this litigation—which have shown *no* interest in seeking this Court's intervention. These injunctions have been in place since 2017, yet, until November 23, 2018, the government made no attempt to seek this Court's review. There were ample opportunities, and the government did not avail itself of any of them. Specifically:

> (i) The District Court granted the original preliminary injunction on December 11, 2017. The government appealed to the Ninth Circuit but, on December 29, 2017, voluntarily dismissed the appeal, without ever seeking this Court's review. *See* No. 17-36009, Dkt. 21 (CA9).
>
> (ii) Earlier this year, the government sought a stay from the district court and from the Ninth Circuit of the denial of its motion to dissolve the preliminary injunction—*the same stay it seeks here*. Both courts denied those stays—the district court on June 15, 2018, and the Ninth Circuit on July 18, 2018. *See* No. 18-35347, Dkt. 90 (CA9); D. Ct. Dkt. 283. The government never sought review in this Court.

That inaction alone flatly belies any need for this Court's urgent intervention now. As the *Doe* court observed—given the "lack of material changes to the factual record," the "Court cannot help but question why Defendants have, again, decided to challenge the Court's preliminary injunction *at this point in the litigation*." Doe Stay Order at 2 (emphasis added). The government has no satisfactory answer.

2. Indeed, the factual record illustrates the complete absence of real-world harms that would warrant immediate review.

These injunctions have been in place for more than a year. And the Carter Policy has been in effect for two-and-a-half years, since June 30, 2016. Yet, the government points to *no actual, real-world* harm from open service, and relies only on speculative and hypothetical concerns. *See* Doe Stay Order at 5, 21 (noting that the government "present[s] no evidence that the [lower court's] preliminary injunction maintaining the status quo of allowing transgender individuals to serve in the military has harmed military readiness," and that "[t]he Court finds the lack of support especially concerning given that the preliminary injunction has been in place for over a year. If a preliminary injunction were causing the military irreparable harm, the Court assumes that Defendants would have presented the Court with evidence of such harm by now.").

This lack of any real-world harm should not be surprising. It is important to remember that these injunctions merely *maintain* the status quo of open

service. They do not impose a new policy on the military—they maintain the current one. And under that current policy, transgender service members are still "subject to the same standards and procedures as other members with regards to their medical fitness for duty, physical fitness, uniform and grooming, deployability and retention." Doe Stay Order at 20–21 (citing Declaration of Raymond E. Mabus, Jr., Retired Sec. of the Navy). That is, "[o]nly those transgender individuals who meet the combat-readiness standards that all non-transgender service members must meet will be permitted to serve in the military." *Id.* The injunctions "simply prohibi[t] the military from refusing to allow an otherwise combat-ready individual to serve based on that individual's transgender status." *Id.*

Moreover—as the *Doe* court noted—under the Carter Policy, "considerable work was done by the military" to ensure there would be no problems with open service, including training of medical personnel and the development of an "exhaustive handbook designed to assist [] transgender [s]ervice members in their transitions, help commanders with their duties and responsibilities, and help all [s]ervice members understand new policies enabling the open service of transgender service members." Doe Stay Order at 20. The factual record makes clear that these efforts have paid off in the successful implementation of open service—with no evidence of any adverse effects on military readiness, lethality, unit cohesion, or discipline or morale.

Indeed, the military's Service Chiefs have explicitly rejected the urgency the government's attorneys now claim. Specifically, in testimony to Congress last spring (21 months after the open service directive went into effect), Senators questioned the military:

> SENATOR: Have you since heard anything, how transgender service members are harming unit cohesion . . . . General Milley, have you heard anything?
>
> GENERAL MARK MILLEY, CHIEF OF STAFF, UNITED STATES ARMY: No, not at all. The—and we have a finite number. We know who they are, and [we] are monitoring very closely, because, you know, I'm concerned about that . . . And no, I have received precisely zero reports—
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> SENATOR: Okay.
>
> GENERAL MILLEY: —of issues of cohesion, discipline, morale, and all of those sorts of things.
>
> * * *
>
> GENERAL ROBERT NELLER, COMMANDANT, UNITED STATES MARINE CORPS: Senator, by reporting, those marines have come forward—there's 27 marines that have identified as

> transgender, one sailor serving—I am not aware of any issues in those areas.
>
> * * *
>
> ADMIRAL JOHN RICHARDSON, CHIEF OF NAVAL OPERATIONS, UNITED STATES NAVY: Ma'am, I will tell you that we're—it's steady as she goes. We have a worldwide deployable Navy. All of our sailors, or the vast majority of our sailors, are worldwide deployable. We're taking lessons from when we integrated women into the submarine force. . . . That program has gone very well.
>
> S.A. 982-983, 988, 990.

3. Finally, the authority that the government cites only underscores the inadequacy of its position here. It provides only three *highly* unusual cases in which this Court has granted certiorari before judgment. *See* Pet. 18. Each involved a time-sensitive issue where the absence of an immediate resolution would have resulted in significant harm to the Nation.

Dames & Moore v. Regan, 453 U.S. 654 (1981), involved a challenge to President Carter's authority to enter into an international agreement ending the Iranian hostage crisis. The Court explained that it granted certiorari before judgment "because lower courts had reached conflicting conclusions on the va-

lidity of the President's actions and, as the Solicitor General informed us, unless the Government acted by July 19, 1981, Iran could consider the United States to be in breach of the Executive Agreement." *Id.* at 660. In this case, by contrast, no impending deadline threatens an international crisis absent the Court's immediate intervention.

In *United States v. Nixon*, the President had openly defied a district court order compelling disclosure of the Watergate tapes. 418 U.S. 683 (1974). The Court granted immediate review based on "the need for . . . prompt resolution" of that extraordinary challenge to the authority of the federal courts. *Id.* at 687.

Finally, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952) (*Steel Seizure*), the Court granted immediate review of President Truman's order nationalizing the country's steel mills during the Korean War. The Court "[d]eem[ed] it best that the issues raised be promptly decided by this Court" because of the risk that "a strike disrupting steel production for even a brief period would . . . endanger the well-being and safety of the Nation." *Id.* at 584. Again, the government can point to no comparable consequence likely to occur prior to final judgment that would warrant certiorari on the interlocutory orders (much less certiorari before judgment) here.

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In sum, the government utterly fails to "justify deviation from normal appellate practice" in this

case. Sup. Ct. R. 11. The factual record fails even to hint at any actual, real-world emergency—indeed, all evidence is to the contrary. And, the government's previous failures to seek this Court's review (despite repeated opportunities) cast serious doubt on its current claims of urgency. This alone is sufficient to deny the petition.

B. This Case Is A Poor Vehicle For The Legal Issues Presented.

The government seeks this Court's ruling on one purportedly urgent issue: The legality—or illegality—of the Ban. Even if this case ultimately warrants this Court's attention, the government's decision to preempt the ordinary process of appellate review by treating this Court as one of first resort plainly illustrates the reasons behind Rule 11. The Courts of Appeals serve an important function in shaping and focusing the issues for presentation to this Court. *See, e.g.*, *United States v. Mendoza*, 464 U.S. 154, 160 (1984). But the government's attempt to skip the Courts of Appeals has created an ill-conceived petition which, even if granted, may not place the issue as to which the government seeks premature review (the constitutionality of the Ban) squarely before the Court. Thus, even if "the issues lying at its core" are "worthy of consideration in a case burdened with fewer antecedent and factbound questions," the "proper course is to deny certiorari in this particular case." *Scenic Am., Inc. v. Dept. of Transp.*, 138 S. Ct. 2 (2017) (Mem.) (GORSUCH J., joined by ROBERTS, C.J. and ALITO, J.) (statement respecting denial of certiorari).

1. The procedural posture of this case is a contested—and material—tangle, such that resolution of yet-unadjudicated predicate procedural questions may deny the Court the opportunity to rule on the Ban's legality.

For starters, the parties cannot even agree on the procedural posture of the case. The government argues that the issue on review is whether the district court erred in *granting* a preliminary injunction against the Ban. *See* Pet. (1) (Question presented is "[w]hether the district court erred *in preliminarily enjoining* the Mattis policy nationwide."). Quite to the contrary, Respondents believe the issue is whether the district court erred in *failing to dissolve* an already existing preliminary injunction. *See supra* "Question Presented."

These are not mere semantics—the two questions implicate very different standards of review. Compare Gov't Opening Br. No. 18-35347, Dkt. 30 at 18 (CA9) ("Standard of Review": abuse of discretion based on four-part test from *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008) for the *grant* of preliminary injunction), with Resps' Br., No. 18-35347, Dkt. 40 at 20 (CA9) ("Standard of review: An appeal of an order denying a motion to dissolve a preliminary injunction is "limited to the propriety of the denial of the dissolution motion and the new matter presented. The party seeking dissolution bears the burden of showing a significant change in the facts or law.")

This procedural question consumed a notable portion of oral argument in both Courts of Appeals.

See, e.g., No. 18-5257 (CADC) Oral Arg. Tr. at 01:20 (Judge Griffith: What's the standard of review that we should be employing now? You want us to get straight to the constitutionality of the Mattis plan. But isn't there an antecedent question we need to ask you given the unique procedural posture? I mean, we're reviewing the denial of a motion to dissolve a preliminary injunction. That's a little unusual.); No. 18-35347 (CA9) Oral Arg. Tr. at 05:27 (Judge Callahan: "I agree you have an appeal, but in order to prevail, what is your burden?").

And for good reason. As government counsel indicated in the Ninth Circuit, the resolution of that question might be dispositive:

> Government Counsel: Sure, your Honor. So, ***I think it depends on how you resolve [the] predicate question*** of whether you view the District Court's April 2018 ruling as an extension of the injunction or simply a refusal to dissolve. If it is an extension of the injunction, then it is a new injunction and it would be treated like a normal PI appeal. If it is just a refusal to dissolve, then we have to show that there has been a change . . . .
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> No. 18-35347 (CA9) Oral Arg. Tr. at 05:27.

This potentially dispositive threshold question would not only complicate this Court's review, it could cause the Ban's legality to evade this Court's review entirely in this vehicle. Should the Court

agree with Respondents on the procedural posture, it may well conclude that the government loses because it failed to present "significant changes in fact or law" warranting dissolution of an existing injunction. *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). Indeed, that is one of the *precise* arguments Respondents urged the Ninth Circuit to adopt. *See* No. 18-35347 (CA9) Oral Arg. Tr. at 26:50 (Counsel for Respondents: "There are two or three ways you can affirm this decision. The first is to find that they didn't meet their burden and the [district court] didn't make a clearly erroneous ruling in saying that this wasn't so significantly new and different that it required dissolving the prior injunction."). This ruling—one on the narrowest possible grounds—could well offer no guidance on the Ban's constitutionality. At the very least, that real possibility counsels strongly in favor of allowing the Courts of Appeals to play their assigned roles in the ordinary course of appellate review by clarifying the questions this Court might reach. *Cf. Saucier v. Katz*, 533 U.S. 194, 213 (2001) (GINSBURG, J., concurring in the judgment) (joined by STEVENS & BREYER, JJ.) ("In the instant case, however, the Court finds that procedural impediments stop it from considering first whether a constitutional right would have been violated on the facts alleged.")

2. Procedural complexities aside, the legal question presented in this petition is thoroughly fact-bound—and the facts are hotly contested, dispositive, and still in development. Depending on the Court's views on the following (and other) fact questions, the

Ban's ultimate legality might well escape review in this vehicle.[12]

For example, the government contends that the Implementation Plan was "the exercise of Secretary Mattis' *independent* judgment, following an *independent* multi-disciplinary review by a panel of experts." Pet. 24–25 (emphasis added). Respondents argued, and the district courts found, that the Implementation Plan was not "independent." *See, e.g.*, *Stone*, 280 F. Supp. 3d at 763 ("The Court cannot interpret the plain text of the President's Memorandum as being a request for a study to determine whether or not the directives should be implemented. Rather, it orders the directives to be implemented by specified dates."). Yet this contested fact undergirds the government's claim that the Ban is entitled to "military deference," *see* Pet. 21, 23, because it is the "professional judgment of military authorities" that triggers deference, *Goldman v. Weinberger*, 475 U.S. 503, 507 (1996). If Secretary Mattis's purported "panel of experts" merely *implemented* the policy the President commanded in the Presidential Memorandum (*i.e.*, if it did not act in the "independent" manner the government asserts), the panel's "conclu-

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[12] The Court's review would be limited to clear error in reversing contrary district court factual findings. *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2347 (2018). In any event, the Supreme Court of the United States typically is not a fact-finding body and factual determinations are rarely granted plenary review via writ of certiorari. *See, e.g.*, *Salazar-Limon v. City of Houston, Tex.*, 137 S. Ct. 1277, 1277 (2017) (Mem.) (ALITO, J., with whom THOMAS, J. joins, concurring in the denial of certiorari).

sions" would *not* reflect the military's "professional judgment"—they would reflect only the *President's* ill-considered and unadvised judgment. Whether the panel acted independently could also prove dispositive to the determination of whether the government has offered the actual reasons for the Ban, or whether the Implementation Plan consists only of impermissible, *post hoc* justifications. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("*VMI*") ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.").

Moreover, discovery and factual development continues in the district court, and there remain a multitude of still-to-be-developed facts that must be found before the Ban's ultimate constitutionality may be determined. This includes the actual motivations for,[13] and any deliberations leading to,[14] the Ban; whether the government's claimed reasons actually support (rather than undermine) the interests the Ban purportedly furthers; and whether those interests might be achieved equally well without class-

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[13] *E.g., Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 265, 266 (1977) ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.")

[14] *E.g.*, *Goldman*, 475 U.S. at 507 ("professional military judgment" triggers deference); *Rostker*, 453 U.S. at 72 (military deference appropriate because Congress did not act "unthinkingly" or "reflexively and not for any considered reason."); *see also VMI*, 518 U.S. at 533 (*post hoc* justifications impermissible).

based discrimination.[15] Granting certiorari now, before the ultimate resolution of these facts, will not ultimately resolve the Ban's legality.

* * * * *

The government does not grapple with—or even deign to recognize—these serious vehicle issues. It merely offers an unexplained statement that granting and consolidating all three pending petitions will "[e]nsure an adequate vehicle for the timely and definitive resolution of the overall dispute." Pet. 27. But the vehicle issues are similar across all three petitions, including the complicated procedural postures and possibly dispositive, but contested, factual issues. Granting three petitions with the same vehicle issues will not magically make those vehicle issues disappear.

Even a brief review of these vehicle problems underscores the benefits of allowing the ordinary appellate process to take its course. The Courts of Appeals could resolve the pending appeals on any number of grounds, most of which would simplify and streamline the issues, and some of which might obviate any need for this Court's review. But no matter how they resolve the cases, this currently splitless

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[15] *E.g.*, *VMI*, 518 U.S. at 533 ("The State must show 'at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (When a classification's sheer breadth is so discontinuous with the reasons offered," it lacks "even a rational relationship to legitimate state interests.").

case warrants further percolation in the Courts of Appeals to ensure that there is a developed factual record and allow for further analysis and refinement of the arguments and their merits, should the Court feel this issue merits plenary review at a later stage.

III. THE DECISION BELOW IS CORRECT.

A. The District Court Did Not Abuse Its Discretion in Declining To Dissolve the Preliminary Injunction.

1. When a party—like the government, here—moves to modify or dissolve a preliminary injunction, it bears the burden of demonstrating that "significant changes in law or facts" since the issuance of the original decree have "turned [it] through changing circumstances into an instrument of wrong." *Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647–48 (1961); *see also United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree."). Accordingly, the appeal is "limited to the propriety of the denial, and does not extend to the propriety of the original injunction itself," *Gon v. First State Ins. Co.*, 871 F.2d 863, 866 (9th Cir. 1989), as "neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided," *Wright*, 364 U.S. at 647.

The decision to continue, modify, or dissolve an existing injunction is committed to the "wide discretion in the district court." *Wright,* 364 U.S. at

648. Moreover, to the extent that determination rests on factual determinations, those factual determinations are reviewable only for clear error. *See Abbott*, 138 S. Ct. at 2347.

The government fails to even acknowledge, let alone satisfy, this standard of review here. It does not show that the district court abused its discretion, let alone committed clear error, in making the fact-bound decision that the "Mattis policy" was not new or materially different and therefore, that there had not been a "significant change in law or facts" that warranted dissolving the preliminary injunction.

2. The government's entire argument is grounded on the faulty factual proposition that the Implementation Plan is somehow a sufficiently "new" and independent policy that it constitutes the required changed circumstances. But, as the district courts properly and uniformly concluded, the Implementation Plan is not a "new" policy. It is merely the implementation of the same policies that the President announced and ordered in the Presidential Memorandum. *See supra* I.B.2–4. As the *Doe* court correctly summarized in concluding that the Implementation Plan was not "new":

> [T]he 2017 Presidential Memorandum ordered that a plan to implement a policy prohibiting transgender military service be submitted by February 2018. . . . [I]n the months following the issuance of the 2017 Presidential Memorandum, Department of Defense officials repeatedly stated that they were preparing such

> an implementation plan based on the President's policy directive. . . . The [] Implementation Plan was provided to the President in February 2018, and it in fact prohibits transgender military service.

Doe Stay Order at 7.

Ultimately, "it is not at all surprising that an implementation plan, crafted over the course of months (clearly with assistance from lawyers and an eye to pending litigation) is a longer, more nuanced expression of the President's policy direction." *Doe 2*, 315 F. Supp. 3d at 494-95. But this does not make it a "significant change" or a "new policy" meriting dissolution in the injunction.

Accordingly, the district court did not err in finding that the government showed no "significant change" warranting a dissolution of the preliminary injunction.

B. The Implementation Plan Is Unconstitutional, In Any Event.

1. The Implementation Plan is subject to heightened scrutiny because, at the very least, it discriminates on the basis of gender. *See VMI*, 518 U.S. at 531 ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."). Moreover, it discriminates on the basis of nonconformity to gender-based expectations and stereotypes, which triggers heightened scrutiny. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). This Court has

explicitly rejected claims that the normal tiers of scrutiny are inapplicable to the military context. *See Rostker*, 453 U.S. at 69–70.[16]

2. The government claims that rational basis review applies because the Implementation Plan purportedly discriminates on the basis of a medical condition (gender dysphoria) and an associated treatment (gender transition), not transgender status. Pet. 19. This wrong as a factual matter, *see supra* I.B.4. It is also wrong as a legal matter. A line drawn on the basis of gender dysphoria and a need or desire to transition is based on transgender status, and therefore triggers the same level of scrutiny. That is particularly true where, as here, the policy also bans transgender persons who have transitioned or have a need to transition—a trait that, by definition, makes a person transgender. *See* E.R. 170; *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010) (targeting same-sex conduct necessarily targets the status of being gay); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

3. Under heightened scrutiny, the government is limited to the actual and "genuine" justifications that motivated its decision *at the time*; it cannot rely on hypothetical or *post hoc* justifications. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1696–1697 (2017); *VMI*, 518 U.S. at 533. As the lower courts have uniformly found, the Implementation Plan was ordered by, and implements, the policy and

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[16] The Ban also triggers heightened scrutiny under due process and First Amendment analysis. *See* Pet. 22a-24a.

directives first set forth and adopted by the President in the Presidential Memorandum. But the government offers precisely zero evidence in support of the Presidential Memorandum. Instead, it relies *exclusively* on the evidence contained in the subsequent Implementation Plan, which post-dates the Presidential Memorandum's command and is thus legally insufficient and irrelevant. As the government offers no evidence other than these *post hoc* rationalizations, its justifications fail as a matter of law.

4. Even if the evidence in the Implementation Plan could be considered, that evidence would fail to satisfy even rational basis review—much less heightened scrutiny. Three key points alone illustrate the insufficiency of the government's purported justifications.

First, all of the arguments the government now presses were considered and rejected by the military in 2016 when it adopted the Carter Policy. While administrations do change policies, the "sheer breadth of the exclusion, the unusual circumstances surrounding the President's announcement of the [Ban]. . . and the recent rejection of [these] reasons by the military itself" casts significant doubt on the justifications now proffered, *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 176 (D.D.C. 2017)—particularly given the military's now nearly 30 months of unproblematic experience with open service.

Second, the sheer breadth of the Ban provides a strong indication of its irrationality (and certainly does not satisfy any tailoring inquiry under heightened scrutiny). The government does not even pur-

port to demonstrate that the interests it asserts could not be satisfied by general standards that apply to individual service members (both transgender and non-transgender), as opposed to a ban of all transgender persons as a group. For example, as to *deployability*, Pet. 21, the military has a universal rule that requires separation of any service member who is non-deployable for more than 12 months. S.E.R. 13–14. This addresses the government's speculative concerns that some transition-related surgeries might render a service member "non-deployable for a potentially significant amount of time." Pet. 22. Similarly, as to "*sex-based standards*," *id.*, the Carter policy requires that transgender service members adhere to the grooming and other standards of their birth-assigned gender until both their doctor and commanding officer certify they have successfully completed transition and thereafter, they must adhere to the grooming and other standards of their gender identity. This creates a bright-line rule that ensures the military maintains sex-based standards, including with respect to transgender service members. Finally, as to *cost*, studies presented to the district court showed that even in the "most extreme scenario" the projected "maximal financial impact is an amount so small it was considered to be 'budget dust,' hardly even a rounding error." Pet. 21a.[17]

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[17] "Only a 0.13 percent ($8.4 million out of $6.2 billion) increase in [military active-duty] healthcare spending." *Id.* Actual costs have proved to be substantially less than those

And *third*, the Implementation Plan's defense of the Ban is grounded not on a military determination, but rather a medical and scientific determination that the successful treatment of gender dysphoria is "uncertain." *See* Pet. 182a. But this predicate is contrary to the settled medical and scientific consensus that gender dysphoria is a medical condition that can be successfully treated, and it has been "definitively rejected" by the American Medical Association, American Psychiatric Association, American Psychological Association, former military leaders and Surgeons General as rooted in outdated, disproved assumptions, and contradicted by a vast body of medical research and literature. *See* S.E.R. 133 (the Implementation Plan has "mischaracterized and rejected the wide body of peer-review research on the effectiveness of transgender medical care.").

* * * * *

In sum, the government's proffered justifications are all *post hoc* and therefore *per se* inadequate to sustain the Ban under the heightened scrutiny that applies. But even if considered, the assertions do not withstand inspection. The district court accordingly did not err in finding the Ban likely to constitute unlawful discrimination.

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estimated, totaling only $2.2 million in FY 2017 (the last period for which data was available). S.E.R. 30.

C. The District Court's Injunction Was Not Overbroad.

The scope of injunctive relief is dictated by the extent of the violation established, *Califano v. Yamaski*, 442 U.S. 682, 702 (1979); *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995). Courts routinely enjoin unconstitutional policies in their entirety, not simply their application to the individual plaintiffs, *e.g.*, *Regents of Univ. of Cal. v. Dep't of Homeland Security*, 279 F. Supp. 3d 1011 (N.D. Cal.) *cert before judgment denied*, 138 S. Ct. 1182 (2018), and this Court has upheld injunctive relief going beyond the actual parties to a case, *e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). There is no circuit court conflict on this issue; rather, this straightforward approach also mirrors the approach long taken in regulatory cases where, "[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to individual petitioners is proscribed." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989).

The government makes the novel argument that Article III somehow bars this longstanding practice. *See* Pet. 26. But they cite no apposite authority. Rather, it relies exclusively on cases that found plaintiffs *themselves* lacked standing—that is, cited cases are mine run standing cases that say nothing about the proper scope of injunctive relief. *See* Pet. 25–26 (citing *Gill v. Whitford*, 138 S. Ct. 1916 (2018), *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017), *Lewis v. Casey*, 518 U.S. 343 (1996) and

Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994)).

This case is also readily distinguishable from *United States Department of Defense v. Meinhold*. There, the complainant had brought a challenge in which he sought "only to have his discharge voided and to be reinstated." 34 F.3d 1469, 1480 (9th Cir. 1994). Respondents here bring a facial challenge to the constitutionality of the Ban.

Even if some program-wide injunctions might be inappropriate, this is not that case. The government concedes that a preliminary injunction should be broad enough to "provide complete relief to the plaintiffs." Pet. 26 ((quoting *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994)). A partial injunction as to only the individual plaintiffs here could not afford them full relief—it would instead only highlight their unequal footing and accentuate legal uncertainty likely to deprive them of their commanders' and peers' investment in their careers. It also would afford only incomplete relief to organizational Respondents Human Rights Campaign, Military Partners Organization, and Gender Justice League—each of whom seek to vindicate the rights of all of their members (including those who, like Respondent Jane Doe, reasonably fear coming forward). In these circumstances, the district court's fact-bound choice to enjoin the policy was not an abuse of discretion, much less error that would warrant correction via plenary certiorari review. *A fortiori*, an extraordinary writ certiorari before judgment is unwarranted.

CONCLUSION

The Court should deny this petition for an extraordinary writ of certiorari before judgment.

Respectfully submitted,

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December 26, 2018