NO. 18-A627

IN THE

Supreme Court of the United States

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

v.

AIDEN STOCKMAN, ET AL.,
Respondents.

OPPOSITION TO APPLICATION FOR A STAY IN THE ALTERNATIVE TO A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RULE 29.6 STATEMENT

Equality California has no parent corporation, and no publicly held company owns 10% or more of its stock.

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I. INTRODUCTION

For more than two and a half years, qualified transgender men and women have openly served their country through military service. The preliminary injunction entered in this case has maintained that *status quo* by preventing enforcement of the President's abrupt order—which surprised even the Nation's most senior career uniformed military leaders—to reverse course 180 degrees and ban such service. The district court's order issuing the preliminary injunction was carefully considered, as was its subsequent decision to deny the government's motion to dissolve it. As the district court correctly found, enjoining the ban is necessary to avert irreparable injury to Respondents, who are all current and aspiring transgender servicemembers. The government's request that this Court "stay" that injunction pending its consideration of certiorari is, in the rather unusual posture of this case, effectively a request that the district court's preliminary injunction should be vacated—and that the government should be permitted to upset the *status quo* by implementing an entirely new policy. As the district court recognized, suspending that injunction now would imperil Respondents' safety, military stature, and careers by permitting the government to enforce a ban that brands them as unfit to serve in the eyes of their peers, their country, and military leadership. The district court properly tailored the injunction to preserve the *status quo* while the case proceeds to final judgment, and the government offers no reason to second-guess any of these case-specific findings.

None of the elements necessary for this Court to stay the district court's injunction is present here. To start, the government's conduct in litigating this case

precludes any credible claim that this Court's intervention is necessary to prevent harm to the military. The injunction in this case has been in place for more than one year, and it has been nine months since the government moved to dissolve it. The government could have appealed the district court's initial order issuing the preliminary injunction. It could have immediately appealed the district court's subsequent order refusing to dissolve the preliminary injunction. But it did neither. The government's decision to let these decisions stand—and to allow transgender men and women, including some respondents, to continue to serve in uniform—causes the sudden urgency to upset the *status quo* asserted in this Application to ring hollow. There is simply no irreparable harm, let alone a change in the balance of equities, that warrants a stay of the district court's considered judgment to leave the preliminary injunction in place. In fact, equity strongly favors Respondents, who stand to lose their safety, stature, and future in the military without the preliminary relief afforded by the injunction.

The Court is also unlikely to grant certiorari to review, let alone reverse, the underlying merits in this interlocutory posture. Neither this case nor any of the other related cases have been litigated to final judgment. And the government's entire merits argument rests upon the demonstrably false assertion that the Implementation Plan, issued for the purpose of effectuating the President's ban on military service by transgender persons, is a completely independent policy. The district court's preliminary rulings issuing and refusing to dissolve the preliminary injunction faithfully apply this Court's precedent to the current record. Given the

interlocutory posture, and the district court's careful and correct analysis of the merits, certiorari is unlikely to be granted, and the district court is unlikely to be reversed. In these circumstances, a stay of the injunction would be inconsistent with this Court's precedents.

Respondents seek only to serve their country in accordance with the same demanding standards that apply to everyone else. The injunction ensures that they can continue to do so while this case reaches a final judgment on the merits. The government's stay request should be denied.

II. BACKGROUND

A. The Military's Policies On Service By Transgender Persons

1. The June 2016 Carter Open Service Policy Allows Transgender People To Serve In The Military

Before 2016, the Department of Defense (DOD) barred transgender people from entering the military and mandated the discharge of those serving. Pet. App. 3a. Following the 2010 repeal of a federal statute that barred gay and lesbian people from service, military leaders recognized that the armed forces also had valuable and highly skilled transgender members. Pet. App. 8a, 64a n.1; CAJA1001; CAJA1018-1019.[1] As then-Army Secretary Eric Fanning explained, "[p]articularly among commanders in the field, there was an increasing awareness that there were already capable, experienced transgender service members in every branch." CAJA1019.

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[1] Citations styled "CAJA" refer to the Joint Appendix filed in *Doe 2, et al. v. Trump, et al.*, Case No. 18-5257 (D.C. Cir.). Citations styled "App." refer to the Application for a Stay in the Alternative to a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Ninth Circuit" filed by Petitioners-Applicants in this Court.

In July 2015, Secretary of Defense Ashton Carter convened a Working Group to examine military service by transgender individuals and to formulate recommendations for future policy.[2] Pet. App. 5a. Recognizing that "the most important qualification for service members should be whether they're able and willing to do their job," the Working Group conducted a comprehensive examination of relevant evidence. CAJA710, CAJA1002; *see also* Pet. App. 5a. The Working Group sought "to ensure that the input of the Services would be fully considered before any changes in policy were made and that the Services were on board with those changes." CAJA1040. The Working Group consulted with medical, personnel, and readiness experts, senior military personnel, and transgender servicemembers. Pet. App. 5a. It also commissioned a RAND Corporation study on the impact of military service by transgender people. Pet App. 5a, 45a.

The Working Group concluded that barring transgender people from military service undermined military effectiveness and readiness. CAJA118-119. Exclusion would require the discharge of "qualified individuals . . . and [would] create[] unexpected vacancies requiring expensive and time-consuming recruitment and training of replacements." *Id.*[3] The Working Group also concluded that "'barring

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[2] The Working Group had approximately 25 members, including senior uniformed officers, senior civilian officials, and representatives of the Surgeon General for each Service branch. CAJA991. The Working Group reported to senior DOD personnel at meetings attended by the Joint Chiefs of Staff, the Chairman, the Vice Chairman, the Service Secretaries, and the Secretary of Defense. CAJA1042.

[3] The RAND study found that health-care coverage for gender-transition treatments would have an "'exceedingly small'" impact on health-care expenditures and that there was no evidence that permitting transgender personnel to serve openly would have "any effect" on unit cohesion. Pet. App. 13a. The study also found that "'[i]n no case'" where foreign

service by transgender people reduces the pool of potential qualified recruits . . . based on a characteristic that has no relevance to their ability to serve.'" CAJA118; CAJA1005. The Working Group therefore recommended evaluating transgender applicants based on the same "medical standards for accession" applied to everyone else, "which seek to ensure that those entering service are free of medical conditions or physical defects that may require excessive lost time from duty." CAJA1023.

Based on those recommendations, Secretary Carter in June 2016 issued a directive-type memorandum announcing "'that service in the United States military should be open to all who can meet the rigorous standards for military service and readiness,'" and setting forth accession and retention policies ("Carter Policy") that permit service by qualified transgender individuals. CAJA586; Pet. App. 6a-7a.

Secretary Carter also set up a comprehensive plan to revise military regulations to ensure equal treatment of transgender servicemembers throughout all aspects of service from accessions through completion of service. That effort included the development and circulation of training materials by DOD and by the individual military service branches. Pet. App. 7a. Those materials explained that a transgender servicemember is one who has undergone or will undergo gender transition, and that gender transition "is the process a person goes through to live fully in their preferred gender." CAJA519-520. They further explained that the process for gender transition in the military would begin with the individual receiving a diagnosis of gender dysphoria, a medical diagnosis that refers to the distress that a

militaries have allowed transgender individuals to serve "'was there any evidence of an effect on the operational effectiveness, operational readiness, or cohesion of the force.'" *Id*.

transgender person "experience[s] due to a mismatch between their gender and their sex assigned at birth." CAJA518, CAJA520-521. Gender transition alleviates such distress by enabling the transgender servicemember to live "in the preferred gender." CAJA519, CAJA521.

Retention. The Carter Policy took immediate effect with respect to retention, prohibiting the discharge of servicemembers "'due solely to their gender identity or an expressed intent to transition genders.'" CAJA588. The Carter Policy established a process for permitting servicemembers to undergo gender transition and to serve in their preferred gender. CAJA490, CAJA500, CAJA589. The servicemember must coordinate with his or her commander regarding the timing of gender transition and any relevant accommodations "addressing the needs of the servicemember in a manner consistent with military mission and readiness." CAJA496, CAJA500-501. The process concludes when the servicemember's gender marker in the Defense Enrollment Eligibility Reporting System (DEERS) is changed to match their gender rather than birth sex. CAJA496. Thereafter, the servicemember is subject to all applicable military standards for that gender. CAJA526.

Accessions. The Carter Policy permits transgender people to enlist and eliminates the prior differential standard applied to the medical treatments associated with transgender people, which required the rejection of any transgender candidate regardless of their fitness to serve. Under the Carter Policy, individuals who have undergone gender transition are generally eligible to serve, as long as their transition is complete and the applicant has been medically stable for at least 18

months. Pet. 5. That is the same approach applied to applicants who have undergone other medical treatments that do not result in any persistent or ongoing "functional limitations." CAJA589; *see also* CAJA595 ("'[M]ilitary services will begin accessing transgender individuals who meet all standards—holding them to the same physical and mental fitness standards as everyone else who wants to join the military.'").

Transgender people have been serving openly in all branches of the United States military since June 2016, including many deployed on active duty in combat zones, and permitted to enlist in the military since January 2018. Pet. App. 12a-14a.

2. The President Bans Transgender People From Military Service

a. The 2017 Presidential Memorandum

On July 26, 2017, President Trump announced via Twitter that the government "will not accept or allow transgender individuals to serve in any capacity in the U.S. military." Pet. App. 3a. On August 15, 2017, the President formalized that policy in a memorandum. *Id.*; CAJA406-407 (2017 Presidential Memorandum). The 2017 Presidential Memorandum directed Secretary of Defense James Mattis "'to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016.'" Pet. App. 8a. That policy, as described by the 2017 Presidential Memorandum, "generally prohibited openly transgender individuals from accession into the United States military and authorized the discharge of such individuals." *Id.*

The 2017 Presidential Memorandum ordered Secretary Mattis to submit a plan to the President "for implementing" the President's directives and specified that

the ban would take effect no later than March 23, 2018. CAJA406. The President also ordered Secretary Mattis to include in the implementation plan provisions "to address transgender individuals currently serving in the United States military." CAJA407.

b. DOD Develops An Implementation Plan

Four days after issuance of the 2017 Presidential Memorandum, Secretary Mattis announced that DOD would "carry out the president's policy direction," including by developing an "implementation plan to address accessions of transgender individuals and transgender individuals currently serving in the United States military." CAJA405. Secretary Mattis stated that he would establish a panel "to provide advice and recommendations on the implementation of the president's direction," and then advise the President "'concerning implementation." *Id.*

Secretary Mattis issued two memoranda related to the President's directive. The first, entitled "Interim Guidance," reiterated DOD's intent to carry out the President's policy and directives, and clarified that the accessions prohibition "remain[s] in effect." CAJA402; Pet. App. 44a. Secretary Mattis stated that he was issuing the interim guidance "[t]o comply with the [2017] Presidential Memorandum" and would "present the President with a plan to implement the policy and directives" in the 2017 Presidential Memorandum on the timeline ordered by the President. CAJA401; Pet. App. 4a. The second, entitled "Terms of Reference," set forth the specific parameters for how to "effect the policy and directives in [the 2017] Presidential Memorandum" with respect to accessions and retention. CAJA403. With respect to accessions, Secretary Mattis stated that the 2017 Presidential

Memorandum required DOD to "prohibit[] accession of transgender individuals." CAJA404. With respect to retention, Secretary Mattis stated that the Memorandum directed DOD to "return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016." *Id.*

In February 2018, DOD issued a report including specific recommendations for how to implement the President's directives. CAJA268-312 (Report). On February 22, 2018, Secretary Mattis endorsed the recommendations and presented them along with the Report in a memorandum to the President regarding "Military Service by Transgender Individuals." CAJA263-265 (Implementation Plan). On March 23, 2018—the date the President had set for reinstating the ban—the President "revoked the 2017 Presidential Memorandum," Pet. App. 51a, and "order[ed]" Secretary Mattis "to implement any appropriate policies concerning" military service by transgender individuals. CAJA261.

c. The Implementation Plan Effectuates The 2017 Presidential Memorandum

The Implementation Plan takes a multi-pronged approach to ensure that all transgender individuals are barred from military service. Specifically, the Implementation Plan excludes: (1) anyone who does not live in their "biological sex"; (2) anyone "who requires or has undergone gender transition"; and (3) anyone with gender dysphoria or a history of gender dysphoria who requires a "change of gender" or who does not live in their "biological sex." Pet App. 55a-56a, 63a; CAJA264-265. Each provision is simply a different way to describe and exclude transgender people.

The Implementation Plan thus reinstates the pre-2016 policy and reverses the Carter Policy. The pre-2016 policy barred individuals with "'transsexualism'" or who required or had undergone a "'change of sex.'" CAJA275, CAJA279. The Carter Policy eliminated that prohibition by permitting military service by any servicemember "who intends to undergo transition, is undergoing transition, or has completed transition." CAJA519. As directed by the President, the Implementation Plan would reinstate the pre-2016 ban using modern terminology. It replaces the outdated terms "transsexual," "transsexualism," and "change of sex" with "transgender," "gender dysphoria," and "gender transition."

The Carter Policy eliminated the pre-2016 rule that previously had barred transgender people from accessions and retention. The Carter Policy recognizes that being transgender is not generally relevant to a person's fitness to serve and thus presumes that "transgender individuals shall be allowed to serve in the military." CAJA519, CAJA586. It ensures that enlistment is "open to all who can meet the rigorous standards for military service and readiness" and subjects transgender servicemembers "to the same standards and procedures as other members with respect to their medical fitness for duty, physical fitness, uniform and grooming, deployability, and retention." CAJA586; Pet. App. 46a.

The Carter Policy rests on the principle that a servicemember "affected by a medical condition or medical treatment related to their gender identity should be treated . . . in a manner consistent with a service member whose ability to serve is similarly affected for reasons unrelated to gender identity or gender transition."

CAJA588. Under the Carter Policy, transgender people who have undergone gender transition are thus eligible to enlist as long as the process is complete and they have been medically stable for at least 18 months. CAJA588-599. In contrast, the Implementation Plan bars accession by anyone who has undergone gender transition, regardless of their fitness to serve. Pet. App. 55a.

Similarly, the Carter Policy and the Implementation Plan take opposing approaches to the retention of servicemembers who identify themselves as transgender. The Carter Policy recognizes that permitting military service by transgender people means that they must be permitted to serve in accord with their "preferred gender." Pet. 5-6. It extends that protection to all transgender servicemembers: those who "intend to begin transition, are beginning transition, who already may have started transition, and who have completed gender transition." CAJA496; *see also* CAJA499 (providing guidance about how to accommodate transgender servicemembers "throughout the gender transition process"). In contrast, the Implementation Plan restores the pre-2016 ban by requiring all servicemembers to serve in their "biological sex." CAJA 263-265.

The Implementation Plan also follows the President's directive to "address transgender individuals currently serving in the United States military." CAJA407. It does so by carving out an exception to the ban for the small group of transgender servicemembers who initiated gender transition in reliance on the Carter Policy.

CAJA273-274.[4] Once the members of that group have concluded their terms of service, no other transgender people will be permitted to enlist or serve.

B. Procedural History

1. Respondents Sue And Secure A Preliminary Injunction

Respondents, current and aspiring transgender servicemembers and Equality California, brought a constitutional challenge in September 2017 to enjoin the President's exclusion of transgender persons from the military. *Stockman, et al. v. Trump, et al.*, No. 17-01799 (C.D. Cal. Sept. 5, 2017), Dkt. No. 1. On November 16, 2017, the district court permitted the State of California to intervene to join Respondents in challenging the ban. *Stockman*, No. 17-01799, Dkt. No. 66. On December 22, 2017, the district court enjoined the government from reinstating a ban on military service by transgender people while this litigation pends. Pet. App. 39a. The district court found that Respondents were likely to succeed on their Fifth Amendment claim. Pet. App. 37a. The district court concluded that "discrimination on the basis of one's transgender status is subject to intermediate scrutiny," and held that the government's decision would likely fail such scrutiny because "the only serious study and evaluation concerning the effect of transgender people in the armed forces led the military leaders to resoundingly conclude there was no justification for the ban." Pet. App. 35a-36a. The district court also found that the ban would irreparably injure Respondents by violating their constitutional rights, branding

[4] The Report stated that the grandfather provisions "should be deemed severable from the rest of the policy" and subject to rescission if "used by a court as a basis for invalidating the entire policy." CAJA273-274.

them as unfit to serve in the eyes of their peers and officers, and imperiling their military careers. Pet. App. 37a-38a. Petitioners chose not to appeal that injunction.

2. Petitioners' Motion To Dissolve The Preliminary Injunction Is Denied

On March 23, 2018, after release of the Implementation Plan, Petitioners moved to dissolve the preliminary injunction, arguing that the Implementation Plan was a "new" policy based on "independent military judgment following an extensive study," and that it differed substantively from the enjoined directives. *Stockman*, No. 17-01799, Dkt. No. 82 at 8. The district court disagreed, concluding that "[t]he policies described in the 2017 Presidential Memorandum and the 2018 Presidential Memorandum are fundamentally the same." Pet. App. 55a.

The district court held that the Implementation Plan "disadvantage[d] transgender service members 'in the same fundamental way.'" Pet. App. 56a (quoting *Ne. Fla. Ch. of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 669 (1993)). Because the Implementation Plan would subject Respondents to substantially the same constitutional injuries the preliminary injunction sought to prevent, and because the balance of hardships and the public interest continued to strongly favor keeping the injunction in place, the district court denied Petitioners' motion. Pet. App. 66a.

3. The Appeal Of The Motion To Dissolve And Motions To Stay

On November 16, 2018, Petitioners appealed the order denying their motion to dissolve the preliminary injunction to the United States Court of Appeals for the Ninth Circuit. *Stockman*, No. 18-56539 (9th Cir.), Dkt. No. 8. On November 20, 2018,

the government filed a motion to hold the briefing schedule in abeyance pending the related appeal of *Karnoski, et al. v. Trump*, *et al.*, No. 18-35347 (9th Cir. oral argument heard Oct. 10, 2018) ("*Karnoski*"), and any further proceedings before this Court in that case. *Stockman*, No. 18-56539, Dkt. No. 11. On December 7, 2018, the government filed an unopposed motion to extend the deadline for its opening brief on appeal. *Stockman*, No. 18-56539, Dkt. No. 24. Then, on December 11, 2018, the Ninth Circuit suspended the briefing on the appeal pending further order. *Stockman*, No. 18-56539, Dkt. No. 25. On December 19, 2018, the Ninth Circuit ordered the case held in abeyance pending issuance of the court's mandate in *Karnoski*, No. 18-35347, or further order of the court. *Stockman*, No. 18-56539, Dkt. No. 28.

On November 23, 2018, the government filed a petition for a writ of certiorari before judgment in this case, as well as in *Karnoski* and *Doe 2, et al. v. Trump, et al.*, No. 17-01597 (D.D.C.) ("*Doe*"). *Stockman*, No. 18-678 (filed Nov. 23, 2018); *see also Doe*, No. 18-677 (filed Nov. 23, 2018). On November 28, 2018, the government filed in the district court a motion to stay the preliminary injunction pending appeal, and on December 3, 2018, filed a second motion to stay in the Ninth Circuit. *Stockman*, No. 17-01799, Dkt. No. 130; *Stockman*, No. 18-56539, Dkt. No. 23-1. Before either court ruled on the motions to stay, on December 13, 2018, the government filed for the same relief in this Court. *Stockman*, No. 18-A627 (filed Dec. 13, 2018).

III. ARGUMENT

"Stays pending appeal to this Court are granted only in extraordinary circumstances." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). To obtain a stay pending the filing and disposition of a petition for a writ

of certiorari, an applicant must show (1) a reasonable probability that four Justices will vote to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). "Denial of such in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers); *see also Pasadena City Bd. of Educ. v. Spangler*, 423 U.S. 1335, 1336 (1975) ("Ordinarily a stay application to a Circuit Justice on a matter currently before a Court of Appeals is rarely granted."). The district court's decision not to grant a stay "is entitled to considerable deference." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983).

A. This Court Is Unlikely To Grant Review

The only question presented by this appeal does not warrant this Court's review. The government's pending petition does not concern the *issuance* of a preliminary injunction; as discussed above, the government elected not to pursue any appeal from that order. Rather, the government has asked this Court to review the district court's refusal to *dissolve* the preliminary injunction it had previously entered. The government makes no argument that four Justices of this Court are likely to grant certiorari on the only question presented here—*i.e.*, whether the district court abused its discretion in refusing to dissolve the preliminary injunction against the ban on military service by transgender individuals. The Court is likewise unlikely to grant certiorari in the present posture to review "the equal-protection

claim at the center of all the suits challenging the constitutionality of the Mattis policy," Pet. 13-14, *inter alia* because that claim has not been adjudicated on the merits. *See generally* Br. in Opposition to Cert. Before J., *Trump v. Stockman*, No. 18-678 at 20-25 (filed Dec. 24, 2018).

This Court typically declines to review interlocutory orders, and "await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," in order to ensure the benefit of a full record and crystallization of the legal issues presented. *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari); *see Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C. J., respecting the denial of certiorari) (noting that "[a]lthough there is no barrier to . . . review, the discriminatory purpose claim is in an interlocutory posture" such that "the District Court has yet to enter a final remedial order," and therefore "[t]he issues will be better suited for certiorari review" after final judgment); *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J., respecting the denial of certiorari) (agreeing with denial of certiorari because of "interlocutory posture" in which district court had not yet "fashion[ed] an appropriate remedy" after final judgment). Here, as in all of the above cases, denial of the petition would not preclude the government from raising the same issues in a later petition following entry of a final judgment. It is unlikely that the Court would depart from its ordinary caution to grant certiorari in these circumstances.

Nor is the Court likely to grant certiorari in this case to address the propriety of nationwide injunctions in challenges to federal government policies. The question

that requires this Court's intervention, in the government's view, is whether a district court can permissibly "issu[e] categorical injunctions designed to benefit nonparties." App. 18. But that question is not presented here. First, the present appeal does not entail plenary review of the district court's *issuance* of a preliminary injunction; rather, it presents only the highly circumscribed review of the court's refusal to *dissolve* that injunction nearly a year after it was entered. *See Horne v. Flores*, 557 U.S. 433, 447 (2009) (party seeking dissolution of injunction must show "changed circumstances" warranting relief); *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932); 11A Wright et al., Federal Practice and Procedure § 2961 (3d ed. 2018) (dissolution or "modification is not warranted if the court determines that the moving party is relying upon events that actually were anticipated when the decree was entered"). The government nowhere contends that there is any split in authority or critical need for this Court's intervention on the only question presented in this case.

Second, this case does not concern an injunction entered "to benefit nonparties." The injunction entered in this case is necessary to remedy the constitutional violation that injures Respondents, and any stay or narrowing of that injunction would deprive Respondents of the relief to which they are entitled and expose them to precisely those harms the facial injunction was entered to address. As the district court in the related *Doe* case explained, "a nationwide preliminary injunction is the only way to address fully Plaintiffs' constitutional injury" because "if the plan goes into effect with its application enjoined only as to Plaintiffs, Plaintiffs would be singled out as an inherently inferior class of service members." *Doe 2* App.

140a. Because "an injunction limited to Plaintiffs would not address the core class-based injury that the ban inflicts on Plaintiffs, nor would it afford them complete relief," a nationwide injunction is "'necessary to provide complete relief to the plaintiff[s].'" *Id.* Whether an injunction prohibiting enforcement of a government policy is necessary to protect plaintiffs from a class-based harm is proper has already been settled by this Court. *Doe 2* App. 136a-140a (collecting authority); *see also infra* § III.B.2. It is not a question presented by any other case the government cites,[5] and so is not one that is likely to be taken up for purposes of resolving courts' authority to enter nationwide injunctions in other circumstances.

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[5] The government cites a string of recent decisions in which district courts have enjoined federal policies nationwide. But in those cases, the basis for the injunction is entirely distinct from that here. Here, as noted above, the district court enjoined the ban in its entirety because doing so is necessary to remedy the harms that it inflicts on the Respondents in this litigation. In contrast, in the cases cited by the government, the district court enjoined the federal government from implementing a policy that was deemed ultra vires or contrary to statutory right. On that basis, the courts generally set aside the agency action nationwide, reasoning either that the same issues would arise in other locations or that the relevant statutory authority would be the same nationwide. *See, e.g.*, *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 951 (N.D. Ill. 2017), *appeal dismissed* No. 17-2991, 2018 WL 4268814, at *2 (7th Cir. Aug. 10, 2018) ("This injunction against imposition of the notice and access conditions is nationwide in scope, there being no reason to think that the legal issues present in this case are restricted to Chicago or that the statutory authority given to the Attorney General would differ in another jurisdiction."); *California v. Health & Human Servs.*, 281 F. Supp. 3d 806, 832 (N.D. Cal. 2017) (reasoning that a nationwide injunction was appropriate where defendant's conduct violated the Administrative Procedure Act (APA) not just as to plaintiffs but as to the public as a whole); *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 565 (D. Md. 2017) (basing nationwide injunction on fact that plaintiffs were "located in different parts of the United States"); *Regents of Univ. of Cal. v. United States Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1049 (N.D. Cal. 2018) (finding geographical scope of issue warranted nationwide injunction because "the problem affects every state and territory of the United States"). That is not what happened here. In ordering a nationwide injunction, the district court focused on remedying Respondents' injuries, not on whether the same issue would arise across the country or on the authority of the President or the military to act. The government's categorical reasoning obscures this critical distinction.

B. Petitioners Fail To Show A Fair Prospect That A Majority Of The Court Will Vote To Reverse The Judgment Below

The government also fails to show that a majority of the Court would be willing to disturb the lower court's preliminary decision that the Implementation Plan is likely unconstitutional, and thus properly enjoined pending this litigation to prevent the particular harms that the Respondents in this case have alleged.

1. The Implementation Plan Is Likely Unconstitutional

Petitioners' claim that the Implementation Plan is based on a medical condition, not on transgender status, has no merit. As the district court correctly concluded, the Implementation Plan "specifically bans transgender individuals from serving in the military" and "disadvantages transgender service members 'in the same fundamental way'" as the 2017 Presidential Memorandum, which ordered the military to reinstate a ban on military service by transgender people. App. 29a. That conclusion is compelled by the record, which shows both that the President ordered Secretary Mattis to submit to him "a plan to implement" a policy prohibiting transgender military service, App. 3a, and that the DOD repeatedly stated that they were preparing to "carry out" such an implementation plan. CAJA315. The government has argued that the Implementation Plan was developed independently of the President's directive to reinstate the ban. But as the district court determined, "[t]he relevant timeline" contradicts that claim, and the Implementation Plan in fact gives force to the President's directive to "ban[] transgender people from the military." Pet. App. 58a-59a.

The government also attempts to cast the Implementation Plan as something other than a ban on transgender service, but its plain language shows otherwise. *See generally* Pet. App. 55a-57a (explaining why the government's "characterization . . . does not match reality" because "the 2017 Presidential Memorandum and the 2018 Presidential Memorandum are fundamentally the same"). As set forth above, the Implementation Plan has three provisions, each of which expressly excludes transgender people from service. The plan (1) requires all servicemembers to serve only in their "biological sex," (2) disqualifies anyone who "requires or has undergone gender transition," and (3) excludes people with gender dysphoria or a history of gender dysphoria who require "a change of gender" or do not live in their "biological sex." Pet. App. 50a.

Each of these provisions is carefully written to exclude only transgender people. The requirement that individuals must serve only in their "biological sex" singles out the defining characteristic of transgender identity—that a person lives in their preferred gender, not their "biological sex"—and makes that defining characteristic a bar to service. Pet. App. 50a-51a. The exclusion of anyone "who requires or has undergone gender transition" similarly singles out the unique experience that facilitates a transgender person's transition from living in their birth sex to living in their preferred gender. Pet. App. 51a**.** Because of these two broad provisions, even if any reference to "gender dysphoria" were eliminated from the Implementation Plan entirely, the substance of the plan would be unaffected, and its exclusion of transgender people would be just as complete. It would still prohibit

anyone from enlistment and subject to discharge anyone who does not live in their "biological sex" or who undergoes or has undergone gender transition, meaning all transgender people.

A third provision in the Implementation Plan specifically addresses people with gender dysphoria or a history of dysphoria; however, it excludes *only* those who do not "live in their biological sex" and who do not require "a change of gender." In other words, a person can have gender dysphoria or a history of gender dysphoria, as long as they live "in their biological sex" and do not undergo "a change of gender"—*i.e.*, as long as they are either not transgender or suppress their transgender identity. The criterion for exclusion is not whether a person has gender dysphoria or a history of gender dysphoria, but rather whether a person lives in their birth sex. Thus, while this provision refers to "gender dysphoria," it actually turns not on that medical condition, but on whether a person is transgender—just as the other provisions do.

That conclusion is reinforced by Petitioners' acknowledgement that not all people with gender dysphoria are transgender. For example, Petitioners acknowledge that a non-transgender man may suffer from gender dysphoria as a result of "genital wounds." Pet. 4. But under the Implementation Plan, individuals who have gender dysphoria for that reason are not excluded from service because they do not require a "change of gender." As Petitioners' own example makes clear, both transgender and non-transgender service members may experience gender dysphoria. Yet, it is only transgender service members who are disqualified—not because they have gender dysphoria, but because they do not live in their birth sex.

Petitioners' argument that the Implementation Plan is not a ban because it permits people who identify as transgender to serve in their "biological sex" is equally baseless. Pet. App. 55a-56a. As the courts below have uniformly held, a policy that targets the very characteristic that defines a class is discriminatory on its face, and requiring a person to suppress that characteristic in order to serve in the military is a ban. Pet. App. 56a; *Karnoski* Pet. App. 51a-52a; *Doe 2* Pet. App. 146a n.11.

Petitioners' argument to the contrary rests on a false distinction between the status of being transgender and the conduct of living in one's preferred gender. Pet. App. 56a. This Court has squarely rejected a similar distinction between status and conduct as a justification for discrimination against gay and lesbian people. *See Christian Legal Soc'y of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 689 (2010); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). It should do so here as well.

For the same reason, the government's claim that the Implementation Plan is not a ban because some transgender people do not ever transition has no merit. Just as some gay and lesbian people have suppressed their sexual orientation to avoid discrimination and violence, so, too, some transgender people suppress who they are in order to survive. But that reality does not make a policy that requires such suppression any less facially discriminatory. Pet. App. 56a (citing *Christian Legal Soc'y*, 561 U.S. at 689).

Petitioners also falsely claim that, like the Implementation Plan, the Carter Policy requires transgender servicemembers "without a history of gender dysphoria" to serve in their "biological sex." App. at 11. That argument ignores that the very

purpose of the Carter Policy is to *permit* transgender servicemembers to undergo gender transition and to serve in accord with their preferred gender. The Carter Policy developed an orderly process that allows a transgender person to publicly identify as such and then to undergo gender transition so that the person can serve in their preferred gender and conform to the sex-based standards applied to others of that gender. It does not require any transgender person to serve in their "biological sex"—it does the opposite. *See* Pet. App. 6a-7a.

Petitioners have also failed to show that a majority of this Court is likely to reverse the district court's determination that, for multiple reasons, the Implementation Plan warrants heightened scrutiny. Discrimination against transgender people implicates the concerns that prompt heightened constitutional scrutiny and rests on impermissible stereotypes and overbroad generalizations rather than an evenhanded approach towards qualifications to serve in the military. Such discrimination also rests upon a sex-based characteristic, which this Court has long subjected to heightened review. *United States v. Virginia*, 518 U.S. 515, 531 (1996). And heightened scrutiny is also required based on the unusual facts of this case. Both the ban and its adoption reflect an unusual departure from ordinary military decision making. Pet. App. 35a. While the military has discriminated against particular classes of people in the past, it no longer does so, *see* Pet. App. 66a, and the decision to reinstate a policy based on such class-based disparate treatment is particularly unusual. The circumstances of the ban's adoption were also unusual and lacked the hallmarks of formality normally associated with the development of military policy.

Under this Court's precedents, these factors warrant at least some level of heightened review. *See United States v. Windsor*, 570 U.S. 744, 770 (2013) (noting that "[d]iscriminations of an unusual character" require careful judicial consideration (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996))); *see also Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

Petitioners contend that the district court should have evaluated the Implementation Plan under a "deferential standard" akin to rational-basis review because it involves a military policy. App. 24. But that claim rests entirely on the government's assertion that—notwithstanding the overwhelming evidence to the contrary in the record—the Implementation Plan was adopted independently of the President's orders to reinstate a ban on military service by transgender people, as a product of "the military's reasoned and considered judgment." *Id.* On the current record, this Court is unlikely to find that the district court abused its discretion in finding no evidence to support that argument. *See* Pet. App. 58a-61a (explaining why the Implementation Plan was "not entitled to military deference").

In addition, even if the Implementation Plan represented an exercise of military judgment independent of the President's directive to impose a ban, which the district court found it does not, Pet. App. 58a-61a, the deference called for by this Court's prior holdings does not lower the level of scrutiny applicable to sex-based discrimination in the military. There is no military exception to equal protection. *Rostker*, 453 U.S. at 69-71 (rejecting "different equal protection test" for "military context"); *Frontiero v. Richardson*, 411 U.S. 677, 688-91 (1973) (plurality) (applying

heightened scrutiny). *Rostker* neither insulates the government's "empirical judgments from scrutiny" nor eliminates judicial scrutiny of "the degree of correlation between sex and the attribute for which sex is used as a proxy." *Lamprecht v. FCC*, 958 F.2d 382, 393 n.3 (D.C. Cir. 1992); *Steffan v. Perry*, 41 F.3d 677, 689 n.9 (D.C. Cir. 1994) (even in military, "[c]lassifications based on race or religion, of course, would trigger strict scrutiny").

To be sure, in cases involving the military, the Court has recognized an obligation to credit the military's assessment of the importance of particular asserted interests that might not be considered important in civilian settings. For example, in *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986), the Court credited the importance of the military's asserted interest in the need for uniformity—a consideration with less relevance to civilian workplaces. Similarly, in *Rostker*, 453 U.S. at 70, the Court recognized the "'important governmental interest'" in "raising and supporting armies." But such deference to the government's asserted interest does not convert heightened scrutiny into mere rational-basis review.

In *Rostker*, the Court upheld a statute exempting women from registration only because at the time Congress decided to retain the exemption women were not eligible to serve in combat positions—and that exclusion was not challenged in that litigation. *Id.* at 77. As a result, this Court found that "[t]he exemption of women from registration [was] not only sufficiently but also closely related to Congress' purpose in authorizing registration" for the drafting of combat troops. *Id*. at 79. The facially-discriminatory classification in this case warrants the same careful scrutiny here.

In any case, the ban cannot survive *any* standard of scrutiny. The military has universal standards for enlistment, deployment, and retention. *See* CAJA498-501; Pet. App. 7a. Because transgender servicemembers must comply with those standards, having a separate policy that bars them from service because they are transgender serves only to exclude individuals who are fit to serve. Similarly, transgender service members do not undermine sex-based standards. They seek to be held to the same standards as everyone else. Pet. App. 7a. Allowing transgender men to serve as men and transgender women to serve as women does not disrupt the military's maintenance of sex-based standards in the few areas where they exist. Petitioners also cannot justify the ban on the basis of cost. Even under rational basis review, "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler v. Doe*, 457 U.S. 202, 227 (1983). Because there is no independent justification for excluding transgender people in order to reduce costs, Petitioners' reliance on this rationale fails.

2. The Scope Of The Injunction Is Proper

The government's argument that the injunction transgresses both Article III and "longstanding equitable principles," App. 24, has no merit, either.

a. The Scope Of The Injunction Is Consistent With Article III

The government contends that the servicemember respondents in this case have no "standing to seek injunctive relief beyond what is needed to redress an actual or imminent injury-in-fact to respondents themselves." App. 25. That is not a controversial proposition, nor is it at issue here. Where a policy discriminates on the

basis of an invidious classification, as the transgender ban does, it inflicts a constitutional injury that cannot be remedied *as to those plaintiffs* without a categorical prohibition against implementing the policy at all. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("the scope of injunctive relief is dictated by the extent of the violation established") (citing *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 414-420 (1977)). A narrower injunction here would fail to redress the core constitutional harm *as to these plaintiffs*, who would otherwise be left to serve as exceptions to a policy that brands them as inferior and a detriment to a military to which they have dedicated their lives.[6]

Without question, the ban in this case "singles out transgender individuals for unequal treatment solely because of their transgender status" and injures Respondents *inter alia* by branding them with "the stigma of being seen as less-than." Pet. App. 37a, 38a. The government never reckons with this conclusion. Even the respondents who are grandfathered into military service "receiv[e] unequal

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6 *Department of Defense v. Meinhold*, 510 U.S. 939 (1993), does not support the government's request for a narrowed stay of the injunction. Meinhold was discharged after he stated during a television interview that he was gay. He was dismissed based on that statement alone and challenged his dismissal on the ground that it was unlawful to dismiss him without any evidence that he had actually engaged in any homosexual conduct. Meinhold's challenge thus clearly implicated only the particular application of the military's policy to the facts of his case. *See Meinhold v. DOD*, 34 F.3d 1469, 1479 (9th Cir. 1994) (discussing "effect of the regulation as applied in Meinhold's case"); *id.* (holding that Meinhold's discharge was unlawful because his statement "in the circumstances under which he made it manifests no concrete, expressed desire to commit homosexual acts"). Unlike Plaintiffs here, Meinhold—a gay man serving in the military—raised an as-applied challenge to his discharge that turned on the particular facts of his case. Because the challenged policy was held unlawful only as applied to him, a broader injunction against the policy could not be maintained. Here, Respondents' constitutional challenge to the Implementation Plan does not turn on their particular circumstances, but on the nature of the discrimination against transgender people as a group.

treatment under the Mattis Implementation Plan," under which they "would be allowed to remain in the military but, unlike any other service members, only pursuant to an exception to a policy that explicitly marks them as unfit for service." *Doe 2* App. 106a. They "are denied equal treatment because they will be the only service members who are allowed to serve only based on a technicality; as an exception to a policy that generally paints them as unfit." *Id.* These injuries cannot be remedied while the ban remains in effect. *See Lawrence*, 539 U.S. at 573 (explaining that the "stigma" of a public policy "might remain even if it were not enforceable" against any person individually).

This Court has made clear that "injunctive relief should . . . provide complete relief to the plaintiffs." *Califano*, 442 U.S. at 702; *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994). Accordingly, even in cases brought by individual plaintiffs, "if the arguments and evidence show that a [challenged] provision is unconstitutional on its face, an injunction prohibiting its enforcement is 'proper.'" *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) (quoting *Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 333 (2010)).

Here, the harms to Respondents will persist if the ban is allowed to go into effect in any respect because the ban conveys, as a matter of United States policy, that transgender people, including Respondents, are unworthy of service in the military. Pet. App. 38a. A nationwide injunction is necessary to afford "complete relief" in these circumstances. *See, e.g.*, *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219 (9th Cir. 2018) (Bybee, J.) (affirming universal injunction against

Presidential directive by applying the "uncontroverted line of precedent" that supports "the propriety of universal injunctions" in circumstances where "the Government failed to explain how the district court could have crafted a narrower remedy that would have provided complete relief" to plaintiffs) (internal brackets and citations omitted).[7]

In addition to these constitutional injuries, failing to enjoin the ban in its entirety would also subject Respondents to serious practical harms. Pet. App. 32a. A policy that officially brands some service members as inferior and unworthy simply for being transgender would imperil Respondents by eroding the bonds of trust upon which they depend for their safety. Enforcing the ban at all would put a target on their backs by sending a message that transgender people "impose an unreasonable burden." App. 33. Supervisors and peers would have less confidence in them and would be less apt to give them opportunities for training, deployment, and assignments. Pet. App. 32a.

Furthermore, narrowing the injunction only to Respondents would be impracticable and overly intrusive. Ensuring equal treatment for Respondents under

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[7] In civil rights cases in particular, courts have routinely observed that it is impossible to fully vindicate a successful plaintiff's rights without categorically prohibiting the defendants' offending conduct. *See, e.g.*, *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) ("[I]n reapportionment and school desegregation cases, for example, it is not possible to award effective relief to the plaintiffs without altering the rights of third parties."); *Bailey v. Patterson*, 323 F.2d 201, 206 (5th Cir. 1963) (injunction prohibiting defendants from engaging in any segregation in order to enforce plaintiffs' right to desegregated transportation facilities); *see also Professional Ass'n of Coll. Educators v. El Paso Cty. Cmty. Coll. Dist.*, 730 F.2d 258, 273-74 (5th Cir. 1984) ("An injunction . . . is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in [a] lawsuit—even if it is not a class action—if such breadth is necessary to give prevailing parties the relief to which they are entitled.").

a narrow injunction would strain the practical limits of military administration, requiring extensive and detailed instructions to branches of the military about how to suspend the overall policy and its adverse effects as to these servicemembers alone. Such concerns are heightened where, as here, some respondents have demonstrated the need to proceed anonymously, and ensuring their equal treatment while allowing the ban to go into effect would require widespread disclosure of their identities.

The district court considered whether any remedy, short of a programmatic prohibition on the ban, could address Respondents' constitutional and material injuries; having found none, the district court properly enjoined it. The government offers no persuasive argument that the district court abused its discretion by granting this relief, nor is a majority of the Court likely to conclude that it did.

The government's reliance on *Alvarez v. Smith*, 558 U.S. 87 (2009), and *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), misapprehends the injury at issue. In those cases, the plaintiffs each had settled their original underlying disputes; because their individual cases were moot, they did not retain Article III standing to pursue injunctions against government policies that no longer aggrieved them. *See Alvarez*, 558 U.S. at 93; *Summers*, 555 U.S. at 494. In the government's view, those cases stand for the proposition that where "a plaintiff's only injury would be eliminated by an injunction barring application to the challenged policy to the plaintiff," only such a narrow injunction comports with Article III. App. 29. Respondents do not disagree, but that precedent strongly supports the injunction

here. The district court did not enjoin the ban to prevent "injury to nonparties," *id.*, but rather to prevent injury to *these plaintiffs*.[8]

b. The Scope Of The Injunction Is Consistent With Longstanding Principles Of Equity

The government likewise contends that the district court's preliminary injunction "violates fundamental rules of equity" because it is "broader than necessary to prevent irreparable harm to respondents." App. 30. Again, the starting premise of the government's argument is wrong—the injunction is precisely as broad as it needs to be in order to accord *these plaintiffs*, and no other parties, full relief pending adjudication of their claims on the merits. But even were the government's characterization of this injunction correct—and it is not—the government's arguments about the role of equity in enjoining unlawful government action are themselves mistaken. Relying principally on *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), the government contends that the district court's injunction transgresses "traditional principles of equity jurisdiction"

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[8] The Court should not confine the injunction to the seven individual respondents for the additional reason that such a limited injunction would not protect Respondent-Intervenor State of California's interests. An injunction that failed to apply to, at a minimum, the whole State, would expose California to irreparable harm. *See California v. Azar*, Nos. 18-15144, 18-15166, 18-15255, 2018 WL 6566752 (9th Cir. Dec. 13, 2018) (sustaining statewide, although not nationwide, preliminary injunction against challenged federal regulation). The California National Guard provides critical services to state residents, including in responding to natural disasters and other emergencies. Because the state Guard operates "under joint federal and state control," *In re Sealed Case*, 551 F.3d 1047, 1048 (D.C. Cir. 2009), California must comply with federal rules prescribing qualifications for Guard service members. *See, e.g.*, 32 U.S.C. § 101(4), 101(6), 108, 110, 301; 10 U.S.C. § 10503. Accordingly, an order allowing the Implementation Plan to take immediate effect in California would require the State to discriminate against its own residents and deprive the State of the services of otherwise highly qualified Guard members.

and oversteps the Judiciary Act of 1789's limitation of federal courts' equity jurisdiction to "the jurisdiction in equity exercised by the High Court of Chancery in England[.]" App. 30-31. In the government's telling, that jurisdiction prohibits the entry of "[a]bsent-party injunctions," App. 31, and so prohibits the injunction entered here. To be clear, there is no "absent-party injunction" at issue here; the injunction accords these plaintiffs full relief as against these defendants only. Setting that aside, however, the government's historical arguments are wrong. At the outset, *Grupo Mexicano* and the cases on which it drew concerned lawsuits between private parties, not lawsuits against the government. *E.g.*, *Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939).[9] The exercise of equity in such cases may have been constrained by the English Court of Chancery's jurisdiction at the Founding, but that court issued injunctions only in private suits, and did not issue injunctions against the Crown at all. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 425 (2017). The equity jurisdiction of federal courts to enjoin unlawful *government* action is thus unconstrained by pre-Founding Court of Chancery practice. Rather, it follows the general rule, reaffirmed time and again by this Court, that courts sitting in equity are empowered to provide "complete relief" to the parties before them, as the district

9 *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010), is irrelevant for the same basic reason. The Court explained in that case that the nationwide injunction entered by the lower courts could not be sustained based on injuries to farmers other than respondents. *Id.* at 163-64. The injunction entered in this case is necessary to protect Respondents themselves, not other transgender servicemembers. *See supra* § III.B.2.a.

court did here. *See, e.g.*, *Alexander v. Hillman*, 296 U.S. 222, 242 (1935); *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 507 (1928).

Moreover, the government is wrong to contend that historical practice would not allow a court of equity to award programmatic injunctive relief restraining the government from injuring non-parties. *See Toilet Goods Ass'n v. Gardner*, 387 U.S. 167, 183 (1967) (Fortas, J., dissenting) (observing that "each of the federal district judges in this Nation" possess the "power to enjoin enforcement of regulations and actions under the federal law," which allows district court judges to "suspend application of these . . . laws pending years of litigation"). As even Professor Bray concedes, bills of peace were used in equity courts to order remedies necessary to protect non-parties. *See* Bray, *supra*, at 426; *see also* Pomeroy, *Treatise on Equity Jurisprudence*, § 260 (1877) (explaining that bills of peace have been used in cases brought by individuals to enjoin unlawful government action). Even were that the purpose of the injunction here—and it is not—it would be fully consistent with historical equity practice, and so within the bounds of the district court's jurisdiction as described in *Grupo Mexicano*.

c. The Injunction Does Not Prevent Other Courts from Addressing the Constitutionality of the Ban

The government's arguments about the practicality of nationwide injunctions, *see* App. 31-32, are equally meritless.[10] The government's contention that the

[10] The government's reliance on *United States v. Mendoza*, 464 U.S. 154 (1984) is misplaced. *Mendoza* did not suggest that injunctions facially invalidating an unconstitutional policy are categorically improper. The Court in *Mendoza* was concerned that nonmutual offensive collateral estoppel against the government "would substantially

injunction somehow inhibits percolation of issues in other fora is particularly inapt here. As this Court is well aware, multiple challenges to the government's ban have continued forward through multiple courts in multiple circuits despite the entry of nationwide injunctions prohibiting the ban's implementation. *See Karnoski v. Trump*, No. 17-1297 (W.D. Wash.); *Stone v. Trump*, No. 17-2459 (D. Md.); *Doe 2 v. Trump*, No. 17-01597 (D.D.C.). The government's speculation that "other plaintiffs may simply drop their suits and rely on the first nationwide injunction," App. at 32, is consequently pure conjecture belied by actual facts. Notwithstanding the entry of four separate nationwide preliminary injunctions, all plaintiffs in these challenges have seen fit to press their claims through to final adjudication.

C. The Government Fails To Show It Will Be Irreparably Harmed Absent A Stay

The government offers no evidence that it will suffer any harm absent a stay, much less the irreparable harm required to justify this Court's extraordinary intervention. The preliminary injunction has been in place for more than a year, and transgender individuals have been serving openly for more than two and a half years. The government's request for a "stay" of that preliminary injunction, in this posture, effectively asks this Court to authorize an abrupt change in the *status quo*—permitting the government to implement a new policy under which Respondents would suffer immediate and irreparable harm prior to full consideration of their

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thwart the development of important questions of law" by preventing percolation of legal issues through multiple courts of appeals. *Id.* at 160. Unlike collateral estoppel, where a decision in one case is "conclusive in a subsequent suit," *id.* at 158, injunctions impose no limits on the arguments the federal government is entitled to make in other cases.

important constitutional claims. Yet, as the district court considering an identical stay motion in *Doe 2* concluded, the government "present[s] no evidence that the Court's preliminary injunction maintaining the *status quo* of allowing transgender individuals to serve in the military has harmed military readiness." *Doe 2* App. 130a. Nor does the government explain why its "need for relief from the Court's preliminary injunction has suddenly become urgent." *Id.*

The government's claimed urgency cannot be squared with its conduct in this case, including its decision to seek a stay only in the alternative to its petition for certiorari before judgment. The government never appealed the district court's preliminary injunction, and at no point sought a stay or review from any court, even as to the scope of the injunction. As for the decision at issue in this appeal, the district court denied the government's motion to dissolve the preliminary injunction on September 18, 2018. Pet. App. 41a. The government did not seek to stay that order for more than two months, when it suddenly filed successive motions (including a motion in contravention of Federal Rule of Appellate Procedure 8) in the district court, the Ninth Circuit Court of Appeals, and this Court. Now, by seeking a stay only in the alternative to its petition for certiorari before judgment, the government acknowledges that no real urgency exists. In light of that history, the government cannot credibly claim that the risk of harm to the military warrants a stay.

In any event, the government has offered no evidence to support that extraordinary request. Petitioners rely on conclusory assertions that permitting the continued service of transgender people would "undermine readiness, disrupt unit

cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." App. 33a. But contrary to those unsupported claims, record evidence shows that there is no risk of harm to the military from allowing the service of transgender individuals under a policy implemented only after "comprehensively analyzing whether any justification remained validating the ban on open service by transgender individuals." Pet. App. 5a. The preliminary injunction maintains the *status quo* that existed prior to the 2017 Presidential Memorandum, which provides for the safe and orderly accession and retention of transgender individuals in the military, and requires transgender servicemembers to meet "the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability and retention." Pet. App. 7a.

During congressional hearings in April 2018, the heads of three service branches testified that they were unaware of any evidence that service by transgender people impairs military effectiveness, and that transgender individuals are able to meet service standards and serve without issue. CAJA831-836. Transgender men and women have been serving honorably and effectively, including on active duty in combat zones, for more than two and a half years. The DOD Report cites no specific examples or evidence to the contrary. Pet. App. 57a-58a; *see also Doe 2* App. 145a ("If the 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."). Nor has the government proffered any new evidence

in support of this motion. Instead, the very policy Petitioners seek to enforce—the Implementation Plan—would allow nearly a thousand transgender individuals to continue serving in the armed forces through a grandfather provision, an exception that cannot be squared with the government's claim that it will be irreparably harmed by the mere continued presence of transgender personnel.

Rather than demonstrating irreparable harm if a stay is not granted, the military's own evidence suggests that granting a stay is more likely to cause irreparable harm to the government than to prevent it. Just as implementation of the Carter Policy took several steps, including revisions to military regulations, medical practices, and training manuals—both service-wide and in each of the branches—enforcement of the Implementation Plan will also be a prolonged and complicated process. If the Implementation Plan is found unconstitutional, the military would have to unwind that implementation and restart the Carter Policy. "Such volatility and instability in the makeup of the military" is harmful and would undermine both military effectiveness and the heightened need for "stasis and security in the composition of the military" during a period of war. *Doe 2* App. 147a. Given the absence of any evidence of irreparable harm from maintaining the *status quo*, there is simply no reason to risk such serious harm.

D. The Balance Of Equities Continues To Support The Scope Of The Injunction

As discussed in Section III.C, *supra*, the government has not shown that it will suffer any harm by maintaining the *status quo*. Under the terms of the preliminary injunction, transgender persons must still satisfy the demanding standards to which

all servicemembers are subject. Pet. App. 7a. And there is no evidence in the record that service by such qualified individuals will harm the government—particularly where even the Implementation Plan permits continued service by hundreds of transgender servicemembers.

On the other side of the ledger, however, are the "harmful consequences" Respondents will face if the injunction were stayed. Pet. App. 32a. Respondents who have not yet enlisted will be barred from doing so. *Id.* Respondents who have come out as transgender and are currently serving will be subject to "the negative stigma the ban forces upon" them, which "sends a damaging public message that transgender people are not fit to serve in the military," and are "not worthy of the military uniform simply because of their gender." Pet. App. 37a-38a (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), and *Lawrence*, 539 U.S. at 573). In addition to the constitutional injury of being "single[d] out . . . for unequal treatment" as part of an inferior class, Pet. App. 38a, the record shows that Respondents will face additional concrete harms to their safety, military stature, and professional futures. Pet. App. 32a. If the ban were permitted to take effect, Respondents will receive less favorable assignments and training opportunities, and will be less respected by their peers and superior officers. *Id.* Furthermore, the harms inflicted on Respondents by the ban cannot be remedied by narrowing the injunction to apply only to them. "By singling out and stigmatizing transgender service members as inherently different and inferior, the Mattis Implementation Plan harms even those transgender service members who may be allowed to continue serving their country." *Doe 2* App. 106a.

In sum, given the grave threat to Respondents and the absence of any demonstrable harm to the government, the equities weigh heavily in favor of denying Petitioners' motion and maintaining the *status quo* while this litigation proceeds.

IV. CONCLUSION

There is no basis to grant the stay the government seeks. Respondents respectfully request that the Court deny the government's application.[11]

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[11] We have been authorized to represent that Respondent-Intervenor State of California agrees that the stay application should be denied.