Nos. 18-676, 18-677, and 18-678

In the Supreme Court of the United States

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

v.

RYAN KARNOSKI, ET AL.

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

v.

JANE DOE 2, ET AL.

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

v.

AIDEN STOCKMAN, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND DISTRICT OF COLUMBIA CIRCUITS

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I. THE QUESTION PRESENTED WARRANTS THIS COURT'S IMMEDIATE REVIEW

Respondents do not dispute that, even if the government were immediately to seek certiorari from an adverse decision of one of the courts of appeals in these cases, a prompt resolution of the question presented would be impossible: absent a stay, the military would be enjoined nationwide from implementing the Mattis policy for at least another year and likely well into 2020. Respondents argue instead that a prompt resolution is unnecessary for several reasons. None withstands scrutiny.

A. Respondents contend that the nationwide preliminary injunctions do not risk any "real-world harm" by forcing the military to maintain the Carter policy. Karnoski Br. in Opp. 17. That contention cannot be squared with the military's own view, which is entitled to "great deference." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). The Carter policy requires, *inter alia*, that the military accommodate gender transition by allowing certain servicemembers with gender dysphoria to undergo transition-related treatment at governmental expense and then serve in their preferred gender. *Karnoski* Pet. 5. After conducting a thorough and independent study—including consideration of "data obtained since the [Carter] policy began to take effect"—the Department of Defense found "substantial risks associated with" making such accommodations for individuals with gender dysphoria who seek or have undergone gender transition. *Karnoski* Pet. App. 206a. In particular, the Department determined that "exempting such persons from well-established mental health, physical health, and sex-based standards, which apply to all Service members,

including transgender Service members without gender dysphoria, could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." *Ibid.*; see *id.* at 178a-197a (explaining reasons for departing from the Carter policy).

Respondents' reliance on congressional testimony by the military's Service Chiefs is misplaced. *E.g.*, Karnoski Br. in Opp. 19-20. The Service Chiefs testified in April 2018 that they were unaware of any issues regarding service by "transgender servicemembers." Washington Br. in Opp. App. 425a. Following that testimony, however, former Secretary of Defense James Mattis himself testified that it would have been "impossible" for the Service Chiefs to have been aware of any such issues because the Carter policy itself "prohibit[s] that very information from coming up" to "the service chief level." *Karnoski* C.A. E.R. 491.

Moreover, the Service Chiefs were asked only generally about "transgender" military service. *E.g.*, Washington Br. in Opp. App. 425a, 426a, 431a. Even under the Mattis policy, however, transgender individuals may serve openly, so long as they meet applicable standards, including standards associated with their biological sex. *Karnoski* Pet. App. 208a. The Department's concerns with the Carter policy lie not in the fact that it permits transgender individuals to serve, but in the fact that it requires the military to make accommodations and exemptions for individuals with gender dysphoria and, in particular, those who seek or have undergone gender transition. *Id.* at 197a-198a, 206a. Similar concerns led Secretary Mattis, "after consulting with the Service Chiefs and Secretaries," to defer implementation of the Carter accession standards for six months "to evaluate

more carefully the[ir] impact * * * on readiness and lethality." *Id.* at 96a.

Respondents also contend that there is no "pressing need" for this Court's review because the Carter policy merely requires "transgender servicemembers" to meet the "same" standards as "all other servicemembers." Doe Br. in Opp. 18. But in fact, the Carter policy contains a number of significant "exempti[ons]" from "well-established mental health, physical health, and sex-based standards." *Karnoski* Pet. App. 206a. For example, the Carter policy permits individuals with a history of gender dysphoria to join the military after achieving 18 months of stability, even though individuals with similar mental-health conditions are subject to disqualification (absent a waiver) or longer stability periods. *Id.* at 199a. The Carter policy also permits individuals with gender dysphoria who have undergone gender transition to serve in their preferred gender, "exempt[ing] [them] from the uniform, biologically-based standards applicable to their biological sex." *Id.* at 185a. In the military's professional judgment, such "exempti[ons]"—which the nationwide injunctions force the military to maintain—render the Carter policy contrary to "military effectiveness and lethality." *Id.* at 206a.

B. Respondents err in contending that the timing of the government's requests for this Court's intervention indicate a lack of urgency. *E.g.*, Karnoski Br. in Opp. 16. Throughout this litigation, the government has made considerable effort to expedite proceedings below. In *Karnoski*—the lead case in the Ninth Circuit—the government briefed its appeal on an expedited basis and sought expedition of oral argument. *Karnoski* Pet. 13-14. The government likewise sought an expedited

briefing schedule in the D.C. Circuit in *Doe*. *Doe* Pet. 11-12.

At the same time, the government has refrained from seeking this Court's intervention until plainly necessary. Thus, the government did not seek certiorari before judgment until it was clear that any decision of the courts of appeals would come too late for this Court to review such a decision in the ordinary course this Term. And the government did not seek a stay from this Court immediately after the Ninth Circuit denied a stay in *Karnoski*, see *Karnoski* Pet. App. 82a-83a, because it was still possible at that point for the Ninth Circuit to render a reasonably prompt decision on the validity of the injunction. Moreover, once the Ninth Circuit denied a stay in *Karnoski*, there was no point in seeking stays of the preliminary injunctions in *Doe* or *Stockman*; given the nationwide scope of the injunction in *Karnoski*, obtaining stays in the other cases would have had no practical effect.

The government's decision not to pursue appeals of the "original" nationwide preliminary injunctions in these cases is likewise immaterial. Karnoski Br. in Opp. 16; see Doe Br. in Opp. 20; Stockman Br. in Opp. 18. Those nationwide injunctions were issued *before* the announcement of the Mattis policy. *Karnoski* Pet. 10-11; *Doe* Pet. 10-11; *Stockman* Pet. 10. And both the D.C. and the Fourth Circuits had denied the government's requests for partial stays of those nationwide injunctions pending appeal. *Karnoski* Pet. 11; *Doe* Pet. 10. Appealing the injunctions at that juncture thus made little sense, given the Department's ongoing and nearly completed review, which could (and ultimately did) lead to a new and different policy, and the fact that, absent stays in

every case, the military would be forced to implement the Carter accession standards in any event.

C. Respondents assert that the question presented in these cases is no more important than the questions presented in *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), or *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006), which the Court "resolved in the ordinary course," Doe Br. in Opp. 17-18. In each of those cases, however, the district court had entered an injunction limited to the parties before it. See *Hamdan* v. *Rumsfeld*, 344 F. Supp. 2d 152, 173-174 (D.D.C. 2004), rev'd, 415 F.3d 33 (D.C. Cir. 2005), rev'd and remanded, 548 U.S. 557 (2006); *Goldman* v. *Secretary of Def.*, 530 F. Supp. 12, 17 (D.D.C. 1981), rev'd, 734 F.2d 1531 (D.C. Cir. 1984), aff'd, 475 U.S. 503 (1986). Neither case involved a nationwide injunction, preventing the military from implementing a policy across the board. Given the nationwide scope of the injunctions here, the need for this Court's immediate review is far more pressing.

II. THESE CASES ARE SUITABLE VEHICLES TO RESOLVE THE QUESTION PRESENTED

Respondents make several arguments that these petitions do not present "appropriate" vehicles "to consider the issues on which the government seeks certiorari." Doe Br. in Opp. 22 (capitalization and emphasis omitted). Contrary to respondents' arguments, each of these cases is a suitable vehicle to resolve the question presented. To ensure that no intervening developments in the lower courts—such as vacatur of the nationwide preliminary injunctions in *Karnoski* or *Doe*—deprive this Court of an adequate vehicle, the government re-

spectfully submits that the Court should grant certiorari before judgment in all three cases and consolidate them for further review. *Karnoski* Pet. 27-28.

A. Respondents contend that the "interlocutory" posture of these cases is reason to deny review. *E.g.*, Doe Br. in Opp. 22. That contention misunderstands the question on which the government seeks certiorari. The question presented is whether the district courts erred in preliminarily enjoining the military from implementing the Mattis policy nationwide. *E.g.*, *Karnoski* Pet. I. That question concerns the validity of preliminary injunctive relief. It therefore necessarily arises in an interlocutory posture. Contrary to respondents' contention, the government could not simply "rais[e] the same issue[] in a later petition following entry of a final judgment," Doe Br. in Opp. 22, because at that point the issue would be moot.

Moreover, respondents err in asserting that the merits of their constitutional claims would not be before this Court. *E.g.*, Doe Br. in Opp. 22. This Court always has the authority, in reviewing a preliminary injunction, to "address the merits" of the litigation when appropriate. *Munaf* v. *Geren*, 553 U.S. 674, 691 (2008). The Court has previously granted review of preliminary injunctions to address important legal issues, see, *e.g.*, *Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018); *United States* v. *Texas*, 136 S. Ct. 2271 (2016); *Munaf*, *supra*, and it should do the same here.

B. Respondents point out that these cases involve refusals to dissolve nationwide preliminary injunctions, after the Mattis policy was announced and the 2017 memorandum (and any similar directive) revoked. *E.g.*, Doe Br. in Opp. 23. But whether "changed circum-

stances" justify dissolving the injunctions, *ibid.* (citation omitted), turns on an issue at the heart of respondents' constitutional claims: whether the Mattis policy is a mere "implementation" of the ban on transgender service supposedly announced in the President's 2017 tweets and memorandum. *Id.* at 22. If it is not, then the Mattis policy represents a change in policy justifying dissolution of the injunctions. Whether the government has demonstrated changed circumstances thus merges into the merits of respondents' constitutional claims. See *Karnoski* Pet. 24-25. And contrary to respondents' contention, deciding that question does not entail a "fact-intensive" inquiry. Doe Br. in Opp. 24. The text of the Mattis policy alone makes clear that it differs materially from the 2017 memorandum both in the substance of its provisions and in the process by which it was developed. *Karnoski* Pet. App. 113a-209a; see *Hawaii*, 138 S. Ct. at 2421 (assessing constitutionality of entry policy by focusing on the "text" of the policy and the "multi-agency review" that supported it).

C. Respondents also contend that this Court's review should await further "discovery and factual development * * * in the district court." Karnoski Br. in Opp. 27. Resolving the question presented, however, does not require any further discovery. This Court's review of the nationwide preliminary injunctions should proceed on the same record before the district courts when they entered (and refused to dissolve) the injunctions.

In any event, respondents' references to further discovery only underscore the need for this Court's intervention. The district court in *Karnoski*, for example, has ordered the Executive Branch both to compile a detailed privilege log of presidential communications

(which would itself reveal privileged information) and to disclose many thousands of documents withheld under the deliberative-process privilege. *Karnoski* Pet. 14 n.4. Those orders—which are currently stayed pending the Ninth Circuit's disposition of the government's mandamus petition, *ibid.*—rest on the district court's erroneous views that the Mattis policy merely implements the President's 2017 memorandum, *Karnoski* Pet. App. 37a, and that the degree of deference owed the military is a "question of fact" that depends on the thoroughness of Executive-Branch deliberations, *id.* at 66a-67a. These petitions present an opportunity for the Court to reject those views and eliminate the need for such intrusive discovery into Executive-Branch decision-making.

III. THE DECISIONS BELOW ARE WRONG

A. In defending the decisions below, respondents repeat the district courts' failure to consider the Mattis policy on its own terms. Throughout their briefs, respondents describe the Mattis policy as a "ban of all transgender persons as a group." Karnoski Br. in Opp. 34; see Doe Br. in Opp. 28 (asserting that the Mattis policy would "authorize discharge of * * * all transgender people"); Washington Br. in Opp. 26 (describing the Mattis policy as a "class-wide ban" on "transgender people"). That description bears no relation to the policy itself. The Mattis policy provides that "transgender persons should not be disqualified from service solely on account of their transgender status." *Karnoski* Pet. App. 149a. Indeed, transgender persons without gender dysphoria may serve under the Mattis policy just as they may under the Carter policy: in accordance with

"all standards, including standards associated with their biological sex." *Ibid.*; see *Karnoski* Pet. 21 n.7.[1]

In characterizing the Mattis policy as a ban on service by transgender individuals, respondents seek to blur the distinction between transgender individuals, on the one hand, and individuals with gender dysphoria who seek or have undergone gender transition, on the other. See Doe Br. in Opp. 28. But in doing so, they put themselves at odds with the American Psychological Association, RAND, and other experts, who all confirm that only some transgender individuals experience gender dysphoria and only some choose to treat that condition through gender transition. See *Karnoski* Pet. App. 152a ("[N]ot all transgender people suffer from gender dysphoria and that distinction * * * is important to keep in mind.") (citation omitted); Washington Br. in Opp. App. 32a ("[O]nly transgender individuals who experience significant related distress are considered to have a medical condition called *gender dysphoria*."); Washington Br. in Opp. App. 33a ("Among transgender individuals, a subset may choose to *transition*.").

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[1] Contrary to respondents' assertion, the Carter policy does not permit "all transgender servicemembers" to serve in their preferred gender. Doe Br. in Opp. 11. Rather, the Carter policy permits only individuals with gender dysphoria who have undergone gender transition to do so; by contrast, transgender servicemembers without gender dysphoria or who have not transitioned must serve in their biological sex. See *id.* at 6; *Karnoski* Pet. 21 & n.7. Respondents also err in asserting that the Mattis policy "applies *only* to transgender persons." Karnoski Br. in Opp. 8. For example, the Mattis policy presumptively disqualifies "persons who are diagnosed with, or have a history of, gender dysphoria," whether they are transgender or not. *Karnoski* Pet. App. 198a; see *id.* at 152a n.57 (explaining that "not all persons with gender dysphoria are transgender").

In *Karnoski*, respondents themselves relied on those distinctions before the military announced the Mattis policy, contrasting the 2017 memorandum's "sweeping exclusion of transgender people" with concerns over "gender dysphoria, the fully treatable distress that a subset of transgender people may experience, or gender transition, which forms part of the medical treatment for gender dysphoria." *Karnoski* D. Ct. Doc. 129, at 22 (Jan. 25, 2018). As the distinctions drawn by the Mattis policy are based on a medical condition (gender dysphoria) and its related treatment (gender transition), the policy is plainly subject only to rational-basis review. *Karnoski* Pet. 19.[2]

In any event, the military context warrants a deferential standard of review, and the Mattis policy satisfies that standard. *Karnoski* Pet. 19-20. Respondents do not dispute the military's compelling interests in readiness, good order and discipline, sound leadership, unit cohesion, and effectiveness. They dispute only the relationship between those interests and the military's reasons for not accommodating gender transition. *E.g.*, Karnoski Br. in Opp. 33-35; Doe Br. in Opp. 31. But the military's judgment that "making accommodations for gender transition" would "not [be] conducive to, and would likely undermine * * * readiness, good order and

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[2] Contrary to respondents' contention, the government has not waived the argument that, even if the Mattis policy turns on transgender status, it is subject to a deferential standard of review. *E.g.*, Stockman Br. in Opp. 25. That alternative argument is fairly included in the question presented and the body of the petition. *Karnoski* Pet. I, 19-20. The government also raised the argument below. See, *e.g.*, *Karnoski* Gov't C.A. Br. 24 n.2; *Doe* Gov't C.A. Br. 23 n.2.

discipline, sound leadership, and unit cohesion," *Karnoski* Pet. App. 197a, is precisely the type of "professional military judgment[]" deserving of deference, *Winter*, 555 U.S. at 24 (citation omitted).

B. Respondents further fail to justify the nationwide scope of the injunctions in these cases.[3] They contend that "[t]he scope of an injunction is a matter of the district court's equitable discretion, not jurisdiction." Doe Br. in Opp. 32. But that contention is irreconcilable with this Court's repeated pronouncements that, under Article III, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill* v. *Whitford*, 138 S. Ct. 1916, 1934 (2018). And even as to equity, respondents cannot evade this Court's admonition that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted). Although respondents assert that an injunction "as to only the individual plaintiffs here could not afford them full relief," Karnoski Br. in Opp. 37; see Washington Br. in Opp. 29; Doe Br. in Opp. 33; Stockman Br. in Opp. 31-32, they fail to identify anyone else whose disqualification from military service would even arguably cause them irreparable injury, see *Karnoski* Stay Appl. 30-31; *Doe* Stay Appl. 27-28; *Stockman* Stay Appl. 26-27. At the very least, therefore, the district courts erred in enjoining the Mattis policy on a nationwide basis.

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[3] Respondents contend that the government could have pursued appeals "more than a year ago" raising the same issue it does now: that the preliminary injunctions should at the very least be limited to barring the implementation of the Mattis policy as to the individual respondents in these cases. Doe Br. in Opp. 24. That contention is mistaken because the Mattis policy did not exist at that time.

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For the foregoing reasons and those stated in the petitions for writs of certiorari before judgment, the petitions should be granted.

Respectfully submitted.

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Solicitor General

JANUARY 2019