No. 18-676

In the Supreme Court of the United States

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

PETITIONERS,

v.

RYAN KARNOSKI, ET AL.,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF WASHINGTON'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

ROBERT W. FERGUSON
Attorney General

NOAH G. PURCELL
Solicitor General

ANNE E. EGELER
Deputy Solicitor General
Counsel of Record

LA ROND BAKER
COLLEEN M. MELODY
Assistant Attorneys General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200
annee1@atg.wa.gov

Attorneys for State of Washington

QUESTION PRESENTED

Whether the district court erred in declining to dissolve a preliminary injunction protecting transgender Americans from being excluded from serving in the armed forces.

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JURISDICTION

The government invokes this Court's jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(e).

INTRODUCTION

Certiorari before judgment is appropriate only in rare cases of "imperative public importance" that "require immediate determination." Rule 11. The facts of this case and the government's own conduct demonstrate that this standard is unmet.

For two and a half years, brave transgender individuals have served openly in our nation's armed forces. Their open service began pursuant to military policy developed after intensive study. Their service continued pursuant to court orders after President Trump reversed that carefully developed policy by tweet. Senior military leaders have testified that open service by transgender individuals is having no negative effects on military readiness or cohesion. And the government showed no urgency for many months in litigating this case, abandoning prior appeals and declining to timely seek stays.

Now, inexplicably, the government claims an urgent need to execute the President's discriminatory policy reversal. It asks this Court to abandon normal

appellate processes to expedite this case even though the government failed to pursue multiple avenues to bring this issue before the Court sooner. There is no real emergency here to justify abandoning this Court's rules. The decision below is correct and is currently under review by the Ninth Circuit after expedited oral argument. The Court should reject this petition and its manufactured emergency and allow the federal courts to function as they should to resolve important issues like the ones presented in this case.

STATEMENT OF THE CASE

A. Factual Background

1. In 2016, the military began allowing transgender persons to serve openly, with no adverse consequences to military readiness

In 2010, Congress repealed the "Don't Ask, Don't Tell" policy that prevented gay, lesbian, and bisexual people from serving openly in the military. Pet. App. 43a. Military policy still prohibited transgender people from serving in the armed forces. Pet. App. 133a. Yet military commanders were increasingly aware that "capable and experienced" transgender personnel were serving in every branch of the military. Pet. App. 43a.

The Department of Defense responded to this growing awareness in August 2014 by eliminating the categorical ban on retention of existing transgender service members and by allowing each branch of the service to independently reassess its own policies. Pet. App. 43a. In July 2015, then-Secretary of Defense Ashton Carter convened a group

of military leaders and experts to evaluate policy options. Pet. App. 43a. This Working Group consulted with medical experts, personnel experts, readiness experts, and commanders whose units included transgender service members. *Id.* The Working Group also commissioned an independent study by the RAND Corporation to assess the military and medical implications of allowing transgender people to serve openly. *Id.* After nearly a year of research, the Working Group members and RAND unanimously recommended that transgender people be allowed to serve openly, and warned that exclusions based on characteristics unrelated to fitness to serve "undermine military efficacy." *Id.* 44a; State App. 173a.

Based on the Working Group's recommendation, in June 2016, Secretary Carter ended the policy barring open enlistment and service of transgender persons, declaring that "the most important qualification for service members should be whether they're able and willing to do their job[.]" State App. 173a. Effective immediately, existing transgender service members were permitted to serve openly in accordance with their gender identity. Pet. App. 91a.

While the Carter Policy took immediate effect for existing transgender service members, it delayed the enlistment of openly transgender persons until July 1, 2017. The Carter Policy contained specific provisions ensuring individual fitness by recruits. For example, individuals receiving hormone therapy were permitted to enlist if they had experienced eighteen months of stability. Pet. App. 168a. And individuals who had received genital surgery were permitted to

enlist if eighteen months had passed since the surgery, there were no complications, and no additional surgery was needed. Pet. App. 168a.

The portion of the Carter Policy permitting enlistment of transgender individuals was initially scheduled to begin July 1, 2017, but was delayed for six months by Secretary James Mattis. Pet. App. 96a; State App. 175a.

2. President Trump tweeted a ban on open service and enlistment by transgender persons

On July 26, 2017, President Trump announced on Twitter that he would "not accept or allow" transgender persons "to serve in any capacity in the U.S. Military." Pet. App. 69a-70a, 98a. The President did not consult the Joint Chiefs of Staff before sending the tweets. Pet. App. 70a. A month later, on August 25, 2017, a Presidential Memorandum memorialized the ban. Pet. App. 99a-102a. The 2017 Memorandum directed the military to: (1) indefinitely bar enlistment of transgender persons; (2) return to the policy prior to June 2016 that prohibited open service; and (3) effectively limit use of Department of Defense or Homeland Security funding for sex-reassignment surgery. *Id.* It also directed the Secretaries of Defense and Homeland Security to submit "a plan for implementing both the general policy . . . and the specific directives set forth" in the Memorandum and "determine how to address transgender individuals currently serving" in the military. Pet. App. 101a. President Trump expressly retained final decision-making authority regarding any change to his policy directives. Pet. App. 100a §§ 1(b), 2(a).

Secretary Mattis promptly affirmed that the Department of Defense would "carry out the President's policy and directives[.]" Pet. App. 5a. Secretary Mattis explained that an "implementation plan" would be developed by establishing "a panel of experts . . . to provide advice and recommendation on the implementation of the [P]resident's direction." Pet. App. 40a (alterations in original). Approximately two weeks later, the Department of Defense issued Interim Guidance affirming that the objective in developing policies governing service by transgender individuals was to "carry out the President's policy and directives[.]" Pet. App. 109a.

Beginning in October 2017, four district courts in three circuits issued preliminary injunctions prohibiting the ban from going into effect. Pet. App. 36a; *Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017); *Stockman v. Trump*, No. EDCV-17-1799-JGB, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017). As a result, openly transgender service members continued their military careers and new transgender recruits who met military fitness standards began enlisting in January 2018.

The government initially appealed the district court orders, but then voluntarily dismissed the appeals. The government did not petition this Court for review of the district court injunctions.

3. The Department of Defense developed a plan for President Trump's tweeted ban

After the government voluntarily dismissed its appeals of the preliminary injunctions, Secretary

Mattis continued work on the Implementation Plan. It was finalized in February 2018, and was accompanied by the "Department of Defense Report and Recommendations on Military Service by Transgender Persons." Pet. App. 113a-203a. Unlike the Carter Policy, the Implementation Plan does not allow service eligibility to turn on individual fitness. Rather, it recommends that a broad policy be implemented that would: (1) ban openly transgender service members from serving in a manner consistent with their gender identity; (2) bar enlistment of persons who require or have undergone gender transition as well as those who have a history or diagnosis of gender dysphoria, regardless of whether it has been resolved; and (3) effectively prohibit military resources from being used for medical care related to gender transition. Pet. App. 207a-08a.

The Implementation Plan contains a limited grandfather clause that allows those who began serving openly since the Carter Policy was implemented to continue to serve consistent with their gender identity and receive any medically necessary treatment. Pet. App. 200a-01a. The Plan expresses that the commitment of these service members, and the military's investment in them, "outweigh[s] the risks identified" in the Implementation Plan. Pet. App. 201a. The Implementation Plan contains a caveat that "should [the Department of Defense] decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption instead is and should be deemed severable from the rest of the policy." *Id.*

In March 2018, President Trump issued a second Presidential Memorandum that recognized Secretary Mattis's recommendations for implementation of the ban, purported to revoke the 2017 Presidential Memorandum, and directed Secretary Mattis and the Secretary of Homeland Security to implement the policies addressing military service by transgender persons. Pet. App. 211a.

4. Military Service Chiefs testified that open service has not impacted military readiness, cohesion, or discipline

From June 2016 to the present, transgender persons have openly served in the military. In April 2018, the Army, Navy, Air Force, and Marine Corps Service Chiefs, each of whom is also a member of the Joint Chiefs of Staff, testified to Congress regarding the military's experience with open service. They consistently stated that open service by transgender persons has not impaired military readiness, unit cohesion, or discipline. Army Chief of Staff Milley[1] testified that he knows who his transgender service members are and that the situation is "monitored very closely." State App. 426a. He stated that he "[has]

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[1] On December 8, 2018, the President announced he is appointing General Milley as the next chairman of the Joint Chiefs of Staff. NPR, Shannon Van Sant, *Trump Appoints Gen. Mark Milley Chairman Of The Joint Chiefs Of Staff*, https://www.npr.org/2018/12/08/674930438/trump-appoints-general-mark-milley-chairman-of-the-joint-chiefs-of-staff (Dec. 8, 2018).

received precisely zero reports of issues of cohesion, discipline, morale, and all those sorts of things." State App. 426a. Marine Corps Commandant General Neller testified that in his experience, not all transgender service members are the same, but they are all ready to deploy. *Id.* 432a. Similarly, Air Force General Goldfein testified that, as with all service members, fitness "is very personal to each individual" and there is "not a one-size-fits-all approach." *Id.* 436a-37a. The Air Force has not had any issues with unit cohesion, discipline, or morale as a result of open service. *Id.* Finally, Navy Admiral Richardson shared that integration of transgender sailors has gone "very well." *Id.* 432a-33a.

The Service Chiefs' testimony is consistent with conclusions reached by medical experts. For example, the American Medical Association stated that "there is no medically valid reason . . . to exclude transgender individuals from military service," and expressed concern that the Department of Defense "mischaracterized and rejected the wide body of peer-reviewed research on the effectiveness of transgender medical care." State App. 302a-03a. The American Psychological Association issued a statement that it "'is alarmed by the administration's misuse of psychological science to stigmatize transgender Americans[.]'" State App. 299a. It rejected the government's recharacterization of the ban as an exclusion based on gender dysphoria, explaining that "[s]ubstantial psychological research shows that gender dysphoria is a treatable condition, and does not, by itself, limit the ability of individuals to function well and excel in their work, including in military service" and that "'the incidence of gender

dysphoria is extremely low.'" State App. 299a. The American Psychiatric Association also opposed the ban, stating that "[t]ransgender people do not have a mental disorder; thus, they suffer no impairment whatsoever in their judgment or ability to work." *Id.* 301a.

Former United States Surgeons General Joycelyn Elders and David Satcher also expressed alarm at the Implementation Plan. State App. 304a-06a. The Surgeons General said that the government had "'mischaracterized the robust body of peer-reviewed research'" regarding dysphoria. *Id.* 305a. They underscored that "transgender troops are as medically fit as their non-transgender peers" and that "there is no medically valid reason—including a diagnosis of gender dysphoria—to exclude them" from the armed forces. *Id.* 305a-06a.

Former Surgeons General of the Navy, Army, and Coast Guard similarly concluded that scholarly research and Department of Defense data confirm that transgender personnel are medically fit and deployable. State App. 307a-422a. They pointed out that service members afforded treatment for gender dysphoria have been deployed in the Middle East. *Id.* 310a, 339a, 343a. They also highlighted the disparity between military policies regarding hormone use by transgender and non-transgender personnel. While hormone use was a disqualifying medical condition for transgender persons, hormones prescribed to non-transgender personnel for gynecological reasons, male genitourinary conditions, and renal dysfunctions were permissible even in combat settings. *Id.* 350a-51a.

B. Procedural History

In August 2017, nine individual plaintiffs and three organizations filed suit in the Western District of Washington challenging the constitutionality of the ban. The complaint alleged that the ban violates the equal protection and substantive due process protections of the Fifth Amendment and the free speech guarantees of the First Amendment. Washington intervened to protect its transgender residents from discrimination and to ensure that the ban does not force the State to act as an agent of discrimination against its own people when it mobilizes the Washington National Guard. Pet. App. 14a-15a.

1. The district court preliminarily enjoined the ban

The district court preliminarily enjoined the ban on December 11, 2017. Pet. App. 27a-28a. Courts in the District of Columbia, Maryland, and California entered similar injunctions. *See Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017), *petition for cert. filed* (U.S. No. 18-677, Nov. 23, 2018); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017); *Stockman v. Trump*, No. EDCV-17-1799-JGB, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017), *petition for cert. filed* (U.S. No. 18-678, Nov. 23, 2018).

The district court concluded that the plaintiffs were likely to prevail on the merits of their equal protection claim. Pet. App. 19a. The court held that discrimination based on transgender status is unlikely to survive even intermediate scrutiny

because although "Defendants identify important governmental interests including military effectiveness, unit cohesion, and preservation of military resources, they fail to show that the policy prohibiting transgender individuals from serving openly is related to the achievement of those interests." Pet. App. 20a. The court found that the government's asserted justifications "'[are] not merely unsupported, but [are] actually *contradicted* by the studies, conclusions, and judgment of the military itself.'" *Id.* (alterations in original) (emphasis in *Doe 1*) (quoting *Doe 1*, 275 F. Supp. 3d at 212). The district court relied in part on the Department of Defense's prior determination that "allowing transgender individuals to serve openly would not impact military effectiveness and readiness" and "*prohibiting* open service would have negative impacts including loss of qualified personnel, erosion of unit cohesion, and erosion of trust in command." *Id.*

The district court also found the "concerns about transition-related medical conditions and costs" to be "'hypothetical and extremely overbroad'" because "*all* service members might suffer from medical conditions that could impede performance" and military studies indicate that costs associated with service by transgender individuals "are exceedingly minimal." Pet. App. 20a-21a. The district court determined that, although courts often accord deference to military decisions, the ban was not entitled to "substantial deference" because it was announced by President Trump on Twitter "abruptly and without any evidence of considered reason or deliberation." *Id.* 21a, 22a.

Based on its findings, the district court held that the government met the requirements for issuance of a preliminary injunction. Pet. App. 24a. The court preliminarily enjoined the military from "taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement[.]" *Id.* 27a.

2. The government abandoned its appeal of the preliminary injunction and asked that the proceedings be slowed to allow discovery

In December 2017, the government appealed the preliminary injunction and sought an emergency administrative stay from the Ninth Circuit Court of Appeals of the injunction on enlistment. State App. 441a. But before briefing was completed, the government voluntarily dismissed its appeal of the preliminary injunction and motion for an emergency stay. State App. 439a, 441a.

In January 2018, Washington and the private plaintiffs moved for summary judgment. Instead of opposing the motions, the government waited until its opposition brief was due and then filed a Rule 56(d) motion requesting that the district court defer ruling on the summary judgment motions to allow Defendants to "test the accuracy and completeness of the factual assertions" and "develop additional facts" in support of the government's case. State App. 445a. The district court rejected these requests. *Id.*

3. Three months after abandoning its appeal, the government moved to dissolve the preliminary injunction

On March 29, 2018, three months after abandoning its appeal, the government moved to dissolve the preliminary injunction. Pet. App. 82a. The government argued that the Implementation Plan constituted a new policy and therefore mooted the plaintiffs' claims. *Id.* 48a-52a. The district court requested supplemental briefing regarding the impact of the 2018 Presidential Memorandum and the Implementation Plan on the pending motions for summary judgment. *Id.* 47a.

After the parties submitted supplemental briefing, the district court granted in part and denied in part the plaintiffs' motion for summary judgment. Pet. App. 36a. The court held that the Implementation Plan did not moot the plaintiffs' claims. *Id.* 49a-50a. The district court concluded that fact questions prevented a grant of summary judgment for either party on the level of deference owed to the ban. The court explained that the level of deference was a "complicated question" that would turn on facts including "the timing and thoroughness of [the military's] study" and "the soundness of the medical and other evidence it relied upon[.]" *Id.* 65a, 67a. The court directed the parties to "proceed with discovery and prepare for trial" on the extent of deference owed to the ban, as well as whether its justifications and means survive constitutional scrutiny. *Id.* 72a.

In the same order, the district court denied the government's motion to dissolve the preliminary injunction. Pet. App. 72a. It rejected the government's

argument that the Implementation Plan was independent from the ban announced in 2017. Pet. App. 49a-50a (finding that "the 2018 Memorandum and the Implementation Plan do not substantively rescind or revoke the Ban, but instead threaten the very same violations that caused it and other courts to enjoin the Ban in the first place"). Having concluded that the Implementation Plan was simply the implementation of the policy the court had already enjoined, the district court maintained the preliminary injunction and denied the motion to dissolve it. *Id.* 72a.

4. The government filed a second appeal of the preliminary injunction and sought a writ of mandamus to block discovery

After the district court denied the motion to dissolve the injunction, the government filed a second appeal with the Ninth Circuit Court of Appeals and concurrently moved the district court for a stay of the injunction pending appeal. Pet. App. 73a. The district court denied the stay request. *Id.* 75a-83a.

The government then moved the Court of Appeals for a stay pending appeal. On July 18, 2018, the Court of Appeals denied the stay motion, noting that a stay "would upend, rather than preserve, the status quo." Order at 2, *Karnoski v. Trump*, No. 18-35347 (9th Cir. July 18, 2018) (Dkt. 90). The government did not appeal or seek a stay of the preliminary injunction from this Court for the next five months.

The Court of Appeals expedited oral argument of the appeal of the district court's refusal to dissolve the preliminary injunction. A panel heard oral argument on October 10, 2018. Less than a month later, the government demanded that the Court of Appeals issue a ruling before November 23, 2018, citing no evidence of any urgent issues caused by compliance with the injunction. State App. 448a-49a. At that point, transgender persons had been permitted to serve in the military for approximately two and a half years.

On November 23, 2018, the government filed the instant petition for certiorari before judgment. The government waited until December 13, 2018, to file an application for stay in the alternative to certiorari before judgment.

REASONS FOR DENYING THE PETITION

A. The Extraordinary Remedy of Interlocutory Review Before Judgment Is Not Warranted

This petition falls far short of meeting the Court's stringent criteria for certiorari before judgment. Certiorari before judgment is "an extremely rare occurrence," *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers), "granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Rule 11. This petition cannot begin to satisfy the "very demanding standard" for certiorari before judgment. *Mount Soledad Mem'l Ass'n v. Trunk*, 134 S. Ct. 2658, 2659 (2014) (Alito, J., in chambers).

Most crucially, there is no urgent impending harm requiring this Court's immediate intervention. Openly transgender persons have been serving in the military for two and a half years and leaders from each branch have testified that their service has not harmed the military. Although the government cries that the sky is falling, it has offered no evidence to support its dire claims.

Given the lack of urgency, allowing the Ninth Circuit Court of Appeals to issue a decision will clarify the issue on appeal and provide helpful analysis. And, of course, the Ninth Circuit's decision may obviate the need for this Court's intervention. Therefore, certiorari before judgment should be denied.

1. There is no issue of imperative public importance requiring immediate review

There is no urgent issue of public importance requiring this Court to accept certiorari before the Court of Appeals has ruled.

The petition is founded on the assertion that continuing open service will impair military readiness, unit cohesion, and discipline. Pet. 18. This argument fails for three reasons. First, two and a half years of open service by transgender persons have demonstrated that there is no justification for the ban. The Service Chiefs testified that the status quo has not harmed any branch of the military. Second, the success of open service is consistent with the extensive medical, psychological, and military experts' analysis that contributed to the Carter Policy. And finally, contrary to the government's assertions, the factual record does not support the notion that the

Implementation Plan is the result of the measured, independent assessment that typically undergirds military policy shifts. Instead, the record shows that President Trump imposed the ban without consulting anyone. The government's deeply flawed post hoc justification does not make this a reasoned military decision that requires immediate implementation.

The first flaw in the government's claim of urgency is that the military's Service Chiefs have had two and a half years to assess the experience "on the ground," and the actual experience of the military has not shown significant evidence of harm. Army Chief of Staff Milley testified that there have been "precisely zero" problems with cohesion, discipline, or morale. State App. 426a. According to Marine Corps Commandant General Neller, transgender Marines have not impacted discipline or cohesion. *Id.* 430a. Consistent with the other service branches, Air Force Chief of Staff General Goldfein reported that the Air Force also has not had any problems with unit cohesion, discipline, or morale as a result of open service. *Id.* 436a-37a. Finally, Chief of Naval Operations Admiral Richardson testified that the Navy's experience has been "steady as she goes." *Id.* 432a. The Navy has maintained worldwide deployability by applying the lessons learned when it integrated women into the submarine force. *Id.*

The district court record is devoid of any evidence contradicting the Service Chiefs' testimony. Although there are two and a half years of experience to draw upon, the government has not offered any evidence to show that open service has actually created harm that demands this Court's immediate attention. Because the overwhelming information in

the record regarding the military's concrete experience with open service is positive, this case does not present an issue requiring immediate review. As the district court for the District of Columbia stated: "If a preliminary injunction were causing the military irreparable harm, the Court assumes that Defendants would have presented the Court with evidence of such harm by now." *Doe 2 v. Mattis*, __ F. Supp. __, 2018 WL 6266119, at *10 (D.D.C. Nov. 30, 2018).

The second reason the government's claims of urgency fall flat is that the Service Chiefs' testimony about the experience of open service is precisely what was expected. Before the Carter Plan was adopted, the Working Group of military and medical experts spent a year studying the impacts of open service. Pet. App. 43a-45a. They incorporated research from experts in every branch of the military, including experts in military readiness, medicine, health expenses, and military commanders who had transgender service members in their units. *Id.* At the conclusion of their research, they recommended that transgender people be permitted to join and openly serve, if they meet rigorous military fitness criteria. *Id.* The Working Group also engaged the RAND Corporation to study the impact on military readiness, health care needs, potential costs, and the experiences of 18 other countries that allow transgender personnel to serve openly in their militaries.[2] The RAND Study

[2] Australia, Austria, Belgium, Bolivia, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Israel, Netherlands, New Zealand, Norway, Spain, Sweden, and the United Kingdom all allow transgender personnel to serve openly in their militaries. Pet. App. 43a-45a; State App. 1a-172a (RAND Study).

concluded that open service would not negatively impact military readiness, effectiveness, or unit cohesion. Pet. App. 44a. On the other hand, discharging transgender service members would cause the armed forces to incur "significant costs" associated with replacing skilled personnel. *Id.*

Finally, the Court should reject the government's assertion that this is a pressing matter needing immediate attention because the government has not offered credible support for its claims. Unlike the independent analysis supporting the Carter Policy, the Implementation Plan was created to carry out an impulsive tweet. Although the petition states that "the Secretary of Defense determined" that transgender persons should not be permitted to serve openly, President Trump acted alone in imposing the class-wide ban. Pet. 17. The tweets were followed by a memorandum directing the Secretaries of Defense and Homeland Security to develop a plan to implement the ban. Pet. App. 99a-102a. In the months following the 2017 Presidential Memorandum, Department of Defense officials repeatedly stated that they were working to *implement* the President's decision to impose a ban, not to evaluate, question, or study the military's need for the sweeping ban. *Id.* 109a. Because the military officials were carrying out the President's order, not exercising independent judgment, the Implementation Plan does not support the petition's contention that "the military has concluded" that a class-wide ban on open service by transgender individuals is necessary. Pet. 18. The Implementation Plan has been widely

criticized by the medical community and military experts for offering junk science to uphold a ban predicated on stereotypes and divorced from the military's own data. *See, e.g.,* State App. 299a, 304a-06a, 307a-422a.

Because continuation of the status quo does not pose a risk of harm to the military, the petition does not remotely raise an issue of such imperative importance that it merits bypassing the Court of Appeals.

2. Unlike this case, the cases cited in support of certiorari before judgment all presented imperative issues of immediate national importance

The government argues that this case presents the same type of issue that justified certiorari before judgment in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), *United States v. Nixon*, 418 U.S. 683 (1974), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Pet. 18. Not so. Unlike the present petition, each of those cases involved a moment in the nation's history that presented a clearly imperative issue requiring immediate resolution.

The Iran Hostage Crisis provided the backdrop for *Dames & Moore.* A district court issued a judgment that conflicted with the United States' agreement to nullify judgments against Iranian funds held in the United States, in exchange for release of the hostages. In granting certiorari before judgment, the Court determined that the urgency of the international conflict—and the presidential authority to suspend court actions—presented issues of "great significance"

that "demand prompt resolution." *Dames & Moore*, 453 U.S. at 668.

Issues of imperative national significance also justified certiorari before judgment in *United States v. Nixon*, which addressed a district court order denying the President's motion to quash a subpoena for disclosure of incriminatory tape recordings. *Nixon*, 418 U.S. 683.

And in *Youngstown Sheet & Tube*, certiorari before judgment was granted to consider the legality of the President's seizure and operation of the nation's steel mills, raising imperative separation of powers issues, and the likelihood of irreparable harm to an industry critical to national security. *Youngstown Sheet & Tube*, 343 U.S. at 588-89.

In sharp contrast, the petition here cannot begin to satisfy the "very demanding standard" for certiorari before judgment. *Mount Soledad Mem'l Ass'n*, 134 S. Ct. at 2659. Indeed, the government's own actions demonstrate that there is *not* a pressing need for this Court's intervention. When the preliminary injunction was entered in December 2017, the government initially appealed to the Court of Appeals, but then voluntarily dismissed its appeal. The government did not seek review in this Court and returned to the district court for months. Likewise, in June 2018, when the district court denied the government's request for stay of the preliminary injunction, and the Ninth Circuit affirmed, the government did not appeal the denial to this Court. Instead, it waited until December 13, 2018, to file an application for stay in the event that certiorari is denied. The government has displayed a similar lack

of urgency regarding each of the other three orders preliminarily enjoining the ban.

Awaiting the Ninth Circuit decision will not compromise the nation's interests. Pending the Ninth Circuit's order, the military will retain its authority to evaluate the fitness of each transgender individual to serve, and take action based on the same objective criteria applicable to all service members.

3. There are good reasons not to deviate from normal appellate practice

There is no reason to depart from this Court's usual practice when no Court of Appeals has reviewed the preliminary injunction. "This Court . . . is one of final review, 'not of first view.'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 71 n.7 (2005)). Taking the case prematurely "would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question" before certiorari is granted. *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

This Court has also declined to grant certiorari before judgment when it has reason to assume that "the Court of Appeals will proceed expeditiously to decide [the] case." *United States v. Clinton*, 524 U.S. 912, 912 (1998); *see also Dep't of Homeland Sec. v. Regents of Univ. of California*, 138 S. Ct. 1182, 1182 (2018) (rejecting the federal government's request for certiorari before judgment and noting that "[i]t is assumed that the Court of Appeals [for the Ninth Circuit] will proceed expeditiously to decide this case"). That assumption holds here. The Court of

Appeals has already ordered and heard expedited oral argument. There is every reason to assume it will continue to work on an expedited basis. If the plaintiffs prevail, the Court of Appeals may provide helpful guidance. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (noting that the Court of Appeals case law helps to "explain and formulate the underlying principles" the Supreme Court must consider in ruling on marriage for same-sex couples). Alternatively, if the Court of Appeals rules against the plaintiffs, it may entirely foreclose the need for this Court's review at this interlocutory stage. There is no reason for the Court to accept review prematurely and make unnecessary decisions regarding the constitutionality of discriminatory military policies.

B. This Interlocutory Appeal Presents a Poor Vehicle for Consideration of the Merits of the Constitutional Arguments

The government asks this Court to decide the underlying issue of whether the President has lawfully banned transgender persons from the military. But in its present posture, this case presents a poor vehicle for consideration of this important civil rights question.

The primary difficulty is that this fact-bound case is still in the early stages of litigation. Discovery is still open. In fact, the government's key piece of evidence—the Implementation Plan—was not even disclosed until March 29, 2018, just two weeks before the district court entered the order denying summary judgment and declining to dissolve the preliminary injunction. Pet. App. 66a. The government's case largely revolves around its assertion that the

Implementation Plan reflects the Defense Secretary's "independent judgment," following independent review by a panel of experts. Pet. 24. As the district court indicated, "Plaintiffs and Washington have not yet had an opportunity to test or respond" to the fact claims made in the Implementation Plan. Pet. App. 66a. The government has also expressed that it needs to conduct discovery. State App. 444a. Without such discovery, the district court stated that it cannot determine the factual basis for the government's assertions of military deference. Pet. App. 67a. If review is prematurely accepted, this Court also will lack the factual record necessary to decide the scope of the rights impaired by the class-wide ban, or the validity of the asserted government interest. Indeed, it is quite possible that the Ninth Circuit will remand the case for further fact-finding.

The government's belated interest in hastening review is particularly perplexing because it has yet to offer any concrete evidence of harm, despite two and a half years of open service. If its argument has any merit, the government also will benefit from the fact-finding process. In the absence of concrete evidence of a negative impact to the military, it will be virtually impossible for this Court to credit the claim of a significant or compelling government interest that justifies the class-wide ban.

In addition to the lack of a factual record, if the Court were to accept review at this time, it is unclear what issue would be before the Court. The government contends that the issue on review is whether the district court erred in granting the preliminary injunction. Pet. at I (posing the Question Presented as: "Whether the district court erred in

preliminarily enjoining . . . the Mattis policy nationwide.”). But the district court order the government appeals did not *impose* the preliminary injunction. Instead, the issue before the district court was whether to *dissolve* the previously-imposed preliminary injunction. As government counsel indicated during the Ninth Circuit oral argument, the question presented to the Court is critical because it establishes the burden.[3] The party requesting a preliminary injunction bears the burden of proof. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Conversely, the party seeking to dissolve an injunction bears the burden of showing a significant change in the facts or law. *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). At a minimum, allowing the Ninth Circuit to rule would determine what issue is on appeal.

C. The District Court Properly Declined to Dissolve the Injunction

After the President announced by tweet that he was banning an entire class of brave Americans from serving in our armed forces, the district court granted an injunction to maintain the status quo of allowing open service. Every other court to consider the issue reached the same conclusion. When the government returned to the district court and asked it to dissolve the injunction based on post-hoc rationalizations, the district court properly declined.

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[3] Oral Argument at 6:11 to 7:05, *Karnoski v. Trump*, No. 18-35347 (Ninth Cir. Oct. 10, 2018) https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000014382.

The government contends that absolute deference to military judgment requires granting review and reversing here. But the government is not "free to disregard the Constitution when it acts in the area of military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). Following the normal appellate practice is particularly warranted given that open service has been the norm for two and a half years and all the evidence from military leadership indicates that integration has been a success.

1. The district court correctly held that the preliminary injunction is necessary to protect constitutional rights

The district court properly determined that the injunction needs to remain in place to protect transgender persons from violation of the Fifth Amendment's guarantees of equal protection and substantive due process. Pet. App. 59a. The district court held that the President's announcement on Twitter of an overbroad, class-wide ban on military service violates the Fifth Amendment under any level of scrutiny. As this Court has stated, the Constitution "requires courts to exercise reasoned judgment in identifying interests of the person so fundamental" that they must be accorded respect. *Obergefell*, 135 S. Ct. at 2598. Here, transgender people are not asking for special treatment. They are asking for an equal opportunity to volunteer to risk their lives for their country. The district court properly rejected the government's contention that the court was required to defer to the Implementation Plan and dissolve the preliminary injunction.

The government's argument that the district court should have viewed the Implementation Plan as focusing on a medical condition, rather than imposing a class-wide ban, is baseless. Pet. 19. The ban is not justified by the possibility that some transgender service members may experience gender dysphoria. On its face, the language of the ban prohibits transgender individuals from serving in accordance with their gender identity regardless of whether they have been diagnosed with gender dysphoria or have resolved a prior diagnosis of dysphoria. If disparate treatment could be justified by showing that some members of a class may cause the government to incur a cost, all women could be excluded from the military because some women will become pregnant. "[E]ven in the ordinary equal protection case calling for the most deferential of standards," there must be a relationship "between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

Here, there is no such connection. The congressional testimony of the Service Chiefs revealed that open service has not damaged military readiness. And contrary to the petition's contention—that open service will create problems with gender-based living and bathing facilities—the testimony demonstrated that open service has not impaired unit cohesion or discipline. Public officials cannot "avoid a constitutional duty by bowing to the hypothetical effects" of private prejudice. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). Government policy cannot be based on "private biases and the possible injury they might inflict[.]" *Id.* If it could, arguments regarding

unit morale would have justified barring gay, female, and black service members.

Furthermore, the ban and the governmental interests supporting it are suspect. "It will not do to 'hypothesiz[e] or inven[t]' governmental purposes . . . '*post hoc* in response to litigation.'" *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1696-97 (2017) (ellipsis ours) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). But this is exactly what the government has done. The Implementation Plan—and the Department of Defense Report that purports to justify it—were created well after the President imposed the ban and after four district courts issued preliminary injunctions.

The balance of equities favors maintaining the injunction pending appeal. The government has a nondiscriminatory means of addressing its concerns while waiting for the appellate review. If a transgender person experiences an issue requiring care or discharge, the military can employ the same individualized assessment applicable to all personnel. On the other hand, if the preliminary injunction is dissolved, transgender individuals will face the harms created by the ban, including loss of employment and stigmatization.

2. The scope of the injunction is appropriate

The district court acted within its discretion when it maintained a preliminary injunction that matches the scope of the constitutional violation. Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the

legal issues it presents. *See Winter*, 555 U.S. at 20. "The purpose of [a preliminary injunction] is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (citation omitted).

The government contends that the military-wide injunction is improper because it "extend[s] beyond the parties to the case." Pet. 26, 27. Not so. The broad relief of a nationwide injunction is appropriate when it is necessary to afford relief to the petitioners. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Here, the State's *parens patriae* interest in the constitutional rights of its residents can only be protected with an injunction that protects Washingtonians wherever they serve their country. Therefore, the injunction is "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Yamasaki*, 442 U.S. at 702.

The government's reliance on *U.S. Department of Defense v. Meinhold*, 510 U.S. 939 (1993), is misplaced. Pet. 26. *Meinhold* involved a military member who challenged the Navy's "don't ask, don't tell" policy and sought only his personal reinstatement. *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469 (9th Cir. 1994). Because the case involved one individual plaintiff, the court could provide effective relief with an injunction against application of the Navy's regulation to Meinhold, and a broader injunction exceeded what was necessary to afford relief. *Id.* at 1480; *Meinhold*, 510 U.S. at 939 (staying injunction pending Ninth Circuit review to the extent

that it "grants relief to persons other than" Meinhold). Here, the district properly imposed military-wide relief, given that it was the only means of granting relief to the State.

CONCLUSION

The petition for writ of certiorari before judgment should be denied.

RESPECTFULLY SUBMITTED.

ROBERT W. FERGUSON
Attorney General

NOAH G. PURCELL
Solicitor General

ANNE E. EGELER
Deputy Solicitor General
Counsel of Record

LA ROND BAKER
COLLEEN M. MELODY
Assistant Attorneys General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200
annee1@atg.wa.gov

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