No. 18-677

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Applicants,

v.

JANE DOE 2, *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 DISTRICT OF COLUMBIA CIRCUIT

Able and qualified transgender men and women have been serving openly in the military since June 2016. The preliminary injunction has maintained that *status quo* since October 2017 by preventing enforcement of the President's order to revert to a ban on transgender military service. The district court carefully considered both sides' arguments and evidence in declining to dissolve that injunction and denying the government's most recent stay request. As the court correctly found, enjoining the ban on its face is necessary to avert irreparable injury to respondents, who are all current and aspiring transgender servicemembers. A stay 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 and military leadership. The district court properly tailored the injunction to afford respondents complete relief on their claims while the case proceeds to final judgment. The government offers no reason to second-guess any of these case-specific findings.

The government's litigation choices belie any claim of harm to the military. The injunction has been in place well over a year, and more than nine months have passed since the government sought to dissolve it. The government could have pursued a first appeal. It could also have sought an immediate stay of the district court's August 6, 2018 order denying its motion to dissolve the injunction. It did neither—even as to the scope of the injunction. Having forfeited those earlier opportunities for relief, the government's asserted urgency to upend the *status quo* in order to implement a transgender service ban strains credulity. There is no irreparable harm to the government or shift in the balance of equities warranting a stay. To the contrary, the balance of equities strongly favors respondents, who stand to lose their security and careers in the military without the injunction.

This Court is unlikely, moreover, to grant certiorari to review the underlying merits in this interlocutory posture. Neither this case nor any other has been litigated to final judgment. The government's application concerns only its effort to *dissolve* the injunction entered months earlier. And its entire merits argument rests on the false claim that the Mattis Plan, issued to implement the President's order, is not a ban. The district court has denied cross-motions for summary judgment and is poised to rule on the scope of discovery that will enable the parties and the court to resolve this case on the merits. The district court's preliminary rulings in dissolving the injunction faithfully apply this Court's precedent to the current record. Given the incomplete record, the preliminary nature of the ruling below, and the district court's careful analysis, certiorari is unlikely to be granted.

Nor do the government's concerns about other injunctions entered against other policies in other cases warrant a stay in this case. The injunction here is necessary to afford relief to respondents in this case and shows due respect for a co-equal branch. The district court dismissed the President from the case, dissolving the preliminary injunction as to him based on the government's separation-of-powers concerns. The court has taken a measured approach to discovery, waiting to resolve several privilege disputes until after the factual issues in the case have been substantially narrowed. And the court of appeals granted the government's request for expedition in the pending appeal and heard oral argument on December 10—three days before the government's stay application to this Court. It is the government, not the courts, that is departing from precedent by asking for the extraordinary remedy of a stay pending appeal after inexplicable delays and with no showing of actual harm. 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.

BACKGROUND

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

1. Development of the Carter Policy allowing 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. Appl. App. 7a-9a. 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. CAJA1018-1019. 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; *see also* CAJA1001.

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.[1] Appl. App. 9a. Recognizing that "the most important qualification for service members should be whether they're able and willing to do their job," CAJA710, the Working Group conducted a comprehensive examination of relevant evidence. 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. Appl. App. 9a-10a. It also commissioned a RAND Corporation study on the impact of military service by transgender people. Appl. App. 10a.

The Working Group concluded that barring transgender people from military service undermined military effectiveness and readiness. Appl. App. 10a. Exclusion would require the discharge of "qualified individuals … and [would] create[] unexpected

[1] The Working Group had approximately 25 members, including senior uniformed officers, senior civilian officials, and representatives of the Surgeons 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.

vacancies requiring expensive and time-consuming recruitment and training of replacements." Appl. App. 10a-11a.[2] The Working Group also concluded that "'barring transgender people from military service causes significant harms to the military, including arbitrarily excluding potential qualified recruits based on a characteristic with no relevance to their ability to serve." Appl. App. 11a n.2. 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 time lost 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 (collectively, the Carter Policy) that permit service by qualified transgender individuals. Appl. App. 12a.

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

[2] 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. Appl. App. 10a. The study also found that "'[i]n no case'" where foreign 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.'" Appl. App. 10a.

military service branches. Appl. App. 14a-15a. 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 transgender person "experience[s] due to a mismatch between their gender and their sex assigned at birth." CAJA518, 520-521. Gender transition alleviates such distress by enabling transgender servicemembers to live "in [their] preferred gender." CAJA519, 521.

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.'" Appl. App. 12a. The Carter Policy established a process for permitting servicemembers to undergo gender transition and to serve in their preferred gender. CAJA490-507; CAJA588-589. The servicemember must coordinate with his or her commander regarding the timing of gender transition and any relevant accommodations "addressing the needs of the Service member in a manner consistent with military mission and readiness." CAJA496; *see also* CAJA500-501. The process concludes when the servicemember's gender marker in the Defense Enrollment Eligibility Reporting System (DEERS) is changed to match the servicemember's gender rather than birth sex. CAJA496. Thereafter, the servicemember is subject to all applicable military standards for that gender. Appl. App. 12a.

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. Appl. App. 12a. 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* Appl. App. 13a ("'[T]he military services will begin acceding 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 on active duty in combat zones. Appl. App. 4a. Transgender individuals have been permitted to enlist in the military since January 2018. Appl. App. 80a.

2. The ban directed by the President

a) President Trump's order to ban transgender people from military service

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." Appl. App. 16a. On August 15, 2017, the President formalized that policy in a memorandum. Appl. App. 17a; 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." CAJA406. 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." CAJA406.

The 2017 Presidential Memorandum ordered Secretary Mattis to "submit a plan to the President 'for implementing'" the President's directives by February 2018 and specified that the ban would take effect no later than March 23, 2018. Appl. App. 18a. The President also ordered Secretary Mattis to include in the implementation plan provisions "'to address transgender individuals currently serving in the United States military.'" *Id.*

b) DOD's development and issuance of 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.'" Appl. App. 19a-20a. 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.'" Appl. App. 20a.

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.'" Appl. App. 117a. Secretary Mattis stated that he was issuing the interim guidance to "'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. *Id.*

The second, entitled "Terms of Reference," set forth the specific parameters for how to "'effect the policy and directives of the [2017] Presidential Memorandum'" with respect to accessions and retention. Appl. App. 117a. With respect to accessions, Secretary Mattis stated that the 2017 Presidential Memorandum required DOD to "prohibit accession by transgender individuals." Appl. App. 117a-118a. 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.'" Appl. App. 117a.

In February 2018, DOD issued a report including specific recommendations for how to implement the President's directives. Appl. App. 98a-99a; 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." Appl. App. 96a; CAJA263-265 (Mattis Plan). On March 23, 2018—the date the President had set for reinstating the ban—the President "'revoke[d]'" the 2017 Presidential Memorandum and "ordered" Secretary Mattis "'to implement … appropriate policies'" regarding military service by transgender individuals. Appl. App. 99a.

c) How the Mattis Plan effectuates the ban

The Mattis Plan takes a multi-pronged approach to ensure that all transgender individuals are barred from military service. Specifically, the Mattis Plan excludes: (1) anyone who does not live in their "biological sex"; (2) anyone "who require[s] or ha[s]

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." Appl. App. 97a. Each of those provisions is simply a different way to describe and exclude transgender people.

The Mattis 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.'" Appl. App. 7a. The Carter Policy eliminated that prohibition by permitting military service by any servicemember "who intends to begin transition, is undergoing transition, or has completed transition." CAJA519. As directed by the President, the Mattis 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." Appl. App. 12a. 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 regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability, and retention." Appl. App. 12a; CAJA586.

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. Appl. App. 12a. In contrast, the Mattis Plan bars accession by anyone who has undergone gender transition, regardless of their fitness to serve. Appl. App. 97a.

Similarly, the Carter Policy and the Mattis Plan take opposing approaches to the retention of servicemembers who identify themselves as transgender. *Compare* Appl. App. 12a *with* Appl. App. 97a. 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." CAJA496. 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 Mattis Plan restores the pre-2016 ban by requiring all servicemembers to serve in their "biological sex." Appl. App. 97a; *see also* Appl. App. 120a n.12.

The Mattis Plan also follows the President's directive to "address transgender individuals currently serving in the United States military." Appl. App. 18a. 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. Appl.

App. 97a.[3] 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, seven active-duty transgender servicemembers and three transgender individuals seeking to pursue military careers, brought this action on August 9, 2017, challenging the constitutionality of the ban on military service by transgender people ordered by the President.[4] On October 30, 2017, the district court preliminarily enjoined the ban, ordering a resumption of "the *status quo* with regard to accession and retention that existed" under the Carter Policy "before the issuance of the [2017] Presidential Memorandum." Appl. App. 80a.

The district court found that respondents were likely to succeed on their Fifth Amendment claim. The court determined that, "[a]s a form of government action that classifies people based on their gender identity, and disfavors a class of historically persecuted and politically powerless individuals, the President's directives are subject to a fairly searching form of scrutiny." Appl. App. 4a-5a. Even considering the military context, the court concluded, those directives likely fail scrutiny due to "a number of factors—including the sheer breadth of the exclusion ordered by the directives, the unusual circumstances surrounding the President's announcement of them, the fact that

[3] 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.

[4] Some respondents were added as plaintiffs in the second amended complaint. CAJA190-211.

the reasons given for them do not appear to be supported by any facts, and the recent rejection of those reasons by the military itself." Appl. App. 5a.

The district court also found that the ban would irreparably injure respondents by violating their constitutional rights and branding them as unfit to serve in the eyes of their peers and officers—thereby harming their safety, military stature, and military careers. Appl. App. 75a. The court found, by contrast, no evidence of negative effects and "considerable evidence that it is the *discharge* and *banning* of [transgender] individuals that would have such effects." Appl. App. 77a.

The government appealed the preliminary injunction and sought a stay of the injunction only as to accessions in order to complete a "further study." Stay Motion at 17, *Doe 1* v. *Trump*, No. 17-5267 (D.C. Cir. Dec. 11, 2017) (quoting CAJA406); *see* Dkt. 66, 73. The district court declined to grant a stay. Dkt. 75.[5] The court of appeals also denied a stay, explaining that the government had "failed to demonstrate that the study" ordered by Secretary Mattis was "motivated by any necessity separate and apart from compliance with the [2017] Presidential Memorandum," and had "provided no non-conclusory factual basis or military justification for their apparent position that the extensive study already conducted prior to President Trump's policy shift was inadequate or otherwise in need of supplementation." *Doe* v. *Trump*, No. 17-5267, 2017

[5] The government sought a stay of all discovery pending that appeal, Dkt. 62, which the district court denied, Dkt. 63. The district court also denied the government's motion to "clarify" the injunction, which contended that Secretary Mattis could independently bar service by transgender individuals even if the President could not. Appl. App. 79a-80a.

WL 6553389, at *2 (D.C. Cir. Dec. 22, 2017). Following that decision, the government voluntarily dismissed its appeal; it did not seek a stay from this Court.

2. The case then proceeded to discovery.[6] Although some documents were produced and a few depositions were taken, applicants "strenuously resisted" any inquiry into the basis for the ban, Appl. App. 117a; *e.g.*, Dkt. 88, at 5:11-16, and "withheld nearly all information concerning" the development of the Mattis Plan, CAJA62. As a result, several discovery-related motions are currently fully briefed and pending before the district court. *E.g.*, Dkts. 169-171.

3. On March 23, 2018, applicants moved to dissolve the injunction, arguing that the recently announced Mattis Plan is a "new policy," distinct from the enjoined directives of the President, that deserves deference as the product of "independent military judgment." Dkts. 96 at 12, 116 at 11-12. On August 6, the district court denied that motion. Stressing that it had "made no final ruling on the merits," Appl. App. 125a, the court concluded that the Mattis Plan did not constitute "changed circumstances" that would justify dissolution of the preliminary injunction, but rather was intended to implement the directives set forth in the 2017 Presidential Memorandum. Appl. App. 122a-125a. The court accordingly held that "the need remains intact for the … preliminary injunction maintaining the *status quo ante* until the final resolution of this case on the merits." Appl. App. 122a.

[6] Applicants again moved for a stay of all discovery, which the district court denied. Dkt. 80.

As the district court explained, the Mattis Plan "prevents service by transgender individuals." Appl. App. 119a. The court rejected the government's contention that the Mattis Plan differs materially from the ban ordered by the President for "three basic reasons": (1) the President directed DOD to submit an implementation plan, not a new policy; (2) all of the intervening statements by Secretary Mattis and DOD indicated that the plan being developed was an implementation plan, not a new policy; and (3) "most importantly, the Mattis Implementation Plan in fact prohibits transgender military service—just as President Trump's 2017 directives ordered." Appl. App. 115a-121a.

The district court thus found that the Mattis Plan "accomplishes an extremely broad prohibition on military service by transgender individuals that appears to be divorced from any transgender individual's actual ability to serve" and "establishes a special additional exclusionary rule" precluding otherwise qualified transgender individuals from serving. Appl. App. 123a. By categorically disqualifying transgender persons who have undergone or seek to undergo gender transition, and requiring any other transgender person to serve "only … *in their biological sex*," the Mattis Plan bans military service by "transgender persons," who, "by definition, … *do not identify or live in accord with their biological sex*." Appl. App. 119a.

4. On August 24, 2018, the district court denied both parties' motions for summary judgment. CAJA48-62. As the court explained, "[t]he parties dispute the facts related to the process used by [the government] to prepare the current proposed policy on transgender military service." CAJA56. Those facts, the court determined, "are material—they go to the heart of the degree of deference owed, and the level of scrutiny to be applied, in this case." CAJA60. Noting that the government "ha[s]

withheld nearly all information concerning the alleged deliberation" that led to the adoption of the Mattis Plan, the court held that it could not definitively resolve the parties' dispute without "basic facts that will inform its answer." CAJA62.[7] The court subsequently directed the parties to brief privilege issues that will largely determine the scope of discovery, Minute Order (September 10, 2018); those issues are fully briefed and awaiting a decision.

5. On August 27, 2018, the government appealed from the denial of the motion to dissolve the injunction but did not seek a stay—even as to the scope of the injunction—from any court at that time. *See* Dkt. 162. At the government's request that appeal was expedited, and it was argued before a panel (Griffith, Wilkins, Williams, JJ.) on December 10, 2018.

6. On November 21—more than three months after the district court denied the motion to dissolve the preliminary injunction—the government moved for a stay of the injunction pending appeal. The district court denied that motion in an order filed on November 30, 2018, taking pains to provide a "fulsome discussion of the issues" and its reasons for, once again, denying Defendants' motion for a stay. 2018 WL 6266119, at *13 (D.D.C. Nov. 30, 2018). Citing the court of appeals' December 2017 ruling denying a stay, the district court reminded Defendants "that all Plaintiffs seek during this litigation is to serve their Nation with honor and dignity, volunteering to face extreme hardships, to endure lengthy deployments and separation from family and friends, and

[7] The court also denied a third request by applicants to stay discovery. Minute Order (Aug. 27, 2018).

to willingly make the ultimate sacrifice of their lives if necessary to protect the Nation, the people of the United States, and the Constitution against all who would attack them." *Id.* at *2 (citing *Doe 1* v. *Trump*, No. 17-5267, 2017 WL 6553389 at *3 (D.C. Cir. Dec. 22, 2017)). First, because the Mattis Plan operates as a categorical ban based on transgender service, the district court's initial conclusion that respondents are likely to succeed on their Fifth Amendment claim remains unchanged. *Id.* at *3-5. Second, even after thirteen months with the injunction in place, the government had offered no support for its conclusory claim that permitting transgender individuals to serve poses "substantial risks" to military readiness, lethality, or unit cohesion. *Id.* at *10-11. Third, respondents would suffer "grave harm" if a plan that brands transgender service members as inferior were allowed to proceed. *Id.* at *11-12. Fourth, "enforcement of an unconstitutional law is always contrary to the public interest." *Id.* at *12-13. Finally, the district court explained in detail why, on the particular facts of this case, a facial injunction prohibiting the ban "is the only way to address fully Plaintiffs' constitutional injury." *Id.* at *7. The court explained:

> [I]f the Mattis Implementation Plan goes into effect, Plaintiffs will be injured even if the plan remains enjoined as to them and they are permitted to continue their service. For, 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, allowed to continue serving only by the Court's limited order and despite the claimed vociferous objections of the military itself. Accordingly, 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.

Id. On December 3, applicants sought a stay from the court of appeals. That motion is fully briefed and remains pending.

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. *See 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 Ed.* 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, 1316 (1983).

I. THIS COURT IS UNLIKELY TO GRANT REVIEW

The only question presented by this application is unworthy of this Court's review. The government's pending petition does not entail plenary review of the district court's *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 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);

see 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 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 this case to review "the equal-protection claim at the center of all the suits challenging the constitutionality of the Mattis policy," Pet. 14, because that claim has not been adjudicated on the merits. The district court denied cross-motions for summary judgment because it determined that the government's central assertion here—that the Mattis Plan reflects an independent exercise of military judgment rather than an implementation of the enjoined directives of the President—involves a factual dispute on which the record is incomplete and that is material to the court's resolution of "the degree of deference owed, and the level of scrutiny to be applied, in this case." CAJA60. Discovery on those matters is ongoing.

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"; "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, 945 (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.

The Court's ordinary caution would be especially warranted here, where the district court's decision is based on a limited record regarding a central issue in the case. The district court found that the current record contradicts the government's assertion that the process underlying the Mattis Plan was independent of the enjoined directives of the President. Appl. App. 124a. The district court denied respondents' motion for summary judgment in order to give the government an opportunity to substantiate that assertion. In light of the limited record before the district court and the court of appeals, it is unlikely that this Court would grant review of a question that has yet to be litigated on a full and final record.

Nor is the Court likely to grant certiorari in this case to address the propriety of facial or programmatic 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." Appl. 18. This case does not concern an injunction entered "to benefit

nonparties." The injunction entered in this case is necessary to remedy the constitutional violation about which respondents complain, and any stay or narrowing of that injunction would deprive them of the relief to which they are entitled and expose them to those precise harms the facial injunction was imposed to address. As the district court explained, a facial preliminary injunction against the ban "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." Appl. 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 facial injunction is "'necessary to provide complete relief to the plaintiff[s].'" *Id.* It is well settled that an injunction prohibiting enforcement of a government policy is proper where it is necessary to protect plaintiffs from a class-based harm. *See* Appl. App. 136a-140a (collecting authority); *see also infra* pp.29-35. That is not a question presented by any other case the government cites,[8] and this Court would not grant review here for the purpose of resolving courts' authority to enter facial injunctions in other circumstances.

[8] The government cites (at 19-22) 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 the ban 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 in its entirety, 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) ("This injunction against imposition of the notice and access conditions is nationwide in scope, there being no reason to think that the legal issues

II. THE GOVERNMENT HAS FAILED TO SHOW A FAIR PROSPECT THAT A MAJORITY OF THE COURT WILL VOTE TO REVERSE THE JUDGMENT BELOW

Nor has the government shown that a majority of the Court would be willing to disturb the lower court's preliminary decision that the Mattis Plan is likely unconstitutional and properly warrants an injunction that addresses the particular harms that respondents in this case have alleged.

A. The Mattis Plan Is Likely Unconstitutional

Applicants' contention that the Mattis Plan is based on a medical condition, not on transgender status, has no merit. The Mattis Plan "implements the President's directive that transgender people be excluded from the military." Appl. App. 100a; *Doe* v. *Trump*, No. 17-5267, 2017 WL 6553389, at *2 (D.C. Cir. Dec. 22, 2017) (Secretary of

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present in this case are restricted to Chicago or that the statutory authority given to the Attorney General would differ in another jurisdiction."), *reconsideration denied*, No. 17 C 5720, 2017 WL 5499167 (N.D. Ill. Nov. 16, 2017), *aff'd*, 888 F.3d 272 (7th Cir. 2018), *reh'g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018); *California* v. *Health & Human Servs.*, 281 F. Supp. 3d 806, 832 (N.D. Cal. 2017) (reasoning that a programmatic injunction was appropriate where defendant's conduct was unlawful not just as to plaintiffs but as to the public as a whole), *aff'd in part, vacated in part, remanded sub nom. California* v. *Azar*, No. 18-15144, 2018 WL 6566752 (9th Cir. Dec. 13, 2018); *International Refugee Assistance Project* v. *Trump*, 241 F. Supp. 3d 539, 565 (D. Md.) (basing facial injunction on fact that plaintiffs were "located in different parts of the United States"), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017), *vacated and remanded sub nom. Trump* v. *International Refugee Assistance*, 138 S. Ct. 353 (2017); *Regents of Univ. of California* v. *United States Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1049 (N.D. Cal.) (finding geographical scope of issue warranted facial injunction because "the problem affects every state and territory of the United States"), *aff'd sub nom. Regents of the Univ. of California* v. *United States Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018). That is not what happened here. In ordering a facial 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 obscures this critical distinction.

Defense has no "authority to act in this matter entirely independently of the specific directions of the Commander in Chief"). 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 and that DOD repeatedly stated that they were preparing such an implementation plan. Appl. App. 116a-117a. The government has claimed that the Mattis Plan was developed independently of the President's directive to reinstate a ban, but as the district court determined, the current record does not support that contention, and the government has resisted producing any such evidence in discovery. Appl. App. 96a.

The government attempts to cast the Mattis Plan as something other than a ban on transgender service, but the plain language of the Plan shows otherwise. As set forth above, the Mattis Plan has three provisions, each of which excludes transgender people from service. The plan (1) requires all servicemembers to serve only in their "biological sex," (2) disqualifies anyone who "require[s] or ha[s] 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." Appl. App. 97a-98a.

Each of these provisions is tailored to exclude only transgender people. First, 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. Appl. App. 97a. Second, the exclusion of anyone "who require[s] or ha[s] 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. *Id.* Because of these two broad provisions, even if any reference to "gender dysphoria" were eliminated from the Mattis 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 from enlistment, and require the discharge of, anyone who does not live in their "biological sex" or who undergoes or has undergone gender transition, meaning all transgender people.

Third, the Mattis 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 applicants' acknowledgement that not all people with gender dysphoria are transgender. For example, applicants acknowledge that a non-transgender man may suffer from gender dysphoria as a result of genital wounds. But under the Mattis Plan, individuals who have gender dysphoria for that reason are not excluded from service because they do not require a "change of gender." As applicants' 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.

Applicants' argument that the Mattis Plan is not a ban because it permits people who identify as transgender to serve in their "biological sex" is equally baseless. Appl. 11. As the courts below have uniformly held, a policy that targets the very characteristic that defines a class is discriminatory on its face; moreover, a policy that requires a person to suppress that defining characteristic in order to serve in the military is a ban. Appl. App. 119a n.11; *see also Stockman* v. *Trump*, 331 F. Supp. 3d 990, 1000 (C.D. Cal. 2018); *Karnoski* Pet. App. 51a-52a. Applicants' 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. Appl. App. 56a. This Court has rejected a similar distinction between status and conduct as a justification for discrimination against gay and lesbian people. *See Christian Legal Soc'y.* 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 Mattis Policy 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, as the district court held, that reality does not make a policy that requires such suppression any less facially discriminatory. Appl. App. 199a n.11.

Applicants misleadingly claim (at 11) that, like the Mattis Plan, the Carter Policy requires transgender servicemembers "without a history of gender dysphoria" to serve

in their "biological sex." 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."

Applicants 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 Mattis Plan warrants heightened scrutiny.[9] The plan's 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, 533 (1996). In addition, as the district court carefully explained, heightened scrutiny is required based on the unusual facts of this case. Appl. App. 74a. Both the ban and its adoption reflect a marked departure from ordinary military decisionmaking. While the military has discriminated against particular classes of people in the past, it no longer does so, and the decision to reinstate

[9] The government does not challenge the district court's conclusion that a classification based on transgender identity warrants heightened scrutiny. Accordingly, they have waived any such argument should the Court grant review. *See Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); Br. in Opp. 26-27.

a policy based on such class-based disparate treatment is particularly unusual. Appl. App. 73a (noting that "[t]he targeted revocation of rights from a particular class of people which they had previously enjoyed—for however short a period of time—is a fundamentally different act than not giving those rights in the first place"). And the circumstances of the ban's adoption were highly suspect. Appl. App. 74a. 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).

Applicants contend (at 25) that the district court should have evaluated the Mattis Plan under a "deferential standard" akin to rational-basis review because it involves a military policy. But that claim rests entirely on the government's assertion that—notwithstanding the overwhelming evidence to the contrary in the record—the Mattis Plan was adopted independently of the President's orders to reinstate a ban on military service by transgender people. On the current record, this Court is unlikely to find that the district court abused its discretion in finding that the government has not established evidence sufficient to support its claim.

In addition, even if the Mattis 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, Appl. App. 53a-57a, 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, 688-691 (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. 453 U.S. 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 event, the ban cannot survive any standard of scrutiny. The military has universal standards for enlistment, deployment, and retention. CAJA215-216. 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 servicemembers do not undermine sex-based standards. They seek to be held to the same standards as everyone else. CAJA 554, 588. 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. Applicants 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 (1982). Because they cannot provide an independent justification for excluding transgender people in order to reduce costs, Applicants' reliance on this rationale fails.

B. The Scope Of The Injunction Is Proper

The government's argument that the injunction transgresses both Article III and "longstanding equitable principles" (at 25) has been repeatedly considered and rejected by the district court. Applicants show no reason why this Court should overturn the lower court's considered judgment.

1. The government argues (at 26) that respondents lack Article III "standing to seek injunctive relief beyond what is needed to redress an actual or imminent injury-in-fact to respondents themselves." But that proposition is not at issue here because the injuries to plaintiffs that establish standing are not disputed, and the district court

tailored the injunction only to redress those injuries. As the district court has repeatedly taken pains to make clear (Appl. App. 102a-114a, 136a-144a), 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 these respondents* without a categorical prohibition against implementing the policy. A narrower injunction would fail to redress the core constitutional harm *as to these respondents*, who are 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.[10]

The district court concluded that the ban injures respondents "[b]y singling [them] out and stigmatizing them as members of an inherently inferior class of service members," Appl. App. 105a; the government never reckons with this conclusion. Even as to those respondents who are grandfathered into military service, the district court determined that they "receiv[e] unequal treatment under the Mattis Implementation

[10] *DOD* 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 is 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 respondents here, Meinhold raised an as-applied challenge to his discharge that turned on the particular facts of his case. Because the challenged policy was held unconstitutional only as applied to him, a broader injunction against the policy could not be maintained. Here, respondents' constitutional challenge to the Mattis Plan does not turn on their particular circumstances, but on the nature of the discrimination against transgender people as a group.

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." Appl. 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.

This Court has made clear that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). It has also recognized, however, that even in cases brought by individual plaintiffs, "if the arguments and evidence show that a statutory 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. *FEC*, 558 U.S. 310, 333 (2010)).[11] Implicit in this Court's remonstration is that an injunction should be sufficiently broad to provide the relief that an applicant needs in order to secure complete relief for his constitutional

[11] 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, 273-274 (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.").

injury. Here, the harms to *respondents* will persist if the ban is allowed to go into effect as to other transgender individuals seeking to join or remain in the military, because the ban conveys as a matter of United States policy that transgender people, including respondents, are unworthy of service in the military.

Allowing the ban to go into effect at all would subject respondents to serious practical as well as constitutional harms. Appl. App. 107a. A policy that officially brands some servicemembers 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." Mattis Mem. 2 (Dist. Ct. Dkt. 96-1). Supervisors and peers would have less confidence in them and would be less apt to give them opportunities for training, deployment, and assignments. Appl. App. 107a.

In addition, narrowing the injunction only to respondents would be impracticable and overly intrusive. Ensuring equal treatment for respondents under a narrow injunction would strain the practical limits of military administration, requiring extensive and detailed instructions to branches of the military about ways to suspend the overall policy and its adverse effects as to these servicemembers alone. Such concerns are heightened where, as here, respondents have demonstrated the need to proceed anonymously; an injunction that attempted to ensure their equal treatment on an individual basis while allowing the ban to go into effect would require widespread disclosure of their identities.

The district court carefully considered whether any other remedy, short of a programmatic prohibition on the ban, could address respondents' constitutional and material injuries; having found that none would do so, the district court properly enjoined the ban on its face. The government offers no argument that the district court abused its discretion in entering this relief, nor is a majority of the Court likely to conclude that it did so.

The government's reliance on *Alvarez* v. *Smith*, 558 U.S. 87 (2009) and *Summers* v. *Earth Island Institute*, 555 U.S. 488 (2009), suffers from the same misapprehension of the injury at issue in this case. 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. Appl. 29-30. That is beside the point. The point is not that the district court's programmatic injunction is necessary to prevent "injury to nonparties" (Appl. 30); the injunction is necessary to prevent injury to *these respondents*.

2. The government likewise contends (at 30) that the district court's preliminary injunction "violates fundamental rules of equity" because it is "broader than necessary to prevent irreparable harm to respondents." 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 respondents*, 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—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" 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[.]" Appl. 31. In the government's telling, that jurisdiction prohibits the entry of "[a]bsent-party injunctions" (Appl. 31), and so prohibits the injunction entered here. But there is no "absent-party injunction" in this case; the injunction accords these respondents full relief as against these applicants only. In any event, the government's historical arguments are wrong. *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).[12] Even assuming the exercise of equity in such cases may be constrained by the English Court of Chancery's jurisdiction

[12] *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 injunction entered by the lower courts could not be sustained based on injuries to farmers other than respondents. *Id.* at 163-164. The injunction entered in this case is necessary to protect respondents themselves, not other transgender servicemembers. "The fact that the preliminary injunction also benefits other transgender individuals who are not a party to this suit does not render the scope of the preliminary injunction improper." Appl. App. 139a.

at the Founding, that court issued injunctions only in private suits, and did not issue injunctions against the Crown at all. 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 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 [has] power to enjoin enforcement of regulations and actions under the federal law," allowing 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* 1 Pomeroy, *A Treatise on Equity Jurisprudence* § 260 (5th ed. 1941) (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*.

3. The government's arguments (at 32-33) about the practicality of facial or programmatic injunctions are all meritless in this case.[13] The government's contention that the injunction somehow inhibits percolation of issues in other fora is particularly inapt. 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 facial injunctions prohibiting the ban's implementation. *See Karnoski* v. *Trump*, No. 17-1297 (W.D. Wash.); *Stockman* v. *Trump*, No. 17-1799 (C.D. Cal.); *Stone* v. *Trump*, No. 17-2459 (D. Md.). The government's speculation (at 31) that "other plaintiffs may simply drop their suits and rely on the first nationwide injunction" is pure conjecture; notwithstanding the entry of four separate facial preliminary injunctions, all plaintiffs in these challenges have seen fit to press their claims through to final adjudication.

Similarly, the government's concern (at 31) that plaintiffs are sidestepping Federal Rule of Civil Procedure 23 is misplaced, particularly here. This case was filed in the United States District Court for the District of Columbia, where personal jurisdiction and venue are always proper for suits to enjoin federal government agents and agencies. If a multiplicity of individual suits seeking the same relief were filed in that District, they would all be deemed related and consolidated before the same judge.

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[13] 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 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.

Conditioning the court's power to enjoin government action on a flood of individual lawsuits is plainly at odds with the Federal Rules of Civil Procedure and the best interests of the courts.

III. THE GOVERNMENT FAILS TO SHOW ANY IRREPARABLE HARM THAT WOULD JUSTIFY 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. Yet, as the district court found, respondents "present 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." Appl. App. 130a. Nor do they explain why their "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 voluntarily withdrew its appeal of the preliminary injunction and did not seek a stay or review from this Court—even as to the scope of the injunction. As for the decision at issue in this application, the district court denied the government's motion to dissolve the preliminary injunction on August 6, 2018. When the government filed a notice of appeal from that decision three weeks later, it did not seek a stay or move for certiorari before judgment at that time. Instead, the government waited more than three months before finally seeking a stay

from the district court. And 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 its extraordinary request. Applicants rely (at 34) 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." 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 after considerable "forethought, research, and planning." Appl. App. 147a. 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 which requires transgender servicemembers to meet the same fitness, readiness, and deployability standards as all other servicemembers. Appl. App. 146a (noting that the injunction "simply prohibits the military from refusing to allow an otherwise combat-ready individual to serve based on that individual's transgender status").

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. Appl. App. 5a; *see also* Appl. 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 its application to this Court. The very policy that applicants seek to implement—the Mattis 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 claims 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—implementation of the Mattis Plan will also be a prolonged and complicated process. If the Mattis 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. Appl. 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.

IV. THE BALANCE OF EQUITIES CONTINUES TO SUPPORT THE SCOPE OF THE INJUNCTION

The balance of equities favors retaining the injunction. As discussed, 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. There is no evidence in the record that service by such qualified individuals will harm the government—particularly where even the Mattis Plan permits continued service by hundreds of transgender servicemembers. *See supra* Part III.

On the other side of the ledger, however, is the "grave harm" respondents will face if the injunction were stayed. Appl. App. 150a. Respondents who have not yet enlisted will be barred from doing so. The currently serving respondent who has not yet openly disclosed her transgender identity will be forced either to suppress that identity or to risk discharge. Appl. App. 109a-114a. Respondents who have come out as transgender and are currently serving will be "stigmatiz[ed] as members of an inherently inferior class of service members," permitted to serve "only pursuant to an exception to a policy that explicitly marks them as unfit for service." Appl. App. 105a-106a. In addition to the constitutional injury of being singled out as part of an inferior class, the record shows that they will face concrete harms to their safety, military stature, and professional futures. Appl. App. 107a-109a. As the district court found, 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.*

As the district court also found, 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." Appl. App. 149a. In addition, under a narrowed injunction, the Doe respondents would be forced to choose either to remain anonymous—and thus reap little benefit from the injunction—or disclose their transgender identities and role in this litigation publicly—and face the risk of targeted retribution and prejudice. Instead of functioning as a tailored remedy, a narrowed injunction would likely put respondents at heightened risk.

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 the government's stay application and maintaining the status quo while this litigation proceeds.

CONCLUSION

The government's stay application should be denied.

Respectfully submitted.

/s/ Paul R.Q. Wolfson

PAUL R.Q. WOLFSON
Counsel of Record
JOHN T. BYRNES
KEVIN M. LAMB
JACK STARCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
paul.wolfson@wilmerhale.com

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

ADAM M. CAMBIER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

JENNIFER LEVI
MARY L. BONAUTO
GLBTQ ADVOCATES AND DEFENDERS
18 Tremont Street
Suite 950
Boston, MA 02108

SHANNON P. MINTER
AMY WHELAN
CHRISTOPHER STOLL
ALEXANDER CHEN
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street
Suite 370
San Francisco, CA 94102

MATTHEW E. MILLER
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210

THERESA M. ROOSEVELT
FOLEY HOAG LLP
1717 K Street NW
Washington, DC 20006

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