No. 18-678

In the Supreme Court of the United States

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

Petitioners,

V.

AIDEN STOCKMAN, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in denying the government's motion to dissolve the preliminary injunction preventing the government from enforcing a ban on military service by transgender individuals.

RULE 29.6 STATEMENT

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

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INTRODUCTION

This case is about whether men and women who want to serve in the United States Armed Forces to protect their country and who are able and otherwise qualified to do so should be barred from military service because they are transgender. While this case does raise important constitutional issues, now is not the appropriate time for this Court to consider them. No court of appeals has issued any decision addressing those issues. No case raising those issues has yet been litigated to final judgment in a district court. And this case does not present any of those constitutional issues in a suitable posture, because it involves only the government's effort to *dissolve* a preliminary injunction entered months earlier, which the government decided not to appeal.

The government's desire for an immediate resolution of this litigation is not a reason for the extraordinary exercise of this Court's authority to review a case before the court of appeals has rendered a decision. The important issues in this case call for a measured approach and a full record. The district court set a trial date for July 2019. Discovery is still ongoing. The government offers no credible showing of urgency that justifies bypassing that careful and respectful consideration by the lower courts.

The government's litigation choices belie any suggestion that this case presents an emergency. The government voluntarily chose not to appeal from the preliminary injunction—including any appeal as to its scope—more than a year ago. When the district court denied the government's motion to dissolve the injunction after the issuance of the Implementation Plan, the government appealed, but did not seek a

stay (even as to the injunction's scope) from the district court, the court of appeals, or this Court. Instead, the government requested an expedited appeal, which the court of appeals granted. That appeal has been held in abeyance by the Ninth Circuit only because another interlocutory appeal presenting substantially similar issues was argued on October 10, and presumably will be decided soon.

Nothing about the underlying merits of the district court's decision—either in refusing to dissolve the preliminary injunction or in granting the preliminary injunction in the first place—justifies immediate review. The district court correctly concluded that the government's ban on military service by transgender individuals is likely to be found unconstitutional and that a preliminary injunction is necessary to prevent irreparable harm to Respondents while the parties work toward final resolution of Respondents' claims on the merits. The district court properly rejected the government's strained argument that the Implementation Plan—which Secretary Mattis issued to implement the President's order—is not a ban. That argument does not warrant this Court's immediate review.

Instead of short-circuiting the normal process of litigation, as the government requests, this Court should deny review and allow the parties to complete the litigation and develop a full record. Once the parties have done so, the courts—including this Court—will be much better positioned to resolve the constitutional issues raised by this case (and the other pending cases).

The petition for certiorari before judgment should be denied.

STATEMENT OF THE CASE

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

In July 2015, Secretary of Defense Ashton Carter convened a Working Group to examine military service by transgender individuals and to formulate recommendations for future policy.[2] Pet. App. 5a.

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[1] Citations styled "CAJA" refer to the Joint Appendix filed in *Doe 2, et al. v. Trump, et al.*, Case No. 18-5257 (D.C. Cir.).

[2] The Working Group had approximately 25 members, including senior uniformed officers, senior civilian officials, and representatives of the Surgeons General for each Service branch. Pet. App. 5a, 44a-45a; 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. Pet. App. 7a; CAJA1042.

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

The Working Group concluded that barring transgender people from military service undermined military effectiveness and readiness. Exclusion would require the discharge of "qualified individuals . . . and [would] create[] unexpected vacancies requiring expensive and time-consuming recruitment and training of replacements."[3] CAJA118-119. The Working Group concluded that barring service by transgender people reduces the pool of potential qualified recruits "on a basis that has

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[3] The RAND study found that health-care coverage for gender-transition treatments would have an "exceedingly small" impact on health-care expenditures, Pet. App. 45a, and that there was no evidence that permitting transgender personnel to serve openly would have any effect on unit cohesion. Pet. App. 6a; CAJA607-608. The study also found that in 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. Pet. App. 6a.

no relevance to their ability to serve." CAJA118; CAJA1005. The Working Group therefore recommended evaluating transgender applicants based on the same "medical standards for accession" applied to everyone else, "which seek to ensure that those entering service are free of medical conditions or physical defects that may require excessive 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. CAJA586; Pet. App. 6a-7a.

Secretary Carter also set up a comprehensive plan to revise military regulations to ensure equal treatment of transgender service members throughout all aspects of service from accessions through completion of service. That effort included the development and circulation of training materials by DOD and by the individual military service branches. Pet. App. 7a. Those materials explained that a transgender service member 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." CAJA519-20. 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, CAJA520-21. Gender transition alleviates such distress by enabling the transgender servicemember to live "in the preferred gender." CAJA519, CAJA521.

Retention. The Carter Policy took immediate effect with respect to retention, prohibiting the discharge of servicemembers "due solely to their gender identity or an expressed intent to transition genders." CAJA588. The Carter Policy established a process for permitting servicemembers to undergo gender transition and to serve in their "preferred gender." CAJA490, CAJA500, CAJA589. The servicemember must coordinate with his or her commander regarding the timing of gender transition and any relevant accommodations "addressing the needs of the [s]ervicemember in a manner consistent with military mission and readiness." CAJA496. 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. CAJA526.

Accessions. The Carter Policy permits transgender people to enlist and eliminates the prior differential standard, which required the rejection of any transgender candidate regardless of their fitness to serve. Under the Carter Policy, individuals who have undergone gender transition are generally eligible to serve, as long as their transition is complete and the applicant has been medically stable for at least 18 months. Pet. 5. That is the same approach applied to applicants who have undergone other medical treatments that do not result in any

persistent or ongoing "functional limitations." CAJA589; *see also* CAJA595 ("[M]ilitary services will begin accessing transgender individuals who meet all standards—holding them to the same physical and mental fitness standards as everyone else who wants to join the military.").

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

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 would "not accept or allow transgender individuals to serve in any capacity in the U.S. Military." Pet. App. 3a. On August 15, 2017, the President formalized that policy in a memorandum. *Id.*; CAJA406-07 (the "2017 Presidential Memorandum"). The 2017 Presidential Memorandum directed Secretary of Defense James Mattis to return to the policy and practice on military service by transgender individuals that was in place prior to June 2016. CAJA406; Pet. App. 8a. That policy, as described by the 2017 Presidential Memorandum, "generally prohibited openly transgender individuals from accession into the United States military and authorized the discharge of such individuals." CAJA406; *see also* Pet. App. 8a.

The 2017 Presidential Memorandum ordered Secretary Mattis to submit a plan to the President

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

b. DOD'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." CAJA405. Secretary Mattis stated that he would establish a panel "to provide advice and recommendations on the implementation of the president's direction," and then advise the President "concerning implementation." *Id.*

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

The second, entitled "Terms of Reference," set forth the specific parameters for how to "effect the policy and directives in [the 2017] Presidential Memorandum" with respect to accessions and retention. CAJA403. With respect to accessions, Secretary Mattis stated that the 2017 Presidential Memorandum required DOD to "prohibit[] accession of transgender individuals." CAJA404. With respect to retention, Secretary Mattis stated that the Memorandum directed DOD to "return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016." *Id.*

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

c. How the Implementation Plan effectuates the ban.

The Implementation Plan takes a multi-pronged approach to ensure that all transgender individuals are barred from the military, including enlistment and retention. It does so by providing three ways of describing and disqualifying transgender people. Specifically, the Implementation Plan excludes: (1)

anyone who does not live in their "biological sex"; (2) anyone "who requires or has undergone gender transition"; and (3) anyone with gender dysphoria or a history of gender dysphoria who requires a "change of gender" or who does not live in their "biological sex." Pet App. 55a-56a, 63a; CAJA264-65. Each of these provisions is simply a different way to describe and exclude transgender people.

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

The Carter Policy reversed the pre-2016 rule that previously had barred transgender people from accession 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." CAJA586. It ensures that enlistment is "open to all who can meet the rigorous standards for military service and readiness" and subjects transgender servicemembers "to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and

grooming, deployability, and retention." CAJA586; Pet. App. 46a.

The Carter Policy rests on the principle that a servicemember "affected by a medical condition or medical treatment related to their gender identity should be treated . . . in a manner consistent with a [s]ervice member whose ability to serve is similarly affected for reasons unrelated to gender identity or gender transition." CAJA588. Consistent with that principle, the Carter Policy provides that transgender people who have undergone gender transition are eligible to enlist as long as the process is complete and they have been medically stable for at least 18 months. CAJA588-589. In contrast, the Implementation Plan bars accession by anyone who has undergone gender transition, regardless of their fitness. Pet. App. 55a.

Similarly, the Carter Policy and the Implementation Plan take opposing approaches to the retention of servicemembers who identify themselves as transgender. The Carter Policy recognizes that permitting military service by transgender people means they must be permitted to serve in accord with their "preferred gender." Pet. 5-6. It extends that protection to all transgender servicemembers: those who "intend to begin transition, are beginning transition, who already may have started transition, and who have completed gender transition." CAJA496; CAJA499 (providing guidance on accommodating transgender servicemembers "throughout the gender transition process"). In contrast, the Implementation Plan restores the pre-2016 ban by requiring all servicemembers to serve in their "biological sex." CAJA263-65.

The Implementation Plan also follows the President's directive to "address transgender individuals currently serving in the United States military." CAJA407. It does so by carving out an exception to the ban for the small group of transgender servicemembers who initiated gender transition in reliance on the Carter Policy. CAJA273-274.[4] Once the members of that group have concluded their terms of service, no other transgender people will be permitted to enlist or serve.

B. The Preliminary Injunction

Respondents, current and aspiring transgender servicemembers and Equality California, brought a constitutional challenge in September 2017 to enjoin the President's targeted and unfounded exclusion of transgender persons from the military. *Stockman, et al. v. Trump, et al.*, No. 17-01799 (C.D. Cal. Sept. 5, 2017), Dkt. No. 1. On November 16, 2017, the district court permitted the State of California to intervene to join Respondents in challenging the ban. *Stockman*, No. 17-01799, Dkt. No. 66.

On December 22, 2017, the district court enjoined the government from reinstating a ban on military service by transgender people while this litigation pends. Pet. App. 39a. The district court found that Respondents were likely to succeed on their Fifth Amendment claim. Pet. App. 37a. The district court concluded that "discrimination on the basis of one's transgender status is subject to intermediate scrutiny," and further held that the government's

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

decision would likely fail such scrutiny because "the only serious study and evaluation concerning the effect of transgender people in the armed forces led the military leaders to resoundingly conclude there was no justification for the ban." Pet. App. 35a-36a. The district court also found that the ban would irreparably injure Respondents by violating their constitutional rights, branding them as unfit to serve in the eyes of their peers and officers, and imperiling their military careers. Pet. App. 37a-38a. Petitioners chose not to appeal that injunction.

C. The District Court Denies Petitioners' Motion to Dissolve the Preliminary Injunction

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

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

the public interest continued to strongly favor keeping the injunction in place, the district court denied Petitioners' motion. Pet. App. 66a.

D. The Appeal from the Motion to Dissolve, and the Motions to Stay

On November 16, 2018, Petitioners appealed the order denying Petitioners' motion to dissolve the preliminary injunction to the United States Court of Appeals for the Ninth Circuit. *Stockman*, No. 18-56539 (9th Cir.), Dkt. No. 8. On November 20, 2018, the government filed a motion to hold the briefing schedule in abeyance pending the related appeal of *Karnoski, et al., v. Trump*, *et al.*, No. 18-35347 (9th Cir. oral argument heard Oct. 10, 2018) ("*Karnoski*"), and any further proceedings before the Supreme Court in that case. *Stockman*, No. 18-56539, Dkt. No. 11. On December 7, 2018, the government filed an unopposed motion to extend the deadline for its opening brief on appeal. *Stockman*, No. 18-56539, Dkt. No. 24. Then, on December 11, 2018, the Ninth Circuit suspended the briefing on the appeal pending further order. *Stockman*, No. 18-56539, Dkt. No. 25. On December 19, 2018, the Ninth Circuit ordered the case held in abeyance pending issuance of the court's mandate in *Karnoski*, No. 18-35347, or further order of the court. *Stockman*, No. 18-56539, Dkt. No. 28.

On November 23, 2018, the government filed a petition for a writ of certiorari before judgment in this case, as well as in *Karnoski* and *Doe 2, et al. v. Trump, et al.*, No. 17-01597 (D.D.C.) ("*Doe*"). *Stockman*, No. 18-678 (filed Nov. 23, 2018); *see also Doe*, No. 18-677 (filed Nov. 23, 2018). On November 28, 2018, the government filed in the district court a motion to stay the preliminary injunction pending appeal, and on December 3, 2018, filed a second motion to stay in the

Ninth Circuit. *Stockman*, No. 17-01799, Dkt. No. 130; *Stockman*, No. 18-56539, Dkt. No. 23-1. While neither court has ruled on the motions to stay, on December 13, 2018, the government filed for the same relief in this Court. *Stockman*, No. 18-678 (filed Dec. 13, 2018).

REASONS FOR DENYING THE PETITION

I. The Government Cannot Justify The Extraordinary Step Of Certiorari Before Judgment

This Court grants certiorari before judgment "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." S. Ct. R. 11. That standard is a "very demanding" one. *Mount Soledad Mem'l Ass'n v. Trunk*, 134 S. Ct. 2658, 2659 (2014) (Alito, J., respecting denial of certiorari before judgment). Even in important and time-sensitive cases, the exercise of that power is "an extremely rare occurrence." *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers). To warrant this Court's extraordinary exercise of its jurisdiction, a petitioner seeking certiorari before judgment must show (1) that the case is of extraordinary national importance and (2) that—in the particular case—there is an exceptional need for speedy resolution. Shapiro, et al., *Supreme Court Practice* § 4.20, at 287-288 (10th ed. 2013). This is not one of those exceptional cases.

The government stakes its request for extraordinary review on the fact that this case implicates "the authority of the U.S. military to determine who may serve in the Nation's armed

forces." *Karnoski* Pet. 16. But that authority is of no more "imperative public importance," *id.*, than the issues presented by many other cases concerning military policies that have been resolved in the ordinary course. *See Goldman v. Weinberger*, 475 U.S. 503 (1986); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *see also, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdan v. Rumsfeld*, 543 U.S. 1096 (2005) (denying petition for certiorari before judgment). Especially in a case raising important constitutional issues, this Court ordinarily prefers to have the benefit of review by the courts of appeals. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) (this Court "benefit[s]" from allowing circuit courts to consider a question "before this Court grants certiorari"); *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (recognizing "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals" prior to Supreme Court review).

Nor is there any pressing need for the extraordinary disposition the government requests. The government seeks certiorari before judgment to "ensure that the injunction does not remain in place any longer than is necessary," Pet. 13, claiming that the national interest is harmed because qualified transgender service members are currently permitted to serve. But there is no harm—much less immediate harm—to the military from continuing to allow the service of transgender individuals who satisfy the demanding standards to which all servicemembers are subject. The preliminary injunction requires transgender servicemembers to meet the same fitness, readiness, and deployability standards as all others. Although transgender men and women have

been serving openly in the military under the Carter Policy for more than two years, the government has presented no evidence that their doing so harms military readiness, effectiveness, or lethality.

On the contrary, extensive record evidence shows that transgender men and women have been serving honorably and effectively. For example, during congressional hearings in April 2018, the heads of three branches of the armed services 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 to serve without issue. CAJA831-836. Indeed, the very policy that Petitioners want to implement would allow hundreds of transgender individuals to continue serving in the armed forces through a grandfather provision—an exception that cannot be squared with the government's claims of urgency to eliminate all other transgender personnel.

In addition, the unusual step of granting certiorari before judgment is generally unnecessary where the courts of appeals have proceeded on an expedited basis. *U.S. Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 138 S. Ct. 1182 (2018) (Mem.) (certiorari before judgment unwarranted where "the Court of Appeals will proceed expeditiously to decide [the] case"); *see also United States v. Clinton*, 524 U.S. 912 (1998). Throughout this case, both the district court and court of appeals have proceeded expeditiously and with due regard for the need to develop a complete record to facilitate the courts' (including this Court's) eventual review. The court of appeals already heard expedited argument in the related *Karnoski* litigation and has held this appeal in abeyance pending the upcoming decision in that

matter. In the district court, the parties are poised to resume discovery so that this case may be brought to final judgment.

In any event, any claim of immediate harm from the preliminary injunction is belied by Petitioners' own litigation choices. The government voluntarily chose not to appeal the preliminary injunction order 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 appeal, 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. In light of that history, the government cannot seriously now claim that this case is of "such imperative public importance," S. Ct. R. 11, that would justify immediate review by this Court.

The government has pointed to the few exceptional cases in which this Court granted certiorari before judgment, suggesting those cases stand for the proposition that certiorari before judgment is appropriate to "promptly resolve important and time-sensitive disputes." *Karnoski* Pet. 18. But—as underscored by the fact that Petitioners never appealed the first order enjoining the ban and did not even seek a stay from any court for months after the district court declined to dissolve the preliminary injunction—this case does not present anything remotely like the circumstances that led the Court to grant certiorari before judgment in those cases. In each, this Court granted early review because waiting

for the case to proceed through normal avenues of appellate review would have risked extraordinary disruption.

United States v. Nixon, 418 U.S. 683 (1974), was a case of unique constitutional significance and urgency, involving the President's refusal to comply with a special prosecutor's subpoena, only a few months before the criminal trial of senior White House staff members. In this case, there is no imminent deadline, much less a constitutional crisis demanding Supreme Court intervention. Moreover, as a procedural matter, the Special Prosecutor in *Nixon* filed a petition for a writ of certiorari before judgment the same day the President appealed to the court of appeals; here, Petitioners waited months after noticing their appeal and oral argument had already occurred in the *Karnoski* case.

In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the need for immediate action was obvious: lower courts had reached conflicting conclusions as to the President's actions regarding the disposition of seized Iranian assets, and the United States could have been in breach of an executive agreement with Iran unless the government acted by July 19, 1981—leaving less than two months for the appellate process to play out. Again, there is no such deadline in this case, and Petitioners have not acted with the expedition shown in cases of true urgency.

Finally, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), involved President Truman's seizure of steel mills to avoid a planned nation-wide strike and work stoppage to assure the continued availability of steel during the Korean War. In opposing a preliminary injunction, the government argued that the seizure was "necessary to avert a

national catastrophe" that would "endanger the well-being and safety of the Nation." *Id.* at 582-84. Certiorari was granted only days after the district court's decision and less than a month after the seizure order. Here, there is no such national emergency, nor any plausible claim of a threat to national security. Transgender individuals have been serving, and will continue to serve, without threatening the overall effectiveness of our military or its ability to wage an ongoing war. This case warrants careful consideration of Respondents' constitutional claims, and the Court should not decide them before there is a complete record.[5]

II. The Petition Does Not Present An Appropriate Vehicle To Consider The Issues On Which The Government Seeks Certiorari

The government stakes its extraordinary request for immediate review on the contention that granting the petition would "bring before this Court the equal-protection claim at the center of all the suits challenging the constitutionality of the Mattis policy." Pet. 13-14. That misstates the procedural posture of this case and the state of the record below. Respondents' equal protection claim has not been adjudicated on the merits. To the contrary, the district court merely determined that the traditional criteria for preliminary injunctive relief to preserve

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[5] Notably, even in a case of such importance as *Youngstown*, Justices Burton and Frankfurter voted to deny certiorari before judgment, reasoning that "[t]he need for soundness in the result outweighs the need for speed in reaching it. The Nation is entitled to the substantial value inherent in an intermediate consideration of the issue by the Court of Appeals." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937, 938 (1952) (Mem.) (Burton, J., concurring).

the status quo during the pendency of the litigation were satisfied, Pet. App. 39a, and rejected Petitioners' request (many months later) to dissolve the preliminary relief. Pet. App. 66a. It is for relief from that latter order—the denial of a motion to dissolve a preliminary injunction—that Petitioners appeal to this Court's jurisdiction. The unique legal standard that applied to that motion, as well as the still-developing factual record the district court relied upon, hardly squares Respondents' equal protection claim up for this Court's resolution.

This Court typically declines review of interlocutory orders, and "await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," to ensure the benefit of a full record and crystallization of the legal issues presented. *Va. 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); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 327-28 (1967) (per curiam) (interlocutory order was "not yet ripe for review by this Court"). 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 is especially warranted here for several additional reasons.

First, the appeal from which Petitioners seek certiorari does not involve review even of a district court's decision to enter a preliminary injunction, but rather only the even more highly circumscribed review of the court's refusal to *dissolve* an injunction nearly a year after it was entered. A party seeking to dissolve an injunction must show that unanticipated "changed circumstances" render the injunction's continuation inequitable. *Horne v. Flores*, 557 U.S. 433, 447 (2009); *see also United States v. Swift & Co.*, 286 U.S. 106, 114 (1932); 11A Charles A. 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"). That strict showing is necessary to prevent the enjoined party from engaging in multiple repetitive appeals or attempting to "revive the right to appeal" the entry of a preliminary injunction under 28 U.S.C. § 1292(a)(1) after the time for doing so has lapsed. 19 Moore's *Federal Practice* § 203.10 (Matthew Bender 3d Ed.). And it ensures that the party cannot relitigate issues in a motion to dissolve that could have been raised through the normal process of appellate review. *See, e.g.*, *Alto v. Black*, 738 F.3d 1111, 1120 (9th Cir. 2013); *Sprint Commc'ns Co. v. CAT Commc'ns Int'l, Inc.*, 335 F.3d 235, 242 (3d Cir. 2003).

Petitioners ignore the highly circumscribed review that is appropriate in this posture, seeking certiorari on issues they could have pressed before this Court in the ordinary course following an appeal of the district court's entry of the injunction. For example, the government objects to the injunction's "nationwide" scope. Pet. 14 n.5; *Karnoski* Pet. 25-27. But that issue is no different now than when the district court issued the preliminary injunction more than a year ago; the scope of the injunction remains the same. Petitioners could have pursued appellate review of that issue, but they declined to do so.[6] Petitioners identify no new circumstances that would warrant this Court's interlocutory review of the facial scope of that preliminary remedial order a year after it took effect. And the government can challenge the scope of any final remedial order on a subsequent appeal.

Second, the district court's fact-intensive determination that petitioners had not made the weighty showing necessary to justify dissolving the preliminary injunction does not warrant this Court's review. The petition assumes that, even if the President's directives were properly enjoined, the Implementation Plan is a new, independent, and different policy that does not effectuate those directives. Pet. 7-9. The district court, after conducting a careful inquiry into Secretary Mattis' orders establishing the process and a close

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[6] On December 22, 2017, the district court enjoined the government from reinstating a ban on military service by transgender people while this litigation pends. Pet. App. 39a. Petitioners did not appeal this order, and instead waited until March 23, 2018, to file a motion to dissolve the injunction, *Stockman*, No. 17-1799, Dkt. No. 82, which the district court denied. *Stockman*, No. 17-1799, Dkt. No. 124.

comparison of the resulting Implementation Plan with the President's August 2017 Memorandum, found that the government had not shown that the Implementation Plan was developed independently of the President's order to ban transgender people from military service. Pet. App. 53a-55a. Such fact-intensive determinations do not ordinarily merit this Court's review. *Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring in the judgment) ("'[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari'"); S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . ."). This Court's review makes even less sense here, where the findings below are preliminary and not part of a final ruling on the merits. *See* Pet. App. A (Order Granting *Preliminary* Injunction; Pet. App. B (Order Denying Motion to Dissolve *Preliminary* Injunction).

Finally, the factual record on several central issues in this case remains incomplete. Further discovery is necessary to develop a fulsome record such that the district court can adjudicate the parties' claims and defenses in this case. Although the government believes that the constitutionality of the Implementation Plan can be resolved as a matter of law now, the denial of summary judgment by the district court in *Doe* counsels in favor of waiting until the parties and the court have compiled a complete record.

Granting certiorari in this posture would only encourage parties to bypass the normal process of appellate review in future cases. It would also interfere with the full development of the factual

record that, as this Court has often emphasized, assists the Court in making its own decisions. And it would conflict with the Court's admonition to avoid interlocutory decisions on constitutional questions until they can be definitively resolved. *E.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 664-65 (2004) ("If the underlying constitutional question is close, . . . we should uphold the injunction and remand for trial on the merits."). Review of the constitutional questions in this case should await a fuller record and final judgment that will facilitate such review.

III. The District Court's Decision Does Not Conflict With Any Decision Of This Court Or A Court of Appeals And Is Correct

There is no circuit split that might warrant this Court's review; indeed, no court of appeals has ruled on *any* of the legal issues Petitioners seek to bring to this Court. Nor is there any division of authority on any of the legal underpinnings of the decision below. Instead, the government strains to find some tension between the district court's decision below and this Court's precedents concerning deference to military decision-making and the availability of programmatic relief under the proper circumstances. There is no such tension—the district court faithfully applied this Court's precedents. There is thus no question on which this Court should grant certiorari at this time.

Petitioners do 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) (refusing to entertain arguments "that were not raised or addressed below"). Instead, Petitioners premise their merits argument on the

contention that the Implementation Plan does not turn on transgender status at all, but rather is based solely on the medical condition of gender dysphoria. The district court correctly rejected that argument, as have all the other courts to address the issue.

Petitioners are wrong because, as the district court correctly held, the Implementation Plan "specifically bans transgender individuals from serving in the military" and it "disadvantages transgender service members 'in the same fundamental way'" as the 2017 Presidential Memorandum. Pet. App. 55a-56a. That conclusion is apparent from 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, Pet. App. 4a, and that the DOD repeatedly stated that they were preparing to advise the president "concerning implementation of his policy direction." Pet. App. 16a. In short, "[t]ransgender individuals will be disadvantaged in the same fundamental way" by "forc[ing them] to suppress the very characteristic[] that defines them as transgender in the first place." Pet. App. 56a (quoting *City of Jacksonville*, 508 U.S. at 699).

As explained above, the Implementation Plan includes multiple provisions that facially exclude transgender people: by requiring all servicemembers to serve only in their "biological sex"; by disqualifying anyone who "requires or has undergone gender transition"; and by excluding anyone with gender dysphoria or a history of gender dysphoria who requires "a change of gender" or does not live in their "biological sex." Pet. App. 50a, 55a-56a. In every instance, the operative criterion is not whether a person has gender dysphoria, but rather whether a

person lives in their birth sex rather than their preferred gender. Even if any reference to "gender dysphoria" was eliminated from the Implementation Plan entirely, the substance of the plan would be unaffected, and its exclusion of transgender people would be just as complete. It would still prohibit anyone from enlistment and subject to discharge anyone who does not live in their "biological sex" or who changes gender, meaning all transgender people.

Each of the operative provisions in the Implementation Plan establishes a classification consisting exclusively of transgender people. The requirement that individuals must serve only in their "biological sex" singles out the defining characteristic of transgender identity—that a person lives in their preferred gender, not their "biological sex"—and makes that defining characteristic a bar to service. Pet. App. 50a-51a. The exclusion of anyone "who requires or has undergone gender transition" similarly singles out the unique experience that facilitates a transgender person's transition from living in their birth sex to living in their preferred gender. Pet. App. 55a. Gender transition is central to transgender identity; it is the process that permits a transgender person to manifest their identity. Finally, the Implementation Plan also excludes people with gender dysphoria or a history of dysphoria, but only those who do not "live in their biological sex" and who do not require "a change of gender." In other words, under this provision, a person can have gender dysphoria or a history of gender dysphoria, so long as they live "in their biological sex" and do not undergo "a change of gender"—*i.e.*, so long as they are either not transgender or suppress their transgender identity.

In sum, the Implementation Plan employs multiple approaches to describe and exclude transgender people.

Petitioners' claim that the Implementation Plan is not a ban because it permits people who identify as transgender to serve in their "biological sex" has no merit. Pet. App. 29a-30a. Petitioners' argument rests on a false distinction between the status of being transgender and the conduct of manifesting that identity through gender transition in order to live in one's preferred gender. Pet. App. 56a. This Court has soundly rejected that distinction as a justification for discrimination against gay and lesbian people and should do so here as well. *See Christian Legal Soc'y of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 689 (2010); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). As the courts below have uniformly held, a policy that targets the very characteristic that defines a class is discriminatory on its face even if some people can suppress that characteristic in response to societal bias and discrimination.

Petitioners also contend that the district court should have evaluated the Implementation Plan under a "deferential standard" akin to rational-basis review. *See* Pet. 12; *Karnoski* Pet. 19-20. Relying on *Rostker v. Goldberg*, 453 U.S. 57 (1981), and *Goldman v. Weinberger*, 475 U.S. 503 (1986), they assert that even if a similar ban would warrant heightened scrutiny in the civilian context, "[a] more searching form of review would be particularly inappropriate given the military context in which the policy arises." *Karnoski* Pet. 19-20.

But even if the Implementation Plan represented an exercise of military judgment independent of the President's directive to impose a ban, which the

district court found it does not, Pet. App. 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, 688-91 (1973) (plurality) (applying heightened scrutiny). *Rostker* neither insulates the government's "empirical judgments from scrutiny" nor eliminates judicial scrutiny of "the degree of correlation between sex and the attribute for which sex is used as a proxy." *Lamprecht v. FCC*, 958 F.2d 382, 393 n.3 (D.C. Cir. 1992); *Steffan v. Perry*, 41 F.3d 677, 689 n.9 (D.C. Cir. 1994) (even in military, "[c]lassifications based on race or religion, of course, would trigger strict scrutiny").

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

In *Rostker*, the Court upheld a statute exempting women from registration only because at the time Congress decided to retain the exemption women were not eligible to serve in combat positions—and

that exclusion was not challenged in that litigation. *Id.* at 77. As a result, this Court found that "[t]he exemption of women from registration [was] not only sufficiently but also closely related to Congress' purpose in authorizing registration" for the drafting of combat troops. *Id.* at 79. The sex-based classification in this case warrants the same careful scrutiny here.

In any case, the ban cannot survive any standard of scrutiny. The military has universal standards for enlistment, deployment, and retention. *See* CAJA498-501. Because transgender servicemembers must comply with those standards, having a separate policy that bars them from service because they are transgender serves only to exclude individuals who are fit to serve. Similarly, transgender service members do not undermine sex-based standards. They seek to be held to the same standards as everyone else. *See id.* Allowing transgender men to serve as men and transgender women to serve as women does not disrupt the military's maintenance of sex-based standards in the few areas where they exist. Petitioners also cannot justify the ban on the basis of cost. Even under rational basis review, "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler v. Doe*, 457 U.S. 202, 227 (1983). Because they cannot provide an independent justification for excluding transgender people in order to reduce costs, Petitioners' reliance on this rationale fails.[7]

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[7] For the same reasons the ban lacks a rational basis and violates the requirement of equal protection, it also violates the

IV. The Scope of the Injunction Is Proper

Petitioners also assert that the district court exceeded Article III and equitable principles insofar as its preliminary injunction protects actual and aspiring transgender servicemembers other than the named Respondents. Pet. 14, n.5; *Karnoski* Pet. 25-27. But Respondents' harm cannot be remedied by a narrower injunction.

The district court's preliminary order preventing enforcement of a ban while this case proceeds is essential to prevent constitutional harms from which Respondents seek relief. As the district court explained, "the ban sends a damaging public message that transgender people are not fit to serve in the military." Pet. App. 37a. Permitting the ban to be implemented—at all—sends an official message that Respondents "are not worthy of the military uniform simply because of their gender." *Id.* As a result, under a narrowed injunction, Respondents would be allowed to join or remain in the military, but unlike any other service members, only pursuant to an

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requirement of due process: The ban "is a status-based enactment divorced from any factual context from which [this Court] could discern a relationship to legitimate state interests." *Romer v. Evans*, 517 U.S. 620, 635 (1996). It is rooted in "animosity" toward transgender people, *id.* at 634, and has no rational relationship to the justifications offered for it. It also infringes upon fundamental interests in autonomy and bodily integrity, including a person's right to live in accord with their preferred gender. *See Lawrence*, 539 U.S. at 562. The ban also violates the First Amendment because it is an impermissible viewpoint-based restriction that prohibits transgender people who do not suppress their transgender identity from serving in the military and demonstrating by their example that transgender people are fit to serve. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985).

exception to a rule that deems them unfit for service. They would continue to be subject to unconstitutional, differential, and disadvantageous treatment. Further, "being set apart as inherently unfit" would threaten their "prospects of obtaining long-term assignments," irreparably injuring their stature in the military as well as damaging their career advancement. Pet. App. 32a. If allowed to take effect at all, the ban would brand all Respondents as unfit to serve, undercutting them in the eyes of their peers and military leadership and jeopardizing their safety and careers. *Id.* Only a facial injunction averts those harms.

Where, as here, "the arguments and evidence show that [the Implementation Plan is likely] unconstitutional on its face, an injunction prohibiting its enforcement is proper." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) (internal quotations omitted); *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). Having found that Respondents' facial constitutional challenges to the directives in the 2017 Presidential Memorandum were likely to succeed, the district court properly barred Petitioners from enforcing them.

Petitioners' reliance on *Lewis v. Casey*, 518 U.S. 343 (1996) and *United States Department of Defense v. Meinhold*, 510 U.S. 939 (1993), is not to the contrary. In *Lewis*, the injunction was deemed overbroad because it enjoined practices not shown to injure the plaintiff. 518 U.S. at 357-58. Here, as the district court already found when analyzing standing, each provision of the ban directly injures each Respondent in this matter. Pet. App. 20a-30a.

In *Meinhold* the challenged policy in that case was invalid only as "applied" to the plaintiff's case. *See*

Meinhold v. U.S. Dep't of Def., 34 F.3d 1469, 1472, 1479-1480 (9th Cir. 1994). Here, by contrast, Respondents' constitutional challenge to the Implementation Plan does *not* turn on their particular circumstances, but on the government's overt, class-based discrimination against transgender people—what the district court called the ban's aim to "eliminate a person's *trans*ness." Pet. App. 56a. Indeed, the fundamental point of the ban—and why it is facially unconstitutional—is that transgender people are excluded based on a factor unrelated to their individual merit.

Independent from the harms to Respondents actively serving in the military, a narrowed injunction would not address the injuries to the transgender military members of organizational Plaintiff-Respondent Equality California, which has a membership base that extends both within and beyond California. Moreover, an injunction narrowed to only the individual Respondents would not remedy the injury to Intervenor-Respondent State of California, the state with both the largest number of active military personnel and the largest number of transgender persons, and whose state National Guard must comply with federal rules prescribing qualifications for Guard servicemembers. *See, e.g.*, 32 U.S.C. §§ 101(4), 101(6), 108, 110, 301; 10 U.S.C. § 10503.

Accordingly, a facial injunction is proper and necessary to address the injuries Respondents would suffer if the ban were allowed to go into effect.

CONCLUSION

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

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