No. 18-35347

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,
Plaintiffs-Appellees,

STATE OF WASHINGTON, Attorney General's Office Civil Rights Unit,
Intervenor-Plaintiff-Appellee,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

APPELLANTS' REPLY BRIEF

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INTRODUCTION AND SUMMARY

As the government's opening brief explained, the district court did not even apply the criteria for a preliminary injunction in enjoining the implementation of a policy announced by the Secretary of Defense in March 2018. Instead, that court simply dismissed that new policy as effectuating a revoked presidential memorandum concerning a substantially different policy that the court had enjoined last December, and refused to dissolve that injunction as well.

In their response briefs, plaintiffs reprise that mischaracterization of the military's new policy as the implementation of "the Ban" allegedly ordered by the President in 2017. But the government's opening brief demonstrated why that position is unsustainable, and plaintiffs' repetition of the district court's misguided reasoning does not improve it. Once that key premise is set aside, plaintiffs' main arguments collapse. Reviewed on its own terms, the 2018 policy easily withstands constitutional scrutiny, and plaintiffs offer scant justification for why this product of the military's professional judgment should have been enjoined at all, let alone on a nationwide basis.

That is especially true given that plaintiffs sought, and the district court granted, an injunction ordering the military to maintain the policy adopted by the Secretary's predecessor in 2016 (the Carter policy). But plaintiffs do not dispute that the Carter policy, like the 2018 policy, presumptively disqualified individuals with a history or diagnosis of the medical condition of gender dysphoria (subject to various exceptions) and required transgender individuals without that condition to meet the standards

associated with their biological sex. In other words, the policy plaintiffs prefer—and the one the injunction compels the military to apply—differs from the 2018 policy only with respect to the nature of its exceptions, meaning this case reduces to a disagreement over where to draw the line. Courts, however, are neither authorized nor equipped to second-guess the line the military has now chosen.

ARGUMENT

I. The Department's 2018 Policy Is Constitutional

A. The 2018 Policy Must Be Considered On Its Terms

The bulk of plaintiffs' arguments—whether bearing on the standard of review, preservation of the issues, or the merits—hinge on the demonstrably false premise that the 2018 policy "is not a new policy at all," but the mere implementation of the presidential memorandum from last year. K.Br.20-21.[1] As a matter of both substance and process, the 2018 policy is markedly different from the one set forth in the President's 2017 memorandum (G.Br.40-47), and plaintiffs' responses fail to rehabilitate that critical defect in the district court's reasoning.

1. On substance, plaintiffs do not dispute that while the 2017 memorandum addressed transgender status, the 2018 policy turns on a medical diagnosis (gender dysphoria) and a related medical treatment (gender transition). G.Br.41-42. Instead, they reject this as "a distinction without a difference" (W.Br.26), insisting that those

[1] In general, "plaintiffs" includes Washington as well. Plaintiffs' brief is referred to as "K.Br.," Washington's as "W.Br.," and the government's opening brief as "G.Br."

"who have never transitioned, or needed to transition, and have never experienced gender dysphoria … *are not transgender*." K.Br.22. But in doing so, they put themselves at odds with RAND, the American Psychological Association, their amici, and their own evidence, all of which confirm that only *some* transgender individuals suffer from gender dysphoria, and only a subset of those choose to undergo gender transition. *See* ER.175-76, 183, 345-46; SER.118, 250, 266, 268; AMA.Amicus.Br.7-14. In fact, plaintiffs themselves relied on this distinction before the military announced its 2018 policy, contrasting the 2017 memorandum's "sweeping exclusion of transgender people" with concerns over "gender dysphoria, the fully treatable distress that a subset of transgender people may experience, or gender transition, which forms part of the medical treatment for gender dysphoria." Doc.129, at 22.

Plaintiffs likewise do not contest that transgender individuals without gender dysphoria may serve under the 2018 policy, even though they would have been presumptively disqualified under the 2017 memorandum. G.Br.42. Rather, plaintiffs claim that because those individuals must meet the standards of "their birth-assigned sex," this aspect of the 2018 policy is equivalent to a demand that Muslims "renounce Islam" to serve. K.Br.23. But plaintiffs err in equating neutral conduct standards with prohibitions on disfavored beliefs, as starkly illustrated by the fact that the same conduct standards were imposed under the Carter policy, which the district court, at their urging, ordered the military to maintain. G.Br.43-44. In fact, plaintiffs admit that "under the Carter policy, sex-specific standards for one's birth-assigned sex 'still apply until

transition is complete'" (K.Br.46 (brackets omitted)), and never dispute that the Carter policy's framework for transition required a diagnosis of gender dysphoria. G.Br.12 (chart comparing policies). That the Carter policy allowed *some* "transgender individuals to serve openly" (K.Br.31 n.7) is no explanation for why requiring *others* to serve "in their birth-assigned sex" was acceptable under plaintiffs' view of the law. K.Br.23.

Nor is a policy based on gender dysphoria or gender transition akin to a "tax on wearing yarmulkes" or a penalty for "convert[ing] from Christianity to Judaism." K.Br.22, 29. Again, the Carter policy turned on this medical diagnosis and treatment, which are unquestionably relevant to military service in a way that religion is not. G.Br.23. The fact that gender dysphoria affects a subset of (though not all) transgender individuals does not transform the 2018 policy (or the Carter policy) into a status-based classification. *Cf. Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification …."). And that is especially true because, conversely, plaintiffs' evidence confirms that "non transgender people can experience gender dysphoria" as well, such as a woman "who must undergo mastectomy because of breast cancer" and then "requires reconstructive breast surgery in order to resolve gender dysphoria arising from the incongruence between her body without breasts and her sense of herself as a woman." SER.279 n.22. In short, classifications "based on gender dysphoria" are not "inextricably based on transgender status." K.Br.22.

Likewise, the fact that the "subject line" of the documents setting forth the 2018 policy is "Military Service by Transgender Individuals" does not mean such individuals have been "targeted" (K.Br.22); after all, the memorandum establishing the Carter policy uses a nearly identical phrase ("Military Service of Transgender Service Members"). ER.314. These titles simply reflect the unremarkable fact that both policies addressed the circumstances in which transgender individuals may serve, and both allowed some, but not all, to do so.

Nor can plaintiffs reconcile their theory that the 2018 policy is a "plan to implement the Ban" the President "announced through Twitter" (K.Br.1-2) with the fact that this policy's reliance exemption allows many current servicemembers with gender dysphoria to serve in their preferred gender, just as they would have under the Carter policy. G.Br.42. Although plaintiffs now contend that this exemption is consistent with the 2017 memorandum's directive to the Secretary to "address transgender individuals currently serving" (K.Br.23), they took the opposite position before the release of the 2018 policy to establish their standing to challenge that memorandum. At that time, they insisted that every transgender servicemember "will be subject to discharge as of March 2018 under the Ban" and that "the President's subordinates will follow th[at] announced policy." Doc.84, at 15. In any event, this belated concession that the 2017 memorandum gave the Secretary discretion to allow these individuals to continue serving defeats their theory that the 2017 memorandum and the 2018 policy simply implemented the President's "crystal-clear tweets" stating

that the government "will not accept or allow Transgender individuals to serve in any capacity in the U.S. military." K.Br.8, 24. And that the 2018 policy did not, in fact, "deliver[] exactly what President Trump had ordered" in 2017 (K.Br.1), is confirmed by the need to "revoke" his 2017 memorandum and "any other directive [he] may have made with respect to military service by transgender individuals." ER.158; G.Br.42.

2. Even if the 2018 policy were somehow substantively identical to the one the President announced in 2017, the 2018 policy rests on an extensive study, a reasoned explanation from the Secretary accompanied by a 44-page report, and ultimately the Secretary's "independent judgment," ER.158. As Secretary Mattis explained, it was "the Department's best military judgment," "the Panel's professional military judgment," and his "own professional judgment" that the military should adopt the 2018 policy, ER.161, and that independent military judgment should be assessed on its own terms.

Faced with these statements, plaintiffs simply accuse the Secretary of Defense and other military leaders of misrepresentation. K.Br.24; W.Br.12. Their principal support for this remarkable allegation is the claim that the 2017 memorandum gave the military no discretion "to disagree with" the policy set forth in that document. K.Br.24. Again, that premise is demonstrably wrong. As the government explained (Br.44), the 2017 memorandum provided that maintaining its framework was necessary only "until such time as a sufficient basis exists upon which to conclude that terminating that policy" would not have "negative effects"; stressed that "[t]he Secretary of Defense, after consulting with the Secretary of Homeland Security, may advise [the President] at

any time, in writing, that a change to this policy is warranted"; and directed the military to "maintain" the current accession standards only "until such time as" the Secretary gave the President "a recommendation to the contrary that [he] find[s] convincing." ER.214. Plaintiffs never respond to this fatal problem with their theory.

Nor do plaintiffs have a meaningful answer to the fact that Secretary Mattis, at the Services' recommendation, ordered a review of the Carter accession policy nearly a month *before* the President's tweets. G.Br.46. Although they contend that this was only "a six-month *pause* on the start of *accessions*" (K.Br.27), the point is that well before the President took to Twitter, senior military leaders were sufficiently concerned about the "impact … on readiness and lethality" of the Carter policy's accession standards that they delayed implementing these standards by six months to conduct a review involving "all relevant considerations," ER.217, which ultimately produced the 2018 policy.[2]

This background also undermines plaintiffs' claim that the Department's process could not have been independent because "military professionals had … *unanimously* rejected the basis for the Ban" in 2016. K.Br.24. The "unanimity of the working group" responsible for the Carter policy (K.Br.24 n.4) could have been the product of a variety of factors, such as the limited evidence available at the time, the group's composition, or the fact that it was instructed to "start with the presumption that transgender persons

[2] Plaintiffs' assertion that "military leadership had confirmed in June 2017 that 'there is no ongoing review'" (K.Br.27) is misleading. That statement was made on June 19, 2017, well before the Secretary ordered this review on June 30.

can serve openly without adverse impact on military effectiveness and readiness." ER.432-33. Especially given that background, there is nothing suspicious about one Defense Secretary at the outset of a new administration reexamining, and ultimately departing from, a policy put in place by his predecessor during the final year of the previous one. *Cf. Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 857-59, 865-66 (1984) (upholding EPA's shift from 1980 regulation issued under President Carter to 1981 regulation issued under President Reagan).

Like the district court, plaintiffs also invoke statements from the Secretary concerning implementation of the 2017 memorandum (K.Br.24-25), but never address the fact that those remarks only confirm that the 2018 policy was not foreordained. G.Br.44-45. The contrast between those initial statements and the 2018 policy itself simply illustrates that whatever the Secretary's plans in 2017, an extensive study by a panel of military experts had convinced him by February 2018 that a new policy differing from both the President's directive and the Carter policy was necessary.

At bottom, plaintiffs' position appears to be that due to the President's statements last year, the military cannot depart from the Carter policy for the remainder of this administration. K.Br.26-27. They pay lip service to the notion that Secretary Mattis is not "forever tied to the policies of Secretary Carter," but give no explanation of how else he could "show that he would have made the same decision but for" the President's statements. K.Br.27 n.6. If neither the President's "revo[cation]" of those

statements (K.Br.21) nor the military's representations of "independen[ce]" (K.Br.24) are enough to address their concerns, it is difficult to imagine what could.[3]

The Supreme Court recently rejected an indistinguishable theory in the context of an Establishment Clause challenge to a presidential proclamation concerning the entry of foreign nationals. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). While the Court in *Hawaii* stated that it "may consider plaintiffs' extrinsic evidence" of previous executive orders and past statements by the President about Muslims, *id.* at 2420, it upheld the proclamation based on its text and the "worldwide review process undertaken by multiple Cabinet officials and their agencies" that supported it, *id.* at 2421. Yet like the challengers and principal dissent in *Hawaii*, plaintiffs urge this Court to ignore the text of the 2018 policy and the extensive review process undertaken by Cabinet officials that supported it in favor of a myopic focus on the President's past statements. *Compare id.* at 2417, 2421, *and id.* at 2433, 2439-40, 2443 (Sotomayor, J., dissenting), *with* K.Br.1-2, 20-21, 23-25, *and* W.Br.27. The Supreme Court rejected that strategy in *Hawaii*, and there is no reason why it should fare any better here.

Finally, plaintiffs offer barely any defense of the district court's decision to enjoin first and ask questions later. G.Br.45-47. At most, Washington contends that while

[3] To be clear, it is not the government's burden under *Hunter v. Underwood*, 471 U.S. 222 (1985), to prove that the Secretary would have adopted the 2018 policy absent the 2017 memorandum (or tweets). K.Br.26. Rather, it is *plaintiffs'* burden to show that the 2018 policy is unconstitutional, and that is "not changed by a finding of past discrimination." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (rejecting similar misreading of *Hunter*).

deference "might apply in ordinary circumstances," the district court correctly reserved judgment on that question because the Department's "90-day" study was "abbreviated" and "post-hoc." W.Br.26-27. But the Court in *Hawaii* rejected a similar attempt to discredit "the thoroughness of [a] multi-agency review" underlying the challenged proclamation. 138 S. Ct. at 2421. Although the final report there—which could equally be mischaracterized as "post hoc"—was "a mere 17 pages," the Court concluded that "a simple page count" (much like Washington's day count) "offers little insight into the actual substance of the final report, much less predecisional materials underlying it." *Id.*

B. The 2018 Policy Is Subject To Highly Deferential Review

When considered on its own terms, the 2018 policy plainly survives constitutional review. For multiple independent reasons, that considered judgment of senior military leaders receives no more than the most deferential form of constitutional scrutiny, and plaintiffs offer no convincing basis for concluding otherwise.

1. At the outset, the 2018 policy triggers rational-basis review because it—like the Carter policy the district court ordered the military to maintain—draws lines on the basis of gender dysphoria (a medical diagnosis) and gender transition (a medical treatment), rather than transgender status (let alone sex). G.Br.23-24. Plaintiffs' effort to collapse this distinction is untenable, *see supra* Pt. I.A.1, leaving them with an objection to the principle that "courts should be 'reluctant' to recognize suspect classes" (K.Br.28), even when the class concerns a medical diagnosis and its treatment. But the Supreme Court itself has counseled reluctance to recognize suspect classes, *City of*

Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985), and military standards should be the last site for breaking new constitutional ground.

2. In any event, even if an analogous civilian policy would trigger heightened scrutiny, military-deference principles require an approach akin to rational-basis review here. G.Br.20-23. The Supreme Court recently confirmed this point in *Hawaii*, when it rejected the invitation to import "the *de novo* 'reasonable observer' inquiry" into "the national security and foreign affairs context." 138 S. Ct. at 2420 n.5. Instead, the Court applied "rational basis review" and stressed that judicial "inquiry into matters of … national security is highly constrained," *id.* at 2420, even when evaluating "a 'categorical' … classification that discriminate[s] on the basis of sex," *id.* at 2419 (discussing *Fiallo v. Bell*, 430 U.S. 787 (1977)).

Even apart from *Hawaii*, plaintiffs fail to distinguish the military-deference cases discussed in the government's opening brief. To start, they dismiss *Goldman v. Weinberger*, 475 U.S. 503 (1986), as involving "a facially neutral rule." K.Br.36. But the 2018 policy, like the Carter policy, is "facially neutral" with respect to transgender status, and in all events, the Supreme Court applied heightened scrutiny to facially neutral laws that substantially burdened religious exercise at the time *Goldman* was decided. *See* 475 U.S. at 506; *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760-61 (2014) (summarizing history). And *Goldman* never held that "courts must continue to scrutinize the fit between the government's means and objectives" even when "deference applies." K.Br.36. To the contrary, the Court in that case curtly rejected a

challenge to uniform regulations that allowed servicemembers to wear religious headgear in living quarters, but not Air Force base hospitals, and to display certain religious jewelry more generally, with the remark that "[t]he Air Force has drawn the line essentially between religious apparel that is visible and that which is not." 475 U.S. at 510; *see* G.Br.22-23. It certainly did not scrutinize the placement of that line.

Nor did *Rostker v. Goldberg*, 453 U.S. 57 (1981), apply "heightened scrutiny" to a sex-based classification governing draft registration. K.Br.35. Instead, *Rostker* refused to "label[] the legislative decision 'military' on the one hand or 'gender-based' on the other," because in this area "degrees of 'deference'" and "levels of 'scrutiny'" can "become facile abstractions used to justify a result." 453 U.S. at 69-70. And the test the Court employed scarcely resembled heightened scrutiny, a fact the dissents recognized. *See id.* at 85 (White, J.); *id.* at 94-95 (Marshall, J.). The Court relied on "administrative problems" and on post hoc justifications, *id.* at 81; *see id.* at 74-75; granted Congress significant latitude to choose "among alternatives" in furthering military interests, *id.* at 71-72; and deferred to Congress even in the face of contrary testimony from military officials, *id.* at 63. Plaintiffs address none of this, and their claim that *Rostker* "examined whether the policy at issue was 'closely related' to an important government interest" (K.Br.35) is selective quotation: What the Court said was that "[t]he exemption of women from registration is not only sufficiently but also closely related to Congress' purpose," connoting that a less-than-close fit was sufficient. 453 U.S. at 79. Nor do plaintiffs explain why this Court should tie the general military-

deference principles applied in *Rostker* to the existence of an independent limitation on service (such as the exclusion of women from combat, which itself was a facial distinction based on sex). K.Br.35. And they do not even mention *Schlesinger v. Ballard*, 419 U.S. 498 (1975), which upheld different mandatory-discharge requirements for male and female officers based on what "Congress may … quite rationally have believed." *Id.* at 508, *quoted in* G.Br.22.

Conversely, plaintiffs overread this Court's precedent, urging that *Witt v. Department of Air Force*, 527 F.3d 806 (9th Cir. 2008), is "controlling." K.Br.34. Insofar as *Witt* acknowledged that "'judicial deference … is at its apogee'" in the military context and that the military's need to preserve "'morale, good order and discipline, and unit cohesion'" is at least "an important governmental interest," 527 F.3d at 817 n.5, 821, the government agrees. But beyond that, its narrow holding that an unusual form of scrutiny governed an as-applied substantive-due-process challenge to "Don't Ask, Don't Tell" under *Lawrence v. Texas*, 539 U.S. 558 (2003), has no bearing on how to resolve this facial challenge to a military policy based on a medical diagnosis. 527 F.3d at 821. Plaintiffs can point to no Supreme Court precedent comparable to *Lawrence*, and *Witt* expressly cautioned that its unusual form of scrutiny should be "as-applied rather than facial" in order "'to avoid making unnecessarily broad constitutional judgments.'" *Id.* at 819. And contrary to plaintiffs' account (K.Br.34), *Witt* did not decline to "defer to the government's factual findings regarding unit cohesion" or hold that "*post hoc* justifications are strictly forbidden." Rather, consistent with the as-applied

nature of its analysis, *Witt* simply noted that that general "congressional findings regarding 'unit cohesion'" alone did not answer whether that "specific[]" application survived review, and that the question was "whether a justification exists for [the challenged law's] application" to the plaintiff, not whether it "has some hypothetical, posthoc rationalization in general." 527 F.3d at 819, 821.

Finally, plaintiffs make much of the "concession" below that the military's exclusion of an entire race or religion would trigger strict scrutiny. K.Br.33. But all that statement proves is that "label[s]" and "levels of 'scrutiny'" are of little use here, *Rostker*, 453 U.S. at 69-70; such an arbitrary policy would not survive any form of review, regardless of what it was called. And although plaintiffs insinuate that applying deference here would support upholding the racial "segregation" of troops (K.Br.49), such rhetorical appeals have been made and rejected before. In *Rostker*, the Supreme Court responded to the suggestion that accepting a draft-registration exemption for women would allow Congress to "'require registration … of only black citizens,'" by pointing out that while Congress could not "arbitrarily choos[e] to burden one of two similarly situated groups," men and women were "simply not similarly situated" in this area. 453 U.S. at 78. The same can be said here with respect to military service by individuals with a history or diagnosis of gender dysphoria, as illustrated by the Carter policy that the district court enjoined the government to maintain.

3. Plaintiffs' efforts to justify heightened scrutiny under substantive due process or the First Amendment (K.Br.30-33, W.Br.35-36) likewise fall short. On substantive

due process, they allege a fundamental "right to live in accordance with [one's] gender identity" (K.Br.31), but never explain how the Carter policy avoided infringing on that asserted right with respect to some transgender individuals. *See supra* Pt. I.A.1. The same problem dogs their First Amendment claim, a theory not even Washington advances. Ultimately, plaintiffs have no explanation for why the 2018 policy trenches on fundamental freedoms while the Carter policy did not, even though it likewise (1) required transgender servicemembers to meet the standards of their biological sex unless they had received a diagnosis of gender dysphoria and had undergone gender transition, and (2) presumptively disqualified applicants who disclosed that they had a history or diagnosis of that medical condition or treatment.

C. The 2018 Policy Survives Constitutional Review

The 2018 policy easily withstands the highly deferential form of review applicable here. G.Br.24-38. Plaintiffs do not seriously dispute that the Department has a compelling interest in preventing harm to military readiness, unit cohesion and troop discipline, or military resources, but rather insist that the 2018 policy is so discontinuous with those interests that it cannot survive even rational-basis review. K.Br.37. They fail to justify that remarkable claim.

1. Much of plaintiffs' case rests on statements by former officials, outside organizations, and their alleged experts criticizing the Department's military judgment. *E.g.*, K.Br.38. Those materials, however, are "quite beside the point." *Goldman*, 475 U.S. at 509 (dismissing "expert testimony that religious exceptions" to uniform

standards "will increase morale"); *see also Rostker*, 453 U.S. at 63 (upholding exemption even though evidence showed "military opinion, backed by extensive study, is that the availability of women registrants would materially increase flexibility, not hamper it"). More recently, the principal dissent in *Hawaii* similarly invoked the views of "several former national-security officials" who supported the plaintiffs there, 138 S. Ct. at 2444 (Sotomayor, J.), but the Court was unmoved. Instead, it emphasized that "we cannot substitute our own assessment for the Executive's predictive judgments on such matters" and that "the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving 'sensitive and weighty interests of national security.'" *Id.* at 2421-22. Plaintiffs never even address the studies underlying the Department's military judgment, let alone explain why those assessments are not controlling under Supreme Court precedent.

2. On the issue of psychological fitness, plaintiffs assail a straw man. The Department does not claim that "gender dysphoria is [un]treatable," much less that "being transgender is … a psychological disorder." K.Br.38 (brackets omitted). Instead, it simply maintains that "the available scientific evidence on the extent to which [transition-related] treatments fully remedy all of the issues associated with gender dysphoria is unclear," especially for those in military service, as no study "account[s] for the added stress of military life, deployments, and combat." ER.187. While plaintiffs may downplay these concerns, RAND itself came to the same conclusion in 2016 when it cautioned that "it is difficult to fully assess the outcomes of treatment" for gender

dysphoria as a general matter and that, in any event, "it is not known how well these findings generalize to military personnel." ER.349. Here, the Secretary simply made a more cautious "evaluation of the[se] underlying facts" than his predecessor, and plaintiffs offer no basis for why the contrary views of their supporters may supplant "the Executive's predictive judgments." *Hawaii*, 138 S. Ct. at 2421-22.

Next, while plaintiffs do not dispute that those with gender dysphoria suffer from "higher rates of psychiatric hospitalization and suicidal behavior," they insist that "individualized determinations" under separate military psychological policies can address these risks. K.Br.39-40. But the Carter policy itself presumptively disqualified those with gender dysphoria despite the existence of these separate policies, and understandably so. Gender dysphoria is characterized by "clinically significant distress or impairment in social, occupational, or other important areas of functioning" and thus inherently raises readiness concerns. ER.175-76.

3. Plaintiffs' critique of the Department's deployability analysis similarly fails. They do not contest that the military may set standards ensuring that its servicemembers are "non-deployable for as little time as possible," ER.198, or that gender dysphoria and its treatment may restrict deployment. G.Br.28-31. Instead, they minimize the effect of these restrictions based on the assessments of their supporters (K.Br.43-44), again without explaining why those views require "military officials … to abandon their considered professional judgment." *Goldman*, 475 U.S. at 509. For example, while plaintiffs believe "schedul[ing] … medical appointments" to avoid "conflict[s] with

upcoming deployments" (K.Br.43) is a viable solution, the Department concluded otherwise on the ground that "postponing treatment, especially during a combat deployment, has risks of its own insofar as the treatment is necessary" to address the limits imposed by gender dysphoria. ER.197.

Plaintiffs further analogize gender dysphoria to other medical conditions that may also impose deployability restrictions, such as pregnancy. K.Br.42-43; W.Br.31. But even assuming that gender dysphoria and pregnancy impose the same limits on deployability, this analogy ignores the fact that no other condition or treatment requires a permanent exception to the Department's sex-based standards (G.Br.31-36), and that the military does not have evidence-related reservations about the efficacy of treatments for pregnancy in the military environment (G.Br.25-28). This misguided argument is just one example of plaintiffs' broader effort to isolate the Department's various considerations in an attempt to obscure that the policy rests on multiple concerns.[4]

4. Plaintiffs next write off the Department's concerns about military discipline and unit cohesion in areas such as deployability, privacy, combat training, and uniforms and grooming (G.Br.29, 31-36), deeming those considerations to simply give effect to private bias. K.Br.45-51; W.Br.29-31. But as they admit, prior military leadership considered many of the same factors in crafting and implementing the Carter policy.

[4] In pressing this analogy, plaintiffs invoke *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976), which rested on an untenable lack of "judicial deference to military decisions" that the Second Circuit has since "specifically rejected … in light of [*Rostker*]." *Mack v. Rumsfeld*, 784 F.2d 438, 439 (2d Cir. 1986) (per curiam).

E.g., K.Br.48 ("Privacy interests were also considered at length by the military working group that developed the Carter policy."). Plaintiffs also never articulate why it is illegitimate to consider that exempting one set of individuals from neutrally applicable standards may impose burdens on, or generate resentment among, those who do not receive preferential treatment, especially when the law sometimes *requires* consideration of such factors elsewhere. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2781 n.37 ("[I]n applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.'"); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (upholding prison's refusal to make "special arrangements for one group" of inmates to attend religious services because "other inmates" could "perceive favoritism").

Nor do cases from the civilian context dealing with privacy concerns (K.Br.47) offer guidance. Just as Establishment Clause precedents "involving holiday displays and graduation ceremonies" cannot be used to assess "immigration policies, diplomatic sanctions, and military actions," *Hawaii*, 138 S. Ct. at 2420 n.5, out-of-circuit decisions involving high-school bathrooms have no bearing on how privacy concerns may affect combat units confined aboard submarines or sent into hostile territory. G.Br.32. The same can be said for the notion that standards for "[a]thletic competitions … at schools across the country" (K.Br.50) should be used to train soldiers for war. G.Br.33-34.

Plaintiffs also invoke recent testimony from some military officials who were unaware of reported problems regarding unit cohesion and discipline. K.Br.48-49; W.Br.29. But as Secretary Mattis has since explained, such reports would not necessarily

be shared with those officials due to reporting limitations in the Carter policy. ER.491. While plaintiffs insist that the "Carter policy contains no such provision" (K.Br.49 n.12), they are mistaken. *See* ER.200 n.143, 223, 232. In any event, the military experts responsible for the 2018 policy *were* aware of such problems. *See* ER.200; G.Br.32.

5. Plaintiffs further argue that the Department's consideration of military resources is inappropriate under "any level of constitutional scrutiny" because servicemembers who require transition are "'similarly situated'" to those with other diagnoses that generate medical costs. K.Br.52. But that simply begs the question: The Department concluded that these servicemembers differed from others receiving taxpayer-funded treatment in part because their care was "proving to be disproportionately costly on a per capita basis, especially in light of the absence of solid scientific support for the efficacy of such treatment." ER.204. And while plaintiffs assert that the military's report does not "quantif[y] the actual cost of transition-related care or compare[] it to the cost of medical care needed by other servicemembers" (K.Br.51), that document provides that "[s]ince implementation of the Carter policy, the medical costs for Service members with gender dysphoria have increased nearly three times … compared to Service members without gender dysphoria." ER.204.

Drawing on the RAND report, plaintiffs also contend that transition-related costs are "budget dust" compared to the total amount the military spends on non-transition-related care. K.Br.51; *see* ER.330-31. But this merely reflects that gender dysphoria is a condition that exists "only in relatively small numbers." ER.198. In any

event, the military is under no constitutional obligation to fund every treatment its servicemembers may desire, let alone admit those who likely will seek such measures.

6. Ultimately, plaintiffs' case for why the 2018 policy fails rational-basis review turns on their belief that it is both so underinclusive (due to the reliance exemption) and so overinclusive (due to the presumptive disqualification of those who already treated their gender dysphoria through full sex-reassignment surgery) when viewed against its underlying justifications that it can be explained only by animus. K.Br.37, 40-43, 47 n.11, 51-52. Neither assertion is justified.

As to underinclusivity, the reliance exemption simply reflects a cost-benefit analysis. In the Department's view, the costs of losing these servicemembers, in whom it had made a "substantial investment," "outweigh[ed] the risks" associated with their continued service. ER.206; *see* G.Br.11. That calculus is similar to the one driving the military's general approach of holding current servicemembers to less rigorous medical standards than the ones applicants face, ER.174, 205, and should hardly be used as a basis for undermining the larger policy, *see Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668-70 (2015) (underinclusivity not fatal even under strict scrutiny where it does not undermine legitimacy of asserted governmental interest); *Winter v. NRDC*, 555 U.S. 7, 31 (2008) (rejecting similar "no good deed goes unpunished" argument). In all events, if this exemption would render the 2018 policy unconstitutional, it is severable. ER.206.

As to overinclusivity, the Department reasonably rejected allowing individuals who had already treated their gender dysphoria through "full sex reassignment surgery"

to serve. ER.194; *see* G.Br.32. As it explained, although such an exception might address some concerns associated with military discipline and unit cohesion, it would be "at odds with current medical practice, which allows for a wide range of individualized treatment." ER.194. Indeed, it is difficult to imagine that plaintiffs would be satisfied with a policy that conditioned military service on genital surgery, especially as "rates for genital surgery are exceedingly low—2% of transgender men and 10% of transgender women." *Id.* And in any event, it would not address the Department's concerns about the efficacy of sex-reassignment surgery as a treatment for gender dysphoria in the military. ER.185-90. Finally, to the extent that there are individuals presumptively disqualified under the 2018 policy who do not raise any of the Department's underlying concerns, an individualized waiver process is available. ER.205; *cf. Hawaii*, 138 S. Ct. at 2422 (relying on the proclamation's "waiver program").

II. Plaintiffs Cannot Satisfy The Equitable Criteria For Injunctive Relief

A. Plaintiffs' responses confirm that they have no standing to challenge the 2018 policy, much less obtain an injunction against its implementation. G.Br.49-53.

1. It is now undisputed that five of the six currently serving plaintiffs qualify for the reliance exemption (K.Br.55-56) and thus would suffer no injury under the 2018 policy. Plaintiffs frame this as a question of mootness (K.Br.56), but that does not excuse them from the duty of demonstrating standing to challenge the 2018 policy at the outset. Their choice to forgo amending their complaint to challenge the 2018 policy is no license to leapfrog basic standing requirements, especially when other challengers

amended theirs, *see, e.g.*, Doc.148, *Stone v. Trump*, No. 1:17-cv-02459 (filed Apr. 27, 2018 D. Md.). And in light of their concession that the 2017 memorandum gave the Secretary discretion "to address transgender individuals currently serving" (K.Br.13, 23), it should now be apparent that these plaintiffs never had standing to challenge that memorandum in the first place. Nor does the remote possibility that a court will uphold the 2018 policy by severing the reliance exemption (K.Br.56) come close to a "certainly impending" injury. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

As for the sixth servicemember, plaintiffs claim that Doe's self-inflicted injury creates standing because the injunction could be dissolved "before she received any diagnosis" of gender dysphoria. K.Br.56. But they provide no support for their assertion that this would involve a "lengthy process" (*id.*) that likely would not be over before the government secured the dissolution of this injunction.

In all events, these plaintiffs have not suffered an irreparable injury. They do not contest that "a stronger showing of irreparable harm is required in the military context," but simply assert that the 2018 policy imposes a "sufficiently weighty" injury without specifying how these six individuals will be actually harmed. K.Br.54 n.14; *see* G.Br.50.

2. Nor do the three plaintiffs who desire to serve have standing. The mere assertion that these individuals are "able and ready" to join the military (K.Br.55) does not satisfy Article III. Rather, they must "demonstrate" that is the case, and "[s]ubmission of a symbolic, incomplete application" does not suffice. *Carroll v. Nakatani*, 342 F.3d 934, 942 (9th Cir. 2003). Here, these plaintiffs have not even

completed their applications, let alone established that they could satisfy the demanding standards for service apart from the 2018 policy. ER.497-98, 527, 539. And in any event, they have not shown that the injunction maintaining the Carter policy will redress any injury, as there is no claim that any of them could meet that policy's 18-month-stability requirement, and it is undisputed that one (D.L.) could not. K.Br.55.

Article III aside, these plaintiffs face no irreparable injury. Given that a more demanding standard applies in the military arena, their authorities concerning the "opportunity to pursue" a "chosen profession" in general (K.Br.53) are irrelevant. And their attempt (K.Br.54 n.14) to limit *Anderson v. United States*, 612 F.2d 1112 (9th Cir. 1979), to its particular facts cannot be reconciled with that case's legal holding that "[a]ny harm" the plaintiff's career might have suffered could "be remedied adequately by retroactive" measures such as "back pay." *Id.* at 1115.

Finally, although plaintiffs apparently no longer contend that "stigmatic harm" alone creates standing, they assert they have all been "personally denied equal treatment." K.Br.54 n.15; *see* G.Br.52. But as discussed, they have yet to demonstrate any such injury. Similarly, even assuming that plaintiffs may establish irreparable harm solely from "constitutional infringement," such a theory would require them at least to show that they "are likely to succeed" on the merits (K.Br.53), which they cannot do.

3. Washington's connection to the 2018 policy is even more strained. As its principal case for Article III purposes explains, while a State may seek to protect its residents from discrimination by "private defendants," it "does not have standing as

parens patriae to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982); G.Br.52. Washington's remaining authorities (W.Br.22) do not suggest otherwise. Rather than "allow[] a State 'to protect her citizens from the operation of federal statutes' (which is what [precedent] prohibits)," they simply "allow[] a State to assert its rights under federal law (which it has standing to do)." *Massachusetts v. EPA,* 549 U.S. 497, 520 n.17 (2007); *see Nebraska v. Wyoming*, 515 U.S. 1, 20 (1995) (no indication of a State suing to protect citizens from federal laws); *American Rivers v. FERC*, 201 F.3d 1186, 1205 (9th Cir. 1999) (same).

Nor does Washington demonstrate any injury to itself. The State cannot identify any member of, or applicant to, the Washington National Guard affected by the 2018 policy, and it has not alleged that it lacks, or would lack, other qualified applicants. W.Br.20. Its assertion that "any reduction" in potential "qualified service members" will harm its natural resources (W.Br.20) is precisely the sort of speculative and expansive theory of standing that the Supreme Court has repeatedly rejected. Indeed, Washington admits that this sweeping theory of standing would allow it to "challenge everyday personnel regulations." W.Br.21. That Washington promises to use this power only when it deems the situation sufficiently important (*id.*) is no barrier to the adjudication of generalized grievances that adoption of this theory would invite.

Finally, Washington concedes that it cannot "identify any state law that would prevent it from adhering to military restrictions based on the medical condition of gender dysphoria or its treatment." W.Br.19. And even if the 2018 policy were

somehow "based on sex and gender identity," it would not require Washington to "discriminat[e] against its own residents" on those grounds. *Id.* To the contrary, Washington would simply be following its facially neutral rule of applying federal military standards to secure federal funding. *See* Wash. Rev. Code § 38.08.010; *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 276 (1979) (holding State's veteran's-preference law to be sex-neutral despite "the panoply of sex-based and assertedly discriminatory federal laws that have prevented all but a handful of women from becoming veterans").

B. Plaintiffs also have little to say about the serious injuries to the military and the public associated with maintaining a policy the Department has concluded would pose "substantial risks" to an effective national defense. ER.161; *see* G.Br.48-49. Their only substantive response is that the military has not provided "*significant* evidence" of injury. W.Br.37; *see* K.Br.57. But if "declarations from some of the Navy's most senior officers" are sufficient (W.Br.37 (quoting *Winter*, 555 U.S. at 24)), it is unclear why a memorandum and accompanying 44-page report from the Secretary of Defense are not.

III. The Nationwide Injunction Is Inappropriate

At a minimum, this Court should vacate the preliminary injunction insofar as it provides nationwide relief. G.Br.54; *see also Gill v. Whitford*, 138 S. Ct. 1916, 1933-34 (2018) ("The Court's constitutionally prescribed role is to vindicate the individual rights of the people before it," and thus "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury."); *Hawaii*, 138 S. Ct. at 2429 (Thomas, J., concurring) (nationwide injunctions "are legally and historically dubious"). That is especially true

given that plaintiffs cannot distinguish *Meinhold v. United States Department of Defense*, 34 F.3d 1469 (9th Cir. 1994). The fact that they seek "facial relief" is irrelevant (K.Br.59); litigants cannot evade precedent through artful pleading, a principle that likewise forecloses their suggested exception for cases involving "organizational plaintiffs." K.Br.58. In any event, the plaintiff in *Meinhold* requested a facial "declaration" that the military's "policy regarding homosexuals was unconstitutional" and even "asked the district court to hold DOD in contempt" based on its plans "to transfer two [other] servicemembers." 34 F.3d at 1473; *see also, e.g.*, *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 649 (9th Cir. 2011) (rejecting nationwide injunction in "facial challenge"). Similarly, the fact that *Meinhold* "construed" the challenged regulation narrowly on the merits (K.Br.59) had no bearing on its analysis of remedy. *See* 34 F.3d at 1479-80. Finally, the claim that nationwide relief is necessary to address "the stigmatization of all transgender troops" (K.Br.59) or to "protect Washington's *parens patriae* interests" (W.Br.40) only underscores why this Court should reject these specious theories of standing. *See supra* Pt. II.A.2-3.

CONCLUSION

The district court's preliminary injunction should be vacated in whole or at least as to its nationwide scope.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Ninth Circuit Rule 32-1(b) because it contains 6,989 words, excluding the parts of the brief excluded by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2018, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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