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22 **UNITED STATES DISTRICT COURT**  
23 **CENTRAL DISTRICT OF CALIFORNIA**

24 AIDEN STOCKMAN; NICOLAS  
25 TALBOTT; TAMASYN REEVES;  
26 JAQUICE TATE; JOHN DOES 1-2;  
27 JANE DOE; and EQUALITY  
28 CALIFORNIA,

Plaintiffs,

v.

CASE NO. 5:17-CV-01799-JGB-KK

**DEFENDANTS' NOTICE OF  
MOTION AND MOTION TO  
STAY PRELIMINARY  
INJUNCTION PENDING  
APPEAL; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF DEFENDANTS'**

DONALD J. TRUMP, et al.  
  
Defendants.

**MOTION TO STAY  
PRELIMINARY INJUNCTION  
PENDING APPEAL**

Hearing  
Date: January 7, 2019  
Time: 9:00 a.m.  
Courtroom: 1  
Judge: Hon. Jesus G. Bernal

STATE OF CALIFORNIA,  
  
Plaintiff-Intervenor,

v.

DONALD J. TRUMP, et al.  
  
Defendants.

**TO ALL PARTIES AND THEIR ATTORIES OF RECORD:**

**PLEASE TAKE NOTICE** that on January 7, 2019 at 9:00 a.m., or as soon thereafter as possible in Courtroom 1 of the above-referenced court located at the George E. Brown, Jr. Federal Building and the United States Courthouse, 2470 Twelfth Street, Riverside, CA 92501-3801, Defendants Donald J. Trump, *et al.*, will, and hereby do, move this Court to stay the preliminary injunction pending appeal. This motion is based on this Notice of Motion and Motion and the accompanying Memorandum and Points of Authorities.

1 Dated: November 28, 2018

Respectfully submitted,

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1 **MEMORANDUM AND POINTS OF AUTHORITIES**

2 **INTRODUCTION**

3 Pursuant to Federal Rule of Civil Procedure 62, the Government respectfully  
4 requests a stay of the Court’s nationwide preliminary injunction, pending the resolution  
5 of the Government’s appeal in the Court of Appeals for the Ninth Circuit and, if the  
6 Ninth Circuit affirms, pending any further proceedings in the Supreme Court. At a  
7 minimum, the Government respectfully requests that the Court stay the nationwide  
8 scope of the injunction pending the resolution of the Government’s appeal in the Ninth  
9 Circuit and any further proceedings in this Court. The preliminary injunction bars the  
10 military from implementing a policy that Secretary of Defense James Mattis announced  
11 earlier this year after an extensive review of military service by transgender individuals,  
12 and even a stay of only the nationwide scope of the injunction—which would prevent  
13 the injunction from sweeping beyond the parties to this case—would ensure that the  
14 injunction does not cause more harm to the Government than is necessary while the  
15 Ninth Circuit resolves the Government’s appeal. The Supreme Court has previously  
16 stayed a nationwide injunction against another military policy to the extent it swept  
17 beyond the parties to the case, *see U.S. Dep’t of Def. v. Meinhold*, 510 U.S. 939 (1993), and  
18 this Court should follow the same course. As set forth below, on November 23, the  
19 Solicitor General filed a petition for a writ of certiorari before judgment in the pending  
20 appeal. The Solicitor General has also determined that, if necessary, the Government  
21 will file in the Supreme Court a request, as an alternative to certiorari before judgment,  
22 for a stay of this Court’s preliminary injunction. The Government therefore respectfully  
23 requests a stay of the preliminary injunction in this Court, and for this Court to rule on  
24 this request by December 3, 2018, so that, if necessary, the Government may further  
25 seek stays in the court of appeals and in the Supreme Court in a timely fashion. *See S.*

1 Ct. R. 23.3.<sup>1</sup>

2 **PROCEDURAL BACKGROUND**<sup>2</sup>

3 Plaintiffs filed this action on September 5, 2017, raising constitutional challenges  
4 to the President's 2017 presidential memorandum concerning military service by  
5 transgender individuals. Compl., Dkt. 1. Similar suits were filed in the District of D.C.,  
6 the Western District of Washington, and the District of Maryland. *See Doe v. Mattis*, No.  
7 17-cv-1597 (D.D.C. filed Aug. 9, 2017); *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash.  
8 filed Aug. 28, 2017); *Stone v. Trump*, No. 17-cv-2459 (D. Md. filed Aug. 28, 2017).

9 On December 22, 2017, the Court issued a nationwide preliminary injunction,  
10 enjoining Defendants from "categorically excluding individuals . . . from military service  
11 on the basis that they are transgender." Mem. Op. 21, Dkt. 79. In March 2018, the  
12 Government informed the Court that the President had issued a new memorandum,  
13 which revoked his 2017 memorandum (and any similar directive) and allowed the  
14 military to adopt Secretary Mattis's proposed policy. *See* Defs.' Notice, Dkt. 80; *see also*  
15

16 <sup>1</sup> On November 21, 2018, Government counsel contacted counsel for Plaintiffs and  
17 counsel for California regarding this motion. On November 27, 2018, counsel for  
18 Plaintiffs indicated that Plaintiffs oppose this motion, and counsel for California  
19 indicated that California opposes this motion. The Government attempted to reach an  
20 agreement with Plaintiffs and California to waive the requirements of Local Rule 7-3, as  
21 the Government sought to file this motion on November 21, 2018 in order to give the  
22 Court as much time as possible to rule on the motion before the Government files for  
23 a stay of the preliminary injunction with the Court of Appeals for the Ninth Circuit.  
24 The Government provided Plaintiffs and California with a nearly identical motion filed  
25 in the related case *Doe v. Mattis*, No. 17-cv-1597 (D.D.C.) to assist them in determining  
26 their positions on the Government's motion in a more timely manner. However,  
27 Plaintiffs and California were unwilling to provide their position on the motion until  
28 November 27, 2018, even though Plaintiffs have previously opposed a narrowed  
injunction. *See* Plfs.' Opp. to Defs.' Mot. to Dismiss and Reply in Support of Plfs.' Mot.  
for a Prelim. Inj. 39–40, Dkt. 47.

<sup>2</sup> The background regarding the creation of the military's new policy is set forth in  
Defendants' motion to dissolve the preliminary injunction. *See* Defs.' Mot. 1–7, Dkt.  
82.

1 Defs.’ Mot. to Dissolve the Prelim. Inj., Dkt. 82. In light of that new policy, the  
2 Government moved to dissolve the December 2017 injunction. Defs.’ Mot. to Dissolve  
3 the Prelim. Inj., Dkt. 82.

4 In September 2018, the Court denied the Government’s motion. Dkt. 124. The  
5 Court characterized the Mattis policy as “essentially the same as the first policy”  
6 announced in the President’s July 26, 2017 statements on Twitter and “formalized” in  
7 the President’s 2017 memorandum. *Id.* at 10. And it dismissed the development of the  
8 Mattis policy and accompanying report as “after-the-fact justifications for the military  
9 ban on transgender service members.” *Id.* at 10. The Court there declined to dissolve  
10 the preliminary injunction. *Id.* at 14.

11 The Government appealed. Dkt. 125. On November 20, 2018, the Government  
12 moved to hold the Ninth Circuit briefing schedule in abeyance pending resolution of  
13 the related Ninth Circuit proceedings in *Karnoski v. Trump*, 18-35347 (9th Cir. Argued  
14 Oct. 10, 2018). On November 21, 2018, the Government informed this Court that in  
15 light of the importance of the issues at stake and the military’s compelling interest in  
16 maintaining an effective national defense, the Solicitor General intends to preserve the  
17 opportunity for the Supreme Court to hear and decide these issues during the Current  
18 Term. *See* Defs.’ Notice of Filing, Exh. A, Dkt. 127-1. On November 23, the Solicitor  
19 General filed a petition for a writ of certiorari before judgment. The Government’s  
20 filing of the petition on November 23 allows the petition to be distributed on December  
21 26, 2018, for consideration at the Court’s January 11, 2019 conference, without a motion  
22 for expedition. The Solicitor General has also determined that, if necessary, the  
23 Government will file in the Supreme Court a request, as an alternative to certiorari  
24 before judgment, for a stay of this Court’s preliminary injunction pending resolution of  
25 the Government’s appeal in the Ninth Circuit and any further proceedings in the  
26 Supreme Court.

## ARGUMENT

Federal Rule of Civil Procedure 62(c) grants district courts discretion to “suspend, modify, restore, or grant an injunction’ during the pendency of the defendant’s interlocutory appeal.” *Mayweathers v. Newland*, 258 F.3d 930, 935 (9th Cir. 2001) (quoting Fed. R. Civ. P. 62(c)). In deciding whether to stay a preliminary injunction pending appeal, district courts consider four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Doe v. Trump*, 284 F. Supp. 3d 1172, 1178 (W.D. Wash. 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

Even when courts enter injunctions, those same courts regularly find cause to stay their own rulings entering, dissolving, or modifying injunctions. *See, e.g., Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 842 (D.C. Cir. 1977) (holding that district court did not abuse its discretion by entering permanent injunction and then staying it pending appeal); *Thiry v. Carlson*, 891 F. Supp. 563, 567 (D. Kan. 1995) (granting stay pending appeal of court’s own order dissolving preliminary injunction). Cause to stay the preliminary injunction exists here. Although the Court ruled that its preliminary injunction now covers DoD’s new policy, the Court should stay its injunction pending Defendants’ appeal, so that the new policy can be implemented.

### **I. The Government Is Likely To Succeed On The Merits Of Its Appeal**

#### **A. Plaintiffs’ Constitutional Challenges Lack Merit.**

As explained in Defendants’ Motion to Dissolve the Preliminary Injunction, Plaintiffs’ equal-protection challenge to DoD’s new policy lacks merit. *See* Defs.’ Mot. 9–24, Dkt. 82. Under DoD’s new policy, individuals may “not be disqualified from service solely on account of their transgender status.” DoD Report and

1 Recommendations, Dkt. 84-2. Like the Carter policy before it, DoD’s new policy turns  
2 on a medical condition (gender dysphoria) and its treatment (gender transition)—not  
3 any suspect or quasi-suspect classification. *See id.* at 7–8. Rational-basis review therefore  
4 applies, and DoD’s new policy satisfies that deferential review because it reflects, *inter*  
5 *alia*, the military’s reasoned and considered judgment that “making accommodations for  
6 gender transition” would “not [be] conducive to, and would likely undermine, the  
7 inputs—readiness, good order and discipline, sound leadership, and unit cohesion—  
8 that are essential to military effectiveness and lethality.” *Id.* at 41.

9 **B. The Nationwide Scope of the Preliminary Injunction Is Improper.**

10 Even if plaintiffs were likely to succeed on their constitutional claims, however,  
11 the nationwide scope of the preliminary injunction is improper. The injunction  
12 transgresses both Article III and longstanding equitable principles by affording relief  
13 that is not necessary to redress any cognizable, irreparable injury to Plaintiffs. And it  
14 frustrates the development of the law, while obviating the requirements for and  
15 protections of class-action litigation.

16 Plaintiffs lack Article III standing to seek injunctive relief beyond what is needed  
17 to redress an actual or imminent injury-in-fact to plaintiffs themselves. “[S]tanding is  
18 not dispensed in gross,” and “a plaintiff must demonstrate standing . . . for each form  
19 of relief that is sought.” *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017)  
20 (citations omitted); *see Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018) (“The Court’s  
21 constitutionally prescribed role is to vindicate the individual rights of the people  
22 appearing before it.”). “The remedy” sought thus “must of course be limited to the  
23 inadequacy that produced the injury in fact that the plaintiff has established.” *Whitford*,  
24 138 S. Ct. at 1931 (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). “The actual-injury  
25 requirement would hardly serve [its] purpose . . . of preventing courts from  
26 undertaking tasks assigned to the political branches, if once a plaintiff demonstrated  
27 harm from one particular inadequacy in government administration, the court were  
28

1 authorized to remedy *all* inadequacies in that administration.” *DaimlerChrysler Corp. v.*  
2 *Cuno*, 547 U.S. 332, 353 (2006) (quoting *Lewis*, 518 U.S. at 357 (brackets omitted)).

3 Applying that principle, the Supreme Court has invalidated injunctions that  
4 afforded relief that was not shown to be necessary to prevent cognizable injury to the  
5 plaintiff himself. For example, in *Lewis*, the Court held that an injunction directed at  
6 certain prison practices was overbroad, in violation of Article III, because it enjoined  
7 practices that had not been shown to injure any plaintiff. 518 U.S. at 358. The  
8 injunction “mandated sweeping changes” in various aspects of prison administration  
9 designed to improve prisoners’ access to legal services, including library hours,  
10 lockdown procedures, access to research facilities and training, and ““direct assistance””  
11 from lawyers and legal support staff for “illiterate and non-English-speaking inmates.”  
12 *Id.* at 347–348 (citation omitted).

13 The Supreme Court held that the plaintiffs lacked standing to seek, and the  
14 district court thus lacked authority to grant, such broad relief. *Lewis*, 518 U.S. at 358-  
15 360. The district court had “found actual injury on the part of only one named plaintiff,”  
16 who claimed that a legal action he had filed was dismissed with prejudice as a result of  
17 his illiteracy and who sought assistance in filing legal claims. *Id.* at 358. “At the outset,  
18 therefore,” the Supreme Court held that “[it] c[ould] eliminate from the proper scope  
19 of the injunction provisions directed at” the other claimed inadequacies that allegedly  
20 harmed “the inmate population at large.” *Id.* “If inadequacies of th[at] character  
21 exist[ed],” the Court explained, “they ha[d] not been found to have harmed any plaintiff  
22 in this lawsuit, and hence were not the proper object of this District Court’s  
23 remediation.” *Id.*

24 Here, likewise, Plaintiffs lack standing to seek an injunction that goes beyond  
25 redressing any harm to Plaintiffs themselves. Even if Plaintiffs had shown any  
26 cognizable, irreparable injuries from the application of DoD’s new policy to particular  
27 individuals, those purported injuries would be fully redressed by an injunction limited  
28

1 to those individuals. Those injuries could not justify further enjoining the policy as to  
2 numerous other individuals to whom Plaintiffs have no connection whatsoever.

3 The Supreme Court also has recognized and applied the corollary principle that,  
4 where a plaintiff faces actual or imminent injury at the outset of a suit but that injury is  
5 subsequently redressed or otherwise becomes moot, the plaintiff no longer can seek  
6 injunctive relief to redress alleged harms to anyone else—unless the plaintiff is the  
7 representative of a certified class. For example, in *Alvarez v. Smith*, 558 U.S. 87 (2009),  
8 the Supreme Court held that the plaintiffs’ challenge to a state-law procedure for  
9 disputing the seizure of vehicles or money had become moot because their “underlying  
10 property disputes” with the State “ha[d] all ended”: the cars that had been seized from  
11 the plaintiffs had been returned, and the plaintiffs had either forfeited the money seized  
12 or had “accepted as final the State’s return of some of it.” *Id.* at 89; *see id.* at 92. The  
13 Supreme Court accordingly held that the plaintiffs could no longer seek declaratory or  
14 injunctive relief against the State’s policy. *Id.* at 92. Although the plaintiffs had “sought  
15 certification of a class,” class certification had been denied, and that denial was not  
16 appealed. *Id.* “Hence the only disputes relevant” in the Supreme Court were “those  
17 between th[ose] six plaintiffs” and the State concerning specific seized property, “and  
18 those disputes [were] . . . over.” *Id.* And although the plaintiffs “continue[d] to dispute  
19 the lawfulness of the State’s hearing procedures,” their “dispute [was] no longer  
20 embedded in any actual controversy about the plaintiffs’ particular legal rights.” *Id.*

21 Similarly, in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), the Supreme  
22 Court held that a plaintiff lacked standing to seek to enjoin certain Forest Service  
23 regulations after the parties had resolved the controversy regarding the application of  
24 those regulations to the specific project that had caused that plaintiff’s own claimed  
25 injury. *Id.* at 494–497. The plaintiff’s “injury in fact with regard to that project,” the  
26 Supreme Court held, “ha[d] been remedied,” and so he lacked standing to maintain his  
27 challenge to the regulations. *Id.* at 494. The Supreme Court expressly rejected a contrary  
28

1 rule that, “when a plaintiff has sued to challenge the lawfulness of certain action or  
2 threatened action but has settled that suit, he retains standing to challenge the basis for  
3 that action”—in *Earth Island*, “the regulation in the abstract”—“apart from any concrete  
4 application that threatens imminent harm to his interests.” *Id.* Such a rule would “fly  
5 in the face of Article III’s injury-in-fact requirement.” *Id.*

6 The same conclusion logically follows where, as here, a plaintiff’s only injury has  
7 been eliminated by an injunction barring application of the challenged law or policy to  
8 the plaintiff. If a plaintiff himself is no longer in any imminent danger of suffering  
9 injury from the law or policy—whether because his injury has become moot through  
10 happenstance or settlement, as in *Alvarez* and *Earth Island*, or because a plaintiff-specific  
11 injunction prevents any future injury to that plaintiff from the law or policy—he lacks  
12 standing to press for additional injunctive relief. The fact that the challenged law or  
13 policy would still cause concrete injury to nonparties is irrelevant. As *Alvarez* and *Earth*  
14 *Island* both demonstrate, the plaintiff must show the relief he seeks is necessary to  
15 redress his own actual or imminent injury-in-fact; potential injuries to others who are  
16 not parties to the case do not entitle the plaintiff to seek relief on their behalf.

17 Independent of Article III, the nationwide injunction here violates fundamental  
18 rules of equity by granting relief broader than necessary to prevent irreparable harm to  
19 Plaintiffs. The Supreme Court has long recognized that injunctive relief must “be no  
20 more burdensome to the defendant than necessary to provide complete relief to the  
21 plaintiffs.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation  
22 omitted). Where no class has been certified, a plaintiff must show that the requested  
23 relief is necessary to redress the plaintiff’s own irreparable harm; the plaintiff cannot  
24 seek injunctive relief in order to prevent harm to others. *See Monsanto Co. v. Geertson Seed*  
25 *Farms*, 561 U.S. 139, 163 (2010) (plaintiffs “d[id] not represent a class, so they could not  
26 seek to enjoin [an agency order] on the ground that it might cause harm to other  
27 parties”). Even where a class has been certified, relief is limited to what is necessary to  
28

1 redress irreparable injury to members of that class. *See Lewis*, 518 U.S. at 359-360 (citing  
2 *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). “[I]he scope of injunctive relief is  
3 dictated by the extent of the violation established” that injured class members, “not by  
4 the geographical extent of the plaintiff class.” *Yamasaki*, 442 U.S. at 702.

5 History confirms that the injunctive relief in this case violates “traditional  
6 principles of equity jurisdiction.” *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund,*  
7 *Inc.*, 527 U.S. 308, 319 (1999) (citation omitted). The Supreme Court “ha[s] long held  
8 that the jurisdiction” conferred by the Judiciary Act of 1789 “over ‘all suits . . . in  
9 equity’ . . . is an authority to administer in equity suits the principles of the system of  
10 judicial remedies which had been devised and was being administered by the English  
11 Court of Chancery at the time of the separation of the two countries.” *Id.* at 318  
12 (brackets, citation, and other internal quotation marks omitted). “Substantially, then,  
13 the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the  
14 High Court of Chancery in England at the time of the adoption of the Constitution and  
15 the enactment of the original Judiciary Act, 1789.” *Id.* (citation omitted).

16 Absent-party injunctions were not “traditionally accorded by courts of equity.”  
17 *Grupo Mexicano*, 527 U.S. at 319. Indeed, they did not exist at equity at all. They are a  
18 modern aberration, with no direct antecedent in English practice, or apparently even in  
19 the United States until the mid-20th century. Samuel L. Bray, *Multiple Chancellors:*  
20 *Reforming the National Injunction*, 131 Harv. L. Rev. 417, 425 (2017) (“There is an easy,  
21 uncomplicated answer to the question whether the national injunction is traceable to  
22 traditional equity: *no.*”); *see id.* 424–445 (detailing historical English practice and U.S.  
23 practice from Founding to present). Thus, in the late 19th century, the Supreme Court  
24 rejected injunctive relief that barred enforcement of a law to nonparties. *Id.* at 429  
25 (discussing *Scott v. Donald*, 165 U.S. 58 (1897)). As a consequence, for example, in the  
26 1930s courts issued more than 1600 injunctions against enforcement of a single federal  
27 statute. *Id.* at 434. The nationwide injunction in this case is thus inconsistent with  
28

1 “longstanding limits on equitable relief.” *Hawaii*, 138 S. Ct. at 2425 (Thomas, J.,  
2 concurring).

3 A nationwide injunction like the one in this case also disserves the orderly,  
4 evenhanded development of the law. An order by a single district court, as this one,  
5 enjoining a federal policy everywhere frequently brings judicial review in all other fora  
6 to a halt and deprives other courts, including the Supreme Court, of differing  
7 perspectives on important questions. *See United States v. Mendoza*, 464 U.S. 154, 160, 162  
8 (1984) (rejecting application of nonmutual issue preclusion against the government for  
9 similar reasons). Permitting such nationwide injunctions also undercuts the primary  
10 mechanism Congress has authorized to permit broader relief: class actions. It enables  
11 all potential claimants to benefit from nationwide injunctive relief by prevailing in a  
12 single district court, without satisfying the prerequisites of Federal Rule of Civil  
13 Procedure 23, while failing to afford the government the corresponding benefit of a  
14 definitive resolution of the underlying legal issue as to all potential claimants if it prevails  
15 instead. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974).

## 16 **II. The Balance Of Equities Strongly Supports A Stay Of The Injunction In** 17 **Its Entirety Or At Least To The Extent It Sweeps Beyond Plaintiffs.**

18 The nationwide injunction in this case causes direct, irreparable injury to the  
19 interests of the Government and the public, which merge here. *See Nken*, 556 U.S. at  
20 435. It does so by forcing the Department to maintain a policy that it has determined  
21 poses “substantial risks” and threatens to “undermine readiness, disrupt unit cohesion,  
22 and impose an unreasonable burden on the military that is not conducive to military  
23 effectiveness and lethality.” Mattis Memorandum 2, Dkt. 84-2; *cf. Maryland v. King*, 567  
24 U.S. 1301, 1303 (2012)) (Roberts, C.J., in chambers) (“[A]ny time a State is enjoined by  
25 a court from effectuating statutes enacted by representatives of its people, it suffers a  
26 form of irreparable injury.”) (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S.  
27 1345, 1351 (1977) (Rehnquist, J., in chambers)). Given this severe harm to the federal  
28 government—which far outweighs Plaintiffs’ speculative claims of injury—this Court

1 should stay the injunction in its entirety.

2 At a minimum, the Court should issue a stay of the nationwide scope of the  
3 injunction, thereby barring the implementation of the Mattis policy only as to the  
4 individual Plaintiffs in this case.<sup>3</sup> That is what the Supreme Court did in *Meinhold*. In  
5 that case, a discharged Navy servicemember brought a facial constitutional challenge  
6 against the Department’s “then-existing policy regarding homosexuals.” *Meinhold v. U.S.*  
7 *Dep’t of Def.*, 34 F.3d 1469, 1473 (1994). After the district court enjoined the Department  
8 from “taking any actions against gay or lesbian servicemembers based on their sexual  
9 orientation” nationwide, the Supreme Court stayed that order “to the extent it conferred  
10 relief on persons other than [the plaintiff].” *Id.* (citing *U.S. Dep’t of Def. v. Meinhold*, 510  
11 U.S. 939 (1993)).

12 This Court should follow the same course. Indeed, this case and others involving  
13 constitutional challenges to DoD’s new policy illustrate the distinct harms to the  
14 Government from nationwide injunctions. The Government is currently subject to four  
15 different nationwide preliminary injunctions, each requiring the Government to  
16 maintain the Carter accession and retention standards. Even if the Government were  
17 to prevail before the Ninth Circuit—which has before it two of these injunctions (in  
18 *Karnoski v. Trump*, No. 18-35347, and in this case)—the Government would still need to  
19 proceed with its appeal before the D.C. Circuit, *see Doe 2 v. Trump*, No. 18-5257. And  
20 even then, the Government would be subject to a fourth nationwide preliminary  
21 injunction, issued by the district court in Maryland, that could potentially cover DoD’s  
22 new policy. *See Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017). Although the  
23 Government moved eight months ago to dissolve that injunction in light of the new  
24 policy, *see Gov’t Mot. to Dissolve the Prelim. Inj., Stone, supra* (No. 17-cv-2459) (Mar.

25  
26  
27 <sup>3</sup> Even if California had standing to challenge the Mattis policy, it has not identified any  
28 individuals beyond some of the individual Plaintiffs in this case whose disqualification  
would even arguably impose an irreparable injury on California.

1 23, 2018), the district court in Maryland has not ruled on the Government’s pending  
2 motion.

3 These injunctions both prevent the military from implementing its carefully  
4 calibrated policy and force the military to maintain a policy that it has concluded poses  
5 a threat to “readiness, good order and discipline, sound leadership, and unit cohesion,”  
6 which “are essential to military effectiveness and lethality.” DoD Report and  
7 Recommendations 41, Dkt. 84-2; *see id.* at 44 (explaining that the “risks” associated with  
8 maintaining the Carter policy should not be incurred “given the Department’s grave  
9 responsibility to fight and win the Nation’s wars in a manner that maximizes the  
10 effectiveness, lethality, and survivability” of servicemembers). Every day that these  
11 injunctions remain in effect causes harm to the Government and the public.

12 Thus, if this Court declines to stay the injunction in its entirety, it should at least  
13 stay the nationwide scope of the injunction, thereby preventing the injunction from  
14 sweeping beyond what is necessary to provide redress to Plaintiffs. Plaintiffs will suffer  
15 no injury—let alone irreparable injury—if the nationwide scope of the injunction is  
16 stayed pending the resolution of the Government’s appeal and any further proceedings  
17 in this Court. Accordingly, the balance of equities warrants, at a minimum, such a partial  
18 stay.

### 19 **III. Request for Expedited Ruling.**

20 If this Court has not ruled on Defendants’ motion by December 3, 2018,<sup>4</sup>  
21 Defendants intend to file for a stay of the Court’s preliminary injunction with the Court  
22 of Appeals for the Ninth Circuit. If this Court rules on Defendants’ motion after  
23 Defendants’ have filed their motion with the Ninth Circuit, Defendants will provide the  
24 Ninth Circuit with this Court’s ruling.

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27 <sup>4</sup> In light of Defendants’ request for an expedited ruling, Defendants are willing to  
28 forego filing a reply brief in support of this motion and request to waive oral argument.

1 **CONCLUSION**

2 The Government respectfully requests that this Court stay the preliminary  
3 injunction in its entirety pending the disposition of its appeal and, if the court of appeals  
4 affirms the injunction, pending the filing and disposition of a petition for a writ of  
5 certiorari and any further proceedings in the Supreme Court. At a minimum, the Court  
6 should issue a stay of the nationwide scope of the injunction, thereby barring the  
7 implementation of the Mattis policy only as to the individual Plaintiffs in this case.

8 Dated: November 28, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 28, 2018, I electronically filed the foregoing Motion to Stay the Preliminary Injunction Pending Appeal using the Court’s CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: November 28, 2018

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