[ORAL ARGUMENT SCHEDULED FOR DECEMBER 10, 2018]

No. 18-5257

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JANE DOE 2, et al.,
Plaintiffs-Appellees,

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 DISTRICT OF COLUMBIA

APPELLANTS' REPLY BRIEF

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REVISED CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. *Parties and Amici.* Defendants in district court, and Appellants here, are James Mattis, in his official capacity as Secretary of Defense; Joseph F. Dunford, Jr., in his official capacity as Chairman of the Joint Chiefs of Staff; the United States Department of the Army; the United States Department of the Air Force; Heather A. Wilson, in her official capacity as Secretary of the Air Force; the United States Coast Guard; the United States of America; the United States Department of the Navy; the Defense Health Agency; Richard V. Spencer, in his official capacity as Secretary of the Navy; Raquel C. Bono, in her official capacity as Director of the Defense Health Agency; Mark T. Esper, in his official capacity as Secretary of the Army; and Kirstjen M. Nielsen, in her official capacity as Secretary of Homeland Security.

In district court, defendants also included Donald J. Trump, in his official capacity as President of the United States, who was also named as an Appellant in this Court. On August 6, 2018, the district court dismissed President Trump from the case and dissolved the preliminary injunction to the extent that it ran against the President. JA108. On September 20, 2018, the district court caption was updated to reflect that President Trump has been terminated from the litigation.

Plaintiffs in district court, and Appellees here, are Jane Doe 2; Jane Doe 3; Jane Doe 4; Jane Doe 5; Dylan Kohere; Regan V. Kibby; John Doe 1; Jane Doe 6; Jane Doe 7; and John Doe 2. Jane Doe 1 was also a plaintiff in district court.

In district court, the Family Research Council and the Heritage Foundation were named as non-party respondents.

The following have appeared as amici in this Court:

- Asian American Legal Defense and Education Fund; Fred T. Korematsu Center for Law and Equality; LatinoJustice PRLDEF; Leadership Conference on Civil and Human Rights;
- American Medical Association; American College of Physicians; American Academy of Nursing; American Medical Women's Association; American Nurses Association; Endocrine Society; GLMA: Health Professionals Advancing LGBT Equality; Mental Health America;
- American Veterans Alliance; American Veterans for Equal Rights; Jewish War Veterans of the USA; Minority Veterans of America; Swords to Plowshares; Transgender American Veterans Association; Truman Center for National Policy; US & Latin Veterans' Support Embassy; VoteVets.org;
- Constitutional Accountability Center;
- NAACP Legal Defense & Educational Fund, Inc.;

- National Center for Transgender Equality; FORGE, Inc.; Gender Spectrum; National LGBTQ Task Force; Southern Arizona Gender Alliance; Trans People of Color Coalition; Transcend Legal; Transgender Allies Group; Transgender Legal Defense & Education Fund; Transgender Resource Center of New Mexico;
- National Organization for Women Foundation; National Women's Law Center; California Women Lawyers, the Center for Reproductive Rights; Columbia Law School Sexuality & Gender Law Clinic; Connecticut Women's Education and Legal Fund; Equal Rights Advocates; Legal Voice; National Association of Women Lawyers; National Partnership for Women & Families; Women's Bar Association of the District of Columbia;
- Organization of American Historians and 47 historians, including Jennifer Mittelstadt, Ronit Y. Stahl, Terry H. Anderson, Christian G. Appy, Beth Bailey, Wayne Bodle, Dirk Bönker, Mark Philip Bradley, D'Ann Campbell, Margot Canaday, John Whiteclay Chambers II, Gregory Daddis, Robert D. Dean, Mary L. Dudziak, Steve Estes, Eugene R. Fidell, Susan R. Grayzel, Elizabeth L. Hillman, William I. Hitchcock, Andrew J. Huebner, Richard H. Immerman, Benjamin H. Irvin, Mark R. Jacobson, David K. Johnson, Donald F. Johnson, Jeffrey P. Kimball, Richard H. Kohn, Scott

Laderman, Meredith H. Lair, Mark Atwood Lawrence, Wayne E. Lee, Anne C. Loveland, Catherine Lutz, Holly Mayer, Melani McAlister, Laura McEnaney, Stephen R. Ortiz, G. Kurt Piehler, Khary O. Polk, Mary Louise Roberts, Daniel J. Sargent, Michael Sherry, Jennifer Siegel, Jeremi Suri, Charissa J. Threat, Kara Dixon Vuic, and Vanessa Walker;

- Retired Military Officers and Former National Security Officials, including Brigadier General Ricardo Aponte, USAF (Ret.); Vice Admiral Donald Arthur, USN (Ret.); Michael R. Carpenter; Brigadier General Stephen A. Cheney, USMC (Ret.); Derek Chollet; Rear Admiral Jay A. DeLoach, USN (Ret.); Major General (Ret.) Paul D. Eaton, USA; Brigadier General (Ret.) Evelyn "Pat" Foote, USA; Vice Admiral Kevin P. Green, USN (Ret.); General Michael Hayden, USAF (Ret.); Chuck Hagel; Kathleen Hicks; Brigadier General (Ret.) David R. Irvine, USA; Lieutenant General Arlen D. Jameson (USAF) (Ret.); Brigadier General (Ret.) John H. Johns, USA; Colin H. Kahl; Lieutenant General (Ret.) Claudia Kennedy, USA; Major General (Ret.) Dennis Laich, USA; Major General (Ret.) Randy Manner, USA; Brigadier General (Ret.) Carlos E. Martinez, USAF (Ret.); General (Ret.) Stanley A. McChrystal, USA; Kelly E. Magsamen; Leon E. Panetta; Major General (Ret.) Gale S. Pollock, CRNA, FACHE, FAAN; Rear Admiral Harold Robinson, USN (Ret.); Brigadier General (Ret.) John M. Schuster, USA; Rear Admiral Michael E.

Smith, USN (Ret.); Brigadier General (Ret.) Paul Gregory Smith, USA; Julianne Smith; Admiral James Stavridis, USN (Ret.); Brigadier General (Ret.) Marianne Watson, USA; William Wechsler; and Christine E. Wormuth;

- Massachusetts, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and the District of Columbia;
- Service Women's Action Network; High Ground Veterans Advocacy; Iraq and Afghanistan Veterans of America; National Law School Veterans Clinic Consortium; National Veterans Legal Services Program; New York City Veterans Alliance; Protect Our Defenders;
- The Trevor Project;
- Vice Admiral Donald C. Arthur, U.S. Navy (Ret.); Major General Gale Pollock, U.S. Army (Ret.); and Rear Admiral Alan M. Steinman, U.S. Public Health Service/U.S. Coast Guard (Ret.).

Many of these amici also participated in district court. Additionally, Rudy DeLeon participated as amicus in district court. Buzzfeed, Inc. moved to intervene to seek access to a teleconference in district court.

B. *Rulings Under Review*. Appellants seek review of the opinion and orders of the Honorable Colleen Kollar-Kotelly in *Doe 2 v. Trump*, Civ. No. 17-1597, including the opinion and accompanying order of August 6, 2018 (Dkt. Nos. 156 and 157). The government wishes to correct its prior certificate to note that the opinion is available at 315 F. Supp. 3d 474.

C. *Related Cases.* This case was previously on appeal before this Court as *Doe 1 v. Trump*, No. 17-5267, but the appeal was voluntarily dismissed. There is an appeal and mandamus petition involving similar issues pending in *Karnoski v. Trump*, No. 18-35347 (9th Cir.), and *In re Trump*, No. 18-72159 (9th Cir.), respectively.

s/ Tara S. Morrissey
Tara S. Morrissey

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GLOSSARY

APA	Administrative Procedure Act
DSM-5	*Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition
RAND	RAND National Defense Research Institute

INTRODUCTION AND SUMMARY

As the government's opening brief explained, the injunction here rested on the false premise that the policy announced by the Secretary of Defense in March 2018 was indistinguishable from the one set forth in a revoked presidential memorandum from last year. Although plaintiffs reprise that mischaracterization of the military's new policy as the implementation of a "ban" allegedly ordered by the President in 2017, their repetition of the district court's misguided reasoning does not improve it.

Once that key premise is set aside, plaintiffs' 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 nationwide. 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). 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 or the medical treatment of gender transition (subject to various exceptions) and required transgender individuals without that condition to meet the standards associated with their biological sex. In other words, plaintiffs' preferred policy 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. And plaintiffs offer no good reason for why the line the military has now chosen falls outside constitutional bounds.

ARGUMENT

I. The Department's 2018 Policy Is Constitutional

A. The 2018 Policy Must Be Considered On Its Own Terms

Most of plaintiffs' arguments hinge on the untenable assertion that the 2018 policy is "the same ban" allegedly "ordered by the President" last year. Br.15. As a matter of both substance and process, the 2018 policy is markedly different from the one addressed in the President's 2017 memorandum (Govt.Br.37-46), and plaintiffs' responses fail to rehabilitate that critical defect in the district court's reasoning.

1. Plaintiffs cannot dispute that while the 2017 memorandum concerned transgender status, the 2018 policy turns on a medical diagnosis (gender dysphoria) and a related medical treatment (gender transition). Govt.Br.38-39. In an effort to blur this distinction, they seek to redefine what it means to be transgender. Plaintiffs claim that the 2018 policy discriminates on the basis of "transgender status" because anyone who does not undergo "gender transition" is, by "defini[tion]," not transgender. Br.20. But in doing so, they put themselves at odds with the American Psychological Association, RAND, their amici, and their evidence, all of which confirm that transgender individuals are those who *identify* with a gender different from their biological sex, that only *some* transgender individuals suffer from gender dysphoria, and that only *some* of those individuals choose to address that condition through gender transition. *See* JA280-81, 288-89, 461, 622-23, 752, 761, 770 n.8, 933, 1056-59; AMA.Amicus.Br.7-14. According to a survey discussed in the RAND report, for instance, 18% of transgender

individuals plan to never transition. *See* JA636 & n.2. Indeed, plaintiffs themselves correctly "defin[e]" transgender individuals as those who "do not identify or live in accord with their birth sex" (Br.15), before shifting to the narrower "defini[tion]" of those "who require or have undergone 'gender transition'" to advance their case. Br.20. And plaintiffs cannot dismiss the "broader meaning" of "transgender" as "irrelevant" (Br.23), while simultaneously claiming that the 2018 policy "hinges on a person's transgender status." Br.20.[1]

Plaintiffs likewise cannot dispute that transgender individuals without gender dysphoria may serve under the 2018 policy, even though they would have been disqualified under the 2017 memorandum. Govt.Br.38-39. Instead, plaintiffs claim that because such individuals must adhere to the standards of their "biological sex," this aspect of the 2018 policy is akin to demanding that Muslim servicemembers "renounce" Islam. Br.22. Plaintiffs err, however, in equating neutral standards with prohibitions on religious beliefs, as illustrated by the fact that the same standards were imposed under the Carter policy, which the district court, at plaintiffs' urging, ordered the military to maintain. Govt.Br.40-41. Indeed, plaintiffs admit that under the Carter policy, transgender servicemembers had to comply with the standards associated with

[1] Contrary to plaintiffs' claim (Br.23), the "disqualification based on 'transsexualism' that existed before 2016 and that the President ordered" was not limited to individuals who "require or have undergone gender transition." As a 2014 study confirms, "[e]ven transgender service members who do not wish to take hormones, have surgery, or undergo any other aspect of gender transition" were disqualified under the pre-2016 policy's standards for "transsexualism." JA784; *see* Govt.Br.38-39.

their biological sex until their transition was "complete" (Br.45), and never dispute that the only transgender servicemembers who could transition under that policy were those diagnosed with gender dysphoria. Govt.Br.12. But if a "requirement to serve in one's biological sex *is* a transgender ban" (Br.15), then the Carter policy—which also permitted only *some* transgender individuals to adhere to the standards associated with their gender identity and only *after* completing transition—is necessarily impermissible under plaintiffs' view of the law as well, even if they may prefer that policy's general "approach[]." Br.24.[2]

Whether it appears under the Carter policy or the 2018 policy, the rule that all servicemembers—whether transgender or not—meet the standards associated with their biological sex (absent an exception) is equivalent to the neutral prohibition on wearing headgear upheld in *Goldman v. Weinberger*, 475 U.S. 503 (1986). Just as the Supreme Court accepted that this rule would render service impossible for some members of particular faiths, *see id.* at 509-10, the military here acknowledged that "[m]any transgender persons may … be unwilling to adhere to the standards associated with their biological sex," but that others "have served, and are serving, with distinction under [those] standards," and could continue to do so. JA274. Plaintiffs agree that the

[2] While plaintiffs compare this facially neutral requirement to "laws restricting marriage to different-sex couples" (Br.22), they fail to mention that the Supreme Court invalidated such laws because they "infring[ed]" on "the fundamental right to marry." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015). Plaintiffs wisely do not contend that there is a fundamental right to serve in the military.

regulation in *Goldman* was "*facially neutral*" (Br.36), and offer no reason why *gender* identity should be accorded greater solicitude than *religious* identity.

Nor can plaintiffs reconcile their theory that the 2018 policy is simply "a plan that *implements* the President's directive that transgender people be excluded from the military" (Br. 18) with the fact that the reliance exemption would allow at least 937 transgender servicemembers to adhere to the standards associated with their gender identity. JA275 n.10; Govt.Br.39. While plaintiffs now claim that this exemption is consistent with the 2017 memorandum's directive to the Secretary to "address transgender individuals currently serving" (Br.24), they took the opposite position before the 2018 policy, insisting that the "discharge" of every transgender servicemember was "certainly impending," and that the only "detail[]" to be addressed was "when." Doc.55, at 8. In any event, this belated concession defeats their theory that the 2017 memorandum and the 2018 policy simply "formalized" the President's "announce[ment] via Twitter" that the government "will not accept or allow transgender individuals to serve in any capacity in the U.S. military." Br.6. And that the 2018 policy did not, in fact, deliver "what the President directed" (Br.1), is confirmed by his need to "revoke" his 2017 memorandum and "any other directive [he] may have made with respect to military service by transgender individuals," JA261, a fact plaintiffs never address. All of this is presumably why the district court, shortly after the 2018 policy was released, described it as "a new policy" and "not an outright ban as it was before." Doc.102, at 6.

2. Even if the 2018 policy were somehow 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," JA261. 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, JA264, and that independent military judgment should be assessed on its own terms.

Faced with these statements, plaintiffs insinuate that the Secretary and other military leaders have engaged in misrepresentation and that "discovery" is needed "to test" their assertions. Br.26. Their principal support for this remarkable allegation is the claim that the 2017 memorandum "'directed' the Secretary to ban transgender service" as a matter of permanent military policy. Br.27. But 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." JA406; *see* Govt.Br.42. And while plaintiffs claim that "nothing in the record indicates that is how the Panel and Secretary Mattis approached their task" (Br.27), both the Secretary's memorandum

and the Department's report invoked the President's statement that the military could provide him with a contrary recommendation. JA263, 285.

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 tweet. JA425-26. Although plaintiffs quibble over that study's scope (Br.28), 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 accession standards that they delayed implementing those standards to conduct a review involving "all relevant considerations," JA425, which ultimately produced the 2018 policy. And while plaintiffs dismiss this ongoing review as "superseded by" the President's 2017 memorandum (Br.28), that confirms that they believe the military cannot depart from the Carter policy for the remainder of this administration, notwithstanding the rejection of an indistinguishable theory in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). Govt.Br.45-46. Plaintiffs have no response to the similarities between their flawed claim that the military's process was not "independent from[] the President's initial policy decisions" (Br.26) and the failed argument of the challengers in *Hawaii*, who objected that the "review process" underlying the proclamation "was dictated by EO-2, an order that was judged unconstitutional by multiple courts." Resp. Br. at 73, *Hawaii*, *supra* (No. 17-965).

3. Given these differences in substance and process, plaintiffs' fixation on this appeal's posture is misplaced. Whether viewed as an extension of the 2017

injunction or a refusal to dissolve, the district court's 2018 order cannot stand. Even if it were necessary to establish "changed circumstances" here (Br.19), the government has done so through both (i) a new policy that prompted plaintiffs to amend their complaint and add new challengers, JA190-211; and (ii) the exhaustive study and professional military judgment that the district court believed the 2017 memorandum lacked, JA177-80.

Similarly, the posture of this appeal does not, as plaintiffs insist (Br.30-31, 52-53), shield the district court's rulings that the 2018 policy triggers heightened scrutiny and merits a nationwide injunction. The government is not asking this Court to "revisit[]" the injunction of the *2017 memorandum* (Br.30), as that memorandum has been revoked and that controversy has been mooted. Govt.Br.46 n.3. Instead, the government seeks a ruling on whether the *2018 policy* should be subject to heightened scrutiny or a nationwide injunction. Those issues necessarily "could not have been raised" in 2017 (Br.30), which is presumably why the district court never suggested the government was barred from pursuing them, but instead rejected our arguments, JA94 n.15 (nationwide injunction), or held that further factual development was necessary, JA58-62 (level of scrutiny). That the government "abandoned" its appeal of the 2017 preliminary injunction (Br.52) makes no difference. Had the government never exercised its option of taking that interlocutory appeal, it would still be entitled to litigate all issues surrounding an injunction of the 2018 policy, as appeals review "judgments, not opinions." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984). Under

plaintiffs' theory, by contrast, defendants would face perverse incentives to immediately appeal a preliminary injunction rather than modify the enjoined action, lest they be subsequently precluded from appealing legal issues common to both the original injunction and a later refusal to dissolve it despite the modification. In short, the entry of a sweeping preliminary injunction cannot insulate a district court's subsidiary legal rulings from further review in the face of changed circumstances.

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 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). Govt.Br.22-23. That the "title[]" of the Department's report mentions "Military Service *By Transgender Persons*" does not mean the 2018 policy "excludes transgender people based on their transgender status" (Br.20, 37); after all, the memorandum establishing the Carter policy uses a similar phrase ("Military Service of Transgender Service Members"). JA585. These titles simply reflect that both policies addressed the circumstances in which transgender individuals may serve—and both allowed some, but not all, to do so. Any non-

transgender individual with a history of gender dysphoria will also be subject to the same standards under the 2018 policy. *See* Govt.Br.41; JA273, 288 n.57, 310. In short, while the 2018 policy specifically addresses service by transgender individuals, it *applies neutral rules* to them concerning whether they have a history of the medical diagnosis of gender dysphoria or the medical treatment of gender transition.

Nor does the 2018 policy contain "unusual" features suggesting animus. Br.31. Plaintiffs fail to specify which "'overbroad' and 'hypothetical' generalizations" they believe produced the 2018 policy, and their claim that this policy "sweeps broadly" (*id.*) cannot be reconciled with its categorical exceptions and individualized waiver process, including for those who have undergone gender transition or seek to do so. JA273. And plaintiffs' assertion that the 2018 policy "revokes rights that transgender people were previously granted" (Br.31) is misplaced, as the challenger in *Goldman* wore his yarmulke on base "for years" before he was ordered to stop. 475 U.S. at 526 (Blackmun, J., dissenting). Finally, that the military officials responsible for the "Carter Policy[]" reached different conclusions (Br.31) is "quite beside the point." *Goldman*, 475 U.S. at 509 (dismissing "expert testimony" from former military official "that religious exceptions" to uniform standards "will increase morale"); *see also Rostker v. Goldberg*, 453 U.S. 57, 63 (1981) (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"). The Supreme Court has repeatedly remained unmoved, including as recently as in *Hawaii*, by the fact that a particular

national-security policy is not supported by the views of certain "former national-security officials," 138 S. Ct. at 2444 (Sotomayor, J., dissenting), cautioning that courts "cannot substitute [their] 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. There is no reason why the views of former military leadership in this case should be given greater weight.

2. Even if an analogous civilian policy would trigger heightened scrutiny, military-deference principles require an approach akin to rational-basis review here. Govt.Br.19-22. Plaintiffs resist this conclusion, but fail to meaningfully address the relevant Supreme Court precedents. They dismiss *Goldman* and *Hawaii* as involving "facially neutral" rules (Br.35, 36), but that is true of 2018 policy, *see supra* pt. I.A.1, even though it, like the proclamation in *Hawaii*, is alleged to have discriminatory purposes and effects. *See* 138 S. Ct. at 2417 (discussing allegation that the proclamation "operates as a 'religious gerrymander'"). In any event, *Goldman* employed a highly deferential form of review even though heightened scrutiny applied to facially neutral laws that substantially burdened religious exercise at that time. *See* 475 U.S. at 506. And plaintiffs' assertion that "immigration cases" get more "deference" than "military" ones (Br.35) cannot be reconciled with *Hawaii*'s treatment of "immigration policies, diplomatic sanctions, and military actions" as a set, 138 S. Ct. at 2420 n.5, or *Rostker*'s observation

that "perhaps in no other area has the Court accorded Congress greater deference" than in "military affairs," 453 U.S. at 64-65.

Nor did *Rostker* apply heightened scrutiny to a sex-based draft-registration law. *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.). For example, the Court relied on "administrative problems" and 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 scarcely address any of this, and their assertion (Br.36) that the new justifications Congress gave in 1980 for a statute enacted in 1948 were not "*post hoc* in response to litigation," *United States v. Virginia*, 518 U.S. 515, 533 (1996), is mystifying, as the challenge to that statute was pending and the Justice Department asked Congress to "formulate the kind of record" that "will be helpful rather than hurtful in the litigation." Kastenmeier.Amicus.Br. at 20 n.14, *Rostker*, *supra* (No. 80-251).

Similarly, regardless of whether one characterizes the Supreme Court as having relied on a "post-hoc" rationale (Br.36) in *Schlesinger v. Ballard*, 419 U.S. 498 (1975), when it upheld different mandatory-discharge requirements for male and female officers

based merely on what it thought "Congress *may* … quite *rationally* have believed," *id.* at 508 (emphases added), it is difficult to imagine the Court taking a similarly lax approach to a civilian sex-based classification, either then or now, *see Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.").

Conversely, plaintiffs' authorities (Br.33-34) do not support their narrow conception of military deference. As this Court has explained, the Supreme Court in *Frontiero v. Richardson,* 411 U.S. 677 (1973), "extend[ed] no special deference to statutes providing benefits to members of the uniformed services" because those laws "never purported to be a congressional judgment on a uniquely military matter." *Goldman v. Secretary of Def.*, 734 F.2d 1531, 1537 (D.C. Cir. 1984). As for *Emory v. Secretary of Navy*, 819 F.2d 291 (D.C. Cir. 1987) (per curiam), that case held only that a constitutional claim against the Navy was justiciable, while stressing the Judiciary's "extreme reluctance to interfere with the military's exercise of its discretion over internal management matters." *Id.* at 293-94. Similarly, plaintiffs seize on dictum from *Steffan v. Perry*, 41 F.3d 677, 689 n.9 (D.C. Cir. 1994) (en banc), but overlook this Court's holding that "[i]t is hard to imagine a more deferential standard than rational basis, but when judging the rationality of a regulation in the military context, we owe even more special deference," *id.* at 685. Plaintiffs' remaining cases either did not involve the

military, *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir 1992) (Thomas, J.), or are out-of-circuit or district court decisions, some of which predate *Rostker*.[3]

Finally, contrary to plaintiffs' unsupported assertion, an application of military deference does not require a "factual" finding of "independent military judgment" (Br.32), just as an application of *Chevron* deference does not require a factual finding of an actual exercise of independent agency "expertise." *Chevron*, 467 U.S. at 865. The Supreme Court has applied military deference to uphold even a congressional sex-based classification that was "contrary" to "the serious view of the Executive Branch, including the responsible military services." *Rostker*, 453 U.S. at 83 (White, J., dissenting). This is because deference to military decisionmaking rests not only on the lack of judicial expertise over military affairs, but also on the Constitution's allocation of military decisionmaking to the political branches, which in this context have delegated that responsibility to the "military authorities." *Goldman*, 475 U.S. at 508.

C. The 2018 Policy Survives Constitutional Review

The 2018 policy easily withstands the highly deferential form of review applicable here. Govt.Br.23-37. Plaintiffs do not dispute the Department's compelling interest in preserving military readiness, discipline and cohesion, and military resources, but rather

[3] *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976), for example, rested on an untenable lack of "judicial deference to military decisions" that has since been "rejected … in light of [*Rostker*]." *Mack v. Rumsfeld*, 784 F.2d 438, 439 (2d Cir. 1986) (per curiam); *see also Goldman*, 734 F.2d at 1537 (similar recognition by this Court).

insist that the 2018 policy is so discontinuous with those interests that it cannot survive even rational-basis review. Br.38. They fail to justify that remarkable claim.

1. On the issue of psychological fitness, plaintiffs—invoking statements from outside organizations and their own asserted expert—criticize the military's concerns about the "scientific uncertainty" surrounding the efficacy of gender transition as a treatment. Br.42. But while plaintiffs and their supporters 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 in general and that, in any event, "it is not known how well these findings generalize to military personnel." JA626. And although plaintiffs claim that "tonsillectomies" would not satisfy the military's standards for scientific reliability (Br.42), "sex reassignment surgery is 'a unique intervention not only in psychiatry but in all of medicine,'" JA290, and was not accepted in the military until the Carter policy's appearance in mid-2016. Indeed, the Centers for Medicare and Medicaid Services found in 2016 that there was "not enough high quality evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria," based on its "comprehensive review" of "the universe of literature regarding sex reassignment surgery" consisting of more than "500 articles, studies, and reports" addressing a general population. JA292. Here, the Secretary simply made a more cautious "evaluation of the underlying facts" than his predecessor, and plaintiffs offer no basis for why the contrary views of outside organizations and their own asserted expert may

supplant this assessment. *Hawaii*, 138 S. Ct. at 2422; *see supra* pp. 10-11. While plaintiffs may think military decisionmaking cannot proceed on "cautio[n]" and "uncertainty" alone (Br.44), the Supreme Court has admonished that in the "national security" context, "conclusions must often be based on informed judgment rather than concrete evidence," and it would be "dangerous" to "demand[] hard proof." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34-35 (2010).

In all events, the military did provide hard data underlying its concerns. JA287-95. Given this evidence, plaintiffs cannot dispute that servicemembers with gender dysphoria "are more likely to be suicidal" and have more "mental-health visits" than others (Br.43 & n.13), and their quibbles over the data are insubstantial. Plaintiffs invoke (Br.39 n.11) a report criticizing the military for underestimating the frequency of suicidal ideation among servicemembers as a whole, but neglect to mention that this report eventually acknowledges that "service members diagnosed with gender dysphoria are slightly more prone to suicidal ideation." Doc.148-2, Ex.B, at 30. Similarly, while plaintiffs and their supporters may blame the "*require[ments]*" of the "Carter Policy" for the higher number of mental-health visits by servicemembers with gender dysphoria (Br.43), their view that even the Carter policy was "overly cautious," Doc.148-2, Ex.B., at 26, only underscores how extreme their position is.

Plaintiffs ultimately retreat to the claim that accession standards that screen for anxiety, depression, and suicidality can address the military's concerns about admitting applicants with gender dysphoria. Br.38-40, 43 n.13. But this argument gets things

backwards: In general, a history of *any* mental-health condition is "automatically disqualifying," with only "a few conditions"—anxiety, depression, and gender dysphoria—subject to categorical 36-month "stability" exceptions. JA288; *see* JA255-57. And notwithstanding the general standards for anxiety, depression, and suicidality, the military has long disqualified applicants with a history of disorders associated with those particular mental-health concerns, such as post-traumatic stress disorder or body dysmorphic disorder. *See* JA255-57. In addition, gender dysphoria can involve not only "clinically significant distress" but also "impairment in social, occupational, or other important areas of functioning," which itself raises readiness concerns, JA281, as confirmed by the fact that servicemembers suffering from "[a]ny DSM-5 psychiatric disorder with residual symptoms" that "impair social or occupational performance" need a waiver to deploy, JA302. Indeed, the Carter policy itself presumptively disqualified those with gender dysphoria notwithstanding the existence of the separate standards for anxiety, depression, and suicidality. JA588-89.

2. Plaintiffs' critique of the Department's deployability analysis fares no better. While they object that there is no deployability justification for disqualifying those "who have completed gender transition" and who therefore "need no surgeries" or "further medical care beyond routine hormone therapy" (Br.40), the military's accession standards regularly disqualify applicants on the basis of previous conditions or treatments, even if no further care is required. For example, any history of gestational diabetes, depression requiring inpatient treatment, or certain surgeries is disqualifying,

even if the applicant has long been cured or needs no further treatment. JA225, 228, 244, 250, 255. This simply reflects that the military's accession standards—which span 35 pages of disqualifying conditions and treatments, ranging from a history of certain food allergies to the current use of Invisalign, JA222-57—are extremely cautious, rendering 71% of Americans of prime military age (17 to 24) presumptively ineligible for service, JA274. And contrary to plaintiffs' suggestion (Br.40), these accession standards would disqualify similarly situated non-transgender individuals. For example, non-transgender applicants would be presumptively disqualified if they had a history of gender dysphoria, *see supra* pp. 9-10, had undergone genital surgery following an injury (Govt.Br.29), or required the same "routine hormone therapy" used in gender transition (Br.40)—testosterone or estrogen supplementation—to treat hypogonadism (the condition in which the body fails to produce enough testosterone or estrogen), JA251.

Plaintiffs next criticize the military for its concerns about "the absence of evidence on the impact of deployment" (Br.42), while failing to address the actual limits on deployment, which they barely contest. Govt.Br.27-29. For instance, while plaintiffs never dispute that Endocrine Society guidelines require "quarterly bloodwork" during the first year of cross-sex hormone therapy, they point to the view of one of the contributors to those guidelines that such treatment is unnecessary (Br.41 n.12), without explaining why the military could not consider the guidelines in assessing what treatment may be required.

Finally, plaintiffs baselessly assert (Br.41) that the 2018 policy would subject any servicemembers who desired gender transition (but never qualified for the reliance exemption) to "automatic discharge" rather than the standard "medical evaluation process" governing other disqualifying conditions or treatments. Nothing in the Department's report or the Secretary's memorandum suggests that this would be the case. If anything, the Department's report emphasizes the availability of individualized waivers, including for this set of individuals. JA273.

3. Turning to discipline and cohesion, plaintiffs have almost nothing to say about the military's concerns that exempting servicemembers on the basis of gender identity from its sex-based standards—which plaintiffs acknowledge are legitimate (Br.44)—could endanger or foster resentment among others, especially in the areas of combat training, fitness standards, grooming, and uniforms. Govt.Br.33-35. At most, plaintiffs suggest that relying on these concerns would give effect to private bias (Br.46-47), but the military may properly consider that exempting one set of individuals from neutrally applicable standards may impose burdens on, or generate resentment among, those who object to *preferential treatment*, especially when the law sometimes *requires* consideration of such risks elsewhere. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014) ("[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"). And while plaintiffs insinuate that considerations of "unit cohesion" should be discounted given the military's previous exclusions of other groups (Br.47), that history has not stopped "the Supreme Court" from ruling that the military's "assessments of morale, discipline, and unit cohesion … are well beyond the competence of judges." *Bryant v. Gates*, 532 F.3d 888, 899 (D.C. Cir. 2008) (Kavanaugh, J., concurring); *see Goldman*, 475 U.S. at 507-10.

Instead, plaintiffs mainly discuss privacy concerns, relying heavily on cases from the civilian context. Br.45. But 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. Govt.Br.30. And while plaintiffs criticize the military's concerns as "speculati[ve]" (Br.46), they never address the actual privacy problems discussed in the military's report, *see* JA305-08, or acknowledge that its "predictive judgments" in this area likewise merit the Judiciary's respect, *Hawaii*, 138 S. Ct. at 2421; *see* Govt.Br.35. Plaintiffs also miss the point (Br.45 n.14) of the government's citation of *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 686-89 (N.D. Tex. 2016), which is that courts may construe "sex" in the statutes mandating separate living arrangements for male and female recruits to mean biological sex rather than gender identity. Govt.Br.32.

4. Finally, plaintiffs assert that considering military resources is inappropriate "[e]ven under rational-basis review" because servicemembers who require transition are "similarly situated" to those with other diagnoses that generate medical costs. Br.48. But that simply begs the question: The military 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." JA309. In all events, the military is under no duty to fund every treatment its servicemembers may desire, let alone admit those who likely will seek such measures. *See id.*; *cf. Geduldig v. Aiello*, 417 U.S. 484, 494-95 (1974) (state may insure "most risks of employment disability" without insuring "disability … attributable to normal pregnancy").

II. Plaintiffs Cannot Satisfy The Equitable Criteria For Injunctive Relief

A. Plaintiffs' response confirms that they have no standing to challenge the 2018 policy, much less obtain an injunction against its implementation. Govt.Br.47-51. They do not dispute that six of the seven currently serving plaintiffs qualify for the reliance exemption and thus may continue to adhere to the standards associated with their gender identity. Instead, plaintiffs insist (Br.49) that the 2018 policy subjects these servicemembers to stigmatic injury, without addressing that *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008) (Kavanaugh, J.), rejected an analogous theory. Govt.Br.49. And while these plaintiffs claim that the 2018 policy would "imperil" their "careers," their only support for that assertion is that one of them received an "unfavorable" work

assignment (Br.50) shortly after the now-revoked "*prior* negative proclamations" made by the President in 2017. JA79; *see* JA963. Under the reliance exemption, which permits plaintiffs to serve "on the terms that … existed" under the Carter policy, JA311, there is no basis to assume that anything similar would occur.

Plaintiffs likewise do not contest that the seventh servicemember plaintiff, Jane Doe 6, could qualify for the reliance exemption by obtaining a gender-dysphoria diagnosis but refuses to do so. Although they claim this "now-or-never choice" is itself an injury (Br.51), Jane Doe 6 currently faces such a decision even absent the 2018 policy, as a separate regulation imposes a duty to disclose such a medical condition to the military right now. *See Department of Defense Instruction No. 6025.19* (June 9, 2014), http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/602519p.pdf.

Nor do plaintiffs dispute that the three aspiring servicemembers have not shown that "they would otherwise be eligible for military service." Br.51. Instead, they claim a competitive injury, without ever addressing that such a theory of standing does not work here given that one generally need not compete to enter the military. Govt.Br.51.

In all events, plaintiffs neither contest that a "higher requirement of irreparable injury should be applied in the military context" Govt.Br.50 (collecting cases), nor explain how any of their asserted injuries would be irreparable. Thus, even if they had standing, an injunction would remain inappropriate.

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. JA264; *see* Govt.Br.46-47. At most, they assert that "thousands of transgender individuals are currently able to meet [military] standards and continue to serve without issue." Br.52. Their cited support, however, is simply recent testimony from some military officials who were unaware of reported problems regarding unit cohesion. JA831-36. As the Secretary has since explained, such reports would not necessarily be shared with those officials due to reporting limitations in the Carter policy. *Hearing on the Department of Defense Budget Posture in Review of the Defense Authorization Request for Fiscal Year 2019 and the Future Years Defense Program: Hearing Before the S. Comm. on the Armed Services*, 115th Cong. 63 (2018), https://www.armed-services.senate.gov/imo/media/doc/18-44_04-26-18.pdf.

III. The Nationwide Injunction Is Inappropriate

At a minimum, constitutional and equitable principles require vacating the preliminary injunction insofar as it provides nationwide relief. Govt.Br.51-52. Relying on a 40-year-old district court opinion from Michigan, plaintiffs respond that in the event they "have standing," Article III imposes no limits on equitable relief going beyond their own asserted injuries to address "the nature of the violation." Br.53-54. Yet the Supreme Court recently reaffirmed that "'standing is not dispensed in gross': A plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). Thus, under Article III, the proper remedy in a vote-dilution challenge brought by an individual voter entailed "revising only such districts as are necessary to reshape the voter's district" rather than "restructuring all of

the State's legislative districts," *notwithstanding* that the alleged gerrymandering was "statewide in nature" rather than limited to each plaintiff's particular district. *Id.* at 1930-31. That holding confirms that it is the scope of the plaintiff's injury and not the defendant's policy that governs the permissible breadth of an injunction under Article III. Plaintiffs' "equitable" authorities for their contrary theory uniformly involve situations, such as school desegregation, in which providing full relief for the plaintiffs before the court necessarily affects non-parties. Br.54; *see McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) (distinguishing such cases). And plaintiffs' bid for a similar approach here based on their alleged stigmatic injuries (Br.53) only underscores the need to reject that specious theory of standing. *See supra* pt. II.A.

Nor is it true that a "facial challenge" necessitates "facial relief" (Br.53); the nature of a plaintiff's legal arguments does not render a remedial order immune from Article III or equitable principles. *See, e.g.*, *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 649 (9th Cir. 2011) (rejecting nationwide injunction in "facial challenge"). To be sure, this Court has permitted a permanent nationwide injunction against the enforcement of a regulation on the basis of language in the Administrative Procedure Act (APA) that unlawful agency action should be "set aside," even though that language does not specify whether the action should be set aside *as applied to the plaintiff* or facially. *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1410 (D.C. Cir. 1998). But even accepting *National Mining*'s holding as binding here, the injunction under review does not rest on that statutory provision. Nor did *National Mining* rule that such

relief would be appropriate even in all APA cases, let alone bless a nationwide *preliminary* injunction, an equitable tool designed merely to "preserve the relative positions of *the parties* until a trial on the merits can be held." *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (emphasis added); *accord Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983). Rather, in the context of a final judgment that held an agency rule invalid and that was affirmed by this Court, *National Mining* created a limited exception to the general rule that the government may re-litigate issues in different circuits, 145 F.3d 1409-10—a rule justified by "the benefit" the Supreme Court "receives from permitting several courts of appeals to explore a difficult question" and the harms of "freezing the first final decision rendered on a particular legal issue," *United States v. Mendoza*, 464 U.S. 154, 160 (1984). Here, by contrast, the district court issued a sweeping interim remedy effectively eliminating the ability of other courts that are currently considering the same policy to issue rulings with any practical effect. Plaintiffs' position is that if *any* court rules in their favor, nationwide relief is appropriate, but the government must win *all* the cases to prevail (because none of them is a class action). Equity does not permit such a one-way class action.

Finally, plaintiffs fail to distinguish *United States Department of Defense v. Meinhold*, 510 U.S. 939 (1993). Contrary to their claim, the Ninth Circuit's subsequent decision to bar only the plaintiff's discharge turned not on that court's holding that the challenged policy was invalid "only as 'applied'" (Br.54 n.17), but on the fact that the case was "not a class action" and an injunction limited to the plaintiff thus provided

"[e]ffective relief," *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1480 (9th Cir. 1994). In any event, the Ninth Circuit's later ruling on the merits hardly suggests that the Supreme Court stayed the injunction's universal scope solely because it deemed the policy invalid only with respect to the particular plaintiff.

CONCLUSION

The district court's preliminary injunction should be vacated in whole, or at least as to all individuals except for plaintiffs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6498 words, excluding the parts of the brief excluded by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1). 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.

s/ Tara S. Morrissey
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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2018, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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