[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

GOVERNMENT'S MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 8, the government respectfully requests a stay of the district court's nationwide preliminary injunction pending this Court's disposition of the appeal and, if this Court affirms, pending the disposition of a petition for a writ of certiorari and any further proceedings in the Supreme Court. At a minimum, the government respectfully requests that the Court stay the nationwide scope of the injunction for the same period. The preliminary injunction bars the military from implementing a policy that Secretary of Defense James Mattis announced earlier this year after an extensive review of military service by transgender individuals, and even a stay of only the nationwide scope of the injunction—which would prevent the injunction from sweeping beyond the parties to this case—would ensure that the injunction does not cause more harm to the government than is necessary while this appeal is pending. The Supreme Court has previously stayed a nationwide injunction against another military policy to the extent it swept beyond the parties to the case, *see U.S. Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993), and this Court should follow the same course in this appeal.

As set forth below, on November 23, the Solicitor General filed a petition for a writ of certiorari before judgment in the pending appeal. The Solicitor General has determined that, if necessary, the government will file in the Supreme Court a request, as an alternative to certiorari before judgment, for a stay of the district court's preliminary injunction. Pursuant to Supreme Court Rule 23.3, the government first

requested a stay in district court, which was denied on November 30. Ex. A. The government now respectfully requests that this Court stay the district court's preliminary injunction, or at a minimum stay the nationwide scope of the injunction. *See* S. Ct. 23.3. Absent relief from this Court, the Solicitor General plans to file a stay application in the Supreme Court on December 13, in order to ensure that the stay can be considered by the Court along with the pending certiorari petition under the Court's distribution schedule.[1]

BACKGROUND

A. Factual Background

This motion incorporates, and does not restate in full, the background on the relevant military policies found in its opening brief in this appeal. Govt.Br.4-15. Briefly, this appeal involves challenges to government policies concerning military service by transgender individuals. In February 2018, Secretary Mattis proposed a new military policy, JA263, 268, and, in March 2018, the President "revoke[d]" his prior 2017 presidential memorandum on this issue, JA261; *see* JA406 (earlier 2017 presidential memorandum), to allow the military to adopt the Secretary's policy.[2]

[1] Government counsel has contacted Paul Wolfson, counsel for plaintiffs, who indicated that plaintiffs do not consent to the requested relief.

[2] Citations to JA__ refer to the Joint Appendix filed in the underlying appeal.

B. Procedural History

1. On August 9, 2017, plaintiffs—current and aspiring service members—brought this action, challenging the constitutionality of the earlier 2017 presidential memorandum and seeking a preliminary injunction barring its enforcement. Doc.9. As relevant here, plaintiffs alleged that the 2017 presidential memorandum violated their Fifth Amendment right to equal protection by "forbidding transgender people from joining or serving in the military." Doc.9, at 15.

Similar suits were filed in the Central District of California, the Western District of Washington, and the District of Maryland. *See Stockman v. Trump*, No. 17-cv-1799 (C.D. Cal. filed Sept. 5, 2017); *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. filed Aug. 28, 2017); *Stone v. Trump*, No. 17-cv-2459 (D. Md. filed Aug. 28, 2017).

2. In October 2017, the district court issued a nationwide preliminary injunction, requiring the military "to revert to the *status quo* with regard to accession and retention that existed before the issuance of" the President's 2017 memorandum. JA185-86; *see* JA110. The government appealed, Doc.66, and sought a partial stay with respect to the issue of accession, Doc.73, at 1; *see* Govt. Stay. Mot., *Doe 1 v. Trump*, No. 17-5267, (D.C. Cir. Dec. 11, 2017). After both the district court and this Court denied a stay, Doc.75; *see Doe 1 v. Trump*, No. 17-5267, 2017 WL 6553389, at *1 (D.C. Cir. Dec. 22, 2017) (per curiam)—and the Fourth Circuit denied a request for a partial stay of a similar nationwide injunction, *Stone v. Trump*, No. 17-2398, 2017 WL 9732004 (4th Cir. Dec. 21, 2017)—the government dismissed its appeal, *see* Order, *Doe 1 v. Trump*, No. 17-5267,

(D.C. Cir. Jan. 4, 2018). Absent a stay of those injunctions and similar nationwide injunctions in *Stockman* and *Karnoski*, the military would be forced to implement the accession standards of then-Secretary Ashton Carter in any event. The government also expected that Secretary Mattis would soon be proposing a final policy that would render moot any appeal of the December 2017 injunction.

3. In March 2018, the government informed the district court that the President had issued a new memorandum, which revoked his 2017 memorandum (and any other similar directive) and allowed the military to adopt Secretary Mattis's proposed policy. Doc.96, at 3-4; *see* Doc.95. In light of that new policy, the government moved to dissolve the December 2017 injunction. Doc.96, at 1-38.

In August 2018, the district court denied the government's motion. JA64. The court characterized the Mattis policy as a plan that merely "*implements* the President's 2017 directives that the military not allow transgender individuals to serve in the military." JA87-89. And it dismissed the development of the Mattis policy and accompanying report as merely "*post hoc* processes" that "appear to have been constrained by, and not truly independent from, the President's initial policy decisions." JA96. The court therefore concluded that "the circumstances of this case" had not "in fact genuinely changed in such a way that the . . . preliminary injunction is no longer warranted." JA94.[3]

[3] In a separate order, the district court dismissed the President as a party and dissolved the preliminary injunction "only as it applies to the President." JA100. The

The government appealed, JA189, and moved to expedite the briefing schedule, explaining that the district court's injunction "prevents the adoption of [the Mattis] policy that the military, in its best professional judgment, has determined is necessary," Govt.Mot.3 (Sept. 10, 2018). This Court granted that motion and scheduled oral argument for December 10, 2018.

4. The government did not previously seek a stay in this case, given that at the time of the district court's decision, the Ninth Circuit had already denied a stay pending appeal in *Karnoski*, which therefore kept in place a nationwide injunction against the Mattis policy regardless of any stay in this case. The Ninth Circuit also had denied the government's motion to expedite oral argument, which was held on October 10, 2018.

As explained in our November 7, 2018 letter to this Court, the Solicitor General determined that in light of the importance of the issues at stake and the military's compelling interest in maintaining an effective national defense, it would be necessary to preserve the opportunity for the Supreme Court to hear and decide these issues during the current Term. Accordingly, on November 23, the Solicitor General filed a petition for a writ of certiorari before judgment in *Karnoski*, and filed similar petitions in this case and *Stockman* given the nationwide scope of the injunctions at issue. *See Trump v. Karnoski*, No. 18-676 (U.S.); *Trump v. Doe*, No. 18-677 (U.S.); *Trump v. Stockman*,

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court explained that "[s]ound separation-of-powers principles counsel the Court against granting [injunctive or declaratory] relief against the President directly." JA101.

No. 18-678 (U.S.). As the Solicitor General explained, the November 23 filing would allow the petition to be distributed on December 26, 2018, for consideration at the Court's January 11, 2019 conference, without a motion for expedition. *See* Govt. Letter 1-2, *Trump v. Doe*, No. 18-677 (U.S. Nov. 23, 2018).

If necessary, the Solicitor General also intends to file, as an alternative to certiorari before judgment, requests for a stay pending resolution of the government's appeals and any further proceedings in the Supreme Court. The Solicitor General would file the stay applications on December 13 so that the applications may be considered when the certiorari petitions are distributed. Pursuant to Supreme Court Rule 23.3, the government therefore asked the district court to stay the preliminary injunction or, at a minimum, to stay the nationwide scope of the injunction, Doc.183.

5. On November 30, 2018, the district court denied the government's motion. Ex. A. The court concluded that the government failed to demonstrate a likelihood of success on the merits of its appeal based on its previous analysis of the government's motion to dissolve the preliminary injunction. *Id.* at 6-11.

The district court additionally concluded that the government's challenge to the nationwide scope of the injunction was not likely to succeed. The court explained that plaintiffs were "clearly making a facial challenge" to the 2018 policy and that "a nationwide preliminary injunction is the only way to address fully Plaintiffs' constitutional injury." Ex. A, at 15. The court emphasized that it was addressing plaintiffs' "core class-based injury." *Id.* The court reasoned that a "systemwide"

injunction is "proper" to remedy the alleged "systemwide" violation. *Id.* at 14, 17, 19. The court discredited the military's determination that a preliminary injunction forcing the military to maintain the Carter policy presents substantial risks to the military. *Id.* at 19-22. Additionally, the court found that plaintiffs would be harmed by a stay because they would be "singl[ed] out and stigmatiz[ed] . . . as inherently different and inferior." *Id.* at 24.

In light of the district court's ruling, the government now seeks a stay of the preliminary injunction—or, at a minimum, of the nationwide aspect of the injunction—pending the resolution of the government's appeal in this Court and any further proceedings in the Supreme Court. Absent relief from this Court, the Solicitor General plans to file a stay application in the Supreme Court on December 13, 2018.

ARGUMENT

The Court will hear oral argument on the district court's nationwide preliminary injunction against the Mattis policy on December 10, 2018. In addition to the relief requested in that pending appeal—vacatur of the injunction—the government respectfully requests that this Court immediately stay the district court's preliminary injunction pending the resolution of the appeal and any further proceedings in the Supreme Court. At a minimum, the Court should stay the nationwide scope of the injunction pending those proceedings.

In considering whether to grant a stay pending appeal, courts consider four factors: (1) the applicant's likelihood of success on the merits; (2) whether the applicant

will suffer irreparable injury; (3) the balance of hardships to other parties interested in the proceeding; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). This Court reviews a grant of a preliminary injunction for abuse of discretion, but legal conclusions are reviewed de novo. *Davis v. Pension Benefit Guar. Co.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009). All of those factors support a stay of the preliminary injunction or, at a minimum, its nationwide scope.

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

A. As explained in the government's opening brief (at 19-37), plaintiffs' equal-protection challenge to the Mattis policy lacks merit. Under the Mattis policy, individuals may "not be disqualified from service solely on account of their transgender status." JA287. Like the prior Carter policy, the Mattis policy turns on a medical condition (gender dysphoria) and medical treatment (gender transition)—not any suspect or quasi-suspect classification. JA275-76. Rational-basis review therefore applies, and the Mattis policy satisfies that deferential review because it reflects, *inter alia*, the military's reasoned and considered judgment that "making accommodations for gender transition" would "not [be] conducive to, and would likely undermine, the inputs—readiness, good order and discipline, sound leadership, and unit cohesion—that are essential to military effectiveness and lethality." JA309. In denying a stay, the district court concluded that these arguments are not likely to succeed on appeal, invoking the same flawed reasoning that we addressed in our merits briefs. *See* Ex. A, at 6-11; *see also* Govt.Br.37-46 (explaining errors in district court's analysis).

B. Even if plaintiffs were likely to succeed on their constitutional claims, however, the nationwide scope of the preliminary injunction is improper. Govt.Br.51-52; Reply.23-26. As the government has explained, extending the injunction beyond the plaintiffs transgresses both Article III and longstanding equitable principles by affording relief that is not necessary to redress any cognizable, irreparable injury to plaintiffs. *Id.* Moreover, nationwide injunctions "take a toll on the federal court system" by preventing issues from percolating through the federal courts, establishing an inequitable "one-way ratchet." Govt.Br.52 (quotations omitted). The district court's order denying a stay makes clear that nationwide injunctions enable all potential claimants to benefit from nationwide injunctive relief in a single district court on a so-called "class-based injury," Ex. A, at 15, 19, even when plaintiffs have never sought to certify a class, much less shown that they would satisfy the prerequisites of Federal Rule of Civil Procedure 23. Meanwhile, the government must prevail in every forum, every time, to gain the benefits of prevailing in any one case.

None of the district court's reasons in its order denying a stay withstands scrutiny. First, the district court erred in concluding that, because there was a "systemwide impact" from the Mattis policy, "a systemwide remedy in the form of the Court's nationwide preliminary injunction is appropriate." Ex. A, at 17. The proper focus under Article III and equitable principles is on the impact to the particular plaintiffs in this case. By shifting the inquiry to the impact on nonparties, the district court ran afoul of these bedrock principles, including the rule that injunctive relief must

"be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). The district court's logic would mean that every federal policy could be enjoined nationwide based on a single plaintiff's claim.

Second, and relatedly, the district court incorrectly assumed (Ex. A, at 12) that a facially unconstitutional policy must be enjoined nationwide. This reasoning conflates the nature of the claim (a facial constitutional claim) and the source of plaintiffs' injury (alleged inability to participate in military service). As the government has explained, the nature of a plaintiff's legal arguments does not exempt an injunction from Article III or equitable principles that limit the remedy to addressing plaintiffs' injury. Reply.Br.24. The district court's reliance on *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), is misplaced, because that case addressed only the scope of a law's invalidity, and not the scope of relief that a court should provide. The question whether that invalid law should be enjoined nationwide was neither pressed by the challengers nor passed on by the Supreme Court. Indeed, that issue would have been of minimal significance because holdings of the Supreme Court apply to non-parties as a matter of precedent regardless of the scope of the judgment. Likewise, as we have explained, this Court's decision in *National Mining Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), does not support nationwide relief here. *See* Reply.Br.24-25.

Finally, the district court erred in concluding that "a nationwide preliminary injunction is the only way to address fully Plaintiffs' constitutional injury." Ex. A, at

15. Even if plaintiffs had asserted any cognizable, irreparable injuries from the application of the Mattis policy, *but see* Govt.Br.47-51; Reply.Br.21-22, those injuries would be fully redressed by an injunction limited to plaintiffs themselves. The district court determined that plaintiffs "would be injured even if they were permitted to continue serving in the military" because they would be "stigmatiz[ed] . . . as an inferior class of service member." Ex. A, at 19; *see also id.* at 15. But as we have explained, even if this were true, both the Supreme Court and this Court have concluded that stigma alone is not a cognizable harm. *See* Govt.Br.49; Reply.Br.21-22, 24. The district court did not even attempt to reconcile its standing analysis with this principle. Plaintiffs themselves suffer no cognizable injury from the application of the Mattis policy to other persons.

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

A. The nationwide injunction in this case causes direct, irreparable injury to the interests of the government and the public, which merge here. *See Nken*, 556 U.S. at 435. It does so by forcing the military to maintain a policy that it has determined poses "substantial risks" and threatens to "undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." JA264; *cf. Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.")

(quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Given this severe harm to the federal government—which far outweighs plaintiffs' speculative claims of injury—the Court should stay the injunction in its entirety.

The district court's rejection of the military's assessment of the harms imposed by a preliminary injunction (*see* Ex. A, at 19-23, 25-26) cannot be reconciled with the Supreme Court's "instruct[ion] that, in assessing the balance of equities and the public interest," a court "must 'give great deference to the professional judgment of military authorities' regarding the harm that would result to military interests if an injunction were granted." *In re Navy Chaplaincy*, 697 F.3d 1171, 1179 (D.C. Cir. 2012) (quoting *Winter v. NRDC*, 555 U.S. 7, 24 (2008)). Contrary to the district court's conclusion (Ex. A, at 20), the record includes numerous findings regarding the harms imposed by the Carter policy, not the least of which is a written determination by the Secretary of Defense that "there are substantial risks associated with" that policy. JA264; *see also* JA300-09 (detailing why a "departure from the Carter policy" was in the military's judgment "necessary").

By contrast, plaintiffs will not suffer harm from a stay. *See* Govt.Br.47-51 (discussing absence of harm to plaintiffs). In concluding otherwise, the district court relied almost exclusively on the unfounded notion that the Mattis plan would "singl[e] out and stigmatiz[e] transgender service members as inherently different and inferior," even if they are permitted to serve. Ex. A, at 24. But as we have explained, even if this

were accurate, stigma alone is not a cognizable harm. *See* Govt.Br.49; Reply.Br.21-22, 24.

B. At a minimum, the Court should stay the injunction to the extent it sweeps beyond plaintiffs. That is what the Supreme Court did in *Meinhold*. In that case, a discharged Navy servicemember brought a facial constitutional challenge against the Department's "then-existing policy regarding homosexuals." *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1473 (1994). After the district court enjoined the Department from "taking any actions against gay or lesbian servicemembers based on their sexual orientation" nationwide, the Supreme Court stayed that order "to the extent it conferred relief on persons other than [the plaintiff]." *Id.* (citing *Meinhold*, 510 U.S. 939). And while the district court here asserted that the Supreme Court in *Meinhold* "provided no reasoning for granting the stay which would apply to this case," Ex. A, at 14, the two authorities the Supreme Court relied upon each confirmed that a district court may not extend injunctive "relief" to individuals over whom it "has no jurisdiction." *Heckler v. Lopez*, 463 U.S. 1328, 1334 (1983) (Rehnquist, J., in chambers), *motion to vacate stay denied*, 464 U.S. 879 (1983); *see Heckler v. Lopez*, 464 U.S. 879, 881 (1983) (Stevens, J., dissenting in part) ("[T]he injunction … grants relief to class members over whom the District Court had no jurisdiction … . To the extent that the stay by Justice REHNQUIST applies to such persons, I agree that it was properly entered.").

The Supreme Court's approach in *Meinhold* should be followed here. Indeed, this case and others involving constitutional challenges to the Mattis policy illustrate the distinct harms to the federal government from nationwide injunctions. The government is currently subject to four different nationwide preliminary injunctions, each threatening to require the government to maintain the Carter accession and retention standards. Even if the government were to prevail in this case, the government would still need to proceed with its appeal before the Ninth Circuit—which has before it two of these injunctions (in *Karnoski v. Trump*, No. 18-35347, and in *Stockman v. Trump*, No. 18-56539). And even then, the government would still be subject to a fourth nationwide preliminary injunction, issued by the district court in Maryland. *See Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017).[4]

Given the injunctions' nationwide scope, the government would have to succeed in vacating all four before it could safely begin implementing the Mattis policy. So long as a single one of those injunctions remains in place, the military will be forced to maintain the Carter policy nationwide—a policy that it has concluded poses a threat to "readiness, good order and discipline, sound leadership, and unit cohesion," which "are essential to military effectiveness and lethality." JA309; *see* JA312 (explaining that the "risks" associated with maintaining the Carter policy should not be incurred "given the

[4] Although the government moved eight months ago to dissolve that injunction in light of the new Mattis policy, *see* Doc. 120, *Stone*, No. 17-cv-2459 (Mar. 23, 2018), the district court in Maryland has not ruled on the government's pending motion.

Department's grave responsibility to fight and win the Nation's wars in a manner that maximizes the effectiveness, lethality, and survivability" of servicemembers).

Thus, if this Court declines to stay the district court's injunction in its entirety, it should at least stay the nationwide scope of the injunction, thereby preventing the injunction from sweeping beyond what is necessary to provide redress to plaintiffs. Plaintiffs will suffer no injury—let alone irreparable injury—if the nationwide scope of the injunction is stayed pending the resolution of the government's appeal and any further proceedings in the Supreme Court. Accordingly, the balance of equities warrants, at a minimum, such a partial stay.

CONCLUSION

The government respectfully requests that this Court stay the preliminary injunction in its entirety pending the disposition of this appeal and, if this Court affirms, pending the disposition of a petition for a writ of certiorari and any further proceedings in the Supreme Court. At a minimum, the injunction should be stayed to the extent it sweeps beyond plaintiffs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 3,795 words. This Motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ Tara Morrissey
Tara Morrissey

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2018, I filed the foregoing motion 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. Counsel for parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Tara Morrissey
Tara Morrissey

ADDENDUM

Ex. A

Order Denying Government's Stay Motion, Dkt. No. 187 (Nov. 30, 2018)

Ex. B

Memorandum Opinion, Dkt. No. 157 (August 6, 2018)
(as reproduced in Joint Appendix at JA64-97)

Ex. C

Order, Dkt. No. 156 (August 6, 2018)
(as reproduced in Joint Appendix at JA98)