

IN THE
Supreme Court of the United States

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

v.

RYAN KARNOSKI, ET AL.,
Respondents.

**JOINT OPPOSITION TO APPLICATION
FOR A STAY IN THE ALTERNATIVE
TO A WRIT OF CERTIORARI BEFORE JUDGMENT TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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INTRODUCTION

In 2017, President Trump stunned even his own military advisors with an unexpected series of Tweets announcing that he would reverse existing policy and ban transgender persons from military service. He followed up with a memorandum (the “Presidential Memorandum”) ordering Secretary Mattis to implement his policy (the “Ban”). Four federal courts issued preliminary injunctions enjoining the Ban. The government did not prosecute appeals of these preliminary injunctions.

In February 2018, Secretary Mattis delivered to the President precisely what the Presidential Memorandum had ordered: a plan implementing the Ban (the “Implementation Plan”). The government then moved to dissolve the preliminary injunctions. The district courts uniformly rejected these requests.¹ Appeals of these decisions are pending in the court of appeals.

For the past 2½ years (13 months before the President’s Tweets announcing the Ban, and for 17 additional months since then), transgender service members have served their country openly. The government *now*—for the first time and without pointing to any real-world urgency—seeks this Court’s intervention, first by way of certiorari before judgment, and in the alternative, by a stay of the preliminary injunction issued by the District Court more than a year ago, and from which the government elected not to appeal.

¹ The lower court adjudicating *Stone v. Trump*, No. 17-cv-2459 (D. Md.), has yet to rule on the government’s motion to dissolve. See Petition for Certiorari Before Judgment (“Pet.”) 9 n.2.

The government's Application should be denied. It does not satisfy any of the requirements for a stay. First, for all the reasons set forth in Plaintiffs' Brief in Opposition to the Government's Petition for Writ of Certiorari Before Judgment, the government does not show that the Court is likely to grant certiorari.

Second, the government does not demonstrate that, even if certiorari were granted, it is likely to succeed on the merits. It fails even to address the central issue in its appeal from the District Court's denial of the motion to dissolve the preliminary injunction: whether the District Court abused its discretion and committed clear error in making the fact-bound determination that the Implementation Plan was *not* new or materially different from the President's Ban, and therefore, that there had *not* been a "significant change in law or facts" that warrants dissolving the preliminary injunction. And, even if the Implementation Plan were new, it too would be unconstitutional. Like the Presidential Memorandum that ordered its creation and directed what it would contain, the Implementation Plan facially targets transgender persons and bans them from enlisting and serving openly. It thereby violates the Equal Protection Clause by imposing a "special, *additional* exclusionary rule that precludes individuals who would otherwise satisfy the demanding standards applicable to all service members." *Doe 2 v. Trump*, 315 F. Supp. 3d 474, 497 (D.D.C. Aug. 6, 2018).

Third, the government does not show that it would be irreparably harmed in the absence of a stay. Open service has now been in effect for more than 2½ years. Yet, the government does not show *any* actual harm, let alone irreparable harm. And

the undisputed evidence, including the testimony of the government’s own Service Chiefs, shows the exact opposite: allowing transgender service members to serve openly has not had any adverse effect, including on military readiness, unit cohesion, discipline, or morale. This lack of adverse effect is further evidenced by the government’s failure to seek emergency relief from this Court in the year since the injunction was first issued. If allowing transgender service members to serve openly truly posed an immediate threat, the government would have pursued an appeal of the injunction to this Court either when the injunction issued last fall or after the District Court (on June 15, 2018) and the Ninth Circuit (on July 18, 2018) denied the same motion for a stay the government now makes here. Even now, the government seeks an immediate stay “only if the Court denies” its separate, alternative request for certiorari before judgment. Pet. 2-3. Incredibly, if the Court *does* grant the government’s petition for certiorari, then the government is willing to wait *at least* an additional six months before this Court issues a ruling on the appeal. *Id.* The government’s one-year delay in seeking relief in this Court, its failure to explain that delay, and its current request for a stay only in the alternative, all undermine any claim of irreparable harm or need for this Court’s immediate—and extraordinary—intervention, particularly where the injunction has now been in place for more than a year and the military’s open service policy has been in effect for more than 2½ years.

In stark contrast to the government’s inability to demonstrate any irreparable harm absent a stay, Plaintiffs and other transgender persons would suffer serious irreparable injury from a stay. Plaintiffs who seek to enlist would be barred from

doing so. Plaintiff Jane Doe and other current service members who have not yet come out would be forced to either suppress their gender identity or face discharge. And those who have come out in reliance on the Carter Policy would be forced to serve at the sufferance of an exception that applies only to them, under a policy that brands them as inferior and unfit and a danger to their colleagues. Accordingly, the balance of hardships tips overwhelmingly against a stay.

Finally, the government's lengthy exegesis against "nationwide" injunctions does not apply to the injunction here, which simply enjoined an unconstitutional policy pursuant to a facial challenge that Plaintiffs clearly had standing to bring. In such cases, this Court has routinely enjoined the policy in its entirety, and not only as applied to the plaintiff. Here, such a policy-wide injunction is also necessary to provide Plaintiffs and the State of Washington complete relief, which is probably why the government did not even raise this issue in oral argument before the Ninth Circuit.

The government's application should be denied. It seeks an abrupt reversal of the status quo that has been in effect for more than 2½ years so the government can immediately reimpose a ban that the military itself, after extensive study, determined should be abolished because it undermined the exact same interests the government now cites. Apart from having devastating, irreparable consequences on transgender persons serving or seeking to serve in the military, it would also be extraordinarily disruptive to the military, which, as the four Service Chiefs recently confirmed, has not encountered any problems from open service. Such an abrupt

reversal makes even less sense where the constitutionality of the President’s Ban and the Implementation Plan are currently being litigated, with trial set for April 2019, and if they are held unconstitutional, the military would have to perform yet another 180 degree turn in six months and reimpose the current open service policy. “Such volatility and instability in the makeup of the military cannot benefit Defendants.” *Doe 2 v. Mattis*, No. 17-1597 (CKK), 2018 WL 6266119, at *11 (D.D.C. Nov. 30, 2018).

STATEMENT

I. THE STATUS QUO AND THE BAN.

A. The Pre-Ban Status Quo.

1. *Exhaustive Studies Lead to the Open Service Status Quo.* The military’s successful experience following the 2010 repeal of Don’t Ask, Don’t Tell (governing gay and lesbian service members) raised questions about the military’s policies on service by transgender people. At the time, the Department of Defense barred transgender persons from open military service, S.E.R. 252, but “[p]articularly among commanders in the field, there was an increasing awareness that there were already capable, experienced transgender service members in every branch, including on active deployment on missions around the world.” S.E.R. 184.²

In 2014, a collection of medical and military health experts (including a former surgeon general) published a peer-reviewed study concluding that there was “no compelling medical reason” for barring open transgender service. S.E.R. 264. By

² S.A., E.R., and S.E.R. cites refer to the Supplemental Appendix, Excerpts and Supplemental Excerpts of Record in the Ninth Circuit, No. 18-35347, Dkts. 22, 31, and 41.

April 2015, the American Medical Association (“AMA”), the largest association of physicians in the United States, announced its support for lifting the ban, declaring that there was no medically valid reason for it. S.E.R. 257.

2. *The Working Group.* In February 2015, then Secretary of Defense Ashton Carter was asked at a town hall meeting in Kandahar, Afghanistan about his views on military service by transgender people. S.E.R. 184-85. He responded that he had not yet given the issue significant study, but that the important criterion was: “Are they going to be excellent service members?” *Id.* A few months later, Secretary Carter convened a working group to address that question and identify any issues related to open transgender service, including how and whether such service was consistent with maximum “military readiness and lethality.”

The working group included approximately 25 military and civilian members, with each service branch represented by a senior uniformed officer, a senior civilian official, and staff. S.E.R. 288. The group extensively reviewed scholarly evidence and consulted with medical, personnel, and readiness experts, health insurance companies, civilian employers, and field commanders. *Id.*

Separately, the working group commissioned a report from the RAND Corporation, a non-profit, non-partisan research institution that has provided the military with objective research and analysis for decades. RAND performed a multidisciplinary, detailed, and data driven study, S.E.R. 288-89, examining: (1) the health care needs of the transgender population; (2) the readiness implications of

open service; and (3) the experiences of foreign militaries with open service. S.E.R. 154.³

The report found “no evidence” that allowing open service would negatively impact unit cohesion, operational effectiveness, or readiness. S.A. 028. Indeed, RAND found the maximum potential impact on available days for deployment would be “negligible”—a mere 0.0015% of available deployable labor years—particularly in comparison to other conditions that routinely and temporarily limit service members’ deployability. *Id.* RAND also found that open service would have minimal effect on health care costs. Even under the “most extreme scenario,” open service would impact active duty health care expenses by no more than 0.13%. S.A. 302.⁴ On the

³ Australia, Austria, Belgium, Bolivia, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Israel, Netherlands, New Zealand, Norway, Spain, Sweden and the United Kingdom all allow transgender personnel to serve openly in their militaries. Pet. App. 43a-45a; State App. 1a-172 (RAND Study).

⁴ *Contra* App. 4, where the government asserts that the RAND Report “concluded that allowing transgender personnel to undergo gender transition and serve in their preferred gender would increase health-care costs and undermine military readiness and unit cohesion, but that those harms would be ‘minimal’ because only a small percentage of ‘the total force would seek transition related care.” Pet. 4 (citing E.R. 330–331 & 408).

What the RAND Report actually says is:

“[W]hen assessing the readiness impact of a policy change, we found that less than 0.0015 percent of total labor-years would be affected, based on estimated gender transition-related health care utilization rates. This is because even at upper-bound estimates, less than 0.1 of the total force would seek transition-related care that could disrupt their ability to deploy. Existing data also suggest a minimal impact on unit cohesion as a result of allowing transgender personnel to serve openly.” E.R. 331.

other hand, RAND identified “significant costs” from a ban, including a loss of current and future transgender “personnel with valuable skills who are otherwise qualified to serve.”

3. *The Carter Policy.* On June 30, 2016, Secretary Carter issued a formal open service directive, and ordered that the military “be open to all who can meet the rigorous standards for military service and readiness,” including qualified transgender individuals (the “Carter Policy”). Specifically, transgender service members already in the military would no longer be “separated, discharged, or denied reenlistment . . . due solely to their gender identity or an expressed intent to transition genders.” Pet. 91a. Those who sought to transition and completed any medically-necessary care related to transition, could serve consistent with their gender identity. See Pet. 93a; DoDI 1300.28. Openly transgender recruits who had completed gender transition and thereafter demonstrated stability in their gender identity for at least 18 months could join the military. Pet. 92a.⁵

B. President Trump’s Ban.

1. *The President Tweets the Ban.* On July 26, 2017, President Trump abruptly and unexpectedly reversed the open service policy. Via his Twitter handle, @realDonaldTrump, he announced, “the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military.” Pet. 2a. President Trump did not consult the Joint Chiefs before his Tweets. See S.A.

⁵ While the other directives took immediate effect, the Carter Policy directed that accessions begin by July 1, 2017 (a date later deferred to January 1, 2018 by Secretary Mattis). See Pet. 96a.

720–721 (Chairman of Joint Chiefs: “I know yesterday’s announcement was unexpected”; “I was not consulted.”). So far as the record shows (and so far as Respondents are aware), no deliberation or studies led to these Tweets.

2. *The President Formalizes the Ban via the Presidential Memorandum and Orders the Implementation Plan.* One month later, President Trump formalized the Ban in a “Presidential Memorandum” dated August 25, 2017. The Presidential Memorandum ordered Secretary Mattis to bar openly transgender individuals from joining and serving in the military, and to prohibit funding for transition-related surgical care. *See* Pet. 2a; Pet. 99a-101a.

The Presidential Memorandum commanded Secretary Mattis to submit to the President, by February 21, 2018, a “plan for implementing both the general policy . . . and specific directives” the memorandum contained. Pet. 101a. It also directed Secretary Mattis to determine “how to address transgender individuals currently serving.” *Id.* It did *not* contain a request for Secretary Mattis to “conduct an independent multi-disciplinary review and study,” or for him to “exercise[] [his] professional military judgment” as to whether to ban open service. App. 10. Instead, it ordered that the President’s “directives” be “implemented” by specific dates. *Contra* Pet. 7. *E.g., Stone*, 280 F. Supp. at 763 (“The Court cannot interpret the plain text of the President’s Memorandum as being a request for a study to determine whether or not the directives should be implemented. Rather, it ordered the directives to be implemented by specific dates.”).

3. *Secretary Mattis Follows the President's Orders and Develops a Plan to Implement the Ban.* Secretary Mattis acknowledged and implemented the President's orders. Four days after the Presidential Memorandum, he issued a statement on "Military Service by Transgender Individuals," in which he stated that he had "received the Presidential Memorandum" and would "carry out the president's policy direction." E.R. 212. Secretary Mattis subsequently issued two more memoranda, one providing "Interim Guidance," and the other directing the development of an Implementation Plan. He stated in the "Interim Guidance" that he would "comply with the Presidential Memorandum" and "present the president with a plan to implement the [Presidential Memorandum's] policy and directives on the required timeline." Pet. 109a. In the second document, a "Terms of Reference," Secretary Mattis stated that he would convene "a panel of experts" to "develop[] an Implementation Plan on military service by transgender individuals, to effect the policy and directives in [the] Presidential Memorandum." Pet. 104a.

4. *The Implementation Plan.* On or about February 22, 2018, Secretary Mattis delivered to the President the ordered Implementation Plan, on the ordered timeline. *See* Pet. 100a. It consists of a memorandum from Secretary Mattis to the President entitled "Military Service by Transgender Individuals," Pet. 204a, and a February 2018 Report purporting to justify the President's Ban, Pet. 113a. The Implementation Plan is longer and more intricate than a Tweet, but it still "in fact prohibits transgender military service—just as was ordered in the Presidential Memorandum." *Doe 2*, 2018 WL 6266119, at *5. Thus, although the Implementation

Plan states that “transgender persons should not be disqualified solely on account of their transgender status,” Pet. 149a, it then proceeds to do exactly that, through three bans:

First, it generally bans from service anyone with a history of dysphoria. Pet. 207a.

Second, it bans anyone who undergoes or requires gender transition. Pet. 208a.

Third, “to the extent that there are any individuals who identify as ‘transgender’ but do not fall under the first two categories,” *Doe 2*, 2018 WL 6266119 at *5, they are allowed to serve only in their biological sex. Pet. 208a; *see also* Pet. 51a (noting that this would force “transgender individuals to suppress the very characteristic that defines them as transgender in the first place”).

Collectively, these bans effect the policy that “openly transgender persons are generally not allowed to serve in conformance with their gender identity.” *Doe 2*, 2018 WL 6266119, at *5. The only exception is a limited grandfather exception for those service members who came out in reliance on the Carter policy. The Presidential Memorandum explicitly contemplated this exception, when it ordered Secretary Mattis to “determine how to address transgender individuals currently serving in the United States military” as part of the Implementation Plan. Pet. 101a.

Contrary to the government’s assertions, the Implementation Plan *does not* “tur[n] on a medical condition (gender dysphoria).” App. 27-28. This characterization, as the lower courts uniformly found, “does not match reality.” *Stockman*, Dkt. 124 at

5. The policy applies *only* to transgender persons. *See, e.g.*, Pet. 177a, 178a, 198a (applying each of the President’s three “directives” to “Transgender Persons”).⁶ Moreover, “[a] diagnosis of gender dysphoria is neither necessary nor sufficient for a person to be excluded from the military under this new policy.” *Stockman*, Dkt. 124 at 5. For example, those who had gender dysphoria but treated it through gender transition (and thus no longer have gender dysphoria) cannot serve, period. Pet. 149a, 208a.

5. *President Trump Approves the Implementation Plan.* President Trump approved the Implementation Plan in a March 23, 2018 memorandum entitled “Military Service by Transgender Individuals,” which acknowledges receipt of the Implementation Plan developed “[p]ursuant to [the President’s] memorandum of

⁶ Indeed, each and every document announcing and implementing the Implementation Plan explicitly refers to military service by *transgender* individuals. Not one includes gender dysphoria in its subject line, compared with many references to transgender status. *See, e.g.*, DoD, *SUBJECT: Accession of Transgender Individuals into the Military Services* (June 30, 2017), Pet. 96a; Presidential Memorandum, *Military Service by Transgender Individuals* (August 25, 2017), Pet. 99a; DoD, *SUBJECT: Terms of Reference—Implementation of Presidential Memorandum on Military Service by Transgender Individuals* (Sept. 15, 2017), Pet. 104a; DoD, *Department of Defense Report and Recommendations on Military Service by Transgender Persons* (Feb. 2018), Pet. 113a; DoD, *Memorandum for the President, SUBJECT: Military Service by Transgender Individuals* (Feb. 22, 2018), Pet. 204a; White House Memorandum, *SUBJECT: Military Service by Transgender Individuals* (Mar. 23, 2018), Pet. 210a.

August 25, 2017,” and authorizes the Secretary of Defense to carry out the Implementation Plan. *See* Pet. 210a.⁷

II. PROCEDURAL HISTORY

A. The District Court and Three Other Federal Courts Preliminarily Enjoin the Ban.

1. *The Preliminary Injunctions.* On August 28, 2017, Respondents—nine transgender persons currently serving or wishing to serve, and three organizations—filed suit challenging the Ban’s constitutionality. Respondents, joined by the State of Washington as an intervenor, sought a preliminary injunction to maintain the status quo that existed before the Ban. D. Ct. Dkt. 32. The District Court and three others granted a preliminary injunction maintaining the status quo under the Carter Policy. Pet. 27a; *see also Doe 1 v. Trump*, No. 17-1567, 2017 WL 6553389 (D.C. Cir. Dec. 22, 2017); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017); *Stockman v. Trump*, No. 17-cv-1799-JGB-KK, Dkt. 79 (C.D. Cal. Dec. 22, 2017).

The District Court found the government’s proffered reasons for the Ban “not merely unsupported, but actually contradicted” by the extensive study and judgment of military leaders in developing the Carter policy. *Id.* The District Court also rejected the government’s argument that the Tweets and Presidential Memorandum were entitled to “military deference” under *Rostker v. Goldberg*, 453 U.S. 57 (1981), as they were announced “abruptly and without any evidence of considered reason or deliberation.” Pet. 22a. Balancing the equities, the court found that Respondents

⁷ This memorandum also purportedly “revoke[s]” the August 25, 2017 Presidential Memorandum. *See* Pet. 211a.

were exposed to irreparable harm, including the violation of their constitutional rights and the loss of their careers, while the government would “face no serious injustice in maintaining the June 2016 Policy pending resolution of this action on the merits,” Pet. 26a, especially since the Carter policy was “voluntarily adopted by DoD after extensive study and review.” *Id.*

2. *The Government Declines Appellate Review.* Initially, the government filed appeals and sought *narrow* stays from the courts of appeal: each stay motion asked the court only for permission to bar new transgender recruits (*i.e.*, accessions), without asking for permission to discharge currently serving individuals or deny them medical care. *See, e.g.*, No. 17-36009, Dkt. 3. The Fourth and D.C. Circuits rejected these motions, and the government then abandoned its Ninth Circuit stay request. *Stone v. Trump*, No. 17-2398, Dkt. 31 (4th Cir. Dec. 21, 2017); *Doe 1 v. Trump*, No. 17-5267, Doc. 1710359 (D.C. Cir. Dec. 22, 2017). At that point, the government voluntarily dismissed all three appeals. *Karnoski v. Trump*, No. 17-36009, Dkt. 21 (9th Cir. Dec. 29, 2017); *Stone v. Trump*, No. 17-2398, Dkt. 35 (4th Cir. Dec. 29, 2017); *Doe 1 v. Trump*, No. 17-5267, Doc. 1711023 (D.C. Cir. Dec. 29, 2017). The injunctions took effect without the government prosecuting any appeals in the courts of appeal—much less seeking any intervention from this Court.

3. *The District Court Decision.* On January 25, 2018, Respondents moved for summary judgment. On March 23, 2018, after briefing was complete, the government released the Implementation Plan that President Trump had ordered. Pet. 210a. Claiming the President had “revoked” his Presidential Memorandum

ordering the Ban in favor of the Implementation Plan, the government moved to dissolve the preliminary injunction. The District Court ordered supplemental briefing. After reviewing those briefs and “carefully consider[ing]” the issue, the District Court rejected the government’s request to dissolve the injunction. Pet. 48a-52a, 72a. The court reached the fact-bound determination that the Implementation Plan was not a “new” policy, but merely the implementation of the Presidential Memorandum—which “did not direct Secretary Mattis to determine *whether* or not the directives should be implemented, but instead ordered the directives to be implemented by specific dates and requested a plan for *how* to do so.” Pet. 50a. The court also analyzed the “exceptions” supposedly distinguishing the Implementation Plan from the pre-Carter policy, and concluded that a purported exception for those serving in their “biological sex” “does not constitute ‘open’ service in any meaningful way, and cannot reasonably be considered an ‘exception’ to the Ban.” Pet. 51a.

The government brought the same motions and made the same arguments in the other lower courts. And, on similar logic, the government lost those motions, too. *See Doe 2 v. Trump*, 315 F. Supp. 3d 474 (D.D.C. 2018); *Stockman v. Trump*, 331 F. Supp. 3d 990 (C.D. Cal. 2018).⁸

B. The Government’s Extraordinary Petition and Application in this Court.

The government appealed the District Court’s denial of its motion to dissolve the preliminary injunction. It likewise sought a stay pending appeal, which both the

⁸ The *Stone* court has yet to rule on the government’s motion to dissolve in that case.

District Court (on June 15, 2018) and the Ninth Circuit (on July 18, 2018) denied. Pet. 75a, 82a. The government did not seek review in this Court—nor would it for another five months. The Ninth Circuit expedited the argument in the government’s appeal, which was held on October 10, 2018, and there is no suggestion it will not likewise decide the case on an expedited basis. On November 23, 2018, the government filed its petition seeking a Writ of Certiorari Before Judgment, Pet. 14, which is pending.

Notwithstanding the government’s appeal to the Ninth Circuit and petition for certiorari to this Court, discovery and other proceedings continue in the District Court as the parties prepare for an April 2019 trial. The government has recently disclosed experts to offer testimony in support of the Ban and similarly served discovery on Respondents, to which Respondents timely responded on December 17, 2018. Respondents are likewise developing the record in support of their claims via discovery and experts.

On December 13, 2018, the government filed its current Application for a Stay in the Alternative to a Writ of Certiorari Before Judgment. Plaintiffs now oppose that application.

ARGUMENT

A stay pending appeal is available “only under extraordinary circumstances,” *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983), and this Court denies such extraordinary relief in all but “rare and exceptional cases,” *Fargo Women’s Health Org. v. Schafer*, 507 U.S. 1013 (1993) (O’Connor, J., concurring). The movant’s already “heavy burden,” *Nken v. Holder*, 556 U.S. 418, 439 (2009), is even heavier

still where lower courts have already denied a stay, as those courts are “closer to the facts,” *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972), and their “conclusion that a stay is unwarranted is entitled to considerable deference,” *Ruckelshaus*, 463 U.S. at 1316-17; *see also Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers). Here, the government makes the same request for a stay that it has previously made before the lower courts *eight times*, and in each case the district court or the court of appeals denied its motion.⁹

⁹ *See Doe 1 v. Trump*, No. 17-1597 (CKK), 2017 WL 6816476, at *2 (D.D.C. Dec. 11, 2017) (“[A] court assesses four factors when considering a motion to stay an injunction pending appeal . . . [n]one of these factors justifies staying the Court’s preliminary injunction.”); *Stone v. Trump*, No. 17-2398, 2017 WL 9732004, at *1 (4th Cir. Dec. 21, 2017) (denying stay); *Doe 1 v. Trump*, 2017 WL 6553389, at *1 (D.C. Cir. Dec. 22, 2017) (“Given Appellants’ failure to make a compelling case on the current record that any of the stay factors weigh in their favor, the court denies the stay.”); *Stone v. Trump*, No. 1:17-cv-02459-MJG, at *3 (D. Md. Dec. 28, 2017) (“Defendants have not met their burden to establish irreparable harm if they must implement the accessions provision by January 1, 2018. Nor have Defendants shown that the Court abused its discretion in weighing the equities to decide that a preliminary injunction was warranted.”); *Karnoski v. Trump*, 2017 WL 6733723 (W.D. Wash. Dec. 29, 2017) (“Having found that Defendants have not shown either a likelihood of success on the merits or a likelihood of irreparable injury absent a stay, the Court need not reach the remaining factors. . . . However, the Court also finds that these remaining factors do not support entry of a stay.”); *Karnoski v. Trump*, No. C17-1297-MJP, Dkt. 283, at 3 (W.D. Wash. June 15, 2018) (“[E]ach of the arguments raised by Defendants already has been considered and rejected by the Court, and Defendants have done nothing to remedy the constitutional violations that supported entry of a preliminary injunction in the first instance.”); *Karnoski v. Trump*, No. 18-35347, at *2 (9th Cir. July 18, 2018) (“[A] stay of the preliminary injunction would upend, rather than preserve, the status quo. Therefore, we deny the motion.”); *Doe 2 v. Mattis*, 2018 WL 6266119, at *3 (D.D.C. Nov. 30, 2018) (“Despite the lack of material changes to the factual record, Defendants are again attempting to rid themselves of the Court’s preliminary injunction. . . . Defendants should note that motions such as this one serve to

The government does not come close to meeting this “heavy burden” here. Its application does not satisfy any of the requirements for issuing a stay: “(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.” *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). And, a balancing of the equities weighs decidedly against a stay. *See Rostker*, 448 U.S. at 1308.

I. THE COURT IS UNLIKELY TO GRANT CERTIORARI.

The Court is unlikely to grant the government’s petition for certiorari before judgment. As explained in Plaintiffs’ Brief in Opposition to that petition, which Plaintiffs incorporate by reference, this is not even remotely a case that calls for such extraordinary intervention by this Court, and the government does not come close to showing that this case “is of such imperative importance” as to “require immediate determination in this Court,” as required by Supreme Court Rule 11.

II. EVEN IF THE COURT WERE TO GRANT CERTIORARI, IT IS HIGHLY UNLIKELY TO REVERSE THE JUDGMENT BELOW.

Even if the Court did grant certiorari, it is highly unlikely to reverse the District Court’s decision denying the government’s motion to dissolve the preliminary injunction. The government’s application does not even acknowledge, let alone address, the central issue in its pending appeal to the Ninth Circuit: Whether the

slow litigation and only increase the time which Defendants must wait for the Court’s final decision on the merits.”).

District Court abused its discretion in concluding that the government failed to show a significant change in law or fact sufficient to dissolve the court's prior injunction. And it devotes exactly one paragraph of its 40-page application to Plaintiffs' underlying constitutional claims. Pet. 27-28. For good reason. The government does not, and cannot, demonstrate that it is likely to prevail on the merits here.

1. *The District Court Did Not Abuse Its Discretion in Declining to Dissolve the Preliminary Injunction.* When a party, like the government here, moves to modify or dissolve a preliminary injunction, it bears the burden of demonstrating that “significant changes in law or facts” since the issuance of the original decree have “turned [it] through changing circumstances into an instrument of wrong.” *Sys. Fed’n No. 91, Ry. Emp. Dep’t, AFL-CIO v. Wright*, 364 U.S. 642, 647–48 (1961); *see also United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) (“We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree.”). Accordingly, the appeal is “limited to the propriety of the denial, and does not extend to the propriety of the original injunction itself,” *Gon v. First State Ins. Co.*, 871 F.2d 863, 866 (9th Cir. 1989), as “neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided,” *Wright*, 364 U.S. at 647. The decision to continue, modify, or dissolve an existing injunction is committed to the “wide discretion in the district court.” *Id.* at 648. Moreover, where, as here, that determination rests on factual determinations, those factual determinations are reviewable only for “clear error.” *Id.*

The government fails to even acknowledge, let alone satisfy, this standard of review here. It does not show that the District Court abused its discretion and committed clear error in making the fact-bound determination that the Implementation Plan was not new or materially different and, therefore, that there had not been a “significant change in law or facts” that warranted dissolving the preliminary injunction.

The government’s entire argument is grounded on the faulty factual proposition that the Implementation Plan is a new and independent policy that constitutes the required changed circumstances. But, as the district courts properly and uniformly concluded, the Implementation Plan is neither new nor independent. It merely implements the same policies that the President announced and ordered in the Presidential Memorandum.

[T]he 2017 Presidential Memorandum ordered that a plan to implement a policy prohibiting transgender military service be submitted by February 2018. . . . [I]n the months following the issuance of the 2017 Presidential Memorandum, Department of Defense officials repeatedly stated that they were preparing such an implementation plan based on the President’s policy directive. . . . The Mattis Implementation Plan was provided to the President in February 2018, and it in fact prohibits transgender military service.

Doe at 4; *see also Doe 2*, 315 F. Supp. 3d at 494-95; *Stockman*, 331 F. Supp. 3d at 999.

Ultimately, “it is not at all surprising that an implementation plan, crafted over the course of months (clearly with assistance from lawyers and an eye to pending litigation) is a longer, more nuanced expression of the President’s policy direction.”

Doe 2, 315 F. Supp. 3d at 494. But this does not make it a “significant change” or a “new policy” meriting dissolution of the injunction. The district court did not err in

finding that the government showed no “significant change” warranting dissolution of the preliminary injunction.

2. *The Implementation Plan Is Unconstitutional, In Any Event.*

Even if the government could show that the Implementation Plan was new or materially different from the Ban, its appeal would still fail. The Implementation Plan would still facially discriminate against transgender persons on the basis of gender, and it would still be subject to heightened scrutiny. *See, e.g., United States v. Virginia*, 518 U.S. 515, 531 (1996) (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”). It would discriminate on the basis of nonconformity to gender-based expectations and stereotypes, which would trigger heightened scrutiny. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982). And, this Court has explicitly rejected claims that the normal levels of scrutiny are somehow inapplicable to the military. *See Rostker*, 453 U.S. at 69–70.¹⁰

Nevertheless, the government claims that rational basis review applies because the Implementation Plan purportedly discriminates only on the basis of a medical condition (gender dysphoria) and treatment (transition), not transgender status. App. 27-28. This argument is belied by the plain text of what the government terms the “Mattis policy,” which is entitled “Military Service by Transgender Individuals,” refers to “transgender persons” repeatedly, and excludes transgender

¹⁰ The Ban also triggers heightened scrutiny under Due Process and First Amendment analysis. *See* Pet 22a-24a.

people even if they never had or do not presently have gender dysphoria. Pet. 204a-208a; *see supra*, at 12. It is also wrong as a legal matter. A line drawn on the basis of gender dysphoria is inescapably based on transgender status, and therefore likewise triggers heightened scrutiny. And that is particularly true where, as here, the policy also bans transgender persons who have transitioned or have a need to transition—as that is the very trait that defines being transgender. *See* Pet. 51a; *Christian Legal Soc. Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 689 (2010) (targeting same-sex conduct necessarily targets the status of being gay); *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993) (“A tax on wearing yarmulkes is a tax on Jews.”).¹¹

Under heightened scrutiny, the government is limited to the actual and “genuine” justifications that motivated its decision *at the time*; it cannot rely on hypothetical or *post hoc* justifications. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1696–97 (2017); *Virginia*, 518 U.S. at 533. As the lower courts have uniformly found, the Implementation Plan was ordered by, and implements, the policy and directives ordered by the President in the Presidential Memorandum. But the

¹¹ Heightened scrutiny is also supported by authorities holding that even otherwise acceptable classifications (which the classifications here are not) are subject to heightened scrutiny if they are “mere pretext designed to effect an invidious discrimination,” *Gen. Elect. Co. v. Gilbert*, 429 U.S. 125, 134 (1976), an issue which should be decided by the fact finder in the first instance, *Nashville Gas Co. v. Satty*, 434 U.S. 136, 145-46 (1977). Here, the Implementation Plan was ordered by the Presidential Memorandum, which the government does not attempt to defend under any level of scrutiny, and was crafted “clearly with assistance from lawyers and an eye to pending litigation.” *Doe 2*, 315 F. Supp. 3d at 949.

government offers precisely zero evidence in support of the Presidential Memorandum. It relies *exclusively* on justifications in the Implementation Plan, which was developed several months later, *during* this litigation and *after* the preliminary injunction was issued. Those *post hoc*, post-litigation justifications post-date the Presidential Memorandum and are thus legally inadequate. As the government offers no support other than these post-hoc rationalizations, its justifications fail as a matter of law.

Even if the *post hoc* justifications in the Implementation Plan could be considered, they would fail to satisfy any level of scrutiny. Three key points alone demonstrate their legal insufficiency.

First, the military considered and rejected all of the arguments the government presses when it adopted the Carter Policy in 2016. While administrations do change policies, the “sheer breadth of the exclusion ordered by the [Ban], the unusual circumstances surrounding the President’s announcement of the [Ban] . . . and the recent rejection of [these] reasons by the military itself” cast significant doubt on the justifications now proffered, *Doe 1 v. Trump, et al.*, 275 F. Supp. 3d 167, 176 (D.D.C. Oct. 30, 2017)—particularly given the military’s 30 months of problem-free experience with open service. *See infra*, at 28.

Second, the sheer breadth of the Ban provides a strong indication of its irrationality (and certainly does not satisfy any tailoring inquiry under heightened scrutiny). *Romer v. Evans*, 517 U.S. 620, 632 (1996) (“When a classification’s sheer breadth is so discontinuous with the reasons offered,” it lacks “even a rational

relationship to legitimate state interests.”). The government does not even purport to demonstrate that the interests it asserts could not be satisfied by general standards that apply to all individual service members (both transgender and non-transgender), as opposed to a ban of all transgender persons as a group. For example, as to *deployability*, Pet. 21, the military has a universal rule that requires separation of any service member who is non-deployable for more than 12 months. This addresses the government’s speculation that some forms of transition-related surgery might prevent deployment for longer periods of time. S.E.R. 13-14. As to “*sex-based standards*,” Pet. 22, the Carter policy requires that transgender service members adhere to the grooming and other standards of their birth-assigned gender until both their doctor and commanding officer certify they have successfully completed transition, and they thereafter must adhere to the grooming and other standards of their gender identity. E.R. 284-85; S.E.R. 157-58. This creates a bright-line rule that ensures the military maintains sex-based standards, including with respect to transgender service members. Finally, as to *cost*, evidence presented to the District Court showed that even in the “most extreme scenario,” the projected “maximum financial impact is an amount so small it was considered to be ‘budget dust,’ hardly even a rounding error” (\$8.4 million or 0.13 percent of total military active-duty healthcare expenditures of \$6.2 million). Pet. 21a; *see also* S.A. 92. The actual costs of open service have been even less—\$2.2 million in FY 2017. S.E.R. 30.

And, *third*, the Implementation Plan’s defense of the Ban is not grounded on a military determination, but rather on the drafters’ opinion as to a medical and

scientific issue—that the successful treatment of gender dysphoria is “uncertain.” *See* Pet. 178a. But this predicate is contrary to the settled medical and scientific consensus that gender dysphoria can be, and is routinely, successfully treated, and has been “definitively rejected” by the American Medical Association, American Psychiatric Association, American Psychological Association, former military leaders and Surgeons General as rooted in outdated, disproved assumptions, and contradicted by a vast body of research. *See, e.g.*, S.E.R. 133 (AMA letter explaining that the Implementation Plan “mischaracterized and rejected the wide body of peer-reviewed research on the effectiveness of transgender medical care”).

III. THE GOVERNMENT DOES NOT SHOW ANY IRREPARABLE HARM.

An essential prerequisite for a stay is a showing that, absent a stay, the applicant will suffer irreparable harm. *See, e.g., Rubin v. United States*, 524 U.S. 1301 (1998) (Rehnquist, C.J., in chambers); *Rostker*, 448 U.S. at 1308 (Brennan, J., in chambers). Indeed, the Court need not even reach the other requirements for a stay if the applicant fails to show irreparable harm. *See, e.g., Ruckelshaus*, 463 U.S. at 1317 (Blackmun, J., in chambers); *Bagley v. Byrd*, 534 U.S. 1301 (2001) (Stevens, J., in chambers).

Here, the government completely omits this requirement, and any reference to irreparable injury, in its discussion of the applicable standard. App. 19. And, it devotes just a single, conclusory sentence to this prerequisite in its 40-page application, asserting that the preliminary injunction is “forcing [the government] to maintain a policy 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.” App. 33-34 (quoting Pet. 206a). Even this bare, conclusory assertion does not claim any actual, present or imminent harm; only unspecified “risks” and “threatened” future consequences. Thus, even if this assertion were supported by a declaration or other evidence (which it is not), it would not satisfy the government’s burden here. As this Court held in *Nken*, “simply showing some possibility of irreparable injury” is not enough; the government must establish that it is likely to suffer an actual and irreparable injury without a stay. 556 U.S. at 434-35 (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)).

In any event, the government’s speculation about potential future harms is refuted by undisputed evidence of the open service policy’s actual effects, including the testimony of the military’s own Service Chiefs. This includes evidence that Defendants spent “a considerable amount of time [] preparing for the safe and orderly accession and retention of transgender individuals in the military.” *Doe 2*, 2018 WL 6266119, at *11 (“Considering the amount of forethought, research, and planning that went into preparing for the accession and retention of transgender individuals, the Court concludes that Defendants will not face irreparable harm by following a plan that was developed by the military itself.”). Moreover, under open service, transgender service members remain “subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability and retention.” *Doe 2*, 2018 WL 6266119, at *10 (citing Declaration of Raymond E. Mabus, Jr., Retired Sec. of the Navy). That is,

“[o]nly those transgender individuals who meet the combat-readiness standards that all non-transgender service members must meet will be permitted to serve in the military.” *Id.* The injunctions “simply prohibit[] the military from refusing to allow an otherwise combat-ready individual to serve based on that individual’s transgender status.” *Id.*

The record shows that these requirements, and the military’s careful planning, have paid off in the successful implementation of open service without evidence of any adverse effects on the military. The injunctions have been in place for more than a year, and the Carter Policy has been in effect for 2½ years, since June 30, 2016. Yet the government points to *no actual, real-world* harm from open service. *See Doe Order* at 5, 21 (the government “present[s] no evidence that the preliminary injunction . . . has harmed military readiness”; “[t]he Court finds [this] lack of support especially concerning given that the preliminary injunction has been in place for over a year. If the preliminary injunction were causing the military irreparable harm, the Court assumes that Defendants would have presented the Court with evidence of such harm by now.”).

None exists. To the contrary, the military’s own Service Chiefs, in testimony to Congress last spring—22 months after the open service directive went into effect—expressly rejected the government’s speculation concerning possible future harm to military readiness, unit cohesion, and discipline and morale. S.E.R. 83-84, 96-97, 107-09. For example, Army Chief of Staff (and recently named Chairman-designee of the Joint Chiefs) Mark Milley testified that he has “monitored” open service “very

closely” and has “received precisely zero reports . . . of issues of cohesion, discipline, morale, and all of those sorts of things.” S.E.R. 96-97. United States Marine Corps Commandant General Robert Neller testified that he, too, was following open service closely and was “not aware of any issues in those areas.” S.E.R. 101. And, Admiral John Richardson, United States Navy Chief of Naval Operations, testified that, with respect to open service, “it’s steady as she goes. We have a worldwide deployable Navy. All of our sailors, or the vast majority of our sailors, are worldwide deployable. We’re taking lessons from when we integrated women into the submarine force . . . That program has gone very well.” S.E.R. 103.

Any claim of irreparable harm is further undermined here by the government’s delay in seeking emergency relief from this Court. *See, e.g., Ruckelshaus*, 463 U.S. at 1318 (Blackmun, J., in chambers) (denying stay where applicant’s “failure to act with greater dispatch” undermined any claim of irreparable harm); *Beame v. Friends of Earth*, 434 U.S. 1310 (1977) (Marshall, J., in chambers) (same); *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (same). The injunctions the government seeks to stay have been in place since the fall of 2017. Yet, until December 13, 2018, the government elected not to seek a stay in this Court, despite numerous opportunities to do so, both in this and the other three cases in which injunctions were entered. For example, in this case:

- The District Court entered the preliminary injunction on December 11, 2017. The government initially sought a partial stay—as to accessions alone—and appealed to the Ninth Circuit, but just days later changed

course, withdrawing its request to stay the injunction and abandoning its appeal altogether. No. 17-36009, Dkts. 20-21. It elected not to seek relief from this Court.

- Six months later, the District Court denied the government’s motion to dissolve the preliminary injunction, and the government again sought a stay below. The District Court denied that request on June 15, 2018, and the Ninth Circuit followed suit on July 18, 2018. *See* No. 18-35347, Dkt. 90; D. Ct. Dkt. 283. Yet, the government waited five months before requesting the same stay here. In the interim, the government sought a stay in this Court related to an unrelated discovery issue, yet even when submitting that stay application it *still* did not request a stay of the injunction. No. 18A-276.

The government’s serial and prolonged inaction in this as well as the other three cases undermines any claim of an urgent need for immediate relief in this Court. This failure is only exacerbated by the government’s failure to identify any intervening change that would support its request for a stay *now*. As the *Doe* court recently found in denying an identical request, given the “lack of material changes to the factual record,” the “Court cannot help but question why Defendants have, again, decided to challenge the Court’s preliminary injunction *at this point in the litigation*.” *Doe 2*, 2018 WL 6266119, at *3 (emphasis added). The government provides no answer.

Not only does the government’s delayed application fail to explain why the Court should entertain such an untimely request now, it affirmatively refutes any claim of urgency or need for immediate relief. It seeks a stay only in the alternative, in the event the government’s petition for certiorari before judgment is not granted. App. 1-2, 18. Its express reasoning is that, if certiorari is granted, the Court “would presumably render a decision in this case by the end of June 2019”—*six months from now*—and “[b]ecause such a decision would *potentially* allow the military to begin implementing the Mattis policy in the *reasonably near future*, the government does not seek interim relief in the event the Court grants certiorari before judgment.” App. 2-3 (emphasis added). In other words, the government is willing to live with the status quo for at least six *more* months and seeks only to implement its preferred Ban “in the reasonably near future.” That admission alone dooms any claim that harm is imminent or that the need for relief is urgent, as is required for irreparable harm and a stay. A stay would also be inappropriate given that the Ninth Circuit is poised to rule soon—and likely within the same six-month window in which the government agrees a stay is unnecessary.

IV. THE BALANCE OF EQUITIES WEIGHS DECIDEDLY AGAINST A STAY.

In stark contrast to the lack of any irreparable harm to the government absent a stay, Plaintiffs and other transgender persons would suffer serious irreparable injury from a stay. Plaintiffs who seek to enlist would be barred from doing so. Plaintiff Jane Doe and other current service members who have not yet come out would be forced to either suppress their gender identity or face discharge. And those

who have come out in the reliance on the Carter Policy would be forced to serve while branded as inherently inferior, unfit to serve, and a danger to their colleagues. *See also Doe 2*, 2018 WL 6266119, at *12 (the Implementation Plan sends a message “that these individuals’ very presence makes the military weaker and less combat-ready”); *Doe 2 v. Trump*, 315 F. Supp. 3d 474, 487 (D.D.C. 2018) (“Plaintiffs will serve only on conditional sufferance and therefore on unequal terms.”). Those unequal terms are likely to have concrete effects in terms of training and career development and advancement. Commanders are likely to be reluctant to invest resources in the training or development of individuals that are deemed unfit and a danger to their colleagues. *C.f.* S.E.R. 146.

Accordingly, the balance of hardships tips overwhelmingly against a stay. Any harm to the government from a relatively brief delay in implementing the Ban would be far outweighed by the serious and irreparable injury it would cause Plaintiffs and other transgender persons. *See, e.g., Certain Named and Unnamed Non-Citizen Children v. Texas*, 448 U.S. 1327 (1980) (Powell, J., in chambers) (vacating stay of statewide injunction where any injury to school districts forced to admit immigrant children was outweighed by the immeasurable but substantial harm to children who would receive no or a sub-standard education); *San Diegans for the Mt. Soledad Nat. War Memorial v. Paulson*, 548 U.S. 1301, 1303 (2006) (Kennedy, J.) (“Compared to the irreparable harm of altering” a war memorial “the harm in a brief delay pending the Court of Appeals’ expedited consideration of the case seems slight.”).

This is particularly true where, as here, the balance of equities is “highly factual” and the balance reached by the District Courts and the Court of Appeals in denying similar stay requests is entitled to particular deference. *See, e.g., Block v. N. Side Lumber Co.*, 473 U.S. 1307 (1985) (Rehnquist, J.). And it is even more true where, as here, “a stay of the preliminary injunction would upend, rather than preserve, the status quo.” *Karnoski v. Trump*, No. 18-35347, at *2 (9th Cir. July 18, 2018); *see, e.g., Nken*, 556 U.S. at 429 (purpose of a stay is to preserve the status quo pending resolution of the merits).

At bottom, Plaintiffs and other transgender persons must satisfy all the fitness and other requirements that apply to all service members. “[A]ll Plaintiffs seek during this litigation is to serve their nation with honor and dignity, volunteering to face extreme hardships, to endure lengthy deployments and separation from family and friends, and to willingly make the ultimate sacrifice of their lives if necessary to protect the Nation.” *Doe 2*, 2018 WL 6266119, at *12.

V. THE GOVERNMENT’S COMPLAINTS CONCERNING “NATIONWIDE” INJUNCTIONS DO NOT PROVIDE A BASIS FOR A STAY.

Finally, the government’s complaints concerning “nationwide” injunctions do not provide grounds for a stay, even if it could point to *any* change in law or fact to justify dissolving the preliminary injunction on these grounds. This case simply does not raise the myriad concerns with “nationwide” injunctions that the government spends 19 of its 20-page argument addressing. The injunction here simply enjoins an unconstitutional policy, pursuant to a facial challenge brought by plaintiffs clearly and directly affected by it. In such cases, this Court has routinely enjoined the

challenged policy or statute in its entirety, and not simply in its application to the plaintiff. The government implicitly recognized this below, devoting only 1½ pages of its brief before the Court of Appeals to this issue and not raising it at all during oral argument.

But, even if this case did raise the policy-based concerns the government complains about (which it does not), the Court almost certainly would never reach them here. The government concedes, as it must, that an injunction should be broad enough to “provide complete relief to the plaintiffs.” Pet. 33 (quoting *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994)). And that is all the injunction here does. Anything less than a policy-wide injunction would have left Plaintiffs subject to a policy that branded them inherently unfit to serve and a potential danger to their colleagues, allowed to serve only at the sufferance of an exception that applies only to them. It would thereby threaten Plaintiffs with actual harm by undermining their standing with their commanders and colleagues, and depriving them of assignments, training, promotions, and deployment opportunities they would otherwise have had. In addition, restricting the injunction to the named individuals would not protect the State’s interest in the constitutional rights of its transgender residents, who are serving on military bases throughout the country, or the State’s interest in not being forced to discriminate against its own residents—in violation of its own antidiscrimination laws—when it deploys the Washington National Guard for intrastate emergencies. For these reasons, Petitioners have not shown that the

District Court abused its discretion in tailoring the preliminary injunction to enjoin the unconstitutional policy.

A. The “Judicial Power” Includes the Power to Enjoin Unconstitutional Policies.

In any event, there is no merit to the government’s scattershot attack on so-called “nationwide” injunctions. Federal courts have always had authority to “command persons properly before [them] to cease or perform acts outside [their] territorial jurisdiction.” *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) (citing *New Jersey v. City of New York*, 283 U.S. 473 (1931); *Massie v. Watts*, 10 U.S. (6 Cranch) 148 (1810); *The Salton Sea Cases*, 172 F. 792 (9th Cir. 1909)); *see also Leman v. Krentler Arnold Hinge Last Co.*, 284 U.S. 448 (1932). Absent this authority, the judiciary—including this Court—would be hobbled in performing its important role as a check on the other branches. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 & n.27 (1952) (Jackson, J., concurring).

Accordingly, “[t]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.” *Califano v. Yamaski*, 442 U.S. 682, 702 (1979) (emphasis added); *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995). Courts routinely enjoin unlawful policies in their entirety, not simply their application to the individual plaintiffs. *See, e.g., Regents of Univ. of Cal. v. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011 (N.D. Cal.), cert before judgment denied, 138 S. Ct. 1182 (2018). And, this Court has upheld such injunctions. *See, e.g., Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (affirming nationwide preliminary injunction “that covered not just respondents, but parties similarly

situated to them”); *Whole Women’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2297 (2016) (if a law “is unconstitutional on its face, an injunction prohibiting its enforcement is ‘proper’” (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 333 (2010))). There is no circuit court split on this issue; rather, this straightforward approach also mirrors the approach long taken when a court finds a statute facially unconstitutional, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (striking down unconstitutional statute as generally “void,” not simply in relation to Marbury), or an agency regulation unlawful, *Nat’l Min. Ass’n v. U.S. Army Corps of Eng’rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (explaining that in such cases, “the ordinary result is that the rules are vacated—not that their application to individual petitioners is proscribed”).

B. Plaintiffs Have Standing to Enjoin A Policy Barring Them from the Military.

Petitioners make the novel argument that Article III somehow bars this firmly established exercise of the judicial power. Pet. 28. Not so. Petitioners erroneously conflate two distinct issues—the nature of a plaintiff’s stake in seeking a particular form of relief, measured by the remedy’s ability to redress an actual or imminent injury of that plaintiff, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and the scope of the remedy sought, which may also apply to similarly situated people. So long as plaintiffs have standing for the remedy they seek—as it applies to them—they may litigate the “Case” or “Controversy”; Article III has never limited plaintiffs to remedies that affect them alone. *See, e.g., Int’l Refugee Assistance Project*, 137 S. Ct. at 2087 (affirming preliminary injunction “that covered not just

respondents, but parties similarly situated to them”); *Whole Women’s Health*, 136 S. Ct. at 2297 (similar); *Hutto v. Finney*, 437 U.S. 678, 685-88 (1978) (affirming prophylactic injunction that exceeded plaintiff’s actual injury); *see also* Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1083 (2018) (“[S]tanding is required to get into federal court, but it does not govern the scope of the remedy a court may issue.”).

Each of the government’s cases deals with the inapposite situation in which plaintiffs sought relief that would not have redressed any injury of their own. In *Gill v. Whitford*, 138 S. Ct. 1916 (2018), voters living in districts that had not been “packed” or “cracked” lacked the individualized injury necessary to challenge the boundaries of other districts. And in *Lewis v. Casey*, 518 U.S. 343 (1996), the Court emphasized that “in granting relief against actual harm that has been suffered . . . by a particular individual[],” a court may “order[] the alteration of an institutional organization or procedure that causes the harm.” *Id.* at 350. The plaintiffs had simply not shown that the injunction remedied any “actual injury” of their own. *Id.* at 358.

Just the opposite is true in this case. Here, there is no question that Plaintiffs—transgender persons serving or wishing to serve in the military, organizations comprised of such individuals, and Washington State—suffer actual, imminent, and concrete injury from the government’s ban on transgender military service. *See supra*, at 31-32. Plaintiffs therefore have standing to seek the precise

“form of relief” the District Court entered. *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017).

C. The District Court Properly Exercised Its Wide Equitable Discretion to Afford Plaintiffs Complete Preliminary Relief.

Where, as here, a plaintiff has standing, the scope of an injunction is constrained not by Article III, but by the district court’s reasoned exercise of its wide equitable discretion. *See Int’l Refugee Assistance Project*, 137 S. Ct. at 2087 (“Crafting a preliminary injunction is an exercise of discretion and judgment” meant “to balance the equities as the litigation moves forward.”); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006) (“[T]he decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts.”). In exercising that discretion, courts must ensure that the scope of the injunction matches “the nature and scope of the constitutional violation.” *Missouri*, 515 U.S. at 88 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)).

In this case, the remedy matches the scope of the constitutional violation one to one. The constitutional harms Plaintiffs suffer include status based discrimination. Enjoining the policy that discriminates based on their transgender status is no broader than the constitutional violation itself.

Relatedly, the government concedes that a preliminary injunction should be broad enough to “provide complete relief to the plaintiffs.” App. 33 (quoting *Madsen*, 512 U.S. at 765). A partial injunction as to only the individual Plaintiffs here would not afford them full relief. *See supra*, at 31; *Doe 2*, 2018 WL 6266119, at *12; *Doe 2*, 315 F. Supp. 3d at 487.

Further, Petitioners' arbitrary request that this Court limit the preliminary relief to the individual Plaintiffs, but not the organizational Plaintiffs, *see* App. 3, 39, has no reasoned basis. The organizational Plaintiffs have the same right to preliminary relief as every other Plaintiff. Enjoining the Ban only as to the individual Plaintiffs would not afford relief to these organizations, each of which seeks to vindicate the rights of all of their members (including those who, like Plaintiff Jane Doe, reasonably fear coming forward).

Narrowing the injunction to the individual Plaintiffs would also fail to provide complete relief to the State of Washington. The State has an interest in its transgender residents who are serving in military locations throughout the Nation. A military-wide injunction, therefore, is no more burdensome than necessary to redress the constitutional violation. *See Yamaski*, 442 U.S. at 702. In addition, the standards governing accession into Washington's National Guard are subject to DoD policies. 10 U.S.C. §12201(b). As a result, the Ban would require Washington to exclude qualified transgender Washingtonians from its Guard, impinging its ability to provide critical emergency response and disaster mitigation in emergency situations, *see* ER18-20; ER42-43, and forcing Washington to violate its independent sovereign interest in implementing its antidiscrimination laws, *see Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982) (“[T]he exercise of sovereign power . . . involves the power to create and enforce a legal code, both civil and criminal”); Washington State Const. art. XXXI, § 1 (affirming that equality of rights and responsibility shall not be abridged on account of sex); Wash. Rev. Code

§ 49.60.040(26) (defining prohibited discrimination to include “gender identity”). The government completely ignores these harms in urging this Court to limit the injunction to the individual Plaintiffs.

Once again, the government’s cases only illustrate the appropriateness of the District Court’s order. The government cites *Meinhold v. Dep’t of Def.*, arguing that it shows injunctions should be stayed “to the extent [they] confer[] relief on persons other than” the plaintiff. App. 38 (quoting 34 F.3d 1469, 1473 (9th Cir. 1994)). But the injunction in that case was narrowed because it would have been inequitable to award the plaintiff more relief than he requested. *See* 34 F.3d at 1480 (explaining that because Meinhold sought “only to have his discharge voided and to be reinstated,” the nationwide injunction was more burdensome than necessary to accomplish that result). That concern is entirely absent here, where Plaintiffs have brought a facial challenge to the constitutionality of the Ban.

Monsanto v. Geertson Seed Farms, 561 U.S. 139 (2010), likewise does not help Petitioners. There, the district court had permanently enjoined all future planting of genetically altered alfalfa plants because the government had failed to prepare a NEPA analysis in deciding to deregulate the crop. *Id.* at 147-48. This Court held that the plaintiffs, environmental groups and conventional alfalfa farms, had standing to bring the challenge, *id.* at 153-56, but that the injunction caused greater harm than it prevented, *id.* at 162-64. In particular, the plaintiffs had not shown that they, as opposed to other farmers, would be injured if the altered crops were planted a safe distance from their farms. *Id.* at 163-64. Therefore, the Court held,

the order forbidding “any partial deregulation” was not necessary to prevent injury to the plaintiffs. *Id.* at 164. Here, for all the reasons explained above, the preliminary injunction must enjoin the Ban in order to grant Plaintiffs complete relief.

In sum, even if some program-wide injunctions might be inequitable, this is not that case. Even the government’s own standard—complete relief for the Plaintiffs—requires that the transgender Ban itself be enjoined.

CONCLUSION

For all of the foregoing reasons, the government’s Application for a Stay of the injunction pending appeal should be denied.

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