[ORAL ARGUMENT SCHEDULED FOR DECEMBER 10, 2018]

No. 18-5257

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, No. 1:17-cv-01597-CKK,
Before the Honorable Colleen Kollar-Kotelly

BRIEF FOR PLAINTIFFS-APPELLEES

JENNIFER LEVI
MARY L. BONAUTO
GLBTQ Advocates and Defenders
18 Tremont Street, Suite 950
Boston, MA 02108

SHANNON P. MINTER
AMY WHELAN
CHRISTOPHER STOLL
ALEXANDER CHEN
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, CA 94102

PAUL R.Q. WOLFSON
JOHN T. BYRNES
KEVIN M. LAMB
JACK STARCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

October 22, 2018

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

MATTHEW E. MILLER
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210

THERESA M. ROOSEVELT
FOLEY HOAG LLP
1717 K Street NW
Washington DC 20006

ADAM M. CAMBIER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

Counsel for Plaintiffs-Appellees

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Appellees certify as follows:

A. Parties and Amici

Plaintiffs in the district court, and Appellees here, are Jane Doe 2; Jane Doe 3; Jane Doe 4; Jane Doe 5; Dylan Kohere; Regan V. Kibby; John Doe 1; Jane Doe 6; Jane Doe 7; and John Doe 2. Jane Doe 1 was also a plaintiff in the district court but voluntarily dismissed her case. JA34-35.

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

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

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

In the district court, the following parties participated as amici curiae:

- Massachusetts; California; Connecticut; Delaware; Hawaii; Illinois; Iowa; Maryland; New Mexico; New York; Oregon; Pennsylvania; Rhode Island; Vermont; and the District of Columbia;
- Brigadier General Ricardo Aponte, USAF (Ret.); Vice Admiral Donald Arthur, USN (Ret.); Michael R. Carpenter; Brigadier General Stephen A. Cheney, USMC (Ret.); Derek Chollet; Rudy DeLeon; Rear Admiral Jay A. DeLoach, USN (Ret.); Major General (Ret.) Paul D. Eaton, USA; Brigadier General (Ret.) Evelyn "Pat" Foote, USA; Vice Admiral Kevin P. Green, USN (Ret.); General Michael Hayden, USAF (Ret.); Chuck Hagel; Kathleen Hicks; Brigadier General (Ret.) David R. Irvine, USA; Lieutenant General Arlen D. Jameson (USAF) (Ret.); Brigadier General (Ret.) John H. Johns, USA; Colin H. Kahl; Lieutenant General (Ret.)

Claudia Kennedy, USA; Major General (Ret.) Dennis Laich, USA; Major General (Ret.) Randy Manner, USA; Brigadier General (Ret.) Carlos E. Martinez, USAF (Ret.); General (Ret.) Stanley A. McChrystal, USA; Kelly E. Magsamen; Leon E. Panetta; Major General (Ret.) Gale S. Pollock, CRNA, FACHE, FAAN; Rear Admiral Harold Robinson, USN (Ret.); Brigadier General (Ret.) John M. Schuster, USA; Rear Admiral Michael E. Smith, USN (Ret.); Brigadier General (Ret.) Paul Gregory Smith, USA; Julianne Smith; Admiral James Stavridis, USN (Ret.); Brigadier General (Ret.) Marianne Watson, USA; William Wechsler; and Christine E. Wormuth (together, "Retired Military Officers and Former National Security Officials");

- The American Academy of Family Physicians; the American Academy of Nursing; the American College of Physicians; the American Medical Women's Association; the American Nurses Association; the Association of Medical School Pediatric Department Chairs; the Endocrine Society; GLMA: Health Professionals Advancing LGBT Equality; the National Association of Social Workers; the Pediatric Endocrine Society; and the World Professional Association for Transgender Health (together, "Medical, Nursing, Mental Health, and Other Health Care Organizations");

- The Trevor Project;
- The National Center for Transgender Equality; the Tennessee Transgender Political Coalition; TGI Network of Rhode Island; the Transgender Allies Group; the Transgender Legal Defense and Education Fund, TransOhio; the Transgender Resource Center of New Mexico, and the Southern Arizona Gender Alliance.[1]

And in the district court, Buzzfeed, Inc. moved to intervene to seek access to a teleconference.

At this time, there are no intervenors and no amici in this Court.

B. Rulings Under Review

Appellants seek review of the opinion and orders of the Honorable Colleen Kollar-Kotelly in *Doe 2 v. Trump*, No. 17-1597 (D.D.C.), including the opinion and accompanying order of August 6, 2018 (Dkts. 156 and 157). The opinion is available at 315 F. Supp. 3d 474.[2]

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[1] Defendants' Certificate as to Parties, Rulings, and Related Cases indicates that only the first two of these groups of amici were granted leave to participate, but all five groups were granted leave. JA43, 46, 170.

[2] Defendants' Certificate as to Parties, Rulings, and Related Cases indicates that the opinion under review is available at 319 F. Supp. 3d 539. This statement is in error; the opinion published there appears at Dkt. 155 and is not on appeal.

C. Related Cases

This case was previously on appeal before this Court as *Doe 1 v. Trump*, No. 17-5267, but the appeal was voluntarily dismissed. There is an appeal and mandamus petition involving similar issues pending in *Karnoski v. Trump*, No. 18-35347 (9th Cir.), and *In re Trump*, No. 18-72159 (9th Cir.), respectively. Cases raising similar issues are proceeding in the district court in *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash.), *Stone v. Trump*, No. 17-cv-2459 (D. Md.), and *Stockman v. Trump*, No. 17-cv-1799 (C.D. Cal.).

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INTRODUCTION

Although the government raises many flawed arguments in its brief, it ignores the most important point about this appeal: This is not the time to make them. This is an appeal from an order declining to dissolve a preliminary injunction that has been in place since October 2017. That order enjoins enforcement of President Trump's abrupt decision to reverse military policy and bar transgender individuals from serving. The government appealed the injunction months ago and then voluntarily abandoned that appeal. The government asks this Court to reverse the district court's conclusion that the military's anticipated plan to implement the President's directive "has not fundamentally changed the circumstances of this lawsuit." JA72.

The government's central argument is that the plan Secretary Mattis announced in March 2018 fundamentally differs from the ban the President announced in June 2017. But there is no substantive difference between the two: To exclude transgender persons who have undergone or require gender transition *is* to exclude transgender persons. Secretary Mattis's plan and the accompanying study justifying it reflect precisely what the President directed. When the military received the President's order to implement and justify a ban on transgender military service, it forthrightly explained that it would do what he had ordered. And that is exactly what it did.

Because there is no legally significant change in circumstances, the government's other arguments are irrelevant. They are also premature. The district court has concluded that additional discovery is necessary to resolve this case and to determine the degree of deference, if any, that is warranted. The district court is poised to rule on the scope of discovery, and once it does, the parties can complete the litigation. The merits issues will then be before this Court on appeal with a full record following final judgment.

The government seeks to short-circuit that process, but the district court rightly rejected that effort to upend the status quo while the parties complete the litigation. Allowing the ban to take effect would inflict grave injury on Plaintiffs, who seek only to defend their country. By contrast, maintaining the injunction does not harm the government. And Plaintiffs have a strong likelihood of prevailing; the transgender ban implicates all of the concerns that prompt heightened constitutional scrutiny and rests on stereotypes and animus rather than an evenhanded approach towards qualifications to serve in the military.

The government argues that its judgment cannot be questioned because this case arises in the military context. That is not the law. Plaintiffs have the right to substantiate their constitutional claims through discovery and to preserve the status quo while doing so to prevent irreparable harm. The district court properly

balanced the relevant considerations. Its order declining to dissolve the preliminary injunction should be affirmed.

STATEMENT OF ISSUE

Whether the district court abused its discretion in denying the government's motion to dissolve the preliminary injunction.

STATEMENT OF CASE

A. Development Of The June 2016 Carter Open Service Policy

Before 2016, the Department of Defense ("DOD") barred transgender people from entering the military and mandated the discharge of those serving. JA115-116. After the 2010 repeal of a federal statute that barred gay people from serving, military leaders recognized that the Armed Forces also had valuable and highly skilled transgender members. JA1001; JA1018-1019. As former Army Secretary Eric Fanning explained, "[p]articularly among commanders in the field, there was an increasing awareness that there were already capable, experienced transgender service members in every branch." JA1019.

In July 2015, then-Secretary of Defense Ashton Carter convened a Working Group to examine military service by transgender individuals and to formulate recommendations for future policy. JA710-711; JA991. The Working Group had approximately 25 members, including senior uniformed officers, senior civilian officials, and representatives of Surgeons General for each service branch. JA991.

The Working Group reported to senior DOD personnel at meetings attended by the Joint Chiefs of Staff, the Chairman, the Vice Chairman, the Service Secretaries, and the Secretary of Defense. JA1042.

The Working Group conducted a comprehensive examination of relevant evidence. JA1002. "The goal was to ensure that the input of the Services would be fully considered before any changes in policy were made and that the Services were on board with those changes." JA1040. The Working Group consulted with medical, personnel, and readiness experts, senior military personnel, and transgender servicemembers. JA992; JA1002-1003. It also commissioned a RAND Corporation study on the impact of open service by transgender people. JA597-708; JA992-994; JA1022.

The Working Group concluded that excluding transgender people from military service undermined military readiness by requiring the discharge of highly trained, experienced servicemembers who were expensive and time-consuming to replace. JA995-996. The Working Group found that allowing service by transgender individuals would have no significant downsides, that the short periods of non-deployability that some transgender servicemembers might experience for health care needs would be negligible, and that related medical costs would likewise make up an "exceedingly small" share of DOD's health expenditures. JA118; JA994-995; JA1048; JA1074-1075. The Working Group concluded that

"barring service by transgender people reduces the pool of potential qualified recruits … based on a characteristic that has no relevance to their ability to serve." JA1005. The Working Group therefore recommended evaluating transgender applicants based on the same "medical standards for accession" applied to everyone else, "which seek to ensure that those entering service are free of medical conditions or physical defects that may require excessive lost time from duty." JA1023.

On June 30, 2016, Secretary Carter issued Directive-Type Memorandum 16-005, which announced "that service in the United States military should be open to all who can meet the rigorous standards for military service and readiness," and set forth a policy permitting service by qualified transgender individuals. JA586. The Carter Policy took immediate effect with respect to retention, allowing current transgender servicemembers to serve under "the same standards" as non-transgender servicemembers, and prohibiting the discharge of otherwise qualified servicemembers "solely on the basis of their gender identity." JA588. The policy directed DOD to update its accession standards by July 1, 2017—a date deferred by Secretary of Defense James Mattis to January 1, 2018, JA426—to prevent disqualification based solely on an individual's transgender status. JA588.

B. The President's Directives

On July 26, 2017, citing "tremendous medical costs" and "disruption," President Trump announced via Twitter that the government "will not accept or allow transgender individuals to serve in any capacity in the U.S. military." JA124. The President formalized that policy in a memorandum dated August 25, 2017. JA406-407 ("2017 Presidential Memorandum"). The 2017 Presidential Memorandum directed Secretary Mattis (and the Secretary of Homeland Security for the Coast Guard) to bar transgender individuals by reinstating the policy "that was in place prior to June 2016" and by blocking enlistment under the Carter Policy from going into effect. JA406.

The 2017 Presidential Memorandum directed Secretary Mattis to submit by February 21, 2018 "a plan for implementing both the general policy … and the specific directives" disallowing military service by transgender individuals. JA406. The President also directed the "implementation plan" to "address transgender individuals currently serving in the United States military." JA407.

C. The Mattis Plan

Four days after issuance of the 2017 Presidential Memorandum, Secretary Mattis announced that DOD would "carry out the president's policy direction," including by "develop[ing] a study and implementation plan." JA405. To develop that plan, DOD would "establish a panel of experts … to provide advice and

recommendations on the implementation of the president's direction," and then Secretary Mattis would advise the President "concerning implementation." *Id.*

Secretary Mattis issued two memoranda—one appending "Interim Guidance," JA401-402; the other directing development of the implementation plan, JA403-404—reiterating DOD's intent to "carry out the President's policy and directives." JA401. Secretary Mattis stated that he was issuing interim guidance "[t]o comply with the Presidential Memorandum" and would "present the President with a plan to implement the policy and directives" in the 2017 Presidential Memorandum on the dictated timeline. JA401.

In the other document, entitled "Terms of Reference," Secretary Mattis convened a panel to "develop[] an Implementation Plan." JA403. He noted that the 2017 Presidential Memorandum required DOD to maintain the pre-2016 ban "prohibit[ing] accession of transgender individuals" and directed the panel to recommend "updated accession policy guidelines to reflect currently accepted medical terminology." JA404. Secretary Mattis also noted that the Memorandum required a "return" to the pre-2016 rule mandating the discharge of transgender servicemembers. *Id.*

DOD issued a report and recommendations in February 2018. JA268-312 ("Report"). Secretary Mattis endorsed the recommendations and presented them along with the Report in a memorandum to the President dated February 22,

2018. JA263-265 ("Mattis Plan"). The Mattis Plan proposed implementation of the President's directive by providing that "[t]ransgender persons who require or have undergone gender transition are disqualified," and that transgender persons must serve "in their biological sex." JA264-265.[3] The Mattis Plan also included a grandfather provision that would permit continued service solely for those current transgender servicemembers "diagnosed with gender dysphoria since the previous administration's policy took effect and prior to the effective date of this new policy." JA264. The Report stated that the grandfather provisions "should be deemed severable from the rest of the policy" and subject to rescission if "used by a court as a basis for invalidating the entire policy." JA273-274.

On March 23, 2018—the date the President had set for reinstating the ban—the President "revoke[d]" the 2017 Presidential Memorandum and "order[ed]"

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[3] Specifically, the Mattis Plan proposed "policies … disqualif[ying] … [t]ransgender persons":

- "with a history or diagnosis of gender dysphoria"—unless they (1) "have been stable for 36 consecutive months in their biological sex prior to accession," (2) were diagnosed "after entering into service" and "do not require a change of gender," or (3) qualify under the terms of the Carter Policy before the effective date of the Mattis Plan;
- "who require or have undergone gender transition"; or
- "without a history or diagnosis of gender dysphoria, who are otherwise qualified for service"—unless they "serve … in their biological sex."

JA264-265.

Secretary Mattis "to implement … appropriate policies" regarding military service by transgender individuals. JA261.

D. The Preliminary Injunction And Defendants' First Appeal

Plaintiffs, current and aspiring servicemembers who are transgender, brought suit in August 2017 to enjoin the President's abrupt reversal of the open service policy. Dkt. 1. In October 2017, the district court issued a preliminary injunction, ordering Defendants "to revert to the *status quo* with regard to accession and retention that existed" under the Carter Policy "before the issuance of the [2017] Presidential Memorandum." JA185-186.

The district court found that Plaintiffs were likely to succeed on their Fifth Amendment claim. The court determined that, "[a]s a form of government action that classifies people based on their gender identity, and disfavors a class of historically persecuted and politically powerless individuals, the President's directives are subject to a fairly searching form of scrutiny," and that even considering the military context, those directives likely fail such scrutiny due to "a number of factors—including the sheer breadth of the exclusion, the unusual circumstances surrounding the President's announcement of them, the fact that the reasons given for them do not appear to be supported by any facts, and the recent rejection of those reasons by the military itself." JA112-113.

The district court also found that the ban would irreparably injure Plaintiffs by violating their constitutional rights, branding them as unfit to serve in the eyes of their peers and officers, and imperiling their military careers. JA183-184. The court found, by contrast, no evidence of negative effects and "considerable evidence that it is the *discharge* and *banning* of [transgender] individuals that would have such effects." JA185.

Defendants appealed and sought to stay the injunction as to accessions to complete a "'further study.'" Stay Mot. 15, 17, *Doe 1 v. Trump*, No. 17-5267 (D.C. Cir. Dec. 11, 2017). This Court denied the government's stay request, explaining that Defendants had "failed to demonstrate that the study" required by Secretary Mattis "is motivated by any necessity separate and apart from compliance with the [2017] Presidential Memorandum," and had "provided no non-conclusory factual basis or military justification for their apparent position that the extensive study already conducted prior to President Trump's policy shift was inadequate or otherwise in need of supplementation." Order 4, *Doe 1 v. Trump*, No. 17-5267 (D.C. Cir. Dec. 22, 2017). With respect to the other stay factors, the Court stressed that, "in balancing the equities, it must be remembered that all Plaintiffs seek during this litigation is to serve their Nation with honor and dignity." *Id.* at 5.

Following this Court's denial of a stay, the government voluntarily withdrew its appeal, and the Carter Policy's standards for accession became effective on January 1, 2018.

The case then proceeded to discovery, where Defendants "strenuously resisted" any inquiry into the President's decision, JA68; *e.g.*, Dkt. 88, at 5:11-16, and "withheld nearly all information concerning" Defendants' review process and "study," JA62. As a result, discovery has largely stalled, and several discovery motions are pending before the district court, *e.g.*, Dkts. 169-171.

E. The District Court's Denial Of Defendants' Motion To Dissolve The Preliminary Injunction

On March 23, 2018, Defendants moved to dissolve the injunction, asserting that the Mattis Plan is a "new policy," distinct from the enjoined directives of the President, that deserves deference as "the product of independent military judgment following an extensive study of the issue." Dkts. 96, 116. Proceeding from the "same fundamental premise" that "the Mattis Implementation Plan is a new and different policy than the one announced by President Trump in 2017," Defendants also moved to dismiss the case or, alternatively, for summary judgment. JA65; Dkt. 115.

The district court denied Defendants' motions to dissolve the injunction and to dismiss the case on August 6, 2018. JA64-98.[4] The court stressed that it had "made no final ruling on the merits," but "simply held that all Plaintiffs still having standing to pursue their claims, … and there are no changed circumstances that justify dissolving the preliminary injunction." JA97. The court accordingly held that "the need remains intact for the … preliminary injunction maintaining the *status quo ante* until the final resolution of this case on the merits." JA94.

The district court recognized that a preliminary injunction may be dissolved where "'changed circumstances eviscerate the justification'" for it, but held that Defendants failed to carry their "burden of establishing [such] circumstances." JA94. "The only material development" was that Defendants issued "a plan to implement the enjoined directives, and a report that purportedly provides support

[4] By separate order the same day, the district court dismissed the President and dissolved the injunction as to him. JA99-108. On August 24, 2018, the court denied the parties' cross-motions for summary judgment, holding that it "cannot summarily adjudicate the claims in this case on the present record" because "[t]he facts about the process leading up to the development of the Mattis Implementation Plan are both material and in dispute." JA58, JA60. The court found that whether the Mattis Plan was "the product of extensive deliberation, study and review" is disputed, that "Defendants have withheld information concerning this deliberation, study and review from Plaintiffs," and that those disputed facts affect the level of deference that the court must apply. JA49. The court thus held that Plaintiffs should be given "the opportunity to complete discovery." JA62.

for that plan." JA95. That did not change the Court's conclusion on any of the preliminary injunction factors. *Id.*

The district court rejected Defendants' claim that the Mattis Plan materially differs from the ban ordered by the President and enjoined by the court for "three basic reasons": (1) the President directed DOD to submit an implementation plan, not a new policy; (2) all of the intervening statements by Secretary Mattis and DOD indicated that the plan being developed was an implementation plan, not a new policy; and (3) "most importantly, the Mattis Implementation Plan *in fact prohibits transgender military service*—just as President Trump's 2017 directives ordered." JA87-90.

The district court acknowledged that the plan is a "more nuanced expression of the President's policy direction than the brief, blanket assertions made by the President in 2017," JA90, but it found the effect to be the same: By categorically disqualifying transgender persons who have undergone or seek to undergo gender transition, and requiring any other transgender person to serve "only … *in their biological sex*," the Mattis Plan bans military service by "transgender persons," who, "by definition, … *do not identify or live in accord with their biological sex*." JA91.

Thus, the district court found that Plaintiffs' likelihood of success on their equal-protection claim was unchanged: The Mattis Plan "still accomplishes an

extremely broad prohibition on military service by transgender individuals that appears to be divorced from any transgender individual's actual ability to serve" and "establishes a special *additional* exclusionary rule" precluding otherwise qualified transgender individuals from serving. JA95. Moreover, "because the plan fundamentally implements" the 2017 Presidential Memorandum, "the unusual factors" surrounding that abrupt policy reversal "are still relevant." *Id.*

The district court's conclusions on the other preliminary injunction factors were similarly unchanged. The court determined that all Plaintiffs are injured by the Mattis Plan, JA76, and reiterated this Court's own conclusion that "[t]he public interest and equities lie with allowing young men and women who are qualified and willing to serve our Nation to do so" while the case proceeds to the merits, JA96.

STANDARD OF REVIEW

A party seeking to dissolve a preliminary injunction must show that unforeseen "changed circumstances" render the injunction's continuation inequitable. *American Council of the Blind v. Mnuchin*, 878 F.3d 360, 366 (D.C. Cir. 2017); *Sprint Commc'ns Co. v. CAT Commc'ns Int'l, Inc.*, 335 F.3d 235, 242 (3d Cir. 2003). The district court has "wide discretion" in deciding whether to modify or dissolve an injunction, 11A Wright et al., *Federal Practice and Procedure* § 2961 (3d ed. 2018), and its decision will not be disturbed unless the

court "committed an error of law or a clear error of fact or struck an unreasonable (not merely erroneous) balance among the considerations that a district judge is required to weigh in deciding whether to grant preliminary injunctive relief," *Centurion Reinsurance Co. v. Singer*, 810 F.2d 140, 143 (7th Cir. 1987).

SUMMARY OF ARGUMENT

I. The district court correctly held that Defendants have failed to show changed circumstances that warrant dissolving the preliminary injunction because the Mattis Plan is substantively the same ban ordered by the President. The Mattis Plan bars transgender people—individuals who, by definition, do not identify or live in accord with their birth sex—from military service. A purported "exception" permitting transgender persons to serve in their "biological sex" does not make the Mattis Plan any less discriminatory; a requirement to serve in one's biological sex *is* a transgender ban.

The district court also correctly found that neither the Mattis Plan nor the accompanying Report represents a new development warranting dissolution of the preliminary injunction. They were anticipated by the parties and the district court based on the President's order to Secretary Mattis to develop a plan to implement and justify the enjoined directives, and they were submitted on the timeline specified by the 2017 Presidential Memorandum. The district court was not required to credit Defendants' assertion that the process resulting in the Mattis Plan

was independent of the President's directive when the current record shows the opposite—particularly given Defendants' refusal to permit any discovery into that process.

II. Plaintiffs remain likely to succeed on the merits of their constitutional claims. The Mattis Plan targets transgender people, discriminating on the bases of sex and transgender status. It is therefore subject to at least intermediate scrutiny. The military context does not dictate lesser scrutiny of facial discrimination on a suspect or quasi-suspect basis, nor is deference warranted on the record here. The same factors that led the district court to enjoin the 2017 Presidential Memorandum remain relevant to the Mattis Plan: The ban discriminates on a facially suspect basis; it is sweeping; the process leading to it was artificially constrained, opaque, and atypical for such a significant military decision; it revokes rights previously granted; and the grounds relied on were recently rejected by the military itself after a comprehensive review. On the present record, Defendants' purported justifications cannot withstand heightened scrutiny or even a less demanding standard of review.

III. The balance of equities strongly supports Plaintiffs, all of whom will face irreparable injuries absent the injunction. Under the Mattis Plan, all transgender people (except the grandfathered few) are excluded from military service. Even those permitted to serve under the grandfather clause do so on

sufferance, as exceptions to a rule that marks them as presumptively unfit. The government's speculation regarding harm to the military is contradicted by the record, which shows that *excluding* qualified transgender people would harm military readiness and the public interest. That clear balance of equities, which led this Court to deny a stay of the injunction, still warrants retaining the injunction in place pending a final judgment on the merits.

IV. The scope of the injunction is proper. When a policy is found to be unconstitutional on its face, the usual remedy is a facial injunction barring enforcement. Here, a facial injunction against the ban is necessary to protect Plaintiffs from the stigma and harm that would result from allowing the ban to take effect.

ARGUMENT

I. THE GOVERNMENT FAILED TO SHOW THE REQUISITE CHANGED CIRCUMSTANCES THAT WOULD JUSTIFY DISSOLVING THE INJUNCTION

A party seeking to dissolve a preliminary injunction must demonstrate "a change of circumstances between entry of the injunction and the filing of the motion that would render the continuance of the injunction in its original form inequitable." *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332, 337 (3d Cir. 1993); *American Council of the Blind v. Mnuchin*, 878 F.3d 360, 366 (D.C. Cir. 2017). Absent that showing, the motion must be denied. The government comes nowhere

close to demonstrating that the Mattis Plan's lockstep implementation of the President's directive meets this burden.

The government contends (at 37) that the Mattis Plan differs from the President's policy "in both substance and process." But as the district court correctly found, "the Mattis Implementation Plan is just that—a plan that *implements* the President's directive that transgender people be excluded from the military." JA72. Using contemporary language, the Plan reinstates the pre-2016 ban by excluding anyone who requires or undergoes "gender transition" or does not live in accord with their "biological sex"—*i.e.*, anyone who is transgender.

The government faults the district court for "never seriously grappl[ing]" with DOD's "extensive deliberative process" and "expert military judgment" underlying the Mattis Plan. Br. 37, 42. But the court considered that process in detail and found, on the record before it, that the government had not substantiated its claim of independent military judgment, and that substantial evidence showed just the opposite: The process resulting in the Mattis Plan was not a *change* in circumstances but the anticipated execution of the President's directive. JA87-90; *see United States v. Undetermined Quantities of Boxes of Articles*, 2008 WL 58871, at *3 (D.N.J. Jan. 3, 2008) ("change must be unanticipated"); *cf. American Council*, 878 F.3d at 367 ("Rule 60(b)(5) … permits a court to alter an injunction to respond to unanticipated factual changes.").

The government claims that the district court "extended" the injunction to the Mattis Plan. Br. 2, 3, 15, 16, 47. Defendants' characterization is a transparent effort to avoid having to show changed circumstances. The injunction prohibits Defendants from altering "the *status quo* with regard to accession and retention that existed before the issuance of the [2017] Presidential Memorandum," JA188—a point on which Defendants expressly sought clarification in November 2017, JA109-110. That was and remains the scope of the injunction the court issued in October 2017. There was no "extension" of it.

A. The Mattis Plan Is Substantively The Same As The Ban Preliminarily Enjoined By The District Court

No less than a policy stating that "no transgender people may serve," the Mattis Plan excludes transgender people from the military by restricting service to those whose gender matches their birth sex. "By definition, transgender people do not identify or live in accord with their biological sex." JA69. Instead, transgender people undergo a gender transition in order to live consistently with their gender identity. For many transgender people, being diagnosed with gender dysphoria—the distress that results when a person's gender identity differs from their birth sex—is the first step in that process. Gender transition is effective as a treatment for gender dysphoria and enables transgender people to live healthy and productive lives. JA1058-1059. The Mattis Plan excludes anyone who requires or undergoes "gender transition" and mandates that even "otherwise qualified"

transgender people (with or without a history of gender dysphoria) may serve only "in their biological sex." JA264-265; JA272-273. That "effectively translates into a ban on transgender persons in the military." JA91.

The government claims (at 38) that the Mattis Plan differs from the 2017 Presidential Memorandum in that it "turns not on transgender status, but on a medical diagnosis (gender dysphoria) and a related medical treatment (gender transition)." That claim is belied by the plain text of the policy, which targets transgender people—and only transgender people. As Secretary Mattis's Memorandum for the President regarding "Military Service by Transgender Individuals" explains, the Mattis Plan applies to three categories of transgender people: (1) "*[t]ransgender* persons with a history or diagnosis of gender dysphoria"; (2) "*[t]ransgender* persons who require or have undergone gender transition"; and (3)"*[t]ransgender* persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service." JA264-265 (emphasis added). The application of the policy hinges on a person's transgender status; it subjects transgender people—and only transgender people—to a "special *additional* exclusionary rule." JA95.

The central feature of the Mattis Plan is a bar on service by individuals who require or have undergone "gender transition"—the defining characteristic of being transgender. To close any possible loophole, it also mandates that any "otherwise

qualified" transgender persons may serve only in their "biological sex"—meaning that a transgender person may serve only by suppressing the characteristic that defines transgender identity. In every instance, the operative consideration is not whether a person has "a medical condition (gender dysphoria)," Br. 38, but whether they are living in accord with their gender identity rather than birth sex, *i.e.*, whether they are transgender.

Moreover, the point of the military's review process was to address its policy with respect to transgender servicemembers, not gender dysphoria. JA286. The "Terms of Reference" that Secretary Mattis issued in August 2017 directing the implementation of the President's ban does not mention gender dysphoria once. JA317-318. It notes the President's directives to "prohibit" accession by transgender enlistees and to "return" to the pre-2016 ban, and it instructs DOD to develop an implementation plan and study to support the ban, including by "updat[ing]" the ban the President ordered with "currently accepted medical terminology." JA318. The Mattis Plan and accompanying Report do exactly that: The pre-2016 ban disqualified transgender people based on "change of sex" or "transsexualism." JA922-923. The Mattis Plan substitutes "gender transition" for "change of sex" and "gender dysphoria" for "transsexualism." JA288. As the district court correctly held, the Mattis Plan implements the President's order,

reflecting only "surface-level" differences to update the terminology from the pre-2016 ban. JA90-92.

Defendants cannot escape that reality by casting the requirement that transgender people serve in their "biological sex" as an "exception." As the district court righty recognized, saying that transgender people can serve if they serve in their biological sex is no different from saying that transgender people are excluded: "Tolerating a person with a certain characteristic only on the condition that they renounce that characteristic is the same as not tolerating them at all." JA91. "'[J]ust as a policy allowing Muslims to serve in the military if they renounce their Muslim faith would be a ban of military service by Muslims, a policy requiring transgender individuals to serve in their birth sex *is* a ban on transgender service.'" JA91-92. It is also no different from the specious claim, uniformly rejected by courts, that laws restricting marriage to different-sex couples do not discriminate against gay people because a gay person can marry a person of the opposite sex. *E.g.*, *In re Marriage Cases*, 183 P.3d 384, 440-441 (Cal. 2008); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1200 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014).[5]

[5] The centrality of gender transition to transgender identity also distinguishes this case from *Geduldig v. Aiello*, 417 U.S. 484 (1974). *See* Br. 41. Unlike a pregnancy exclusion, the gender transition exclusion in the Mattis Plan is based on a characteristic that defines membership in the excluded group. Pregnancy is not

Defendants try to sow confusion by suggesting that there is "a subset of … transgender individuals" who indefinitely live, work, and function in their birth sex. Br. 5, 41. Although the term "transgender" is sometimes used to encompass a broader range of individuals who do not conform to gender norms, *see, e.g.*, JA621-622, that broader meaning is irrelevant to this case. The policy here targets Plaintiffs and other transgender individuals—a group sometimes referred to by the now less common word "transsexual"—on the basis that they require or have undergone gender transition. *E.g.*, *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 658 n.8 (S.D. Tex. 2008) (noting that courts "use the terms 'transgender' and 'transsexual' interchangeably"); *Schroer v. Billington*, 424 F. Supp. 2d 203, 205 (D.D.C. 2006) (using term "transsexual"). That is the same disqualification based on "transsexualism" that existed before 2016 and that the President ordered the military to reinstate. JA406; JA754; JA784.

Defendants' contention (at 41) that not all servicemembers have initiated gender transition does not change this analysis. As the district court noted, a transgender person's decision about when to transition is affected by numerous factors, including "career considerations, medical considerations, and fear of

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the defining characteristic of a woman. Living in accord with one's gender identity rather than birth sex is the defining characteristic of a transgender person.

discrimination." JA91 n.11. That fact provides no basis to infer that the policy is anything but a ban.

Under the Mattis Plan, the only transgender people permitted to serve are those retained under the grandfather clause. JA264. But that provision does not change the nature of the ban ordered by the President. The President expressly called for the implementation plan to "address transgender individuals currently serving," JA407, and the resulting provision was crafted while litigation by Plaintiffs and other transgender servicemembers has been ongoing. The clause applies only to the few servicemembers who have already taken steps to transition in reliance on the Carter Policy; it enables that small group to serve only on sufferance, with no protection from the stain of being labeled officially unfit; and it will expire when the last such person leaves, resulting in the complete elimination of transgender people from military service. The grandfather clause is in service of the implementation of the ban, not an exception to it. It is also "severable" from the rest of the policy, JA274, and can be eliminated at any time its existence proves disadvantageous to the government's position.

Finally, the district court rightly rejected the government's specious argument (at 38, 40) that the Mattis Plan is "like" the Carter Policy, and that the difference is just about "the *size* of exceptions." The two policies take diametrically opposed approaches to military service by transgender people. The

Carter Policy seeks to equalize treatment of transgender people by holding them "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." JA586.[6] The Mattis Plan does the reverse, targeting them for exclusion and discharge—hence, the need for the grandfather clause.

In short, despite Defendants' attempt to characterize the policy as based on a medical condition, the district court correctly found that the Mattis Plan is the same ban called for by the President. Defendants have failed to demonstrate that it is, in fact, "new and different" "in any meaningful way." JA87.

B. The Process Resulting In The Mattis Plan Was Designed To Implement And Justify The Enjoined Directives Of The President

The government contends (at 42) that even if the Mattis Plan is substantively similar to the ban the district court enjoined, the injunction should nevertheless be dissolved because the government has now engaged in "an extensive deliberative process" that warrants deference to an independent exercise of "expert military judgment." That is wrong for several reasons.

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[6] The Carter Policy eliminates any differential treatment of transgender people who are already serving and holds transgender applicants to the same standards applied to others, consistent with the way the military evaluates accessions for people with other treatable conditions. JA588-589.

First, the current record does not show that the process underlying the Mattis Plan reflected independent military judgment. On that basis, the district court denied the parties' cross-motions for summary judgment and directed the parties to resume discovery. The parties are currently briefing several issues that will define the scope of that discovery, which remains far from complete. JA62; Dkts. 169-171. The government cannot credibly claim that it is entitled to dissolution of the injunction based on the military's "considered judgment" following "a comprehensive review" (Br. 2, 16) while refusing to allow Plaintiffs to test that assertion.

Second, on the existing record, the district court found that Defendants' "*post hoc* processes and rationales appear to have been constrained by, and not truly independent from, the President's initial policy decisions." JA96. Consequently, "the unusual factors" surrounding those decisions—including the revocation of rights based on conclusions rejected by the military itself less than two years earlier and the lack of typical process accompanying such major policy announcements—remain "relevant" for determining whether deference is warranted at this stage, JA95. Those preliminary findings by the district court, which is much "closer to the facts and parties," should not be disturbed on appeal, especially in this interlocutory posture. *Richland/Wilkin Jt. Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1036 (8th Cir. 2016).

The government faults the district court for "seiz[ing] on" Secretary Mattis's "promise" in August 2017 to "'present the President with a plan to implement the policy and directives in the 2017 Presidential Memorandum.'" Br. 43 (citing JA88-90; JA401-405). But DOD necessarily conducted its review under Secretary Mattis's "direction," which is, in turn, "[s]ubject to the direction of the President." 10 U.S.C. § 113(b). The President "directed" the Secretary to ban transgender service and to submit an "implementation plan" laying out "appropriate" "steps" to accomplish that objective. JA406-407. Secretary Mattis then "direct[ed]" senior military officials to "develop[] an Implementation Plan … to effect the policy and directives in [the 2017] Presidential Memorandum," stating that DOD's "study will be planned and executed to inform the Implementation Plan." JA317-318. The government identifies no "other legal source" to support its claim that the process was carried out in any other manner or with any other aim than to implement and justify the ban ordered by the President. Order 4, *Doe 1 v. Trump*, No. 17-5267 (D.C. Cir. Dec. 22, 2017).

The government contends that the Mattis Plan and the Report invoke the Secretary's authority "to 'advise [the President] at any time … that a change [in] policy is warranted.'" Br. 42 (quoting JA406). But nothing in the record indicates that is how the Panel and Secretary Mattis approached their task; nothing suggests, for example, that they considered whether transgender military service should

continue or the impact of reversing an existing policy. To the contrary, the Secretary's directives made clear from the beginning that the purpose of the undertaking was to design and "execute" a study that would support an "Implementation Plan" to accomplish the President's ban. JA318.

The government argues that DOD's review must be "independent" because it "began at the initiative of Secretary Mattis … *before* the President's tweet." Br. 18, 44. That contention has no support in the record. DOD deferred the Carter accession standards to permit "the Services to assess their readiness to begin accessions." JA425. It did not purport to initiate a comprehensive review of transgender military policy or even accessions. In any event, any review that was ongoing was necessarily superseded by the explicit "direction" from the President in August 2017, 10 U.S.C. § 113(b); *accord* Order 4, *Doe 1 v. Trump*, No. 17-5267 (D.C. Cir. Dec. 22, 2017)—as Defendants' public statements and internal documents confirm, *e.g.*, JA368, 375; JA401-402; JA403-404; JA405.

II. PLAINTIFFS REMAIN LIKELY TO SUCCEED ON THE MERITS OF THEIR CONSTITUTIONAL CHALLENGE

The government has failed to show that changed circumstances warrant dissolving the injunction. That should end this appeal. In any event, the record at this stage supports the district court's finding that Plaintiffs remain likely to succeed on the merits of their constitutional claims.

A. The Mattis Plan Is Subject To At Least Intermediate Scrutiny

Policies that target transgender people warrant at least intermediate scrutiny for two reasons: First, transgender people constitute a small, politically powerless group that has faced virulent persecution on the basis of a deeply ingrained, immutable characteristic that has no bearing on their ability to contribute to society; they thereby satisfy "the criteria of at least a quasi-suspect classification." JA169-171. Second, discrimination against transgender people is "inextricably intertwined with gender classifications" because transgender status entails a difference between a person's gender identity and birth sex. JA172-173. For that reason, it is also sex-based because it turns on a person's change of sex. *Glenn v. Brumby*, 663 F.3d 1312, 1320-1321 (11th Cir. 2011); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-308 (D.D.C. 2008). And such discrimination inherently rests upon impermissible gender stereotypes about how men and women "should feel, act, and look." JA172-173 (citing *Price Waterhouse v. Hopkins,* 490 U.S. 228, 251 (1989)). Therefore, disparate treatment of transgender people is also subject to heightened scrutiny because it is a form of sex discrimination.

The courts that have recently considered the issue have applied at least intermediate scrutiny to classifications based on transgender status for one or both of the reasons cited by the district court here. *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir.

2017); *Glenn*, 663 F.3d at 1316-1320; *M.A.B. v. Board of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 718-722 (D. Md. 2018); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Board of Educ. of Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 872-874 (S.D. Ohio 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015). That conclusion is further bolstered by numerous decisions holding that discrimination against transgender people is sex discrimination under various federal statutes. *E.g.*, *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-216 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1198-1203 (9th Cir. 2000).[7]

The government offers no reason to disturb the district court's preliminary holding that heightened scrutiny applies here. A motion to dissolve "must rest on grounds that could not have been raised before" by appealing the injunction. *Alto v. Black*, 738 F.3d 1111, 1120 (9th Cir. 2013); *Sprint Commc'ns Co. v. CAT Commc'ns Int'l, Inc.*, 335 F.3d 235, 242 (3d Cir. 2003). Defendants did not pursue their prior appeal and identify no change in law that warrants revisiting the issue in

[7] A district court hearing a related challenge recently held that strict scrutiny applies as a matter of law. *Karnoski v. Trump*, 2018 WL 1784464, at *11 (W.D. Wash. Apr. 13, 2018). Plaintiffs agree, given that transgender people are a paradigmatic "discrete and insular minorit[y]." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). This Court need not reach that issue, however, since the Mattis Plan fails either test. *Infra* pp. 37-48.

this interlocutory posture. Moreover, while Defendants in a single sentence in a footnote assert that "such classifications do not trigger heightened scrutiny," Br. 23 n.2, they make no substantive argument to support that conclusory assertion and accordingly have forfeited the issue for purposes of this appeal. *CTS Corp. v. EPA*, 759 F.3d 52, 64-65 (D.C. Cir. 2014).[8]

The Mattis Plan, moreover, has the same "unusual" features the district court found in enjoining the President's directives: (1) It sweeps broadly, excluding anyone who requires or has undergone gender transition or is unable to serve in their birth sex; (2) it relies on "overbroad" and "hypothetical" generalizations about transgender people; (3) it is contradicted by an independent military study—conducted prior to the Carter Policy's adoption—which concluded that there is no valid reason to exclude transgender people; and (4) it revokes rights that transgender people were previously granted. JA95; JA175-182. As the Supreme Court has explained, "'[d]iscriminations of an unusual character'" suggest improper animus and require especially careful judicial consideration. *United States v. Windsor*, 570 U.S. 744, 770 (2013) (quoting *Romer v. Evans*, 517 U.S.

[8] Defendants cite *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007), but that case declined to decide whether classifications based on transgender status warrant heightened scrutiny. It held only that the transgender plaintiff made no equal-protection argument distinct from her Title VII claim, which failed because the employer had articulated a legitimate, nondiscriminatory reason for termination. *Id*. at 1224, 1227-1228.

620, 633 (1996)); *see also Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). For that reason as well, the Mattis Plan warrants heightened scrutiny.

B. The Government's Arguments For Evading Heightened Judicial Scrutiny Of The Mattis Plan Fail

Rather than attempt to defend the Mattis Plan under heightened scrutiny, the government principally argues that because the Mattis Plan involves "the professional judgments of our Nation's military leaders," the district court should have evaluated its constitutionality by applying "a highly deferential form of review" akin to rational-basis review. Br. 2, 19, 21. That is wrong on both the facts and the law.

As a factual matter, deference does not apply on the record here. Deference to military decisionmaking is not automatic; its application depends on the actual exercise of independent military judgment. Here, the district court's finding that the government's "*post hoc* processes and rationales appear to have been constrained by, and not truly independent from, the President's initial policy decisions" (JA96) was not clear error and should not be disturbed on appeal.

As a legal matter, even had the process been as the government claims, deference does not lower the level of scrutiny applicable to sex-based discrimination in the military. There is no "military exception" to the requirement of equal protection. JA173-174; *Rostker v. Goldberg*, 453 U.S. 57, 69-71 (1981)

(rejecting "different equal protection test" for "military context"); *Frontiero v. Richardson*, 411 U.S. 677, 688-691 (1973) (plurality) (applying heightened scrutiny). As this Court has recognized, *Rostker* neither insulates the government's "empirical judgments from scrutiny," nor eliminates judicial scrutiny of "the degree of correlation between sex and the attribute for which sex is used as a proxy." *Lamprecht v. FCC*, 958 F.2d 382, 394 n.3 (D.C. Cir. 1992); *Steffan v. Perry*, 41 F.3d 677, 689 n.9 (D.C. Cir. 1994) (even in military, "[c]lassifications based on race or religion, of course, would trigger strict scrutiny"); *Emory v. Secretary of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987); *Owens v. Brown*, 455 F. Supp. 291, 305-309 (D.D.C. 1978) (invalidating ban on assignment of female servicemembers where overbreadth belied asserted purpose of preserving combat effectives, and rejecting government's morale and discipline rationales).

To be sure, in military cases, courts have recognized an obligation to credit the military's assessment of the importance of particular asserted interests that might not be considered important in civilian settings. For example, in *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986), the Court credited the importance of the military's asserted interest in the need for uniformity—a consideration with little relevance to civilian workplaces. Similarly, in *Rostker*, 453 U.S. at 70, the Court recognized the "'important governmental interest'" in "raising and supporting

armies." But that deference to the government's asserted interest does not convert heightened scrutiny into mere rational-basis review.

Rather, as the government's own cases show, while courts may defer to "the relative importance of … particular military interest[s]," *Goldman*, 475 U.S. at 507, they may not "abdicat[e]" the judiciary's constitutional responsibility to determine whether there is a sufficiently close fit between the sex-based distinction and the asserted interest under heightened scrutiny, *Rostker*, 453 U.S. at 70. Deference does not permit a court to relax the required level of fit between a discriminatory classification and its justification. *See, e.g.*, *Adair v. England*, 183 F. Supp. 2d 31, 52, 64-65 (D.D.C. 2002) (applying strict scrutiny to claims of differential treatment of Navy chaplains); *Crawford v. Cushman*, 531 F.2d 1114, 1122-1123 (2d Cir. 1976) (striking down policy requiring automatic discharge of pregnant women while permitting individualized assessment of servicemembers with other temporary disabilities);[9] *Witt v. Department of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (holding that deference to asserted importance of governmental interests did not preclude heightened scrutiny of whether policy restricting service

[9] Contrary to the government's argument below (Dkt. 138 at 31 n.12), there is no reason to believe *Crawford* would be decided differently today, post-*Rostker*. The Second Circuit has since reaffirmed that "military conduct is not immune from judicial review when challenged as violative of the Bill of Rights." *Katcoff v. Marsh*, 755 F.2d 223, 233 (2d Cir. 1985).

by gay servicemembers significantly furthered, and was necessary to achieve, those interests).

Trump v. Hawaii, 138 S. Ct. 2392 (2018)—a case involving neither military personnel policies nor facially discriminatory rules—did not alter these longstanding principles. First, in contrast to the policy in *Hawaii*, which was facially neutral and thus subject only to rational-basis review, the Mattis Plan subjects transgender people to a facially discriminatory rule. *Supra* pp. 19-25. The Supreme Court went to great pains to distinguish the "facially neutral policy" in *Hawaii*, which "den[ies] certain foreign nationals the privilege of admission" into the United States, from the race-based order in *Korematsu v. United States*, 323 U.S. 214 (1944), which the Court characterized as "objectively unlawful and outside the scope of Presidential authority." 138 S. Ct. at 2423.

Second, as the Court noted in *Hawaii*, the extreme deference applicable in immigration cases is premised on the recognition that "over no conceivable subject" is the government's power "more complete" or "immune from judicial control.'" *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). By contrast, "[t]he military has not been exempted from constitutional provisions that protect the rights of individuals," and "[i]t is precisely the role of the courts to determine whether those rights have been violated." *Emory*, 819 F.2d at 294; *see supra* p. 33.

Defendants argue (at 21) that courts have accepted "administrative problems" and post-hoc justifications—concerns that would not typically survive heightened scrutiny—in the military cases involving gender-based discrimination. But neither *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975), nor *Rostker* supports that proposition. In *Ballard*, the Supreme Court found that, *at the time the statute at issue was enacted*, Congress sought to compensate for reduced promotion opportunities available to women line officers. Rather than relying on a post-hoc justification, the Court looked to whether a sufficient justification for the law existed when it was enacted.[10] Similarly, in *Rostker*, the Court considered the views expressed by Congress in 1980, rather than in 1948 when the law exempting women from the draft was first enacted, because the relevant decision occurred in 1980 when Congress "thoroughly reconsider[ed] the question" and declined to change its prior policy. 453 U.S. at 74-75. Defendants also rely heavily on *Goldman*, but that case involved a First Amendment challenge to the application of a *facially neutral* regulation regarding dress. In contrast, where plaintiffs challenge a military policy that classifies persons on a suspect or quasi-suspect basis, courts subject that policy and its asserted evidentiary bases to the same careful scrutiny

[10] *Ballard* also predates the Court's decision a year later in *Craig v. Boren*, 429 U.S. 190 (1976), which first clearly established that a gender classification will be upheld only if it serves an important governmental objective and is substantially related to achievement of that objective. *See id.* at 197.

required in non-military cases. *See Adair*, 183 F. Supp. 2d at 52 (rejecting the "slippery slope" of extending *Goldman* to Equal Protection and Establishment Clause claims).

Finally, the government argues (at 22-23) that rational-basis review applies because the Mattis Plan "draws lines on the basis of a medical condition (gender dysphoria) … and a medical treatment (gender transition)," not transgender status. That argument is refuted by the face of the policy: The Report supporting the Mattis Plan is titled "Department of Defense Report and Recommendations on Military Service *By Transgender Persons*," and it recommends a new "*Transgender* Policy" under which "*Transgender Persons* Who Require or Have Undergone Gender Transition Are Disqualified," "*Transgender Persons* With a History or Diagnosis of Gender Dysphoria are Disqualified," and "*Transgender Persons* without a History or Diagnosis of Gender Dysphoria May [Only] Serve … in Their Biological Sex." JA268, 300, 309 (emphasis added). This is not a neutral medical policy, but a policy that excludes transgender people based on their transgender status. *Supra* pp 19-25.

C. None Of The Government's Justifications Withstands Any Level Of Scrutiny

Under the heightened review applicable here, the burden falls on the government to prove that the ban is substantially related to an "exceedingly persuasive justification," which is "genuine, not hypothesized or invented *post hoc*

in response to litigation," and does "not rely on overbroad generalizations about the different talents, capacities, or preferences" of transgender people. *United States v. Virginia*, 518 U.S. 515, 531, 533 (1996). Here, the government's three justifications—military readiness, unit cohesion, and cost—are so discontinuous with the Mattis Plan's exclusion of an entire class of people that they cannot satisfy even rational-basis review, much less the more demanding standard required here.

1. The ban undermines military readiness.

Banning individuals from military service because they are transgender undermines military readiness. The military has universal policies for accession, deployment, and retention. Having a separate policy that excludes people for being transgender serves only to bar individuals who are otherwise deployable and fit to serve.

a. The ban irrationally excludes transgender people from the pool of qualified enlistees.

All prospective servicemembers undergo a rigorous examination to identify physical and mental health conditions that would preclude enlistment. JA215-216. Ignoring that generally applicable screening process, the government defends the ban (at 25) by claiming that transgender people "suffer from high rates of suicidal thoughts and behavior, as well as other mental-health conditions such as anxiety, depression, and substance-abuse disorders." Even if those sweeping assertions

were true—and they are not[11]—they do not justify singling out transgender people when the military already screens for all of these concerns. Anyone with a history of suicidal behavior—whether transgender or not—is barred from enlisting, as is anyone with a history of anxiety or depression unless they meet generally applicable criteria to demonstrate that those conditions will not limit their ability to serve. JA255-256.

The irrationality of excluding fit applicants explains why the military does not adopt a similar categorical approach to other groups with disproportionate rates of depression, suicidality, anxiety, or other mental-health conditions. For example, children of servicemembers have a significantly elevated incidence of suicide attempts. JA845. Depression, anxiety, and suicide are more common among white people than black people. *Id*. But the military does not exclude these groups. Defendants' reliance on this rationale to support a categorical exclusion of transgender people is completely anomalous—strongly suggesting animus rather than legitimate concerns. *Cf. Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (striking down policy as unconstitutional where its "purported

[11] The Report mischaracterizes and selectively cites data on military personnel that, in fact, show "roughly equivalent" rates of suicidal ideation among transgender and non-transgender servicemembers. Dkt. 148-2, Ex. B, at 29.

justifications … made no sense in light of" the government's treatment of "similarly situated" groups).

The Report also invokes concerns about deployability to justify excluding transgender recruits. JA264. But those concerns have no logical application to transgender individuals who have completed gender transition and need no further medical care beyond routine hormone therapy required by many other servicemembers. Because the excluded individuals need no surgeries, there is no rational (let alone substantial) connection between the ban and non-deployability due to transition-related surgical care. Instead, the ban only excludes individuals who could satisfy all of the same accession criteria applied to other applicants.

b. The ban results in the discharge of servicemembers who are fit to serve.

Defendants do not claim—nor could they—that transgender servicemembers cannot meet the universal deployment standards recently adopted by the military that mandate discharge for servicemembers who are nondeployable "for more than 12 consecutive months, for any reason." JA266. Moreover, as the government admits, not all transgender persons undergo any particular surgery, and even for those who undergo surgery, typical recovery times fall well short of 12 months. JA291; *see also* JA795-797 (describing related testimony before the panel of

experts).[12] The only effect of having a special rule for transgender people is thus to require the discharge of servicemembers who otherwise satisfy universal deployment standards.

That marks a dramatic departure from military policy. No other group faces discharge for receiving a particular diagnosis or needing treatment. A servicemember who develops even a serious condition that may result in non-deployability undergoes a medical evaluation process, not automatic discharge. *See* Dkt. 128-2, Ex. B, at 14, 16, 23. The Mattis Plan diverts transgender servicemembers from that individualized review and subjects them to automatic discharge. JA300. There is nothing unique to transgender people's health or transition-related care that justifies bypassing the ordinary evaluation process already in place. JA852. Nor does the government claim that transgender people who require gender transition would categorically fail individualized review. The only result of this special rule is thus, again, to irrationally exclude individuals who are otherwise fit to serve.

[12] The government wrongly claims (at 27) that hormone therapy could render a transitioning servicemember non-deployable for a significant amount of time to monitor hormone levels. As a drafter of the medical guidelines the government relies on explained, "quarterly bloodwork is not necessary care." JA796.

c. The government's readiness justifications are meritless.

With no way to explain why the Mattis Plan excludes transgender troops who meet military accession, deployment, and retention standards, the government offers a grab bag of double standards, speculation, hypotheticals, and distortions of data to defend the ban. None has merit.

First, although the government claims (at 26) that there is "scientific uncertainty" regarding the efficacy of transgender-related medical care, the American Psychological Association and American Medical Association "immediately denounced" that claim as contrary to the consensus of the medical community. JA54-55. The claim also implies a requirement of "certainty" that the military does not apply to other medical conditions, holding treatment for gender dysphoria to a standard of efficacy that few, if any, treatments could meet. JA842. As Plaintiffs' expert explained in unrefuted testimony, "[i]f the military limited all medical care to surgical procedures supported by prospective, controlled, double-blind studies," very few conditions would be treated, and common procedures like tonsillectomies and appendectomies would be excluded. JA841-842.

Second, Defendants rely (at 24) on "the absence of evidence on the impact of deployment." But they concede that there is equally no indication that transgender people would fare differently. Defendants cannot ban transgender people based on a lack of data resulting from their own exclusionary policies. That

circular justification—transgender people cannot serve because they never have—cannot satisfy even rational-basis review, much less heightened scrutiny. *See Lawrence v. Texas*, 539 U.S. 558, 577-578 (2003) ("neither history nor tradition could save a [discriminatory] law" from constitutional challenge); *Virginia*, 518 U.S. at 535-536 (invalidating tradition of single-sex education at Virginia Military Institute); *Heller v. Doe*, 509 U.S. 312, 326 (1993) ("Ancient lineage of a legal concept does not give [a law] immunity from attack for lacking a rational basis.").

Third, the government portrays (at 25) transgender people as unfit based on the comparative number of mental-health visits by transgender servicemembers since the Carter Policy went into effect. But transgender servicemembers were *required* to make such visits for both administrative and medical reasons during this period to obtain transition-related care. Dkt. 148-2, Ex. B, at 24-29. It is also unsurprising that when the military began to provide previously denied medical care, the number of provider visits increased.[13]

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[13] Defendants cite (at 25) a concern that transgender people are more likely to be suicidal, relying on a thin body of inconclusive data from after the Carter Policy went into effect. Sex discrimination, however, cannot be justified using overbroad generalizations, even when they have some statistical support. *Virginia*, 518 U.S. at 540-542 (rejecting evidence of "average capacities or preferences of men and women" as sufficient to justify excluding even women with "the will and capacity" to attend military college). With respect to other groups, Defendants rely on universal standards to screen for suicidality and other mental-health conditions; they identify no reason, much less an "exceedingly persuasive" one, *id.* at 533, to treat transgender troops differently. *Supra* pp. 38-41.

Finally, Defendants claim (at 27) that Secretary Mattis has a lower "risk tolerance" than his predecessor. But they fail to identify any actual risks. A "cautious" approach to risk can only justify policies based on evidence of a risk to be avoided. Just as the government may not "urg[e] the need and wisdom of proceeding slowly and gradually" based on "speculations or vague disquietudes," *Watson v. City of Memphis*, 373 U.S. 526, 528, 536 (1963), Defendants cannot rationally rely on a desire to proceed slowly without proffering evidence of the legitimate goals that are furthered by that approach. And here, as the district court stressed, it is the government that is seeking to upend the status quo of a carefully crafted policy based on inconclusive speculation. JA71 (noting that "in lieu of affirmative evidence," Defendants' "Report repeatedly cites 'uncertainty'").

In sum, by singling out transgender people who would otherwise meet service-wide accession and retention standards and excluding them from military service, the ban serves only to compromise military readiness, not bolster it.

2. The government's unit-cohesion justification fails.

The government's contention that the mere presence of transgender servicemembers is inconsistent with sex-based standards and would "erode reasonable expectations of privacy" (Br. 30) is similarly meritless.

Plaintiffs do not challenge the military's ability to maintain any of its sex-based standards. They seek only to be held to the same standards as non-

transgender men and women. Under the status quo, a servicemember's sex while in the military is determined for all purposes by the gender marker in DOD's personnel database. JA518. Changing that marker requires a complete gender transition and commander's approval, consistent with that commander's evaluation of "expected impacts on mission and readiness." JA493; JA856-860, 862. That process creates a bright-line rule that ensures the military can maintain sex-based standards applicable to all men or women—whether transgender or not.

Defendants cite no support for their argument (at 31-32) that recognizing transgender women as women and transgender men as men in sleeping arrangements or restrooms violates either privacy rights or laws mandating separate accommodations for men and women. As courts have uniformly held, sharing restrooms or similar facilities with a transgender person does not violate any privacy rights. *See Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 533 (3d Cir. 2018); *Whitaker*, 858 F.3d at 1046-1047; *Cruzan v. Special Sch. Dist.*, 294 F.3d 981, 984 (8th Cir. 2002); *M.A.B.*, 286 F. Supp. 3d at 723-726; *Students & Parents for Privacy v. U.S. Dep't of Educ.*, 2016 WL 6134121, at *28-29 (N.D. Ill. Oct. 18, 2016).[14]

[14] The government's citation (at 32) to *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016), does nothing to bolster its claim. There, the district court enjoined, on statutory grounds, enforcement of regulations construing

Virginia provides no support for Defendants' argument that "biological differences" between men and women justify excluding transgender people from service. As the Court explained, "some women are capable of all of the individual activities required of VMI cadets," and "can meet the physical standards [VMI] now impose[s] on men." 518 U.S. at 523, 525. To the extent the footnote cited by Defendants has any relevance, it is in acknowledging that experience has shown that adjustments made to equalize opportunities for men and women in military service academies have been "manageable." *Id.* at 555 n.19.

The government's claim that permitting transgender people to serve creates intractable practical problems is also belied by the military's successful implementation of extensive guidance and training since the adoption of the Carter Policy. *See* JA856-860, 862. Tellingly, with more than two years' experience integrating openly transgender people into the service, Defendants present no evidence and rely instead on hypothetical rather than actual concerns. JA304-305; *e.g.*, Br. 33-34 (claiming that permitting transgender troops to serve "*risks* creating unfairness," "*could* become" a source of uncertainty, and "*could* degrade" unit cohesion (emphasis added)). Such speculation is insufficient under heightened scrutiny. *Virginia*, 518 U.S. at 533. And "[t]o the extent this is a thinly-veiled

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the Affordable Care Act to prohibit denial of medical treatment of transgender people; the case has no bearing on Defendants' privacy argument.

reference to an assumption that other servicemembers are biased against transgender people, this would not be a legitimate rationale for the challenged policy." JA176 n.10 (citing *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

Defendants' arguments are similar to those rejected in *Owens v. Brown*, where the government sought to justify a law barring Navy commanders from assigning female personnel to ships. 455 F. Supp. at 294-295. The government argued that such assignments would undermine morale and discipline, citing "the unknown effects that full sexual integration might have on group dynamics." *Id*. at 306. The court rejected that justification: "Commanding Officers have sufficient authority to deal with persons having difficulty adjusting to mixed crews." *Id*. at 309 (internal quotation marks omitted). The same is true here.

The military has already engaged in significant planning and training on this issue, and transgender troops have been serving openly for more than two years. The history of military service in this country shows that "'the loss of unit cohesion' has been consistently weaponized against open service by a new minority group," but it also demonstrates the military's repeated ability "to adapt and grow stronger" by including these groups. *Stockman v. Trump*, 2018 WL 4474768, at *10 (C.D. Cal. Sept. 18, 2018). Defendants offer no reason that the lessons from integrating previously excluded groups should be ignored when it comes to transgender people.

3. The ban cannot be justified based on cost.

Defendants appeal (at 36) to "the military's general interest in maximizing efficiency through minimizing costs." Under heightened review, however, they "must do more than show that denying … medical care … saves money." *Memorial Hosp. v. Maricopa Cty.*, 415 U.S. 250, 263 (1974). "The conservation of the taxpayers' purse is simply not a sufficient state interest" to justify an equal-protection violation under heightened scrutiny. *Id.*; *see Graham v. Richardson*, 403 U.S. 365, 375 (1971).

Even under rational-basis review, "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." *Plyler v. Doe*, 457 U.S. 202, 227 (1982). The government must articulate more than a desire to save resources; it must justify why it chose one group rather than similarly situated others to bear the burden of cost savings. *Id.* at 229; *see also Diaz v. Brewer*, 656 F.3d 1008, 1013 (9th Cir. 2011). Defendants offer no such explanation here. Because the military already provides "the same or substantially similar services" to other servicemembers, JA1073, its cost-savings argument is nothing more than "a concise expression of an intention to discriminate," *Plyler*, 457 U.S. at 227.[15]

[15] *Middendorf v. Henry*, 425 U.S. 25 (1976), does not vindicate Defendants' cost-savings argument. There, the Supreme Court held that the right to counsel did not apply to summary courts-martial because that form of military discipline is less

III. THE BALANCE OF EQUITIES CONTINUES TO SUPPORT THE INJUNCTION

A. The Mattis Plan Would Irreparably Harm Plaintiffs

Plaintiffs would each suffer concrete and serious harms were the Mattis Plan in effect. JA96. Defendants assert that Plaintiffs suffer no injury *at all*, lacking standing even to pursue this action. But the district court explained at length why that argument is meritless. JA75-86.

The government claims (at 48) that current transgender servicemembers who identified themselves as transgender in reliance on the Carter Policy—Jane Does 2 through 5, John Doe 1, and Regan Kibby[16]—are protected by the grandfather clause. But as the district court recognized, the Mattis Plan nonetheless "singles them out from all other servicemembers and marks them as categorically unfit for military service," denying them the opportunity to serve on an equal footing with their peers. JA76; *see, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995).

Relying primarily on *Allen v. Wright*, 468 U.S. 737 (1984), Defendants argue (at 49) that those "'stigmati[c]'" injuries are insufficient to confer standing.

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analogous to a civilian criminal trial than to other proceedings where the right does not attach. Nowhere did the Court indicate that cost savings could justify denying equal protection to servicemembers.

[16] Defendants have stated that Kibby—a midshipman at the United States Naval Academy—will be treated as a current servicemember for purposes of the Mattis Plan. JA76 n.4.

But the plaintiffs in *Allen* sought to challenge the tax-exempt status of racially segregated private schools even though their children had never applied to the schools and had not been "'personally denied equal treatment.'" *Id.* at 739, 744-745, 755. They asserted only a generalized harm "suffered by all members of a racial group when the Government discriminates on the basis of race." *Id.* at 754. Here, in contrast, Plaintiffs "are members of the precisely defined group that the Mattis Implementation Plan discriminates against by labelling as unsuited for military service." JA78.

The district court also found that the Mattis Plan would imperil Plaintiffs' military careers by reducing their "opportunities for assignments, promotion, training, and deployment." JA79. Those injuries are not speculative: At least one Plaintiff has already received unfavorable work assignments because of the impending ban. *See* JA79-80. The district court thus correctly found, based on the record and common sense, that it was "fanciful" to believe that a policy declaring transgender individuals to be unfit for service would not harm Plaintiffs' "experience, career development, and growth in the military." JA79.

The government's arguments with respect to the other Plaintiffs are equally meritless. Jane Doe 6 is a transgender servicemember who has not yet received a gender dysphoria diagnosis from a military physician. JA1105. She therefore does not qualify for retention under the grandfather clause and is subject to discharge if

she discloses her transgender identity and seeks to transition. Defendants contend (at 48) that this injury is self-inflicted, and that she should rush to obtain a gender dysphoria diagnosis while the injunction they seek to dissolve remains in effect. But subjecting Jane Doe 6 to this now-or-never choice is itself a discriminatory harm. And even if she succeeded in qualifying for the grandfather provision, she would face the same injuries that other openly identified transgender servicemembers do under the ban.

In addition, the Mattis Plan would bar Jane Doe 7 and John Doe 2—who seek to enlist—because John Doe 2 has undergone gender transition and Jane Doe 7 is in the process of doing so. It would also bar Dylan Kohere, a transgender man who has begun gender transition, because he cannot serve in his "biological sex." Defendants claim (at 51) that those Plaintiffs are not suffering any injury because the record does not definitively establish that they would otherwise be eligible for military service. But plaintiffs challenging unequal treatment are not required to establish that they would obtain some benefit but for alleged discrimination. *See Northeastern Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 665-666 (1993). The "injury in fact element of standing in an equal protection case is the denial of equal treatment resulting from the imposition of the barrier." *American Freedom Law Ctr. v. Obama*, 821 F.3d 44, 51 (D.C. Cir. 2016)

(internal quotation marks omitted); *In re Navy Chaplaincy*, 697 F.3d 1171, 1176 (D.C. Cir. 2012).

B. Maintaining The Injunction Furthers The Public Interest

"[E]nforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). Because Plaintiffs are likely to succeed in establishing that the ban is unconstitutional, the public interest favors maintaining the injunction. Moreover, "[t]he public interest and equities lie with allowing young men and women who are qualified and willing to serve our Nation to do so." JA96; Order 5, *Doe 1 v. Trump*, No. 17-5267 (D.C. Cir. Dec. 22, 2017).

Defendants have shown no harm to the government. The Mattis Plan's "broad prohibition on military service by transgender individuals" is "divorced from any transgender individual's actual ability to serve." JA95. Transgender individuals who wish to serve must meet all relevant physical, mental, and medical standards, just like everyone else. And the record establishes that thousands of transgender individuals are currently able to meet those standards and continue to serve without issue. JA831-836.

IV. THE INJUNCTION IS PROPER IN SCOPE

Defendants challenge (at 51-52) the scope of the injunction, but they raised the same objection to the *entry* of the preliminary injunction and abandoned their

appeal. *See* Stay Mot. 10-11, *Doe 1 v. Trump*, No. 17-5267 (D.C. Cir. Dec. 11, 2017). They identify no factual or legal change that justifies relitigating the issue. *See Alto*, 738 F.3d at 1120; *Sprint*, 335 F.3d at 242.

The injunction properly bars enforcement of a facially unconstitutional policy. Plaintiffs brought a facial challenge to the ban, and facial relief is necessary to redress their injury. Permitting Plaintiffs to serve under the pall of a ban that proclaims all transgender people unfit does not afford complete relief for the unconstitutional discrimination they allege. If allowed to take effect, the ban would brand *all* Plaintiffs (including those grandfathered under the Mattis Plan) as unfit to serve, undercutting them in the eyes of their peers and military leadership and jeopardizing their careers. JA183. Only a facial injunction averts those harms.

None of Defendants' cursory arguments against "nationwide" injunctions has merit. Defendants' invocation of Article III (Br. 51) "confuse[s] the doctrine of standing with the power of a court to order a remedy." *Berry v. School Dist. of City of Benton Harbor*, 467 F. Supp. 695, 702 (W.D. Mich. 1978). The district court has Article III jurisdiction because these Plaintiffs have standing. JA74-86; *see Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006). Under the Constitution itself, the court therefore has "power to enjoin unconstitutional acts by the government." *Hubbard v. EPA*, 809 F.2d 1, 11 n.15 (D.C. Cir. 1986) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). And

it has authority to enjoin acts by the "parties"—including the government—before it. Fed. R. Civ. P. 65(d)(2).

The scope of the injunction is a matter of the district court's equitable discretion, not jurisdiction. Given the serious harm that Plaintiffs will suffer if the ban is not enjoined on its face, *see supra* pp. 49-52, equitable principles strongly support facial invalidation. "[B]readth and flexibility are inherent in equitable remedies," and "the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971); *Brown v. Plata*, 563 U.S. 493, 538 (2011); *Hills v. Gautreaux*, 425 U.S. 284, 293-294, 306 (1976). Here, where "the arguments and evidence show that [the Mattis Plan is likely] unconstitutional on its face, an injunction prohibiting its enforcement is proper." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016); *Citizens United v. FEC*, 558 U.S. 310, 331 (2010) (explaining that distinction between facial and as-applied challenges "goes to the breadth of the remedy … necessary to resolve a claim"). Indeed, the "ordinary result" when a policy is determined to be facially unconstitutional is to enjoin it in its entirety, not merely its application to the plaintiff. *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998).[17] That rule is also reflected in the

[17] Defendants' citation to the Supreme Court's stay in *DOD v. Meinhold*, 510 U.S. 939 (1993), is not to the contrary. The challenged policy was not invalid on its face, but only as "applied" to the plaintiff's case. *Meinhold v. DOD*, 34 F.3d

Administrative Procedure Act, which directs courts to "set aside" unconstitutional agency action, not to limit relief to the parties before the Court. 5 U.S.C. § 706(2)(B).

The government claims (at 52) that "nationwide injunctions 'take a toll on the federal court system.'" But that ignores the "flood of duplicative litigation" that its approach would generate, *National Mining Ass'n*, 145 F.3d at 1409, particularly in this Circuit, since anyone challenging the ban could bring suit in the district court here, *see* 28 U.S.C. § 1391(e)(1). Defendants likewise ignore that the ban addresses transgender people as a group; the fundamental point of the ban—and why it is unconstitutional—is that transgender people's eligibility to serve does *not* turn on their individual circumstances. In this case, limiting federal courts' equitable authority to patchwork injunctive relief would fundamentally erode "the rule of law." *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 534 (D.C. Cir. 1963); *see City of Chicago v. Sessions*, 2017 WL 4572208, at *4 (N.D. Ill. Oct. 13, 2017) ("All similarly-situated persons are entitled to similar outcomes under the law, and as a corollary, an injunction that results in unequal treatment of litigants appears arbitrary.").

1469, 1472, 1479-1480 (9th Cir. 1994). Here, Plaintiffs' constitutional challenge to the Mattis Plan does not turn on their particular circumstances, but on the nature of the discrimination against transgender people as a group.

CONCLUSION

The district court's order declining to dissolve the preliminary injunction should be affirmed.

Respectfully submitted.

/s/ Paul R.Q. Wolfson

PAUL R.Q. WOLFSON
JOHN T. BYRNES
KEVIN M. LAMB
JACK STARCHER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

ADAM M. CAMBIER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

JENNIFER LEVI
MARY L. BONAUTO
GLBTQ Advocates and Defenders
18 Tremont Street, Suite 950
Boston, MA 02108

SHANNON P. MINTER
AMY WHELAN
CHRISTOPHER STOLL
ALEXANDER CHEN
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, CA 94102

MATTHEW E. MILLER
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210

THERESA M. ROOSEVELT
FOLEY HOAG LLP
1717 K Street NW
Washington DC 20006

October 22, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 12,431 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Paul R.Q. Wolfson
PAUL R.Q. WOLFSON

October 22, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Paul R.Q. Wolfson
PAUL R.Q. WOLFSON