No. 18-677

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

JANE DOE 2, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in denying the government's motion to dissolve the preliminary injunction prohibiting the government from enforcing a ban on military service by transgender individuals.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT 3

A. The Military's Policies On Service By Transgender Individuals 3

1. Development of the Carter Policy allowing transgender people to serve in the military 3

2. The ban directed by the President 7

a. President Trump's order to ban transgender people from military service 7

b. DOD's development and issuance of an implementation plan 8

c. How the Mattis Plan effectuates the ban 10

B. Procedural History 12

REASONS FOR DENYING THE PETITION 17

I. THE GOVERNMENT CANNOT JUSTIFY THE EXTRAORDINARY STEP OF CERTIORARI BEFORE JUDGMENT 17

II. THE PETITION DOES NOT PRESENT AN APPROPRIATE VEHICLE TO CONSIDER THE ISSUES ON WHICH THE GOVERNMENT SEEKS CERTIORARI 22

TABLE OF CONTENTS—Continued

Page

III. THE DISTRICT COURT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR A COURT OF APPEALS AND IS CORRECT 26

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Page(s)

Abbott v. *Veasey*, 137 S. Ct. 612 (2017) 23

Alto v. *Black*, 738 F.3d 1111 (9th Cir. 2013) 24

Ashcroft v. *ACLU*, 542 U.S. 656 (2004) 26

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327 (1967) 23

Brown v. *Plata*, 563 U.S. 493 (2011) 32

Christian Legal Society v. *Martinez*, 561 U.S. 661 (2010) 29

Citizens United v. *FEC*, 558 U.S. 310 (2010) 33

Coleman v. *Paccar, Inc.*, 424 U.S. 1301 (1976) 17

Dames & Moore v. *Regan*, 453 U.S. 654 (1981) 21

Department of Homeland Security v. *Regents of the University of California*, 138 S. Ct. 1182 (2018) 19

Doe v. *Trump*, No. 17-5267, 2017 WL 6553389 (D.C. Cir. Dec. 22, 2017) 14, 27

DOD v. *Meinhold*, 510 U.S. 939 (1993) 33

E.I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 (1977) 18

Frontiero v. *Richardson*, 411 U.S. 677 (1973) 30

Goldman v. *Weinberger*, 475 U.S. 503 (1986) 18, 29, 30

Hamdan v. *Rumsfeld*, 548 U.S. 557 (2006) 18

Hamdan v. *Rumsfeld*, 543 U.S. 1096 (2005) 18

TABLE OF AUTHORITIES—Continued

Page(s)

Hills v. *Gautreaux*, 425 U.S. 284 (1976) 32

Horne v. *Flores*, 557 U.S. 433 (2009) 23

Hubbard v. *EPA*, 809 F.2d 1 (D.C. Cir. 1986) 32

Lamprecht v. *FCC*, 958 F.2d 382 (D.C. Cir. 1992) 30

Lawrence v. *Texas*, 539 U.S. 558 (2003) 29, 31

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 32

Meinhold v. *DOD*, 34 F.3d 1469 (9th Cir. 1994) 33

Mount Soledad Memorial Ass'n v. *Trunk*, 134 S. Ct. 2658 (2014) 17

Mount Soledad Memorial Ass'n v. *Trunk*, 567 U.S. 944 (2012) 23

National Mining Ass'n v. *United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) 33

Plyler v. *Doe*, 457 U.S. 202 (1982) 31

Romer v. *Evans*, 517 U.S. 620 (1996) 31

Rostker v. *Goldberg*, 453 U.S. 57 (1981) 29, 30

Rumsfeld v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) 32

Sprint Communications Co. L.P. v. *CAT Communications International, Inc.*, 335 F.3d 235 (3d Cir. 2003) 24

Steffan v. *Perry*, 41 F.3d 677 (D.C. Cir. 1994) 30

TABLE OF AUTHORITIES—Continued

Page(s)

Stockman v. *Trump*, 331 F. Supp. 3d 990 (C.D. Cal. 2018) 29

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) 32

Tolan v. *Cotton*, 572 U.S. 650 (2014) 25

United States v. *Clinton*, 524 U.S. 912 (1998) 19

United States v. *Mendoza*, 464 U.S. 154 (1984) 18

United States v. *Nixon*, 418 U.S. 683 (1974) 20, 21

United States v. *Swift & Co.*, 286 U.S. 106 (1932) 23

Virginia Military Institute v. *United States*, 508 U.S. 946 (1993) 22

Whole Woman's Health v. *Hellerstedt*, 136 S. Ct. 2292 (2016) 33

Yee v. *City of Escondido*, 503 U.S. 519 (1992) 27

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 937 (1952) 21

DOCKETED CASES

Trump v. *Karnoski*, No. 18-676 (U.S.) .... *passim*

STATUTES AND RULES

5 U.S.C. § 706 33

28 U.S.C. § 1292 24

Fed. R. Civ. P. 65 32

TABLE OF AUTHORITIES—Continued

Page(s)

S. Ct. Rules
Rule 10 25
Rule 11 .... 17, 20

OTHER AUTHORITIES

19 Moore, James Wm., et al., *Federal Practice* § 203.10 (2018) 24

Shapiro, Stephen M., et al., *Supreme Court Practice* § 4.20 (10th ed. 2013) 17

11A Wright, Charles Alan, et al., *Federal Practice and Procedure* § 2961 (3d ed. 2018) 23

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BRIEF IN OPPOSITION

INTRODUCTION

This case is about whether men and women who want to serve in the United States armed forces to protect their country and who are able and otherwise qualified to do so should be barred from military service because they are transgender. While this case does raise important constitutional issues, now is not the appropriate time for this Court to consider them. No court of appeals has issued any decision addressing those issues. No case raising those issues has yet been litigated to final judgment in a district court. And this case does not present any of those constitutional issues in a suitable posture, because it involves only the government's

effort to *dissolve* a preliminary injunction entered months earlier, which the government decided not to appeal.

The government's desire for an immediate resolution of this litigation is not a reason for the extraordinary exercise of this Court's authority to review a case before the court of appeals has rendered a decision. The important issues in this case call for a measured approach and a full record. The district court is poised to issue rulings on discovery disputes that will allow the parties to conclude the litigation in an efficient and orderly manner. And the court of appeals heard the government's appeal in this case earlier this month. The government offers no credible showing of urgency that justifies bypassing that careful and respectful consideration by the lower courts.

The government's litigation choices also belie any suggestion that this case presents an emergency. The government voluntarily abandoned its appeal from the preliminary injunction—including any appeal as to its scope—a year ago. When the district court denied the government's motion to dissolve the injunction after the issuance of the Mattis Plan, the government appealed, but did not seek a stay (even as to the injunction's scope) from the district court, the court of appeals, or this Court. Instead, the government requested an expedited appeal, which the court of appeals granted.

Nothing about the underlying merits of the district court's decision—either in refusing to dissolve the preliminary injunction or in granting the preliminary injunction in the first place—justifies immediate review. The district court correctly concluded that the government's ban on military service by transgender individ-

uals is likely to be found unconstitutional and that a preliminary injunction is necessary to prevent irreparable harm to respondents while the parties work toward final resolution of respondents' claims on the merits. The district court properly rejected the government's strained argument that the Mattis Plan—which Secretary Mattis issued to implement the President's order—is not a ban. Those findings do not warrant this Court's immediate review.

Instead of short-circuiting the normal process of litigation, as the government requests, this Court should deny review and should allow the parties to complete the litigation and develop a full record. Once the parties have done so, the courts—including this Court—will be much better positioned to resolve the constitutional issues raised by this case (and the other pending cases). The petition for certiorari before judgment should be denied.

STATEMENT

A. The Military's Policies On Service By Transgender Individuals

1. Development of the Carter Policy allowing transgender people to serve in the military

Before 2016, the Department of Defense (DOD) barred transgender people from entering the military and mandated the discharge of those serving. Pet. App. 9a-11a. Following the 2010 repeal of a federal statute that barred gay and lesbian people from service, military leaders recognized that the armed forces also had valuable and highly skilled transgender members. CAJA1018-1019. As then-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." CAJA1019; *see also* CAJA1001.

In July 2015, Secretary of Defense Ashton Carter convened a Working Group to examine military service by transgender individuals and to formulate recommendations for future policy.[1] Pet. App. 12a. Recognizing that "the most important qualification for service members should be whether they're able and willing to do their job," CAJA710, the Working Group conducted a comprehensive examination of relevant evidence. The Working Group sought "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." CAJA1040. The Working Group consulted with medical, personnel, and readiness experts, senior military personnel, and transgender servicemembers. Pet. App. 12a. It also commissioned a RAND Corporation study on the impact of military service by transgender people. *Id.*

The Working Group concluded that barring transgender people from military service undermined military effectiveness and readiness. Pet. App. 13a. Exclusion would require the discharge of "qualified individuals … and [would] create[] unexpected vacancies

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[1] The Working Group had approximately 25 members, including senior uniformed officers, senior civilian officials, and representatives of Surgeons General for each Service branch. CAJA991. 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. CAJA1042.

requiring expensive and time-consuming recruitment and training of replacements." *Id.*[2] The Working Group also concluded that "'barring transgender people from military service causes significant harms to the military, including arbitrarily excluding potential qualified recruits based on a characteristic with no relevance to their ability to serve.'" Pet. App. 13a-14a n.2. 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 time lost from duty." CAJA1023.

Based on those recommendations, Secretary Carter in June 2016 issued a directive-type memorandum announcing that "'service in the United States military should be open to all who can meet the rigorous standards for military service and readiness,'" and setting forth accession and retention policies (collectively, the Carter Policy) that permit service by qualified transgender individuals. Pet. App. 15a.

Secretary Carter also set up a comprehensive plan to revise military regulations to ensure equal treatment of transgender servicemembers throughout all aspects of service from accessions through completion of service. That effort included the development and

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[2] The RAND study found that health-care coverage for gender-transition treatments would have an "'exceedingly small'" impact on health-care expenditures and that there was no evidence that permitting transgender personnel to serve openly would have "any effect" on unit cohesion. Pet. App. 13a. The study also found that "'[i]n no case'" where foreign militaries have allowed transgender individuals to serve "'was there any evidence of an effect on the operational effectiveness, operational readiness, or cohesion of the force.'" *Id.*

circulation of training materials by DOD and by the individual military service branches. Pet. App. 17a-19a. Those materials explained that a transgender servicemember is one who has undergone or will undergo gender transition, and that gender transition "is the process a person goes through to live fully in their preferred gender." CAJA519-520. They further explained that the process for gender transition in the military would begin with the individual receiving a diagnosis of gender dysphoria, a medical diagnosis that refers to the distress that a transgender person "experience[s] due to a mismatch between their gender and their sex assigned at birth." CAJA518, 520-521. Gender transition alleviates such distress by enabling transgender servicemembers to live "in [their] preferred gender." CAJA519, 521.

Retention. The Carter Policy took immediate effect with respect to retention, prohibiting the discharge of servicemembers "'due solely to their gender identity or an expressed intent to transition genders.'" Pet. App. 15a. The Carter Policy established a process for permitting servicemembers to undergo gender transition and to serve in their preferred gender. CAJA490-507; CAJA588-589. The servicemember must coordinate with his or her commander regarding the timing of gender transition and any relevant accommodations "addressing the needs of the Service member in a manner consistent with military mission and readiness." CAJA496; *see* CAJA500-501. The process concludes when the servicemember's gender marker in the Defense Enrollment Eligibility Reporting System (DEERS) is changed to match the servicemember's gender rather than birth sex. CAJA496. Thereafter, the servicemember is subject to all applicable military standards for that gender. Pet. App. 15a.

Accessions. The Carter Policy permits transgender people to enlist and eliminates the prior differential standard applied to the medical treatments associated with transgender people, which required the rejection of any transgender candidate regardless of their fitness to serve. Under the Carter Policy, individuals who have undergone gender transition are generally eligible to serve, as long as their transition is complete and the applicant has been medically stable for at least 18 months. Pet. App. 16a. That is the same approach applied to applicants who have undergone other medical treatments that do not result in any persistent or ongoing "functional limitations." CAJA589; *see also* Pet. App. 17a ("'[T]he military services will begin acceding transgender individuals who meet all standards—holding them to the same physical and mental fitness standards as everyone else who wants to join the military.'").

Transgender people have been serving openly in all branches of the United States military since June 2016, including on active duty in combat zones. Pet. App. 5a. Transgender individuals have been permitted to enlist in the military since January 2018. Pet. App. 96a.

2. The ban directed by the President

a. President Trump's order to ban transgender people from military service

On July 26, 2017, 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.'" Pet. App. 20a. On August 15, 2017, the President formalized that policy in a memorandum. Pet. App. 21a; CAJA406-407 (2017 Presidential Memo-

randum). The 2017 Presidential Memorandum directed Secretary of Defense James Mattis "to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016." CAJA406. That policy, as described by the 2017 Presidential Memorandum, "generally prohibited openly transgender individuals from accession into the United States military and authorized the discharge of such individuals." *Id.*

The 2017 Presidential Memorandum ordered Secretary Mattis to "submit a plan to the President 'for implementing'" the President's directives by February 2018 and specified that the ban would take effect no later than March 23, 2018. Pet. App. 23a. The President also ordered Secretary Mattis to include in the implementation plan provisions "'to address transgender individuals currently serving in the United States military.'" *Id.*

b. DOD's development and issuance of an implementation 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 developing an "'implementation plan'" to "'address accessions of transgender individuals and transgender individuals currently serving in the United States military.'" Pet. App. 24a. Secretary Mattis stated that he would establish a panel "'to provide advice and recommendations on the implementation of the president's direction,'" and then advise the President "'concerning implementation.'" *Id.*

Secretary Mattis issued two memoranda related to the President's directive. The first, entitled "Interim

Guidance," reiterated DOD's intent to "'carry out the President's policy and directives.'" Pet. App. 143a. Secretary Mattis stated that he was issuing the interim guidance to "'comply with the [2017] Presidential Memorandum'" and would "present the President with a 'plan to implement the policy and directives'" in the 2017 Presidential Memorandum, on the timeline ordered by the President. *Id.*

The second, entitled "Terms of Reference," set forth the specific parameters for how to "'effect the policy and directives of the [2017] Presidential Memorandum'" with respect to accessions and retention. Pet. App. 143a. With respect to accessions, Secretary Mattis stated that the 2017 Presidential Memorandum required DOD to "prohibit accession by transgender individuals." Pet. App. 144a. With respect to retention, Secretary Mattis stated that the Memorandum directed DOD to "'return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016.'" *Id.*

In February 2018, DOD issued a report including specific recommendations for how to implement the President's directives. Pet. App. 119a-120a; CAJA268-312 (Report). On February 22, 2018, Secretary Mattis endorsed the recommendations and presented them along with the Report in a memorandum to the President regarding "Military Service by Transgender Individuals." Pet. App. 117a; CAJA263-265 (Mattis Plan). On March 23, 2018—the date the President had set for reinstating the ban—the President "'revoke[d]'" the 2017 Presidential Memorandum and "ordered" Secretary Mattis "'to implement … appropriate policies'" regarding military service by transgender individuals. Pet. App. 121a.

c. How the Mattis Plan effectuates the ban

The Mattis Plan takes a multi-pronged approach to ensure that all transgender individuals are barred from military service. Specifically, the Mattis Plan excludes: (1) anyone who does not live in their "biological sex"; (2) anyone "who require[s] or ha[s] undergone gender transition"; and (3) anyone with gender dysphoria or a history of gender dysphoria who requires a "change of gender" or who does not live in their "biological sex." Pet. App. 118a-119a. Each of those provisions is simply a different way to describe and exclude transgender people.

The Mattis Plan thus reinstates the pre-2016 policy and reverses the Carter Policy. The pre-2016 policy barred individuals with "'transsexualism'" or who required or had undergone a "'change of sex.'" Pet. App. 9a. The Carter Policy eliminated that prohibition by permitting military service by any servicemember "who intends to begin transition, is undergoing transition, or has completed transition." CAJA519. As directed by the President, the Mattis Plan would reinstate the pre-2016 ban using modern terminology. It replaces the outdated terms "transsexual," "transsexualism," and "change of sex" with "transgender," "gender dysphoria," and "gender transition."

The Carter Policy eliminated the pre-2016 rule that previously had barred transgender people from accessions and retention. The Carter Policy recognizes that being transgender is not generally relevant to a person's fitness to serve and thus presumes that "transgender individuals shall be allowed to serve in the military." Pet. App. 15a. It ensures that enlistment is "open to all who can meet the rigorous stand-

ards for military service and readiness" and subjects transgender servicemembers "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." CAJA586; Pet. App. 15a.

The Carter Policy rests on the principle that a servicemember "affected by a medical condition or medical treatment related to their gender identity should be treated … in a manner consistent with a service member whose ability to serve is similarly affected for reasons unrelated to gender identity or gender transition." CAJA588. Under the Carter Policy, transgender people who have undergone gender transition are thus eligible to enlist as long as the process is complete and they have been medically stable for at least 18 months. Pet. App. 16a. In contrast, the Mattis Plan bars accession by anyone who has undergone gender transition, regardless of their fitness to serve. Pet. App. 119a.

Similarly, the Carter Policy and the Mattis Plan take opposing approaches to the retention of servicemembers who identify themselves as transgender. *Compare* Pet. App. 15a *with* Pet. App. 119a. The Carter Policy recognizes that permitting military service by transgender people means that they must be permitted to serve in accord with their "preferred gender." CAJA496. It extends that protection to all transgender servicemembers: those who "intend to begin transition, are beginning transition, who already may have started transition, and who have completed gender transition." *Id.*; *see also* CAJA499 (providing guidance about how to accommodate transgender servicemembers "throughout the gender transition process"). In contrast, the Mattis Plan restores the pre-2016 ban by requiring all servicemembers to serve in

their "biological sex." Pet. App. 119a; *see also* Pet. App. 147a n.12.

The Mattis Plan also follows the President's directive to "address transgender individuals currently serving in the United States military." Pet. App. 23a. It does so by carving out an exception to the ban for the small group of transgender servicemembers who initiated gender transition in reliance on the Carter Policy. Pet. App. 118a.[3] Once the members of that group have concluded their terms of service, no other transgender people will be permitted to enlist or serve.

B. Procedural History

1. Respondents, seven active-duty transgender servicemembers and three transgender individuals seeking to pursue military careers, brought this action on August 9, 2017, challenging the constitutionality of the ban on military service by transgender people ordered by the President.[4] On October 30, 2017, the district court preliminarily enjoined the ban with respect to both the accession and retention of transgender individuals, ordering a resumption of "the *status quo* with regard to accession and retention that existed" under the Carter Policy "before the issuance of the [2017] Presidential Memorandum." Pet. App. 93a.

The district court found that respondents were likely to succeed on their Fifth Amendment claim. The

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[3] 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." CAJA273-274.

[4] Some respondents were added as plaintiffs in the second amended complaint. CAJA190-211.

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." Pet. App. 6a. Even considering the military context, the court concluded, those directives likely fail scrutiny due to "a number of factors—including the sheer breadth of the exclusion ordered by the directives, 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." Pet. App. 6a-7a.

The district court also found that the ban would irreparably injure respondents by violating their constitutional rights and branding them as unfit to serve in the eyes of their peers and officers—thereby harming their stature and imperiling their military careers. Pet. App. 90a. 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." Pet. App. 92a.

Petitioners appealed the preliminary injunction and sought a stay of the injunction, only as to accessions, in order to complete a "'further study.'" Stay Motion at 17, *Doe* v. *Trump*, No. 17-5267 (D.C. Cir. Dec. 11, 2017) (quoting CAJA406); *see* Dkts. 66, 73. The district court declined to grant a stay. Dkt. 75.[5] The court of appeals

[5] Petitioners sought a stay of all discovery pending that appeal, Dkt. 62, which the district court denied, Dkt. 63. The district court also denied petitioners' motion to "clarify" the injunction, which contended that Secretary Mattis could independently bar service by transgender individuals even if the President could not. Pet. App. 95a-96a.

also denied a stay, explaining that petitioners had "failed to demonstrate that the study" ordered by Secretary Mattis was "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." *Doe* v. *Trump*, No. 17-5267, 2017 WL 6553389, at *2 (D.C. Cir. Dec. 22, 2017). Following that decision, petitioners voluntarily dismissed their appeal; they did not seek a stay from this Court.

2. The case then proceeded to discovery.[6] Although some documents were produced and a few depositions were taken, petitioners "strenuously resisted" any inquiry into the basis for the ban, Pet. App. 117a; *e.g.*, Dkt. 88, at 5:11-16, and "withheld nearly all information concerning" the development of the Mattis Plan, CAJA62. As a result, several discovery-related motions are currently fully briefed and pending before the district court. *E.g.*, Dkts. 169-171.

3. On March 23, 2018, petitioners moved to dissolve the injunction, arguing that the recently announced Mattis Plan is a "new policy," distinct from the enjoined directives of the President, that deserves deference as the product of "independent military judgment." Dkts. 96 at 12, 116 at 11-12. On August 6, the district court denied that motion. Stressing that it had "made no final ruling on the merits," Pet. App. 153a, the court concluded that the Mattis Plan did not consti-

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[6] Petitioners again moved for a stay of all discovery, which the district court denied. Dkt. 80.

tute "changed circumstances" that would justify dissolution of the preliminary injunction, but rather was intended to implement the directives set forth in the 2017 Presidential Memorandum. Pet. App. 149a-152a. 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." Pet. App. 150a.

As the district court explained, the Mattis Plan "prevents service by transgender individuals." Pet. App. 145a. The court rejected petitioners' contention that the Mattis Plan differs materially from the ban ordered by the President, 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." Pet. App. 141a-147a.

The district court thus found that the Mattis Plan "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. Pet. App. 150a. 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*." Pet. App. 145a.

4. On August 24, 2018, the district court denied both parties' motions for summary judgment. CAJA48-62. As the court explained, "[t]he parties dispute the facts related to the process used by [petitioners] to prepare the current proposed policy on transgender military service." CAJA56. Those facts, the court determined, "are material—they go to the heart of the degree of deference owed, and the level of scrutiny to be applied, in this case." CAJA60. Noting that petitioners "have withheld nearly all information concerning th[e] alleged deliberation" that led to the adoption of the Mattis Plan, the court held that it could not definitively resolve the parties' dispute without "basic facts that will inform its answer." CAJA62.[7] The court subsequently directed the parties to brief privilege issues that will largely determine the scope of discovery, Minute Order (September 10, 2018); those issues are fully briefed and awaiting a decision.

5. On August 27, 2018, petitioners appealed from the denial of the motion to dissolve the injunction, but did not seek a stay—even as to the scope of the injunction—from any court at that time. *See* Dkt. 162. At petitioners' request that appeal was expedited, and it was argued before a panel (Griffith, Wilkins, Williams, JJ.) on December 10, 2018.

On November 21—more than three months after the district court denied the motion to dissolve the preliminary injunction—petitioners moved for a stay of the injunction pending appeal. Dkt. 183. The district court denied that motion on November 30. Dkt. 187. On December 3, petitioners sought a stay from the court of

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[7] The court also denied a third request by petitioners to stay discovery. Minute Order (August 27, 2018).

appeals. That motion is fully briefed and remains pending.

REASONS FOR DENYING THE PETITION

I. THE GOVERNMENT CANNOT JUSTIFY THE EXTRAORDINARY STEP OF CERTIORARI BEFORE JUDGMENT

This Court grants certiorari before judgment "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11. That standard is a "very demanding" one. *Mount Soledad Mem'l Ass'n* v. *Trunk*, 134 S. Ct. 2658, 2659 (2014) (Alito, J., respecting denial of certiorari before judgment). Even in important and time-sensitive cases, the exercise of that power is "an extremely rare occurrence." *Coleman* v. *Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers). To warrant this Court's rare exercise of its jurisdiction, a petitioner seeking certiorari before judgment must show (1) that the case is of extraordinary national importance and (2) that—in the particular case—there is an exceptional need for speedy resolution. Shapiro et al., *Supreme Court Practice* § 4.20, at 287-288 (10th ed. 2013). This is not one of those exceptional cases.

The government stakes its request for extraordinary review on the fact that this case implicates "the authority of the U.S. military to determine who may serve in the Nation's armed forces." Petition at 16, *Trump* v. *Karnoski*, No. 18-676 (U.S. Nov. 23, 2018) ("*Karnoski* Pet."). But that authority is of no more "imperative public importance," *id.*, than the issues presented by many other cases concerning important military policies that have been resolved in the ordi-

nary course. *See Goldman* v. *Weinberger*, 475 U.S. 503 (1986); *see also, e.g.*, *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006); *Hamdan* v. *Rumsfeld*, 543 U.S. 1096 (2005) (denying petition for certiorari before judgment). Especially in a case raising important constitutional issues, this Court ordinarily prefers to have the benefit of review by the courts of appeals. *See United States* v. *Mendoza*, 464 U.S. 154, 160 (1984) (this Court "benefit[s]" from allowing circuit courts to consider a question "before this Court grants certiorari"); *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977) (recognizing "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals" prior to Supreme Court review).

Nor is there any pressing need for the extraordinary disposition the government requests. The government seeks certiorari before judgment to "ensure that the injunction does not remain in place any longer than is necessary," Pet. 13, claiming that the national interest is harmed because qualified transgender servicemembers are currently permitted to serve. But there is no harm—much less immediate harm—to the military from allowing the service of transgender individuals who satisfy the demanding standards to which all servicemembers are subject. The preliminary injunction maintains the status quo that existed prior to the 2017 Presidential Memorandum and that requires transgender servicemembers to meet the same fitness, readiness, and deployability standards as all other servicemembers. Although transgender men and women have been serving openly in the military under the Carter Policy for more than two years, the government has presented no evidence that their doing so harms military readiness, effectiveness, or lethality.

On the contrary, extensive record evidence shows that transgender men and women have been serving honorably and effectively, including on active duty in combat zones. Pet. App. 5a; CAJA1001; CAJA1019. For example, during congressional hearings in April 2018, the heads of three service branches testified that they were unaware of any evidence that service by transgender people impairs military effectiveness, and that transgender individuals are able to meet service standards and serve without issue. CAJA831-836. The very policy that petitioners want to implement—the Mattis Plan—would itself allow hundreds of transgender individuals to continue serving in the armed forces through a grandfather provision—an exception that cannot be squared with the government's claims of urgency to eliminate all other transgender personnel.

In addition, the unusual step of granting certiorari before judgment is generally unnecessary where the courts of appeals have proceeded on an expedited basis. *Department of Homeland Sec.* v. *Regents of Univ. of California*, 138 S. Ct. 1182 (2018) (certiorari before judgment is unwarranted where "Court of Appeals will proceed expeditiously to decide [the] case"); *see United States* v. *Clinton*, 524 U.S. 912 (1998). Throughout this case, both the district court and court of appeals have proceeded expeditiously and with due regard for the need to develop a complete record to facilitate judicial review, including any eventual review by this Court. The court of appeals is currently considering petitioners' appeal on an expedited basis, and in the district court the parties are poised to resume discovery so that this case may be brought to final judgment.

Any claim of immediate harm from the preliminary injunction is also belied by petitioners' own litigation

choices. The government voluntarily withdrew its first appeal of the preliminary injunction and did not seek a stay or review from this Court—even as to the scope of the injunction. As for the decision at issue in this appeal, the district court denied the government's motion to dissolve the preliminary injunction on August 6, 2018. When the government filed a notice of appeal from that decision three weeks later, it did not seek a stay or move for certiorari before judgment at that time. Instead, the government waited more than three months before finally seeking a stay from the district court. In light of that history, the government cannot credibly now claim that this case is of "such imperative public importance," S. Ct. R. 11, as to justify this Court's immediate review.

The government has pointed to the few exceptional cases in which this Court granted certiorari before judgment, suggesting those cases stand for the proposition that certiorari before judgment is appropriate to "promptly resolve important and time-sensitive disputes." *Karnoski* Pet. 18. But—as underscored by the fact that petitioners abandoned their first appeal in this case and did not even seek a stay from any court on their second appeal for months after the district court declined to dissolve the preliminary injunction—this case does not present anything remotely like the circumstances that led the Court to grant certiorari before judgment in those cases. In each, this Court granted early review because waiting for the case to proceed through normal avenues of appellate review would have risked extraordinary disruption.

United States v. *Nixon*, 418 U.S. 683 (1974), was a case of unique constitutional significance and urgency, involving the President's refusal to comply with a special prosecutor's subpoena, only a few months before

the criminal trial of senior White House staff members. There is no imminent deadline in this case, much less a constitutional crisis demanding Supreme Court intervention. Moreover, as a procedural matter, the Special Prosecutor in *Nixon* filed a petition for a writ of certiorari before judgment the same day the President appealed to the court of appeals; here, petitioners waited months after noticing their appeal, and oral argument has already occurred.

In *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), the need for immediate action was obvious: Lower courts had reached conflicting conclusions as to the legality of the President's actions regarding the disposition of seized Iranian assets, and the United States could have been in breach of an executive agreement with Iran unless the government acted by July 19, 1981, possibly generating a diplomatic crisis and leaving less than two months for the appellate process to be completed. Again, there is no such deadline here, and petitioners have not acted with the promptness shown in cases of true urgency.

Finally, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), involved President Truman's seizure of steel mills to avoid a planned nationwide strike and work stoppage in order to assure the continued availability of steel during the Korean War. In opposing a preliminary injunction, the government argued that the seizure was "necessary to avert a national catastrophe" that would "endanger the well-being and safety of the Nation." *Id.* at 582, 584. Certiorari was granted only days after the district court's decision, and less than a month after the seizure order. Here, there is no such national emergency, nor any plausible claim of a threat to national security. Transgender individuals have been serving, and will continue to serve, with-

out threatening the overall effectiveness of our military or its ability to wage an ongoing war. This case warrants careful consideration of respondents' constitutional claims, and the Court should not decide them before there is a complete record.

II. THE PETITION DOES NOT PRESENT AN APPROPRIATE VEHICLE TO CONSIDER THE ISSUES ON WHICH THE GOVERNMENT SEEKS CERTIORARI

The government's extraordinary request for immediate review rests on the contention (at 14) that granting the petition would "bring before this Court the equal-protection claim at the center of all the suits challenging the constitutionality of the Mattis policy." That misstates the procedural posture of this case and the state of the record. Respondents' equal-protection claim has not been adjudicated on the merits. To the contrary, the district court denied both parties' motions for summary judgment. In that court's view, an issue material to respondents' equal-protection challenge—whether (as petitioners contend) the Mattis Plan reflects an independent exercise of military judgment rather than an implementation of the enjoined directives of the President, *see Karnoski* Pet. 24—involves a factual dispute on which the record is incomplete. The district court is poised to rule on discovery disputes, after which the parties can proceed to expeditiously litigate this case to final judgment on a complete record.

This Court typically declines review of interlocutory orders, and "await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," to ensure the benefit of a full record and crystallization of the legal issues presented. *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari); *see Abbott* v. *Veasey*,

137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari) (noting that "[a]lthough there is no barrier to … review, the discriminatory purpose claim is in an interlocutory posture," "the District Court has yet to enter a final remedial order," and therefore "[t]he issues will be better suited for certiorari review" after final judgment); *Mount Soledad Mem'l Ass'n* v. *Trunk*, 567 U.S. 944 (2012) (Alito, J., respecting the denial of certiorari) (agreeing with denial of certiorari because of "interlocutory posture" in which district court had not yet "fashion[ed] an appropriate remedy" after final judgment); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 327-328 (1967) (per curiam) (interlocutory order was "not yet ripe for review by this Court"). Here, as in all of the above cases, denial of the petition would not preclude the government from raising the same issues in a later petition following entry of a final judgment.

The Court's ordinary caution is especially warranted here for several additional reasons.

First, the appeal from which petitioners seek certiorari does not involve review even of a district court's decision to enter a preliminary injunction, but rather only the still more highly circumscribed review of the court's refusal to *dissolve* an injunction nearly a year after it was entered. A party seeking to dissolve an injunction must show that unanticipated "changed circumstances" render the injunction's continuation inequitable. *Horne* v. *Flores*, 557 U.S. 433, 447 (2009); *see United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932); 11A Wright et al., *Federal Practice and Procedure* § 2961 (3d ed. 2018) (dissolution or "modification is not warranted if the court determines that the moving party is relying upon events that actually were anticipated when the decree was entered"). That strict showing is

necessary to prevent the enjoined party from engaging in multiple repetitive appeals or attempting to "revive the right to appeal" the entry of a preliminary injunction under 28 U.S.C. § 1292(a)(1) after the time for doing so has lapsed. 19 Moore, *Federal Practice* § 203.10 (2018). And it ensures that the party cannot relitigate issues in a motion to dissolve that could have been raised through the normal process of appellate review. *See, e.g.*, *Alto* v. *Black*, 738 F.3d 1111, 1120 (9th Cir. 2013); *Sprint Commc'ns Co. L.P.* v. *CAT Commc'ns Int'l, Inc.*, 335 F.3d 235, 242 (3d Cir. 2003).

Petitioners ignore the highly circumscribed review that is appropriate in this posture, seeking certiorari on issues they could have pressed before this Court following entry of the injunction. For example, the government objects to the injunction's "nationwide" scope. *Karnoski* Pet. 25-27. But that issue is no different now than when the district court issued the preliminary injunction more than a year ago; the scope of the injunction remains the same. Petitioners could have pursued appellate review of that issue, but they declined to do so. *Supra* pp. 13-14. Petitioners identify no new circumstances that would warrant this Court's interlocutory review of the facial scope of that preliminary remedial order a year after it took effect. And the government can challenge the scope of any final remedial order in a subsequent appeal.

Second, the district court's fact-intensive determination that petitioners failed to make the weighty showing necessary to justify dissolving the preliminary injunction does not warrant this Court's review. The petition assumes that, even if the President's directives were properly enjoined, the Mattis Plan is a new, independent, and different policy that does not effectuate those directives. Pet. 7; *Karnoski* Pet. 24. The district

court, after conducting a careful inquiry into Secretary Mattis's orders establishing the process and a close comparison of the resulting Mattis Plan with the 2017 Presidential Memorandum, found that the government had not shown that the Mattis Plan was developed independently of the President's order to ban transgender people from military service. Pet. App. 141a-148a. Such fact-intensive determinations do not ordinarily merit this Court's review. *Tolan* v. *Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring in the judgment) ("'[E]rror correction … is outside the mainstream of the Court's functions and … not among the 'compelling reasons' … that govern the grant of certiorari'"); S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings[.]"). This Court's review makes even less sense here, where these findings are preliminary and not part of a final ruling on the merits. Pet. App. 153a.

Finally, the factual record on several central issues in this case remains incomplete and is the subject of pending motions before the district court. When it denied both parties' motions for summary judgment, the district court emphasized that further discovery was necessary to allow it to adjudicate the parties' claims and defenses in this case. CAJA58 ("The Court cannot summarily adjudicate the claims in this case on the present record."). Although the government believes that the constitutionality of the Mattis Plan can be resolved as a matter of law now, the denial of summary judgment by the district court—which is close to this case and is determined to resolve it in an orderly and efficient manner—counsels in favor of waiting until the parties and that court have compiled a complete record.

Granting certiorari in this posture would only encourage parties to bypass the normal process of appellate review in future cases. It would interfere with the full development of the factual record that this Court has often emphasized is indispensable to its own review. And it would conflict with the Court's admonition to avoid interlocutory decisions on constitutional questions until they can be definitively resolved. *E.g.*, *Ashcroft* v. *ACLU*, 542 U.S. 656, 664-665 (2004) ("If the underlying constitutional question is close, … we should uphold the injunction and remand for trial on the merits."). Review of the constitutional questions in this case should await a fuller record and final judgment that will facilitate such review.

III. The District Court's Decision Does Not Conflict With Any Decision Of This Court Or A Court of Appeals And Is Correct

There is no circuit split that might warrant this Court's review; indeed, no court of appeals has ruled on *any* of the legal issues petitioners seek to bring to this Court. And there is no division of authority on any of the legal underpinnings of the decision below. The government strains to find some tension between the district court's decision and this Court's precedents concerning deference to military decisionmaking and the availability of programmatic relief under the proper circumstances. But there is no such tension. The district court faithfully applied this Court's precedents. There is thus no question on which this Court should grant certiorari at this time.

1. Petitioners do not challenge the district court's conclusion that a classification based on transgender identity warrants heightened scrutiny. Accordingly, they have waived any such argument should the Court

grant review. *See Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992). Instead, petitioners premise their merits argument on the contention that the Mattis Plan does not turn on transgender status at all, but is based solely on the medical condition of gender dysphoria. The district court correctly rejected that argument—as have all the other courts that have addressed the issue.

Petitioners are wrong because, as the district court correctly determined, "the Mattis Implementation Plan is just that—a plan that *implements* the President's directive that transgender people be excluded from the military." Pet. App. 122a; *see Doe*, 2017 WL 6553389, at *2 (Secretary of Defense has no "authority to act in this matter entirely independently of the specific directions of the Commander in Chief"). That conclusion is apparent from the record, which shows both that the President ordered Secretary Mattis to submit to him a plan to reinstate a ban on military service by transgender people, Pet. App. 20a-24a, and that Secretary Mattis and DOD repeatedly affirmed that they were preparing such an implementation plan, Pet. App. 141a. And "most importantly, the Mattis Implementation Plan *in fact prohibits transgender military service*." Pet. App. 144a.

As explained above, the Mattis Plan includes multiple provisions that facially exclude transgender people: by requiring all servicemembers to serve only in their "biological sex"; by disqualifying anyone who "require[s] or ha[s] undergone gender transition"; and by excluding anyone with gender dysphoria or a history of gender dysphoria who requires "a change of gender" or does not live in their "biological sex." Pet. App. 118a-119a. In every instance, exclusion from the military turns not on whether a person has gender dysphoria, but on whether a person lives in their birth sex rather

than their preferred gender. Pet. App. 144a-147a. Even if "gender dysphoria" were eliminated from the Mattis Plan entirely, the substance of the plan would be unaffected, and its exclusion of transgender people would be just as complete. It would still prohibit from enlistment, and authorize discharge of, anyone who does not live in their "biological sex" or who changes gender—meaning all transgender people.

Each of the operative provisions in the Mattis Plan establishes a classification consisting exclusively of transgender people. The requirement that individuals must serve only in their "biological sex" singles out the defining characteristic of transgender identity—that a person lives in their preferred gender, not their "biological sex"—and makes that defining characteristic a bar to service. The exclusion of anyone "who require[s] or ha[s] undergone gender transition" similarly singles out the unique experience that facilitates a transgender person's transition from living in their birth sex to living in their preferred gender. Gender transition is central to transgender identity; it is the process that permits a transgender person to manifest their identity. CAJA519, 543. Finally, the Mattis Plan also excludes people with gender dysphoria or a history of dysphoria, but only those who do not "live in their biological sex" and who do not require "a change of gender." In other words, under this provision a person can have gender dysphoria or a history of gender dysphoria, as long as they live "in their biological sex" and do not undergo "a change of gender"—*i.e.*, as long as they are either not transgender or suppress their transgender identity. In sum, the Mattis Plan employs multiple approaches to describe and exclude transgender people.

Petitioners' argument that the Mattis Plan is not a ban because it permits people who identify as

transgender to serve in their "biological sex" has no merit. That argument rests on a false distinction between the status of being transgender and the conduct of manifesting that identity through gender transition in order to live in one's preferred gender. This Court has soundly rejected that distinction as a justification for discrimination against gay and lesbian people and should do so here as well. *See Christian Legal Society* v. *Martinez*, 561 U.S. 661, 689 (2010); *Lawrence* v. *Texas*, 539 U.S. 558, 575 (2003). As the district courts hearing these cases have uniformly held, a policy that targets the very characteristic that defines a class is discriminatory on its face even if some people can suppress that characteristic in response to societal bias and discrimination. Pet. App. 146a n.11; *see also Stockman* v. *Trump*, 331 F. Supp. 3d 990, 1000 (C.D. Cal. 2018); *Karnoski* Pet. App. 51a-52a.

Petitioners also contend that the district court should have evaluated the Mattis Plan under a "deferential standard" akin to rational-basis review. Pet. 12; *Karnoski* Pet. 19-20. Relying on *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), and *Goldman* v. *Weinberger*, 475 U.S. 503 (1986), they assert that even if a similar ban would warrant heightened scrutiny in the civilian context, "[a] more searching form of review would be particularly inappropriate given the military context in which the policy arises." *Karnoski* Pet. 19-20.

But even if the Mattis Plan actually represented an exercise of military judgment independent of the President's directive to impose a ban, which the district court found it does not, Pet. App. 86a-87a, the deference called for by this Court's prior holdings does not lower the level of scrutiny applicable to sex-based discrimination in the military. There is no military exception to equal protection. *Rostker*, 453 U.S. at 69-71 (re-

jecting "different equal protection test" for "military context"); *Frontiero* v. *Richardson*, 411 U.S. 677, 688-691 (1973) (plurality) (applying heightened scrutiny). *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").

To be sure, in cases involving the military, the Court has 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*, 475 U.S. at 507, 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. In *Rostker*, the Court upheld a statute exempting women from registration only because at the time Congress decided to retain the exemption, women were not eligible to serve in combat positions and that exclusion was not challenged in that litigation. 453 U.S. at 77. As a result, this Court found that the exemption of women from registration was "not only sufficiently but also closely related to Congress's purpose in authorizing registration" for the drafting of combat troops. *Id*. at 78-79. The sex-based classification in this case warrants the same careful scrutiny.

In any event, the ban cannot survive any standard of scrutiny. The military has universal standards for enlistment, deployment, and retention. CAJA215-216. Because transgender servicemembers must comply with those standards, having a separate policy that bars them from service because they are transgender serves only to exclude individuals who are fit to serve. Similarly, transgender servicemembers do not undermine sex-based standards. They seek to be held to the same standards as everyone else. CAJA554, 588. Allowing transgender men to serve as men and transgender women to serve as women does not disrupt the military's maintenance of sex-based standards in the few areas where they exist. Petitioners also cannot justify the ban on the basis of cost. 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). Because petitioners have no independent justification for excluding transgender people in order to reduce costs, their reliance on this rationale fails.[8]

2. Petitioners also assert that the district court exceeded Article III and equitable principles insofar as

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[8] For the same reasons that the ban lacks a rational basis and violates the requirement of equal protection, it also violates the requirement of due process: The ban "is a status-based enactment divorced from any factual context from which [this Court] could discern a relationship to legitimate state interests." *Romer* v. *Evans*, 517 U.S. 620, 635 (1996). It is rooted in "animosity" toward transgender people, *id.* at 634, and has no rational relationship to the justifications offered. It also infringes upon fundamental interests in autonomy and bodily integrity, including a person's right to live in accord with their preferred gender. *See Lawrence*, 539 U.S. at 562.

its preliminary injunction protects actual and aspiring transgender servicemembers other than the named plaintiffs. Pet. 12; *Karnoski* Pet. 25-27. But petitioners confuse the doctrine of standing with the power of a court to order a remedy.

The district court has Article III subject-matter jurisdiction over this dispute because respondents have standing to challenge the ban. Pet. App. 54a-66a; *see Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006).[9] Article III therefore conferred on the court below the "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 the court had authority to enjoin acts by the "parties"—including the government—before it. Fed. R. Civ. P. 65(d)(2).

The scope of an injunction is a matter of the district court's equitable discretion, not jurisdiction. But given the serious harm that respondents will suffer if the ban is not enjoined on its face, 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).

As the district court explained in denying petitioners' belated request for a stay, a facial injunction "is the

[9] Although petitioners argued unsuccessfully in the district court that respondents lack standing, Pet. App. 139a, they do not pursue that argument here.

only way to address fully [respondents'] constitutional injury." Dkt. 187, at 15. If the Mattis Plan goes into effect with its application enjoined only as to respondents, respondents "would be singled out as an inherently inferior class of service members, allowed to continue serving only by the Court's limited order and despite the claimed vociferous objections of the military itself." *Id.* If allowed to take effect, the ban would brand all respondents (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 safety, stature, and careers. Pet. App. 90a. Only a facial injunction averts those harms.

Where, as here, "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) (quoting *Citizens United* v. *FEC*, 558 U.S. 310, 333 (2010)). 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). That rule is also reflected in the 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).

Petitioners' reliance on the stay granted in *DOD* v. *Meinhold*, 510 U.S. 939 (1993), is misplaced. The challenged policy in that case was not invalid on its face, but only as "applied" to the plaintiff's case. *See Meinhold* v. *DOD*, 34 F.3d 1469, 1472, 1479-1480 (9th Cir. 1994). Here, respondents' constitutional challenge to the Mattis Plan does *not* turn on their particular circumstances, but on the government's overt, class-based

discrimination against transgender people. Indeed, the fundamental point of the ban—and why it is facially unconstitutional—is that transgender people are deemed categorically ineligible to serve based on a factor unrelated to their individual merit, qualifications, or physical and mental fitness to serve.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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