[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 18-5257

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

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

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANTS' OPENING BRIEF

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

BRINTON LUCAS
Counsel to the Assistant Attorney General

MARLEIGH D. DOVER
TARA S. MORRISSEY
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7261
950 Pennsylvania Ave., NW
Washington, DC 20530

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

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

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

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

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

In district court, the following States and the District of Columbia participated as amici curiae: Massachusetts, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, and Vermont. Additionally, the Retired Military Officers and Former National Security Officials participated as amicus curiae, which include 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.

In addition, several organizations moved to participate as amici curiae, including the American Academy of Family Physicians; American Academy of Nursing; American College of Physicians; American Medical Women's Association; American Nurses Association; Association of Medical School Pediatric Department Chairs; Endocrine Society; GLMA: Health Professionals Advancing LGBT Equality; National Association of Social Workers; Pediatric Endocrine Society; World Professional Association For Transgender Health; Trevor Project; National Center For Transgender Equality; Tennessee Transgender Political Coalition; TGI Network of Rhode Island; Transgender Allies Group; Transgender Legal Defense & Education Fund; TransOhio; Transgender Resource Center of New Mexico; and Southern Arizona Gender Alliance. 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*, Civ. No. 17-1597, including the opinion and accompanying order of August 6, 2018 (Dkt. Nos. 156 and 157). The opinion is available at 319 F. Supp. 3d 539.

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

s/ Tara S. Morrissey
Tara S. Morrissey

TABLE OF CONTENTS

Page

GLOSSARY

INTRODUCTION 1

STATEMENT OF JURISDICTION 3

STATEMENT OF THE ISSUE 4

STATEMENT OF THE CASE 4

A. History Of The Department's 2018 Policy 4

B. Prior Proceedings 13

SUMMARY OF ARGUMENT 16

STANDARD OF REVIEW 17

ARGUMENT 18

I. The Department's 2018 Policy Satisfies Constitutional Scrutiny 18

A. The Department's 2018 Policy Is Consistent With Equal Protection 19

1. The 2018 Policy Is Subject To The Most Deferential Review 19

2. The 2018 Policy Survives Constitutional Review 23

a. Military Readiness 24

b. Unit Cohesion and Good Order and Discipline 30

c. Disproportionate Costs 35

B. The District Court's Analysis Is Fundamentally Flawed 37

1. Substance 38

2. Process 42

II. The Balance Of The Equities Precludes An Injunction Of The 2018 Policy 46

A. The District Court's Injunction Creates Serious, Irreparable Harm 46

B. The 2018 Policy Will Not Injure Plaintiffs, Let Alone Irreparably 47

1. Current Servicemembers 48

2. Aspiring Servicemembers 50

III. The Nationwide Injunction Is Improper 51

CONCLUSION 53

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases: **Page(s)**

Allen v. Wright,
468 U.S. 737 (1984) 49

Anderson v. United States,
612 F.2d 1112 (9th Cir. 1979) 50

Board of Trs. of Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 23

City of Chicago v. Sessions,
888 F.3d 272 (7th Cir. 2018) 52

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 48, 51

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 48

Doe 1 v. Trump,
No. 17-5267, 2017 WL 6553389 (D.C. Cir. Dec. 22, 2017) 14

Etsitty v. Utah Transit Auth.,
502 F.3d 1215 (10th Cir. 2007) 23

Fiallo v. Bell,
430 U.S. 787 (1977) 21

Franciscan All., Inc. v. Burwell,
227 F. Supp. 3d 660 (N.D. Tex. 2016) 32

Geduldig v. Aiello,
417 U.S. 484 (1974) 23, 41

Gill v. Whitford,
138 S. Ct. 1916 (2018) 51

Goldman v. Secretary of Def.,
734 F.2d 1531 (D.C. Cir. 1984), *aff'd*, 475 U.S. 503 (1986) 33, 34

Goldman v. Weinberger,
475 U.S. 503 (1986) 20, 21, 22, 37, 44

Guerra v. Scruggs,
942 F.2d 270 (4th Cir. 1991) 50

Madsen v. Women's Health Ctr., Inc.,
512 U.S. 753 (1994) 52

Middendorf v. Henry,
425 U.S. 25 (1976) 36

In re Navy Chaplaincy,
534 F.3d 756 (D.C. Cir. 2008) 49

In re Navy Chaplaincy,
697 F.3d 1171 (D.C. Cir. 2012) 17, 18, 47

Rostker v. Goldberg,
453 U.S. 57 (1981) 20, 21, 22, 29, 33, 37

Sampson v. Murray,
415 U.S. 61 (1974) 50

Schlesinger v. Ballard,
419 U.S. 498 (1975) 21

Solorio v. United States,
483 U.S. 435 (1987) 20

Steffan v. Perry,
41 F.3d 677 (D.C. Cir. 1994) 35

Thomasson v. Perry,
80 F.3d 915 (4th Cir. 1996) 23

Trump v. Hawaii,
138 S. Ct. 2392 (2018) 21, 46, 52

U.S. Dep't of Def. v. Meinhold,
510 U.S. 939 (1993) 52

United States v. Virginia,
518 U.S. 515 (1996) 32, 33

Weiss v. United States,
510 U.S. 163 (1994) 20

Winter v. NRDC,
555 U.S. 7 (2008) 18, 19, 24, 47

Statutes:

10 U.S.C. § 4319 32

10 U.S.C. § 4320 32

10 U.S.C. § 6931 32

10 U.S.C. § 6932 32

10 U.S.C. § 9319 32

10 U.S.C. § 9320 32

28 U.S.C. § 1292(a)(1) 3

28 U.S.C. § 1331 3

28 U.S.C. § 1343 3

Other Authority:

Army Directive 2017-03, at 7(a) (Jan. 2017),
https://www.army.mil/e2/c/downloads/463407.pdf 34

GLOSSARY

APA	American Psychiatric Association
DSM	*Diagnostic and Statistical Manual of Mental Disorders*
RAND	RAND National Defense Research Institute

INTRODUCTION

A year after a significant change to longstanding military policy, the Department of Defense in June 2017 began an extensive review of the issue of military service by transgender individuals. That months-long process, involving a panel of senior military officials who thoroughly studied various aspects of the question, culminated in a new policy announced by Secretary of Defense James Mattis in March 2018. Under this 2018 policy—as under the policy instituted by the Secretary's predecessor in June 2016—individuals with a history of gender dysphoria would be presumptively disqualified (subject to various exceptions), but transgender individuals without this medical condition would be eligible to serve in their biological sex.

Both historically and today, the military has not permitted individuals to serve if they have medical conditions that may excessively limit their deployability, pose an increased risk of injury to themselves or others, or otherwise require measures that threaten to impair the effectiveness of their unit. In the Department's professional military judgment, these criteria are met for the medical condition of gender dysphoria—a lengthy and marked incongruence between one's biological sex and gender identity, characterized by "clinically significant distress or impairment in social, occupational, or other important areas of functioning," JA280-81—particularly when a person has undergone gender transition to treat this condition or seeks to do so. As Secretary Mattis observed, generally allowing service by those individuals poses "substantial risks" and threatens to "undermine readiness, disrupt unit cohesion, and

impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." JA264. This conclusion was based on "the Department's best military judgment," the recommendations of the panel of military experts who had thoroughly studied the issue, and the Secretary's "own professional judgment." *Id.*

After briefly analyzing the preliminary-injunction factors, the district court issued a nationwide preliminary injunction blocking the military from implementing this policy. In doing so, the court never engaged with the military's thorough explanation for its new policy, set forth in a memorandum from the Secretary and an accompanying 44-page report. Instead, it simply extended (and refused to dissolve) a previous preliminary injunction from October 2017, even though that injunction concerned a presidential memorandum addressing a substantially different policy that had been revoked in light of the military's 2018 policy.

This disregard for the military's judgment, and the comprehensive review underlying it, is remarkable. The Supreme Court has repeatedly stressed that special deference is owed to the professional judgments of our Nation's military leaders, yet the district court concluded that the 2018 policy was so unlikely to withstand scrutiny that it could be enjoined without any significant analysis of its constitutionality. But the Department's careful calculus of military risk in adopting this policy deserves the respect of the Judiciary, and the court below provided scant explanation for disregarding that reasoned military assessment. Instead, it ordered the military to adhere to the policy adopted by the Secretary's predecessor in 2016, which also required

transgender individuals without a history or diagnosis of gender dysphoria to serve in their biological sex and presumptively disqualified individuals with gender dysphoria from military service, subject to different exceptions. Such line-drawing exercises, however, are matters for military discretion, and one Defense Secretary cannot bind his successors to his chosen policies for all time.

This injunction against the military's judgment is made all the more inexplicable by the lopsided balance of equities here. The Department is being forced to maintain a course of action that it squarely rejected in its "professional military judgment," concluding that it is "not conducive to, and would likely undermine, the inputs … that are essential to military effectiveness and lethality." JA309. Yet the military's 2018 policy will not cause the plaintiffs here to suffer an irreparable injury, or even a cognizable one. In all events, Article III standing requirements and bedrock equitable principles require that any injunction should at least be limited to redressing the injuries of the plaintiffs here, not extended to everyone serving or seeking to serve.

STATEMENT OF JURISDICTION

The district court's jurisdiction in this federal constitutional challenge was invoked under 28 U.S.C. §§ 1331, 1343. JA191. The district court entered a preliminary injunction on October 30, 2017, JA187-88, which it refused to dissolve and extended on August 6, 2018, JA96-97. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). The government filed a timely notice of appeal on August 27, 2018. JA189.

STATEMENT OF THE ISSUE

Whether the district court erred in issuing a nationwide preliminary injunction barring the implementation of the Department of Defense's 2018 policy regarding military service by transgender individuals.

STATEMENT OF THE CASE

A. History Of The Department's 2018 Policy

1. Given the stakes of warfare, the Defense Department "has historically taken a conservative and cautious approach" in setting standards for military service. JA271. It has long disqualified individuals with "physical or emotional impairments that could cause harm to themselves or others, compromise the military mission, or aggravate any current physical or mental health conditions that they may have" from entering military service. JA277. And it has taken a particularly cautious approach with respect to mental-health standards, in light of "the unique mental and emotional stresses of military service." JA278. "Most mental health conditions" are "automatically disqualifying" for entry into the military absent a waiver, even when an individual no longer suffers from that condition. JA288. In general, the military has aligned these disqualifying conditions with the ones listed in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), published by the American Psychiatric Association (APA). JA278. Military standards for decades therefore presumptively disqualified individuals with a history of "transsexualism," consistent with the inclusion of that term in the third edition of the DSM. JA275, 277-78.

2. In 2013, the APA published a new edition of the DSM, which replaced the term "gender identity disorder" (itself a replacement for "transsexualism") with "gender dysphoria." JA278, 280. The APA explained that it no longer viewed identification with a gender different from one's biological sex (*i.e.*, transgender status), on its own, to be a disorder. JA280. It stressed, however, that a subset of transgender people suffer from a medical condition called "gender dysphoria," a "marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months duration," that is "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning." JA280-81, 288. Treatment for gender dysphoria often involves psychotherapy and, in some cases, may include gender transition through cross-sex hormone therapy, sex-reassignment surgery, or living and working in one's preferred gender. JA290, 622-23, 637, 695-97.

In 2015, then-Secretary of Defense Ashton Carter ordered the creation of a working group to study "the policy and readiness implications of welcoming transgender persons to serve openly," but instructed the group to "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness." JA709-10. As part of this review, the Department commissioned the RAND National Defense Research Institute (RAND) to conduct a study. JA281. The resulting RAND report concluded that the proposed policy change would have "an adverse impact on health care utilization and costs, readiness, and unit cohesion," but that these harms would be "'negligible' and 'marginal' because of the

small estimated number" of transgender servicemembers relative to the size of the armed forces as a whole. JA282; *see* JA607-08, 655-60, 662-63, 685-86.

Following this review, in June 2016, then-Secretary Carter ordered the armed forces to adopt a new policy on military service by transgender individuals. JA282-84, 585-90. Under the Carter policy, transgender servicemembers on active duty could transition genders with government funding if they received a diagnosis of gender dysphoria from a military medical provider, but were required to serve in their biological sex until a military medical provider determined that their "gender transition is complete." JA493; *see* JA282-83, 490-507, 580-84, 588-89. In addition, the military had until July 1, 2017, to revise its accession standards to allow transgender individuals, including those who had already transitioned, to enter military service if they met certain medical criteria. JA588-89. Specifically, a "history of gender dysphoria" would be disqualifying unless an applicant provided a certificate from a licensed medical provider that the applicant had been "stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months." JA588. A "history of medical treatment associated with gender transition"—including "sex reassignment or genital reconstruction surgery"—would likewise be disqualifying, absent certification that the applicant had completed all transition-related medical treatment and had been stable or free of complications for 18 months. JA588-89. Finally, transgender individuals who lacked a history or diagnosis of gender dysphoria, whether they were currently serving or seeking to serve, could not be disqualified on

the basis of their transgender status, but were required, like everyone else, to meet all of the standards associated with their biological sex. JA272, 588-89.

3. On June 30, 2017, the day before the Carter accession standards were set to take effect, Secretary Mattis, on the recommendation of the Service Chiefs and in the exercise of his discretion, decided that it was "necessary to defer" those standards until January 1, 2018, so that the military could "evaluate more carefully" the effect of accessions by transgender individuals "on readiness and lethality." JA425; *see* JA272, 426. Without "presuppos[ing] the outcome," he ordered a five-month study that would "include all relevant considerations" and give him "the views of the military leadership and of the senior civilian officials who are now arriving in the Department." JA425.

While this review was ongoing, the President stated on Twitter on July 26, 2017, that the government "will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military." JA124; *see* JA272. He then issued a memorandum in August 2017 explaining that former Secretary Carter had "failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy"—which generally disqualified transgender individuals from service—"would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." JA406. The President therefore called for "further study" to ensure that implementation of the Carter policy "would not have those negative effects." *Id.*

In the interim, the President directed a "return to the longstanding policy" on service by transgender individuals "until such time as a sufficient basis exists upon

which to conclude that terminating [it] would not have the negative effects discussed." JA406. He ordered the Secretary of Defense to craft a "plan for implementing" this directive by February 2018 that would "determine how to address transgender individuals currently serving." JA406-07. The President stressed, however, that the Secretary of Defense, after consultation with the Secretary of Homeland Security, could "advise [him] at any time, in writing, that a change to this policy is warranted," and directed the military to "maintain" the current accession standards only "until such time" as the Secretary gave him "a recommendation to the contrary that [he] find[s] convincing." JA406.

4. In September 2017, Secretary Mattis established a panel of experts to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." JA404. The panel consisted of "senior uniformed and civilian Defense Department and U.S. Coast Guard leaders," including "combat veterans." JA263. Given "their experience leading warfighters," "their expertise in military operational effectiveness," and their "statutory responsibility to organize, train, and equip military forces," these senior military leaders were "uniquely qualified to evaluate the impact of policy changes on the combat effectiveness and lethality of the force." JA286. This panel was instructed "to provide its best military advice … without regard to any external factors." JA263.

The panel drew on "experts from across the Departments of Defense and Homeland Security," including three groups dedicated to issues involving personnel,

medical treatment, and military lethality. JA286. These groups provided "a multi-disciplinary review of relevant data" and information about medical treatment, as well as standards for accession and retention; developed a set of policy recommendations; and responded to "numerous queries for additional information and analysis." *Id.*

In 13 meetings over 90 days, the panel met with military and civilian medical professionals, commanders of transgender servicemembers, and transgender servicemembers themselves. JA286. It reviewed information regarding gender dysphoria, its treatment, and the impact of this condition on military effectiveness, unit cohesion, and resources. *Id.* And it had the benefit of, and relied on, "the Department's own data and experience obtained since the Carter policy took effect." *Id.* After "extensive review and deliberation," which included consideration of evidence that supported and cut against its eventual proposals, the panel "exercised its professional military judgment" and presented its recommendations to the Secretary. *Id.*

5. After considering these recommendations along with additional information, Secretary Mattis, with the agreement of the Secretary of Homeland Security, sent the President a memorandum in February 2018 proposing a new policy, consistent with the panel's conclusions, that differed from both the Carter policy and the pre-Carter policy addressed in the 2017 memorandum. JA263-65. The memorandum was accompanied by a 44-page report explaining the new policy and its rationale. JA268-312. Noting that the President had "made clear" that Secretary Mattis "could advise" the President "at any time, in writing, that a change to [the pre-Carter] policy is warranted," the

Secretary recommended that the President "revoke" his 2017 memorandum, "thus allowing" the military to adopt the new policy. JA263, 265.

Like the Carter policy before it, the Department's new policy turns on the medical condition of gender dysphoria, not on transgender status. Under each policy, transgender individuals without a history or diagnosis of gender dysphoria may serve if they meet the standards associated with their biological sex, whereas those with gender dysphoria are presumptively disqualified. JA272-74. The main difference between the two policies is the nature of the exceptions to that presumptive disqualification.

Under the 2018 policy, individuals with a history or diagnosis of gender dysphoria may join or remain in the military if they neither have undergone gender transition nor seek to do so. JA273. In addition, for accession into the military, they must show 36 months of stability (as opposed to 18 months of stability under the Carter policy) before applying, while for retention in the military, they may remain if they meet deployability standards. *Id.* These exceptions rest on the Department's judgment that "a history of gender dysphoria should not alone" be disqualifying, especially given evidence that the presence of this condition in children does not always persist into adulthood, and the Department's interest in retaining those in whom "it has made substantial investments." JA310.

By contrast, those with gender dysphoria who have undergone gender transition or seek to do so are disqualified, absent a waiver. JA273. "In the Department's military judgment," this is a "necessary departure from the Carter policy" because service by

these individuals is "not conducive to, and would likely undermine, the inputs—readiness, good order and discipline, sound leadership, and unit cohesion—that are essential to military effectiveness and lethality." JA300, 309. This judgment rests on numerous military concerns, including evidence that those with gender dysphoria continued to have higher rates of psychiatric hospitalization and suicidal behavior even after transition; the creation of substantial privacy demands that would generate friction in the ranks; the safety risks arising from having training and athletic standards turn on gender identity; the difficulties associated with adjusting uniform and grooming standards; evidence that transition could render servicemembers non-deployable for significant periods; and disproportionate transition-related costs. JA287-310.

Recognizing, however, that a number of individuals with gender dysphoria had "entered or remained in service following the announcement of the Carter policy," the Department included a reliance exemption in its 2018 policy. JA311. Specifically, servicemembers "who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy, may continue to receive all medically necessary treatment" as well as "serve in their preferred gender, even after the new policy commences." *Id.* In the Department's judgment, its "substantial investment" in and "commitment to" these servicemembers "outweigh the risks" associated with service by individuals with gender dysphoria who have undergone gender transition or seek to do so more generally. *Id.*

This chart summarizes the policies concerning service by transgender individuals:

	Issue	**Pre-Carter Policy**	**Carter Policy**	**2018 Policy**
No History or Diagnosis of Gender Dysphoria	*Accession*	Generally disqualified	May serve in biological sex	May serve in biological sex
	Retention	Generally disqualified	May serve in biological sex	May serve in biological sex
	Funded Transition	Unavailable	Unavailable	Unavailable
History or Diagnosis of Gender Dysphoria	*Accession*	Generally disqualified	If no history of gender transition, disqualified unless stable for 18 months	If no history of gender transition, disqualified unless stable for 36 months
			If history of gender transition, disqualified unless stable in preferred gender and no complications for 18 months	If history of gender transition, disqualified absent waiver
	Retention	Generally disqualified	May serve in biological sex or in preferred gender upon completing transition if meet deployability standards	If no history of gender transition, may serve in biological sex if meet deployability standards
				If history or plan of gender transition, may serve in preferred gender under reliance exemption
	Funded Transition	Unavailable	Available if medically necessary	Available if medically necessary for servicemembers under reliance exemption

6. On March 23, 2018, the President "revoke[d]" his 2017 memorandum "and any other directive [he] may have made with respect to military service by transgender individuals," thereby allowing the Secretaries of Defense and Homeland Security to "exercise their authority to implement any appropriate policies concerning military service by transgender individuals." JA261.

B. Prior Proceedings

1. Shortly after the President issued his 2017 memorandum, plaintiffs—a number of current and aspiring servicemembers—challenged the constitutionality of that memorandum and sought a preliminary injunction against its enforcement. Doc.9, 13. In October 2017, the district court enjoined the enforcement of what it understood to be the memorandum's directives concerning accession and retention. JA187.

In the court's view, these directives did not rest on a "study and evaluation of evidence," yet they established "a policy banning the accession, and allowing the discharge, of an entire category of individuals from the military solely because they are transgender." JA175, 180. It further assumed that under this policy, all transgender individuals currently serving will be "discharged based on their transgender status," JA160, and the only issue the military was currently "studying" was how to accomplish their "removal and replacement," JA146-47. From these premises, the court concluded that plaintiffs had standing to challenge these directives, JA141-62, and were entitled to a preliminary injunction against their enforcement, JA168-75.

On the merits, the district court held that plaintiffs were likely to succeed on their equal-protection claim. JA169-82. It held that the directives "discriminat[ed] on the basis of … transgender identity" and thereby triggered intermediate scrutiny. JA171; *see* JA169-74. It then ruled that these directives would likely fail intermediate scrutiny based on "the combined effect of a number of unusual factors"—namely, "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." JA113, 175; *see* JA174-82.

The court further held that the equities favored injunctive relief. JA182-85. Concluding that the "record before [it]" provided "no support for the claim that the ongoing service of transgender people would have *any* negative effect[]," it dismissed the government's concerns of injury. JA185. It entered a nationwide preliminary injunction forbidding the enforcement of the directives and requiring the military to adhere to "the retention and accession policies established in [June 2016]." JA186.

The government appealed and sought a partial stay so that the military would not have to implement the Carter accession standards before finishing its study. A motions panel denied the request, in part due to "'the recent rejection'" of the President's position "'by the military'" in 2016. *Doe 1 v. Trump*, No. 17-5267, 2017 WL 6553389, at *1 (D.C. Cir. Dec. 22, 2017) (per curiam). The government dismissed its appeal, and the Carter accession standards took effect by court order on January 1, 2018.

2. On March 23, 2018, after the President's revocation of his 2017 memorandum, the government, in an abundance of caution, moved to dissolve the October 2017 injunction so the military could safely implement its newly announced policy. Doc.96. The government argued that plaintiffs' challenge to the now-revoked 2017 memorandum is moot and that, in any event, plaintiffs would be unable to meet any of the preliminary-injunction factors with respect to the 2018 policy. *Id.* At the district court's urging, plaintiffs amended their complaint to challenge the 2018 policy, JA190, and each side moved for summary judgment. Doc.115, 131.

On August 6, the district court denied the motion to dissolve and extended its injunction to preclude the military from implementing its 2018 policy. JA96-97. The court devoted two paragraphs to applying the preliminary-injunction factors to that policy, JA95-96, which it viewed as "a plan that *implements* the President's directive that transgender people be excluded from the military," JA72, and dismissed the military's "processes and rationales" as "constrained by, and not truly independent from, the President's initial policy decisions." JA96. It also held that its earlier assessment of the equities stood, and that a nationwide injunction remained appropriate. JA94.n.15, 96. It later denied both sides' summary-judgment motions so that plaintiffs could "pursu[e] discovery" into the military's "alleged deliberation." JA62.[1]

[1] In a separate order issued on August 6, the district court dissolved the injunction as to the President and dismissed him from the case. JA98, 99.

SUMMARY OF ARGUMENT

I. The district court's order is extraordinary in every respect. That court not only refused to dissolve an injunction concerning a revoked presidential memorandum, but it extended that injunction to block the Secretary of Defense from implementing a new, thoroughly explained, and eminently reasonable policy reflecting the military's best judgment as to how to address the military risks associated with gender dysphoria. And its ultimate justification for disregarding the professional judgments of senior military leaders, including the Secretary of Defense, was the unfounded suggestion that those conclusions were not genuine. Nothing in the precedents of the Supreme Court or this Court countenances a judicial intrusion of this nature into the operation of our Nation's armed forces.

Rather than address the Department's 2018 policy on its own terms, the district court brushed it aside as the mere implementation of the President's directives that it had already enjoined. But even a cursory comparison of the President's policy and the one proposed by the Secretary reveals that the two are markedly different in both process and substance. The President ordered a return to a longstanding policy that generally disqualified individuals from service on the basis of transgender status while the military further studied the issue. By contrast, the Department's 2018 policy, the product of a comprehensive review by high-ranking military officials exercising their considered judgment, permits transgender people to serve and presumptively disqualifies only certain individuals on the basis of a medical condition and its treatment.

Once the pretense that the 2018 policy merely implements the President's directives is set aside, it is plain that the military's judgment survives plaintiffs' equal-protection challenge. That judgment is entitled to the most deferential form of scrutiny, and since it rests on a careful balancing of military risks that is not susceptible to judicial re-analysis, it more than satisfies this test. While plaintiffs may prefer the balance struck by the Secretary's predecessor, nothing in the Constitution freezes in place a single Defense Secretary's choice of where to draw the line.

II. Even ignoring plaintiffs' inability to succeed on the merits, the balance of the harms precludes an injunction. Given the Department's judgment that retaining the Carter policy poses substantial risks to military readiness—a judgment based in part on its experience under that policy—the injunction here threatens a serious harm to the national defense (and hence to the public interest). The lack of an injunction, by contrast, would not cause plaintiffs any irreparable injuries, or even cognizable ones.

III. The injunction should at least be narrowed to cover only the plaintiffs here. The district court's contrary decision to enjoin the implementation of the 2018 policy nationwide cannot be reconciled with Article III or with basic principles of equity.

STANDARD OF REVIEW

To obtain the "extraordinary remedy" of a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *In re Navy Chaplaincy*, 697

F.3d 1171, 1178 (D.C. Cir. 2012) (*Navy Chaplaincy II*) (quoting *Winter v. NRDC*, 555 U.S. 7, 20, 22 (2008)). This Court reviews an order regarding preliminary injunctive relief for an abuse of discretion, but any of its "legal conclusions" are reviewed de novo. *Id.*

ARGUMENT

I. The Department's 2018 Policy Satisfies Constitutional Scrutiny

The military's independent re-examination of the Carter policy—begun on the recommendation of the Services, in the exercise of the Secretary's discretion, and before the President's tweet—involved an extensive review by many of the Department's high-ranking officials, combat veterans, and subject-matter experts. JA263-64, 285-86. As part of that study, the Department considered evidence on all sides of the question of military service by transgender individuals—including the materials underlying, and the military's experience with, the Carter policy—and meticulously explained its conclusions in a 44-page report. JA263-65, 286, 312.

Given that analysis, Secretary Mattis concluded, as a matter of "the Department's best military judgment," that permitting service by individuals with gender dysphoria, especially those who had undergone transition or seek to do so, posed "substantial risks" to military readiness. JA264. In doing so, he adopted a more cautious approach than the one taken by his predecessor, in part because "this policy issue has proven more complex than the prior administration or RAND assumed." *Id.* Even RAND had "concluded that allowing gender transition would impede readiness, limit deployability, and burden the military with additional costs," although it dismissed these

harms as "negligible in light of the small size of the transgender population." JA312. But given "the various sources of uncertainty in this area, and informed by the data collected since the Carter policy took effect," the Department was no longer "convinced that these risks could be responsibly dismissed or that even negligible harms should be incurred given [its] grave responsibility." *Id.* The Department thus "weighed the risks" of keeping the Carter policy—"risks that are continuing to be better understood as new data become available"—against "the costs of adopting a new policy that was less risk-favoring," and decided that "the various balances struck" by the latter offer "the best solution currently available." *Id.*

That is the sort of risk assessment the military must make on a regular basis, *see* JA277, 212-60, and it is singularly ill-suited for second-guessing in a court of law. Given that even civilian agencies enjoy significant freedom to change their policies over time, the Department's careful military judgment, based on new information, that a "departure from the Carter policy" was "necessary" easily satisfies constitutional demands, JA300, and the district court gave no valid reason for concluding otherwise.

A. The Department's 2018 Policy Is Consistent With Equal Protection

1. The 2018 Policy Is Subject To The Most Deferential Review

As one of the "'complex, subtle, and professional decisions as to the composition … of a military force,' which are 'essentially professional military judgments,'" the Department's 2018 policy is subject to a highly deferential form of review. *Winter v. NRDC*, 555 U.S. 7, 24 (2008). After all, choices about who should

serve "are based on judgments concerning military operations and needs, and the deference unquestionably due the latter judgments is necessarily required in assessing the former as well." *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) (citation omitted). "Judicial deference is at its apogee" in this area because "[n]ot only are courts ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have, but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy." *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986) (quotation marks, alterations, and citations omitted).

All of this would be true even if, as the district court assumed, an analogous civilian policy would trigger heightened scrutiny. Although the armed forces are subject to constitutional constraints, the Supreme Court has stressed that "the tests and limitations to be applied may differ because of the military context," including when even sex-based classifications are involved. *Rostker*, 453 U.S. at 67. Judicial "review of military regulations challenged on First Amendment grounds," for instance, "is far more deferential than constitutional review of similar laws or regulations designed for civilian society," *Goldman*, 475 U.S. at 507, and the same can be said for "rights of servicemembers" more generally, including those under the Due Process Clause, *Weiss v. United States*, 510 U.S. 163, 177 (1994); *see Solorio v. United States*, 483 U.S. 435, 448 (1987) (listing "variety of contexts" where deference applied).

The Supreme Court reaffirmed this point last Term, when it declined to import "the *de novo* 'reasonable observer' inquiry" under the Establishment Clause into "the national security … context," which includes "military actions." *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 n.5 (2018). The Court instead applied "rational basis review" and stressed that judicial "inquiry into matters of … national security is highly constrained," *id.* at 2420, even when evaluating a "'categorical' … classification that discriminate[s] on the basis of sex," *id.* at 2419 (discussing *Fiallo v. Bell*, 430 U.S. 787 (1977)).

Although the Supreme Court has expressly refused to attach a "label[]" to the type of review applicable to military policies alleged to trigger heightened scrutiny, *Rostker*, 453 U.S. at 70, the Court's approach most closely resembles rational-basis review in substance. In this context, the Court has accepted concerns about "administrative problems" and post hoc justifications, even when sex-based classifications are involved, as sufficient to uphold military policies. *Id.* at 81; *see id.* at 74-75 (relying on 1980 legislative record to sustain 1948 statute exempting women from draft-registration requirement); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (upholding different mandatory-discharge requirements for male and female naval officers based on what "Congress may … quite rationally have believed"). It has deferred to the political branches on military matters even in the face of significant evidence to the contrary, including testimony from current and former military officials. *See Goldman*, 475 U.S. at 509; *Rostker*, 453 U.S. at 63. And it has granted the political branches significant latitude to choose "among alternatives" in furthering military interests,

Rostker, 453 U.S. at 71-72, as well as where to "draw[] the line," *Goldman*, 475 U.S. at 510. Whatever label is assigned this lenient form of review, it is not heightened scrutiny.

Applying this deferential standard, the Supreme Court has upheld military policies that likely would not have survived scrutiny had they governed civilian society. In *Goldman*, for instance, the Court rejected a free-exercise challenge to the Air Force's judgment that exempting from uniform regulations a Jewish officer's "practice of wearing an unobtrusive yarmulke" while working as a psychologist in an Air Force base hospital would "threaten discipline," even though that claim would have triggered strict scrutiny had it been raised in the civilian context at the time. 475 U.S. at 509; *see id.* at 506. The Court did so even though the regulations authorized commanders to let servicemembers wear "visible religious headgear … in designated living quarters" and permitted servicemembers to wear "certain pieces of jewelry," *id.* at 508-09—including "emblems of religious … identity," *id.* at 518 (Brennan, J., dissenting). And the Court rejected this claim even though the plaintiff relied on "expert testimony" from a former Air Force official and claimed that the Air Force's position was "mere *ipse dixit*, with no support from actual experience or a scientific study in the record." *Id.* at 509 (majority).

Even if dispensing with military-deference principles were somehow justified here, heightened scrutiny would remain inappropriate. That is because the military's new policy, like the Carter policy before it, draws lines on the basis of a medical condition (gender dysphoria)—a condition that involves "clinically significant distress or impairment in social, occupational, or other important areas of functioning," JA280-

81—and a medical treatment (gender transition), and not transgender status. JA272-74, 282-84, 588-89. Such classifications—which turn on eminently reasonable considerations in setting standards for military service—receive only rational-basis review, which perhaps explains why no one ever challenged the Carter policy on grounds that it was subject to heightened scrutiny. *See, e.g.*, *Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365-68 (2001); *Geduldig v. Aiello*, 417 U.S. 484, 494-97 & n.20 (1974). Given that courts should be "reluctant to establish new suspect classes"—a presumption that "has even more force when the intense judicial scrutiny would be applied to the 'specialized society' of the military"—there is no basis for departing from rational-basis review here. *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc).[2]

2. The 2018 Policy Survives Constitutional Review

The 2018 policy's presumptive disqualification of individuals with gender dysphoria, and especially those who have undergone gender transition or seek to do so, easily satisfies the deferential standard applicable here. As Secretary Mattis explained, generally allowing these individuals to serve poses "substantial risks" and would "undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." JA264. There should be no dispute that the military's interest in avoiding those harms is a compelling

[2] Even if the 2018 policy could be characterized as turning on transgender status, such classifications do not trigger heightened scrutiny either. *See, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227-28 (10th Cir. 2007).

one: Courts must "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest," *Winter*, 555 U.S. at 24, and the Department has concluded that minimizing these risks is "absolutely essential," JA264. Therefore, the only issue is whether this Court should defer to the military's judgment that this presumptive disqualification is not just rationally related to, but actually "necessary" to, furthering that critical interest. JA300. That should not be a close question.

a. Military Readiness

As the Department explained, service by individuals with gender dysphoria, and especially by those who have undergone gender transition or seek to do so, poses at least two significant risks to military readiness. *First*, the Department was concerned about subjecting those with gender dysphoria to the unique stresses of military life. JA289, 310. At the outset, any mental-health condition characterized by clinically significant distress or impairment in functioning raises readiness concerns. Servicemembers suffering from "[a]ny DSM-5 psychiatric disorder with residual symptoms" that "impair social or occupational performance[]" need "a waiver … to deploy," as the military must consider the "risk of exacerbation if the individual were exposed to trauma or severe operational stress." JA302. Particularly given "the absence of evidence on the impact of deployment on individuals with gender dysphoria," the Department concluded that this condition posed readiness risks. *Id.*; *see* JA310. That judgment is also reflected in the Carter policy, which disqualified individuals with a

history of gender dysphoria absent proof that they had been "stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months." JA588.

In addition to the inherent problem of clinically significant distress or impairment, gender dysphoria presents associated dangers, especially in the military context. In general, those with gender dysphoria suffer from high rates of suicidal thoughts and behavior, as well as other mental-health conditions such as anxiety, depression, and substance-abuse disorders. JA289. Especially given recent evidence that military service can be a contributor to suicidal thoughts, the Department therefore had legitimate concerns that generally allowing those with gender dysphoria to serve would subject them and their comrades to unacceptable risks. JA287, 289. Indeed, preliminary evidence from the Carter policy reveals that servicemembers with gender dysphoria are eight times more likely to engage in suicidal ideation and nine times more likely to have mental-health encounters than servicemembers as a whole. JA289-90.

These concerns fully apply, the Department explained, to those who addressed their gender dysphoria by transitioning genders. JA300. To begin, none of the available studies concerning the efficacy of transition-related treatment for this condition accounted for "the added stress of military life, deployments, and combat." JA292. And even with respect to a broader population, the Department was concerned about evidence that "rates of psychiatric hospitalization and suicide behavior remain higher for persons with gender dysphoria, even after treatment," as compared to those without

this condition. JA300. The Department further had reasonable concerns about the "considerable scientific uncertainty concerning whether these treatments fully remedy, even if they may reduce, the mental health problems associated with gender dysphoria." *Id.*; *see* JA289-95. Given these inherent uncertainties, the Department determined that the accession of those who had undergone transition or seek to do so should be considered only on a case-by-case basis through the waiver process. *See* JA273.

The Department therefore reasonably decided to modify the Carter policy. That choice was consistent with the expectations of former Secretary Carter, who, in announcing his policy in June 2016, directed that the new accession standards were to "be reviewed" before June 30, 2018, and could be "changed, as appropriate," to "ensure consistency with military readiness." JA589. The Department conducted that review, on that timetable, using evidence unavailable to former Secretary Carter, and concluded that his accession standards must be revised.

The Department's concerns were also not new ones. RAND had cautioned the prior administration that "it is difficult to fully assess the outcomes of treatment" for gender dysphoria as a general matter, given "the absence of quality randomized trial evidence"—"the gold standard for determining treatment efficacy"—and that, in any event, "it is not known how well these findings generalize to military personnel." JA626. Although former Secretary Carter was more willing to tolerate these risks, Secretary Mattis "firmly believe[d] that compelling behavioral health reasons require the Department to proceed with caution before compounding the significant challenges

inherent in treating gender dysphoria with the unique, highly stressful circumstances of military training and combat operations." JA264. And there is no constitutional requirement that the Secretary of Defense must hew to the risk tolerance of his predecessor, especially when new information has come to light.

Second, even if it were guaranteed that the risks associated with gender dysphoria could be fully addressed by gender transition, it remains the case that transition-related medical treatment—namely, cross-sex hormone therapy and sex-reassignment surgery—could render transitioning servicemembers "non-deployable for a potentially significant amount of time." JA303. Endocrine Society guidelines recommend "quarterly bloodwork and laboratory monitoring of hormone levels during the first year" of therapy, meaning that if "the operational environment does not permit access to a lab for monitoring hormones," then the transitioning servicemember must forgo "treatment, monitoring, or the deployment," each of which "carries risks for readiness." JA301. That period of potential non-deployability only increases for those who obtain sex-reassignment surgery, which in addition to a recommended "12 continuous months of hormone therapy … prior to genital surgery," comes with "substantial" recovery time, even without complications. *Id.*

In addition to being inherently problematic, these limits on deployability would have harmful effects on transitioning servicemembers' units as a whole. As the Department explained, any increase in the number of non-deployable servicemembers requires those who can deploy to bear "undue risk and personal burden," which itself

"negatively impacts mission readiness." JA303. On top of these personal costs, servicemembers who deploy more frequently to "compensate for" their unavailable comrades face risks to family resiliency. *Id.* And when servicemembers with medical conditions do deploy but then fail to meet fitness standards in the field, "there is risk for inadequate treatment within the operational theater, personal risk due to potential inability to perform combat required skills, and the potential to be sent home from the deployment and render the deployed unit with less manpower." JA302. All of this, the Department concluded, posed a "significant challenge for unit readiness." JA303.

Again, these are not new concerns. Former Secretary Carter acknowledged that "[g]ender transition while serving in the military presents unique challenges associated with addressing the needs of the Service member in a manner consistent with military mission and readiness needs," JA589, a conclusion reflected in his policy's requirement that applicants with a history of transition-related treatment demonstrate that they had finished treatment and had been stable and free of complications for an 18-month period in order to serve, JA588-89. Likewise, as the Department observed, RAND acknowledged that gender transition by servicemembers "will have a negative impact on readiness." JA302. Although RAND dismissed this harm as "minimal" because of its estimation of the "exceedingly small number of transgender Service members who would seek transition-related treatment" compared to the servicemember population as a whole, JA302-03; *see* JA655-59, 662-63, the Department need not do so. The question for the Department is not "whether the military can absorb periods of non-deployability

in a small population"; by that metric, "the readiness impact" of many other disqualifying medical conditions, "from bipolar disorder to schizophrenia," would also be "minimal" because they too "exist only in relatively small numbers." JA303. The question for the Department is instead "whether an individual with a particular condition can meet the standards for military duty and, if not, whether the condition can be remedied through treatment that renders the person non-deployable for as little time as possible." *Id.* Applying that general standard, the Department concluded that the limitations on deployability posed by gender transition were unacceptably high. *Id.*

In other words, the differences between the Carter policy and the 2018 policy reflect different judgments by military leadership over what limits on deployability and other readiness considerations they are willing to tolerate. The Department's current judgment on this issue merits significant deference. *See Rostker*, 453 U.S. at 81-82 (deferring to Congress's judgment on matters of deployability with respect to exempting women from draft registration). That is particularly true given that the 2018 policy simply ends the Carter policy's approach of giving gender transition special treatment when it comes to readiness concerns. Under the Carter policy, for example, an applicant who received genital surgery following an injury could not serve absent a waiver, yet an applicant who received genital surgery as part of a gender transition was provided a waiver-free pathway to military service. JA236, 278-79, 296.

In short, the Department concluded that the risks stemming from the uncertain efficacy of, and constraints imposed by, treatment for gender dysphoria counseled

against allowing individuals with that condition to serve in general. This is the sort of analysis the Department must perform for any medical accession or retention standard, and the cautious approach it took here is hardly out of the norm. *See* JA271, 276-78.

b. Unit Cohesion and Good Order and Discipline

Apart from these readiness concerns, the Department determined that exempting individuals with gender dysphoria who have undergone gender transition or seek to do so—whether through hormones, surgery, or living and working in their preferred gender—from the military's sex-based standards would undermine the critical objectives served by those rules, namely, "good order, discipline, steady leadership, unit cohesion, and ultimately military effectiveness and lethality." JA296. To start, the military reasoned that unless it demanded complete sex-reassignment surgery to serve in one's preferred gender—a requirement both "at odds with current medical practice, which allows for a wide range of individualized treatment," and practically irrelevant given the "exceedingly low" rates of genital surgery—maintaining the Carter policy threatened to "erode reasonable expectations of privacy." JA299, 305. As the Department observed, "[g]iven the unique nature of military service," servicemembers must often "live in extremely close proximity to one another when sleeping, undressing, showering, and using the bathroom." JA305. To protect reasonable expectations of privacy, the military has therefore "long maintained separate berthing, bathroom, and shower facilities for men and women." *Id.*

In the Department's judgment, allowing individuals who retain some, if not all, of the anatomy of their biological sex to use the facilities of their preferred gender "would invade the expectations of privacy" of the other servicemembers sharing those facilities. JA305. Thus, absent the creation of separate facilities for transitioned or transitioning servicemembers, which could be both "logistically impracticable for the Department" as well as unacceptable to those individuals, the military would face irreconcilable privacy demands. *Id.* For example, the panel of experts heard from one commander who received dueling equal-opportunity complaints over allowing a servicemember who identified as a female, but had male genitalia, to use the female shower facilities—one from the female members of the unit and one from the individual servicemember. *Id.* This episode is consistent with reports from officers in the Canadian military that "they would be called on to balance competing requirements" by meeting a transitioning servicemember's "expectations … while avoiding creating conditions that place extra burdens on others or undermined the overall team effectiveness" in areas such as "communal showers[] and shipboard bunking." JA308.

Such considerations are far from suspect. The implementation handbook for the Carter policy repeatedly stressed the need to respect the "privacy interests" and "rights of Service members who are not comfortable sharing berthing, bathroom, and shower facilities with a transitioning Service member," and urged commanders to try to accommodate competing interests to the extent that they could. JA545; *see* JA529, 536, 540, 567-68, 570-71; *see also* JA306 (discussing some of "[t]he unique leadership

challenges arising from gender transition" that "are evident in the Department's handbook"). In addition, the Supreme Court itself has recognized that it is "necessary to afford members of each sex privacy from the other sex in living arrangements," *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996), and "[i]n the context of recruit training, this separation is even mandated by Congress," JA305. With respect to basic training, Congress has required that "the sleeping and latrine areas provided for 'male' recruits be physically separated from the sleeping and latrine areas provided for 'female' recruits," and that "access by drill sergeants and training personnel 'after the end of the training day' be limited to persons of the 'same sex as the recruits' to ensure 'after-hours privacy.'" JA297 (citing 10 U.S.C. §§ 4319, 4320, 6931, 6932, 9319, 9320). The 2018 policy ensures compliance with these statutory privacy protections. *Cf. Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 686-89 (N.D. Tex. 2016) (holding that the term "sex" in Title IX excludes gender identity).

Aside from these privacy-related considerations, the Department was concerned that exempting servicemembers from sex-based standards in training and athletic competitions on the basis of gender identity would generate perceptions of unfairness in the ranks. JA304. For example, requiring female servicemembers to compete with individuals who identify as female but retain male physiology, the Department reasoned, would likely put the former at a disadvantage. JA299, 304. And in violent activities, "pitting biological females against" those with male physiology but a female gender identity, and vice versa, could pose "a serious safety risk as well." JA304.

Again, these are legitimate military concerns, as Congress and the Supreme Court have recognized that it is "necessary" to "adjust aspects of the physical training programs" for servicemembers to address biological differences between the sexes. *Virginia*, 518 U.S. at 550 n.19 (discussing statute requiring standards for women in the service academies to "be the same as those … for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals"). In fact, the Supreme Court deferred to Congress's judgment that including women in the draft would create "administrative problems such as housing and different treatment with regard to … physical standards." *Rostker*, 453 U.S. at 81. Especially given the Department's view that "physical competition[] is central to the military life and is indispensable to the training and preparation of warriors," JA304, its judgments here cannot be ignored.

The Department was also concerned that exempting servicemembers from uniform and grooming standards on the basis of gender identity would create friction in the ranks. For example, allowing someone with male physiology but a female gender identity "to adhere to female uniform and grooming standards" could frustrate male servicemembers who are not transgender but "would also like to be exempted from male uniform and grooming standards as a means of expressing their own sense of identity." JA299; *cf. Goldman v. Secretary of Def.*, 734 F.2d 1531, 1540 (D.C. Cir. 1984) (deferring to Air Force's judgment "that it cannot make exceptions … for religious reasons without incurring resentment from those who are compelled to adhere to the

rules strictly"), *aff'd*, 475 U.S. 503 (1986). Such resentment is particularly likely when these servicemembers are precluded by these standards from expressing core aspects of their identity. *See, e.g.*, Army Directive 2017-03, at 7(a) (Jan. 2017) (only female servicemembers may wear dreadlocks), https://www.army.mil/e2/c/downloads/463407.pdf. Again, such concerns were reflected in the Carter policy's implementation handbook, which told commanders that in considering exceptions to "uniform and grooming standards" under the Carter policy, commanders should account for their "impact on unit cohesion and good order and discipline." JA535.

The point is not that the Department deems the needs or views of certain servicemembers to take priority over those of others. Rather, it is that the inescapable "collision of interests" injected by the Carter policy's departure from military uniformity poses "a direct threat to unit cohesion and will inevitably result in greater leadership challenges without clear solutions," JA305, a problem compounded by the risks to unit cohesion stemming from significant limits on deployability, *see supra* Pt. I.A.2.a. Under the Carter policy, the "routine execution of daily activities" could become a recurring source of uncertainty, if not "discord in the unit," requiring commanders "to devote time and resources to resolve issues not present outside of military service." JA306. And any flawed or delayed solution could "degrade an otherwise highly functioning team," as any "appearance of unsteady or seemingly unresponsive leadership to Service member concerns erodes the trust that is essential to unit cohesion and good order and discipline." *Id.* Given that "[l]eaders at all levels already face immense challenges in

building cohesive military units," the Department concluded that it would be unwise to maintain a policy that "will only exacerbate those challenges and divert valuable time and energy from military tasks." JA305-06. That military judgment regarding matters of discipline should not be cast aside. *See Steffan v. Perry*, 41 F.3d 677, 686 (D.C. Cir. 1994) (en banc) ("The military is entitled to deference with respect to its estimation" of how particular policies will affect "military discipline.").

c. Disproportionate Costs

Finally, the Department noted that transition-related treatment under the Carter policy is "proving to be disproportionately costly on a per capita basis." JA309. Since the Carter policy's implementation, the medical costs for servicemembers with gender dysphoria "have increased nearly three times" compared to servicemembers without this condition. *Id.* And that is "despite the low number of costly sex reassignment surgeries that have been performed so far"—34 non-genital procedures and one genital surgery—which likely would only increase as more servicemembers avail themselves of these measures. *Id.* Notably, 77% of the 424 treatment plans available for study "include requests for transition-related surgery" of some kind. *Id.*

Several commanders also reported that providing servicemembers in their units with transition-related treatment "had a negative budgetary impact" because of the use of "operations and maintenance funds to pay for … extensive travel throughout the United States to obtain specialized medical care." JA309. This is not surprising given that transition-related treatments "require[] frequent evaluations" by both a mental-

health professional and an endocrinologist, and most military treatment facilities "lack one or both of these specialty services." JA309 n.164. Transitioning servicemembers consequently "may have significant commutes to reach their required specialty care," with those "stationed in more remote locations fac[ing] even greater challenges." *Id.*

Given the military's general interest in maximizing efficiency through minimizing costs, JA271, the Department concluded that its disproportionate expenditures on facilitating gender transition could be better devoted elsewhere, *see* JA309, a judgment that merits this Court's respect. Even when the alleged constitutional rights of servicemembers are involved, decisions by the political branches as to whether a benefit "consumes the resources of the military to a degree … beyond what is warranted" deserve significant deference. *Middendorf v. Henry*, 425 U.S. 25, 45 (1976).

* * *

In short, both Secretary Carter and Secretary Mattis were confronted with undisputed military risks stemming from service by individuals with gender dysphoria, especially those who have undergone gender transition or seek to do so, and both concluded that such individuals should be presumptively disqualified. Where the two parted ways was simply over the nature of the exceptions to this presumptive disqualification. All that this reflects is that different military leaders struck different balances of costs and benefits at different times, a point confirmed by the fact that the 2018 policy allows some individuals with gender dysphoria to serve as a general matter (under different standards, depending on whether they seek to join or remain in the

military) and allows others to transition at government expense and serve in their preferred gender (under the reliance exemption). To be sure, former Secretary Carter opted for a different set of exceptions that likely would allow more individuals with gender dysphoria to serve, consistent with his instruction to his working group to "presum[e]" that all transgender individuals could serve openly "without adverse impact on military effectiveness and readiness," JA709-10. But such military policy disagreements over where to "draw[] the line" are not constitutional violations, *Goldman*, 475 U.S. at 510, especially where, as here, the shift stems from new information, a comprehensive study, and a different tolerance for military risk. Rather, the Department's "studied choice of one alternative in preference to another" is committed to the military's discretion. *Rostker*, 453 U.S. at 71-72.

B. The District Court's Analysis Is Fundamentally Flawed

The district court never seriously grappled with the Department's reasoning. Instead, it dismissed the Department's 2018 policy as merely "implement[ing]" a "blanket ban on all 'transgender individuals'" allegedly ordered in "the President's 2017 tweet and memorandum." JA68. The professional military judgment of the Secretary of Defense, based on an exhaustive analysis by a panel of military experts, is entitled to greater respect. Even a passing review of the 2018 policy reveals that this policy is substantially different in both substance and process from the President's 2017 memorandum and the tweet that preceded it. And in any event, the court's

mischaracterization of the 2018 policy, even if credited, provides no basis for dispensing with the substantial deference owed to the military's professional judgment.

1. Substance

The claim that the 2018 policy "merely implements the basic policy directives in the President's 2017 tweet," JA80 n.6, is inexplicable. The 2018 policy—which permits some transgender individuals to serve, including in their preferred gender—does not effectuate the President's tweet that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military." JA124.

Nor does that policy implement, or even reflect, the approach taken by the President's 2017 memorandum, which ordered the military to "return" to its "longstanding policy"—maintained under every administration until June 2016—of generally disqualifying individuals from military service on the basis of their "transgender" status. JA406. The military's 2018 policy differs from that pre-Carter framework in at least two critical respects.

First, the 2018 policy, like the Carter policy, turns not on transgender status, but on a medical diagnosis (gender dysphoria) and a related medical treatment (gender transition). JA272-74. Specifically, the 2018 policy, like the Carter policy, allows transgender individuals without a history or diagnosis of gender dysphoria to serve, a possibility that was generally unavailable during the pre-Carter era. As a 2014 study on which plaintiffs rely observed, the pre-Carter policy generally disqualified "[e]ven

transgender service members who do not wish to take hormones, have surgery, or undergo any other aspect of gender transition." JA784.

Second, the 2018 policy categorically permits some individuals with gender dysphoria to serve in their preferred gender (and receive taxpayer-funded transition-related treatment) as they did under the Carter policy, JA311, an option that did not exist before June 2016, JA279. In short, rather than implement a "return" to the pre-Carter policy, JA88, the 2018 policy substantially departs from it.

This is why Secretary Mattis had to recommend that the President "revoke" his 2017 memorandum in order to "allow[]" the military to implement its preferred framework. JA265. If the 2018 policy simply implemented the pre-Carter policy addressed in the 2017 memorandum, there would have been no need for the Secretary to have made this recommendation or for the President to have "revoke[d]" that memorandum "and any other directive [he] may have made with respect to military service by transgender individuals." JA261.

The district court nevertheless ruled that the 2018 policy "is not a 'new policy'" because it "effectively implements" the President's alleged "blanket ban on all 'transgender individuals.'" JA68, 72. The court never reconciled that characterization with the existence of the 2018 policy's reliance exemption, other than to dismiss it as covering a "small group." JA92 n.12. But a policy with even a "small" exemption is by definition not a "blanket" one, JA68, and this exemption covers nearly 1000 servicemembers already, JA275 n.10. In fact, the district court acknowledged in its first

opinion that "[m]any" servicemembers had "reli[ed]" on the Carter policy, JA178, making its dismissal of this exemption as insignificant all the more puzzling. Nor did the court ever attempt to reconcile its earlier assumption that the 2017 memorandum required all transgender individuals to be "discharged from the military," JA160—and that the military was "studying" only how to effectuate their "removal and replacement," JA146-47—with its observation that some transgender "individuals … will be allowed to remain" under the 2018 policy, JA92 n.12.

Instead, the district court ruled that the 2018 policy "implements" the President's alleged "ban" by (1) "targeting proxies of transgender status, such as 'gender dysphoria' and 'gender transition,'" and (2) "requiring all service members to serve 'in their biological sex.'" JA68-69. In doing so, the court never addressed the fact that the same critique could be leveled at the Carter policy it ordered the military to maintain, which likewise (1) presumptively disqualified individuals with a history or diagnosis of gender dysphoria (subject to various exceptions) and (2) required transgender individuals without a history or diagnosis of that medical condition to meet the standards associated with their biological sex. At most, the court dismissed, in a footnote, "[a]ny similarities" between the two policies as "red herrings," asserting that the policies are "*fundamentally* different" because the 2018 policy allows only "a small group" of transgender individuals "to serve in accordance with their gender identity." JA92 n.12. It never explained, however, why a difference in the *size* of exceptions was a *fundamental* one.

In all events, the district court's analysis rests on misguided assumptions about transgender individuals as a class. To start, the fact that the medical condition of gender dysphoria affects a subset of (though not all) transgender individuals does not transform the 2018 policy (or the Carter policy) into a status-based classification. *Cf. Geduldig*, 417 U.S. at 496 n.20 ("While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification."). That is especially true because, conversely, plaintiffs' evidence shows that "non-transgender people can experience gender dysphoria" as well, such as a woman "who must undergo mastectomy because of breast cancer" and then "requires reconstructive breast surgery in order to resolve gender dysphoria arising from the incongruence between her body without breasts and her sense of herself as a woman." JA771 n.31. And as the Carter policy itself confirms, a history of this medical diagnosis and its treatment (gender transition) are unquestionably relevant to military service in a way that other "proxies" are not.

Nor is it true that transgender people "by definition" "*do not … live in accord with their biological sex*." JA91. Instead, as RAND explained, only "a subset" of transgender individuals "choose to *transition*, the term used to refer to the act of living and working in a gender different from one's sex assigned at birth." JA622. Indeed, an estimated 8980 servicemembers identify as transgender according to one study, yet to date, only 937 of them have obtained a diagnosis for gender dysphoria necessary to qualify for the Carter policy's framework for gender transition since June 2016. JA275 n.10, 300.

2. Process

Even if there were no daylight between the policy set forth in the President's 2017 memorandum and the one recommended by the Secretary in 2018, the Department's 2018 policy rests on the professional military judgment of the Secretary of Defense and other senior military officials following an extensive deliberative process. The district court dismissed the President's decision, by contrast, as "not supported," lacking "study and evaluation of evidence," and "contradicted by the only military judgment available." JA180. The government of course disagrees with that characterization of an initial judgment by the Commander-in-Chief to maintain a longstanding military policy while the Department conducted a further review. But in any event, the 2018 policy was the result of an extensive deliberative process and the expert military judgment of the Department of Defense.

The district court nevertheless dismissed the military's judgments based on its view that the 2017 memorandum "did not direct Secretary Mattis to determine *whether* or not the directives should be implemented, but instead ordered the directives to be implemented by specific dates and requested a plan for *how* to do so." JA88. That characterization, however, simply overlooks the President's instructions to "study" the issue and to "advise [him] at any time, in writing, that a change to this policy is warranted," JA406, as well as the Secretary's reliance on that fact in recommending that the President revoke his memorandum, JA263.

The district court also seized on statements the Secretary made shortly after the release of the 2017 memorandum, such as his promise to "present the President with a plan to implement the policy and directives in the 2017 Presidential Memorandum." JA89 (quotation marks, alteration, and emphasis omitted); *see* JA88-90 (collecting statements); JA401-05 (relevant materials). But the court never addressed the fact that the extensive study by a panel of experts ultimately led Secretary Mattis to recommend that the President depart from the policy in that memorandum and adopt a new one that, as the Department explained, differed from both the Carter policy and the longstanding framework that preceded it. JA275-84, 300-11. Indeed, the contrast between these initial statements and the Secretary's final recommendation only confirm that the result of the military's review was far from preordained. In short, the military "implemented" the 2017 memorandum only insofar as it studied the issue and advised the President that a different policy was appropriate.

In all events, the district court failed to explain why the military's proposed course of action was constitutionally problematic. Instead, the court declared that it was "not convinced at this stage that the processes" leading up to the 2018 memorandum "resolve the constitutional issues that persuaded [it] that a preliminary injunction was warranted in the first place," and extended its prior preliminary injunction without further analysis. JA95-96.

That approach turns principles of military deference on their head. A federal court cannot enjoin the professional judgments of senior military leaders and then wait

until it is persuaded that those judgments are likely correct or sufficiently deliberative to lift the injunction. Rather, it must refrain from interfering in the operation of our Nation's armed forces unless and until a plaintiff proves that the military's judgment likely cannot survive (or warrant) deferential scrutiny. For instance, the Supreme Court in *Goldman* confronted an argument by the plaintiff that the Air Force had "failed to prove that a specific exception for his practice of wearing an unobtrusive yarmulke would threaten discipline" and "that the Air Force's assertion to the contrary is mere *ipse dixit*, with no support from actual experience or a scientific study in the record, and is contradicted by expert testimony." 475 U.S. at 509. In response, the Court did not question whether the Air Force's judgment rested on adequate evidence or deliberation, but deemed it sufficient that the issue had been "decided by the appropriate military officials" in their "considered professional judgment." *Id.* The district court provided no justification for its inversion of this deferential form of review.

At most, the court below dismissed the Department's "processes and rationales" as "*post hoc*," "constrained by, and not truly independent from[] the President's initial policy decisions." JA96. But the court's accusation that the military's study was a post hoc effort with a preordained result ignores the fact that the Department's review of the Carter policy began at the initiative of Secretary Mattis nearly a month *before* the President's tweet. JA263, 272, 425-26. It also ignores the representations of the Secretary in his memorandum that the panel of experts was tasked with conducting "an independent multi-disciplinary review," JA404, and providing recommendations

"without regard to any external factors," JA263; and that the 2018 policy reflected "the Panel's professional military judgment," "the Department's best military judgment," and his "own professional judgment," JA264; *see also* JA272 (Department's report) ("The Panel made recommendations based on each Panel member's independent military judgment."); JA261 (President's 2018 memorandum) ("[The Secretary's memorandum and report] set forth the policies on this issue that the Secretary of Defense, in the exercise of his independent judgment, has concluded should be adopted."). The district court barely acknowledged these statements, much less offered a compelling reason why representations by senior military leadership, including the Secretary of Defense, should be called into question.

Ultimately, the district court's position appears to be that because of the President's statements last year, the Department cannot depart from the Carter policy or exercise its military judgment for the remainder of this administration. Although the court paid lip service to the notion that "the military's previous study of transgender service cannot forever bind future administrations from looking into the issue themselves," JA181, it gave no indication of how the Secretary could show to the court's satisfaction that the military's "processes and rationales" are "truly independent from[] the President's initial policy decisions," JA96. If neither the President's "revo[cation]" of his 2017 directives, JA92, nor the military's representations of "independence," JA90 n.10, are enough to address its concerns, it is difficult to imagine what could.

The Supreme Court recently rejected an indistinguishable theory in the context of an Establishment Clause challenge to a presidential proclamation concerning the entry of foreign nationals. While the Court in *Hawaii* stated that it "may consider plaintiffs' extrinsic evidence" of previous executive orders and past statements by the President about Muslims, 138 S. Ct. at 2420, it upheld the proclamation based on its text and the "worldwide review process undertaken by multiple Cabinet officials and their agencies" that supported it, *id.* at 2421. Yet, like the challengers and principal dissent in *Hawaii*, the district court wrote off "the results of the [underlying] multi-agency review [as] 'foreordained,'" *id.* at 2417, and the military's final policy as a mere "repackaging" of the President's original policy "behind a façade of national-security concerns," *id.* at 2433 (Sotomayor, J., dissenting). The Supreme Court rejected that approach in *Hawaii*, and there is no reason why it should fare any better here.[3]

II. The Balance Of The Equities Precludes An Injunction Of The 2018 Policy

A. The District Court's Injunction Creates Serious, Irreparable Harm

Even apart from the merits, the injunction here is extraordinary. The district court ordered the military to adhere to a policy that the Secretary of Defense has determined poses "substantial risks" to an effective national defense, JA264, without offering a compelling reason why the military (and the public) should bear these harms.

---

[3] In all events, plaintiffs' challenge to the President's 2017 memorandum is moot. If the 2018 policy would disqualify them from service, an injunction barring enforcement of that revoked memorandum would do nothing to cure their alleged injuries.

An order of that magnitude should stand on firmer ground. "[T]he Supreme Court has instructed that, in assessing the balance of equities and the public interest, [courts] must 'give great deference to the professional judgment of military authorities' regarding the harm that would result to military interests if an injunction were granted." *In re Navy Chaplaincy*, 697 F.3d 1171, 1179 (D.C. Cir. 2012) (*Navy Chaplaincy II*) (quoting *Winter*, 555 U.S. at 24). Here, the Secretary of Defense not only provided "specific, predictive judgments about how [a] preliminary injunction would reduce the effectiveness" of military operations, *Winter*, 555 U.S. at 27, but went so far as to document some of the harms the military had already sustained. The district court, however, did not even acknowledge these specific military judgments, much less justify its refusal to defer to them. Instead, it adhered to its earlier assessment of the equities, JA96, which rested on its view that the "record before [it]" at that time provided "no support for the claim that the ongoing service of transgender people would have *any* negative effect[s]," JA185. By the time the court extended its injunction to the 2018 policy, however, the Department had documented the negative effects of the Carter policy, and explained why, in its professional judgment, it was "necessary" to depart from it, JA300.

B. The 2018 Policy Will Not Injure Plaintiffs, Let Alone Irreparably

Against those serious harms to the national defense, plaintiffs cannot even show cognizable injury, let alone an irreparable one.

1. Current Servicemembers

To start, the seven plaintiffs who are serving lack standing to challenge the 2018 policy's standards for current servicemembers. To satisfy Article III, these individuals "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). Yet as the district court noted, six of them (Jane Does 2 through 5, John Doe 1, and Kibby) would qualify for the reliance exemption, JA76, and would thus suffer no cognizable harm from implementation of the 2018 policy.

Although the seventh plaintiff, Jane Doe 6, has yet to obtain the necessary diagnosis of gender dysphoria to qualify for this exemption, JA84, nothing prevents this servicemember from doing so right now, and thereby qualifying for the reliance exemption, because the 2018 policy has not yet taken effect. Any refusal to seek that diagnosis does not create a cognizable injury, as plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). Although the court below excused this self-inflicted injury on the assumption that Jane Doe 6 would immediately be subject to discharge if the preliminary injunction were dissolved, JA84, it overlooked the fact that even absent an injunction, this servicemember could obtain a diagnosis, and thus qualify for the exemption, before the Department implements the 2018 policy, *see* JA785-87 (noting that the 2018 policy has been "proposed" and showing that its details remain to be fleshed out).

The district court nevertheless held that all of these plaintiffs had standing because the 2018 policy "stigmatiz[es]" them by "send[ing] the message" that they are "an inherently inferior class of service members." JA76-77. But it is blackletter law that "stigmatizing injury … accords a basis for standing only to 'those persons who are personally denied equal treatment,'" *Allen v. Wright*, 468 U.S. 737, 755 (1984), which no plaintiff has alleged. Indeed, this Court rejected an indistinguishable argument by Protestant Navy chaplains who claimed that they were "subjected to the 'message' of religious preference conveyed by the Navy's allegedly preferential retirement program for Catholic chaplains" and thus "fe[lt] like second-class citizens … even if they themselves have not suffered discrimination." *In re Navy Chaplaincy*, 534 F.3d 756, 763 (D.C. Cir. 2008) (*Navy Chaplaincy I*). As this Court explained, allowing a plaintiff to "re-characterize[]" an abstract injury flowing from "government *action*" directed against others as a personal injury from "a governmental *message*" directed at the plaintiff would "eviscerate well-settled standing limitations." *Id.* at 764. And contrary to the district court's misguided analysis, that plaintiffs here also dislike the reasoning behind the 2018 policy does not change the fact that they are challenging that policy's implementation, a government action that will affect only others. *See* JA79 n.5.

The district court went on to conclude that plaintiffs also had standing due to a risk that the 2018 policy will harm their "career development in the form of reduced opportunities for assignments, promotion, training, and deployment." JA79. Yet the court acknowledged that this conclusion rested on declarations concerning the "effects

of *prior* negative proclamations about transgender service"—*i.e.*, "the President's 2017 tweet and memorandum"—and an assumption that the same would be true under the 2018 policy. JA79-80, 80 n.6 (emphasis added). But that flawed extrapolation does not establish a certainly impending injury, and, in all events, the military regularly retains servicemembers with medical conditions that would presumptively disqualify them for accession (such as high blood pressure), JA310, without impeding their careers.

Even if these plaintiffs had suffered a cognizable injury, it would not be an irreparable one. A "higher requirement of irreparable injury should be applied in the military context given the federal courts' traditional reluctance to interfere with military matters," and "a military record which carries a stigma" does not meet that standard. *Guerra v. Scruggs*, 942 F.2d 270, 274 (4th Cir. 1991) (applying *Sampson v. Murray*, 415 U.S. 61 (1974)). If even "damage to [one's] reputation resulting from the stigma of a less than honorable discharge [is] insufficient … to justify injunctive relief" under that framework, *id.*, then temporary impediments to "career development" cannot do so, JA79; *see also Anderson v. United States*, 612 F.2d 1112, 1115 (9th Cir. 1979) (holding that the plaintiff's assertion "that her career" in the Air Force "would be damaged by losing [a] specific position" did not establish "irreparable injury" because "[a]ny harm she might suffer can be remedied adequately by retroactive promotion and back pay").

2. Aspiring Servicemembers

Nor can the three plaintiffs who desire to serve (Kohere, Jane Doe 7, and John Doe 2) obtain an injunction against the 2018 policy's standards for accession into the

military. These individuals, all of whom appear to have undergone or are in the process of undergoing gender transition, JA81, 85, have not established that they would be otherwise eligible for military service, JA1089-93, JA1107-12, JA1113-17, rendering any "threatened injury" from these new accession standards far from "*certainly impending*," *Clapper*, 568 U.S. at 409. In an effort to cure this deficiency, the district court suggested that any aspiring servicemember presumptively disqualified under the 2018 policy would have standing under a theory of "competit[ive]" injury. JA82 n.7; *see* JA148-57. But one need not "compete" to enter the military in general; rather, service is open to all, provided eligibility requirements are met. JA270. Thus, the relevant question is not whether the 2018 accession standards impose a competitive disadvantage on a subset of otherwise qualified applicants, but whether these prospective applicants are in fact otherwise qualified. And even if these plaintiffs could show a cognizable injury, it would not be an irreparable one. *See supra* Part II.B.1.

III. The Nationwide Injunction Is Improper

At a minimum, the nationwide scope of the preliminary injunction violates Article III and exceeds the district court's equitable authority. As the Supreme Court recently admonished, any "remedy" ordered by a federal court must "be limited to the inadequacy that produced the injury in fact that the plaintiff has established"; a court's "constitutionally prescribed role is to vindicate the individual rights of the people appearing before it"; and "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1921, 1933-34 (2018). Equitable

principles likewise require that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 765 (1994); *see also Hawaii*, 138 S. Ct. at 2429 (Thomas, J., concurring) (noting that nationwide injunctions "are legally and historically dubious"). Moreover, nationwide injunctions "take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch." *Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring); *see also City of Chicago v. Sessions*, 888 F.3d 272, 298 (7th Cir. 2018) (Manion, J., concurring in the judgment and dissenting in part) (admonishing that nationwide injunctions create an inequitable "one-way-ratchet" under which any prevailing party obtains relief on behalf of all others, but a victory by the government would not preclude other potential plaintiffs from "run[ning] off to the 93 other districts for more bites at the apple").

Because a preliminary injunction blocking the enforcement of the 2018 policy against the ten plaintiffs here would have provided complete relief pending final judgment, the district court had no authority to bar implementation of that policy nationwide. And that is particularly true given that these constitutional and equitable principles apply with special force to injunctions concerning military policies. *See U.S. Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993) (staying injunction against military policy concerning gay and lesbian servicemembers to the extent it conferred relief on anyone other than the plaintiff).

CONCLUSION

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

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

s/Brinton Lucas
BRINTON LUCAS
Counsel to the Assistant Attorney General

MARLEIGH D. DOVER
TARA S. MORRISSEY
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7261
950 Pennsylvania Ave., NW
Washington, DC 20530
202-353-9018

September 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,000 words, excluding the parts of the brief excluded by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Tara S. Morrissey
Tara S. Morrissey

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Tara S. Morrissey
Tara S. Morrissey