18A625

No. 18-676

Supreme Court, U.S.
FILED
DEC 13 2018
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

RYAN KARNOSKI, ET AL.

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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

PARTIES TO THE PROCEEDING

Applicants (defendants-appellants below) are Donald J. Trump, in his official capacity as President of the United States; the United States of America; James Mattis, in his official capacity as Secretary of Defense; and the United States Department of Defense.

Respondents (plaintiffs-appellees below) are Ryan Karnoski; Cathrine Schmid, Staff Sergeant; D. L., by his next friend and mother, FKA: K. G.; Laura Garza; Human Rights Campaign Fund; Gender Justice League; Lindsey Muller, Chief Warrant Officer; Terece Lewis, Petty Officer First Class; Phillip Stephens, Petty Officer Second Class; Megan Winters, Petty Officer Second Class; Jane Doe; Conner Callahan; and American Military Partner Association. Respondents also include the State of Washington, Attorney General's Office Civil Rights Unit (intervenor-plaintiff-appellee below).

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-676

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

v.

RYAN KARNOSKI, ET AL.

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

Pursuant to this Court's Rule 23 and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of applicants Donald J. Trump, et al., respectfully seeks, as an alternative to certiorari before judgment, a stay of the nationwide preliminary injunction issued by the United States District Court for the Western District of Washington (App., infra, 1a-23a, 24a-29a, 30a-60a), pending the consideration and disposition of the government's appeal from that injunction to the United States Court of Appeals for the Ninth Circuit and, if the court of appeals affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. Should the Court decline to grant certiorari before judgment or stay the injunction in its entirety, the government respectfully

requests that the Court stay the nationwide scope of the injunction pending the resolution of the government's appeal in the court of appeals and any further proceedings in this Court.

The district court in this case preliminarily enjoined the military from implementing a policy that Secretary of Defense James Mattis announced earlier this year after an extensive review of military service by transgender individuals. In arriving at that new policy, Secretary Mattis and a panel of senior military leaders and other experts determined that the prior policy, adopted by Secretary Mattis's predecessor, posed too great a risk to military effectiveness and lethality. As a result of the court's nationwide preliminary injunction, however, the military has been forced to maintain that prior policy for nearly a year.

The government has appealed that injunction and has filed a petition for a writ of certiorari before judgment to the court of appeals.[1] The government now files this application for a stay of the injunction as an alternative to certiorari before judgment. The government seeks such a stay only if the Court denies certiorari before judgment. If the Court grants certiorari before

---

[1] The petition for a writ of certiorari before judgment in this case (No. 18-676) was filed on November 23, 2018, and docketed that same day. As explained more fully in a letter filed in this Court with the certiorari petition, the government's filing of the petition on November 23 allows the petition to be distributed on December 26, 2018, for consideration at the Court's January 11, 2019 conference, without a motion for expedition. The government respectfully requests that this stay application be considered simultaneously with the certiorari petition.

judgment, it would presumably render a decision in this case by the end of June 2019. Because such a decision would potentially allow the military to begin implementing the Mattis policy in the reasonably near future, the government does not seek interim relief in the event the Court grants certiorari before judgment.

Should the Court deny certiorari before judgment, however, a decision by the Court this Term would no longer be possible. Even if the government were immediately to seek certiorari from an adverse decision of the court of appeals, this Court would not be able to review that decision until next Term. Absent a stay, the nationwide injunction would thus remain in place for at least another year and likely well into 2020 -- a period too long for the military to be forced to maintain a policy that it has determined, in its professional judgment, to be contrary to the Nation's interests. The government therefore respectfully requests a stay of the injunction pending further proceedings in the court of appeals and this Court, in the event this Court denies certiorari before judgment.

At a minimum, the Court should stay the nationwide scope of the injunction, so that the injunction prohibits the implementation of the Mattis policy only as to the nine individual respondents who are currently serving in the military or seeking to join it -- namely, Karnoski, Schmid, D. L., Muller, Lewis, Stephens, Winters, Doe, and Callahan. Such a narrower injunction -- which would limit the district court's preliminary remedy to

the parties in this case -- would allow the military to implement the Mattis policy in part while litigation proceeds through 2019 and into 2020. This Court has previously stayed a nationwide injunction against a military policy to the extent it swept beyond the parties to the case, see United States Dep't of Def. v. Meinhold, 510 U.S. 939 (1993), and it should, at a minimum, grant such a partial stay here.[2]

* * * * *

It is with great reluctance that we seek such emergency relief in this Court. Unfortunately this case is part of a growing trend in which federal district courts, at the behest of particular plaintiffs, have issued nationwide injunctions, typically on a preliminary basis, against major policy initiatives. Such injunctions previously were rare, but in recent years they have become routine. In less than two years, federal courts have issued 25 of them, blocking a wide range of significant policies involving national security, national defense, immigration, and domestic issues.

In cases involving these extraordinary nationwide injunctions, moreover, several courts have issued equally extraordinary discovery orders, compelling massive and intrusive discovery into Executive-Branch decision-making, including blanket

---

[2] In accordance with this Court's Rule 23.3, the government also moved in the district court and the court of appeals for a stay of the injunction -- and, at a minimum, its nationwide scope -- pending appeal. Both courts denied a stay. See App., infra, 61a-68a.

abrogations of the deliberative-process privilege. In the face of these actions, we have had little choice but to seek relief in the courts of appeals; and when that has proven unavailing, to do so in this Court. Absent such relief, the Executive will continue to be denied the ability to implement significant policy measures, subject to appropriate checks by an independent Judiciary in resolving individual cases and controversies.

STATEMENT

A. The Military's Policies

1. To assemble a military of "qualified, effective, and able-bodied persons," 10 U.S.C. 505(a), the Department of Defense (Department) has traditionally set demanding standards for military service, Karnoski Pet. App. 116a.[3] "The vast majority of Americans from ages 17 to 24 -- that is, 71% -- are ineligible to join the military without a waiver for mental, medical, or behavioral reasons." Id. at 125a.

Given the "unique mental and emotional stresses of military service," Karnoski Pet. App. 132a, a history of "[m]ost mental health conditions and disorders" is "automatically disqualifying," id. at 151a. In general, the military has aligned the disorders it has deemed disqualifying with those listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association (APA). Id. at 132a-133a. The

[3] References to "Karnoski Pet." and "Karnoski Pet. App." are to the petition for a writ of certiorari and the appendix to that petition filed in this case (No. 18-676) on November 23, 2018.

1980 edition of the DSM listed, among other disorders, "transsexualism." Id. at 133a. When the DSM was updated in 1994, "transsexualism" was subsumed within, and replaced by, the term "'gender identity disorder.'" Ibid. (citation omitted); see C.A. E.R. 416.[4]

Consistent with the inclusion of "'transsexualism'" in the DSM, the military's accession standards -- the "standards that govern induction into the Armed Forces" -- had for decades disqualified individuals with a history of "'transsexualism'" from joining the military. Karnoski Pet. App. 126a-127a; see id. at 133a; C.A. E.R. 482. And although the military's retention standards -- the "standards that govern the retention and separation of persons already serving in the Armed Forces" -- did not "require" separating "'transsexual[]'" servicemembers from service, "'transsexualism'" was a "permissible basis" for doing so. Karnoski Pet. App. 127a.

2. In 2013, the APA published a new edition of the DSM, which replaced the term "gender identity disorder" with "gender dysphoria." Karnoski Pet. App. 136a. That change reflected the APA's view that, when there are no "accompanying symptoms of distress, transgender individuals" -- individuals who identify with a gender different from their biological sex -- do not have "a diagnosable mental disorder." C.A. E.R. 416; see Karnoski Pet. App. 204a.

---

[4] References to the "C.A. E.R." are to the excerpts of record filed in the court of appeals in No. 18-35347.

According to the APA, a diagnosis of gender dysphoria should be reserved for individuals who experience a "marked incongruence between [their] experienced/expressed gender and assigned gender, of at least 6 months' duration," associated with "clinically significant distress or impairment in social, occupational, or other important areas of functioning." C.A. E.R. 417; see Karnoski Pet. App. 136a-138a. 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 the preferred gender. Karnoski Pet. App. 155a-156a; C.A. E.R. 345-346. The APA emphasizes that "[n]ot all transgender people suffer from gender dysphoria." Karnoski Pet. App. 152a (citation omitted; brackets in original). "Conversely, not all persons with gender dysphoria are transgender." Id. at 152a n.57; see ibid. (giving the example of men who suffer genital wounds in combat and who "feel that they are no longer men because their bodies do not conform to their concept of manliness") (citation omitted).

3. In June 2016, then-Secretary of Defense Ashton Carter ordered the armed forces to adopt a new policy on "Military Service of Transgender Service Members." Karnoski Pet. App. 87a. In a shift from the military's longstanding policy, Secretary Carter declared that "transgender individuals shall be allowed to serve in the military." Id. at 88a. But Secretary Carter recognized the need for "[m]edical standards" to "help to ensure that those

entering service are free of medical conditions or physical defects that may require excessive time lost from duty." Id. at 91a. Secretary Carter thus ordered the military to adopt, by July 1, 2017, new accession standards that would "disqualify[]" any applicant with a history of gender dysphoria or a history of medical treatment associated with gender transition (including a history of sex reassignment or genital reconstruction surgery), unless the applicant met certain medical criteria. Id. at 91a-92a. An applicant with a history of medical treatment associated with gender transition, for example, would be disqualified unless the applicant provided certification from a licensed medical provider that the applicant had completed all transition-related medical treatment and had been stable in the preferred gender for 18 months. Id. at 92a. If the applicant provided the requisite certification, the applicant would be permitted to enter the military and serve in the preferred gender.

Secretary Carter also imposed new retention standards, effective immediately, prohibiting the discharge of any servicemember on the basis of gender identity. Karnoski Pet. App. 91a. Under the Carter policy, current servicemembers who received a diagnosis of gender dysphoria from a military medical provider would be permitted to undergo gender transition at government expense and serve in their preferred gender upon completing the transition. C.A. E.R. 219-236; see Karnoski Pet. App. 93a. Transgender servicemembers without a diagnosis of gender dysphoria,

by contrast, would be required to continue serving in their biological sex. See Karnoski Pet. App. 128a; C.A. E.R. 221-222.

4. On June 30, 2017 -- the day before the Carter accession standards were set to take effect -- Secretary of Defense James Mattis determined, "after consulting with the Service Chiefs and Secretaries," that it was "necessary to defer" those standards until January 1, 2018, so that the military could "evaluate more carefully" their potential effect "on readiness and lethality." Karnoski Pet. App. 96a. Without "presuppos[ing] the outcome" of that study, Secretary Mattis explained that it was his intent to obtain "the views of the military leadership and of the senior civilian officials who are now arriving in the Department" and to "continue to treat all Service members with dignity and respect." Id. at 97a.

While that study was ongoing, the President stated on Twitter on July 26, 2017, that "the United States Government will not accept or allow" "Transgender individuals to serve in any capacity in the U.S. Military." Karnoski Pet. App. 98a. The President issued a memorandum in August 2017 noting the ongoing study and directing the military to "return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have * * * negative effects" on the military. Id. at 100a. The President ordered Secretary Mattis to submit "a plan for implementing" a return to the longstanding pre-Carter

policy by February 2018, while emphasizing that the Secretary could "advise [him] at any time, in writing, that a change to th[at] policy is warranted." Id. at 100a-101a.

5. Secretary Mattis thereafter established a panel of experts to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." Karnoski Pet. App. 106a. The panel consisted of "senior uniformed and civilian Defense Department and U.S. Coast Guard leaders." Id. at 205a. After "extensive review and deliberation," the panel "exercised its professional military judgment" and presented its independent recommendations to the Secretary. Id. at 148a.

In February 2018, Secretary Mattis sent the President a memorandum proposing a new policy consistent with the panel's conclusions, along with a lengthy report explaining the policy. Karnoski Pet. App. 113a-209a. Like the Carter policy, the Mattis policy holds that "transgender persons should not be disqualified from service solely on account of their transgender status." Id. at 149a. And like the Carter policy, the Mattis policy draws distinctions on the basis of a medical condition (gender dysphoria) and related treatment (gender transition). Id. at 207a-208a. Under the Mattis policy -- as under the Carter policy -- transgender individuals without a history of gender dysphoria would be required to serve in their biological sex, whereas individuals with a history of gender dysphoria would be

presumptively disqualified from service. Ibid. The two policies, however, differ in their exceptions to that disqualification.

Under the Mattis accession standards, individuals with a history of gender dysphoria would be permitted to join the military if they have not undergone gender transition, are willing and able to serve in their biological sex, and can show 36 months of stability (i.e., the absence of gender dysphoria) before joining. Karnoski Pet. App. 123a. Under the Mattis retention standards, servicemembers who are diagnosed with gender dysphoria after entering service would be permitted to continue serving if they do not seek to undergo gender transition, are willing and able to serve in their biological sex, and are able to meet applicable deployability requirements. Id. at 123a-124a.

Under both the accession and the retention standards of the Mattis policy, individuals with gender dysphoria who have undergone gender transition or seek to do so would be ineligible to serve, unless they obtain a waiver. Karnoski Pet. App. 123a. The Mattis policy, however, contains a categorical reliance exemption for "transgender Service members who were diagnosed with gender dysphoria and either entered or remained in service following the announcement of the Carter policy." Id. at 200a. Under that exemption, those 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 * * * and to serve in their preferred gender, even after the new policy commences." Ibid.; see C.A. E.R. 489.

6. In March 2018, the President issued a new memorandum "revok[ing]" his 2017 memorandum "and any other directive [he] may have made with respect to military service by transgender individuals." Karnoski Pet. App. 211a. The 2018 memorandum recognized that the Mattis policy reflected "the exercise of [Secretary Mattis's] independent judgment," and it permitted the Secretaries of Defense and Homeland Security "to implement" that new policy. Id. at 210a-211a.

B. Procedural History

1. Shortly after the President issued his 2017 memorandum, respondents -- six current servicemembers, three individuals who seek to join the military, and three advocacy organizations -- brought suit in the Western District of Washington, challenging as a violation of equal protection, substantive due process, and the First Amendment what they described as "the Ban" on military service by transgender individuals reflected in the President's 2017 tweets and memorandum. C.A. E.R. 118; see id. at 117-156. The State of Washington subsequently intervened in the suit as a plaintiff. Id. at 55-62, 108-116.

2. In December 2017, the district court issued a nationwide preliminary injunction, enjoining the military "from taking any action relative to transgender individuals that is inconsistent

with the status quo that existed prior to President Trump's July 26, 2017 announcement" on Twitter. App., infra, 23a.

The district court construed the President's 2017 tweets and memorandum as "unilaterally proclaim[ing] a prohibition on transgender service members." App., infra, 13a. The court determined that respondents were likely to succeed in challenging that prohibition on equal-protection, substantive-due-process, and First Amendment grounds. Id. at 15a. With respect to respondents' equal-protection claim, the court reasoned that the policy set forth in the President's 2017 memorandum "distinguishe[d] on the basis of transgender status, a quasi-suspect classification, and [wa]s therefore subject to intermediate scrutiny." Ibid. The court determined that the policy did not survive such scrutiny because its justifications were "contradicted by the studies, conclusions, and judgment of the military" in adopting the Carter policy. Id. at 16a (citation and emphasis omitted). With respect to respondent's substantive-due-process claim, the court determined that the President's policy "directly interfere[d]" with respondents' "fundamental right" to "define and express their gender identity" by "depriving them of employment and career opportunities." Id. at 19a. And with respect to respondents' First Amendment claim, the court determined that the President's policy was an impermissible "content-based restriction" that "penalize[d] transgender service members * * * for disclosing their gender identity." Id. at 19a-20a.

The district court subsequently clarified that maintaining the "status quo" under its injunction required implementing the Carter accession standards by January 1, 2018. App., infra, 26a. The government filed an appeal but dismissed it after the D.C. Circuit and the Fourth Circuit denied the government's requests for partial stays of similar nationwide injunctions in related cases. See Doe 1 v. Trump, No. 17-5267, 2017 WL 6553389 (D.C. Cir. Dec. 22, 2017) (per curiam); Stone v. Trump, No. 17-2398, 2017 WL 9732004 (4th Cir. Dec. 21, 2017); 17-36009 C.A. Doc. 21, at 1 (Dec. 29, 2017). Absent stays of those injunctions, the military would have been forced to implement the Carter accession standards in any event. The government also expected that Secretary Mattis would soon be proposing a final policy that would render moot any appeal of the December 2017 injunction.

3. The parties filed cross-motions for summary judgment in the district court. See D. Ct. Doc. 129 (Jan. 25, 2018); D. Ct. Doc. 150 (Jan. 25, 2018); D. Ct. Doc. 194 (Feb. 28, 2018). Then, in March 2018, the government informed the court that the President had issued the new memorandum, which revoked his 2017 memorandum (and any similar directive) and allowed the military to adopt Secretary Mattis's proposed policy. D. Ct. Doc. 223, at 3 (Mar. 29, 2018); see D. Ct. Doc. 213 (Mar. 23, 2018). In light of that new policy, the government moved to dissolve the December 2017 injunction. D. Ct. Doc. 223, at 1-27.

In April 2018, the district court ruled on the pending motions. App., infra, 30a-60a. The court struck the government's motion to dissolve, id. at 60a, and extended the injunction to enjoin the Mattis policy.[5] The court characterized the Mattis policy as simply "a plan to implement" the "ban on military service by openly transgender people" that the President had supposedly announced in his 2017 tweets and memorandum. Id. at 31a; see id. at 32a n.1, 41. The court upheld respondents' standing to challenge that "Ban." Id. at 43a-49a. And despite having previously found "transgender people" to be "a quasi-suspect class," the court concluded that they are "a suspect class," id. at 49a, such that "[t]he Ban * * * must satisfy strict scrutiny if it is to survive," id. at 53a.

The district court declined, however, to grant in full respondents' motions for summary judgment. App., infra, 30a-31a. The court identified "an unresolved question of fact" regarding whether the "justifications for the Ban" found in the Mattis policy were entitled to "deference." Id. at 55a. The court stated that it could not determine, "[o]n the present record," "whether the [Department's] deliberative process -- including the timing and thoroughness of its study and the soundness of the medical and

---

[5] The district court granted the government's cross-motion for summary judgment "with respect to injunctive relief against President Trump," but stated that "[t]he preliminary injunction previously entered otherwise remains in full force and effect." App., infra, 59a; see id. at 31a ("[T]he preliminary injunction will remain in effect.").

other evidence it relied upon -- is of the type to which Courts typically should defer." Ibid. The court also reasoned that "facts related to Defendants' deliberative process" would be necessary to determine "[w]hether Defendants have satisfied their burden of showing that the Ban is constitutionally adequate (i.e., that it was sincerely motivated by compelling state interests, rather than by prejudice or stereotype)." Id. at 57a. The court therefore directed the parties "to proceed with discovery and prepare for trial on the issues of whether, and to what extent, deference is owed to the Ban and whether the Ban violates equal protection, substantive due process, and the First Amendment." Id. at 60a.

4. The government promptly appealed and sought a stay of the preliminary injunction from the district court. Karnoski Pet. App. 73a-74a; D. Ct. Doc. 238 (Apr. 30, 2018). After the court rejected the government's request for an expedited ruling, D. Ct. Doc. 240, at 1 (May 2, 2018); see D. Ct. Doc. 238, at 6, the government filed a stay motion in the court of appeals, 18-35347 C.A. Doc. 3-1 (May 4, 2018).

For six weeks, neither court acted on the government's request for a stay. Then, in June 2018, more than two months after having extended the injunction, the district court denied the government's stay motion. App., infra, 61a-66a. After another month passed and the parties finished briefing the merits of the appeal on an expedited basis, see 9th Cir. R. 3-3, the court of

appeals likewise denied a stay, App., infra, 67a-68a, and notified the parties that it had scheduled oral argument in the case for October 2018, 18-35347 C.A. Doc. 92 (July 20, 2018).

The following business day, the government asked the court of appeals to expedite the date of oral argument. 18-35347 C.A. Doc. 93 (July 23, 2018). The government explained that "[e]xpedition is all the more necessary now that [the court] has denied the government's motion for a stay pending appeal." Id. at 4. The government urged the court to resolve the appeal as soon as possible because the injunction requires the military to maintain a policy that, in its own professional judgment, risks undermining readiness, disrupting unit cohesion, and weakening military effectiveness and lethality. Ibid. The government also emphasized that, absent expedition, it would "be difficult for the government, if it loses the appeal, to seek and obtain review during the Supreme Court's 2018 Term." Ibid.

The court of appeals denied the government's request for expedition, 18-35347 C.A. Doc. 102 (Aug. 6, 2018), and heard oral argument on October 10, 2018, 18-35347 C.A. Docket entry No. 119 (Oct. 10, 2018). As of the date of this filing, the court has not issued a decision.[6]

---

[6] On November 7, 2018, the government informed the court of appeals that, "in order to preserve th[is] Court's ability to hear and decide the case this Term," it intended to file a petition for a writ of certiorari before judgment on November 23 if the court of appeals had not issued its judgment by then. 18-35347 C.A. Doc. 124, at 1-2.

5. Discovery continued in the district court after the government appealed the preliminary injunction. In July 2018, the court ordered the President to produce a detailed privilege log of presidential communications and make particularized objections of executive privilege on a document-by-document basis. D. Ct. Doc. 299, at 11 (July 27, 2018); see D. Ct. Doc. 311, at 1-10 (Aug. 20 2018). The court also ordered the wholesale disclosure of many thousands of documents withheld under the deliberative-process privilege. D. Ct. Doc. 299, at 11. On August 1, 2018, the government filed a petition for a writ of mandamus, arguing that the court's order raised precisely the separation-of-powers concerns identified in Cheney v. United States District Court for the District of Columbia, 542 U.S. 367 (2004). The government's mandamus petition remains pending before the court of appeals, which has stayed the district court's order pending its disposition of the petition. See Karnoski Pet. 14 n.4.

ARGUMENT

In a petition for a writ of certiorari before judgment filed in this Court on November 23, 2018, the government seeks review of the district court's nationwide preliminary injunction against the Mattis policy. For the reasons set forth in the petition, this Court should grant certiorari before judgment. If the Court declines to do so, however, the government respectfully requests, in the alternative, a stay of the injunction pending the resolution of the government's appeal in the court of appeals and any further

proceedings in this Court. At a minimum, the Court should stay the nationwide scope of the injunction pending those proceedings.

Under this Court's Rule 23 and the All Writs Act, 28 U.S.C. 1651, a single Justice or the Court has authority to enter a stay pending proceedings in a court of appeals.[7] In considering an application for such a stay, the Court or Circuit Justice considers the likelihood of whether four Justices would vote to grant a writ of certiorari if the court of appeals ultimately rules against the applicant; whether five Justices would then conclude that the case was erroneously decided below; and whether, on balancing the equities, the injury asserted by the applicant outweighs the harm to the other parties or the public. See San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); Hilton v. Braunskill, 481 U.S. 770, 776 (1987) (traditional stay factors). All of those factors support a stay of the injunction or, at a minimum, its nationwide scope.

I. THIS COURT IS LIKELY TO GRANT REVIEW IF THE COURT OF APPEALS AFFIRMS THE INJUNCTION AND ITS NATIONWIDE SCOPE

If the court of appeals affirms the district court's nationwide preliminary injunction against the Mattis policy, this Court is likely to grant review. Respondents challenge the constitutionality of the Mattis policy on equal-protection,

---

[7] See, e.g., Trump v. International Refugee Assistance Project, 138 S. Ct. 542 (2017); West Virginia v. EPA, 136 S. Ct. 1000 (2016); Stephen M. Shapiro et al., Supreme Court Practice § 17.6, at 881-884 (10th ed. 2013).

substantive-due-process, and First Amendment grounds. Those challenges concern a matter of imperative public importance: the authority of the U.S. military to determine who may serve in the Nation's armed forces. After an extensive process of consultation and review involving senior military officials and other experts, the Secretary of Defense determined that individuals with a history of the medical condition gender dysphoria should be presumptively disqualified from military service, particularly if they have undergone the treatment of gender transition or seek to do so. See pp. 10-12, supra.

The district court in this case entered a nationwide preliminary injunction nullifying that exercise of professional military judgment and blocking the implementation of a policy that the Secretary has deemed necessary to "place the Department of Defense in the strongest position to protect the American people, to fight and win America's wars, and to ensure the survival and success of our Service members around the world." Karnoski Pet. App. 208a. If the court of appeals were to affirm the injunction, a judicial intrusion of that significance into the operation of our Nation's armed forces would warrant this Court's review. See Department of the Navy v. Egan, 484 U.S. 518, 520 (1988) (granting certiorari to address interference with Executive Branch determinations that are of "importance * * * to national security concerns"); see also Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 12 (2008).

Leaving aside the merits of respondents' constitutional challenges, the issue of the appropriate remedy would itself present a question of exceptional importance warranting this Court's review. The district court in this case enjoined the implementation of the Mattis policy on a nationwide basis. The government has previously sought -- and this Court has previously granted -- review of whether a court of appeals erred in affirming the nationwide scope of an injunction entered by a district court. See Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018); Summers v. Earth Island Institute, 555 U.S. 488, 492 (2009). If the court of appeals affirms the nationwide scope of the district court's injunction here, this Court's review would again be warranted.

That is particularly so because the nationwide relief ordered in this case extends a disturbing but accelerating trend among lower courts of issuing categorical injunctions designed to benefit nonparties. Lower courts, including the Ninth Circuit, once recognized that injunctions should be limited to redressing irreparable harm to the plaintiffs. See Meinhold v. United States Dep't of Def., 34 F.3d 1469, 1480 (9th Cir. 1994) (vacating a "nation-wide injunction" against the Department's policy on military service by gays and lesbians except to the extent that the injunction granted relief to the particular plaintiff before the court); see also, e.g., McKenzie v. City of Chicago, 118 F.3d 552, 555 (7th Cir. 1997).

Those same courts and others, however, have since transformed a remedy that had been imposed in only a small number of cases into the norm. Thus, in a span of less than two years, district courts have issued 25 nationwide injunctions or temporary restraining orders against major policy decisions in areas including national defense, national security, immigration, and domestic policy. For example, district courts have issued nationwide injunctions against:

- the temporary suspension of entry into the United States of certain foreign nationals from select countries previously identified by prior Administrations or Congress as presenting a heightened risk of terrorism or other national-security concerns, in order to review screening and vetting procedures for foreign travelers;[8]
- entry restrictions on foreign nationals from select countries identified by a worldwide review as failing to provide information needed to adequately vet their

---

[8] See Darweesh v. Trump, No. 17-cv-480, 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017); Tootkaboni v. Trump, No. 17-cv-10154, 2017 WL 386550 (D. Mass. Jan. 29, 2017); Mohammed v. United States, No. 17-cv-786, 2017 WL 438750 (C.D. Cal. Jan. 31, 2017); Washington v. Trump, No. 17-cv-141, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017); Hawaii v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017); International Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md.), aff'd in part, vacated in part, 857 F. 3d 554 (4th Cir.), vacated, 138 S. Ct. 353 (2017); Hawaii v. Trump, 245 F. Supp. 3d 1227 (D. Haw.), aff'd in part, vacated in part, 859 F.3d 741 (9th Cir.), vacated, 138 S. Ct. 377 (2017).

nationals or otherwise presenting heightened national-security risks;[9]

- conditions on federal grants to local governments to ensure that the Nation's immigration laws are faithfully executed;[10]
- exemptions to protect the sincerely held religious beliefs or moral convictions of certain entities whose health plans are subject to the mandate of contraceptive coverage under Affordable Care Act regulations;[11]
- the rescission of Deferred Action for Childhood Arrivals (DACA), a discretionary policy of immigration enforcement adopted in 2012 as a temporary stop-gap measure permitting some 700,000 aliens to remain in the United

---

[9] See Hawaii v. Trump, 265 F. Supp. 3d 1140 (D. Haw.), aff'd in part, vacated in part, 878 F.3d 662 (9th Cir. 2017), rev'd, 138 S. Ct. 2392 (2018); International Refugee Assistance Project v. Trump, 265 F. Supp. 3d 570 (D. Md. 2017) (same), aff'd, 883 F.3d 233 (4th Cir.), vacated, 138 S. Ct. 2710 (2018).

[10] See County of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017); City of Chicago v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017), aff'd, 888 F.3d 272 (7th Cir.), reh'g en banc granted, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4), vacated, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018) (en banc); County of Santa Clara v. Trump, 275 F. Supp. 3d 1196 (N.D. Cal. 2017), aff'd in part, vacated in part, 897 F.3d 1225 (9th Cir. 2018); City & Cnty. of San Francisco v. Sessions, No. 17-cv-4642, 2018 WL 4859528 (N.D. Cal. Oct. 5, 2018); City of Chicago v. Sessions, 321 F. Supp. 3d 855 (N.D. Ill. 2018).

[11] See California v. Health & Human Servs., 281 F. Supp. 3d 806 (N.D. Cal. 2017).

States unlawfully while Congress considered a more permanent solution;[12]

- Executive Orders promoting efficiency and accountability in the federal civil service;[13]
- the termination of discretionary temporary protected status designations for four countries based on the Secretary of Homeland Security's determination that the extraordinary conditions that gave rise to the years-old (sometimes decades-old) "temporary" designations no longer persisted;[14] and
- a rule addressing unlawful mass migration at the southern border and the massive recent increase in meritless asylum claims.[15]

---

[12] See Regents of the Univ. of Cal. v. Department of Homeland Sec., 279 F. Supp. 3d 1011 (N.D. Cal.), aff'd, 908 F.3d 476 (9th Cir. 2018), petition for cert. pending, No. 18-587 (filed Nov. 5, 2018); Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401 (E.D.N.Y.), appeal pending, No. 18-485 (2d Cir. filed Feb. 20, 2018), petition for cert. before judgment pending, No. 18-589 (filed Nov. 5, 2018); see also Casa de Maryland v. Department of Homeland Sec., 284 F. Supp. 3d 758 (D. Md. 2018) (enjoining any change in the use of information provided by DACA recipients to the Department of Homeland Security (DHS), despite DHS's public statements that no such change had been made).

[13] See American Fed'n of Gov't Emps. v. Trump, 318 F. Supp. 3d 370 (D.D.C. 2018).

[14] See Ramos v. Nielsen, No. 18-cv-1554, 2018 WL 4778285 (N.D. Cal. Oct. 3, 2018).

[15] See East Bay Sanctuary Covenant v. Trump, No. 18-cv-6810, 2018 WL 6053140 (N.D. Cal. Nov. 19, 2018). On December 11, 2018, the Solicitor General filed an application in this Court for a stay

Equally troubling, several courts issuing these nationwide preliminary injunctions have also ordered massive and intrusive discovery into Executive-Branch decision-making, including, in a number of instances, blanket abrogations of the deliberative-process privilege. In this case, for example, the district court ordered the President to compile a detailed privilege log of presidential communications and the Executive Branch to produce many thousands of documents withheld under the deliberative-process privilege. D. Ct. Doc. 299, at 11. In other cases involving nationwide injunctions, the government has likewise been ordered to produce wide swaths of deliberative-process materials and, in one instance, "to include in the administrative record all * * * 'emails, letters, memoranda, notes, media items, opinions, and other materials'" considered by an acting Cabinet Secretary with respect to a particular policy. In re United States, 875 F.3d 1200, 1212 (9th Cir.) (Watford, J., dissenting), vacated, 138 S. Ct. 443 (2017); see, e.g., Order at 1-2, Ramos v. Nielsen, No. 18-cv-1554 (N.D. Cal. Aug. 15, 2018); Mem. Op. at 13-17, Stone v. Trump, No. 17-2459 (D. Md. Nov. 30, 2018).[16]

---

of the district court's nationwide injunction pending appeal to the Ninth Circuit. No. 18A615.

[16] In still other suits against the government, which do not involve nationwide injunctions, intrusive discovery into Executive-Branch decision-making has likewise been ordered or is likely to be sought. See 7/3/18 Tr. at 82, New York v. United States Dep't of Commerce, No. 18-cv-2921 (S.D.N.Y.), mandamus denied, Nos. 18-2652, 18-2856 (2d Cir. 2018), cert. granted, No. 18-557 (Nov. 16,

There is an additional concern for the Judiciary as well as the Executive. "Given the sweeping power of the individual judge to issue a national injunction, and the plaintiff's ability to select a forum," it raises the prospect that a plaintiff will engage in forum shopping, or that plaintiffs will file in multiple courts in the hope of obtaining a single favorable nationwide ruling. Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 460 (2017). Even if other district courts disagree, see, e.g., Sarsour v. Trump, 245 F. Supp. 3d 719 (E.D. Va. 2017) (declining to preliminarily enjoin the temporary suspension of entry into the United States of certain foreign nationals), so long as any court of appeals lets stand a single nationwide injunction -- which they largely have, with limited exceptions -- it prevents the implementation of Executive-Branch policies nationwide or even globally. See, e.g., Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476 (9th Cir. 2018), petition for cert. pending, No. 18-587 (filed Nov. 5, 2018); International Refugee Assistance Project v. Trump, 883 F.3d 233 (4th Cir. 2018), vacated, 138 S. Ct. 2710 (2018). But see City & Cnty. of San Francisco v. Trump, 897 F.3d 1225, 1244 (9th Cir. 2018) (determining that the record was "not sufficient to support a nationwide injunction"); Order, City of Chicago v.

2018); Statement Pursuant to F.R.C.P. 26(f) at 4, District of Columbia v. Trump, No. 17-cv-1596 (D. Md. Sept. 14, 2018).

Sessions, No. 17-2991 (7th Cir. June 26, 2018) (staying nationwide scope of preliminary injunction).

Accordingly, if the court of appeals affirms the nationwide scope of the injunction here -- continuing this troubling and increasing trend in the lower courts -- that decision would warrant this Court's review. Hawaii, 138 S. Ct. at 2425 (Thomas, J., concurring); see id. at 2429 ("If federal courts continue to issue [universal injunctions], this Court is duty-bound to adjudicate their authority to do so."). Indeed, it is only this Court that can arrest this trend and address this rapidly expanding threat to the respect that each coordinate Branch of our Nation's government owes the others.

II. THERE IS AT LEAST A FAIR PROSPECT THAT THIS COURT WILL REVERSE IF THE COURT OF APPEALS AFFIRMS THE INJUNCTION AND ITS NATIONWIDE SCOPE

There is also at least a "fair prospect," Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers), that if the court of appeals affirms the preliminary injunction and its nationwide scope, this Court will reverse.

A. As explained in the government's certiorari petition, respondents' equal-protection challenge to the Mattis policy lacks merit. See Karnoski Pet. 19-25. Under the Mattis policy, individuals may "not be disqualified from service solely on account of their transgender status." Karnoski Pet. App. 149a. Like the Carter policy before it, the Mattis policy turns on a medical condition (gender dysphoria) and related treatment (gender

transition) -- not any suspect or quasi-suspect classification. Id. at 92a, 121a-124a. Rational-basis review therefore applies, particularly given the military context in which the policy arises. And the Mattis policy satisfies that deferential review because it reflects, inter alia, the military's reasoned and considered judgment that "making accommodations for gender transition" would "not [be] conducive to, and would likely undermine, the inputs -- readiness, good order and discipline, sound leadership, and unit cohesion -- that are essential to military effectiveness and lethality." Id. at 197a. Respondents' substantive-due-process and First Amendment claims fare no better. See Karnoski Pet. 25.

B. Even if respondents could demonstrate a likelihood of success on their constitutional claims, there is a fair prospect that this Court would vacate the nationwide scope of the preliminary injunction. Nationwide injunctions like the one here transgress both Article III and longstanding equitable principles by affording relief that is not necessary to redress any cognizable, irreparable injury to the parties in the case. They also frustrate the development of the law, while obviating the requirements for and protections of class-action litigation.

1. a. Respondents lack Article III standing to seek injunctive relief beyond what is needed to redress an actual or imminent injury-in-fact to respondents themselves. "[S]tanding is not dispensed in gross," and "a plaintiff must demonstrate standing * * * for each form of relief that is sought." Town of Chester

v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650 (2017) (citations omitted); see Gill v. Whitford, 138 S. Ct. 1916, 1933 (2018) ("The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it."). The remedy sought thus "must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." Whitford, 138 S. Ct. at 1931 (quoting Lewis v. Casey, 518 U.S. 343, 357 (1996)). "The actual-injury requirement would hardly serve [its] purpose . . . of preventing courts from undertaking tasks assigned to the political branches, if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy all inadequacies in that administration." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 353 (2006) (brackets and citation omitted).

Applying that principle, this Court has invalidated injunctions that afforded relief that was not shown to be necessary to prevent cognizable injury to the plaintiff himself. For example, in Lewis, the Court held that an injunction directed at certain prison practices was overbroad, in violation of Article III, because it enjoined practices that had not been shown to injure any plaintiff. 518 U.S. at 358. The injunction "mandated sweeping changes" in various aspects of prison administration designed to improve prisoners' access to legal services, including library hours, lockdown procedures, access to research facilities and training, and "'direct assistance'" from lawyers and legal

support staff for "illiterate and non-English-speaking inmates." Id. at 347-348 (citation omitted).

This Court held that the plaintiffs lacked standing to seek, and the district court thus lacked authority to grant, such broad relief. Lewis, 518 U.S. at 358-360. The district court had "found actual injury on the part of only one named plaintiff," who claimed that a legal action he had filed was dismissed with prejudice as a result of his illiteracy and who sought assistance in filing legal claims. Id. at 358. "At the outset, therefore," this Court held that "[it] c[ould] eliminate from the proper scope of the injunction provisions directed at" the other claimed inadequacies that allegedly harmed "the inmate population at large." Ibid. "If inadequacies of th[at] character exist[ed]," the Court explained, "they ha[d] not been found to have harmed any plaintiff in this lawsuit, and hence were not the proper object of this District Court's remediation." Ibid.

Here, respondents likewise lack standing to seek an injunction that goes beyond redressing any harm to respondents themselves. Even if the nine individual respondents who are currently serving in the military or seeking to join it -- namely, Karnoski, Schmid, D. L., Muller, Lewis, Stephens, Winters, Doe, and Callahan -- could show that they would suffer cognizable, irreparable injuries from the implementation of the Mattis policy, those injuries would be fully redressed by an injunction limited to them. An injunction so limited would also fully redress any purported injuries to the

other respondents in this case. Even assuming that the State of Washington has Article III standing at all, it has not identified anyone beyond the individual respondents named above whose disqualification from military service would even arguably irreparably injure it. See C.A. E.R. 119 (first amended complaint alleging that three individual respondents -- Karnoski, Schmid, and Lewis -- are residents of the State of Washington); id. at 513, 530, 536 (declarations asserting the same). Similarly, the three advocacy organizations -- Human Rights Campaign, Gender Justice League, and American Military Partner Association -- have not identified any members beyond the individual respondents named above who would even arguably suffer an irreparable injury. See Karnoski Pet. App. 56a-57a (determining that the organizations have standing only because particular individual respondents who are members have standing).

b. This Court also has recognized and applied the corollary principle that, where a plaintiff faces actual or imminent injury at the outset of a suit but that injury is subsequently redressed or otherwise becomes moot, the plaintiff no longer can seek injunctive relief to redress alleged harms to anyone else. For example, in Alvarez v. Smith, 558 U.S. 87 (2009), the Court held that the plaintiffs' challenge to a state-law procedure for disputing the seizure of vehicles or money had become moot because their "underlying property disputes" with the State "ha[d] all ended": the cars that had been seized from the plaintiffs had been

returned, and the plaintiffs had either forfeited the money seized or had "accepted as final the State's return of some of it." Id. at 89; see id. at 92. The Court accordingly held that the plaintiffs could no longer seek declaratory or injunctive relief against the State's policy. Id. at 92. Although the plaintiffs had "sought certification of a class," class certification had been denied, and that denial was not appealed. Ibid. "Hence the only disputes relevant" in this Court were "those between th[ose] six plaintiffs" and the State concerning specific seized property, "and those disputes [were] * * * over." Id. at 93. And although the plaintiffs "continue[d] to dispute the lawfulness of the State's hearing procedures," their "dispute [wa]s no longer embedded in any actual controversy about the plaintiffs' particular legal rights." Ibid.

Similarly, in Earth Island, the Court held that a plaintiff lacked standing to seek to enjoin certain Forest Service regulations after the parties had resolved the controversy regarding the application of those regulations to the specific project that had caused that plaintiff's own claimed injury. 555 U.S. at 494-497. The plaintiff's "injury in fact with regard to that project," the Court held, "ha[d] been remedied," and so he lacked standing to maintain his challenge to the regulations. Id. at 494. The Court expressly rejected a contrary rule that, "when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action" -- in Earth

Island, "the regulation in the abstract" -- "apart from any concrete application that threatens imminent harm to his interests." Ibid. Such a rule would "fly in the face of Article III's injury-in-fact requirement." Ibid.

The same conclusion logically follows where, as here, a plaintiff's only injury would be eliminated by an injunction barring application of the challenged policy to the plaintiff. If a plaintiff himself is no longer in any imminent danger of suffering injury from the policy -- whether because his injury has become moot, as in Alvarez and Earth Island, or because a plaintiff-specific injunction prevents any future injury to that plaintiff from the policy -- he lacks standing to press for additional injunctive relief. The fact that the challenged policy could still cause concrete injury to nonparties is irrelevant. As Alvarez and Earth Island both demonstrate, the plaintiff must show the relief he seeks is necessary to redress his own actual or imminent injury-in-fact; potential injuries to others do not entitle the plaintiff to seek relief on their behalf.

2. Independent of Article III, the nationwide preliminary injunction here violates fundamental rules of equity by granting relief broader than necessary to prevent irreparable harm to respondents. This Court has long recognized that injunctive relief must "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (citation omitted).

Where no class has been certified, a plaintiff must show that the requested relief is necessary to redress the plaintiff's own irreparable harm; the plaintiff cannot seek injunctive relief in order to prevent harm to others. See Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 163 (2010) (plaintiffs "d[id] not represent a class, so they could not seek to enjoin [an agency order] on the ground that it might cause harm to other parties"). Even where a class has been certified, relief is limited to what is necessary to redress irreparable injury to members of that class. See Lewis, 518 U.S. at 359-360, 360 n.7.

History confirms that the injunction in this case violates "traditional principles of equity jurisdiction." Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 319 (1999) (citation omitted). This Court "ha[s] long held that the jurisdiction" conferred by the Judiciary Act of 1789 "over 'all suits . . . in equity' * * * is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." Id. at 318 (brackets, citation, and internal quotation marks omitted). Absent a specific statutory provision providing otherwise, then, "the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789." Ibid. (citation omitted).

Absent-party injunctions were not "traditionally accorded by courts of equity." Grupo Mexicano, 527 U.S. at 319. Indeed, they did not exist at equity at all. See Bray 424-445 (detailing historical practice). Thus, in the late 19th century, this Court rejected injunctive relief that barred enforcement of a law to nonparties. Bray 429 (discussing Scott v. Donald, 165 U.S. 58 (1897)). As a consequence, for example, in the 1930s courts issued more than 1600 injunctions against enforcement of a single federal statute. Bray 434. The nationwide injunction in this case is thus inconsistent with "longstanding limits on equitable relief." Hawaii, 138 S. Ct. at 2425 (Thomas, J., concurring).

3. Nationwide injunctions like the one here also disserve this Court's interest in allowing an issue to percolate in the lower courts. See United States v. Mendoza, 464 U.S. 154, 160 (1984). While other suits may proceed even after a nationwide injunction is issued, the moment the first nationwide injunction on a question is affirmed by a court of appeals, this Court is forced to either grant review or risk losing the opportunity for review altogether; there may be no second case if it denies review in the first, because other plaintiffs may simply drop their suits and rely on the first nationwide injunction. Permitting such nationwide injunctions also undercuts the primary mechanism Congress has authorized to permit broader relief: class actions. It enables all potential claimants to benefit from nationwide injunctive relief by prevailing in a single district court, without

satisfying the prerequisites of Federal Rule of Civil Procedure 23, while denying the government the corresponding benefit of a definitive resolution as to all potential claimants if it prevails instead. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974). In other words, if plaintiffs file multiple suits against a government policy, they collectively need to win only a single suit for them all to prevail, while the government must run the table to enforce its policy.

4. Finally, nationwide preliminary injunctions (and the oft-accompanying discovery orders) deeply intrude into the separated powers upon which our national government is based. Under those principles, the political Branches are charged with making national policies, including and especially with regard to the national defense. The Judicial Branch, in contrast, is charged with resolving specific cases and controversies -- and in particular, redressing concrete injuries to specific parties when the policies adopted by the political Branches transgress legal limits. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."). The types of unrestrained orders that have, in recent years, transformed from rare exceptions into routine interim remedies risk undermining, if not reversing, this fundamental constitutional order -- ultimately, to the long-term detriment of all Branches of

our national government. This Court's intervention is therefore both necessary and appropriate.

III. THE BALANCE OF EQUITIES STRONGLY SUPPORTS A STAY OF THE INJUNCTION IN ITS ENTIRETY OR AT LEAST OF ITS NATIONWIDE SCOPE

The nationwide preliminary injunction in this case causes direct, irreparable injury to the interests of the government and the public, which merge here. See Nken v. Holder, 556 U.S. 418, 435 (2009). It does so by forcing the Department to maintain a policy that it has determined poses "substantial risks" and threatens to "undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." Karnoski Pet. App. 206a; cf. King, 567 U.S. at 1303 (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (brackets in original) (quoting New Motor Vehicle Bd. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Given this severe harm to the federal government -- which far outweighs respondents' speculative claims of injury, see Gov't C.A. Br. 49-53, Gov't C.A. Reply Br. 23-26 -- the Court should stay the injunction in its entirety.

At a minimum, the Court should stay the nationwide scope of the injunction, such that the injunction bars the implementation of the Mattis policy only as to Karnoski, Schmid, D. L., Muller, Lewis, Stephens, Winters, Doe, and Callahan. The Court granted

just such a stay in Meinhold. In that case, a discharged Navy servicemember brought a facial constitutional challenge against the Department's "then-existing policy regarding homosexuals." Meinhold, 34 F.3d at 1473. After the district court enjoined the Department from "taking any actions against gay or lesbian servicemembers based on their sexual orientation" nationwide, this Court stayed that order "to the extent it conferred relief on persons other than Meinhold." Ibid.; see Meinhold, 510 U.S. at 939.

The Court should follow the same course here. Indeed, this case and others involving constitutional challenges to the Mattis policy illustrate the distinct harms to the government from nationwide injunctions. The government is currently subject to four different nationwide preliminary injunctions, each requiring the government to maintain the Carter accession and retention standards. Even if the government were to prevail in the Ninth Circuit -- which has before it two of these injunctions (in this case and in Stockman v. Trump, No. 18-56539) -- the government would still need to proceed with its appeal before the D.C. Circuit, see Doe 2 v. Trump, No. 18-5257. And even then, the government would still be subject to a fourth nationwide preliminary injunction, issued by the district court in Maryland. See Stone v. Trump, 280 F. Supp. 3d 747 (D. Md. 2017). Although the government moved nine months ago to dissolve that injunction in light of the new Mattis policy, see Gov't Mot. to Dissolve the Prelim. Inj., Stone, supra

(No. 17-cv-2459) (Mar. 23, 2018), the district court in Maryland has not ruled on the government's pending motion.

Given the injunctions' nationwide scope, the government would have to succeed in vacating all four before it could begin implementing the Mattis policy. So long as even a single injunction remains in place, the military will be forced to maintain nationwide a policy that it has concluded is contrary to "readiness, good order and discipline, sound leadership, and unit cohesion," which "are essential to military effectiveness and lethality." Karnoski Pet. App. 197a; see id. at 202a (explaining that the "risks" associated with the Carter policy should not be incurred "given the Department's grave responsibility to fight and win the Nation's wars in a manner that maximizes the effectiveness, lethality, and survivability" of servicemembers).

By contrast, respondents will suffer no injury -- let alone irreparable injury -- if the nationwide scope of the injunction is stayed pending the resolution of the government's appeal and any further proceedings in this Court. That is because the injunction would still bar the implementation of the Mattis policy as to the nine individual respondents who are currently serving in the military or seeking to join it, redressing any purported harm to respondents themselves. See pp. 30-31, supra.

The balance of equities therefore warrants, at a minimum, a stay of the nationwide scope of the injunction. In the absence of certiorari before judgment, such a stay would at least allow the

military to implement in part the Mattis policy -- a policy it has determined, after a thorough and independent review, to be in the Nation's best interests -- while litigation continues through 2019 and into 2020.[17]

CONCLUSION

If the petition for a writ of certiorari before judgment is denied, the injunction should be stayed in its entirety pending the disposition of the appeal in the court of appeals and, if that court affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. At a minimum, the Court should stay the nationwide scope of the injunction, such that the injunction bars the implementation of the Mattis policy only as to the nine individual respondents in this case who are currently serving in the military or seeking to join it.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

DECEMBER 2018

---

[17] In applications filed simultaneously with this one, the government also seeks, as an alternative to certiorari before judgment, stays of the preliminary injunctions (or, at a minimum, their nationwide scope) in Doe and Stockman. If this Court were to stay the injunctions in these cases in whole or in part, that decision would be binding precedent on the application of the stay factors to such an injunction and would therefore require the district court to similarly stay the injunction in Stone.