No. 18-35347

United States Court of Appeals for the Ninth Circuit

RYAN KARNOSKI, ET AL.,

Plaintiffs-Appellees,

STATE OF WASHINGTON,

Intervenor-Plaintiff-Appellee,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Washington
Case No. 2:17-cv-01297-MJP

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee Human Rights Campaign hereby files its corporate disclosure statement and certifies that Human Rights Campaign does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee Gender Justice League hereby files its corporate disclosure statement and certifies that Gender Justice League does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock. Gender Justice League further certifies that Gay City Health Project serves as the fiscal sponsor for Gender Justice League.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee American Military Partner Association hereby files its corporate disclosure statement and certifies that American Military Partner Association does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock.

INTRODUCTION

Last summer, President Trump abruptly reversed the status quo and announced on Twitter that openly transgender individuals could no longer "serve in any capacity in the U.S. Military." Add.111[1] (the "Tweets"). The President followed up with an August 25, 2017 Memorandum, *see* Add.109 ("2017 Memorandum"), that ordered the Department of Defense (DoD) to implement his policies. The district court—and three other federal district courts—issued preliminary injunctions to preserve the status quo pending review of this hasty and discriminatory policy reversal (the "Ban"). Under these preliminary injunctions, transgender individuals may join the military and continue to serve openly, on equal terms.

The 2017 Memorandum ordered DoD to "submit to [the President] a plan for implementing both the general policy . . . and the specific directives" it announced by February 21, 2018. Add.109. Following those explicit orders, on February 22, 2018, DoD provided the President with an implementation plan consisting of a memorandum setting forth the

[1] "Add." and "SA." refer to Defendants'-Appellants' and Plaintiffs'-Appellee's addenda, respectively.

requested plan and a report attempting to justify the policies contained therein. *See* Add.59 ("Mattis Memorandum") and Add.62 ("Report") (collectively, the "Implementation Plan"). With the Implementation Plan in hand, the President issued a new memorandum, in which he purportedly "revoke[s]" his previous directives so DoD may purportedly go forward with the Implementation Plan. *See* Add.57 ("2018 Memorandum").

The Implementation Plan faithfully implements the policies the President ordered last summer—nothing more. The district court followed this obvious causal chain, refusing to credit the government's argument that the Implementation Plan and the Ban it implements are somehow entirely unconnected to the 2017 Memorandum. As the district court found, the 2018 Memorandum and Implementation Plan continued "the very same violations that caused it and other courts to enjoin the Ban in the first place," Add.14, and it continued its preliminary injunction. The government now asks this Court to stay that order, so that it may immediately commence implementation of the Ban.

There is no basis for a stay. The government cannot show the district court abused its discretion in concluding that Plaintiffs-Appellees

("Plaintiffs") were likely to succeed on the merits of their constitutional claims. And a stay would upend the status quo, deny an entire class of Americans the ability to serve their country on equal terms as others, and expose a large number of transgender service members to immediate discharge. The government's stay request should be denied.

BACKGROUND

I. Background on Military Service by Transgender Individuals

A. The Pre-Ban Status Quo

The military adopted policies allowing open service by transgender individuals after independent and comprehensive study and analysis.

First, in 2014, DoD eliminated a then-existing categorical ban on service by transgender individuals, enabling each branch of the military to reassess its own service-specific policies. SA.171. Second, in July 2015, former Secretary of Defense Ashton Carter formed a working group of senior DoD personnel to study the issue (the "Working Group"). SA.026. The Working Group was directed to identify and study potential concerns related to open service by transgender Americans and analyze whether such service was consistent with maximum "military effectiveness and lethality." *Id.*; SA.030.

The Working Group had approximately 25 members, including a senior uniformed officer and a senior civilian official, as well as representatives of the Surgeons General for each service branch. SA.026. It conducted a careful, "evidence-based assessment" of "all available scholarly evidence" and consulted with experts in medicine, health insurance, personnel, and readiness, as well as military commanders. SA.728; SA.026.

Separately, the Working Group commissioned RAND Corporation—a non-profit, non-partisan research institution with decades of experience advising the military—to study the impact of open service by transgender individuals. SA.026–027. RAND followed a multidisciplinary, detailed, and data-driven approach to study (1) the health care needs of the transgender population; (2) the readiness implications of open service; and (3) the experiences of foreign militaries. SA.249. RAND found that even under the "most extreme scenario," open service would impact active duty health care expenses by no more than 0.13%. SA.302. RAND also found "no evidence" that allowing open service would negatively impact unit cohesion, operational effectiveness, or readiness. SA.028. Indeed, RAND found the maximum potential impact

on available days for deployment would be "negligible"—a mere 0.0015% of all available deployable labor-years—particularly in comparison to other conditions that routinely and temporarily limit service members' deployability. *Id.* On the other hand, RAND identified "significant costs" from a ban, including separation of "personnel with valuable skills who are otherwise qualified" to serve. *Id.*

The Working Group unanimously concluded that a ban would actually "harm the military by excluding qualified individuals based on a characteristic with no relevance to a person's fitness to serve." SA.027; SA.030. Based on the Working Group's recommendations, Secretary Carter issued a formal open service directive on June 30, 2016 that "transgender individuals shall be allowed to serve in the military." SA.611 (the "Carter Policy").

B. President Trump's Ban

1. The President Announces the Ban

On July 26, 2017, President Trump abruptly and unexpectedly reversed the military's open service policy. Via @realDonaldTrump, he announced that he would "not accept or allow" transgender individuals to "serve in any capacity in the U.S. Military." Add.111. President Trump did not consult the Joint Chiefs before the Tweets. *See* SA.720–721

(emails from Chair to other Joint Chiefs stating: "I know yesterday's announcement was unexpected," and "I was not consulted.").

On August 25, 2017, the President issued the 2017 Memorandum, which ordered DoD to implement three broad directives: (1) an *Accession Directive*, under which DoD was to bar openly transgender individuals from joining the military, *see* Add.109 § 2(a); (2) a *Retention Directive*, under which DoD was to return to previously discarded policies that "authorized the discharge of [transgender] individuals" as of March 23, 2018, Add.109 §§ 1, 3; and (3) a *Medical Care Directive*, under which DoD was to prohibit funding transition-related surgical care for transgender service members as of March 23, 2018, Add.109 §§ 2(b), (3).

The 2017 Memorandum also ordered DoD to "submit . . . a plan for implementing both [the President's] general policy . . . and [his] specific directives" by February 21, 2018. Add.109 § 3. By its plain terms, the 2017 Memorandum was *not* a request for "a study to determine whether or not the directives should be implemented. Rather, it order[ed] the directives to be implemented by specific dates." *Stone v. Trump*, 280 F. Supp. 3d 747, 763 (D. Md. 2017); *accord* SA.013.

2. The Department of Defense Implements the Ban

a. The Implementation Plan

DoD faithfully executed those orders from its Commander-in-Chief. On August 29, 2017 (four days after the 2017 Memorandum), DoD confirmed it would "carry out the President's policy direction," "develop a study and *implementation* plan" for the policies in the 2017 Memorandum, and "provide advice and recommendations on the *implementation* of the [P]resident's direction." Add.107 (emphasis added). On September 14, 2018, DoD issued another memorandum stating it would "develo[p] an Implementation Plan" that would "effect the policy and directives in Presidential Memorandum, *Military Service by Transgender Individuals,* dated August 25, 2017." SA.807.

That is exactly what DoD did. The 2017 Memorandum ordered an implementation plan by February 21, 2018. DoD delivered the Implementation Plan on February 22, 2018. *See* Add.59 *et seq*. That Implementation Plan effects each of the three directives in the 2017 Memorandum:

Accessions: The 2017 Memorandum ordered a ban be implemented against openly transgender individuals joining the military. *See* Add.109 §§ 1, 2(a). The Implementation Plan implements this by specifying that

individuals "who require or have undergone gender transition are disqualified from military service." Add.60. Moreover, transgender individuals who have *not* transitioned will still be disqualified unless they suppress their gender identity and are "willing and able to adhere to all standards associated with their [birth-assigned] sex." Add.66. In other words, transgender individuals may join only if they somehow make themselves *not* transgender or otherwise suppress their fundamental identity.

Retention: The 2017 Memorandum ordered DoD to "determine how to address transgender individuals currently serving in the United States military" as part of the Implementation Plan. *See* Add.110 § 3. The Implementation Plan implements this with a limited exception for currently serving transgender individuals 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 the President's new policies (the "Grandfather Exception"). Individuals who qualify under this limited exception may serve openly and receive "medically necessary" care. Add.67. Those currently serving transgender individuals

who do not qualify for this extremely limited exception will be subject to discharge. *See* Add.60.

Medical Care: The 2017 Memorandum ordered DoD to stop providing surgical transition-related medical care. Add.109 § 2(b). The Implementation Plan accomplishes this by barring individuals "who require gender transition" from joining the military. *See* Add.60. Additionally, anyone who requires gender transition after joining is subject to discharge, as the Implementation Plan disqualifies those who "require a change of gender." Add.60.

The Implementation Plan thus faithfully implements each of the 2017 Memorandum's directives.

3. The 2018 Memorandum

One month later, on March 23, 2018, the President issued a further memorandum. The memorandum begins by acknowledging receipt of the Implementation Plan developed "[p]ursuant to [the President's] memorandum of August 25, 2017." Add.57. The memorandum then purports to "revoke" the 2017 Memorandum and thereby authorizes the Secretary of Defense to carry out the Implementation Plan. *Id.*

C. Procedural History

On August 28, 2017, Plaintiffs—nine transgender individuals currently serving or wishing to serve, and three organizations—filed suit challenging the Ban's constitutionality. Plaintiffs—joined by the State of Washington as an intervenor—sought a preliminary injunction to maintain the status quo that existed before the Ban. On December 11, 2017, the district court enjoined the Ban. Also in late 2017, three other district courts enjoined it. *See Doe v. Trump*, 275 F.3d 167 (D.D.C 2017); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017); *Stockman v. Trump*, No. 17-cv-1799-JGB-KK, Dkt. 79 (C.D. Cal. Dec. 22, 2017).

The government initially appealed the preliminary injunctions in each Circuit and sought emergency stays from the courts of appeals (including this Court). *See Stone v. Trump*, No. 17-2398 (4th Cir.); *Karnoski v. Trump*, No. 17-36009 (9th Cir.); *Doe 1 v. Trump*, No. 17-5267 (D.C. Cir.). After the Fourth and D.C. Circuits rapidly denied the requested stays, the government withdrew its request for an emergency stay in this Court and voluntarily dismissed all the appeals. *See Stone*, No. 14-2398, Dkt. 31, 35; *Karnoski*, No. 17-36009, Dkt. 21; *Doe 1*, No. 17-

5267, Doc. 1710359, 1711023. Thus, transgender service members were permitted to continue to serve openly, as they have for the past two years.

On March 23, 2018, the same date the President issued his new 2018 Memorandum, the government filed a motion to dissolve the preliminary injunction, which the district court denied. *See* Add.32–33. On April 30, 2018, the government asked the district court for a stay. Without awaiting a ruling, the government now seeks the same relief in this Court.

ARGUMENT

I. The Government Fails to Meet the High Standard for Stay of a Preliminary Injunction

The government's burden on this motion is heavy, for two independent reasons: It requests the extraordinary remedy of a stay, and the appeal is of a preliminary injunction.

A stay pending appeal is extraordinary—it is "not a matter of right, even if irreparable injury might otherwise result." *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) (internal citation and quotation marks omitted). In deciding a stay request, this Court considers (1) whether the government "has made a *strong showing* that [it] is likely to succeed on the merits, (2) whether the [government] will be irreparably

injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* (emphasis added).

The government's burden grows higher still on account of the "limited and deferential" abuse-of-discretion standard governing preliminary injunction appeals. *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1047 (9th Cir. 2007). Review of a preliminary injunction "is therefore much more limited than review of an order involving a permanent injunction." *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). Moreover, because the government sought to *dissolve* a preliminary injunction, it must show that the district court abused its discretion in concluding that the government failed to show "a significant change in facts or law warrants revision or dissolution of the injunction." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000).

The government does not acknowledge—and certainly cannot meet—this doubly high burden.

II. The Government Fails to Make the Required Strong Showing of a Likelihood of Success

A. Heightened Scrutiny Applies

The district court properly concluded that the Ban triggers heightened scrutiny.

Under equal protection, laws are subject to heightened scrutiny when they classify or discriminate against individuals based on presumptively illegitimate characteristics—that is, against individuals in "suspect" or "quasi-suspect" classes. *See Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001). "Courts have consistently found that transgender individuals constitute, at a minimum, a quasi-suspect class." Add.25. The Ban clearly discriminates on the basis of sex, and discrimination on the basis of sex triggers heightened scrutiny. *See Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (canvassing authority).

Additionally, transgender individuals also satisfy all the indicia of a suspect class: they are a politically vulnerable minority who have faced a history of discrimination based on an immutable characteristic

unrelated to their ability to contribute to society. *See* Add.22–26. The district court therefore found strict scrutiny warranted. *See* Add.26.[2]

The government offers two responses. Both fail. *First*, it claims rational basis review applies because the Implementation Plan purportedly "draws lines on the basis of a medical condition (gender dysphoria) and an associated treatment (gender transition), not transgender status." Mot. at 13. Not so. The classifications are inescapably based on transgender status—indeed, the President's 2018 Memorandum alone refers *seven times* to transgender individuals, including in the subject line, and the Implementation Plan is titled "Military Service by Transgender Individuals." *See* Add.57–59. Litigants have tried such sophistry before—and failed every time. *See, e.g.*, *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010) (targeting same-sex conduct necessarily targets the status of being gay); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993); *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1159 n.23 (9th Cir. 2013).

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[2] Heightened scrutiny also is required under due process and the First Amendment, because the Ban burdens a fundamental liberty interest to live in accordance with one's gender identity. *See* SA.018–020.

Second, the government argues that even if heightened scrutiny applies, a lower tier applies to the military context here. Mot. at 12. Not so. The Supreme Court explicitly rejected this argument in *Rostker v. Goldberg*, 453. U.S. 57, 69–71 (1981), when it declined "to apply a different equal protection test because of the military context." *Accord Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008) (applying heightened scrutiny to military justifications invoked for "Don't Ask, Don't Tell").

B. The Ban Fails Heightened Scrutiny

The President's discriminatory Ban cannot survive any form of heightened scrutiny, for two fundamental reasons.

First, under heightened scrutiny, the government bears the burden of justifying the discrimination at issue, and it is limited to the actual and genuine justifications that motivated its actions *at the time it commenced the discriminatory actions*; it cannot rely on hypothetical or justifications conceived after-the-fact. *See Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1696–97 (2012); *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("*VMI*"); *W. States Paving Co. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 991, 993 (9th Cir. 2005). Here, the government offers *only*

impermissible, *post hoc* justifications for the Ban. Legally, that leaves the government in the same position as having offered no justification at all.

Second, the government must overcome a "strong presumption that gender classifications are invalid." *VMI*, 518 U.S. at 532 (internal citation and quotation marks omitted). It must establish, at the very least, that its discrimination is "substantially related" to the achievement of "important governmental objectives," and its justification must be "exceedingly persuasive." *Id.* at 524, 533. Even if this Court were to consider the government's scant *post hoc* justifications, they would still fall well short of providing an "exceedingly persuasive" justification for these discriminatory policies. *Id.*

1. The Government Offers Only Impermissible *Post Hoc* Justifications

The Ban was announced and ordered in 2017, through the President's Tweets and 2017 Memorandum. *See supra* I.B, *accord* Add.46 ("President Trump's announcement on Twitter and his Presidential Memorandum did not order a study, but instead unilaterally proclaimed" his policies on military service by transgender individuals). Yet, the government does not even try to justify the Tweets or the 2017 Memorandum. *See* SA.724. Rather, it argues that the Implementation

Plan originated independently of the President's 2017 Memorandum. It asks the Court to ignore the entire history leading to the Implementation Plan and pretend that the President's 2017 Memorandum had no role in its creation. But, as explained above, the Implementation Plan is just that—an *implementation* of the Ban on military service by transgender individuals, as conceived, announced, and ordered by the President last summer. Any justifications it contains are *post hoc* and thus legally irrelevant.

Perhaps recognizing that *post hoc* justifications are all it has, the government offhandedly suggests such justifications are "tolerated" in the military context. *See* Mot. at 11–12. But the well-established prohibition against *post hoc* justifications under heightened scrutiny applies equally in the military context. *See Witt*, 527 F.3d at 819 (rejecting claim that "Don't Ask, Don't Tell" could be justified by "some hypothetical, *post hoc* rationalization"). *Rostker* expressly rejected "any further 'refinement' in the applicable tests" for gender discrimination based on the military context, 453 U.S. at 69, and those tests unquestionably prohibit *post hoc* justifications. *See VMI*, 518 U.S. at 533; *Witt*, 527 F.3d at 819.

2. Even the Impermissible *Post Hoc* Justifications Cannot Sustain the Ban

Even if the Court were to consider the government's *post hoc* report, it would still be insufficient to justify the President's Ban. The Report is rife with unsupported assumptions and provides no *new* information that justifies sweeping exclusion of transgender persons from open service.

Deployability. The Report cites no evidence contradicting the Working Group's finding that open service would have "no greater impact on deployability than service by individuals with many other medical conditions that are not disqualifying." SA.730. Whereas the Carter policy was tailored to "minimiz[e] any impact on deployability" and included provisions that mitigated such impacts in a manner that was "consistent with medical standards" and satisfied "military readiness concerns," SA.730–731, the Report paints transgender service members with overbroad generalizations. Citing *no data* whatsoever, it speculates that transition-related care "could" render a transgender service-member non-deployable for "perhaps even a year." Add.95. It never disputes the RAND Report's conclusion that the "impact [of open service] on readiness would be minimal—e.g., 0.0015% of available deployable labor-years[,]" Add.96, and it fails to explain why transgender service members should

be treated differently from service members with equally temporary periods of non-deployability due to conditions like pregnancy, sleep apnea, appendicitis, or gall bladder disease. *See* SA.731. Moreover, under the Carter policy, transgender applicants generally must have already completed transition-related care well before joining the military. *See* Add.135 § 2(1).

Unit Cohesion. The Report provides no support for its repeated and conclusory assertion that open service threatens "unit cohesion." In contrast, the Working Group addressed the very same questions about privacy, good order, and discipline that the Report frames as insuperable obstacles and determined, based on the evidence, that service by transgender persons would *not* lead to "any significant issues or impacted morale or unit cohesion." SA.732. Moreover, the Report fails to address any of the *negative* impacts on readiness, morale, and cohesion imposed by forcing transgender service members to serve in silence, and ignores the military's experience with policies permitting women to serve in combat positions and allowing open service by gay and lesbian personnel—where fears about "unit cohesion" proved equally unfounded. SA.028. Indeed, and perhaps most strikingly, open service has now been

in place for nearly two years, and the military's own recent testimony to Congress on the experience flatly rejects the Report's conclusions. The Army Chief of Staff, Gen. Mark Milley, testified to Congress that he has monitored open service "very closely," and has "received precisely zero reports . . . of issues of cohesion, discipline, morale, and all those sorts of things." SA.982–983. Chief of Naval Operations Adm. John Richardson and Marine Corps Commandant Gen. Robert Neller similarly testified that they had heard of no issues regarding discipline or unit cohesion. SA.988–990.

Cost. The Supreme Court has long made clear that cost savings alone cannot justify discrimination: the government cannot "protect the public fisc by drawing an invidious distinction between classes" of persons. *Mem. Hosp. v. Maricopa Cty.*, 415 U.S. 250, 263 (1974). In any event, the Report fails to provide any new data that undermines the conclusions of the Working Group or RAND. Rather than conducting the detailed evidence-based analysis necessary to estimate the cost of transition-related care, the Report assumes such care is "disproportionately costly" based on decontextualized anecdotes and vague concerns that "it remains to be seen how many [service members]

will ultimately obtain surgeries." Add.103. Nowhere does the Report contradict the RAND Report's upper bound estimate of annual transition-related care at $8.4 million (out of an annual active duty health care budget of $6.2 *billion*). SA.302. Nor does the Report account for the significant costs associated with the Ban, including the loss of qualified personnel. *See* SA.031. The Panel's failure to do the math renders its purported cost justifications completely inadequate to sustain the Ban.

No amount of military deference can overcome the Report's shortcomings—nor is any amount of military deference even due here, for two reasons. *First*, the only deference claimed by the government is related to the Implementation Plan, but the Implementation Plan does not contain an independent decision-making process to which this Court could even defer. It is simply the implementation of the President's orders.

Second, the government's authorities make clear that deference is warranted *only* where there has been a careful and deliberative evaluation—not, as with the Ban, abrupt and reflexive dictates. *See, e.g.*, *Rostker*, 453 U.S. at 61, 72, 74, 82–83 (allowing deference to decision to

exclude women from the draft because the issue was "extensively considered by Congress in hearings, floor debate," "at great length," and because Congress "carefully evaluated" myriad evidence and "did not act unthinkingly or reflexively.") (internal citation and quotation marks omitted). That simply is not the case here.

The Report's hasty review process, based on limited data and unsupported conclusions, stands in stark contrast to the thorough analysis and considered judgment that characterize the military's usual policymaking process. As explained in detail by 34 high-ranking retired military officers and former national security officials, the process here materially departs from the military's usual searching review and examination of major personnel policies. *See generally* SA.909–934; SA.918–919 (decision to repeal "Don't Ask, Don't Tell" was reached after 95 forums at 51 military bases, input from about 400,000 service members, and a comprehensive, 256-page report); SA.919–920 (removal of barriers to service by women in combat proceeded over several years and involved over thirty studies).

The irregular process here created an aberrant result. As leading medical organizations explain in detail, "there is no medically valid

reason" to ban open service—the Report simply "mischaracterize[s] and reject[s] the wide body of peer-reviewed research" to go against the overwhelming medical consensus. SA.853 (letter from American Medical Association criticizing Report); SA.878 (letter from American Psychological Association explaining that the Report "misuse[s] psychological science"). As the Palm Center explains in detail, the Report "reli[es] on a highly selective review of the evidence and distort[s] the finding of the research it cites." SA.849.

III. The Government Does Not Show Irreparable Harm Pending Appeal, While a Stay Would Harm Plaintiffs and the Public Interest

Nor can the government meet its burden of showing that it will suffer irreparable harm absent a stay pending appeal. On the other hand, a stay would clearly harm Plaintiffs and the public interest.

As the district court correctly found, Plaintiffs face a variety of legally cognizable and irreparable harms from the Ban, including exclusion from joining the military (Karnoski, D.L., and Callahan), discharge from the military (Schmid and Muller),[3] and denial of medical

[3] Muller and Schmid both received gender dysphoria diagnoses *before* the Carter Policy, and are thus outside the scope of the narrow Grandfather Exception. *See* Add.18 n.7; SA.792–793 (Muller Declaration); SA.796 (Schmid Declaration). The government's assertion that service members who received a diagnosis of gender

treatment (Doe). *See* Add.17–18 & n.7.[4]

These injuries are not abstract. And they are coupled with the ongoing harm Plaintiffs would suffer, in the absence of an injunction, by being marked as unworthy for military service. Even those "grandfathered" will bear the "depri[vation] of dignity" and "stigmatization" from being labeled as part of an "innately inferior" class. Add.18. "The Supreme Court has repeatedly emphasized [that] discrimination itself, by perpetuating archaic and stereotypic notions or by stigmatizing members of the disfavored group as innately inferior and therefore less worthy participants, can cause severe injuries to those who are denied equal treatment solely because of their membership in a disfavored group." *Latta v. Otter*, 771 F.3d 456, 467 n.7 (9th Cir. 2014) (internal quotation marks and citation omitted).

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dysphoria *before* the Carter Policy can still qualify for the exception flatly contradicts the plain terms of the Implementation Plan, and the document they cite (Department of Defense Instruction 1300.28, *see* Add.114), provides no support for that assertion.

[4] These continuing injuries also establish Plaintiffs' standing and refute any suggestion of mootness. (Independently, the doctrine of voluntary cessation would preclude a finding of mootness. *See, e.g.*, *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982); *Bell v. City of Boise*, 709 F.3d 890, 899–901 (9th Cir. 2013).)

These irreparable injuries outweigh any claimed harm to the government pending appeal. Notably, though the Carter Policy allowing open service has now given the government nearly two years of experience with actual open service, the government relies almost exclusively on hypothetical and speculative concerns. But as Admiral Richardson testified concerning the Navy's *actual* experience with open service: "It's steady as she goes." SA.990; *accord supra* II.B.2 (citing testimony of Service Secretaries and Chiefs of Staff). Strikingly, the "best illustration" of an *actual* problem the government can muster from two years of open service is that of a single commander who was "confronted with dueling equal opportunity complaints" arising from a dispute between a transgender woman and a non-transgender woman. Add.99.

As the status quo remains "steady," the government's claims of irreparable harm pending appeal fall flat. In contrast, a stay would irreparably injure Plaintiffs, including by depriving them of their constitutional rights. And, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *see also Hernandez v. Sessions*, 872 F.3d 976, 1000 (9th Cir. 2017). Moreover, maintaining the status quo pending

appeal serves to further the goal of a strong national defense by continuing and permitting the employment of skilled and qualified service members dedicated to their country.

For all these reasons, the balance of equities and public interest tips decidedly in Plaintiffs' favor and against a stay.

IV. The District Court Did Not Abuse its Discretion in Ordering Relief

The district court had both the authority and obligation to afford relief commensurate to the full scope of the constitutional injuries at issue, by enjoining the Ban in full.

"[T]he scope of injunctive relief is dictated by the extent of the violation established." *Hawaii v. Trump*, 859 F.3d 741, 786 (9th Cir. 2017) (internal citation and quotation marks omitted) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)), *vacated as moot*, No. 16-1540 (Oct. 24, 2017). When confronted with a facially unconstitutional scheme like the Ban, the appropriate remedy is not merely surgically to excise a handful of individuals from its reach, it is to enjoin enforcement of the scheme as a whole. *See, e.g., Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (refusing to stay injunctions to the extent they "covered not just [plaintiffs], but parties similarly situated to

them"); *Hawaii*, 859 F.3d at 787–88 (declining to limit injunctive relief to named plaintiffs); *Latta*, 771 F.3d at 476–77 (same); *Ariz. Dream Act Coal. v. Brewer*, 81 F. Supp. 3d 795, 810 (D. Ariz. 2015) (same), *aff'd*, 855 F.3d 957 (9th Cir. 2017); *see also Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981); *Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017). To require otherwise would not only result in needless judicial inefficiency, it would also leave pervasive constitutional violations unremedied.

The fact that the constitutional violation here occurs in the military context does not warrant narrowing the scope of the injunction. The lone case the government cites, *Meinhold v. United States*, 34 F.3d 1469 (9th Cir. 1994), does not suggest otherwise. The plaintiff in that case "sought only to have *his discharge* voided and to be reinstated," whereas Plaintiffs here seek facial relief. *Id.* at 1480; *cf. Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 888 (C.D. Cal. 2010) (granting facial relief in facial challenge to "Don't Ask, Don't Tell" Act). The district court did not abuse its discretion in enjoining the Ban in full.

CONCLUSION

The government's motion for a stay should be denied.

Respectfully submitted,

s/ Daniel Siegfried

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 5,181 words. This brief complies with the typeface and the type style requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5)–(6) because this brief has been prepared in a proportionally spaced typeface using Word 14-point Century Schoolbook typeface.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 14, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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