No. 18-35347

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,
Plaintiffs-Appellees,

STATE OF WASHINGTON, Attorney General's Office Civil Rights Unit,
Intervenor-Plaintiff-Appellee,

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

APPELLANTS' OPENING BRIEF

CHAD A. READLER
Acting Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

BRINTON LUCAS
Counsel to the Assistant Attorney General

MARLEIGH D. DOVER
CATHERINE H. DORSEY
TARA S. MORRISSEY
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7236
950 Pennsylvania Ave., NW
Washington, DC 20530

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Other Authority:

INTRODUCTION

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

Both historically and today, the military has not permitted individuals to serve if they have medical conditions that may excessively limit their deployability, pose an increased risk of injury to themselves or others, or otherwise require measures that threaten to impair the effectiveness of their unit. In the Department's professional military judgment, these criteria are met for the medical condition of gender dysphoria—a lengthy and marked incongruence between one's biological sex and gender identity characterized by "clinically significant distress or impairment in social, occupational, or other important areas of functioning," ER.175-76, particularly when a person requires or has undergone gender transition to treat this condition. As Secretary Mattis observed, generally allowing service by those individuals poses "substantial risks" and threatens to "undermine readiness, disrupt unit cohesion, and impose an

unreasonable burden on the military that is not conducive to military effectiveness and lethality." ER.161. This conclusion is based on "the Department's best military judgment," the recommendations of the panel of military experts who had thoroughly studied the issue, and the Secretary's "own professional judgment." *Id.*

Without even considering the preliminary-injunction factors, the district court issued a nationwide preliminary injunction blocking the military from implementing this policy. The court neither found that plaintiffs were likely to succeed on the merits of a constitutional challenge to the 2018 policy nor offered any justification for disregarding the considered judgment of senior military leaders. Instead, it simply extended (and refused to dissolve) a previous preliminary injunction from December 2017, even though that injunction concerned a presidential memorandum addressing a substantially different policy that had been revoked in light of the military's 2018 policy.

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

predecessor in 2016, which also required transgender individuals without gender dysphoria to serve in their biological sex and presumptively disqualified individuals with gender dysphoria from military service subject merely to different exceptions. Such line-drawing exercises, however, are matters for military discretion, and one Defense Secretary cannot bind his successors to his chosen contours for all time.

This injunction against the military's judgment is made all the more inexplicable by the lopsided balance of equities here. The Department is being forced to maintain a course of action that it squarely rejected in its "professional military judgment," concluding that it is "not conducive to, and would likely undermine, the inputs … that are essential to military effectiveness and lethality." ER.204. Yet its 2018 policy will not cause the plaintiffs here to suffer an irreparable injury, or even a cognizable one.

At a minimum, any injunctive relief should have been limited to redressing the injuries of the plaintiffs in this case, not extended to everyone serving or seeking to serve. Article III standing requirements, bedrock equitable principles, and controlling circuit precedent all preclude such an overbroad intrusion into military affairs.

STATEMENT OF JURISDICTION

The district court's jurisdiction in this federal constitutional challenge was invoked under 28 U.S.C. § 1331. ER.121. The district court entered a preliminary injunction on December 11, 2017, ER.54, which it extended and refused to dissolve on April 13, 2018, ER.2, 30-31. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). The government filed a timely notice of appeal on April 30, 2018. ER.63-65.

STATEMENT OF THE ISSUE

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

STATEMENT OF THE CASE

A. History Of The Department's 2018 Policy

1. Given the stakes of warfare, the Defense Department "has historically taken a conservative and cautious approach" in setting standards for military service. ER.166. The Department has long disqualified individuals with "physical or emotional impairments that could cause harm to themselves or others, compromise the military mission, or aggravate any current physical or mental health conditions that they may have" from entering military service. ER.172. And it has taken a particularly cautious approach with respect to mental-health standards in light of "the unique mental and emotional stresses of military service." ER.173. "Most mental health conditions" are "automatically disqualifying" for entry into the military absent a waiver, even when an individual no longer suffers from that condition. ER.183. In general, the military has aligned these disqualifying conditions with the ones listed in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), published by the American Psychiatric Association (APA). ER.173. Military standards for decades therefore presumptively disqualified individuals with a history of "transsexualism," consistent with the inclusion of that term in the third edition of the DSM. ER.170, 173-74.

2. In 2013, the APA published a new edition of the DSM, which replaced the term "gender identity disorder" (itself a replacement for "transsexualism") with "gender dysphoria." ER.173, 175. In doing so, the APA explained that it no longer considered identification with a gender different from one's biological sex (*i.e.*, transgender status) to be a disorder. ER.175. It stressed, however, that a subset of transgender people suffer from the medical condition of gender dysphoria, a "marked incongruence between one's experience/expressed gender and assigned gender, of at least 6 months duration," that is "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning." ER.175-76, 183. Individuals diagnosed with gender dysphoria sometimes transition genders—through cross-sex hormone therapy, sex-reassignment surgery, or simply living and working in their preferred gender—to treat this condition. ER.185, 345-46, 360.

In 2015, then-Secretary of Defense Ashton Carter ordered the creation of a working group to study "the policy and readiness implications of welcoming transgender persons to serve openly," and instructed it to "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness." ER.432-33. As part of this review, the Department commissioned the RAND National Defense Research Institute to conduct a study. ER.176. The resulting RAND report concluded that the proposed policy change would have "an adverse impact on health care utilization and costs, readiness, and unit cohesion," but that these harms would be "'negligible' and 'marginal' because of the

small estimated number" of transgender servicemembers relative to the size of the armed forces as a whole. ER.177; *see* ER.330-31, 378-83, 385-86, 408-09.

Following this review, in June 2016, then-Secretary Carter ordered the armed forces to adopt a new policy on military service by transgender individuals. ER.177, 314-19. Under the Carter policy, transgender servicemembers could transition genders at government expense if they received a diagnosis of gender dysphoria from a military medical provider. ER.177-78; *see* ER.219-36, 309-13, 318. In addition, the military had until July 1, 2017, to revise its accession standards to allow transgender individuals, including those who had already transitioned, to enter military service if they met certain medical criteria. ER.317-18. Specifically, a "history of gender dysphoria" would be disqualifying unless an applicant provided a certificate from a licensed medical provider that the applicant had been "stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months." ER.317. A "history of medical treatment associated with gender transition"—including "sex reassignment or genital reconstruction surgery"—would likewise be disqualifying absent certification that the applicant had completed all transition-related medical treatment and had been stable or free of complications for 18 months. ER.317-18. Finally, transgender individuals who lacked a history or diagnosis of gender dysphoria, whether they were currently serving or seeking to serve, could not be disqualified on the basis of their transgender status, but were required, like everyone else, to meet all of the standards associated with their biological sex. ER.167, 317-18.

3. On June 30, 2017, the day before the Carter accession standards were set to take effect, Secretary Mattis, on the recommendation of the Service Chiefs and in the exercise of his discretion, decided that it was "necessary to defer" those standards until January 1, 2018, so that the military could "evaluate more carefully" the effect of accessions by transgender individuals "on readiness and lethality." ER.217; *see* ER 167, 218. Without "presuppos[ing] the outcome," he ordered a five-month study that would "include all relevant considerations" and give him "the views of the military leadership and of the senior civilian officials who are now arriving in the Department." ER.217.

While this study was ongoing, the President stated on Twitter on July 26, 2017, that the government "will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military." ER.216. He then issued a memorandum in August 2017 explaining that former-Secretary Carter had "failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy"—which generally disqualified transgender individuals from service—"would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." ER.214. The President therefore called for "further study" to ensure that implementation of the Carter policy "would not have those negative effects." *Id.*

In the interim, the President directed a "return to the longstanding policy" on service by transgender individuals "until such time as a sufficient basis exists upon which to conclude that terminating [it] would not have the negative effects discussed." ER.214 He ordered the Secretary of Defense to craft a "plan for implementing" this

directive by February 2018 that would "determine how to address transgender individuals currently serving." ER.214-15. The President stressed, however, that the Secretary of Defense, after consultation with the Secretary of Homeland Security, "may advise [him] at any time, in writing, that a change to this policy is warranted." ER.214.

4. In September 2017, Secretary Mattis established a panel of experts to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." ER.211. The panel consisted of "senior uniformed and civilian Defense Department and U.S. Coast Guard leaders," including "combat veterans." ER.160. Given "their experience leading warfighters," "their expertise in military operational effectiveness," and their "statutory responsibility to organize, train, and equip military forces," these senior military leaders were "uniquely qualified to evaluate the impact of policy changes on the combat effectiveness and lethality of the force." ER.181. This panel was instructed "to provide its best military advice, based on increasing the lethality and readiness of America's armed forces, without regard to any external factors." ER.160.

The panel drew on "experts from across the Departments of Defense and Homeland Security," including three groups dedicated to issues involving personnel, medical treatment, and military lethality. ER.181. These groups provided "a multi-disciplinary review of relevant data" and information about medical treatment as well as standards for accession and retention, developed a set of policy recommendations, and responded to "numerous queries for additional information and analysis." *Id.*

In 13 meetings over 90 days, the panel met with military and civilian medical professionals, commanders of transgender servicemembers, and transgender servicemembers themselves. ER.181. It reviewed information regarding gender dysphoria, its treatment, and the impact of this condition on military effectiveness, unit cohesion, and resources. *Id.* And unlike in prior reviews, the panel relied on the "the Department's own data and experience obtained since the Carter policy took effect." *Id.* After "extensive review and deliberation," which included consideration of evidence that supported and cut against its proposals, the panel "exercised its professional military judgment" and presented its recommendations to the Secretary. *Id.*

5. After considering these recommendations along with additional information, Secretary Mattis, with the agreement of the Secretary of Homeland Security, sent the President a memorandum in February 2018 proposing a new policy, consistent with the panel's conclusions, that differed from both the Carter policy and the longstanding policy addressed in the 2017 memorandum, along with a 44-page report explaining the Department's position. ER.160-207. Noting that the President had "made clear" that he "could advise" him "at any time, in writing, that a change to [the pre-Carter] policy is warranted," Secretary Mattis recommended that the President "revoke" his 2017 memorandum, "thus allowing" the military to adopt the new policy. ER.160, 162.

Like the Carter policy before it, the Department's new policy turns on the medical condition of gender dysphoria, not transgender status. Under each policy, transgender individuals without a history or diagnosis of gender dysphoria may serve if

they meet the standards associated with their biological sex, whereas those with gender dysphoria are presumptively disqualified. ER.167-69. The main difference between the two policies is the nature of the exceptions to that presumptive disqualification.

Under the 2018 policy, individuals with a history or diagnosis of gender dysphoria may join or remain in the military if they neither need nor have undergone gender transition, are willing and able to adhere to the standards associated with their biological sex, and can meet additional criteria. ER.168. For accession into the military, they must show 36 months of stability (*i.e.*, absence of gender dysphoria) before applying, while for retention in the military, they may remain if they meet deployability standards. *Id.* These exceptions rest on the Department's judgment that "a history of gender dysphoria should not alone" be disqualifying given evidence that the presence of this condition in children does not always persist into adulthood and the military's interest in retaining those in whom "it has made substantial investments." ER.205.

By contrast, individuals with gender dysphoria who require or have undergone gender transition are disqualified absent a waiver. ER.168. "In the Department's military judgment," this is a "necessary departure from the Carter policy" because service by these individuals was "not conducive to, and would likely undermine, the inputs—readiness, good order and discipline, sound leadership, and unit cohesion—that are essential to military effectiveness and lethality." ER.195, 204. This judgment rests on numerous military concerns, including evidence that individuals with gender dysphoria continued to have higher rates of psychiatric hospitalization and suicidal

behavior even after transition, evidence that transition-related treatment could render servicemembers non-deployable for a significant time, the creation of irreconcilable privacy demands that would create friction in the ranks, the safety risks and perceptions of unfairness arising from having training and athletic standards turn on gender identity, the frustration of other servicemembers who also wish to be exempted from uniform and grooming standards, and disproportionate transition-related costs. ER.182-205.

Recognizing, however, that a number of individuals with gender dysphoria had "entered or remained in service following the announcement of the Carter policy," the Department included a categorical reliance exemption in its 2018 policy. ER.206. Specifically, 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" as well as "serve in their preferred gender, even after the new policy commences." *Id.* The Department has since confirmed that this exemption will extend to any servicemember "who was diagnosed with gender dysphoria prior to the effective date of the Carter policy and has continued to serve and receive treatment pursuant to the Carter policy after it took effect." ER.489. In the Department's judgment, its "substantial investment" in and "commitment to" these particular servicemembers "outweigh the risks" associated with service by individuals with gender dysphoria who need or have undergone gender transition more generally. ER.206.

The following chart summarizes the relevant military policies:

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

6. On March 23, 2018, the President "revoke[d]" his 2017 memorandum "and any other directive [he] may have made with respect to military service by transgender individuals," thereby allowing the Secretaries of Defense and Homeland Security to "exercise their authority to implement any appropriate policies concerning military service by transgender individuals." ER.158.

B. Prior Proceedings

1. Shortly after the President issued his 2017 memorandum, plaintiffs—six current servicemembers, three individuals who wish to serve, three organizations, and the State of Washington as an intervenor—brought a constitutional challenge to the memorandum and sought a preliminary injunction of its enforcement. ER.117-57; *see* ER.62.[1] In December 2017, the district court granted their request. ER.54.

In the court's view, the President, through his tweets and 2017 memorandum, had unilaterally instituted a policy categorically "excluding transgender individuals from the military" without "considered reason or deliberation." ER.32, 49. From these premises, it concluded that plaintiffs had standing to challenge this policy, ER.38-43, and were entitled to a preliminary injunction against its enforcement, ER.45-53.

On the merits, the district court held that plaintiffs were likely to succeed on their equal-protection claim because the President's memorandum drew lines "on the basis of transgender status" and thereby triggered intermediate scrutiny. ER.46. Concluding

[1] In this brief, "plaintiffs" generally includes the original plaintiffs and Washington.

that no deference should be shown to the President's decision given the circumstances of its announcement, ER.49, the court determined that his memorandum would likely fail intermediate scrutiny because its justifications were "*contradicted* by the studies, conclusions, and judgment of the military" in adopting the Carter policy, ER.47. The court further held that plaintiffs were likely to succeed on their substantive-due-process claim because the memorandum unnecessarily intruded on their "fundamental right" to "define and express their gender identity" by "depriving them of employment and career opportunities." ER.50. Finally, the court concluded that the memorandum was likely an unconstitutional "content-based restriction" on speech that "penalizes transgender service members … for disclosing their gender identity." ER.50-51.

The district court further held that the equities favored injunctive relief. ER.51-53. As it was "not convinced that reverting to the June 2016 Policy, … which has been in effect for over a year without documented negative effects, will harm Defendants," it dismissed the government's concerns of irreparable injury. ER.52-53. The court then issued a nationwide preliminary injunction forbidding 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." ER.54.

2. In January 2018, before the parties had even submitted a discovery plan, plaintiffs moved for summary judgment. Doc.129, 150. After the district court denied the government's Rule 56(d) motion requesting discovery, Doc.189, the government filed a cross-motion for partial summary judgment, Doc.194.

In March 2018, after the President's revocation of his 2017 memorandum, the government, in an abundance of caution, moved to dissolve the December 2017 injunction so the military could safely implement its newly announced policy. Doc.223. The government argued that plaintiffs' challenge to the now-revoked 2017 memorandum is moot and that, in any event, they would be unable to meet any of the preliminary-injunction factors with respect to the 2018 policy. *Id.* Neither plaintiffs nor Washington amended their complaints to challenge the 2018 policy.

In the course of ruling on the parties' cross-motions for summary judgment, the district court struck the government's motion to dissolve on the merits (thus effectively denying it) and extended its injunction to preclude the military from implementing its 2018 policy. ER.2, 30-31. The court never explained why plaintiffs were likely to succeed in any constitutional claims against the 2018 policy or to satisfy the remaining preliminary-injunction factors with respect to that policy. Instead, it wrote off the military's 2018 policy as merely "a plan to implement the Ban" purportedly adopted by the President on Twitter. ER.2 Dismissing the reliance exemption as "narrow," the court deemed the 2018 policy "a 'categorical' prohibition" on military service because it barred "transgender people—including those who have neither transitioned nor been diagnosed with gender dysphoria—from serving, unless they are 'willing and able to adhere to all standards associated with their biological sex.'" ER.13 & n.6. In its view, that requirement—which also existed in the Carter policy that the court ordered the

military to maintain—would "force transgender service members to suppress the very characteristic that defines them as transgender in the first place." ER.13.

Having decided that the 2018 policy simply "further defined" the "specifics of the Ban," the court refused to defer to the military's judgment. ER.25. Instead, it ruled that "whether the Ban is entitled to deference raises an unresolved question of fact" because it is unclear "whether the [Department's] deliberative process—including the timing and thoroughness of its study and the soundness of the medical and other evidence it relied upon—is of the type to which Courts typically should defer." ER.26.

The district court also granted partial summary judgment for plaintiffs, holding that they all had standing to challenge the 2018 policy, ER.14-20, and that this policy triggered strict scrutiny, ER.20-24. It then ordered the parties to "prepare for trial" on "whether … deference is owed to the Ban." ER.31.

3. The government appealed and sought a stay of the preliminary injunction from both the district court and this Court. ER.63-65, Doc.238. As of the filing of this brief, the government is awaiting rulings in each Court.

SUMMARY OF ARGUMENT

I. The district court's order is extraordinary in every respect. That court not only refused to dissolve a now-moot injunction concerning a revoked presidential memorandum, but it also extended that injunction to block the Secretary of Defense from implementing a new, thoroughly explained, and eminently reasonable policy reflecting the military's best judgment as to how to address the risks associated with

gender dysphoria. And that court did so without finding that plaintiffs are likely to succeed in any challenge to the 2018 policy, and without offering any justification for disregarding the judgments of senior military leaders concerning risks to military readiness. Nothing in the precedents of the Supreme Court or this Court countenances a judicial intrusion of this nature into the operation of our Nation's armed forces.

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

Once the pretense that the 2018 policy merely implements the President's memorandum is set aside, it is plain that the military's judgment survives constitutional review. Whether viewed under principles of equal protection, substantive due process, or free expression, that judgment is entitled to the most deferential form of scrutiny. And since it rests on a careful balancing of military risk that is not susceptible to judicial re-analysis, it more than satisfies this lenient test. While the district court may have

preferred the balance struck by the Secretary's predecessor, nothing in the Constitution freezes in place a single Defense Secretary's choice of where to draw the line.

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

III. The injunction should at least be narrowed to cover only those individuals whose disqualification would irreparably injure the plaintiffs here. The district court's contrary decision to enjoin the implementation of the 2018 policy nationwide cannot be reconciled with Article III, principles of equity, or this Court's precedent.

STANDARD OF REVIEW

To obtain the "extraordinary remedy" of a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20, 22 (2008); *accord, e.g.*, *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1289 (9th Cir. 2013). This Court reviews an order regarding preliminary injunctive relief for an abuse of discretion. *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1126 n.7 (9th Cir. 2005). Any "underlying issues of law," however, are reviewed de novo. *Id.*

ARGUMENT

I. The Department's 2018 Policy Satisfies Constitutional Scrutiny

The military's independent re-examination of the Carter policy—begun on the recommendation of the Services, in the exercise of the Secretary's discretion, and before the President's tweets—involved an extensive review by many of the Department's high-ranking officials, combat veterans, and experts in a variety of subjects. ER.160-61, 180-81. As part of that study, the Department considered evidence on all sides of the question of military service by transgender individuals—including the materials underlying, and the military's experience with, the Carter policy itself—and meticulously explained its conclusions in a 44-page report. ER.160-62, 181, 207.

Given that analysis, Secretary Mattis determined, as a matter of "the Department's best military judgment," that allowing individuals with gender dysphoria, especially those who need or had undergone transition, to serve posed "substantial risks" to military readiness. ER.161. In doing so, he simply opted for a more cautious approach than the one taken by his predecessor, in part because the Department's latest review had revealed that "this policy issue has proven more complex than the prior administration or RAND assumed." *Id.* In fact, even RAND had "concluded that allowing gender transition would impede readiness, limit deployability, and burden the military with additional costs," but had dismissed these harms as "negligible in light of the small size of the transgender population." ER.207. But given "the various sources of uncertainty in this area, and informed by the data collected since the Carter policy

took effect," the Department was "not convinced that these risks could be responsibly dismissed or that even negligible harms should be incurred given [its] grave responsibility." *Id.* It thus "weighed the risks" of keeping the Carter policy—"risks that are continuing to be better understood as new data become available"—against "the costs of adopting a new policy that was less risk-favoring," and decided that "the various balances struck" by the latter offer "the best solution currently available." *Id.*

That is the sort of risk assessment the military must make on a regular basis, *see* ER.172, 435-86, and one singularly ill-suited for second-guessing in a court of law. Given that even civilian agencies enjoy significant freedom to change their policies over time, the Department's careful military judgment, based on new information, that a "departure from the Carter policy" was "necessary" easily satisfies constitutional demands, ER.195, and the district court gave no valid reason for concluding otherwise.

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

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

As one of the "'complex, subtle, and professional decisions as to the composition … of a military force,' which are 'essentially professional military judgments,'" the Department's 2018 policy is subject to a highly deferential form of review. *Winter*, 555 U.S. at 24 (citation omitted). After all, decisions about who should serve "are based on judgments concerning military operations and needs, and the deference unquestionably due the latter judgments is necessarily required in assessing the former as well." *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) (internal citation omitted). "Judicial deference is at

its apogee" in this area because "[n]ot only are courts ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have, but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy." *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986) (internal quotation marks, alterations, and citations omitted).

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

Although the Supreme Court has expressly refused to attach a "label[]" to the type of review applicable to military policies alleged to trigger heightened scrutiny, *Rostker*, 453 U.S. at 70, the Court's substantial departures in this context from core aspects of strict or intermediate scrutiny demonstrate that its approach most closely resembles rational-basis review. In this area, the Court has relied on concerns about "administrative problems" and on post hoc justifications, even when sex-based

classifications are involved. *Id.* at 81; *see id.* at 74-75 (relying on 1980 legislative record to sustain 1948 statute exempting women from requirement to register for the draft); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (upholding different mandatory-discharge requirements for male and female naval officers based on what "Congress may … quite rationally have believed"). It has deferred to the political branches on military matters even in the face of significant evidence to the contrary, including testimony from current and former military officials. *See Goldman*, 475 U.S. at 509; *Rostker*, 453 U.S. at 63. And it has granted the political branches significant latitude to choose "among alternatives" in furthering military interests, *Rostker*, 453 U.S. at 71-72, as well as where to "draw[] the line," *Goldman*, 475 U.S. at 510. Whatever label is assigned this lenient form of review, it is not heightened scrutiny.

Applying this deferential standard, the Supreme Court has upheld military policies that likely would not have survived scrutiny had they governed civilian society. In *Goldman*, for instance, the Court rejected a free-exercise challenge to the Air Force's judgment that exempting from uniform regulations a Jewish officer's "practice of wearing an unobtrusive yarmulke" while working as a psychologist in an Air Force base hospital would "threaten discipline," even though that claim would have triggered strict scrutiny at the time had it been raised in the civilian context. 475 U.S. at 509; *see id.* at 506. The Court did so even though the regulations authorized commanders to let servicemembers wear "visible religious headgear … in designated living quarters" and permitted servicemembers to wear "certain pieces of jewelry," *id.* at 508-09—including

"emblems of religious … identity," *id.* at 518 (Brennan, J., dissenting). And the Court rejected this claim even though the plaintiff relied on "expert testimony" from a former Air Force official and claimed that the Air Force's position was "mere *ipse dixit*, with no support from actual experience or a scientific study in the record." *Id.* at 509 (majority opinion). *Goldman* thus offers a good illustration of the fact that "[r]egulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities." *Beller v. Middendorf*, 632 F.2d 788, 811 (9th Cir. 1980) (Kennedy, J.), *overruled on other grounds by Witt v. Department of Air Force*, 527 F.3d 806 (9th Cir. 2008).

Finally, even if dispensing with military-deference principles here were somehow justified, heightened scrutiny would be inappropriate. That is because the military's new policy, like the Carter policy before it, draws lines on the basis of a medical condition (gender dysphoria) and its treatment (gender transition)—eminently reasonable considerations in setting standards for military service—and not transgender status. ER.167-69, 177-79, 317-18. Such classifications receive only rational-basis review, which perhaps explains why no one ever challenged the Carter policy on grounds that it was subject to heightened scrutiny. *See, e.g.*, *Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365–68 (2001); *Geduldig v. Aiello*, 417 U.S. 484, 494–97 & n.20 (1974). Given that courts should be "reluctant to establish new suspect classes"—a presumption that "has even more force when the intense judicial scrutiny would be applied to the

'specialized society' of the military"—there is no basis for departing from rational-basis review here. *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc).[2]

2. The 2018 Policy Survives Constitutional Review

The 2018 policy's presumptive disqualification of individuals with gender dysphoria, and especially those who require or have undergone gender transition, easily satisfies the deferential standard that applies here. As Secretary Mattis explained, generally allowing these individuals to serve would pose "substantial risks" as well as "undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." ER.161. There should be no dispute that the military's interest in avoiding those harms is a compelling one: Courts must "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest," *Winter*, 555 U.S. at 24 (quoting *Goldman*, 475 U.S. at 507), and here, the Department has concluded that minimizing these risks is "absolutely essential," ER.161. Therefore, the only issue is whether this Court should defer to the military's judgment that this

[2] Even if this policy could be characterized as turning on transgender status, such classifications do not trigger heightened scrutiny either. *See, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227-28 (10th Cir. 2007). Contrary to the district court's belief, *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), did not hold otherwise. ER.46. Rather, *Schwenk* held only that a particular claim under the Gender Motivated Violence Act survived summary judgment given evidence that the attack on the plaintiff was motivated "by her assumption of a feminine rather than a typically masculine appearance." 204 F.3d at 1202. That individualized, evidentiary, and statutory sex-stereotyping holding does not justify the district court's sweeping constitutional ruling.

presumptive disqualification is not just rationally related to, but actually "necessary" to furthering that critical interest. ER.195. That should not be a close question.

a. Military Readiness

As the Department explained, service by individuals with gender dysphoria, and especially those who need or have undergone gender transition, poses at least two significant risks to military readiness. *First*, the Department was concerned about subjecting those with gender dysphoria to the unique stresses of military life. ER.184, 203. At the outset, any mental-health condition characterized by clinically significant distress or impairment in functioning raises readiness concerns. Servicemembers suffering from "[a]ny DSM-5 psychiatric disorder with residual symptoms" that "impair social or occupational performance[] require a waiver … to deploy," as the military must consider the "risk of exacerbation if the individual were exposed to trauma or severe operational stress." ER.197. Particularly given "the absence of evidence on the impact of deployment on individuals with gender dysphoria," the Department concluded that this condition posed readiness risks. *Id.*; *see* ER.205. That judgment is reflected in the Carter policy, which disqualified individuals with a history of gender dysphoria absent proof that they had been "stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months." ER.317.

In addition to the inherent problem of clinically significant distress or impairment, gender dysphoria comes with associated perils, especially in the military context. As preliminary evidence from the Department's experience with the Carter

policy reveals, servicemembers with gender dysphoria were eight times more likely to attempt suicide and nine times more likely to have mental-health encounters than servicemembers as whole. ER.184-85. In fact, over a two-year period of study, the nearly 1000 active servicemembers with gender dysphoria accounted for 30,000 mental-health visits. ER.185. These trends were consistent with data concerning those with gender dysphoria more generally, a group that suffers from high rates of suicide ideation, attempts, and completion, as well as other mental-health conditions such as anxiety, depression, and substance-abuse disorders. ER.184. Especially given recent evidence that military service can be a contributor to suicidal thoughts, the Department had legitimate concerns that generally allowing those with gender dysphoria to serve would subject them and their comrades to unacceptable risks. ER.182, 184.

All of this was true, the Department explained, even for those who had addressed their gender dysphoria by transitioning genders. ER.195. For one thing, none of the available studies concerning the efficacy of transition-related treatment for this condition accounted for "the added stress of military life, deployments, and combat." ER.187. And even with respect to a broader population, the Department was concerned about evidence that "rates of psychiatric hospitalization and suicide behavior remain higher for persons with gender dysphoria, even after treatment," as compared to those without this condition, as well as about the "considerable scientific uncertainty

concerning whether these treatments fully remedy, even if they may reduce, the mental health problems associated with gender dysphoria." ER.195; *see* ER.184-90.[3]

The Department therefore reasonably decided to modify the Carter policy. In doing so, it was acting consistently with the expectations of former-Secretary Carter, who, in announcing his policy in June 2016, directed that the new accession standards were to "be reviewed" before June 30, 2018, and could be "changed, as appropriate," to "ensure consistency with military readiness." ER.318. The Department conducted that review, on that timetable, using evidence unavailable to then-Secretary Carter, and concluded that his accession standards must be revised.

Nor were the Department's concerns new ones. RAND had cautioned the prior administration that "it is difficult to fully assess the outcomes of treatment" for gender dysphoria as a general matter given "the absence of quality randomized trial

[3] For example, the Centers for Medicare and Medicaid Services (CMS) issued a report in August 2016 concluding that there was "not enough high quality evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria." ER.187. While this study was primarily concerned with Medicare beneficiaries, CMS "conducted a comprehensive review" of "the universe of literature regarding sex reassignment surgery," which consisted of more than "500 articles, studies, and reports" addressing a general population. *Id.* Of these materials, only six studies provided "useful information" on the efficacy of sex-reassignment surgery, and "the four best designed and conducted" among them "did not demonstrate clinically significant changes" after the procedure. *Id.* And "one of the most robust" of the six "found increased mortality and psychiatric hospitalization" for those "who had undergone sex reassignment surgery as compared to a healthy control group." ER.188-89. According to that study, "post[-]surgical transsexuals are a risk group that need long-term psychiatric and somatic follow-up," and "[e]ven though surgery and hormonal therapy alleviates gender dysphoria, it is apparently not sufficient to remedy the high rates of morbidity and mortality." ER.189.

evidence"—"the gold standard for determining treatment efficacy"—and that, in any event, "it is not known how well these findings generalize to military personnel." ER.349. Although former-Secretary Carter was willing to tolerate these risks, Secretary Mattis determined the military should "proceed with caution before compounding the significant challenges inherent in treating gender dysphoria with the unique, highly stressful circumstances of military training and combat operations." ER.161. And there is no constitutional requirement that the Secretary of Defense must hew to the risk tolerance of his predecessor, especially when new information has come to light.

Second, even if it were guaranteed that the risks associated with gender dysphoria could be fully addressed by gender transition, it remains the case that transition-related medical treatment—namely, cross-sex hormone therapy and sex-reassignment surgery—could render transitioning servicemembers "non-deployable for a potentially significant amount of time." ER.198. Some commanders, for example, reported that transitioning servicemembers under their authority would be non-deployable for up to two to two-and-a-half years. ER.197. More generally, Endocrine Society guidelines recommend "quarterly bloodwork and laboratory monitoring of hormone levels during the first year" of therapy, meaning that if "the operational environment does not permit access to a lab for monitoring hormones," then the transitioning servicemember "must be prepared to forego treatment, monitoring, or the deployment," each of which "carries risks for readiness." ER.196. That period of potential non-deployability only increases for those who obtain sex-reassignment surgery, which in addition to a

recommended "12 continuous months of hormone therapy … prior to genital surgery," comes with "substantial" recovery time even without complications. *Id.*

In addition to being inherently problematic, these limits on deployability would have harmful effects on transitioning servicemembers' units as a whole. As the Department explained, any increase in non-deployable servicemembers will require those who can deploy to bear "undue risk and personal burden," which itself "negatively impacts mission readiness." ER.198. On top of these personal costs, servicemembers deployed more frequently to "compensate for" their unavailable comrades face risks to family resiliency as well. *Id.* And when servicemembers with conditions do deploy but then fail to meet fitness standards in the field, "there is risk for inadequate treatment within the operational theater, personal risk due to potential inability to perform combat required skills, and the potential to be sent home from the deployment and render the deployed unit with less manpower." ER.197. All of this, the Department concluded, posed a "significant challenge for unit readiness." ER.198.

Again, these are not new concerns. Former-Secretary Carter acknowledged that "[g]ender transition while serving in the military presents unique challenges associated with addressing the needs of the Service member in a manner consistent with military mission and readiness needs," ER.318, a conclusion reflected in his policy's requirement that applicants with a history of transition-related treatment must demonstrate that they had finished treatment and had been stable and free of complications for an 18-month period in order to serve. ER.317-18. Likewise, RAND acknowledged that gender

transition by servicemembers "will have a negative impact on readiness"; it simply dismissed this harm as "minimal" due to its estimation of the "exceedingly small number of transgender Service members who would seek transition-related treatment" compared to the active servicemember population as a whole. ER.197-98; *see* ER.378-82, 385-86. But in the Department's judgment, "whether the military can absorb periods of non-deployability in a small population" was the wrong question; by that metric, "the readiness impact" of many other disqualifying medical conditions, "from bipolar disorder to schizophrenia," would also be "minimal" because they too "exist only in relatively small numbers." ER.198. Instead, as the prior administration explained, the relevant inquiry is "whether an individual with a particular condition can meet the standards for military duty and, if not, whether the condition can be remedied through treatment that renders the person non-deployable for as little time as possible." *Id.* Applying that general standard, the Department concluded that the limitations on deployability posed by gender transition were unacceptably high. *Id.*

In other words, the differences between the Carter policy and the 2018 policy simply reflect different judgments by military leadership over what limits on deployability they are willing to tolerate. Given that the Supreme Court has permitted Congress to reject the military's judgments on deployability with respect to exempting women from having to register for the draft, there is no reason why one Secretary of Defense should be barred from disagreeing with the judgments of his predecessor in this context. *See Rostker*, 453 U.S. at 82 (relying on Congress's concern that absorbing

female inductees into noncombat positions would impede deployability of combat-ready soldiers). That is particularly true given that the 2018 policy simply ends the Carter policy's approach of giving gender transition special treatment when it came to readiness concerns. For example, both before and under the Carter policy, individuals with a history of genital surgery unrelated to gender transition were presumptively disqualified. ER.173-74, 190-91, 459-61. Thus, an applicant who received genital surgery following an injury could not serve under the Carter policy absent a waiver. ER.191. Yet if that applicant had received genital surgery as part of a gender transition, the Carter policy provided a waiver-free pathway to military service. *Id.*

In short, the Department concluded that the readiness risks stemming from the uncertain efficacy of, and constraints imposed by, treatment for gender dysphoria counseled against allowing individuals with that condition to serve in general. This is the sort of analysis it must perform for any medical accession or retention standard, and the cautious approach it took here is hardly out of the norm. *See* ER.166, 171-73.

b. Unit Cohesion and Good Order and Discipline

Apart from these readiness concerns, the Department determined that exempting individuals with gender dysphoria who need or have undergone gender transition—whether through hormones, surgery, or simply living and working in their preferred gender—from the military's longstanding sex-based standards would inevitably undermine the critical objectives served by those rules, namely, "good order, discipline, steady leadership, unit cohesion, and ultimately military effectiveness and

lethality." ER.191. To start, the military reasoned that unless it demanded complete sex-reassignment surgery to serve in one's preferred gender—a requirement both "at odds with current medical practice, which allows for a wide range of individualized treatment," as well as practically irrelevant given "exceedingly low" rates of genital surgery—maintaining the Carter policy threatened to "erode reasonable expectations of privacy." ER.194, 200. As the Department observed, "[g]iven the unique nature of military service," servicemembers must often "live in extremely close proximity to one another when sleeping, undressing, showering, and using the bathroom." ER.200. To protect reasonable expectations of privacy, the military has therefore "long maintained separate berthing, bathroom, and shower facilities for men and women while in garrison," including on deployments. *Id.*; *see also Beller*, 632 F.2d at 812 (Kennedy, J.) (noting the general "potential for difficulties arising out of possible close confinement aboard ships or bases for long periods of time")

In the Department's judgment, allowing individuals who retain some, if not all, of the anatomy of their biological sex to use the facilities of their preferred gender "would invade the expectations of privacy" of the other servicemembers sharing those facilities. ER.200. Thus, absent the creation of separate facilities for transitioned or transitioning servicemembers, which could be both "logistically impracticable for the Department" as well as unacceptable to those individuals, the military would face irreconcilable privacy demands. *Id.* For example, the panel of experts heard from one commander who received dueling equal-opportunity complaints over allowing a

servicemember who identified as a female but had male genitalia to use the female shower facilities—one from the female members of the unit and one from the individual servicemember. *Id.* This episode is consistent with reports from officers in the Canadian military that "they would be called on to balance competing requirements" by meeting a transitioning servicemember's "expectations … while avoiding creating conditions that place extra burdens on others or undermined the overall team effectiveness" in areas such as "communal showers[] and shipboard bunking." ER.203.

Such considerations are far from suspect. The prior administration's implementation handbook for the Carter policy repeatedly stressed the need to respect the "privacy interests" and "rights of Service members who are not comfortable sharing berthing, bathroom, and shower facilities with a transitioning Service member," and urged commanders to try to accommodate competing interests to the extent that they could. ER.274; *see* ER.258, 265, 269, 296-97, 299-300; *see also* ER.201 (discussing some of "[t]he unique leadership challenges arising from gender transition" that "are evident in the Department's handbook"). In addition, the Supreme Court itself has recognized that it is "necessary to afford members of each sex privacy from the other sex in living arrangements," *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996), and "[i]n the context of recruit training, this separation is even mandated by Congress," ER.200. With respect to basic training, Congress has required that "the sleeping and latrine areas provided for 'male' recruits be physically separated from the sleeping and latrine areas provided for 'female' recruits," and that "access by drill sergeants and training personnel

'after the end of the training day' be limited to persons of the 'same sex as the recruits' to ensure 'after-hours privacy.'" ER.192 (citing 10 U.S.C. §§ 4319, 4320, 6931, 6932, 9319, 9320). The 2018 policy thus ensures compliance with these statutory privacy protections as well. *Cf. Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 686-89 (N.D. Tex. 2016) (holding that the term "sex" in Title IX excludes gender identity).

Aside from these privacy-related considerations, the Department was concerned that exempting servicemembers from sex-based standards in training and athletic competition on the basis of gender identity would generate perceptions of unfairness in the ranks. ER.199. For example, requiring female servicemembers to compete with individuals who identify as female but retain male physiology, the Department reasoned, would likely put the former at a disadvantage. ER.194, 199. And in violent activities, "pitting biological females against" those with male physiology but a female gender identity, and vice versa, could pose "a serious safety risk as well." ER.199.

Again, these are legitimate military concerns, as Congress and the Supreme Court have recognized that it is "necessary" to "adjust aspects of the physical training programs" for servicemembers to address biological differences between the sexes. *Virginia*, 518 U.S. at 550 n.19 (discussing statute requiring standards for women in the service academies to "be the same as those … for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals"). In fact, the Supreme Court specifically deferred to Congress's judgment that including women in the draft would

create "administrative problems such as housing and different treatment with regard to … physical standards." *Rostker*, 453 U.S. at 81. Especially given the Department's view that "physical competition[] is central to the military life and is indispensable to the training and preparation of warriors," ER.199, its judgments here cannot be ignored.

The Department was also concerned that exempting servicemembers from uniform and grooming standards on the basis of gender identity would create additional friction in the ranks. For example, allowing someone with male physiology but a female gender identity "to adhere to female uniform and grooming standards" could frustrate male servicemembers who are not transgender but "would also like to be exempted from male uniform and grooming standards as a means of expressing their own sense of identity." ER.194; *cf. Goldman v. Secretary of Def.*, 734 F.2d 1531, 1540 (D.C. Cir. 1984) (deferring to Air Force's judgment "that it cannot make exceptions … for religious reasons without incurring resentment from those who are compelled to adhere to the rules strictly"), *aff'd sub nom. Goldman v. Weinberger*, 475 U.S. 503. Such resentment is particularly likely when these servicemembers are precluded by these standards from expressing core aspects of their identity. *See, e.g.*, Army Directive 2017-03, at 7(a) (Jan. 2017) (only female servicemembers may wear dreadlocks), *available at* https://www.army.mil/e2/c/downloads/463407.pdf. Again, such concerns were appreciated by the prior administration, which told commanders that in considering exceptions to "uniform and grooming standards" under the Carter policy, they should account for their "impact on unit cohesion and good order and discipline." ER.264.

The point of all this is not that the Department deems the needs of certain servicemembers to take priority over those of others. Rather, it is that the inescapable "collision of interests" injected by the Carter policy's departure from military uniformity poses "a direct threat to unit cohesion and will inevitably result in greater leadership challenges without clear solutions," ER.200, a problem only compounded by the risks to unit cohesion stemming from significant limits on deployability, *see supra* Part I.A.2.a. Under the Carter policy, the "routine execution of daily activities" thus could become a recurring source of "discord in the unit," requiring commanders "to devote time and resources to resolve issues not present outside of military service." ER.201. And any flawed or delayed solution could "degrade an otherwise highly functioning team," as any "appearance of unsteady or seemingly unresponsive leadership to Service member concerns erodes the trust that is essential to unit cohesion and good order and discipline." *Id.* Given that "[l]eaders at all levels already face immense challenges in building cohesive military units," ER.200-01, the Department reasonably concluded that it would be unwise to maintain a policy that "will only exacerbate those challenges and divert valuable time and energy from military tasks," ER.201. There is no reason why that military judgment regarding matters of discipline should be cast aside.

c. Disproportionate Costs

Finally, the Department noted that transition-related treatment under the Carter policy is "proving to be disproportionately costly on a per capita basis." ER.204. Since the Carter policy's implementation, the medical costs for servicemembers with gender

dysphoria "have increased nearly three times" compared to servicemembers without this condition. *Id.* And that is "despite the low number of costly sex reassignment surgeries that have been performed so far"—34 non-genital procedures and one genital surgery—which likely would only increase as more servicemembers avail themselves of these measures. *Id.* Notably, 77 percent of the 424 treatment plans available for study "include requests for transition-related surgery" of some kind. *Id.*

Several commanders also reported that providing servicemembers in their units with transition-related treatment "had a negative budgetary impact" due to the use of "operations and maintenance funds to pay for … extensive travel throughout the United States to obtain specialized medical care." ER.204. This is not surprising given that transition-related treatments "require[] frequent evaluations" by both a mental-health professional and an endocrinologist, and most military treatment facilities "lack one or both of these specialty services." ER.204 n.164. Transitioning servicemembers consequently "may have significant commutes to reach their required specialty care," with those "stationed in more remote locations fac[ing] even greater challenges." *Id.*

Given the military's general interest in maximizing efficiency through minimizing costs, ER.166, the Department concluded that its disproportionate expenditures on facilitating gender transition could be better devoted elsewhere, *see* ER.204, a judgment that merits this Court's respect. Even when the alleged constitutional rights of servicemembers are involved, decisions by the political branches as to whether a benefit

"consumes the resources of the military to a degree … beyond what is warranted" deserve significant deference. *Middendorf v. Henry*, 425 U.S. 25, 45 (1976).

In short, both Secretary Carter and Secretary Mattis were confronted with undisputed military risks stemming from service by individuals with gender dysphoria, and especially those who need or have undergone gender transition, and both concluded that such individuals should be presumptively disqualified. Where the two parted ways was simply over the scope of the exceptions to this presumptive disqualification. All that this reflects is that different military leaders struck different balances of costs and benefits at different times, a point confirmed by the fact that the 2018 policy allows some individuals with gender dysphoria to serve as a general matter (under different standards depending on whether they seek to join or remain in the military) and others to transition and serve in their preferred gender (under the reliance exemption). To be sure, former-Secretary Carter opted for a different set of exceptions that likely would allow additional individuals with gender dysphoria to serve, consistent with his instruction to his working group to "presum[e]" that all transgender individuals could serve openly "without adverse impact on military effectiveness and readiness," ER.432, 433. But such military policy disagreements over where to "draw[] the line" are not constitutional violations, *Goldman*, 475 U.S. at 510, especially where, as here, the shift stems from new information, a comprehensive study, and a different tolerance for military risk. Rather, the Department's "studied choice of one alternative in preference to another" is committed to the military's discretion. *Rostker*, 453 U.S. at 71-72.

B. The Department's 2018 Policy Is Not Otherwise Unconstitutional

The district court further erred in implicitly holding that the military's 2018 policy likely violates substantive due process and the First Amendment. In deciding that the policy's alleged "intrusion" on plaintiffs' "fundamental right[s]" and "protected expression" were unnecessary "to further an important government interest," ER.49-50, the court simply repeated the same mistakes made in its equal-protection analysis. Both due-process and free-speech challenges to military policies trigger a highly deferential form of review, *see, e.g.*, *Brown v. Glines*, 444 U.S. 348, 353-59 (1980); *Parker v. Levy*, 417 U.S. 733, 756, 758 (1974), and the Supreme Court has cautioned that "within the military community there is simply not the same individual autonomy as there is in the larger civilian community," *Goldman*, 475 U.S. at 507 (alteration omitted). The district court did not even try to explain why the military's 2018 policy would flunk this highly deferential form of review.

In any event, these identity-based theories lack merit for additional reasons. With respect to substantive due process, the district court evidently believed that the 2018 policy unjustifiably interfered with plaintiffs' "fundamental right" to "define and express their gender identity" by "depriving them of employment and career opportunities." ER.50. But there is no fundamental right to serve in the military, much less to do so in a particular manner. *See, e.g.*, *Canfield v. Sullivan*, 774 F.2d 1466, 1469 (9th Cir. 1985). Indeed, by the district court's logic, the Carter policy itself likewise would have violated the fundamental rights of the transgender servicemembers it

precluded from either serving in their preferred gender or serving at all—yet the court, at plaintiffs' request, *ordered* the military *to maintain* that policy.

As for the First Amendment, the district court apparently concluded that the 2018 policy amounts to a content-based restriction on speech because it "penalizes transgender servicemembers … for disclosing their gender identity." ER.50-51. But the 2018 policy, like the Carter policy before it, simply turns on medical information provided by servicemembers or applicants. Granted, one must disclose a history or diagnosis of gender dysphoria (and any accompanying gender transition) through words, but the same is true in the case of any failure to satisfy any military medical standard. *Cf. Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."). Again, the district court's expansive theory would apply with equal force to the Carter policy.

C. The District Court's Analysis Is Fundamentally Flawed

The district court never grappled with the Department's reasoning. Although it purported to reserve judgment on whether "deference is owed to" the military's 2018 policy and whether that policy "survives constitutional review," ER.30, its decision to preliminarily enjoin that policy necessarily meant that it was likely to answer both questions in the negative. But the court never explained why that was so, other than to

dismiss the Department's 2018 policy as merely "a plan to implement the Ban" the President "announced on Twitter" last July. ER.2.

The professional military judgment of the Secretary of Defense, based on an exhaustive analysis by a panel of military experts, is entitled to more respect. Even a passing review of the 2018 policy reveals that this policy is substantially different in both substance and process from the President's 2017 memorandum and the tweets that preceded it. And in any event, the district court's mischaracterization of the Department's 2018 policy, even if credited, provides no basis for dispensing with the substantial deference owed to the military's independent judgment.

1. The assertion that the 2018 policy is merely "a plan for carrying out the policies set forth in [the President's] Twitter Announcement," ER.5, is inexplicable. On its face, the 2018 policy—which indisputably permits some transgender individuals to serve, including in their preferred gender—fails to effectuate the President's tweet that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military." ER.216.

Nor does that policy implement, or even reflect, the approach taken by the President's 2017 memorandum, a document the district court viewed as merely "formalizing his Twitter Announcement." ER.4. That memorandum ordered the military to "return" to its "longstanding policy"—adhered to by the armed forces under every administration until June 2016—of generally disqualifying individuals from military service on the basis of their "transgender" status. ER.214. The military's 2018

policy differs from that pre-Carter framework in at least two critical respects. First, the 2018 policy, like the Carter policy, turns not on transgender status, but on a medical condition (gender dysphoria) and a related medical treatment (gender transition). ER.167-69. In other words, the 2018 policy allows transgender individuals without a history or diagnosis of gender dysphoria to serve, a possibility that was generally unavailable during the pre-Carter era. Second, the 2018 policy categorically permits individuals with gender dysphoria to serve in their preferred gender (and receive transition-related treatment) as they did under the Carter policy, ER.206, an option that likewise did not exist before June 2016, ER.174. Thus, rather than "implement" a "return" to the pre-Carter policy, ER.2, 4, the 2018 policy substantially departs from it.

This is why Secretary Mattis had to recommend that the President "revoke" his 2017 memorandum in order to "allow[]" the military to implement its preferred framework. ER.162. If the 2018 policy simply implemented the pre-Carter policy addressed in the 2017 memorandum, there would have been no need for the Secretary to have made this recommendation or for the President to have "revoke[d]" that memorandum "and any other directive [he] may have made with respect to military service by transgender individuals." ER.158.

The district court nevertheless ruled that the military's 2018 policy "adheres to the policy and directives set forth in the 2017 Memorandum" on the ground that it "mandate[s] a 'categorical' prohibition on service by openly transgender people." ER.12-13. The court never reconciled that characterization, however, with the

existence of the 2018 policy's reliance exemption, for instance, other than to dismiss it as "narrow." ER.13 n.6. But a policy with even a narrow exemption is by definition not a "categorical" one, ER.13, and in any event this exemption covers nearly 1000 servicemembers already, ER.170 n.10. As even the district court noted elsewhere, "many" servicemembers had "reli[ed] upon the Carter policy," ER.8, making its dismissal of the reliance exemption all the more puzzling.

Moreover, the district court's only basis for this characterization was that the 2018 policy would require some transgender individuals "'to adhere to all standards associated with their biological sex'" and thereby "force [them] to suppress the very characteristic that defines them as transgender." ER.13. But the court's assumption that all openly transgender servicemembers wish to be exempted from these standards is itself nothing more than an overbroad generalization. As the RAND Report explains, only "a subset" of transgender individuals "choose to *transition*, the term used to refer to the act of living and working in a gender different from one's sex assigned at birth." ER.345. In fact, an estimated 8980 servicemembers identify as transgender according to one study, yet to date, only 937 of them have taken advantage of the Carter policy's framework for gender transition in the nearly two years of its existence. ER.170 n.10, 195. More fundamentally, the same critique could be leveled at the Carter policy the district court ordered the military to maintain, which likewise requires transgender individuals who have "no[t] been diagnosed with gender dysphoria … 'to adhere to all

standards associated with their biological sex,'" and presumptively disqualifies individuals with gender dysphoria altogether. ER.13; *see* ER.177-79, 317-18.

2. Substance aside, the Department's 2018 policy was also the product of a significantly different process than the one preceding the President's 2017 memorandum. In its December 2017 injunction, the district court dismissed that memorandum as lacking "evidence of considered reason or deliberation." ER.49. The government of course disagrees with that mischaracterization of an initial judgment by the Commander-in-Chief to maintain a longstanding military policy while the Department conducted a further review. But in any event, the 2018 policy was the result of an extensive deliberative process as well as thoroughly explained in a reasoned memorandum from the Secretary of Defense and an accompanying 44-page report.

The district court nevertheless dismissed the military's judgments based on its view that the 2017 memorandum "did not direct Secretary Mattis to determine *whether* or not the directives should be implemented, but instead ordered the directives to be implemented by specific dates and requested a plan for *how* to do so." ER.12. That characterization, however, simply overlooks the President's instructions to "study" the issue and to "advise [him] at any time, in writing, that a change to this policy is warranted," ER.214, as well as the Secretary's reliance on that fact in recommending that the President revoke his memorandum, ER.160.

The district court also seized on statements the Secretary made shortly after the release of the 2017 memorandum that he would "carry out the President's policy and

directives," "develop a study and implementation plan," "establish a panel of experts to provide advice and recommendation on the implementation of the President's direction," and "present the President with a plan to implement the policy and directives in the 2017 Memorandum." ER.4 (brackets and ellipsis omitted); *see* ER.208-13. But the court never addressed the fact that the extensive study by a panel of experts ultimately led Secretary Mattis to recommend that the President depart from the policy in that memorandum and adopt a new one that, as the Department explained, differed from both the Carter policy and the longstanding framework that preceded it. ER.170-79, 195-206. Indeed, the contrast between these initial statements and the Secretary's final recommendation only confirm that the result of the military's review was far from preordained. In short, the military "implemented" the 2017 memorandum only insofar as it studied the issue and advised the President that a different policy was appropriate.

3. In any event, even if there were no daylight between the policy set forth in the President's 2017 memorandum and the one recommended by the Secretary in 2018, the district court identified no basis for concluding that the military's proposed course of action was in any respect constitutionally problematic, let alone for concluding that these particular plaintiffs were likely to succeed in challenging it. Instead, the court simply declared that it could not presently "determine whether the [Department's] deliberative process … is of the type to which Courts typically should defer," ER.26, and extended its prior preliminary injunction without further analysis.

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

At most, the court below suggested that the "timing" of the Department's review called its 2018 policy into question. ER.26. To the extent that this court meant to imply that the military's study was a post hoc effort with a preordained result, that charge ignores the fact that the Department's review of the Carter policy began at the initiative of Secretary Mattis nearly a month *before* the President's tweets. ER.160, 167, 217-18. Nor can it be squared with the Secretary's statements that the panel of experts was

tasked with conducting "an independent multi-disciplinary review," ER.211, and providing recommendations "without regard to any external factors," ER.160, and that the 2018 policy reflected "the Panel's professional military judgment," "the Department's best military judgment," and his "own professional judgment," ER.161; *see also* ER.167 ("The Panel made recommendations based on each Panel member's independent military judgment."); ER.158 (According to the President, the memorandum he received "set forth the policies on this issue that the Secretary of Defense, in the exercise of his independent judgment, has concluded should be adopted."). The district court scarcely acknowledged these statements, much less offered a reason why representations by senior military leadership, including the Secretary of Defense himself, should be called into question.[4]

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

Apart from its errors on the merits, the district court necessarily abused its discretion in failing to consider the equitable criteria for a preliminary injunction with respect to the 2018 policy—criteria that plaintiffs plainly cannot satisfy. The risks that injunction places on our Nation's military easily outweigh the negligible, if not nonexistent, harms plaintiffs claim they will face if the new policy takes effect.

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

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

The injunction here is extraordinary. The district court ordered the military to adhere to a policy that the Secretary of Defense has determined poses "substantial risks" to an effective national defense, ER.161, without ever offering a reason why the military (and the public) should bear these harms. An order of that magnitude should stand on firmer ground. The Supreme Court has stressed that courts must "defer" to "specific, predictive judgments" by senior military officials "about how [a] preliminary injunction would reduce the effectiveness" of military operations. *Winter*, 555 U.S. at 27. Here, the Secretary of Defense and senior military leadership not only provided these predictive judgments, but went so far as to document some of the harms the military had already sustained. Yet the district court did not even acknowledge these specific military judgments, predictive or otherwise, much less justify its refusal to defer to them.

At most, the district court briefly addressed the military's concerns about the Carter policy when it issued its December 2017 order, ER.52-53, but even that discussion cannot salvage its injunction of the 2018 policy. For one thing, the court dismissed any harm to the government on the basis of a manifest factual error. The district court viewed the Carter policy as the status quo, mistakenly assuming that it "ha[d] been in place for over a year without documented negative effects." ER.53. But the Carter *accession* standards—which had been deferred until January 1, 2018—had not yet taken effect at that point. That there were no documented negative effects from a key aspect of a policy that had not yet been implemented was hardly a legitimate reason

for the district court to discount the harms its implementation would sow. In any event, by the time the court extended its injunction to the 2018 policy, the Department had "documented" the "negative effects" of the Carter policy, *id.*, and explained why, in its professional judgment, it was "necessary" to depart from it, ER.195.

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

Against those serious harms to the national defense, plaintiffs cannot even show cognizable injury. The original plaintiffs lack standing to challenge either the retention or accession standards in the 2018 policy, and Washington has no business being in this litigation at all. At a minimum, plaintiffs will suffer no irreparable injury that outweighs the harms to the military and the public.

1. At the outset, none of the six plaintiffs who are already serving has standing to challenge the 2018 policy's standards for current servicemembers. To satisfy Article III, these individuals "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). Yet five of them (Winters, Stephens, Lewis, Muller, and Schmid) would qualify for the 2018 policy's reliance exemption, as they used the Carter policy's framework for in-service gender transition. ER.501-02, 508-09, 514-15, 521-23, 531-33. Although the district court questioned whether these plaintiffs had received a gender-dysphoria diagnosis by a military medical provider after the Carter policy took effect, ER.15 n.7, it overlooked that they could transition under that policy only after obtaining such a diagnosis from such a source,

ER.177-78, 225-26, 309-13. And to the extent that there is any doubt, the Department has confirmed that it will exempt any servicemember "who was diagnosed with gender dysphoria prior to the effective date of the Carter policy and has continued to serve and receive treatment pursuant to the Carter policy after it took effect." ER.489.

Although it is unclear whether the sixth plaintiff, Doe, has obtained the necessary diagnosis, ER.492-95, nothing should prevent this servicemember from doing so right now, and thereby qualify for the reliance exemption, because the 2018 policy has not yet taken effect. *See* ER.494 (alleging that Doe will need surgery to transition, which requires a gender-dysphoria diagnosis). Any refusal to seek such a diagnosis does not create a cognizable injury, as plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

Even if these plaintiffs had standing, separation from the military is not an irreparable injury. Given "the magnitude of the interests weighing against judicial interference in the internal affairs of the armed forces," this Court has required a "much stronger showing of irreparable harm" in this context than in the "ordinary" case. *Hartikka v. United States*, 754 F.2d 1516, 1518 (9th Cir. 1985) (applying *Sampson v. Murray*, 415 U.S. 61 (1974)). The "loss of income, loss of retirement and relocation pay, and damage to [one's] reputation resulting from the stigma attaching to a less than honorable discharge" are thus "insufficient … to justify injunctive relief." *Id.*

2. Nor can the three plaintiffs who desire to serve obtain an injunction against the 2018 policy's standards for accession into the military. These individuals (Callahan, D.L., and Karnoski), all of whom appear to have taken steps to transition genders, have not even established that they would be otherwise eligible for military service, ER.496-99, 526-29, 536-40, rendering any "threatened injury" from these new accession standards far from "*certainly impending*," *Clapper*, 568 U.S. at 409. In an effort to cure this deficiency, the district court ruled that these plaintiffs had suffered an injury "in the denial of an equal *opportunity* to compete." ER.15. But one need not "compete" to enter the military in general; rather, service is open to all provided eligibility requirements are met. ER.165. Thus, the relevant question is not whether the 2018 accession standards impose a competitive disadvantage on a subset of otherwise qualified applicants, but whether these prospective applicants are in fact otherwise qualified. *Cf. LULAC v. Bredesen*, 500 F.3d 523, 528-29 (6th Cir. 2007) (assuming challengers to Tennessee law denying driver's licenses to certain aliens must show they are Tennessee residents "otherwise eligible for a Tennessee driver license").

In any event, even if these plaintiffs would suffer a cognizable injury under the 2018 policy's accession standards, they have not shown that this injury would be redressable by the district court's injunction maintaining the Carter policy. There is no claim that any of these individuals could obtain the requisite certificate establishing 18 months' stability post-treatment under the Carter policy, ER.496-99, 526-29, 536-40, and it is clear that one of them (D.L.) could not, ER.527. And even if this alleged injury

were redressable, it would not be an irreparable one. *Cf. Anderson v. United States*, 612 F.2d 1112, 1115 (9th Cir. 1979) (plaintiff's claim "that her career" in the Air Force "would be damaged by losing [a] specific position" does not show "irreparable injury").

Although the district court further held that all individual plaintiffs—even if they were "not excluded, discharged, or denied medical care"—had standing from an alleged "stigmatic injury," ER.16, such a harm "accords a basis for standing only to 'those persons who are personally denied equal treatment,'" *Allen v. Wright*, 468 U.S. 737, 755 (1984), which no plaintiff has alleged. Indeed, as the Department stressed, "[t]he 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," but that does not mean that all of these individuals, including those "with gender dysphoria," are any "less valued members of our Nation," ER.169, let alone constitutionally stigmatized.[5]

3. Washington's asserted injuries from the 2018 policy are even further afield. To start, contrary to the district court's belief, ER.18, "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government," even when it alleges an interest in protecting its "residents from the harmful effects of discrimination." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 609, 610 n.16 (1982) (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923)).

[5] The presence of the organizations makes no difference. Their standing turns on that of their members, so if the relevant individuals (Karnoski, Schmid, Muller, Stephens, and Winters) cannot satisfy Article III or equitable requirements, the organizations cannot either. ER.17-18.

Similarly, Washington's claim that the 2018 policy will harm its ability to protect its "natural resources" by "diminishing the number of eligible members" for the Washington National Guard, ER.19, is speculative, and if adopted, would allow any State to challenge any military personnel regulation. Washington has alleged only that the 2017 memorandum "*may* result in diminished numbers of service members who can provide emergency response and disaster mitigation," Doc.55 at 7 (emphasis added), and has yet to identify a single Guard member or applicant affected by either that memorandum or the military's 2018 policy. As of last September, the Guard had only "one soldier" who identified as transgender, and that individual's term of service has since ended. ER.544. And even if the State were able to identify a Guard member or applicant affected by the 2018 policy, it has not even alleged that it lacks, or would lack, other qualified applicants to serve in the Guard.

Washington's assertion that the 2018 policy would force it to violate its own "anti-discrimination laws" with respect to the Guard is likewise unfounded. ER.19. Washington has yet to identify any state law that would prevent it from adhering to military restrictions based on the medical condition of gender dysphoria or its treatment. Indeed, if such a law existed, the State would be in violation of it under the Carter policy the military is required to maintain. And in all events, Washington remains free to protect its territory with any servicemembers disqualified under the 2018 policy through its own State Defense Force. *See* 32 U.S.C. § 109(c).

III. The Nationwide Injunction Is Improper

At a minimum, the nationwide scope of the preliminary injunction violates Article III and exceeds the district court's equitable authority. Under basic principles of standing, "[t]he remedy" ordered by a federal court must "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Equitable principles likewise require that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 765 (1994). This Court therefore has repeatedly confirmed that "[i]njunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification." *E.g.*, *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011).

Thus, even crediting the district court on every other issue, it had no authority to bar implementation of the 2018 policy nationwide. Instead, a preliminary injunction blocking the enforcement of the 2018 policy against any individual whose disqualification would irreparably injure plaintiffs would have provided complete relief pending final judgment. *See Haven Hospice*, 638 F.3d at 665.

Indeed, this case is indistinguishable from *Meinhold v. United States Department of Defense*, 34 F.3d 1469 (9th Cir. 1994), which involved a facial constitutional challenge by a discharged Navy servicemember to the Department's "then-existing policy regarding homosexuals." *Id.* at 1473. After the district court enjoined the Department from "taking any actions against gay or lesbian servicemembers based on their sexual

orientation" nationwide, the Supreme Court stayed that order "to the extent it conferred relief on persons other than Meinhold." *Id.*; *see U.S. Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993). This Court then vacated that injunction save for a narrow application to the plaintiff, explaining that the challenge was "not a class action" and that "[e]ffective relief can be obtained by directing the Navy not to apply its regulation to Meinhold." 34 F.3d at 1480. The district court here gave no explanation for why this case is meaningfully different, nor could it do so.

Finally, nationwide relief would remain inappropriate even if the organizations and Washington had standing to challenge the 2018 policy. Plaintiffs have identified only six individuals (Karnoski, Lewis, Schmid, Muller, Stephens, and Winters) with ties to Washington or these organizations who may be affected by this policy. ER.18, 513, 530, 536. And whatever harms Washington may allege, redressing them would not require an injunction extending to all 49 other States.

CONCLUSION

The district court's preliminary injunction should be vacated in whole, or at least as to all individuals except those whose disqualification would impose an irreparable injury on plaintiffs.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

BRINTON LUCAS
Counsel to the Assistant Attorney General

MARLEIGH D. DOVER
s/Catherine H. Dorsey
CATHERINE H. DORSEY
TARA S. MORRISSEY
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7236
950 Pennsylvania Ave., NW
Washington, DC 20530
202-514-3469

May 2018

STATEMENT OF RELATED CASES

Appellants are not aware of any related cases pending in this Court as defined in Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Ninth Circuit Rule 32-1(a) because it contains 13,971 words, excluding the parts of the brief excluded by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Garamond 14-point font, a proportionally spaced typeface.

s/ Catherine H. Dorsey
Catherine H. Dorsey

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2018, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Catherine H. Dorsey
Catherine H. Dorsey