Nos. 18A625, 18A626, and 18A627

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

RYAN KARNOSKI, ET AL.

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

v.

JANE DOE 2, ET AL.

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

v.

AIDEN STOCKMAN, ET AL.

REPLY IN SUPPORT OF APPLICATIONS FOR STAYS IN THE ALTERNATIVE TO WRITS OF CERTIORARI BEFORE JUDGMENT

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I. THIS COURT IS LIKELY TO GRANT REVIEW IF A NATIONWIDE PRELIMINARY INJUNCTION IS AFFIRMED

A. Respondents contend that, if a court of appeals affirms one of the nationwide preliminary injunctions against the Mattis policy, the "interlocutory" posture of the case would render this Court's review unlikely. E.g., Doe Stay Appl. Opp. 19.[1] That contention misunderstands the question presented: whether the district court erred in preliminarily enjoining the military from implementing the Mattis policy nationwide. E.g., 18-676 Pet. (Karnoski Pet.) I. That question necessarily arises in an interlocutory posture. Contrary to respondents' contention, the government could not simply "rais[e] the same issue[] in a later petition following the entry of a final judgment," Doe Stay Appl. Opp. 20, because at that point the issue would be moot.

Moreover, respondents err in asserting that the merits of their constitutional claims would not be before this Court. E.g., Doe Stay Appl. Opp. 19. This Court always has the authority, in reviewing a preliminary injunction, to "address the merits" of the litigation when appropriate. Munaf v. Geren, 553 U.S. 674, 691 (2008). The Court has previously granted review of preliminary

[1] Contrary to the Karnoski respondents' contention, the question for purposes of the government's stay applications is not whether the Court is likely to "grant the government's petition[s] for certiorari before judgment." Karnoski Stay Appl. Opp. 18 (emphasis added). Because the government seeks stays only if the Court denies certiorari before judgment, the question is whether this Court is likely to grant certiorari following judgment in the courts of appeals.

injunctions to address important legal issues, see, e.g., Trump v. Hawaii, 138 S. Ct. 2392 (2018); United States v. Texas, 136 S. Ct. 2271 (2016); Munaf, supra, and if a court of appeals affirms, the Court is likely to grant review here.[2]

Respondents further contend that this Court is unlikely to grant review of "refus[als] to dissolve" the preliminary injunctions. Doe Stay Appl. Opp. 19. But whether changed circumstances justify dissolving the injunctions turns on an issue at the heart of respondents' constitutional claims: whether the Mattis policy is a mere "implementation" of the ban on transgender service supposedly announced in the President's 2017 tweets and memorandum. Ibid. If it is not, then the Mattis policy represents a change in policy justifying dissolution of the injunctions. Whether the government has demonstrated changed circumstances thus merges into the merits of respondents' constitutional claims. See Karnoski Pet. 24-25. And contrary to respondents' contention, deciding that question does not entail a "factual" inquiry. Doe Stay Appl. Opp. 19. The text of the Mattis policy alone makes clear that it differs materially from the 2017 memorandum both in the substance of its provisions and in the process by which it was developed. 18-676 Pet. App. (Karnoski Pet. App.) 113a-209a; see

[2] Earlier today in Doe, the D.C. Circuit issued a per curiam decision reversing the district court's denial of the government's motion to dissolve the preliminary injunction and vacating the preliminary injunction. In a letter filed with this brief, the government is submitting that decision to the Court and explaining its effect on the pending petitions and stay applications.

Hawaii, 138 S. Ct. at 2421 (assessing constitutionality of entry policy by focusing on the "text" of the policy and the "multi-agency review" that supported it).

B. If a nationwide preliminary injunction is affirmed, the proper scope of the injunction would itself be an issue this Court is likely to review. The accelerating trend of lower courts' enjoining enforcement of federal policies nationwide, including as to nonparties, reflects an abandonment of settled principles and underscores the need for this Court's review. See Karnoski Stay Appl. 21-27.

Respondents contend that the question whether an injunction may appropriately sweep beyond the parties to a case is not implicated here because nationwide injunctive relief is necessary to fully redress respondents' own injuries. Karnoski Stay Appl. Opp. 33; Doe Stay Appl. Opp. 21; Stockman Stay Appl. Opp. 17-18. Respondents assert that enjoining the implementation of the Mattis policy as to only the individual respondents in each case would "singl[e] them out and stigmatiz[e] them as members of an inherently inferior class of service members." Doe Stay Appl. Opp. 30 (brackets and citation omitted). That purported stigma, however, is not a "judicially cognizable" injury. Allen v. Wright, 468 U.S. 737, 755-756 (1984). This Court has "ma[d]e clear" that "the stigmatizing injury often caused by racial [or other invidious discrimination] * * * accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged

discriminatory conduct." Id. at 755 (citation omitted). An injunction that barred implementation of the Mattis policy as to only the individual respondents who are currently serving in the military or seeking to join it -- namely, Karnoski, Schmid, D. L., Muller, Lewis, Stephens, Winters, Doe, and Callahan in Karnoski; Jane Doe 2, Jane Doe 3, Jane Doe 4, Jane Doe 5, Jane Doe 6, Jane Doe 7, Kohere, Kibby, John Doe 1, and John Doe 2 in Doe; and Stockman, Talbott, Reeves, Tate, John Doe 1, John Doe 2, and Jane Doe in Stockman -- would fully redress those individuals' claims that they are being "personally denied equal treatment." Ibid. (citation omitted). Any purported stigma that persists would be too "abstract" to be a basis for seeking broader relief, because it would flow not from how the military is treating them, but how it is treating others. Id. at 755-756; accord In re Navy Chaplaincy, 534 F.3d 756, 763-765 (D.C. Cir. 2008) (Kavanaugh, J.), cert. denied, 556 U.S. 1167 (2009). Enjoining the Mattis policy's application to third parties would not provide respondents themselves with any concrete personal benefit, because the scope of relief could not change any alleged stigma caused by the Mattis policy.

Respondents contend that the purported stigma of being subject to such a narrower injunction would lead to more concrete injuries, such as fewer "opportunities for training, deployment, and assignments." Doe Stay Appl. Opp. 32. But such asserted injuries are "entirely speculative." Allen, 468 U.S. at 758. Respondents

provide no support for the notion that an injunction requiring that the individual respondents be given "equal treatment," id. at 755 (citation omitted), would somehow result in their being given unequal treatment. And if that were to happen, the proper remedy would be for respondents to seek relief against such treatment, not to preemptively seek a nationwide injunction based on the speculative hope that it would somehow make such treatment less likely.

The advocacy organizations in these cases -- namely, Human Rights Campaign Fund, Gender Justice League, and American Military Partner Association in Karnoski and Equality California in Stockman -- likewise have no standing to seek a nationwide injunction. The standing of those organizations rests entirely on that of the individual respondents who are their members. See Karnoski Pet. App. 56a-57a; 17-cv-1799 Stockman D. Ct. Doc. 20, at 2 (Oct. 2, 2017). None of the organizations has identified any other individual who would even arguably suffer an irreparable injury from implementation of the Mattis policy.

Nor does the presence of two States as intervenors -- Washington in Karnoski and California in Stockman -- justify broader relief. Washington contends that it "has an interest in its transgender residents who are serving in military locations throughout the Nation." Karnoski Stay Appl. Opp. 38. Even if that were a cognizable interest (which it is not, see Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 610 n.16

(1982)), it would not justify a nationwide injunction that applied to non-Washington residents. And in any event, Washington has not identified any of its residents, beyond Karnoski, Schmid, and Lewis, who would even arguably suffer an irreparable injury from implementation of the Mattis policy. See Karnoski Stay Appl. 31.

Washington also asserts that the Mattis policy would require it to "exclude qualified transgender Washingtonians from its [National] Guard." Karnoski Stay Appl. Opp. 38; see Stockman Stay Appl. Opp. 31 n.8. But it has not identified any member of, or applicant to, its National Guard who would be affected by the Mattis policy, and it has not alleged that it lacks, or would lack, other qualified applicants. Washington's contention that the Mattis policy would force it "to violate its independent sovereign interest in implementing its antidiscrimination laws" is similarly unavailing. Ibid. Washington has been unable 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." 18-35347 Karnoski Washington C.A. Br. 19 (citation omitted). And even if the Mattis policy were somehow based on "sex" or "'gender identity,'" Karnoski Stay Appl. Opp. 38-39 (citations omitted), it would not require Washington to discriminate against its own residents on those grounds. To the contrary, Washington would merely be following its facially neutral rule of applying federal military standards to secure federal funding. See Wash. Rev. Code Ann. § 38.08.010 (2003); Personnel Adm'r of Mass. v.

Feeney, 442 U.S. 256, 276 (1979) (holding State's veterans-preference law to be sex-neutral despite "the panoply of sex-based and assertedly discriminatory federal laws that have prevented all but a handful of women from becoming veterans").

In short, respondents' contention that nationwide preliminary injunctive relief is necessary to fully redress their own injuries is mistaken. Because relief limited to the individual respondents would fully redress the asserted injuries of all respondents -- including the various advocacy organizations and States -- a court of appeals' decision affirming nationwide relief would raise the same issue this Court previously granted review to decide in Hawaii, supra, and Summers v. Earth Island Institute, 555 U.S. 488 (2009): whether a nationwide preliminary injunction, sweeping beyond the parties to a case, is impermissibly overbroad.

II. THERE IS AT LEAST A FAIR PROSPECT THAT THIS COURT WILL REVERSE IF A NATIONWIDE PRELIMINARY INJUNCTION IS AFFIRMED

A. In defending the nationwide preliminary injunctions in these cases, respondents repeat the district courts' failure to consider the Mattis policy on its own terms. Respondents describe the Mattis policy as a "ban of all transgender persons as a group." Karnoski Stay Appl. Opp. 24. That description bears no relation to the policy itself, which provides that "transgender persons should not be disqualified from service solely on account of their transgender status." Karnoski Pet. App. 149a. As the distinctions drawn by the Mattis policy are based on a medical condition (gender

dysphoria) and its related treatment (gender transition), the policy is plainly subject only to rational-basis review. The military context likewise warrants a deferential standard of review, and the Mattis policy satisfies that standard. Karnoski Pet. 19-20. Respondents do not dispute the military's compelling interests in readiness, good order and discipline, sound leadership, unit cohesion, and effectiveness. They dispute only the relationship between those interests and the military's reasons for not accommodating gender transition. E.g., Doe Stay Appl. Opp. 29. But the military's judgment that "making accommodations for gender transition" would "not [be] conducive to, and would likely undermine * * * readiness, good order and discipline, sound leadership, and unit cohesion," Karnoski Pet. App. 197a, is precisely the type of "professional military judgment[]" deserving of deference, Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008) (citation omitted).

B. Respondents' arguments defending the nationwide scope of the preliminary injunctions likewise lack merit. Respondents contend that "the scope of an injunction is constrained not by Article III, but by the district court's reasoned exercise of its wide equitable discretion." Karnoski Stay Appl. Opp. 37. But that contention is irreconcilable with this Court's repeated pronouncements that, under Article III, "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." Gill v. Whitford, 138 S. Ct. 1916, 1934 (2018). And even as to

equity, respondents cannot evade this Court's admonition that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (citation omitted). Although respondents assert that an injunction "as to only the individual Plaintiffs here would not afford them full relief," Karnoski Stay Appl. Opp. 37, that assertion fails for reasons explained above, see pp. 4-8, supra.

In similar circumstances, this Court stayed the nationwide scope of the injunction in United States Department of Defense v. Meinhold, 510 U.S. 939 (1993). Respondents attempt to distinguish Meinhold on the ground that the plaintiff there had not brought a facial challenge to the military policy at issue. Karnoski Stay Appl. Opp. 39. But the two authorities on which this Court relied confirm that the Court granted the stay for a more fundamental reason -- that a district court may not extend injunctive "relief" to individuals over whom it "has no jurisdiction." Heckler v. Lopez, 463 U.S. 1328, 1334 (1983) (Rehnquist, J., in chambers), motion to vacate denied, 464 U.S. 879 (1983); see Heckler v. Lopez, 464 U.S. 879, 881 (1983) (Stevens, J., dissenting in part) ("[T]he injunction * * * grants relief to class members over whom the District Court had no jurisdiction * * * . To the extent that the stay by Justice Rehnquist applies to such persons, I agree that it was properly entered.").

Respondents further err in contending that a facially unconstitutional policy must be enjoined nationwide. E.g., Karnoski Stay Appl. Opp. 32, 34-35. Regardless of the nature of a plaintiff's claim, an injunction must still be limited to reddressing the plaintiff's injury. Respondents' reliance on Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016), is misplaced, see Doe Stay Appl. Opp. 28, because that case addressed only the scope of a law's invalidity, not the scope of proper relief.

Respondents also attempt to minimize the practical effects of nationwide injunctions, e.g., Doe Stay Appl. Opp. 33-34, but they overlook the fact that, once a nationwide injunction is upheld by a court of appeals, the rulings of other lower courts will be essentially academic, the government will have little choice but to seek this Court's review, and this Court will be put in the position of deciding whether to grant certiorari without the benefit of further percolation. Nor do respondents address the fact that when plaintiffs file multiple suits seeking nationwide preliminary injunctions, they need to prevail in only one to block a policy entirely, while the government must prevail in all to be able to implement its policy.

III. THE BALANCE OF EQUITIES STRONGLY SUPPORTS STAYS

The balance of equities favors staying the injunctions in their entirety and even more strongly supports staying them at least as to their nationwide scope. While staying the nationwide scope would not cause respondents any injury, see pp. 4-8, supra,

it would relieve the government of the irreparable harm caused by having to maintain a policy that the military has deemed contrary to "effectiveness and lethality," Karnoski Pet. App. 206a.

Respondents contend that the balance of equities favors them because the nationwide preliminary injunctions do not risk any "actual" harm to the government. Karnoski Stay Appl. Opp. 26. That contention cannot be squared with the military's own view, which is entitled to "great deference." Winter, 555 U.S. at 24 (citation omitted). The Carter policy requires, inter alia, that the military accommodate gender transition by allowing certain servicemembers with gender dysphoria to undergo transition-related treatment at governmental expense and then serve in their preferred gender. Karnoski Pet. 5. After conducting a thorough and independent study -- including consideration of "data obtained since the [Carter] policy began to take effect" -- the Department found "substantial risks associated with" making such accommodations for individuals with gender dysphoria who seek or have undergone gender transition. Karnoski Pet. App. 206a. In particular, the Department determined that "exempting such persons from well-established mental health, physical health, and sex-based standards * * * could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." Ibid.

Respondents' reliance on congressional testimony by the military's Service Chiefs is misplaced. E.g., Karnoski Stay Appl.

Opp. 26-28. The Service Chiefs testified in April 2018 that they were unaware of any issues regarding service by "transgender servicemembers." 18-676 Washington Br. in Opp. App. 425a. Following that testimony, however, former Secretary of Defense James Mattis himself testified that it would have been "impossible" for the Service Chiefs to have been aware of any such issues because the Carter policy itself "prohibit[s] that very information from coming up" to "the service chief level." Karnoski C.A. E.R. 491. Moreover, the Service Chiefs were asked only generally about "transgender" military service. E.g., 18-676 Washington Br. in Opp. App. 425a, 426a, 431a. Even under the Mattis policy, however, transgender individuals may serve openly, so long as they meet applicable standards, including standards associated with their biological sex. Karnoski Pet. App. 208a. The Department's concerns with the Carter policy lie not in the fact that it permits transgender individuals to serve, but in the fact that it requires accommodations and exemptions for individuals with gender dysphoria and, in particular, those who seek or have undergone gender transition. Id. at 197a-198a, 206a.

Respondents also contend that there is no risk of harm to the military absent a stay because the Carter policy merely requires "transgender servicemembers to meet the same * * * standards as all other servicemembers." Doe Stay Appl. Opp. 38. But in fact, the Carter policy contains a number of significant "exempti[ons]" from "well-established mental health, physical health, and sex-

based standards." Karnoski Pet. App. 206a. For example, the Carter policy permits individuals with a history of gender dysphoria to join the military after achieving 18 months of stability, even though individuals with similar mental-health conditions are subject to disqualification (absent a waiver) or longer stability periods. Id. at 199a. The Carter policy also permits individuals with gender dysphoria who have undergone gender transition to serve in their preferred gender, "exempt[ing] [them] from the uniform, biologically-based standards applicable to their biological sex." Id. at 185a. In the military's professional judgment, such "exempti[ons]" render the Carter policy contrary to "military effectiveness and lethality." Id. at 206a.

Respondents further err in contending that the timing of the government's requests for this Court's intervention indicate an absence of harm. E.g., Karnoski Stay Appl. Opp. 28-29. Throughout this litigation, the government has made considerable effort to expedite proceedings below. In Karnoski -- the lead case in the Ninth Circuit -- the government briefed its appeal on an expedited basis and sought expedition of oral argument. Karnoski Pet. 13-14. The government likewise sought an expedited briefing schedule in the D.C. Circuit in Doe. 18-677 Pet. (Doe Pet.) 11-12.

At the same time, the government has refrained from seeking this Court's intervention until plainly necessary. Thus, the government did not seek certiorari before judgment until it was clear that any decision of the courts of appeals would come too

late for this Court to review such a decision in the ordinary course this Term. And the government did not seek a stay from this Court immediately after the Ninth Circuit denied a stay in Karnoski, see Karnoski Pet. App. 82a-83a, because it was still possible at that point for the Ninth Circuit to render a reasonably prompt decision on the validity of the injunction. Moreover, once the Ninth Circuit denied a stay in Karnoski, there was no point in seeking stays of the preliminary injunctions in Doe or Stockman; given the nationwide scope of the injunction in Karnoski, obtaining stays in the other cases would have had no practical effect.

The government's decision not to pursue appeals of the original nationwide preliminary injunctions in these cases is likewise immaterial. Those nationwide injunctions were issued before the announcement of the Mattis policy. Karnoski Pet. 10-11; Doe Pet. 10-11; 18-678 Pet. 10. And both the D.C. and the Fourth Circuits had denied the government's requests for partial stays of those nationwide injunctions pending appeal. Karnoski Pet. 11; Doe Pet. 10. Appealing the injunctions at that juncture thus made little sense, given the Department's ongoing and nearly completed review, which could (and ultimately did) lead to a new and different policy, and the fact that, absent stays in every case, the military would be forced to implement the Carter accession standards in any event.

Finally, respondents are clearly wrong when they contend that the government's decision to seek a stay as an alternative to

certiorari before judgment shows that the need for relief is not urgent. E.g., Karnoski Stay Appl. Opp. 30. If certiorari before judgment were granted, the Court would likely definitively resolve the issue by the end of this Term. In contrast, if the Court denies certiorari before judgment, then, absent a stay, the military will be forced to maintain a policy it believes antithetical to military readiness for potentially another year or more. The difference between those two scenarios in terms of harm to military readiness is obvious, which is why the government took the reasonable approach of seeking a stay only if the Court determined not to resolve the issue this Term.

* * * * *

For the foregoing reasons and those stated in the stay applications, if the petitions for writs of certiorari before judgment are denied, the injunctions should be stayed in their entirety pending the disposition of the appeals in the courts of appeals and, if a court of appeals affirms, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. At a minimum, the Court should stay the nationwide scope of each injunction, such that each injunction bars the implementation of the Mattis policy only as to the individual respondents in each case who are currently serving in the military or seeking to join it.

Respectfully submitted.

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