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VIA CM/ECF

August 15, 2018

Ms. Molly C. Dwyer
Clerk, United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

RE: *Karnoski v. Trump,* No. 18-35347 (calendared for argument October 10, 2018)

Dear Ms. Dwyer:

We write in response to plaintiffs' August 10 letter concerning *Doe v. Trump*, No. 17-1597 (D.D.C. Aug. 6, 2018). That decision simply repeats the errors of the ruling under review.

First, the *Doe* court wrongly concluded that the 2018 policy "is not a 'new policy,'" but "a plan that *implements*" an alleged 2017 presidential "directive that transgender people be excluded from the military." Op.9. In doing so, it failed to grapple with the substantial differences between the two policies or the fact that the President revoked his 2017 directives at the request of Secretary Mattis. Opening Br. 41-44; Reply Br. 2-6. Instead, it declared that the 2018 policy effectuates "a blanket ban on all 'transgender individuals'" by (1) "targeting proxies of transgender status, such 'gender dysphoria' and 'gender transition,'" and (2) by requiring transgender individuals without gender dysphoria to serve "'in their biological sex.'" Op.5-6. But the court never addressed the fact that the Carter policy, which it ordered the military to maintain, shared these two features. Opening Br. 43-44; Reply Br. 3-5. Instead, it dismissed "[a]ny similarities" between the two policies as "red herrings," without explaining why a difference in the *size* of their exceptions rendered the policies "*fundamentally* different." Op.29 n.12 (acknowledging 2018 policy permits "a small group" of transgender individuals to serve in their preferred gender).

Second, the court incorrectly deemed the 2018 policy likely unconstitutional due to what it viewed as "unusual factors" surrounding "the issuance of the [President's] 2017 directives." Op.32. Those factors included "the recent rejection of [the President's] reasons by the military," Op.3, which cannot be said about a policy *recommended* by the military. Its only attempt to resolve this inconsistency was to dismiss the military's latest judgment as "*post hoc*" and "not truly independent," Op.33, notwithstanding the unaddressed fact that Secretary Mattis had ordered a review of the Carter policy *before* the President's 2017 tweets. In any event, this analysis reduces to the indefensible proposition that because of the President's statements last year, the military cannot depart from the Carter policy for the remainder of this administration. Reply Br. 8-10.

Sincerely,

s/ *Marleigh D. Dover*
Marleigh D. Dover
Attorney

cc: all counsel (via CM/ECF)

## CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

*s/Marleigh D. Dover*
Marleigh D. Dover