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VIA CM/ECF

September 27, 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' September 25 letter concerning *Stockman v. Trump*, No. 17-1799 (C.D. Cal. Sept. 18, 2018). That decision repeats the errors of the ruling under review.

First, the *Stockman* court incorrectly concluded that the 2018 policy is "the same" as an alleged 2017 presidential directive to "ban[] transgender people from the military." Op.10. In doing so, it never grappled with the substantial differences between the two policies, the military's study underlying the 2018 policy, or the fact that the President had revoked his 2017 directives at Secretary Mattis's request. Instead, it emphasized the 2018 policy's requirement that some transgender servicemembers adhere to neutral conduct "standards associated with their biological sex." Op.8. It failed to address, however, that the Carter policy, which it ordered the military to maintain, shared that feature, and that the 2018 policy let other transgender servicemembers adhere to the standards associated with their preferred gender. Opening Br. 42-44; Reply Br. 3-5.

Second, the court wrongly dismissed the 2018 policy as "an after-the-fact justification[]" of the President's tweet "not entitled to military deference." Op.9-10. That analysis rests on the indefensible assumptions that the 2018 policy is "the same" as the one announced in the tweet and that the President cannot change his mind following further recommendations by "military experts." Op.10. The court also never

addressed the fact that Secretary Mattis had ordered a review of the Carter policy *before* that tweet or, in all events, the ruling in *Rostker v. Goldberg*, 453 U.S. 57, 74-75 (1981), that even post hoc justifications may sustain military policies alleged to trigger heightened scrutiny. Opening Br. 21-22, 46.

Third, the court incorrectly held that the 2018 policy failed constitutional scrutiny. Any alleged over- or under-inclusivity stemming from the policy's exceptions (Op.12), however, simply reflects a careful cost-benefit analysis. Reply Br. 21. And although the court dismissed considerations of "unit cohesion" as impermissible, Op.13, the Supreme Court and this Court have held otherwise. *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986); *Witt v. Department of Air Force*, 527 F.3d 806, 821 (9th Cir. 2008).

Sincerely,

s/ Tara S. Morrissey

Tara S. Morrissey

Attorney

cc: all counsel (via CM/ECF)

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 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/Tara S. Morrissey

TARA S. MORRISSEY