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VIA ELECTRONIC FILING

Molly C. Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
The James R. Browning Courthouse
95 Seventh Street
San Francisco, CA 94103

Re: *Karnoski v. Trump*, No. 18-35347 (argued October 10, 2018)

Dear Ms. Dwyer:

The unpublished decision in *Doe* (in which that panel saw "no precedential value," D.C. Cir. L.R. 36(e)(2)) does not help Appellants.

The panel agreed that the government must show "a significant change" to dissolve the injunction. But neither of the "changes" *Doe* identified withstands even cursory analysis.

First, *Doe* viewed the Implementation Plan as an attempt to "cure" "procedural deficiencies" in connection with the Ban. That alone indicates that DoD was *not* developing a "new policy." Rather, it was implementing the President's directives as ordered—and as repeatedly acknowledged by Secretary Mattis in contemporaneous documents. *See* Appellees' Br. (Dkt. 40) at 9–10 (citing E.R.208–215)). The district court here did not clearly err in this factual determination.

Second, the Implementation Plan does ban open service, as explicitly ordered by the 2017 Presidential Memorandum. The "reliance exemption," Op. 3, is not

new; the Memorandum specifically contemplated it. *See* E.R.215 (ordering Secretary Mattis to determine how to "address transgender individuals currently serving" as part of the Implementation Plan). And, the fact that the Implementation Plan "allows" transgender persons to serve in their "biological sex" is not a change from either the pre-Carter ban, which had "generally prohibited *openly* transgender individuals" from service, or the Memorandum, which ordered a "return" to that ban. E.R.214 (emphasis added).

Finally, a "significant change" is only a *necessary* threshold showing to dissolve an injunction—it is not *sufficient* by itself. Thus, even if the Implementation Plan were a significant change, this Court must still determine whether that change altered the relevant preliminary-injunction factors such that the injunction should be dissolved. *Doe* did not even reference the irreparable harm to Appellees or the balance of equities. And, even as to the merits, it did not conclude that the government was likely to succeed—only that it raised "substantial arguments," largely based on military deference. This Court has already held that heightened scrutiny continues to apply in the military context. Appellees' Br. at 33-34 (discussing *Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008)). All of those factors weigh against dissolving the injunction here.

Respectfully submitted,

/s/ *Stephen R. Patton*

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 2019, the attached letter was filed electronically through the Court's CM/ECF system, and was provided by electronic mail to all counsel of record.

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