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March 19, 2019

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:

Neither of the *Doe* concurrences provides any analysis that is helpful or persuasive in deciding the only dispute remaining in these appeals: whether the district court committed clear error in denying mandamus. *See* Dkt. 145 (appellees' withdrawal of opposition to vacatur). Instead, both underscore the need for full discovery into the black box of what actually occurred between the President's 8/25/17 Memorandum and the 3/23/18 release of the "Mattis Plan" and Report. That includes whether that plan was the result of independent analysis, as the government claims, or the military's implementation of its Commander-in-Chief's "directives." Plaintiffs' constitutional rights, and the courts' discharge of their constitutional obligations, depend on answers to these factual questions.

To begin, both concurrences are premised on rebutting a strawman argument that "all transgender persons undergo a gender transition." Wilkins Op.11; Williams Op.2. That some transgender persons do not transition, including because of feared discrimination, does not change that the "Mattis Plan" targets only transgender persons; they are the only persons affected by a rule that

individuals can only serve in "their biological sex." By analogy, that not all gay people marry does not change that a ban on marriage by same-sex couples still targets only gay people.

Both opinions are also premised on assumed facts that are either refuted or unsupported by the current, limited record. For example, Judge Wilkins assumes the Report "was prepared by" the "Panel of Experts." Op.8. As explained in Plaintiffs' motion to supplement (No. 18-72159, Dkt. 244), that is factually inaccurate. Defendants have refused to disclose who wrote the Report, the circumstances under which it was prepared, or whose views it represents. Similarly, Judge Williams' opinion (which urged a result—dismissal in order to avoid "complete discovery"—that the majority rejected) assumes that "the Ban" began with Secretary Mattis' decision to *delay* only *accessions* for six months, that the President's tweets merely agreed with that decision, and that Secretary Mattis "had already put" the entire Carter policy "on hold." Op.15.

The only relevance of the *Doe* concurrences is that they underscore why full discovery is essential and mandamus should be denied.

Respectfully submitted,

/s/ *Stephen R. Patton*

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 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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