U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

January 4, 2019

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Donald J. Trump, President of the United States, et al. v. Ryan Karnoski, et al., No. 18-676;
Donald J. Trump, President of the United States, et al. v. Jane Doe 2, et al., No. 18-677;
Donald J. Trump, President of the United States, et al. v. Aiden Stockman, et al., No. 18-678

Dear Mr. Harris:

The government is today filing replies in support of petitions for writs of certiorari before judgment or stays in the alternative in the above-captioned cases. This morning, the D.C. Circuit issued the attached per curiam judgment in *Doe*. The court of appeals reversed the district court's denial of the government's motion to dissolve the preliminary injunction, vacated the preliminary injunction, and denied the government's motion to stay the injunction as moot. The D.C. Circuit's decision underscores why this Court's immediate review is warranted.

In vacating the preliminary injunction, the court of appeals determined that the district court had committed "clear error" in two ways. First, the court of appeals held that the district court clearly erred by treating the Mattis policy as "not a new policy but rather an implementation of the policy directives" in the President's 2017 memorandum. Op. 2-3. The court of appeals explained that the government took "substantial steps" after the issuance of the President's memorandum, including "the creation of a panel of military and medical experts, the consideration of new evidence gleaned from the implementation of the [Carter Policy] * * * , and a reassessment of the priorities of the group that produced the Carter Policy." *Ibid.* Those steps, the court of appeals concluded, meant that the Mattis policy was not "foreordained." *Id.* at 3.

Second, the court of appeals held that the district court had clearly erred by treating the Mattis policy as "the equivalent of a blanket ban on transgender service." Op. 3. The court of appeals explained that, "[a]lthough the Mattis Plan continues to bar many transgender persons from joining or serving in the military, the record indicates that the Plan allows some transgender persons barred under the military's standards prior to the Carter Policy to join and

serve in the military." *Ibid.* In particular, the record evidence "repeatedly state[s] that not all transgender persons seek to transition to their preferred gender or have gender dysphoria." *Ibid.* The Mattis policy thus "appears to permit some transgender individuals to serve in the military consistent with established military mental health, physical health, and sex-based standards," based upon "the 'considered professional judgment' of 'appropriate military officials.'" *Id.* at 4 (quoting *Goldman* v. *Weinberger*, 475 U.S. 503, 509 (1986)). The court of appeals concluded that "the military has substantial arguments for why the Mattis [policy] complies with the equal protection principles of the Fifth Amendment," and "any review must be appropriately deferential in recognition of the fact that the Mattis [policy] concern[s] the composition and internal administration of the military." *Ibid.* (citation omitted).

The D.C. Circuit's decision is squarely at odds with the district court decisions declining to dissolve the preliminary injunctions in *Karnoski* and *Stockman*. Those district courts, like the district court in *Doe*, enjoined the Mattis policy as an implementation of an alleged presidential directive to ban transgender individuals from serving in the armed forces. The D.C. Circuit's decision in *Doe*, moreover, throws into stark relief the problems with the nationwide scope of these preliminary injunctions. Today's vacatur of the injunction in *Doe* is essentially academic: the military remains constrained by, and all of the *Doe* respondents continue to benefit from, the nationwide injunctions in *Karnoski* and *Stockman*. If the Ninth Circuit were to affirm in either or both of those cases, it would create a square circuit conflict. And even if the Ninth Circuit were promptly to issue a decision vacating both injunctions, the military would still be subject to a fourth nationwide preliminary injunction issued by a district court in Maryland. See *Stone* v. *Trump*, 280 F. Supp. 3d 747 (D. Md. 2017). The government moved to dissolve that injunction in March 2018 following issuance of the Mattis policy, but the district court has not ruled on the government's motion. Given the remaining injunctions, only action by this Court, whether in granting the government's petitions or its stay applications, is likely to permit the military to implement the Mattis policy—which the D.C. Circuit has now concluded is supported by "substantial constitutional arguments," Op. 4—in the reasonably near future.

The government therefore respectfully requests that this Court grant the government's petitions in *Karnoski* and *Stockman* and hold the government's petition and stay application in *Doe* to account for the possibility that the *Doe* respondents may seek en banc review in the D.C. Circuit. In the alternative, the Court should stay the injunctions in *Karnoski* and *Stockman* in their entirety. At a minimum, the Court should stay the nationwide scope of those injunctions, such that each injunction bars the implementation of the Mattis policy only as to the individual respondents in each case.

Sincerely,

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cc: See Attached Service List

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