No. 18-676

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

v.

RYAN KARNOSKI, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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ARGUMENT

Respondents submit this supplemental brief in response to the government's January 4, 2019 letter concerning the D.C. Circuit's recent, unpublished panel decision in *Doe 2 v. Shanahan*, No. 18-5257, 2019 WL 102309 (D.C. Cir. Jan. 4, 2019) (per curiam) ("*Doe*"). The government claims the panel's decision "underscores why this Court's immediate review is warranted." (Ltr. at 1.) In fact, *Doe* establishes just the opposite.

I. *Doe* Confirms the Petition for Certiorari Before Judgment Should Be Denied.

As an initial matter, there remains no split among the circuits on the fact-bound issues raised by the government. *See* Stephen M. Shapiro, et al., *Supreme Court Practice* § 4.8, at 257 (10th ed. 2013) ("The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or in another circuit. . . . It is the duty of the courts of appeals to . . . supervise the decisions of the various district courts.").

In addition, the *Doe* decision further supports each of Respondents' grounds for denying the government's request for this Court's extraordinary intervention by way of certiorari before judgment: (1) the government has not shown an urgent need for immediate determination, as required by Rule 11

(*Karnoski* Br. in Opp. at 15-22), (2) in all events, a messy procedural posture, unresolved factual issues, and an incomplete record make this petition a poor vehicle for review (*id.* at 22-29), and (3) the district court decisions were correct (*id.* at 29-37).

No Urgency. The pending appeals in the D.C. and Ninth Circuits are the first time the government has prosecuted appellate review of the preliminary injunctions. *Doe* demonstrates that the courts of appeals can, and will, act expeditiously in deciding appeals of disputed issues in these cases. The decision also demonstrates that the ordinary appellate process may provide the government the relief it seeks without extraordinary intervention from this Court.

The *Doe* decision also does not find, or even suggest, any real-world or actual harm, or urgent need, that would support this Court's immediate intervention. (*Karnoski* Br. in Opp. at 15-22.) Nor does it address, let alone explain away, the government's serial failures to seek this Court's intervention despite numerous opportunities to do so, which belie any claim of urgency or need for immediate review. (*Id.* at 16-17.)

Vehicle Problems. The *Doe* decision also highlights the unresolved procedural and factual issues that make this petition a poor vehicle for adjudicating the underlying issue on which the government seeks review—the constitutionality of the Implementation Plan (which the government refers to

as the "Mattis policy"). (*Karnoski* Pet. at 18 (requesting certiorari for "a prompt resolution of the validity of Secretary Mattis's proposed policy"); *id.* at 27 (requesting certiorari and consolidation "[t]o ensure an adequate vehicle for the timely and definitive resolution of this overall dispute" including "all the relevant [constitutional] claims" in *Karnoski*)).

As to procedural issues, the *Doe* panel agreed with Respondents that the issue here is whether the government has demonstrated a "significant change" such that the preliminary injunction previously entered by the district court should be dissolved. (*Karnoski* Pet. at 23-25.) Even though the panel reversed the district court's ruling on that issue, it still did not address, let alone decide, whether the Implementation Plan is constitutional. To the contrary, it expressly declined to do so. (*Doe* Slip Op. at 4.) Despite adopting the government's (flawed) view of the facts, *Doe* failed to produce what the government requests through this petition: a decision determining "the validity of Secretary Mattis's proposed policy." (*Karnoski* Pet. at 18.) Instead, *Doe* confirms that the procedural posture of this petition "would not only complicate this Court's review, it could cause the Ban's legality to evade this Court's review entirely in this vehicle." (*Karnoski* Br. in Opp. at 24-25.)

As to factual issues, *Doe* confirms that "the legal question presented in this petition is thoroughly fact-bound—and the facts are hotly contested,

dispositive, and still in development." (*Id.* at 25.) This includes, among other things, both of the purported "changes" in circumstances the *Doe* panel identified. (*Doe* Slip Op. at 2-3.) For the reasons explained below, the *Doe* decision illustrates the dangers of addressing these fact-bound issues without the benefit of a fully developed record and a thorough vetting in the lower courts. This is particularly true where, as here, the government contends that these disputed fact issues also lie "at the heart of Respondents' constitutional claims" and therefore may be dispositive on the merits. (*Karnoski* Pet'rs' Pet. for Cert. Before J. Reply Br. at 8; *Karnoski* Pet'rs' Stay Appl. Reply Br. at 3.)

The District Courts Were Correct. The panel in *Doe* agreed with Respondents that the issue presented is whether the government can show that the district courts "abused [their] discretion" and committed "clear error" in making the fact-bound decision that the government had not met its "burden of establishing . . . a significant change in facts," such that the preliminary injunction previously entered should be dissolved. (*Doe* Slip Op. at 2.) However, neither of the purported "changes" the panel identified withstands even cursory analysis.

First, *Doe* viewed the Implementation Plan as an attempt to "cure the procedural deficiencies the [district] court [had] identified in the enjoined 2017 Presidential Memorandum," including by creating a panel of experts. (*Id.* at 2-3.) But that determination alone indicates that DoD was *not* developing a "new"

substantive policy. Rather, it was implementing the President's directives as ordered. More fundamentally, the factual dispute regarding whether the Implementation Plan is new or materially different from the President's 2017 Memorandum did not depend on "cur[ing] the procedural deficiencies the [district] court identified in the enjoined 2017 Presidential Memorandum." (*Id.* at 2.) Rather, it depended on whether the Implementation Plan was developed "independent of the policy announced in the 2017 Presidential Memorandum." (*Id.* at 3.) The panel specifically noted this potentially dispositive issue—and that it was "dispute[d]." (*Id.*; *see also Karnoski* Pet'rs' Pet. for Cert. Before J. Reply Br. at 7-8 ("[W]hether 'changed circumstances' justify dissolving the injunctions . . . turns on . . . whether the Mattis Policy is a mere 'implementation'" of the President's 2017 Memorandum); *Karnoski* Pet'rs' Stay Appl. Reply Br. at 3 (same)). But the panel did not even purport to resolve that issue. Instead, it simply asserted that the post hoc "procedural" steps it cited nevertheless demonstrated "that it was error for the district court to conclude that the Mattis Plan was foreordained." (*Doe* Slip Op. at 3.) But whether the Implementation Plan was "foreordained" depends on whether it was, in fact, "new" and "independent" or simply the implementation of the President's directives as ordered in the 2017 Memorandum—a question the panel failed to answer. In any event, regardless of whether the outcome was "foreordained" (which it was), the record shows that the Implementation Plan was, at a minimum,

meaningfully constrained by the President's decision to adopt the Ban in 2017. Even under that view of these disputed facts, the Implementation Plan is still unconstitutional.

Moreover, the panel entirely failed to address the many contemporaneous documents in which Secretary Mattis repeatedly acknowledged that, in taking these procedural steps, he was simply implementing the President's directives. (*See, e.g.*, Pet. App. at 40a (Mattis statement, four days after the 2017 Memorandum, that "as directed" DoD would "develop a study and implementation plan" that "would carry out the president's policy and directives," and appoint a "panel of experts . . . to provide advice and recommendations on the implementation of the president's direction."); *id.* at 41a (September 14, 2017 Memorandum confirming that, by the date the President had ordered, Mattis would "present the President with a plan to implement [his] policy and directives"); *id.* at 104a (separate September 14, 2017 Memorandum announcing the appointment of a panel of experts to study and recommend an "Implementation Plan" that would "effect the policy and directives in [the] Presidential Memorandum")). Particularly given the inherent authority structure of the military, it was not clearly erroneous for the district court to find that military officials would not have felt discretion to contradict their Commander in Chief.

Second, the supposed differences between the Implementation Plan and the 2017 Memorandum cited by the panel (*Doe* Slip Op. at 3) are likewise contradicted by the record. The "reliance exemption" is not new; it was specifically contemplated by the Memorandum. *See* Pet. App. at 101a (2017 Presidential Memorandum ordering Secretary Mattis to determine how to "address transgender individuals currently serving" as part of the Implementation Plan). And, 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" serving), or the Memorandum (which sought a "return" to that prohibition). Pet. App. at 99a (emphasis added).

Finally, a "significant change" is only a *necessary* threshold showing to dissolve an injunction—it is not *sufficient* for dissolution. Thus, even if the Implementation Plan were a significant change, the Court of Appeals would have had to determine whether that change altered the relevant preliminary-injunction factors such that the injunction should be dissolved. But *Doe* did not even reference the absence of any showing that the government would be irreparably harmed without a stay, the irreparable harm to Respondents from a stay, or the balance of equities between the parties. And, even as to the merits, it did not conclude the government was likely to succeed—only that it had raised "substantial arguments." (*Doe* Slip. Op. at

4.) All of those factors weigh against dissolving the injunction here.

II. *Doe* Does Not Advance The Government's Case For A Stay.

Doe also does not help the government's stay arguments. As Respondents explained in their opposition, the government does not satisfy *any* of the factors required for that extraordinary relief, including demonstrating a likelihood that this Court will grant certiorari and reverse, establishing irreparable harm absent a stay, and showing that the balance of equities weighs in its favor. (*Karnoski* Stay Appl. Opp. at 2-4, 18.) *Doe* does nothing to change that analysis.

First, *Doe* does not increase the likelihood that this Court will grant certiorari. For the reasons above—including that this remains a fact-bound, splitless issue presented in a poor vehicle and requiring further percolation—certiorari before judgment is unlikely. If anything, *Doe* makes it *less* likely that certiorari will be granted. The government no longer seeks certiorari in *Doe*. (*See* Ltr. at 2 (asking the Court to hold the *Doe* petition)). Should the Ninth Circuit rule against Respondents, presumably the government would no longer seek this Court's intervention.

Second, *Doe* also does not increase the likelihood that this Court would reverse the *Karnoski* injunction, should it grant the petition for certiorari

before judgment. For reasons already explained, the district court here did not abuse its discretion or commit clear error in finding that there had *not* been a significant change in circumstances that would warrant dissolving its earlier injunction. (*Supra* at 3-4; *Karnoski* Br. in Opp. at 29-37; *Karnoski* Stay Appl. Opp. at 18-25.) *Doe* actually supports Respondents' position and refutes the government's position concerning the precise question presented and the applicable standard, and does not reach the merits of the constitutional claims. And for the reasons set forth above, the *Doe* panel's conclusion that there has been a "significant change" that justifies dissolving the injunction cannot withstand even cursory analysis. *See supra* at 2-4.

Third, *Doe* does not point to *any* harm to the government from the status quo (open service pursuant to the Carter policy, which has now been in effect for 2½ years), let alone the irreparable harm required for a stay. (*Karnoski* Stay Appl. Opp. at 25-27.)

Fourth, the *Doe* decision also does not address, let alone rebut, the serious irreparable harm to Respondents and other transgender persons from a stay. (*Id.* at 30-32.)

CONCLUSION

For all of the foregoing reasons, *Doe* further confirms that neither certiorari before judgment nor a stay are warranted here.

Respectfully submitted,

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