

The Honorable Marsha J. Pechman

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as
President of the United States, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

**DECLARATION OF JORDAN HEINZ
IN SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY
JUDGMENT**

I, Jordan Heinz, swear under penalty of perjury under the laws of the United States to the following:

1. I am counsel of record for Plaintiffs in this action, am over the age of 18, and am competent to be a witness. I make this declaration in support of Plaintiffs’ Reply to Defendants’ Rule 56(d) Response to Plaintiffs’ and Intervenor’s Motions for Summary Judgment based on facts within my own personal knowledge.

2. The Court granted Plaintiffs’ motion for a preliminary injunction on December 11, 2017. The very next day, Plaintiffs’ counsel informed Defendants’ counsel that Plaintiffs would be moving for summary judgment and that they anticipated filing the motion in January 2018. This occurred during the parties’ Rule 26(f) conference on December 12, 2017. Following the conference, Plaintiffs served written discovery on Defendants, and Plaintiffs have received legal responses to their document requests and interrogatories.

1 3. Plaintiffs repeatedly confirmed to Defendants that they still planned to move for
2 summary judgment at subsequent telephonic conferences between the parties on December 19,
3 2017, January 12, 2018, and January 17, 2018.

4 4. Plaintiffs also disclosed to Defendants in these conferences that they intended to
5 rely upon the same argument and evidence for their summary judgment motion as that submitted
6 in support of the preliminary injunction motions filed in this and other cases challenging the
7 government's policy of excluding transgender people from military service.

8 5. During the telephonic conference between the parties on December 19, 2017,
9 Plaintiffs' counsel specifically asked Defendants' counsel whether Defendants planned to seek a
10 Rule 56(d) continuance in response to Plaintiffs' motion for summary judgment. Defendants'
11 counsel responded he did not "anticipate laying out more discovery that we'd need."

12 6. At no point prior to Defendants' February 12, 2018 deadline for opposing
13 Plaintiffs' motion for summary judgment did Defendants seek discovery from Plaintiffs or even
14 express any intent to do so.

15 7. On February 5, 2018, Defendants' counsel contacted counsel for Plaintiffs and the
16 State of Washington seeking a 45-day extension of time to oppose summary judgment. By this
17 point, the deadline for a motion seeking an extension had already passed, because such a motion
18 requires a second Friday noting date under Local Civil Rule 7(d)(2)(A).

19 8. When counsel for Plaintiffs and Washington probed the basis for the request
20 during a telephone conference on February 6, 2018, Defendants' counsel never stated that they
21 needed additional time to take discovery of Plaintiffs. Instead, Defendants' counsel stated that
22 their "primary motivation" for seeking delay was because they had been focused on document
23 production in another case, *Doe v. Trump*, No. 17-1597 (D.D.C. filed Aug. 9, 2017). They also
24 indicated they wanted more time to be able to prepare declarations to submit from their own
25 witnesses, who are necessarily under Defendants' control rather than Plaintiffs. Finally, they
26 expressed that they believed the parties and Court should await the implementation plan and
27 study due on February 21, 2018.

1 9. Defendants also informed Plaintiffs on February 5, 2018 that Defendants intended
2 to seek a protective order to *freeze* further discovery. Defendants wrote that, in their view, “it
3 does not make sense for the parties to plow forward with discovery beyond what is occurring in
4 the other cases when there is a [preliminary injunction] in place and Plaintiffs and Washington
5 have both filed potentially dispositive motions for summary judgment.” Attached as Exhibit A is
6 an email exchange between counsel for Defendants, Plaintiffs, and Washington.

7
8 I declare under the penalty of perjury that the foregoing is true and correct.

9
10 DATED: February 16, 2018

11 /s/ Jordan Heinz
12 Jordan Heinz
13 Kirkland & Ellis LLP
14 300 N. LaSalle
15 Chicago, IL 60654
16 (312) 862-2000

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Attorney for Plaintiffs

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on February 16, 2018.



Samantha Everett, WSBA #47533
samantha@newmanlaw.com
Newman Du Wors LLP
2101 Fourth Ave., Ste. 1500
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(206) 274-2800

Exhibit A

Peter Renn

From: Melody, Colleen (ATG) <ColleenM1@ATG.WA.GOV>
Sent: Tuesday, February 6, 2018 5:42 PM
To: Peter Renn; vanessa.barsanti@kirkland.com; Parker, Ryan (CIV); Baker, La Rond (ATG); jheinz@kirkland.com
Cc: Carmichael, Andrew E. (CIV); Skurnik, Matthew (CIV); Natalie Nardecchia; Tyson, Ben
Subject: RE: Karnoski v. Trump: Call

Ryan:

I appreciate our call of earlier today.

Washington is likewise unable to consent to your request for an extension of 45 days to file your opposition to summary judgment in this case. Washington relied exclusively on Defendants' evidence and public documents in support of its motion for summary judgment, and the arguments and evidence offered by the Private Plaintiffs are familiar from this and other litigation on these same issues.

As you mentioned on today's call, Defendants take the position that the February 21 implementation plan may have a significant impact on this case. To the extent that Defendants' extension request is intended to allow time for the further development, finalization, and release of the implementation plan, Washington's position is that the development of post hoc evidence is to justify the challenged policy is an insufficient ground for a briefing extension.

Under Local Rule 7(d)(2)(A), and because nearly two weeks have passed since Washington and the Private Plaintiffs filed their motions, we do not believe there is sufficient time for the parties to brief any motion for relief from a deadline before next Monday's responsive briefing deadline. If Defendants nonetheless intend to proceed with a motion, please let me know so that I may provide Washington's statement of position for your motion.

Sincerely,

Colleen

Colleen M. Melody

Civil Rights Unit Chief
Office of the Washington State Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-5342

From: Peter Renn [mailto:prenn@lambdalegal.org]
Sent: Tuesday, February 06, 2018 4:54 PM
To: vanessa.barsanti@kirkland.com; Parker, Ryan (CIV) <Ryan.Parker@usdoj.gov>; Baker, La Rond (ATG) <LaRondB@ATG.WA.GOV>; jheinz@kirkland.com
Cc: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Skurnik, Matthew (CIV) <Matthew.Skurnik@usdoj.gov>; Melody, Colleen (ATG) <ColleenM1@ATG.WA.GOV>; Natalie Nardecchia <nNardecchia@lambdalegal.org>; Tyson, Ben <ben.tyson@kirkland.com>
Subject: RE: Karnoski v. Trump: Call

Ryan,

Thank you for speaking with us this morning regarding your request for a 45-day extension of time to oppose the summary judgment motions. Although we are generally willing to work with you on deadlines, including most recently in granting you a two-week extension on your response to our document requests and interrogatories, we aren't able to agree to your extension request on this occasion.

We informed you back in December that we would be moving for summary judgment. In addition, the argument and evidence submitted in support of our motion for summary judgment is substantially similar to that filed in support of the preliminary injunction motion in this and other cases challenging the policy. We also informed you of that similarity in advance of when we actually filed the motion for summary judgment. Likewise, the amicus briefs filed in support of the Plaintiffs were in large part previously filed in the other cases several months ago.

Furthermore, we understand that Defendants recently represented to the court in the Stone case that the reason you did not identify any witnesses in your initial disclosures is because you intend to defend only whatever finalized policy emerges from the implementation plan that must be completed by February 21st. If that is your position, and you intend to argue that Plaintiffs' current challenge is moot, we don't see why you would need the additional time requested to prepare your opposition.

Finally, on the discovery front, because Defendants plan to oppose the summary judgment motion, we still need to continue to prosecute our own case and prepare for trial. We therefore cannot agree to a protective order that prevents us from pursuing discovery to the extent such discovery is not already sought in other cases challenging the policy.

Regards,
Peter

Peter Renn
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From: Barsanti, Vanessa [<mailto:vanessa.barsanti@kirkland.com>]

Sent: Monday, February 5, 2018 1:22 PM

To: Parker, Ryan (CIV) <Ryan.Parker@usdoj.gov>; Peter Renn <prenn@lambdalegal.org>; *LaRondB@ATG.WA.GOV <LaRondB@ATG.WA.GOV>; jheinz@kirkland.com; daniel.siegfried@kirkland.com

Cc: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Skurnik, Matthew (CIV)

<Matthew.Skurnik@usdoj.gov>; ColleenM1@ATG.WA.GOV

Subject: RE: Karnoski v. Trump: Call

Ryan,

Apologies, but we are not available this afternoon. We are generally available tomorrow morning. I'm also looping in Colleen for her availability as I understand LaRond may be out this week.

Vanessa Barsanti

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From: Parker, Ryan (CIV) [<mailto:Ryan.Parker@usdoj.gov>]

Sent: Monday, February 5, 2018 11:25 AM

To: *prenn@lambdalegal.org <prenn@lambdalegal.org>; *LaRondB@ATG.WA.GOV <LaRondB@ATG.WA.GOV>; Barsanti, Vanessa <vanessa.barsanti@kirkland.com>; Heinz, Jordan M. <jheinz@kirkland.com>; Siegfried, Daniel I. <daniel.siegfried@kirkland.com>

Cc: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>; Skurnik, Matthew (CIV) <Matthew.Skurnik@usdoj.gov>

Subject: Karnoski v. Trump: Call

All,

Could we set up a brief call this afternoon? I'd like to discuss a few items that I'll preview in this email.

First, we are going to need additional time to respond to the two motions for summary judgment, dozens of declarations, and many amicus briefs that have been filed in this case. Would you be willing to consent to a 45 day enlargement of time for our oppositions? We will, of course, give Plaintiffs and Washington as much time as they need for their replies.

Second, we are planning to file a motion for a limited protective order that would relieve Defendants of the burden of responding to Plaintiffs latest discovery requests or producing witnesses for depositions while Plaintiffs' motion for summary judgment is pending. We are, of course, still planning to respond to Plaintiffs' first set of discovery requests this Friday and would allow Plaintiffs and Washington to participate in any of the depositions that occur in the other cases. In our view, it does not make sense for the parties to plow forward with discovery beyond what is occurring in the other cases when there is a PI in place and Plaintiffs and Washington have both filed potentially dispositive motions for summary judgment.

Third, I'd like to discuss a few discovery issues in advance of our production and responses on Friday.

Thanks,

Ryan B. Parker

Senior Trial Counsel
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Civil Division, Federal Programs Branch
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