

The Honorable Marsha J. Pechman

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

RYAN KARNOSKI, et al.,

*Plaintiffs,*

STATE OF WASHINGTON,

*Plaintiff-Intervenor,*

v.

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

*Defendants.*

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

**PLAINTIFFS’ REPLY IN SUPPORT  
OF PLAINTIFFS’ MOTION TO  
COMPEL DEFENDANTS’ INITIAL  
DISCLOSURES**

1 Defendants' opposition to Plaintiffs' motion to compel makes clear that the government  
2 does not intend to defend—because it cannot defend—President Trump's announced exclusion  
3 of transgender people from the military. Defendants profess in their opposition brief that they  
4 “do presently have a defense, as reflected in their opposition to summary judgment and cross-  
5 motion for summary judgment,” Defs.' Opp., Dkt. 199, at 6, yet also contend that their current  
6 disclosures identify “all of the witnesses and documents that they currently intend to rely upon to  
7 support their defenses,” *id.* at 1. As Defendants only disclose Plaintiffs themselves, and list no  
8 documents or witnesses supporting any justification for the exclusion of transgender people from  
9 the military, Defendants' disclosures and their opposition brief lay bare that Defendants make no  
10 attempt to substantively defend President Trump's accessions, retention, and medical bans.

11 Defendants instead painfully attempt to justify their deficient disclosures by stating that  
12 “until a final policy is publicly announced, there is simply no basis to supplement” their  
13 disclosures. *Id.* However, the government cannot ignore the retention, accessions, and medical  
14 bans issued by President Trump. Nor should the government be permitted to style whatever  
15 results from this study as a “final policy” or “new policy,” as this study is nothing more than a  
16 disguised *post hoc* rationalization for President Trump's ban. Under Rule 26, Defendants are  
17 required to disclose witnesses and documents that they “may use to support [their] claims or  
18 defenses.” Plaintiffs' claims relate to Defendants' ban on military service by transgender people  
19 and ban on related medical care. Plaintiffs ask this Court to compel Defendants' production of  
20 complete initial disclosures so Plaintiffs and the Court can confirm that Defendants either do not  
21 have a defense to the underlying ban, or that Defendants are not complying with their Rule 26  
22 disclosure obligations.

23 Defendants' other arguments are similarly unconvincing. *First*, there is no contradiction  
24 between Plaintiffs' motion for summary judgment and Plaintiffs' motion to compel, as  
25 Defendants repeatedly argue. “‘A major purpose’ of the initial disclosure requirements ‘is to  
26 accelerate the exchange of basic information about the case and to eliminate the paper work  
27 involved in requesting such information.’” *BWP Media USA Inc. v. Rich Kids Clothing Co.,*  
28 *LLC*, No. C13-1975-MAT, 2015 WL 347197, at \*4 (W.D. Wash. Jan. 23, 2015) (quoting 1993

1 advisory committee’s note), *aff’d sub nom. BWP Media USA Inc. v. Urbanity, LLC*, 696 F.  
2 App’x 795 (9th Cir. 2017). “The theory of disclosure under the Federal Rules of Civil Procedure  
3 is to encourage parties to try cases on the merits, not by surprise, and not by ambush.” *Ollier v.*  
4 *Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 862 (9th Cir. 2014). By contrast, Plaintiffs’  
5 motion for summary judgment concerns the narrower issue of whether there is a genuine issue of  
6 material fact that must be resolved by a factfinder. Defendants present no authority—because  
7 there is none—supporting their contention that a defendant is no longer required to serve  
8 complete and accurate initial disclosures because the plaintiff moved for summary judgment.

9 **Second**, even if Defendants are declining to defend President Trump’s retention,  
10 accessions, and medical bans, and instead plan to defend the implementation “policy that has yet  
11 to be announced,” Defs.’ Opp., Dkt. 199, at 4, Defendants should still be required to disclose the  
12 documents and witnesses they intend to rely upon concerning this purported “new policy.”  
13 Indeed, Defendants’ assertion that no Rule 26 information is available for disclosure flatly  
14 ignores Defendants’ own statements that the “policy-making process is now complete, and  
15 Secretary Mattis has transmitted his policy recommendation to the President.” Defs.’ Opp. to  
16 Mot. for Summ. J., Dkt. 194, at 11 n.5; *see also* Defs.’ Opp., Dkt. 199, at 4 (“At this point,  
17 Secretary of Defense Mattis has submitted a recommendation to the President, who is now  
18 reviewing that recommendation.”). Defendants have referenced numerous individuals and  
19 documents in their pleadings related to this “new policy” or “implementation study” that are  
20 nowhere identified in their initial disclosures, including:

- 21 • Secretary of Defense James N. Mattis, whom the President directed to submit an  
22 implementation plan. Defs.’ Opp. to Mot. for Summ. J., Dkt. 194, at 10.
- 23 • The Secretary of Homeland Security, with whom Secretary Mattis was directed to  
24 consult regarding the implementation plan. *Id.* at 10.
- 25 • The “panel of experts” assembled by Secretary Mattis in response to the  
26 Presidential Memorandum, and the “pertinent data, quantifiable and non-  
27 quantifiable” that the panel of experts analyzed. *Id.* at 10-11.

- 1 • The Deputy Secretary of Defense and Vice Chairman of the Joint Chiefs of Staff,  
2 who provided recommendations to Secretary Mattis regarding the implementation  
3 plan, and the “evidence and information” underlying those recommendations. *Id.*  
4 at 11.
- 5 • The “implementation plan” that was communicated to President Trump by  
6 Secretary Mattis on February 21, 2018. *Id.* at 10.

7 Defendants argue these witnesses and documents create a “genuine dispute of material fact  
8 regarding the applicable policy governing military service by transgender individuals,” *id.* at 11,  
9 but fail to identify *any* of these individuals or documents as evidence Defendants “may use to  
10 support its claims or defenses,” Fed. R. Civ. P. 26. The government apparently only intends to  
11 rely on *post hoc* evidence to support President Trump’s ban, if at all.<sup>1</sup> This strategy is nothing  
12 more than “whack-a-mole” gamesmanship that requires Plaintiffs to keep guessing at what  
13 evidence, if any, Defendants intend to rely upon at trial to support their “policy of prohibiting  
14 transgender individuals from serving openly in the military.” Dkt. 103, at 22.

15 \* \* \*

16 President Trump’s proclamation that “the United States Government will not  
17 allow...Transgender individuals to serve in any capacity in the U.S. Military” could not have  
18 been any clearer. Plaintiffs respectfully request that the Court order Defendants to serve Rule 26  
19 initial disclosures that identify with the same clarity the evidence the government intends to rely  
20 upon to defend those words.

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26 <sup>1</sup> Plaintiffs maintain that the implementation study, conducted *after* the ban was announced, confirms that there was  
27 no actual military judgment underpinning the policy at the time it was announced. *See Doe 1 v. Trump*, 275 F. Supp.  
28 3d 167, 212 (D.D.C. 2017). As such, Defendants cannot rectify this deficiency with *post hoc* factual support that  
could not have actually motivated the ban. Nonetheless, Defendants—if they intend to defend the ban in this  
litigation—have a duty to comply with Rule 26 by providing initial disclosures, which will enable Plaintiffs to  
prepare for trial.

1 Respectfully submitted,

2 Dated: March 9, 2018



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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 March 9, 2018.



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