

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JANE DOE 1, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*

Defendants.

Civil Action No. 17-cv-01597

**BUZZFEED, INC.'S MOTION TO INTERVENE TO SEEK
ACCESS TO MARCH 28, 2018 TELEPHONE CONFERENCE**

Pursuant to Federal Rule of Civil Procedure 24 and Local Rule of Civil Procedure 7(j), BuzzFeed, Inc., by and through its undersigned counsel, hereby moves to intervene for the limited purpose of seeking access to the March 28, 2018 telephone conference to be held in the above-captioned action.

In an effort to facilitate the Court's resolution of the Motion, BuzzFeed has conferred with the Plaintiffs and Defendants' counsel in a good faith effort to obtain their consent to BuzzFeed's Motion. Plaintiffs and Defendants take no position on the Motion.

In support of its Motion, BuzzFeed submits the accompanying: (1) Memorandum of Points and Authorities; (2) Corporate Disclosure Certification; (3) Declaration of Matthew L. Schafer; (4) Declaration of Zoe Tillman; and (5) Proposed Order. BuzzFeed does not request oral argument.

Dated: March 27, 2018

Respectfully Submitted,

BUZZFEED, INC.

By: s/ Matthew L. Schafer

Nabiha Syed, Esq.*
Matthew L. Schafer, Esq. (DC Bar No.
1008728)
BuzzFeed, Inc.
111 E. 18th Street, 14th Floor
New York, NY 10003
Tel: (646) 798-0693
Fax: (212) 431-7461
Nabiha.Syed@BuzzFeed.com
Matthew.Schafer@BuzzFeed.com

*Counsel for Proposed Intervenor
BuzzFeed, Inc.*

* *pro hac vice* forthcoming

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**BUZZFEED, INC.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO
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Nabiha Syed, Esq.*
Matthew L. Schafer, Esq. (DC Bar No.
1008728)
BuzzFeed, Inc.
111 E. 18th Street, 14th Floor
New York, NY 10001
Tel: (646) 798-0693
Fax: (212) 431-7461
Nabiha.Syed@BuzzFeed.com
Matthew.Schafer@BuzzFeed.com

*Counsel for Proposed Intervenor
BuzzFeed, Inc.*

* *pro hac vice* forthcoming

INTRODUCTION

This lawsuit is about the role of transgender individuals who wish to serve their country in the Nation's Armed Forces. It is of the utmost public importance. BuzzFeed News respectfully requests access to a telephone conference of unknown substance scheduled for March 28 or, absent access, findings of fact on the record supporting closure of the telephone conference and the expeditious release of a transcript of that proceeding.

BACKGROUND

Plaintiffs filed suit on August 9, 2017, after President Donald J. Trump announced via Twitter that the Government would no longer allow transgender individuals to serve in the military. *See* Dkt. 1. The President issued a formal directive to the Secretary of Defense and the Secretary of Homeland Security on August 25, and Plaintiffs filed an amended complaint thereafter. *See* Dkt. 9. Plaintiffs, transgender individuals who are either active duty servicemembers or who wish to enlist, sought a declaratory judgment that the President's directive was unconstitutional, as well as injunctive relief. *See* Dkt. 13. On October 30, the Court partially granted Plaintiffs' motion for a preliminary injunction, enjoining Defendants from enforcing the "Accession and Retention Directives" of the President's memorandum. *See* Dkt. 60. On December 22, the Court of Appeals denied Defendants' emergency motion for an administrative stay and partial stay pending appeal of the preliminary injunction order. *Doe, et al. v. Trump, et al.*, No 17-5267 (D.C. Cir. Dec. 22, 2017).

On March 23, Defendants filed notice of a new memorandum, which granted the Secretaries of Defense and Homeland Security discretion to "exercise their authority to implement any appropriate policies concerning military service by transgender individuals." *See* Dkt. 95. Defendants thereafter moved to dissolve the preliminary injunction. *See* Dkt. 96. On

March 26, the Court issued a minute order scheduling a teleconference for March 27, which was later rescheduled for March 28. The minute order does not, however, indicate what the substance of the hearing will be.

On March 26, Zoe Tillman, a BuzzFeed News reporter, made an informal request through the Assistant to the Chief Judge for access to the teleconference, citing the significant public interest in this case and in particular the March 26 filings. That same day she was informed that the request was denied. *See generally* Declaration of Zoe Tillman. On March 27, counsel for BuzzFeed was directed to file a formal motion seeking access. *See generally* Declaration of Matthew L. Schafer. This Motion follows.

ARGUMENT

I. BUZZFEED SHOULD BE PERMITTED TO INTERVENE TO ENFORCE THE PUBLIC’S RIGHT OF ACCESS

It is well settled that members of the press and public have a right to intervene in a judicial proceeding for the limited purposes of opposing the closure of proceedings. *Globe Newspaper Co. v. Super Ct.*, 457 U.S. 596, 609 n.25 (1982). Federal courts routinely permit journalists to intervene under Fed. R. Civ. P. 24 to challenge restrictions on the public’s right of access to proceedings. *See, e.g., EEOC v. Nat’l Children’s Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998) (collecting cases). Indeed, the Supreme Court has held that “representatives of the press and general public *must* be given an opportunity to be heard on the question of their exclusion” from judicial proceedings. *Globe Newspapers Co.*, 457 U.S. at 609 n.25 (emphasis added; internal marks and citations omitted); *see also Wash. Post Co. v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991) (noting that courts should allow the “press an opportunity to intervene and present their objections to the court” regarding sealing).

Intervention is appropriate here, where there is an extraordinary level of public interest in and ongoing public controversy over the Government's treatment of transgender servicemembers.¹ This is especially the case in light of last Friday's White House Memorandum to the Secretaries of Defense and Homeland Security disqualifying certain transgender individuals from military service. *See* Dkt. 95-1. As such, BuzzFeed respectfully requests to intervene for the limited purpose of enforcing the right of access to the hearing in this case.

II. THE COURT MUST MAKE FINDINGS OF FACT ON THE RECORD SUPPORTING CLOSURE

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Supreme Court recognized that the First Amendment carries with it an implicit right of public access to certain government proceedings. The right is also secured at common law. *Nixon v. Warner Commc 'ns, Inc.*, 435 U.S. 589, 597 (1978). The press and the public's presumptive right of access to court proceedings plays a structural role in our democracy. Public access not only improves the actual operation of a hearing, it also improves the appearance of justice and thus enhances the legitimacy of the outcome. *See, e.g., Dhiab v. Obama*, 70 F. Supp. 3d 465, 467-69 (D.D.C. 2014) (right of access to proceedings relating to preliminary injunctions); *In re Guantanamo Bay Detainee Litigation*, 624 F. Supp. 2d 27, 36-37 (D.D.C. 2009) (collecting cases finding right of access applies to civil proceedings). As Chief Justice Burger wrote, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc.*, 448 U.S. at 572.

¹ *See, e.g.,* Vera Bergengruen, *Trump Follows Through On Banning Most Transgender Troops*, BuzzFeed News (Mar. 23, 2018), <https://www.buzzfeed.com/verabergengruen/trump-follows-through-on-banning-most-transgender-troops>; Dominic Holden, *The Pentagon Just Gave Trump Recommendations On Transgender Military Service*, BuzzFeed News (Feb. 23, 2018), <https://www.buzzfeed.com/dominicholden/heres-why-the-pentagons-new-transgender-military-proposal>.

Of course, even in the face of the right of access, judges retain the “authority . . . to conduct in camera conferences.” *Globe Newspaper Co.*, 457 U.S. at 609 n.25; *see also* Fed. R. Civ. Pro. 77(b). But such authority extends only to such conferences that “are distinct from trial proceedings.” *Richmond Newspapers, Inc.*, 448 U.S. at 598 n.23 (Brennan, J., concurring in judgment). A court may not, for example, consider a motion relating to the proceedings in chambers without first making findings on the record that closure complies with the standards set by the Supreme Court for the exclusion of the public. *See, e.g., Rovinsky v. McKaskle*, 722 F. 2d 197, 200 (5th Cir. 1984) (noting in challenge to in chambers hearing on motions that the Court “made clear in *Globe Newspaper* . . . that no state interest, however compelling, can sustain the exclusion of press and public from part of a trial, absent findings of necessity articulated on the record”); *see also Cable News Network v. United States*, 824 F.2d 1046 (D.C. Cir. 1987) (finding improper *in camera voir dire* of jurors without findings supporting closure).

The standards applied by the Supreme Court that must be met prior to the exclusion are as follows. *First*, there must be a substantial probability of prejudice to a compelling interest. *Richmond Newspapers*, 448 U.S. at 581. *Second*, there must be no alternative to adequately protect the threatened interest. *Press-Enterprise v. Super. Ct.*, 478 U.S. 1, 13-14 (1986) (“*Press-Enterprise II*”). *Third*, any restriction on access must be narrowly tailored. *Press-Enterprise II*, 478 U.S. at 13-14; *Robinson*, 935 F.2d at 287. *Fourth*, any restriction on access that is imposed must be effective. *Press-Enterprise II*, 478 U.S. at 14. And, most importantly, it is the duty of the court to make factual findings demonstrating that these standards have been met. *See, e.g., Press-Enterprise II*, 478 U.S. at 13-14; *Cable News Network*, 824 F.2d at 1048 (reversing lower court in part because it placed “no evidence in the record and made no findings” as to the necessity of closure); *accord In re Wash. Post Co.*, 807 F.2d 383, 392 (1986) (same).

BuzzFeed is unaware of the precise substance of the hearing, and therefore is at a disadvantage in arguing whether these standards have been met. Nor is BuzzFeed aware of any existing findings of fact on the record supporting closure. For these reasons, BuzzFeed respectfully requests that the telephone conference be held in open court before the press and the public or that the Court make the necessary factual findings supporting closure of the conference. If the Court does determine that closure is necessary, BuzzFeed respectfully requests that the Court expeditiously release a transcript of any such hearing. *But see United States v. Alcantara*, 396 F.3d 189, 201 (2d Cir. 2005) (rejecting argument that taking plea in the robing room “does not implicate First Amendment concerns because the transcript . . . was not sealed”).

CONCLUSION

For each and all of the foregoing reasons, BuzzFeed respectfully requests access to the telephone conference.

Dated: March 27, 2018

BUZZFEED, INC.

By: s/ Matthew L. Schafer

Nabiha Syed, Esq.*
Matthew L. Schafer, Esq. (DC Bar No.
1008728)
BuzzFeed, Inc.
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DECLARATION OF ZOE TILLMAN

Pursuant to 28 U.S. Code § 1746, I, Zoe Tillman, declare the following to be true under penalties of perjury:

1. My name is Zoe Tillman and I am a reporter for BuzzFeed News. I submit this declaration in support of BuzzFeed, Inc.'s Motion to Intervene to Seek Access to March 28, 2018 Telephone Conference.
2. On March 26, 2018, I requested permission from Lisa Klem, the Assistant to the Chief Judge, for access to the Court's March 28 telephone conference.
3. That same day, Ms. Klem indicated that she directed the request to Your Honor's chambers, and that it had denied that request.

I declare under penalty of perjury that the foregoing is true and correct. Executed on:
March 27, 2018 in Washington D.C.



Zoe Tillman

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DECLARATION OF MATTHEW L. SCHAFER

Pursuant to 28 U.S. Code § 1746, I, Matthew L. Schafer, declare the following to be true under penalties of perjury:

1. My name is Matthew L. Schafer and I am counsel for BuzzFeed, Inc. I submit this declaration in support of BuzzFeed, Inc.'s Motion to Intervene to Seek Access to March 28, 2018 Telephone Conference.

2. On March 27, 2018, I spoke with Lisa Klem, the Assistant to the Chief Judge, regarding Ms. Tillman's request for access.

3. Ms. Klem indicated that, in the case BuzzFeed, Inc. wished to pursue Ms. Tillman's request, a formal motion should be filed.

I declare under penalty of perjury that the foregoing is true and correct. Executed on: March 27, 2018 in New York, NY.

s/ Matthew Schafer
Matthew Schafer

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[PROPOSED] ORDER

Upon consideration of the Motion of BuzzFeed, Inc. to Intervene to Seek Access to March 28, 2018 Telephone Conference, it is this ____ day of _____ 2018, hereby

ORDERED that the Motion to Intervene is **GRANTED**; it is further

ORDERED that the Motion for Access to March 28, 2018 Telephone Conference is **GRANTED**.

Dated: _____, 2018
Washington, D.C.

Colleen Kollar-Kotelly
United States District Judge

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RULE 7.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1, counsel hereby certifies that BuzzFeed, Inc. is a privately owned corporation. 10% or more of its stock is owned by NBCUniversal Media LLC, a wholly-owned indirect subsidiary of Comcast Corporation, which is publicly traded. No other publicly held company owns 10% or more of its stock.

Respectfully Submitted,

BUZZFEED, INC.

By: s/ Matthew L. Schafer

Nabiha Syed, Esq.*
Matthew L. Schafer, Esq. (DC Bar No.
1008728)
BuzzFeed, Inc.
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