The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al, Plaintiffs, v. DONALD TRUMP, et al, Defendants. STATE OF WASHINGTON, Intervenor-Plaintiff, v. DONALD TRUMP, et al, Intervenor-Defendants.	Case No: 2:17-cv-1297-MJP WASHINGTON'S RESPONSE TO DEFENDANTS' SUPPLEMENTAL BRIEF REGARDING THE IMPACT OF *TRUMP V. HAWAII* ON PENDING MOTIONS

Defendants filed a supplemental brief arguing that the Supreme Court's decision in *Trump v. Hawaii*, No. 17-965 (June 26, 2018), impacts discovery motions currently pending before this Court. ECF 289 (citing pending motions at ECF 245 and 268). Washington did not issue the discovery at issue in those motions, but respectfully submits this response to Defendants' supplemental briefing because a ruling on the discovery motions may affect the availability of discovery for all plaintiffs in this action. Simply put, *Hawaii* does not impact the need for, or availability of, discovery in this case.

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First, *Hawaii* involved a facially neutral policy and no issues of discovery whatsoever, arising as it did from appeals of two preliminary injunctions. Slip op. at 3. As a result, aside from presenting an opportunity for Defendants to renew their request for broad deference in "decision[s] involving military affairs," ECF 289 at 3, *Hawaii* provides this Court no guidance in determining the amount or nature of deference to apply to the policy at issue here, which, on its face, discriminates based on quasi-suspect and suspect classifications. *Compare* ECF 298 at 5 (Defendants' acknowledgment, but dismissal, of this difference), *with* ECF 233 at 24 (Court's holding that "transgender people constitute a suspect class" and the Ban "must satisfy strict scrutiny to survive"). As this Court has explained, the issues remaining for trial are whether the Ban "was sincerely motivated by compelling interests, rather than by prejudice or stereotype," and "whether the Ban is well supported by evidence and entitled to deference." ECF 233 at 3. Unless *Hawaii* stands for the proposition that no discovery is permissible because complete deference to the Ban is required—a position not even Defendants advance—discovery will be required to prepare for trial on the issues of strict scrutiny and deference. *Id.* at 31. *Hawaii* tells the Court nothing about how to adjudicate a discovery dispute involving the scope of discovery and assertions of privilege where governmental interests and processes are at the heart of the required constitutional inquiry.

Second, the cases cited by Defendants in support of their request for deference in the specific military context actually favor discovery here, because they confirm that whether deference will be accorded depends on whether and how the military was involved in the development of the Ban. *Cf.* ECF 289 at 3 (citing *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), *Rostker v. Goldberg*, 453 U.S. 57, 65–66 (1981), and *Winter v. NRDC, Inc.*, 555 U.S. 7, 24, 27 (2008)). *Gilligan* held non-justiciable a lawsuit seeking ongoing judicial oversight of the Ohio National Guard following the Kent State shootings in 1970. 413 U.S. at 3. The Supreme Court held this type of remedy unavailable, concluding that while "there is accountability in a judicial form for violations of law or *specific* unlawful conduct by military personnel," the Court would

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defer to the day-to-day "professional decisions as to the composition, training, equipping, and control of a military force," where they were "essentially professional military judgments." *Id.* at 10–12 (emphasis added). Likewise, *Rostker* upheld a military regulation with a facial classification, only after determining that the law was "extensively considered" and not developed "unthinkingly" or "reflexively." 453 U.S. at 72. And *Winter* discussed the deference owed to "the Navy's most senior officers" only after recounting the careful process those officers used to balance the need for specific anti-submarine training against more than 40 years of data involving the resulting environmental impacts. 555 U.S. at 12–20, 24.

All of these cases point to the need for discovery here, where a key remaining question is whether the specific policies announced in the Ban were the result of considered, professional military judgment, or a "reflexive[]" effort to comply with a decision announced by the President before the military had been consulted. *Cf. Rostker*, 453 U.S. at 72. *Hawaii* does nothing to alter the longstanding precedents emphasizing that the quality of the military's process is relevant to whether judicial deference will be accorded to the resulting policy.

DATED this 12th day of July, 2018.

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CERTIFICATE OF SERVICE

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Dated this 12th day of July, 2018.

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