

The Honorable Marsha J. Pechman

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

RYAN KARNOSKI, et al.,

Plaintiffs, and

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’ RESPONSE TO
DEFENDANTS’ SUPPLEMENTAL
BRIEF CONCERNING THE IMPACT OF
TRUMP V. HAWAII ON PENDING
MOTIONS**

1 The Supreme Court’s decision in *Trump v. Hawaii* does not impact either of the discovery
2 motions pending before the Court. *Hawaii* did not purport to address standards governing
3 discovery at all, and instead analyzed only what it repeatedly emphasized was a facially-neutral
4 immigration policy. Because *Hawaii* does not obviate the need for discovery into the purported
5 deliberative process behind the facially discriminatory policy under review here, nor bear in any
6 way on the scope of any evidentiary privilege, *Hawaii* does nothing to change the fact that
7 Plaintiffs’ motion to compel should be granted and Defendants’ motion for a protective order
8 should be denied.

9 *Hawaii* considered a challenge to Proclamation No. 9645, 82 Fed. Reg. 45161, which
10 imposed entry restrictions on the nationals of eight foreign nations, Slip. Op. 3. The Order was
11 issued pursuant to § 1182(f) of the INA, which provides:

12 Whenever the President finds that the entry of any aliens or of any class of aliens
13 into the United States would be detrimental to the interests of the United States,
14 he may by proclamation, and for such period as he shall deem necessary, suspend
15 the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or
impose on the entry of aliens any restrictions he may deem to be appropriate.

16 Noting the broad sweep of this statutory text, the Supreme Court rejected the argument that
17 the Proclamation was outside the President’s statutory authority, Slip Op. 24, and then
18 considered the argument that the policy unconstitutionally discriminated against Muslims, *id.*
19 at 25. Rejecting that challenge, the Court repeatedly emphasized the Proclamation’s facial
20 neutrality, *id.* at 29, 32, 34, 38 (“The Proclamation, moreover, is facially neutral toward
21 religion.”), and relied on immigration precedent holding that courts need not “look behind the
22 exercise of . . . discretion” when the government gives “facially legitimate” reasons for its
23 admissions decisions, *id.* at 30–31 (discussing *Kleindienst v. Mandel*, 408 U.S. at 756–57).

24 What *Hawaii* did **not** do was change any standards for discovery, address when the
25 deliberative process or any other privilege applies, or say anything at all about how courts should
26 proceed when applying heightened constitutional scrutiny. Indeed, the Court held that “we may
27 consider plaintiffs’ extrinsic evidence,” Slip Op. 32—a clear indication that such evidence
28

1 continues to be relevant and thus discoverable under Fed. R. Civ. Proc. 26(b)(1), even when a
2 plaintiff challenges a facially neutral government action reviewed for rational basis.

3 Instead of citing any discussion in *Hawaii* relating to the privilege questions at issue in the
4 pending motions—because there is none—Defendants instead try to re-litigate the merits of
5 military deference and collaterally attack this Court’s prior rulings, arguing that (1) the actual
6 motivations for the policy at issue—including whether the policy was motivated by animus,
7 political considerations, or reflexive judgments unsupported by fact—are not at issue in this case,
8 Defs.’ Br. at 1; (2) military deference is a prerequisite to inquiry into military affairs, *id.* at 2; and
9 (3) discovery “should be curtailed” because “when it comes to collecting evidence and drawing
10 inferences on questions of national security, the lack of competence of the courts is marked,” *id.*
11 at 3. These arguments all conflate the *merits* of the Court’s ultimate constitutional inquiry with
12 the scope of permissible *discovery* to uncover evidence bearing on that inquiry. None impacts
13 either of the pending discovery motions, and all are wrong to the extent Defendants demand
14 sweeping deference as a substantive matter.

15 **First**, the Supreme Court’s decision in *Hawaii* does not in any way undermine the
16 relevance of the actual motivations for the policy at issue here, nor does it displace the need to
17 test whether the government’s justifications are factually supported, even if they actually
18 motivated the policy. *Hawaii* relied extensively on the Proclamation’s facial neutrality, in sharp
19 contrast to the facially discriminatory policy targeted against a historically vulnerable group at
20 issue here. *See* Slip Op. at 29, 32, 34, 38. Here, the latest Presidential Memorandum was labeled
21 “Military Service by Transgender Individuals.” Had *Hawaii* discussed an analogous and express
22 “Muslim Admission Policy,” its analysis almost certainly would have been different. While a
23 facially neutral Proclamation does not by itself call for immediate suspicion, the whole point of
24 the heightened scrutiny that applies here is to “smoke out illegitimate uses” of a suspect
25 classification. *Mitchell v. Washington*, 818 F.3d 436, 445 (9th Cir. 2016) (quoting *Johnson v.*
26 *California*, 543 U.S. 499, 506 (2005)). That the Court in *Hawaii* applied rational basis review,
27 and stated it would “uphold the policy so long as it can reasonably be understood to result from a
28 justification independent of unconstitutional grounds,” Defs.’ Br. 1 (quoting *Hawaii*, Slip

Op. 32), is thus not relevant to a case like this one requiring heightened scrutiny, where courts must look to the actual motivations behind a policy and the burden falls on Defendants to justify that policy. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481–82 (9th Cir. 2014) (holding, under heightened scrutiny, that courts must scrutinize the “actual purposes” at the time the discrimination was adopted rather than “hypothetical justifications”); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980).

This same distinction between a facially neutral Proclamation subject to rational basis review and a policy expressly targeting a minority group that is subject to heightened scrutiny, likewise disposes of Defendants’ argument that the 44-page *post-hoc* report they created to support the Ban is “more than adequate” for the Court’s review. Defs.’ Br. 4. The notion that Defendants alone get to determine what is “adequate” misapprehends the strict scrutiny standard. That standard demands review of the “actual purposes” behind a policy, not those Defendants might wish were behind it, and such review warrants discovery. The whole point of strict scrutiny is to determine whether the government acted without adequate justification, and settled law—which *Hawaii* did not purport to change—holds that the deliberative process privilege “has no place . . . in a constitutional claim for discrimination.” *In re Subpoena Duces Tecum*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (when “the Constitution . . . makes the nature of governmental deliberations *the issue*, the privilege is a nonsequitur”); *accord Greenpeace v. Nat’l Marine Fisheries Serv.*, 198 F.R.D. 540, 543 (W.D. Wash. 2000) (“[T]he privilege may be inapplicable where the agency’s decision-making process is itself at issue.”) (citing *Burka v. New York City Transit Auth.*, 110 F.R.D. 660, 667 (S.D.N.Y. 1986) (“Where the decision-making process itself is the subject of the litigation, the deliberative privilege may not be raised as a bar against disclosure of critical information.”)).

Equally unavailing is Defendants’ straw-man argument that the Ban classifies only on the basis of gender dysphoria, and thus is facially neutral. Defs.’ Br. 4. The Ban allows new recruits to serve only in their birth-assigned sex, and excludes from military service individuals who have undergone or require gender transition. That discriminates against transgender people on its face. Furthermore, gender dysphoria—a condition produced by dissonance between one’s birth-

1 assigned sex and true gender identity—is inextricably intertwined with transgender status, and
2 provides but a poor veil for discrimination against transgender people. Indeed, the Court has
3 already dispensed with this claim: Defendants made the same argument in seeking to dissolve the
4 preliminary injunction, and the Court properly recognized that their “new” policy was simply the
5 implementation of the policy President Trump announced and ordered the military to implement
6 in 2017. Dkt. # 233 at 31. Defendants were granted leave to brief the impact of *Hawaii* on
7 pending motions, not to seek reconsideration of the Court’s prior orders.

8 **Second, *Hawaii***—an immigration case reviewing a facially neutral Presidential
9 Proclamation—says nothing about whether deference is a prerequisite to inquiry into military
10 personnel policy, Defs.’ Br. 2. *Hawaii*’s analysis of immigration law did not impact—much less
11 overrule—precedent establishing that heightened scrutiny applies to military personnel decisions.
12 See *Witt v. Dep’t. of Air Force*, 527 F.3d 806, 820 n.10 (9th Cir. 2008); *Rostker v. Goldberg*, 453
13 U.S. 57, 87-88 (applying heightened scrutiny).

14 **Finally, *Hawaii*** does not support Defendants’ argument that “discovery in this case should
15 be significantly curtailed, [and] in particular, discovery concerning communications about a
16 military policy.” Defs.’ Br. 3. As discussed previously, *Hawaii* does not address discovery, the
17 scope or applicability of any privilege, or even military deference. To the contrary, the section of
18 the decision *Hawaii* from which Defendants cull selective partial quotes to suggest otherwise
19 begins with the following topic sentence: “For more than a century, this Court has recognized
20 that the admission and exclusion of foreign nationals is a ‘fundamental sovereign attribute
21 exercised by the Governments’ political departments . . .” Slip Op. 30 (quoting *Fiallo v. Bell*,
22 430 U.S. 787, 792 (1977)). This discussion, and the partial quotes Defendants string together, has
23 nothing to do with the well-settled constitutional standards that apply to the rights of U.S.
24 citizens under the Equal Protection, Substantive Due Process, and Free Speech guarantees at
25 issue here. Moreover, Defendants’ “military deference” argument conflates Defendants’ *legal*
26 contention, that strict scrutiny is somehow relaxed when military judgment is involved, with the
27 separate issue here, which is whether such judgments are *discoverable*. Whether the Court later
28

1 defers to those judgments, plaintiffs have a right to discover what they are, who made them, and
2 how they were made.

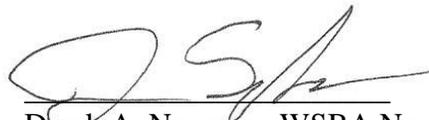
3 Indeed, without discovery, it is unknown whether President Trump *actually relied* on
4 military judgment, or sought military input before he ordered and publicly announced the Ban.
5 Under strict scrutiny, Plaintiffs are allowed discovery on that issue, and Defendants bear the
6 burden of proof on it. *See Wengler*, 446 U.S. at 151. *Hawaii* provides no reason to deny
7 discovery to which Plaintiffs are entitled and the Court has required. *See* Dkt. # 233 (“The parties
8 are directed to proceed with discovery and prepare for trial on the issues of whether, and to what
9 extent, deference is owed to the Ban and whether the Ban violates equal protection, substantive
10 due process, and the First Amendment.”).

11 * * *

12 Defendants’ reliance on a decision deciding a facially-neutral immigration policy is
13 misplaced. *Trump v. Hawaii* did not alter any discovery standard, or change the need to inquire
14 into actual motivations for facially discriminatory policies and test the sufficiency of the
15 government’s justifications for those policies. For this reason and all the reasons detailed in
16 Plaintiffs’ prior briefing, the Court should grant Plaintiffs’ motion to compel, Dkt. # 245, and
17 reject Defendants’ motion for a protective order, Dkt. # 268.

18
19 Respectfully submitted July 12, 2018.

20 **NEWMAN DU WORS LLP**

21 

22 Derek A. Newman, WSBA No. 26967

23 *dn@newmanlaw.com*

24 Jason B. Sykes, WSBA No. 44369

25 *jason@newmanlaw.com*

26 2101 Fourth Ave., Ste. 1500

27 Seattle, WA 98121

28 (206) 274-2800

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**LAMDBA LEGAL DEFENSE AND EDUCATION
FUND, INC.**

Tara Borelli, WSBA No. 36759

tborelli@lambdalegal.org

Camilla B. Taylor (admitted pro hac vice)

Peter C. Renn (admitted pro hac vice)

Sasha Buchert (admitted pro hac vice)

Kara Ingelhart (admitted pro hac vice)

OUTSERVE-SLDN, INC.

Peter Perkowski (admitted pro hac vice)

KIRKLAND & ELLIS LLP

James F. Hurst, P.C. (admitted pro hac vice)

Steve Patton (admitted pro hac vice)

Jordan M. Heinz (admitted pro hac vice)

Scott Lerner (admitted pro hac vice)

Vanessa Barsanti (admitted pro hac vice)

Daniel I. Siegfried (admitted pro hac vice)

Counsel for Plaintiffs

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 July 12, 2018.



Jason B. Sykes, WSBA No. 44369
jason@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28