

No. 18-72159

**UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT**

In re DONALD J. TRUMP, et al.,
Petitioners.

DONALD J. TRUMP, President of the United States, et al.,
Petitioners-Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
Respondent,

RYAN KARNOSKI, et al.,
Real Parties in Interest-Plaintiffs,

STATE OF WASHINGTON,
Real Party in Interest-Plaintiff-Intervenor.

**REAL PARTIES IN INTEREST-PLAINTIFFS' OPPOSITION TO
DEFENDANTS' RENEWED MOTION FOR A STAY**

Peter C. Renn
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
4221 Wilshire Blvd., Ste. 280
Los Angeles, CA 90010
(213) 382-7600

Tara L. Borelli
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
730 Peachtree St., NE, Ste. 640
Atlanta, GA 30308
(404) 897-1880

James F. Hurst, P.C.
Stephen R. Patton, P.C.
Jordan M. Heinz
Scott Lerner
Vanessa Barsanti
Daniel Siegfried
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000

Counsel for Real Parties in Interest-Plaintiffs

Additional Counsel

Diana Flynn
Sasha Buchert
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
1875 I St., NW 5th Fl.
Washington, DC 20006
(202) 740-0914

Camilla B. Taylor
Kara Ingelhart
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
105 W. Adams, 26th Fl.
Chicago, IL 60603
(312) 663-4413

Paul D. Castillo
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
3500 Oak Lawn Ave., Ste. 500
Dallas, TX 75219
(214) 219-8585

Peter E. Perkowski
OUTSERVE-SLDN, INC.
445 S. Figueroa St., Ste. 3100
Los Angeles, CA 90071
(213) 426-2137

Derek A. Newman
Jason B. Sykes
NEWMAN DU WORS LLP
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

INTRODUCTION

The government's latest motion for a stay arises out of the district court's resolution of two related discovery disputes, which had put this case at a near standstill for several months. On July 27, 2018, the district court rejected the government's argument that it could withhold documents solely on the basis of the deliberative process privilege, and ordered the withheld documents produced. In the same order, the court also required the government to produce a legally sufficient privilege log for those documents withheld under the presidential communications privilege. The district court ordered that both the log and documents be produced in ten days.

The government requested that this order be stayed pending their petition for mandamus, complaining that disclosure of documents would irreparably harm it, and that preparation of the privilege log in the time allowed would impose a "herculean" burden. Dist. Ct. Dkt 300 at 2.¹ The

¹ Because the mandamus petition has been assigned to the same panel deciding the related preliminary injunction appeal (No. 18-35347), this brief presumes familiarity with briefing in that appeal. References to "Add" and "SER" refer to the Addendum and Supplemental Excerpts of Record in the related appeal. References to "SA" refer to the Supplemental Addendums submitted with Dkt. 30 (SA.1-197) and herewith (SA.198-216).

district court rejected the government's arguments for a stay on the merits, but nevertheless modified its order to eliminate both of the harms the government alleged. In particular, the district court ordered that the government need not disclose documents, or produce a privilege log, until after this Court decides its petition for mandamus. Instead, the court ordered only that the government "in the meantime" compile the log and prepare the documents for production, and certify that it has done so by the time its mandamus petition is argued on October 10, 2018. SA.2.

Not satisfied with this relief, the government has now moved for a stay in this Court, contending that merely compiling a privilege log and assembling documents "will set the branches of government on a collision course," and that the district court's "particularly egregious" order, composed of "clear and significant error," will impose on the government "irreparable injury" and "enormous burden" for "no discernible purpose." (Gov't Renewed Mot. for Stay ("Mot."), Dkt. 20 at 4-8.)

These claims are overblown and without merit. The district court's order imposes no burden beyond the ordinary ones lawyers routinely undertake in discovery. The government does not, and cannot, point to

any irreparable harm from the district court's order as modified, and for that reason alone, its motion should be denied.

This is especially true as the district court's order, far from serving "no discernible purpose," in fact is necessary to ensure that once the government's petition for mandamus is decided, this case can remain on track for a timely trial and final judgment. Both Plaintiffs and the public have strong interests in securing the certainty that only a final judgment can provide, and the government nowhere shows that its claimed harms—preparing (but not serving) a privilege log and documents—outweigh deference to a district court's case management and the just and speedy final determination the law requires. FED. R. CIV. PROC. 1.

RELEVANT PROCEDURAL BACKGROUND²

On July 27, 2018, the district court granted Plaintiffs' motion to compel documents withheld under the deliberative process privilege, finding that "[t]he evidence Plaintiffs seek is undoubtedly relevant" (SA.204), and that Plaintiffs had overcome the privilege's qualified

² For a full recitation of procedural history, Plaintiffs refer the Court to the background sections in their Answering Brief (Dkt. 40, Case No. 18-35347) and Answer to the Government's Petition for Writ of Mandamus (Dkt. 30, Case No. 18-72159).

nature under the relevant balancing test (SA.206). The district court also ordered that with respect to documents withheld under the presidential communications privilege, the government should provide a privilege log that complies with Federal Rule of Civil Procedure 26(b)(5), namely, one that “identif[ies] individual author(s) and recipient(s)” and “include[s] specific, non-boilerplate privilege descriptions on a document-by-document basis.” SA.208. The district court gave the government ten days to comply with its order. *Id.*

On July 31, 2018, the government moved for a stay in the district court, indicating that it would seek appellate review via an extraordinary writ of mandamus. The motion alleged that the district court’s order would inflict “immediate irreparable harm” because of, first, “the irretrievable disclosure of tens of thousands of [purportedly] privileged documents” (Dist. Ct. Dkt. 300 at 3), and second, the “herculean task” and “staggering burden” of complying within only 10 days (Dist. Ct. Dkt. 300 at 2, 4).

The next day, the government filed its petition for mandamus and also asked this Court to stay the district court’s July 27 discovery order. (Dkt. 1, at 33-34.) In response, this Court granted only a temporary

administrative stay of the district court's order, "pending the district court's decision on petitioners' July 31, 2018 motion" to stay. (Dkt. 4, at 2.)

The district court issued that decision on August 20, 2018, and denied the government's request for a stay. The district court, however, modified its order to address both of the harms that the government alleged would result from the court's July 27 order. First, the district court ordered that the government need only *prepare, but not serve*, the discovery at issue—the "document-by-document" executive privilege log and deliberative process documents—pending disposition of its petition for mandamus.

Second, the district court ordered that the government need not complete any task within ten days, but instead granted it an additional two months, until October 10, 2018, to certify that it had completed the legally sufficient log and preparation of documents that the court had ordered. SA.1. In doing so, the district court balanced the burden on the government of preparing discovery that will be due if and when its petition for mandamus is denied against Plaintiffs', the court's, and the public's interest in not further delaying the trial and final resolution of

this case, and in avoiding the resulting uncertainty and continuing harm from the Ban. The district court thus found that “[t]his case is currently set to proceed to trial in April 2019,” and further delay beyond this Court’s decision on the mandamus petition would harm “Plaintiffs’ ability to litigate the case and prepare for trial—and the Court’s ability to enforce the rule of law and thereby perform its essential role in our system of government.” SA.9. The district court therefore ordered that even though the government need not serve any of this discovery until after its petition is decided, the government would “[i]n the meantime” be “directed to prepare legally sufficient privilege logs for documents withheld under the presidential communications and deliberative process privileges and prepare to turn over materials withheld solely under the deliberative process privilege.” (*Id.*) The district court further specified that Defendants should “certify . . . by no later than October 10, 2018” that “they have taken these steps and are prepared to comply with its Discovery Order.” (*Id.*)

Not satisfied, the government on August 23, 2018 moved in this Court for a complete stay of the district court’s order.

ARGUMENT

A stay pending appeal is an exceptional remedy—it is “not a matter of right, even if irreparable injury might otherwise result.” *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) (internal citation and quotation marks omitted). In deciding a stay request, this Court considers (1) whether the government “has made a strong showing that [it] is likely to succeed on the merits, (2) whether the [government] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* The government’s motion does not satisfy any of these elements.

I. The Government Has Not Made a “Strong Showing” of Success on the Merits.

The government’s burden on this first factor is a heavy one. A writ of mandamus is “drastic and extraordinary” and “[t]he petitioner bears the burden of showing that its right to the issuance of the writ is clear and indisputable.” *In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011). As Plaintiffs explain in their Answer to Defendants’ Petition for Writ of Mandamus, filed August 27, 2018 (Dkt. 30), the government does not come close to satisfying that burden here. Plaintiffs incorporate those

arguments by reference here, and the government’s motion to stay should be denied on the basis of this factor alone.

II. The Government Will Not Be Irreparably Harmed By Generating a Privilege Log and Preparing Documents for Production.

The government’s stay request should also be denied because it cannot show any irreparable harm from the district court’s discovery order as modified.

First and foremost, the district court’s order requires only that the government “*prepare* legally sufficient privilege logs for documents withheld under the presidential communications and deliberative process privileges and *prepare to turn over* materials withheld solely under the deliberative process privilege.” SA.2 (emphasis added). The government *need not serve* the log or documents “until the Ninth Circuit has ruled on Defendants’ Mandamus Petition.” SA.10. Thus, the government can claim “harm” only from preparing a privilege log and documents for production—tasks that are routine in litigation. It strains credulity for the government to argue this qualifies as irreparable injury to the government—as opposed to a routine requirement of its lawyers.

That is doubly true considering the district court ordered the government to certify completion of this work by October 10, 2018—over *ten weeks* after the district court ordered the government on July 27 to prepare the log and documents, and nearly *six months* after the district court first ordered that “to the extent that Defendants intend to claim Executive privilege, they must ‘expressly make the claim’ and provide a privilege log” compliant with Rule 26(b)(5). SA.212. A discovery order requiring that a litigant draft a privilege log and prepare documents for production, particularly under these circumstances, does not constitute “irreparable harm,” as required for a stay pending appeal. *See Montegna v. Ocwen Loan Serv., LLC*, 2017 WL 4680168, at *4 (S.D. Cal. Oct. 18, 2017) (“Defendant[s] cannot demonstrate an inequitable hardship or extraordinary challenge in moving forward with this litigation and proceeding with routine discovery.”); *Meyer v. Bebe Stores, Inc.*, 2015 WL 1223658, at *4 (N.D. Cal. Mar. 17, 2015) (denying stay where “defendant would suffer no specific hardship other than the typical costs of litigation”).

Second, the government’s claim that compliance with the district court’s discovery order is “distracting the Executive Branch from its

constitutional duties” (Mot. at 3) and that a stay is needed “to avoid the enormous burdens on the Executive Branch of complying with the discovery orders by October 10” (*id.* at 1) is, at best, disingenuous. Drafting a privilege log and preparing documents for production are tasks for government lawyers and paralegals, not Executive Branch officials charged with policymaking or other “constitutional duties.” Moreover, the lion’s share of the work has already been done. As to documents withheld on grounds of deliberative process, custodians have already been identified, files have been searched, and responsive documents have been collected and reviewed. All the government needs to do by October 10th is finalize the documents for production. And as to the privilege log, the government has already collected and reviewed the documents in question, and even created privilege log, albeit a legally insufficient one. All the government needs to do by October 10th is revise and supplement that log so that it complies with Rule 26(b)(5). SA.10. Drafting a legally sufficient privilege log and preparing previously collected documents for production is plainly not an “enormous burden” that would “distract the Executive Branch from its constitutional duties.”

Third, the government's vague separation-of-powers concerns also ring hollow. As an initial matter, as in *Washington v. Trump*, 847 F.3d at 1161, “[t]o the extent that the Government claims that it has suffered an institutional injury by erosion of the separation of powers, that injury is not ‘irreparable.’” Just as in that case, the district court’s order (which does not require the government to yet disclose anything) infringes on no interests that could not be later “vindicate[d]...in the full course of this litigation.” *Id.* Indeed, preparation as required by the district court’s order cannot possibly raise “serious separation-of-powers concerns” (Mot. at 3) when the logs and documents *remain entirely within the Executive Branch* until this Court rules on the mandamus petition.

At bottom, the government cites no authority for the incredible position it asserts here: that having lawyers draft a privilege log and prepare documents for production “irreparably injures” the government. Because the desire to free government lawyers’ from routine litigation tasks cannot constitute the “irreparable injury” necessary to support a stay, the government’s motion should be denied.

III. A Stay Would Substantially Injure Plaintiffs.

The government repeatedly argues that Plaintiffs face no harm from a stay, as they “have already obtained a preliminary injunction.” (Mot. at 2, 4, 5.) But a stay would allow the government to continue to delay taking any step to comply with the court’s order until after mandamus is resolved, and would further delay these proceedings—which have already largely been at a standstill for the past several months—for several additional months. That additional delay threatens real harm and continued uncertainty to Plaintiffs and other transgender people who are currently serving or who hope to serve in the military. These harms are not fully eliminated by the current preliminary injunction.

While the preliminary injunction ensures that Plaintiffs and other transgender service members will not be discharged, it does not eliminate the risk that they will face reduced career opportunities, because commanders are understandably hesitant to promote them or invest in their further training while the Ban is still threatened. (*See, e.g.*, SER196, ¶ 58 (“The policy announced by the President unnecessarily creates uncertainty and instability for current transgender service

members and their commanders.”); SER145, ¶ 7 (noting that “discretionary judgments or decisions within a service member’s chain of command can have a strong impact on one’s job opportunities or daily life” and that “commanders understandably are reluctant to invest significant resources in the training or development of individuals who might leave military service in the near future, or to entrust them with important assignments”).) The absence of final relief also forces some Plaintiffs and transgender service members to contend with wrenching personal decisions, including whether to express their gender identity at all. (*See* SA.215, ¶ 10 (noting that because of the Ban, “I have not come out to anyone in my chain of command.”).)

Transgender people who wish to serve likewise require a final judgment for full relief. Many, if not most, are faced with imminent decisions over whether to apply to the military or choose some other educational or career path. With the Ban still threatened, they are forced to choose between either foregoing or delaying military service, or joining the military with only the protection of a preliminary injunction, in the hope that the protection of the preliminary injunction will become permanent in a final judgment.

The court's order that the government prepare to comply with its discovery obligations while this Court decides its mandamus petition will avoid unnecessary delay, and thereby reduce these threatened irreparable harms.

IV. The Public Interest Favors Deference to the District Court's Case Management Decisions Absent "Clear Abuse of Discretion."

The government also bears the burden of showing "the public interest lies" with ordering a stay, *Nken v. Holder*, 556 U.S. 418 (2009), and it does not carry its burden on this factor either. Instead, just as Plaintiffs have an interest in the certainty of a final judgment, the public interest also favors deference to district courts' attempts to ready cases for trial and promptly adjudicate important constitutional claims.

"As the first of the Federal Rules of Civil Procedure reflects, the public has an overriding interest in securing 'the just, speedy, and inexpensive determination of every action,'" and "[o]rderly and expeditious resolution of disputes is of great importance to the rule of law." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1227 (9th Cir. 2006) (quoting FED. R. CIV. P. 1). Here, the district court found that "the stay requested by Defendants would harm Plaintiffs

and the public interest,” especially as the case is “set to proceed to trial in April 2019.” SA.9. “Were the Court to permit Defendants to further delay compliance with its prior orders and their discovery obligations, there can be no doubt that Plaintiffs’ ability to litigate the case and prepare for trial,” and the district court’s own ability to do its job and enforce the law, “would be harmed.” (*Id.*) The district court therefore ordered the government to prepare (but not serve) discovery in order to keep the case on track for an April 2019 trial.

That case management decision is entitled to deference. This Court’s review of district court case management orders “begin[s] with the principle that the district court is charged with effectuating the speedy and orderly administration of justice,” *United States v. W.R. Grace*, 526 F.3d 499, 508–09 (9th Cir. 2008), and “repeatedly give[s] deference to district courts, which are best suited to determine when delay in a particular case interferes with docket management and the public interest,” *Oliva v. Sullivan*, 958 F.2d 272, 275 (9th Cir. 1992). A district court’s management of pre-trial litigation therefore “will not be disturbed unless it is a clear abuse of discretion,” *Packnett v. Gomez*, 182

F.3d 926, at *1 (9th Cir. 1999) (citing *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 369 (9th Cir. 1985)).

There was no such abuse here, especially in view of the government's serial delay and repeated failure to comply with the district court's prior orders. Last March, the government moved the district court for a protective order staying all discovery, making the *same* argument it does here: that discovery should be stayed because resolution of the government's motion to dissolve the preliminary injunction "should either obviate the need for any discovery in this case or, at the very least, significantly narrow the issues that remain." Dist. Ct. Dkt. 217 at 2. The district court disagreed, held that discovery should proceed, and ordered the government to produce a legally sufficient privilege log that "describ[es] the nature of the documents . . . in a manner that . . . will enable other parties to assess the claim." Add. 3-33. The government did not seek reconsideration or review of this order; it simply failed to comply, and served a non-compliant categorical privilege log. In July it was ordered *again* to produce a log compliant with Rule 26. SA.198-209. Now, over a month later, it is apparent that the government still has not

even started preparing a proper privilege log, and now complains that even generating one by October would be too much. (Mot. at 3.)

In light of the government’s history of delay, the district court’s order—which does not yet implicate any purported privilege and instead only ensures that the government will be ready to comply with its obligations—was no abuse of discretion, much less a clear one. Had the district court allowed the government to forgo even preparing the requisite log and the withheld documents for production until this Court rules on its mandamus petition, this case would continue to be at an effective standstill for several additional months. It was well within the district court’s case-management authority to enter an order that attempts to prevent such additional delay.³

³ The public’s interest is also consistent with this Court’s interest in avoiding entanglement in pre-trial disputes. The “courts of appeals cannot afford to become involved with the daily details of discovery,” *In re United States*, 884 F.3d 830, 835 (9th Cir. 2018); *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) (same). Here, this Court and the public have an interest in not allowing litigants to burden appellate courts with interlocutory review of trial court discovery and case management decisions, or to use mandamus as a means of delaying their discovery obligations.

Finally, the government's repeated argument that its interlocutory appeal and petition for mandamus may render discovery unnecessary (Mot. at 4, 6-8, 13) is without merit. The requested discovery will be relevant even if the government prevails in its appeal and the preliminary injunction is dissolved. Such discovery is essential to determining whether and to what extent the military was involved in ordering the Ban, which, in turn, is a necessary predicate for the government's claim of military deference. Similarly, such discovery is critical to testing the government's contention that Secretary Mattis' February 22, 2018 Memorandum implementing the Ban was developed independent of the President. And proof of impermissible motives or actual animus in the government's deliberative process will be relevant (or even dispositive) under any level of scrutiny. *Romer v. Evans*, 517 U.S. 620, 632, 634-35 (1996) (holding that animus may "outrun and belie any legitimate justifications that may be claimed" for a policy).⁴

⁴ *In re United States*, 138 S. Ct. 443, 445 (2017) is inapposite. There, the Supreme Court found that the district court should have "first resolved the Government's threshold arguments" regarding jurisdiction and reviewability of the agency action at issue. *Id.* Here, there are no open, potentially dispositive threshold issues, and plaintiffs' claims will proceed regardless of whether this Court affirms or dissolves the preliminary injunction. Moreover, the district court

CONCLUSION

The government shows no irreparable harm from mere preparation for compliance with ordinary discovery obligations, and the public interest favors deference to the district court's efforts to ready this case for trial. The government's emergency motion for a stay should be denied.

Dated: September 4, 2018

Diana Flynn
Camilla B. Taylor
Peter C. Renn
Tara L. Borelli
Paul D. Castillo
Sasha Buchert
Kara Ingelhart
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.

Respectfully submitted,

By: s/ Stephen R. Patton
James F. Hurst, P.C.
Stephen R. Patton, P.C.
Jordan M. Heinz
Scott Lerner
Vanessa Barsanti
Daniel Siegfried
KIRKLAND & ELLIS LLP

Peter E. Perkowski
OUTSERVE-SLDN, INC.

Derek A. Newman
Jason B. Sykes
NEWMAN DU WORS LLP

Attorneys for Real Parties in Interest-Plaintiffs

in *In re United States* ordered the *disclosure* of information, whereas here the district court only ordered the government only *to prepare* certain discovery for disclosure if a writ of mandamus is denied.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 27-1(1)(d), because it does not exceed 20 pages, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Stephen R. Patton _____
Stephen R. Patton

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 4, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen R. Patton _____
Stephen R. Patton

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**REAL PARTIES IN INTEREST-PLAINTIFFS' SUPPLEMENTAL
ADDENDUM**

Peter C. Renn
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
4221 Wilshire Blvd., Ste. 280
Los Angeles, CA 90010
(213) 382-7600

Tara L. Borelli
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
730 Peachtree St., NE, Ste. 640
Atlanta, GA 30308
(404) 897-1880

James F. Hurst, P.C.
Stephen R. Patton, P.C.
Jordan M. Heinz
Scott Lerner
Vanessa Barsanti
Daniel Siegfried
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000

Counsel for Real Parties in Interest-Plaintiffs

Additional Counsel

Diana Flynn
Sasha Buchert
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
1875 I St., NW 5th Fl.
Washington, DC 20006
(202) 740-0914

Camilla B. Taylor
Kara Ingelhart
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
105 W. Adams, 26th Fl.
Chicago, IL 60603
(312) 663-4413

Paul D. Castillo
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
3500 Oak Lawn Ave., Ste.
500
Dallas, TX 75219
(214) 219-8585

Peter E. Perkowski
OUTSERVE-SLDN, INC.
445 S. Figueroa St., Ste.
3100
Los Angeles, CA 90071
(213) 426-2137

Derek A. Newman
Jason B. Sykes
NEWMAN DU WORS LLP
2101 Fourth Ave., Ste.
1500
Seattle, WA 98121
(206) 274-2800

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

CASE NO. C17-1297-MJP

ORDER GRANTING MOTION TO
COMPEL; DENYING MOTION
FOR PROTECTIVE ORDER

THIS MATTER comes before the Court on Plaintiffs’ Motion to Compel Defendants’
Discovery Withheld Under the Deliberative Process Privilege (Dkt. No. 245) and Defendants’
Motion for Protective Order (Dkt. No. 268). Having reviewed the Motions, the Responses
(Dkt. Nos. 266, 278), the Replies (Dkt. Nos. 273, 281), the Supplemental Briefs
(Dkt. Nos. 289, 292, 293) and the related record, and having considered the submissions of the
parties at oral argument, the Court GRANTS Plaintiffs’ Motion to Compel and DENIES
Defendants’ Motion for Protective Order.

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Background

I. Procedural History

On July 26, 2017, President Donald J. Trump announced a ban on military service by openly transgender people (the “Ban”). On March 23, 2018, following the Court’s entry of a preliminary injunction, the President issued a Presidential Memorandum (the “2018 Memorandum”) directing the Department of Defense (“DoD”) to implement the Ban. (Dkt. No. 224, Ex. 3.) That same day, Defendants moved to dissolve the preliminary injunction. (Dkt. No. 215.) On March 29, 2018, Defendants requested to preclude discovery pending resolution of their motion to dissolve the preliminary injunction. (Dkt. No. 225.) The Court denied that request and ordered discovery in the case to proceed. (Dkt. No. 235.) The Court explained:

To the extent that Defendants intend to claim executive privilege, they must “expressly make the claim” and provide a privilege log “describ[ing] the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.”

(Id. at 3 (quoting Fed. R. Civ. P. 26(b)(5)(i)-(ii)).)

On April 13, 2018, the Court ordered the preliminary injunction to remain in effect and granted partial summary judgment against the Ban. (See Dkt. No. 233.) The Court held that the Ban would be subject to strict scrutiny, but declined to rule on its constitutional adequacy. (Id.) The Court observed that “[w]hether Defendants have satisfied their burden of showing that the Ban is constitutionally adequate (i.e., that it was sincerely motivated by compelling state interests, rather than by prejudice or stereotype) necessarily turns on facts related to Defendants’ deliberative process.” (Id. at 28.) Because those facts were not yet before it, the Court directed the parties “to proceed with discovery and prepare for trial on the issues of whether, and to what

1 extent, deference is owed to the Ban and whether the Ban violates equal protection, substantive
2 due process, and the First Amendment.” (*Id.* at 31.) Defendants filed a notice of appeal and
3 requested that the Ninth Circuit stay the preliminary injunction pending its review. (Dkt. No.
4 236); see also *Karnoski v. Trump*, No. 18-35347, Dkt. No. 3 (9th Cir. May 4, 2018). On July 18,
5 2018, the Ninth Circuit denied the request, holding that “a stay of the preliminary injunction
6 would upend, rather than preserve, the status quo.” (Dkt. No. 295.) The appeal is set to be heard
7 in October 2018. (Dkt. No. 296.)

8 **II. The Requested Discovery**

9 Throughout this litigation, Plaintiffs have sought discovery regarding:

- 10 • The identity of the individuals with whom President Trump discussed or
11 corresponded regarding policies on military service by transgender people;
- 12 • The date on which President Trump decided that transgender people should be
13 banned from military service;
- 14 • The process by which President Trump formulated the Ban, including identification
15 of “all sources of fact or opinion” he “consulted, considered, or otherwise referred to”
16 in formulating the Ban;
- 17 • Documents and communications related to President Trump’s consultation with
18 employees, agents, contractors, or consultants of the United States Armed Forces
19 regarding military service by transgender people;
- 20 • Documents and communications relating to, and including all drafts of, the 2017
21 Memorandum;
- 22 • Communications between President Trump and Congress concerning military service
23 by transgender people prior to August 26, 2017; and
- 24 • Documents relating to visits and communications between President Trump and his
Evangelical Advisory Board.

(Dkt. No. 278 at 3-4; Dkt. No. 268 at 4-5.)

To date, Defendants have objected to each of these requests and have withheld or
redacted tens of thousands of documents based on the deliberative process privilege. President

1 Trump has refused to substantively respond at all based on the presidential communications
2 privilege. (Dkt. No. 245 at 8-9; Dkt. No. 246, Ex. 28; Dkt. No. 278 at 4-5.)

3 On May 10, 2018, Plaintiffs moved to compel responses withheld under the deliberative
4 process privilege. (Dkt. No. 245.) On May 21, 2018, Defendants moved to preclude discovery
5 directed at President Trump. (Dkt. No. 268.) These motions are now before the Court.

6 Discussion

7 I. Trump v. Hawaii

8 Before turning to the merits of the pending discovery motions, the Court addresses the
9 impact of the Supreme Court’s recent ruling in Trump v. Hawaii, 138 S.Ct. 2392 (2018). In
10 Hawaii, the Supreme Court held that President Trump’s policy restricting the entry of certain
11 foreign nationals did not violate the Immigration and Nationality Act or the Establishment
12 Clause. The majority found the policy to be “facially neutral toward religion” and plausibly
13 related to the government’s stated national security objectives. Id. at 2418-24. While
14 Defendants claim that the same reasoning precludes discovery directed to President Trump in
15 this case, the Court disagrees for the following reasons:

16 First, Hawaii involved an entirely different standard of scrutiny. The Court already ruled
17 that the Ban is subject to strict scrutiny (Dkt. No. 233 at 20-24) and rejects Defendants’
18 suggestion that it “turns on a medical condition—gender dysphoria—and its treatment, not on
19 any protected status.” (Dkt. No. 289 at 5.) Unlike the policy in Hawaii, the Court need not “look
20 behind the face” of the Ban, as the Ban is facially discriminatory. 138 S.Ct. at 2420. President
21 Trump’s announcement explains that “the United States Government will not accept or allow . . .
22 Transgender individuals to serve in any capacity in the U.S. Military” (Dkt. No. 149, Ex. 1); the
23 2017 Memorandum, 2018 Memorandum, and Implementation Plan are titled “Military Service
24

1 by Transgender Individuals.” (Dkt. No. 149, Ex. 2; Dkt. No. 224, Exs. 1, 3.) That the Ban turns
2 on transgender identity—and not on any medical condition—could not be clearer.¹

3 Second, the majority in Hawaii repeatedly emphasized that the exclusion policy was
4 formulated following a “worldwide, multi-agency review.” See, e.g., 138 S.Ct. at 2404-06,
5 2408, 2421. This review considered risks “identified by Congress or prior administrations” and
6 involved the Department of Homeland Security (DHS), the State Department, “several
7 intelligence agencies,” and “multiple Cabinet members and other officials.” Id. at 2403-05. The
8 majority considered this process “persuasive evidence” that the policy had “a legitimate
9 grounding in national security concerns, quite apart from any religious hostility.” Id. at 2421. In
10 contrast, Defendants in this case have provided no information whatsoever concerning the
11 process by which the Ban was formulated.

12 Finally, Hawaii does not purport to address the scope of discovery or the application of
13 any privilege. For these reasons, the Court finds that Hawaii does not impact its consideration of
14 either of the pending motions.

15 **II. Plaintiffs’ Motion to Compel**

16 Plaintiffs move to compel documents withheld under the deliberative process privilege.
17 (Dkt. No. 245.)

18 The deliberative process privilege protects documents and materials which would reveal
19 “advisory opinions, recommendations and deliberations comprising part of a process by which
20

21 ¹ The Implementation Plan prohibits transgender people who have *never* been diagnosed
22 with gender dysphoria from serving unless they are “willing and able to adhere to all standards
23 associated with their biological sex.” (Dkt. No. 224, Ex. 1 at 4, Ex. 2 at 7.) As the Court
24 previously noted, “[r]equiring transgender people to serve in their ‘biological sex’ . . . would
force [them] to suppress the very characteristic that defines them as transgender in the first
place.” (Dkt. No. 233 at 13.)

1 governmental decisions and policies are formulated.” N.L.R.B. v. Sears, Roebuck & Co., 421
2 U.S. 132, 150 (1975). For the privilege to apply, a document must be (1) “predecisional,”
3 meaning that it was “generated before the adoption of an agency’s policy or decision,” and (2)
4 “deliberative,” meaning that it contains “opinions, recommendations, or advice about agency
5 policies.”² FTC v. Warner Commc’ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984). “Purely factual
6 material that does not reflect deliberative processes is not protected.” Id.

7 The deliberative process privilege is not absolute. Several courts have recognized that
8 the privilege does not apply in cases involving claims of governmental misconduct or where the
9 government’s intent is at issue. See, e.g., In re Sealed Case, 121 F.3d 729, 738, 746 (D.C. Cir.
10 1997); In re Subpoena Duces Tecum, 145 F.3d 1422, 1424-25 (D.C. Cir. 1998). However,
11 “[t]his appears to be an open question in the Ninth Circuit,” Vietnam Veterans of Am. v. CIA,
12 2011 WL 4635139, at *10 (N.D. Cal. Oct. 5, 2011), and even where there are claims of
13 governmental misconduct, courts in this district and circuit have applied a balancing test. See,
14 e.g., Wagafe v. Trump, No. 17-094RAJ, Dkt. No. 189 (W.D. Wash. May 21, 2018); All. for the
15 Wild Rockies v. Pena, No. 16-294RMP, 2017 WL 8778579, at *6-8 (E.D. Wash. Dec. 12, 2017);
16 Thomas v. Cate, 715 F. Supp. 2d 1012, 1021 (E.D. Cal. 2010). For purposes of this motion, the
17 Court assumes, without deciding, that applying the balancing test set forth in Warner, 742 F.2d at
18 1161, is appropriate.

19 In Warner, the Ninth Circuit instructed courts to consider whether “[Plaintiffs’] need for
20 the materials and the need for accurate fact-finding override the government’s interest in

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22 ² Plaintiffs contend that Defendants have improperly asserted the deliberative process
23 privilege over categories of documents that are facially outside its scope (i.e., post-decisional
24 documents generated after President Trump’s July 26, 2017 announcement and non-deliberative
documents containing purely factual information). (Dkt. No. 245 at 15-17.) Because the Court
finds that the deliberative process privilege does not apply at all, it need not address its scope.

1 nondisclosure.” Id. In making this determination, relevant factors include: “(1) the relevance of
2 the evidence; (2) the availability of other evidence; (3) the government’s role in the litigation;
3 and (4) the extent to which disclosure would hinder frank and independent discussion regarding
4 contemplated policies and decisions.” Id.

5 As with all evidentiary privileges, “the deliberative process privilege is narrowly
6 construed” and Defendants bear the burden of establishing its applicability. Greenpeace v. Nat’l
7 Marine Fisheries Serv., 198 F.R.D. 540, 543 (W.D. Wash. 2000) (citations omitted). In addition
8 to showing that withheld documents are privileged, Defendants must comply with formal
9 procedures necessary to invoke the privilege. Id. “Blanket assertions of the privilege are
10 insufficient. Rather [Defendants] must provide ‘precise and certain’ reasons for preserving the
11 confidentiality of designated material.” Id.

12 **A. Relevance of the Evidence**

13 The evidence Plaintiffs seek is undoubtedly relevant. The Court has already found that
14 the Ban’s constitutionality “necessarily turns on facts related to Defendants’ deliberative
15 process.” (Dkt. No. 233 at 28.) Defendants may not simultaneously claim that deference is
16 owed to the Ban because it is the product of “considered reason [and] deliberation,” “exhaustive
17 study,” and “comprehensive review” by the military (Dkt. No. 194 at 17; Dkt. No. 226 at 9)
18 while also withholding access to information concerning these deliberations, including whether
19 the military was even involved.³ This information is central to the litigation and should not be
20 withheld from the searching judicial inquiry that strict scrutiny requires. See In re Subpoena,
21 145 F.3d at 1424; see also Johnson v. California, 543 U.S. 499, 506 (2005) (observing that strict
22 scrutiny is intended to assure that the government “is pursuing a goal important enough to

23 _____
24 ³ The Court notes that Defendants have steadfastly refused to identify even one general or
military official President Trump consulted before announcing the Ban.

1 warrant use of a highly suspect tool.”); Arizona Dream Act Coalition v. Brewer, 2014 WL
2 171923, at *3 (D. Ariz. Jan. 15, 2014) (holding that withheld communications were “highly
3 relevant” because the “Court must consider the actual intent behind Arizona’s driver’s license
4 policy when it considers the merits of this case.”). This factor weighs in favor of disclosure.

5 **B. Availability of Other Evidence**

6 Defendants possess all of the evidence concerning their deliberations over the Ban, and
7 there is no suggestion that this evidence can be obtained from other sources. Defendants’
8 production of non-privileged documents and an administrative record do not obviate Plaintiffs’
9 need for responsive documents concerning the deliberative process. (See Dkt. No. 235 at 2.)
10 This factor weighs in favor of disclosure.

11 **C. Government’s Role in the Litigation**

12 There is no dispute that the government is a party to this litigation. This factor weighs in
13 favor of disclosure.

14 **D. Extent to Which Disclosure Would Hinder Independent Discussion**

15 While Defendants claim that disclosure “risks chilling future policy discussions on
16 sensitive personnel and security matters” and could “potentially lead[] to a direct negative impact
17 to national security” (Dkt. No. 266 at 12-13), they cannot avoid disclosure based on mere
18 speculation. Instead, Defendants must identify specific, credible risks which cannot be mitigated
19 by the existing protective order in this case (Dkt. No. 183), and must explain why these risks
20 outweigh the Court’s need to perform the “searching judicial inquiry” that strict scrutiny
21 requires. Johnson, 543 U.S. at 506. Because they have failed to do so, this factor weighs in
22 favor of disclosure.

1 Having found that the deliberative process privilege does not apply in this case, the Court
2 GRANTS Plaintiffs' Motion to Compel.

3 **III. Defendants' Motion for Protective Order**

4 Defendants move for a protective order precluding discovery directed at President
5 Trump. (Dkt. No. 268.) Defendants concede that the President has not provided substantive
6 responses or produced a privilege log, but contend that because the requested discovery raises
7 "separation-of-powers concerns," Plaintiffs must exhaust discovery "from sources other than the
8 President and his immediate White House advisors and staff" before he is required to do
9 formally invoke the privilege. (*Id.* at 8, 10-11.)

10 The Supreme Court has recognized that discovery directed at the President involves
11 "special considerations," and that his "constitutional responsibilities and status are factors
12 counseling judicial deference and restraint in the conduct of litigation" against him. Cheney v.
13 U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 385, 387 (2004) (citation omitted).
14 Nevertheless, the President is not immune from civil discovery. Courts have permitted discovery
15 directed at the President where, as in this case, he is a party or has information relevant to the
16 issues in dispute. *See, e.g., United States v. Nixon*, 418 U.S. 683, 706 (1974) (rejecting "an
17 absolute, unqualified Presidential privilege of immunity from judicial process under all
18 circumstances"); Clinton v. Jones, 520 U.S. 681, 704 (1997) (noting that "[s]itting Presidents
19 have responded to court orders to provide testimony and other information with sufficient
20 frequency that such interactions between the Judicial and Executive Branches can scarcely be
21 thought a novelty.").

22 The President may invoke the privilege "when asked to produce documents or other
23 materials that reflect presidential decisionmaking and deliberations that [he] believes should
24

1 remain confidential.” In re Sealed Case, 121 F.3d at 744. Once he does so, those documents and
2 materials are presumed to be privileged. Id. However, “the privilege is qualified, not absolute,
3 and can be overcome by an adequate showing of need.” Id. at 745. If the Court finds that an
4 adequate showing has been demonstrated (i.e., that the materials contain evidence “directly
5 relevant to issues that are expected to be central to the trial” and “not available with due
6 diligence elsewhere”), it may then proceed to review the documents in camera to excise
7 non-relevant material. Id. at 754, 759.

8 To date, President Trump and his advisors have failed to invoke the presidential
9 communications privilege, to respond to a single discovery request, or to produce a privilege log
10 identifying the documents, communications, and other materials they have withheld. While
11 Defendants claim they need not do so until Plaintiffs “exhaust other sources of non-privileged
12 discovery, meet a heavy, initial burden of establishing a heightened, particularized need for the
13 specific information or documents sought, and at a minimum substantially narrow any requests
14 directed at presidential deliberations” (Dkt. No. 268 at 3), the Court finds no support for this
15 claim. To the extent the President intends to invoke the privilege, the Court already ordered that
16 he “‘expressly make the claim’ and provide a privilege log ‘describ[ing] the nature of the
17 documents, communications, or tangible things not produced or disclosed—and do so in a
18 manner that, without revealing information itself privileged or protected, will enable other parties
19 to assess the claim.’” (Dkt. No. 235 at 3 (quoting Fed. R. Civ. P. 25(b)(5)(i)-(ii).) Only then can
20 the Court evaluate whether the privilege applies and if so, whether Plaintiffs have established a
21 showing of need sufficient to overcome it.

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The clerk is ordered to provide copies of this order to all counsel.

Dated July 27, 2018.



Marsha J. Pechman
United States District Judge

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

CASE NO. C17-1297-MJP

ORDER DENYING
DEFENDANTS' MOTION FOR A
PROTECTIVE ORDER

THIS MATTER comes before the Court on Defendants' Motion for a Protective Order. (Dkt. No. 225.) Having reviewed the Motion, the Responses (Dkt. Nos. 230, 231), and the Reply (Dkt. No. 232), the Court DENIES the Motion in its entirety.

Defendants seek to preclude discovery pending the resolution of their motion to dissolve the preliminary injunction, including through any interlocutory appeal. (Dkt. No. 222.) Defendants claim (1) that Plaintiffs' and Washington's current challenge is moot because the "new policy" (i.e., the policy set forth in President Trump's 2018 Memorandum) is the "operative policy" governing military service by transgender persons; (2) that any challenge to the "new policy" is subject to the Administrative Procedures Act ("APA"), including the

1 requirement that review be confined to the administrative record; and (3) that it is in the interest
2 of judicial economy to preclude discovery until their motion to dissolve the preliminary
3 injunction has been resolved. (Dkt. No. 225 at 2, 5-7.)

4 In light of the Court’s recent order—which directed the parties to proceed with discovery
5 and prepare for trial and which struck Defendants’ motion to dissolve the preliminary injunction
6 in its entirety—the Court finds that entry of a protective order is not warranted. (See Dkt. No.
7 233.)

8 First, as explained in further detail in that Order, Plaintiffs’ and Washington’s challenge
9 is not “moot,” and discovery related to President Trump is not “irrelevant.” (Id. at 11-14.) The
10 2018 Memorandum and Implementation Plan are not a “new policy,” but rather a plan to
11 implement, with few exceptions, the directives of the 2017 Memorandum. (Id. at 11-14.)

12 Second, there is no reason for discovery to be confined to the administrative record.
13 Plaintiffs and Washington do not challenge the policy under the APA, but instead raise direct
14 constitutional claims. (Dkt. No. 230 at 5-6; Dkt. No. 231 at 10-12); see also Bolton v. Pritzker,
15 Case No. 15-cv-1607MJP, 2016 WL 4555467, at *4 (W.D. Wash. Sept. 1, 2016) (noting that “a
16 direct constitutional challenge is reviewed independent of the APA and as such the court is
17 entitled to look beyond the administrative record in regard to such a claim”) (internal quotation
18 marks and citation omitted). Further, Defendants have not demonstrated that the policy
19 excluding openly transgender people from military service constitutes an “agency action” that
20 “resulted from an administrative process by the Department of Defense.” (Dkt. No. 223 at 6.)
21 Indeed, the policy was announced by President Trump, and whether the DoD was even consulted
22 prior to its announcement is disputed. (See Dkt. No. 233 at 28-29.)
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Finally, Defendants have not demonstrated that precluding discovery will serve the interests of judicial economy in any way.

Accordingly, the Court DENIES Defendants’ motion and ORDERS that discovery in this case proceed. Such discovery shall not be confined to the administrative record. To the extent that Defendants intend to claim Executive privilege, they must “expressly make the claim” and provide a privilege log “describ[ing] the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” Fed. R. Civ. P. 26(b)(5)(i)-(ii).

The clerk is ordered to provide copies of this order to all counsel.

Dated April 19, 2018.



Marsha J. Pechman
United States District Judge

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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 JANE DOE IN
SUPPORT OF PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION
AND PLAINTIFF JANE DOE'S
MOTION TO PROCEED UNDER
PSEUDONYM**

I, Jane Doe, declare as follows:

1. I am a plaintiff in the above-captioned action. I have actual knowledge of the matters stated in this declaration.

2. I am a 29-year-old woman, and I am currently serving in the U.S. military.

3. I am also transgender, although I have not yet transitioned to living openly as a woman. Because of the federal government's recently announced policy with respect to transgender service members, I am limiting the information in my testimony to exclude identifying information, for fear that I would be separated from the military on the basis of my transgender status or face other negative consequences.

4. I joined the military to serve my country and for the security and stability that a

DECLARATION OF JANE DOE IN SUPPORT
OF PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION AND TO USE PSEUDONYM - 1
[2:17-cv-01297-MJP]

NEWMAN DU WORS LLP

2101 Fourth Avenue, Suite 1500
Seattle, Washington 98121
(206) 274-2800

1 military career provides. I enjoy the challenge my military career provides, and I take pride in
2 my role in protecting our country and helping others save innocent lives.

3 5. I desire to continue serving in the military for the maximum number of years I am
4 permitted to do so openly. My re-enlistment window opens within the next year.

5 6. I was assigned the sex of male at birth. However, I have felt since I was 11 years
6 old, and known since I was 20 years old, that I am female. I have long hoped to be able to
7 transition to living openly as a woman, but the prospect of doing so felt unattainable in the past,
8 without a supportive environment in which to transition.

9 7. On or around June 30, 2016, I became aware that the ban on open military service
10 by transgender individuals had been lifted. I was very excited and nervous about the possibility
11 of serving openly as a woman. In October 2016, I began extensively reviewing the materials the
12 military was releasing to implement the lifting of the ban. In December 2016, I attended my
13 command-level training on the new policy. Around that time, I decided to come out as
14 transgender to select colleagues whom I felt I could trust. I also researched what was required to
15 formally change my gender marker in the military's Defense Enrollment Eligibility Reporting
16 System.

17 8. I decided to begin my legal and medical transition and begin the process of
18 officially changing my gender marker once I was posted at my next assigned location. I planned
19 to time and structure my transition so that it was as smooth as possible for me and others. I
20 wanted to work carefully with military medical personnel and my Commanding Officer, giving
21 him plenty of time to prepare my unit so that my transition would go smoothly for everyone. I
22 also wanted the other service members at my next assigned location to get to know me as a
23 valuable individual member of the team. I additionally wanted to give myself some time to come
24 out to individuals to whom I could look for support. I transferred to this assigned location in July
25 2017.

26 9. On July 26, 2017, President Trump posted three tweets that said that transgender
27 people would not be able to serve in the military "in any capacity." After I saw the President's
28 tweets, I decided to put my plans to transition, come out as transgender, live openly as a woman,

1 and change my gender marker, on hold.

2 10. Because of this change in policy, I have not come out to anyone in my chain of
3 command. I am open to a few select individuals with whom I serve, as well as a group of
4 veterans with whom I communicate about my gender identity for support and friendship.

5 11. I have been extremely anxious and stressed about what to do next. I have placed
6 my life “on hold.” I have not come out as transgender to any additional people in my life; I have
7 not pursued any of the steps required for me to transition; and I no longer know if I will be able
8 to continue serving in the military, a career that I love and wish to continue. This is all due to the
9 announced policy banning transgender people like me from serving openly in the military.

10 12. I am terrified that my career will be brought to an early end because of the
11 President’s decision to ban transgender individuals from military service. That fear is heightened
12 by the prospect of having to use my name to participate in this lawsuit.

13 13. The ban on open service for transgender military personnel harms my mental and
14 emotional health by causing me to continue living as if I were a man, even though I am a
15 woman, and by indefinitely delaying, if not altogether prohibiting, my medical and legal
16 transition to living openly as female.

17 14. In short, I am caught between a rock and a hard place. If I transition, I lose my
18 career and everything that comes with it—including my current income, my benefits, my future
19 employability outside the military, and my identity as a service member. If I do not transition,
20 then I give up the expression of who I am on the most fundamental level and, instead, must
21 continue living as someone that I am not.

22 15. All that I want is to live openly as the woman I am and to serve my country with
23 respect and dignity.

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

25
26 DATED: September 13, 2017


Jane Doe

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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 on September 14, 2017, I caused true and correct copies of the foregoing documents to be served by the method(s) listed below on the following interested parties:

By Hand Delivery:

US Attorney’s Office
700 Stewart St., Suite 5220
Seattle, WA 98101-1271

By Registered or Certified Mail:

Attorney General of the United States	Department of Defense
U.S. Department of Justice	1400 Defense Pentagon
950 Pennsylvania Avenue, NW	Washington, DC 20301-1400
Washington, DC 20530-0001	

Secretary of Defense James N. Mattis	President Donald J. Trump
1000 Defense Pentagon	1600 Pennsylvania Ave. NW
Washington, DC 20301-1000	Washington, DC 20500

I hereby certify under the penalty of perjury that the foregoing is true and correct. Executed on September 14, 2017 at Seattle, Washington.



Rachel Horvitz, *Paralegal*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 4, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen R. Patton _____
Stephen R. Patton