

**No. 18-72159**

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

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

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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.

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**REAL PARTIES IN INTEREST-PLAINTIFFS' REPLY BRIEF IN  
IN FURTHER SUPPORT OF THEIR MOTION TO SUPPLEMENT  
APPELLATE RECORD**

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The government does not dispute that, contrary to its representations at oral argument, Plaintiffs do *not* “have the entire Panel of Experts report.” As Plaintiffs correctly responded at oral argument, that document, titled “Final Report and Recommendations of the Transgender Panel,” as produced to Plaintiffs, was entirely redacted. At most, the government contends that one section of that 24-page report, summarizing the “Information Presented to the Panel,” was separately produced. (Response, Dkt. No. 45, at 3, Ex. 3.) But even if that were true, that document itself is significantly redacted. And it would not change the fact that the remainder of the Panel’s 24-page “Final Report”—including the Panel’s analysis and “Range of Options Considered”—has been withheld, and that the government’s representation that the report was produced in full was not correct.

The government provides no support for its *assertion* that the Panel’s “Final Report” is a “draft document” and “is not a final document at all.” (*Id.* at 1, 3.) The document itself refutes that assertion. As the District Court noted when the government made the same claim below, it is titled “Final Report and Recommendation of the Transgender Panel” (Dist. Ct. Dkt. No. 310, at 7/17/18 Hr’g Tr. at 66:6-7), and the government

does not point to, nor are Plaintiffs aware of, any subsequent version of this document or any other report of the Panel. This is also how the government's own lawyers characterized the document in the government's privilege log—"FINAL Report with Data and Options." (Dist. Ct. Dkt. No. 246-26 (log entry no. 517); *see also* Dist. Ct. Dkt. No. 310, 7/17/18 Hr'g Tr. at 78:13-17.) Moreover, it is clearly not an "earlier draft" of the January 11, 2018 two-page memorandum from Robert Wilkie to Secretary Mattis reporting the Panel's recommendations ("Wilkie Memorandum"). (*See* Response at 2, Ex. 1.) As even a quick comparison confirms, the two documents bear absolutely no similarity. The Wilkie Memorandum simply reports the Panel's recommendations. It does not purport to set forth the Panel's "Final Report," including its analysis, the information presented to it, or the options it considered. (*See* Motion Ex. A, Dkt. No. 44-2, ("Final Report and Recommendations of the Transgender Panel") at 8779, 8786, 8800.)

The same is true for any suggestion that the Panel's "Final Report" constitutes an earlier draft of the February 2018 Report that the government relies on to support the Ban. Indeed, the section headings (the only text in the Panel's "Final Report" that is not redacted) bear no

relationship to the section headings, the organization, or the subjects addressed in the February 2018 Report. Similarly, the February 2018 Report does not contain any indication that it was drafted, or even reviewed, by the Panel of Experts or that the Panel played any role in its preparation. In fact, the Report does not contain any acknowledgment or indication of who authored it or the circumstances under which it was prepared. What the additional documents attached to the government's Response do make clear, however, is that it was *not* authored by the Panel of Experts, which completed its work and issued its recommendations on or before January 15, 2018, as directed by Secretary Mattis. (Response at 2, Ex. 1.) This was several weeks *before* the Report the government relies on was prepared.

The Wilkie Memorandum also confirms that the Panel's recommendations were made "in accordance with [the] direction from the President in his August 25, 2017 Memorandum," which was attached as an exhibit, and that the Panel's recommendations closely tracked President Trump's three directives in that August 25, 2017 Memorandum. (*See* Response, Ex. 1, Dkt. No. 46, at 3059-60.) And, while the effect of these recommendations is the same as the recommendations

in the subsequent, February 2018 Report (*viz.*, subject to a one-time grandfather exception, transgender persons are barred from accessing into or serving in the military unless they serve “in their biological sex”), the recommendations in the February 2018 Report are drafted to make it appear as though they are focused on gender dysphoria. (*Compare* Response, Ex. 1 at 3059-60 *with* Response, Ex. 3 at 4-5). In other words, someone (presumably the same person(s) who drafted the February 2018 Report) appears to have also redrafted the Panel’s recommendations to support the government’s litigation argument that they discriminate on the basis of gender dysphoria as opposed to transgender status.

Finally, while the government places great reliance on Mr. Wilkie’s statement to Secretary Mattis that, “based on your review of these recommendations, and other information and input you elect to consider, we will develop a writing by which you would advise the President of your conclusions and recommendations in this matter” (Response at 2 (quoting Ex. 1 at 3060)), all that statement does is confirm that the February 2018 Report was “developed” after the Panel completed its work and made its recommendations, and likely included “other information and input.” It does not indicate the individuals to whom Mr. Wilkie was referring when

he said “we will develop a writing,” or whether the White House or outside groups were involved in that process. All of this simply illustrates the significant unanswered questions concerning the February 2018 Report the government relies upon, and rebuts the government’s assertion that Plaintiffs “already have all the information they need” to challenge that Report. (Response at 2.)

In sum, the Response confirms that the government was not correct when it asserted, first in its main argument and again on rebuttal, that Plaintiffs “have the entire Panel of Experts report.” For that reason alone, Plaintiffs’ motion should be granted. But more fundamentally, the Panel’s “Final Report” further illustrates why discovery concerning the government’s decision-making and deliberations with respect to the Ban and the February 2018 Report the government relies upon to justify it, is essential to resolving whether the Ban survives constitutional scrutiny and to evaluating the government’s claim that it represents an independent military judgment entitled to deference. Finally, the redacted “Final Report” illustrates why courts have uniformly held that the deliberative process privilege does not apply where, as here, the government’s intent and decision-making are in dispute. (*See* Plaintiffs’

Answer to Petition for Mandamus, Dkt. No. 30-1, at 23-24.) Plaintiffs respectfully request that their motion to supplement the record with the Panel of Experts “Final Report” be granted.

Dated: October 17, 2018

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## 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* \_\_\_\_\_  
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## 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 October 17, 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* \_\_\_\_\_  
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