

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

BROCK STONE, et al.,
Plaintiffs,

vs.

DONALD J. TRUMP, et al.,
Defendants.

Case No. 1:17-cv-02459-GLR

PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs hereby respond to Defendants' Notice of Supplemental Authority, ECF 255, regarding the United States Court of Appeals for the Ninth Circuit's June 14, 2019 opinion in *Karnoski v. Trump*, No. 18-35347 (9th Cir.) (per curiam) ("*Karnoski* Opinion"). The *Karnoski* Opinion triggers a lifting of this Court's November 30, 2018 stay of the effect of the Magistrate Judge's August 14, 2018 decision granting Plaintiffs' Motion to Compel, *see* ECF 227, 228, and supports Plaintiffs' Opposition to Defendants' Motion to Dissolve the Preliminary Injunction, ECF 139, and Plaintiffs' Opposition to Defendants' Motion to Dismiss or for Summary Judgment, ECF 163-2.

First, far from providing a basis for the Court to reconsider its Order overruling Defendants' Objections to the Magistrate Judge's Memorandum and Order, ECF 227, 228, the *Karnoski* Opinion supports this Court's approach and outcome. The *Karnoski* Opinion directed the district court to apply a four-factor balancing test by examining how those factors applied to different categories of withheld documents. *Karnoski* Opinion at 53–55 (discussing *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)). Unlike the requests at issue in *Karnoski*, the requests at issue in this case are limited to the agency defendants (not the

President) and the requests have already been narrowed to three discrete categories of documents that are central to Plaintiffs' claims. *See* ECF 204 at 3. This Court *already* applied the four-factor balancing test and found that they favor disclosure of all of the three discrete categories of documents identified in Plaintiffs' Motion to Compel. ECF 227 at 16. Plaintiffs intend to oppose the motion for reconsideration that Defendants have indicated they will file and will explain in more detail how this Court's discovery orders are fully consistent with the approach adopted by the Ninth Circuit in *Karnoski*.

Second, the *Karnoski* Opinion supports Plaintiffs' argument that, even if Secretary Mattis's implementation plan is analyzed independently from President Trump's original ban, the policy is still subject to heightened scrutiny. *See* ECF 139 at 18; ECF 163-2 at 30. The Ninth Circuit held that discrimination based on transgender status is subject to heightened scrutiny based on "the factors ordinarily used to determine whether a classification affects a suspect or quasi-suspect class." *Karnoski* Opinion at 41. The Ninth Circuit further held this heightened scrutiny applies even in the military context: "deference informs the application of intermediate scrutiny, but it does not displace intermediate scrutiny and replace it with rational basis review." *Id.* at 42. And the Ninth Circuit held that "the 2018 Policy on its face treats transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies." *Id.* at 43. "Defendants bear the burden of establishing that they reasonably determined the policy 'significantly furthers' the government's important interests, and that is not a trivial burden." *Id.* at 45.

Dated: June 19, 2019

David M. Zionts*
Carolyn F. Corwin*
Mark H. Lynch (Bar No. 12560)
Augustus Golden*
Jeff Bozman*
Marianne F. Kies (Bar No. 18606)
Joshua Roselman*
Peter J. Komorowski (Bar No. 20034)
Mark Andrews-Lee*
Covington & Burling LLP
One CityCenter
850 Tenth St. NW
Washington, DC 20001
Telephone: (202) 662-6000
Fax: (202) 778-5987
dzionts@cov.com
ccorwin@cov.com
mlynch@cov.com
agolden@cov.com
jbozman@cov.com
mkies@cov.com
jroselman@cov.com
pkomorowski@cov.com
mandrewslee@cov.com

Mitchell A. Kamin*
Nicholas A. Lampros*
Covington & Burling LLP
1999 Avenue of the Stars, Suite 3500
Los Angeles, California 90067
Telephone: (424) 332-4800
Facsimile: (424) 332-4749
mkamin@cov.com
nlampros@cov.com

* *Admitted pro hac vice*

Respectfully submitted,

/s/ Peter J. Komorowski

Peter J. Komorowski

Deborah A. Jeon (Bar No. 06905)
David Rocah (Bar No. 27315)
American Civil Liberties Union Foundation of
Maryland
3600 Clipper Mill Road, #350
Baltimore, MD 21211
Telephone: (410) 889-8555
Fax: (410) 366-7838
jeon@aclu-md.org
rocah@aclu-md.org

Joshua A. Block*
Chase B. Strangio*
James Esseks*
Leslie Cooper*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: 212-549-2627
Fax: 212-549-2650
jblock@aclu.org
cstrangio@aclu.org
jesseks@aclu.org
lcooper@aclu.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on June 19, 2019, a copy of the foregoing was served on Defendants
via CM/ECF.

/s/ Peter J. Komorowski

Peter J. Komorowski