

The Honorable Marsha J. Pechman

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**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

**JOINT STIPULATION TO REVISE
CASE SCHEDULE**

NOTE ON MOTION CALENDAR:
July 12, 2019

1 Plaintiffs Ryan Karnoski, Cathrine Schmid, D.L., formerly known as K.G., by his next
2 friend and mother, Laura Garza, Lindsey Muller, Terece Lewis, Phillip Stephens, Megan
3 Winters, Jane Doe, Human Rights Campaign, Gender Justice League, and American Military
4 Partner Association n/k/a Modern Military Association of America (collectively, “Plaintiffs”);
5 Plaintiff-Intervenor State of Washington; and Defendants Donald J. Trump, the United States of
6 America, Mark Esper, and the United States Department of Defense (collectively,
7 “Defendants”), stipulate and move the Court as follows:

8 WHEREAS, the Court granted the Parties’ stipulation on September 28, 2018, vacating the
9 deadlines for filing and noting discovery motions, completing discovery, and filing dispositive
10 motions, and further ordered the Parties to submit proposed revisions to the case schedule within
11 21 days after the Ninth Circuit ruled on the Mandamus Petition. (Dkt. No. 319.) All other
12 deadlines in the case schedule remained unchanged. (*Id.*)

13 WHEREAS, on February 19, 2019 the Parties further agreed that revisions to the case
14 schedule were warranted because the Ninth Circuit still had not ruled on the pending Mandamus
15 Petition—including vacating the March 4, 2019 motions in limine deadline, the March 27, 2019
16 pretrial order deadline, the March 27, 2019 proposed findings of fact and conclusions of law
17 deadline, the March 29, 2019 pretrial conference, and the April 8, 2019 trial date. (Dkt. No 330.)

18 WHEREAS, the Court granted the Parties’ stipulation on February 20, 2019 and further
19 ordered the Parties to submit proposed revisions to the case schedule within 21 days after the
20 Ninth Circuit ruled on the Mandamus Petition. (Dkt. No. 331.)

21 WHEREAS, the Ninth Circuit issued its order on the Mandamus Petition on June 14, 2019.
22 (Dkt. No. 338.)

23 WHEREAS, the Parties have indicated that they will not file a petition for panel rehearing,
24 a petition for rehearing en banc, or a petition for a writ of certiorari.

25 WHEREAS, the Parties disagree on the order in which the Court should resolve the
26 Parties’ discovery disputes and Defendants’ motion to dissolve the preliminary injunction. The
27 Parties’ respective positions are set forth below:
28

- 1 • **Plaintiffs and Plaintiff-Intervenor’s Position:** Plaintiffs and Plaintiff-Intervenor
2 believe that the Court should resolve the Parties’ dispute over Defendants’ claims of
3 privilege (and subsequent withholding of documents) first. The Ninth Circuit specified
4 that “Plaintiffs on remand may present additional evidence” beyond “the current record”
5 in support of the preliminary injunction. (Dkt. No. 338 at 44.) The Ninth Circuit also
6 “vacate[d] the district court’s discovery order, so that the district court may reconsider
7 Plaintiffs’ discovery requests,” and it set forth guidance for resolution of privilege
8 disputes. (Dkt. No. 338 at 56.) In order for the Plaintiffs to “present additional evidence”,
9 as contemplated by the Ninth Circuit, the discovery disputes must be resolved. And this
10 delay in considering Defendants’ dissolution motion does no harm to Defendants
11 because the preliminary injunction has been stayed “through the district court’s further
12 consideration of the motion to dissolve,” and if that motion is denied, “throughout [the
13 Ninth Circuit’s] disposition of any appeal by the Government” (Dkt. No. 338 at 56).
14 Plaintiffs and Plaintiff-Intervenor are not requesting an “indefinite amount of time” to
15 oppose Defendants’ motion as Defendants suggest below, and instead only request that
16 the threshold privilege issues be addressed first since such discovery is very likely to
17 inform the Court’s consideration of Defendants’ motion.
- 18 • **Defendants’ Position:** Defendants believe that there is no legal basis for permitting
19 Plaintiffs and Plaintiff-Intervenor to take an indefinite amount of time to oppose
20 Defendants’ motion to dissolve the preliminary injunction, Dkt. 223, which was filed on
21 March 29, 2018 and noted for consideration on April 27, 2018, while Plaintiffs take
22 additional discovery. Preliminary relief is appropriate only when a party can show that
23 “(1) it is likely to succeed on the merits of its claim, (2) it is likely to suffer irreparable
24 harm in the absence of preliminary relief, (3) the balance of hardships tips in its favor,
25 and (4) a preliminary injunction is in the public interest.” *Int’l Franchise Ass’n, Inc. v.*
26 *City of Seattle*, 803 F.3d 389, 399 (9th Cir. 2015). If Plaintiffs and Plaintiff-Intervenor
27 believe they need to take more discovery before they can satisfy this standard, then there
28 is no basis in law for the preliminary injunction to remain in place in the interim.

1 Although the Ninth Circuit stated that “Plaintiffs on remand may present additional
2 evidence to support th[eir] *theory*”—that the 2018 policy was not the product on
3 independent military judgment—the Ninth Circuit nowhere stated that Plaintiffs or
4 Plaintiff-Intervenor may indefinitely delay resolution of Defendants’ pending motion to
5 dissolve the preliminary injunction. Dkt. 338 at 45 (emphasis added). To the contrary,
6 the Ninth Circuit instructed that “the district court on remand must apply the ‘traditional’
7 standard for injunctive relief to determine whether dissolution of the injunction is
8 warranted.” *Id.* at 45. Accordingly, Defendants respectfully request that the Court order
9 that if Plaintiffs or Plaintiff-Intervenor wish to file an opposition to Defendants’ motion
10 to dissolve the preliminary injunction, they must do so on or before August 2, 2019; and
11 Defendants will file a reply on or before August 23, 2019.

12 WHEREAS, the Parties disagree about whether Plaintiffs and Plaintiff-Intervenor are
13 entitled to discovery beyond the administrative record.

- 14 • **Defendants’ Position:** The Ninth Circuit definitively set the standard for judicial review
15 in this case. This Court “must apply appropriate deference to its evaluation” of the
16 challenged policy under “intermediate scrutiny.” *Id.* at 45. This means that, to prevail,
17 the government must “establish[] that [the military] reasonably determined the policy
18 ‘significantly furthers’ the government’s important interests.” *Id.* Under no
19 circumstance is the reviewing court to “substitute its ‘own evaluation of evidence for a
20 reasonable evaluation’ by the military.” *Id.* (quoting *Rostker*, 453 U.S. at 68). Thus,
21 because “the reasonableness of the 2018 Policy must be evaluated on the record
22 supporting that decision and with the appropriate deference due to a proffered military
23 decision,” *id.* at 56, Plaintiffs’ and Plaintiff-Intervenor’s claims are properly adjudicated
24 based on a review of the administrative record supporting Defendants’ decision, and the
25 case should proceed directly to dispositive motions. *See id.* at 54 n.22 (noting that that a
26 12-page memo was sufficient to evaluate the government policy in *Trump v. Hawaii*, 138
27 S. Ct. 2392, 2421–22, (2018)). However, in the event that the Court disagrees or requires
28 further briefing on this issue, Defendants agree with the below schedule.

- 1 • **Plaintiffs and Plaintiff-Intervenor’s Position:** Plaintiffs and Plaintiff-Intervenor
2 maintain that this Court has already rejected Defendants’ contention that Plaintiffs’ and
3 Plaintiff-Intervenor’s direct constitutional claims should be confined to an administrative
4 record. *E.g.*, Dkt. 235 at 2. Nothing in the Ninth Circuit’s opinion disturbed that
5 manifestly correct decision—and in fact the opinion further undermines Defendants’
6 position. The Ninth Circuit expressly held that Plaintiffs’ and Plaintiff-Intervenor’s
7 claims are subject to heightened scrutiny, which requires testing the government’s
8 purported justifications for a discriminatory classification to ensure they are “exceedingly
9 persuasive ... genuine, not hypothesized or invented *post hoc* in response to litigation.”
10 (Slip op. at 39.) Equally plain, the Ninth Circuit observed that the government had
11 already produced the administrative record, yet far from foreclosing additional discovery,
12 as Defendants suggest this Court should do, the Ninth Circuit repeatedly recognized that
13 Defendants may seek additional discovery. (*E.g. id.* at 44, 49, 52-55.)

14 NOW THEREFORE, Plaintiffs, Plaintiff-Intervenor, and Defendants, through their
15 respective counsel of record, do hereby stipulate and agree, and respectfully request, that the
16 Court enter an order as follows:

- 17 1. The Parties stipulate that amended pleadings may be filed two weeks from the date
18 the Court issues the revised case schedule.
- 19 2. Before filing any motion pertaining to the Deliberative Process Privilege, the Parties
20 will meet and confer to try to attempt to narrow any remaining discovery disputes.
- 21 3. Motions pertaining to the Deliberative Process Privilege will be filed on or before
22 August 22, 2019 with a noting date of Friday, September 27, 2019. Oppositions will be filed on
23 or before September 13, 2019. Replies will be filed on or before September 27, 2019. This
24 schedule shall not apply to Plaintiff-Intervenor, as Defendants’ responses to Plaintiff-
25 Intervenor’s discovery requests are pending.
- 26 4. All motions related to discovery will be filed on or before January 30, 2020 and
27 noted on the motion calendar on the third Friday thereafter.
- 28 5. The discovery cutoff will be February 28, 2020.

6. Dispositive Motions will be filed on or before March 27, 2020 with a noting date of Friday, May 1, 2020. Oppositions will be filed on or before April 24, 2020. Replies will be filed on or before May 1, 2020.

7. Motions in Limine will be filed on or before June 4, 2020 with a noting date of Friday, June 19, 2020.

8. The Joint Pretrial Order will be due on or before July 2, 2020.

9. Trial Briefs and Proposed Findings of Fact and Conclusions of Law will be filed on or before July 13, 2020.

10. The Pretrial Conference will be held the week of July 20, 2020

11. Trial will start on July 27, 2020.

SO STIPULATED

Respectfully submitted July 12, 2019.

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UNITED STATES DEPARTMENT OF JUSTICE

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s/ Ashley Cheung

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12 Counsel for Plaintiffs

Counsel for Intervenor-Plaintiff State of
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[PROPOSED] ORDER

This matter comes before the Court on the Parties' Joint Stipulation to Revise Case Schedule. After considering the Parties' Joint Stipulation, IT IS HEREBY ORDERED THAT:

1. The Parties stipulate that amended pleadings may be filed two weeks from the date the Court issues the revised case schedule.

2. Before filing any motion pertaining to the Deliberative Process Privilege, the Parties will meet and confer to try to attempt to narrow any remaining discovery disputes.

3. [If Plaintiffs wish to file an opposition to Defendants' motion to dissolve, they must do so on or before August 2, 2019; and Defendants will file a reply on or before August 23, 2019.]

4. Motions pertaining to the Deliberative Process Privilege will be filed on or before August 22, 2019 with a noting date of Friday, September 27, 2019. Oppositions will be filed on or before September 13, 2019. Replies will be filed on or before September 27, 2019. This schedule shall not apply to Plaintiff-Intervenor, as Defendants' responses to Plaintiff-Intervenor's discovery requests are pending.

5. All motions related to discovery will be filed on or before January 30, 2020 and noted on the motion calendar on the third Friday thereafter.

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11. The Pretrial Conference will be held the week of July 20, 2020

12. Trial will start on July 27, 2020.

1 IT IS SO ORDERED.

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3 Dated this _____ day of _____, 2019.

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6 Marsha J. Pechman
United States District Judge

7
8 PRESENTED BY:

9 **NEWMAN DU WORS LLP**

UNITED STATES DEPARTMENT OF JUSTICE

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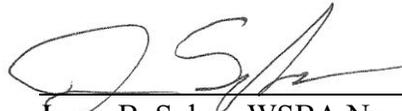
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CERTIFICATE OF SERVICE

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 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, 2019.



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