

The Honorable Marsha J. Pechman

**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.

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

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

- **Defendants’ Position:** The Ninth Circuit definitively set the standard for judicial review in this case. This Court “must apply appropriate deference to its evaluation” of the challenged policy under “intermediate scrutiny.” *Id.* at 45. This means that, to prevail, the government must “establish[] that [the military] reasonably determined the policy ‘significantly furthers’ the government’s important interests.” *Id.* Under no circumstance is the reviewing court to “substitute its ‘own evaluation of evidence for a reasonable evaluation’ by the military.” *Id.* (quoting *Rostker*, 453 U.S. at 68). Thus, because “the reasonableness of the 2018 Policy must be evaluated on the record supporting that decision and with the appropriate deference due to a proffered military decision,” *id.* at 56, Plaintiffs’ and Plaintiff-Intervenor’s claims are properly adjudicated based on a review of the administrative record supporting Defendants’ decision, and the case should proceed directly to dispositive motions. *See id.* at 54 n.22 (noting that that a 12-page memo was sufficient to evaluate the government policy in *Trump v. Hawaii*, 138 S. Ct. 2392, 2421–22, (2018)). However, in the event that the Court disagrees or requires 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 17, 2019.

NEWMAN DU WORS LLP

**UNITED STATES DEPARTMENT OF
JUSTICE**

s/ Jason B. Sykes

s/ Ashley Cheung

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AMENDED ORDER

This matter comes before the Court on the Parties' Joint Stipulation to Revise Case Schedule. After considering the Parties' Joint Stipulation, **the Court grants the revision and further alters the dates to accommodate the Court's schedule.** 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 20, 2020 and noted on the motion calendar on the third Friday thereafter.

6. The discovery cutoff will be February 18, 2020.

7. Dispositive Motions will be filed on or before March 17, 2020 and noted on the motion calendar on the fourth Friday thereafter.

8. Motions in Limine will be filed on or before 5/26/2020 and noted on the motion calendar on the third Friday thereafter.

9. The Joint Pretrial Order will be due on or before June 10, 2020.

10. Trial Briefs and Proposed Findings of Fact and Conclusions of Law will be filed on or before June 10, 2020.

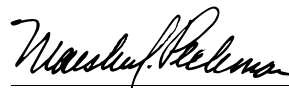
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11. The Pretrial Conference will be held on June 12, 2020 at 1:30 p.m.

12. Trial will start on June 22, 2020 at 9:00 a.m.

IT IS SO ORDERED.

Dated this 17th day of July, 2019.



Marsha J. Pechman
United States District Judge

PRESENTED BY:

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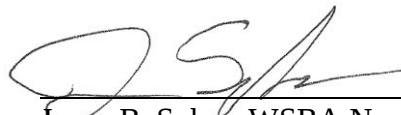
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CERTIFICATE OF SERVICE

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 17, 2019.



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