

No. 20-72793

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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'  
MOTION FOR EXTENSION TO FILE RESPONSE TO MOTION TO STAY**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Real Party in Interest-Plaintiff Human Rights Campaign hereby files its corporate disclosure statement and certifies that Human Rights Campaign does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Real Party in Interest-Plaintiff Gender Justice League hereby files its corporate disclosure statement and certifies that Gender Justice League does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Real Party in Interest-Plaintiff American Military Partner Association now known as Modern Military Association of America hereby files its corporate disclosure statement and certifies that Modern Military Association of America does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock.

Real Parties in Interest-Plaintiffs (“Plaintiffs”) move for an extension of time to file a response to Petitioners-Defendants’ (“Defendants”) motion to stay, which was filed with this Court before the district court has ruled on their motion to stay, in violation of the appellate rules. Plaintiffs respectfully request that this Court extend the deadline for their response, which is currently September 28th, until ten days after the district court rules on the motion to stay, the briefing for which is still currently underway before the district court. Defendants do not oppose an extension until October 2nd but otherwise oppose this motion.

As a threshold matter, Defendants’ motion to stay violates Federal Rule of Appellate Procedure 8, which provides that “[a] party must ordinarily move first in the district court for ... a stay of the judgment or order of a district court pending appeal.” FED. R. APP. PROC. 8(a)(1)(A). Rule 8 further provides that a motion to stay must state that “the district court denied the motion or failed to afford the relief requested.” FED. R. APP. PROC. 8(a)(2)(A)(ii). The rule exists for good reason: the district court’s initial adjudication of a motion to stay may alter the nature and scope of what remains to be decided—if not wholly obviate the need for an appellate court to rule on the motion—and, at a minimum, provides a ruling and record for the appellate court to review. That is not a hypothetical benefit. For example, in recently adjudicating Defendants’ motion for a stay of a different order (issued on July 15th), the district court subsequently modified its order, and

Defendants thereafter abandoned their stated plan to seek a stay of that order from this Court. *See* Dist. Ct. Dkt. 566. At this point, the district court has had no opportunity to consider Defendants' request for a stay, given that briefing is still underway, pursuant to a briefing schedule agreed upon by the parties. According to that agreed schedule, Plaintiffs' response is not due until September 24th, and Defendants' reply is not due until October 1st. *See* Dist. Ct. Dkt. 608-1.

An extension until ten days after the district court rules would not prejudice Defendants. Defendants admit that there is no basis for emergency relief and thus have not sought such relief.<sup>1</sup> Pet. at 4, 28. And, as detailed in a district court filing before Defendants prematurely filed their motion with this Court, "Plaintiffs confirmed to Defendants that (1) Plaintiffs would be willing to stipulate to a stay of the depositions of the Witnesses [at issue] pending further order of the district court, (2) Plaintiffs do not plan to reissue the subpoenas for those Witnesses in the foreseeable future, and (3) Plaintiffs will give Defendants a minimum of 30-days notice before attempting to depose any of the Witnesses." Dist. Ct. Dkt. 608-1 at 2.

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<sup>1</sup> Despite that concession, Defendants also demand that this Court hear oral argument on their third mandamus petition a mere 26 days after it has been filed, and when the Court has not even ordered an answer (and it should not). *See* FED. R. APP. P. 21(b); 9th Cir. R. 21-4.

Indeed, unless and until Plaintiffs reissue the subpoenas at issue—which, to be clear, they may elect not to do at all—Defendants’ motion for a stay, and indeed their entire petition, are not ripe. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985) (recognizing that courts should not resolve issues that “involve[] contingent future events that may not occur as anticipated, or indeed may not occur at all”) (internal quotes and citation omitted). The original dates for the subpoenas have passed, and they were issued when there was a forthcoming discovery cut-off that has now been lifted.

Notwithstanding Plaintiffs’ right to these depositions, several considerations could impact whether Plaintiffs will ultimately choose to exercise that right. As Plaintiffs advised Defendants before they filed their motion: Plaintiffs do not intend to take the depositions until further discovery and discovery-related proceedings are completed. That includes the resolution of Defendants’ second petition for mandamus and the district court’s ongoing *in camera* review of documents withheld by Defendants on grounds of privilege, which could affect Plaintiffs’ decision to take the depositions Defendants challenge in their premature motion. Second, depending on the results of that further discovery, Plaintiffs may elect not to take some or all of the depositions at all. Third, in order to avoid a premature and potentially unnecessary dispute over yet another mandamus petition and stay motion, Plaintiffs would agree to the immediate entry of an order by the

district court that would bar them from even *noticing* the depositions without first providing Defendants at least 30-days advance notice (or more, if Defendants thought 30 days insufficient) to permit Defendants ample time to seek further relief at that time.

For the reasons set forth above, Plaintiffs respectfully request that this Court order that Plaintiffs' response to Defendants' motion to stay be extended until ten days after disposition of the motion to stay pending before the district court.

Dated: September 21, 2020

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Respectfully submitted,

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**STATEMENT OF RELATED CASES**

Plaintiffs are not aware of any other related cases beyond those identified by Defendants.

### **CERTIFICATE OF COMPLIANCE**

I certify that this motion complies with the length limits permitted by Ninth Circuit Rule 27-1, because it does not exceed 20 pages. The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

*/s/ Stephen R. Patton*

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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 21, 2020. 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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Stephen R. Patton