



**U.S. Department of Justice**  
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VIA CM/ECF

April 19, 2021

Ms. Molly C. Dwyer  
Clerk, United States Court of Appeals for the Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103-1526

RE: *In re Trump*, No. 20-70365 (Clifton, Callahan, Friedland, JJ.)  
*In re Trump*, No. 20-72793 (Clifton, Callahan, Friedland, JJ.)

Dear Ms. Dwyer:

Pursuant to the Court's February 16, 2021 order, the government submits this letter addressing the impact of the President's Executive Order on this litigation and the need for the Court to address the government's petitions for mandamus.

The Court has before it the government's February 2020 mandamus petition in No. 20-70365, along with the government's September 2020 petition and motion to stay all discovery in No. 20-72793. The Court heard argument on October 14, 2020 on both petitions, which concern discovery matters in plaintiffs' challenge to the Department of Defense's now-rescinded Mattis Policy on military service by transgender individuals.

On January 25, following the change in administration, President Biden issued an Executive Order revoking the Mattis Policy, changing the military's policy to allow transgender individuals to serve, and directing the military to report its progress in implementing this new policy within 60 days. Executive Order 14004—Enabling All Qualified Americans to Serve Their Country in Uniform, Doc. 667-1 (EO). The EO also directs the Secretary of Defense and Secretary of Homeland Security to “establish[] a process by which transgender service members may transition gender while serving.” *Id.* at 2-3.

On February 1, in light of the EO, the parties jointly agreed to a stay of the litigation in the expectation of dismissal after 60 days. Doc. 668. Notwithstanding the change in policy and the parties' agreement to stay the case, on February 5, the district court ordered the government to produce approximately one hundred deliberative documents related to the military's development of the since-revoked Mattis Policy within just ten days. Doc. 671. The court reasoned that it had reviewed *in camera* "4,500 documents page-by-page" and "honestly, I just don't want all of that work to go to waste." Tr. of Feb. 5, 2021 Hearing, 4:20-21. There was no basis for the district court's disclosure order at that point in the litigation. In the interests of expediting resolution of the case, however, because the district court conditioned the stay of the case on the production of these privileged documents, the government elected to comply with the order without seeking further review in this Court. Doc. 673. On February 16, the district court stayed the case until April 9. Doc. 674.

On March 31, the government provided plaintiffs with copies of Department of Defense Instruction (DoDI) 6130.03 (Medical Accessions Standards) and DoDI 1300.28 (In Service Transition), which implemented the EO. Docs. 678, 678-1, 678-2. These new policies take effect on April 30.

On April 9, the parties filed a joint status report requesting that the district court continue the stay of the case until June 11 to allow time for DoD's new policies to take effect "and for the parties to determine thereafter what proceedings, if any, will be necessary in this case." Doc. 678 at 3. The district court stayed the case until June 11. Doc. 679.

In light of these developments, it is abundantly clear that there is no further need for discovery in this case. However, plaintiffs have not yet dismissed their claims or withdrawn their discovery requests, and the district court's discovery orders remain outstanding. See No. 20-70365, Add. 1-6, 46, 78-85; No. 20-72793, Add. 1-29. Accordingly, the government's mandamus petitions remain live. *GATX/Airlog Co. v. U.S. Dist. Ct. for N. Dist. of California*, 192 F.3d 1304, 1306 (9th Cir. 1999) ("A case is moot only if interim events have completely and irrevocably eradicated the effects of an allegedly improper ruling."). The government expects that plaintiffs will soon dismiss their lawsuit in light of the new DoD policies, in which case we will notify the Court promptly that the mandamus petitions are moot.

Sincerely,

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s/ Ashley A. Cheung  
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cc: all counsel (via CM/ECF)

### **CERTIFICATE OF SERVICE**

I hereby certify that on April 19, 2021, 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. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

*s/ Ashley A. Cheung*  
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ASHLEY A. CHEUNG