The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

DEFENDANTS' RULE 56(d) RESPONSE TO PLAINTIFFS' AND INTERVENOR'S MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs brought this action challenging the constitutionality of the President's memorandum regarding military service by transgender individuals. Relying heavily on twenty declarations and numerous exhibits, Plaintiffs, as well as the State of Washington as an intervenor, moved for summary judgment early in this litigation and before Defendants had had the opportunity to take any depositions or serve discovery. The Court should defer ruling on these summary judgment motions under Federal Rule of Civil Procedure 56(d) to allow Defendants the opportunity to take discovery. Discovery has just recently begun in this and three other related cases in other jurisdictions, and most of the depositions Defendants currently have scheduled of Plaintiffs' declarants will not occur until mid-to-late March. Moreover, as discussed in the attached declaration, discovery will enable Defendants to test the accuracy and completeness of the factual assertions contained in the numerous declarations submitted in support of Plaintiffs' summary judgment motion—assertions that Plaintiffs contend are material—and to develop additional facts that will further support, *inter alia*, why Plaintiffs lack standing to bring their claims and why summary judgment should be granted for Defendants.

By filing this Rule 56(d) motion, Defendants in no way concede that the facts asserted in support of Plaintiffs' and intervenor's summary judgment motions, if true, would entitle them to summary judgment. Courts, however, have held that a party "may not attempt to meet a summary judgment challenge head-on but fall back on [Rule 56(d)] if its first effort is unsuccessful." *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1235 (10th Cir. 2007); *accord Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 23 (1st Cir. 1999). Accordingly, Defendants have filed this Rule 56(d) response instead of attempting to oppose summary judgment without any discovery. *Been*, 495 at 1235. Defendants reserve the right to oppose the summary judgment motions even if discovery does not reveal any basis to dispute Plaintiffs' and the intervenor's asserted material facts or disclose any other material facts (in particular, facts related to this Court's jurisdiction).

BACKGROUND

On August 28, 2017, Plaintiffs filed a complaint in this action, Dkt. No. 1. They then filed an amended complaint and a motion for a preliminary injunction on September 14. *See* Dkt. Nos.

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30, 32. On December 11, 2017, the Court dismissed Plaintiffs' procedural due process claim, denied the remainder of Defendants' motion to dismiss, and granted Plaintiffs' motion for a preliminary injunction, which enjoined Defendants "from taking any action relative to transgender individuals that is inconsistent with their status quo that existed prior to President Trump's July 26, 2017 announcement." *See* Dkt. No. 103 at 22-23. On January 5, 2018, the Court issued an Order setting the date for the exchange of initial disclosures, the holding of the Rule 26(f) conference, and the submission of a Joint Status Report and Discovery Plan. *See* Dkt. No. 124. In particular, the Court ordered that the parties exchange initial disclosures on February 9, 2018, and submit a combined Joint Status Report and Discovery Plan on February 16, 2018. *Id.*

Although the parties had not yet submitted a discovery plan, and although the Secretary of Defense is scheduled to submit a plan to the President concerning transgender service members that may substantially affect this litigation in just over a week, Plaintiffs and Washington filed summary judgment motions contending that there are no genuine disputes of material fact and that they are entitled to judgment as a matter of law. Dkt. No. 129; Dkt. No. 150. In support of their motion, Plaintiffs submitted twenty declarations (totaling over 160 pages), including declarations from the nine individual Plaintiffs, the three organizational Plaintiffs, four former Service and Under Secretaries and a former Chairman of the Joint Chiefs of Staff, two purported expert witnesses, and an attorney declaration seeking to authenticate a host of exhibits. *See* Dkt. Nos. 130–49. Their motion relies heavily on those declarations.

ARGUMENT

Pursuant to Rule 56(d), Defendants are entitled to discovery before the Court rules on Plaintiffs' and intervenor's summary judgment motions. Plaintiffs' summary judgment motion contains a lengthy "Statement of Undisputed Fact," which is based upon twenty declarations and a number of attached exhibits. *See* Dkt. No. 129 at 2-8; Dkt. Nos. 130–49. Without the time and the opportunity for discovery, Defendants cannot contest these facts. This lack of a fair

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opportunity to test these asserted facts will necessarily hinder Defendants' efforts to oppose Plaintiffs' and intervenor's summary judgment motions.[1]

"[Rule 56(d)] allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).[2] To prevail on a Rule 56(d) motion, "the parties opposing a motion for summary judgment must make (a) a timely application [that] (b) specifically identifies; (c) relevant information; (d) where there is some basis for believing that the information sought actually exists." *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1091 n.5 (9th Cir. 2009) (citations and internal quotations omitted). And where, as here, "a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case, district courts should grant any Rule 56[(d)] motion fairly freely." *Burlington N. Santa Fe R.R. Co. v. Assiniboine Tribe*, 323 F.3d 767, 773 (9th Cir. 2003); *see also Berkeley v. Home Ins. Co.*, 68 F.3d 1409, 1414 (D.C. Cir. 1995) (holding that Rule 56(f) motions are granted "almost as a matter of course unless the nonmoving party has not diligently pursued discovery of the evidence") (citation and quotation omitted). Indeed, the specificity requirement is substantially relaxed where, like here, no discovery has taken place whatsoever as "the party making a Rule 56[(d)] motion cannot be expected to frame its motion with great

[1] Although the State of Washington's summary judgment motion purports to rely only upon "this Court's prior rulings and Defendants' evidence, briefing and public statements," Dkt. No. 150 at 1, Defendants' opposition to Washington's summary judgment motion also should be held in abeyance until Defendants have had an opportunity to engage in discovery. Washington's motion puts at issue identical questions to be resolved on the merits, and discovery obtained from many of Plaintiffs' declarants will be used in responding to Washington's summary judgment motion. Accordingly, given the substantial overlap in the legal and factual issues, resolution of Washington's summary judgment motion should proceed at the same time as the Plaintiffs' motion for summary judgment. *See* Fed. R. Civ. P. 1 (noting that the Federal Rules should be "construed, administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."). In addition, because Washington's status as a proper intervenor necessarily turns on the Court's conclusion that Plaintiffs possess standing, resolving Washington's summary judgment motion while Defendants are conducting discovery into Plaintiffs' standing would be particularly inappropriate. *See Sanford v. Memberworks, Inc.*, 625 F.3d 550, 560-61 (9th Cir. 2010) (holding that there is no right to intervene where plaintiffs lack standing). Deferring Washington's summary judgment motion to allow Defendants the opportunity to obtain discovery will not prejudice Washington because Defendants are currently enjoined from "taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement." Dkt. No. 103 at 23. The Court's preliminary injunction will remain in effect pending resolution of this action on the merits or further order of this Court. *Id.*

[2] Pursuant to the 2010 amendments to the Federal Rules of Civil Procedure, Rule 56(f) was re-designated as Rule 56(d). This re-designation did not substantively change the rule. *See Michelman v. Lincoln Nat'l Life Ins, Co.*, 685 F.3d 887, 899 n.7 (9th Cir. 2012)

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specificity as to the kind of discovery likely to turn up useful information, as the ground for such specificity has not yet been laid." *Burlington N. Santa Fe*, 323 F.3d at 774.

Here, there can be no serious dispute that Defendants' motion is timely. *Blough*, 574 F.3d at 1091 n.5. Defendants have not previously had an opportunity to fully pursue discovery in this case; indeed, the Court has yet to even issue a scheduling order. Dkt. No. 124. Moreover, on December 15 and December 22, 2017—more than a month before Plaintiffs and the intervenor filed their summary judgment motions—Defendants noted in a Joint Status Report and Supplement in the related case *Doe v. Trump* that it would be taking the depositions of Brad Carson on March 19, 2018; Deborah Lee James on March 21, 2018; Raymond Mabus, Jr., on March 26, 2018; Eric K. Fanning on March 29, 2018; George Richard Brown on March 5, 2018; and Mark Eitelberg on March 27, 2018. *See* Joint Status Report at 4-5, *Doe v. Trump*, No. 1:17-cv-01597-CKK (D.D.C. Dec. 15, 2017) Dkt. No. 76; Supplemental Joint Status Report at 3, *Doe*, No. 1:17-cv-01597-CKK (D.D.C. Dec. 22, 2017) Dkt. No. 77. These six individuals have submitted declarations in support of Plaintiffs' summary judgment motion in this case, and appear to be offering the same testimony in all four related cases. *See* Dkt. No. 142–47. And, counsel for Plaintiffs here have been invited to attend the depositions.

Defendants, moreover, have satisfied their burden of showing how discovery will likely reveal relevant information. The attached declaration sets forth the specific facts Defendants hope to elicit through discovery and the reasons those sought-after facts would create a genuine issue of material fact (or warrant summary judgment in Defendants' favor). *See* Decl. of Ryan B. Parker (Feb. 12, 2018). The declaration satisfies the requirements of Rule 56(d), because, at the very least, it "give[s] the [] court some idea of how the sought-after discovery might reasonably be supposed to create a factual dispute." *Emplanar, Inc. v. Marsh*, 11 F.3d 1284, 1292 (5th Cir. 1994).

For example, Plaintiffs have submitted declarations from each of the nine individual Plaintiffs, *see* Dkt. Nos. 130–38, as well as the three organizational Plaintiffs, *see* Dkt. Nos. 139–41. Each of these declarations seek to support Plaintiffs' standing to sue. *See* Dkt. No. 129 at 6-8. As the parties invoking federal jurisdiction, Plaintiffs bear the burden of satisfying the elements of jurisdiction. *See Lujan v. Defenders of the Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted). And

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although this Court previously concluded that the Plaintiffs had standing for purposes of their motion for a preliminary injunction, Plaintiffs burden on summary judgment is significantly more exacting. *See id.* ("[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation.") (citations omitted). Accordingly, at the summary judgment stage, Plaintiffs "can no longer rest on [ ] 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken to be true." *Id.* (citation omitted). When Plaintiffs use affidavits to support their standing argument, courts grant defendants the opportunity to "test the assertions in Plaintiffs' affidavits through discovery." *Bryant v. Woodall*, No. 1:16CV1368, 2017 WL 1292378, at *7 (M.D.N.C. Apr. 7, 2017) (finding that although the plaintiffs claimed that they asserted facts to establish standing in their affidavits, the defendants should be afforded an opportunity to conduct discovery on the issue); *MKB Mgmt. Corp. v. Burdick*, No. 1:13-CV-071, 2013 WL 6147204, at *5 (D.N.D. Nov. 15, 2013) (stating that "although it appears plaintiffs' standing is well-established, some discovery regarding that issue may be undertaken if the State is going to contest it"); *see also Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor of Baltimore,* 721 F.3d 264, 285 (4th Cir. 2013) (stating that "discovery is especially important where, as here, the relevant facts are exclusively in the control of the summary judgment movant" (internal quotation omitted)). Thus, a court that enters a preliminary injunction for a plaintiff may later enter judgment for the defendant on jurisdictional grounds based on the factual record developed through discovery. *See, e.g., In re IPhone Application Litig.*, 6 F. Supp. 3d 1004, 1016 (N.D. Cal. 2013) (noting that the court found standing at motion to dismiss stage but concluded that plaintiffs lacked standing at summary judgment because the defendant adduced "specific facts" through discovery that established a lack of evidence of causation). *See generally People To End Homelessness, Inc. v. Develco Singles Apartments Assocs.*, 339 F.3d 1, 8 (1st Cir. 2003) ("As litigation progresses, Article III places an increasingly demanding evidentiary burden on parties that seek to invoke federal jurisdiction. A plaintiff who has standing at the motion to dismiss stage, does not automatically have standing at the summary judgment or trial stage.").

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The "Statement of Undisputed Facts" in support of Plaintiffs' summary judgment motion relies heavily upon the declarations by the various Plaintiffs. *See* Dkt. No. 129 at 2-8. In particular, it relies on the declarations to establish that the plaintiffs have suffered harm—a basic requirement for establishing jurisdiction. *See id.* at 6–8; *Lujan*, 504 U.S. at 560. Yet many of the factual contentions Plaintiffs assert are based on information that is not readily available to Defendants. Before responding to Plaintiffs' motion, Defendants are entitled to discovery that would enable them to test Plaintiffs' version of the facts. *See, e.g., Bischoff v. Osceola Cty.,* 222 F.3d 874, 876 (11th Cir. 2000) (holding that the district court erred in granting summary judgment based on conflicting affidavits concerning plaintiffs' standing). For example, Plaintiff Ryan Karnoski states in conclusory fashion in his declaration that he is "ready and able to pursue a military career," Dkt. No. 130 at ¶ 16, and that he is "fit to serve in the military." *Id.* at ¶ 20. Defendants should be afforded the opportunity to vet these conclusory assertions. Similarly, Plaintiff D.L. states that "when [he] meet[s] the current requirements to enlist, [he] intend[s] to do so." Dkt. No. 132 at ¶ 16. Of course, this raises the question of whether he can, in fact, meet the eligibility requirements for service in the military. Defendants, at a minimum, should have the opportunity to enquire into these and other factual assertions by the Plaintiffs before the Court resolves Plaintiffs' and intervenor's summary judgment motions.

In addition, many of the non-Plaintiff declarants express, in lengthy declarations, their opinions about the previous Administration's analysis of the issue of military service by transgender individuals and what they perceive to be the current Administration's policy on this issue. In particular, Plaintiffs' summary judgment motion relies heavily on these declarations for their argument that the Government "lacks any justification" for the exclusion of transgender individuals from military service, and that restrictions on transgender service members do not further "military effectiveness, unit cohesion and cost." Dkt. No. 129 at 14. Although Plaintiffs have not clearly indicated whether they seek to offer this testimony as expert or fact testimony for each of these witnesses, Defendants are entitled to test the basis and reliability of these sort of "opinions" concerning what Plaintiffs believe to be the key facts and issues in this case. *1443 Chapin Street, L.P., v. PNC Bank, Nat'l Ass'n*, 258 F.R.D. 186, 188 (D.D.C. 2009) (party seeking

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Rule 56(f) continuance is entitled to test the accuracy and/or qualifications of a purported expert through discovery rather than being forced to respond to summary judgment); *United States v. Nutri-Cology, Inc.*, No. C-91-1332, 1993 WL 13585505, *4 (N.D. Cal. Sept. 23, 1993) (granting continuance under Rule 56(f) so that party could take depositions of the summary judgment movant's experts). Defendants intend to depose each of these individuals to test the bases for their opinions concerning military readiness, unit cohesion, and costs, as well as uncover the underlying facts they have relied upon (or not relied upon) in reaching their opinions.[3] Indeed, these individuals' depositions have already been scheduled throughout the month of March. *See* Decl. of Ryan B. Parker, ¶10.

Finally, a non-movant has "clearly met" its burden under Rule 56(d) when it is "not seeking *additional* discovery, but discovery at all." *Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345 (5th Cir. 1989). "[R]ush[ing] to summary judgment" without allowing the non-movant to engage in any discovery would "substantially handicap[]" the non-movant "in any attack on the facts asserted by the [summary judgment movant]." *Id.* at 355. Instead, courts "must afford" a non-movant "some protective armor . . . to properly defend against" a motion for summary judgment. *Int'l Shortstop, Inc. v. Rally's Inc.*, 939 F.2d 1257, 1268 (5th Cir. 1991); *see, e.g.*, *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 245 (4th Cir. 2002) (holding that court improperly denied Rule 56(d) relief where summary judgment was granted six weeks after complaint was filed and there had been almost no discovery conducted in the case).

Accordingly, this Court should not "substantially handicap" Defendants by denying them the time and opportunity to take discovery necessary to determine whether Plaintiffs' factual assertions are accurate and complete, and whether Plaintiffs have standing to support this Court's jurisdiction. Because this action was only recently filed, Defendants have had no opportunity to

[3] Plaintiffs note in their summary judgment motion that the evidence they are relying upon "includes substantially similar declarations as those submitted in support of Plaintiffs' preliminary injunction motion, supplemented with relevant factual updates as appropriate, as well as declarations from former Secretary of the Army Eric Fanning and former Secretary of the Air Force Deborah Lee James." Dkt. No. 129 at 2 n.1. If Plaintiffs are suggesting that Defendants should be foreclosed from deposing their declarants at this juncture because Defendants should have deposed them during the pendency of the preliminary injunction briefing, such an argument lacks legal support. In any event, Plaintiffs acknowledge that their declarants have supplemented their preliminary injunction declarations and that they are submitting declarations from two new individuals.

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pursue and complete discovery. Indeed, pursuant to the Court's January 5, 2018 Order, the parties did not even exchange initial disclosures until February 9, 2018, and will not submit a combined Joint Status Report and Discovery Plan until February 16, 2018. Dkt. No. 124. The Court, therefore, should not rely upon the Plaintiffs' "Statement of Undisputed Facts," Dkt. No. 129 at 2-8, without first allowing Defendants discovery to test those assertions and uncover other material facts relevant to the summary judgment motions.

CONCLUSION

For these reasons, the Court should defer ruling on Plaintiffs' and Washington's motions for summary judgment under Rule 56(d) to allow Defendants' to take discovery before filing their opposition to Plaintiffs' and Washington's summary judgment motions. If the Court denies Defendants' request, Defendants respectfully request 30 days to oppose the summary judgment motions.

Dated: February 12, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2018, I electronically filed the foregoing Rule 56(d) Response To Plaintiffs' And Intervenor's Motions for Summary Judgment using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: February 12, 2018

/s/ Ryan Parker

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