The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

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

PLAINTIFFS' SUPPLEMENTAL BRIEFING IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NEWMAN DU WORS LLP
2101 Fourth Avenue, Suite 1500
Seattle, Washington 98121
(206) 274-2800

The undisputed facts tell a simple story: Last summer, via @realDonaldTrump, the President announced that openly transgender individuals could not serve in the military and that the military would not provide transition-related medical care. Recognizing that policy implementation might require more than a few tweets, the President issued an August 25, 2017 Presidential Memorandum (the "2017 Memorandum"), in which he announced specific policies: In particular, that as of January 1, 2018, the Secretary of Defense was not to allow openly transgender individuals to join the military, and that as of March 23, 2018, the U.S. military was to return to a policy of authorizing the discharge of openly serving transgender individuals and denying them certain medical coverage. President Trump ordered the Secretary of Defense to provide to him an *implementation* plan for *how*—not *whether*—to implement those commands (the "Implementation Plan"). Following those explicit orders, the Secretary of Defense provided the President with the demanded Implementation Plan that implements the President's commands. The President now has ordered the Secretary to put it into place.

On March 23, 2018, the government filed with the Court that Implementation Plan (consisting of a report, *see* Dkt. 216-2 ("Report"), and cover memorandum, *see* Dkt. 216-1 ("Mattis Memorandum")), along with the President's directive to Secretary Mattis to go forward with the Implementation Plan, *see* Dkt. 216-3 (the "2018 Memorandum") (collectively the "March 23 Filings").

The March 23 Filings do not change Plaintiffs' entitlement to summary judgment. The Implementation Plan is not "new" policy; it merely implements the President's commands that this Court already preliminarily enjoined. The case is not moot, as at least one plaintiff retains standing to challenge each element of the government's ongoing discriminatory policies. And there is still no constitutionally sufficient justification for those policies. Nothing material has changed.

I. THERE IS NO "NEW" POLICY: THE MARCH 23 FILINGS MERELY IMPLEMENT THE PRESIDENT'S ANNOUNCED POLICIES ON MILITARY SERVICE BY TRANSGENDER PEOPLE.

The March 23 Filings are not "new" policies. They are merely the expected

NEWMAN DU WORS LLP
2101 Fourth Avenue, Suite 1500
Seattle, Washington 98121
(206) 274-2800

1 implementation of the same policies that the President announced last summer—nothing more.

2 The manner in which the Implementation Plan arose makes clear that it does not contain
3 "new" policies. In his 2017 Memorandum, the President formally declared his policies on open
4 service, which consisted of three broad directives: (1) An *Accession Directive*, under which the
5 Secretary of Defense was, on January 1, 2018 (the date that the military was to begin accession
6 of transgender people into the military) to continue to bar openly transgender people from
7 military service indefinitely, *see* Dkt. 103 ("PI Order") at 3; (2) a *Retention Directive*, under
8 which, as of March 23, 2018, the Secretary of Defense was to return to the military's previous
9 policy "authorizing the discharge of openly transgender individuals," *id.*; and (3) a *Medical Care*
10 *Directive*, under which, as of March 23, 2018, the Secretary of Defense was to prohibit the
11 funding of transition-related surgical care for transgender service members, *id.* In the 2017
12 Memorandum, the President ordered the Secretary of Defense to "submit to [him] a plan for
13 implementing both [his] general policy . . . and [his] specific directives" by February 21, 2018.
14 Dkt. 149-2 at 3. Notably, the 2017 Memorandum was ***not*** a request for "a study to determine
15 *whether* or not the directives should be implemented. Rather, it order[ed] the directives to be
16 implemented by specific dates." *Stone v. Trump*, No. MJG-17-2459, 2017 WL 5589112, at *10
17 (D. Md. Nov. 21, 2017).

18 Secretary Mattis faithfully executed those orders from his Commander-in-Chief. On
19 August 29, Secretary Mattis stated via Department of Defense press release that he had received
20 the commands and would "carry out the President's direction. . . . As directed, [he would]
21 develop a study and *implementation* plan" and would "provide advice and recommendation on
22 the *implementation* of the [P]resident's policy direction." Dkt. 197 at 11 (emphasis added). In
23 February, as commanded by the 2017 Memorandum, Secretary Mattis delivered the
24 Implementation Plan to the President. *See* Mattis Memorandum (date-stamped February 22,
25 2018). Now, the March 23, 2018 Presidential Memorandum, explicitly recognizing that the
26 Implementation Plan was created "[p]ursuant to [the President's] memorandum of August 25,
27 2017," contemplates that Secretary Mattis will put into place the Implementation Plan—that is,
28 will put into place a plan that implements the policies the President ordered in 2017. *See* 2018

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(206) 274-2800

1 Memorandum.

2 Secretary Mattis, in creating the Implementation Plan, followed through on the
3 President's commands to him in August 2017 (to repeat, the 2017 Memorandum tasked
4 Secretary Mattis not with figuring out *whether* a ban on military service by transgender people
5 should be implemented, but *how*). Facially, the Implementation Plan adheres exactly to the
6 President's commands in the 2017 Memorandum. In particular:

7 *Accessions*: The Implementation Plan provides that individuals "who require or have
8 undergone gender transition are disqualified from military service," Mattis Memorandum at 2,
9 and, moreover, even if a transgender individual has *not* transitioned, they will still be disqualified
10 from service unless they suppress their gender identity and are "willing and able to adhere to all
11 standards associated with their [birth-assigned] sex." Report at 5. In other words, a person can
12 only serve if they somehow make themselves *not* transgender. That implements the President's
13 directives to bar openly transgender individuals from military service. *See* PI Order at 3.

14 *Retention*: Similarly, the Implementation Plan's bar on individuals "who require or have
15 undergone gender transition," and on those who have not transitioned but wish to live in
16 accordance with their gender identity (and thus do not "adhere to all standards associated with
17 their [birth-assigned] sex," Report at 5) implements the President's directives to re-authorize the
18 discharge of openly transgender individuals. The Implementation Plan allows an extremely
19 limited exception for currently serving transgender individuals who "were diagnosed with gender
20 dysphoria by a military medical provider after the effective date of the Carter policy," but before
21 the policy implementation announced by the March 23 Filings (the "Grandfather Exception").
22 Those few individuals who qualify under this Grandfather Exception may serve openly and
23 receive "medically necessary" care (though notably the exception itself is subject to a
24 severability clause). Report at 5, 43. These various provisions implement the 2017
25 Memorandum's request that the military itself "determine how to address transgender individuals
26 currently serving in the United States military" as part of the Implementation Plan. 2017
27 Memorandum § 3.

28 *Medical Care*: Under the Implementation Plan, the U.S. military will not provide

NEWMAN DU WORS LLP
2101 Fourth Avenue, Suite 1500
Seattle, Washington 98121
(206) 274-2800

transition-related surgical care to transgender individuals, as it will not allow individuals "who require gender transition" to accede into service, *see supra*. Additionally, if an individual requires gender transition after acceding into the military, they will be subject to discharge, as the Implementation Plan disqualifies from service all service members (except those few qualified under the Grandfather Exception) who "require a change of gender." Mattis Memorandum at 2. The Implementation Plan thus faithfully continues President Trump's order barring transition-related surgical care.

In sum, the Implementation Plan is not new policy; it does not change or in any way contravene the President's 2017 Memorandum. Nor was it expected to, given the procedure that produced it. As this Court has already observed, "President Trump's announcement on Twitter and his Presidential Memorandum did not order a study, but instead unilaterally proclaimed" his policies on military service by transgender people. PI Order at 13.[1] The Secretary of Defense faithfully followed the President's commands; the Implementation Plan is the result.

II. THE MARCH 23 FILINGS DO NOT CHANGE THAT PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THE CONSTITUTIONALITY OF THE BAN.

The government makes three principal claims regarding the impact of the March 23 Filings: (1) that they moot Plaintiffs' current challenges; (2) that they change the applicable level of scrutiny; and (3) that they satisfy heightened scrutiny. Each is wrong.

A. The March 23 Filings Create No Mootness or Standing Issues.

The government once again claims that justiciability doctrines prevent the Court from adjudicating the constitutionality of the President's discriminatory policies. Once again, not so.

Courts evaluate standing at the beginning of each case, *see Yamade v. Snipes*, 786 F.3d 1182, 1203 (9th Cir. 2015), but "Article III nevertheless demands that an 'actual controversy'

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[1] It is mere pettifoggery to claim that the 2018 Memorandum somehow revokes the President's earlier discriminatory policies on transgender service. While that memorandum purportedly rescinds the 2017 Memorandum, it did so only a full month *after* the Secretary of Defense delivered the Implementation Plan. The 2017 Memorandum told the Secretary of Defense what policies the Implementation Plan was to contain and the Secretary labored under the then-operative 2017 Memorandum in creating the Implementation Plan. The 2018 Memorandum now contemplates that Secretary Mattis will implement that Implementation Plan—that is, that he will implement the policies the President told the Secretary to adopt in the 2017 Memorandum.

persist throughout all stages of the litigation," which generally requires Plaintiffs to face cognizable injury throughout the case, *see Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013).[2] At each point, however, only one Plaintiff needs standing for each form of relief sought. *See Thorsted v. Gregoire*, 841 F. Supp. 1068, 1073 (W.D. Wash. 1994).

At the beginning of the case, the Court concluded that the individual and organizational Plaintiffs—as well as the state of Washington—had standing to challenge the President's policies on transgender military service. The Court found that the Accessions Directive denied Plaintiffs Karnoski, D.L., and Callahan "opportunities to compete for accession on an equal footing with non-transgender individuals." PI Order at 7–8. The Court held that the Retention Directive placed Plaintiffs Schmid, Muller, Lewis, Stephens, Winters, and Doe under a "credible threat of discharge" on account of their transgender status. *Id.* at 7. And the Court found that as a result of the Medical Care Directive, Plaintiff Stephens faced a "credible threat of being denied surgical treatment." *Id.* at 8. Accordingly, Plaintiffs had Article III standing at the start of the case.

At least one Plaintiff maintains standing to challenge each of the Accession, Retention, and Medical Care Directives (as announced last summer and as continued through the Implementation Plan), as they suffer the same Article III injuries-in-fact under the Implementation Plan that they suffered at the time of the preliminary injunction. As for the Accessions Directive: Plaintiffs D.L., Karnoski, and Callahan—each a transgender individual who "ha[s] taken clinically appropriate steps to transition"[3]—remain barred from joining the military under the Implementation Plan. *See* Mattis Memorandum at 2 ("Transgender persons who require or have undergone gender transition are disqualified from military service."). As for the Retention Directive: Plaintiff Jane Doe—a transgender woman who has not yet come out and does not serve openly, but wishes to transition[4]—is still subject to discharge under the Implementation Plan if she seeks to serve openly. *See* Mattis Memorandum at 2 (noting transgender individuals coming out after entering into service may remain in service only if

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[2] Even this requirement is qualified by the voluntary cessation exception, discussed *infra*, which independently satisfies Article III in this case.

[3] *See* Dkt. 130 ¶ 10; Dkt. 132 ¶ 8; Dkt. 137 ¶ 8.

[4] *See generally* Dkt. 138 (Doe Decl.).

"they do not require a change of gender").[5] As for the Medical Care Directive: Plaintiff Doe also seeks surgical care, *see* Doe Decl. ¶ 13, but cannot receive it under the Implementation Plan, which does not provide for surgical care at all.

As before, these injuries are directly traceable to the President's policy decisions (as announced by the Tweets, as ordered by the 2017 Memorandum, and as implemented by the Implementation Plan), and they are redressable by the same injunctive and declaratory relief requested by Plaintiffs' motion for summary judgment. Thus, at all times in this litigation, Plaintiffs have met Article III's requirements.

In all events, moreover, the doctrine of voluntary cessation controls. *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283 (1982) provides the leading Supreme Court case. In that case, a city council passed a law that plaintiffs challenged as unconstitutional. While the litigation was pending, the city council repealed the objectionable pieces and sought to dismiss the case as moot. The Supreme Court found it "well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Id.* at 289. Otherwise, "repeal of the objectionable [policy] would not preclude [the defendant] from reenacting precisely the same provision" once the litigation were dismissed. *Id.*

So too, here. The party claiming mootness from voluntary cessation must show that it is "absolutely clear" that the original harms will not reoccur. *See Buono v. Norton*, 371 F.3d 543, 545–46 (9th Cir. 2004). For this reason alone, the Ninth Circuit has expressed doubts that unilateral executive action such as this—as opposed to repealing legislation—can *ever* moot a case through voluntary cessation. *See Bell v. City of Boise*, 709 F.3d 890, 899–901 (9th Cir. 2013). Indeed, the threat of future harm is particularly credible here, given that most, if not all, of the original Plaintiffs suffer the *same* harms. *See supra*. That alone precludes a finding of

[5] Defendants contend that Plaintiffs Schmid, Muller, Lewis, Stephens, and Winters qualify for the Grandfather Exception. But, facially, the exception is subject to a severability clause, and it also seems to exclude any Plaintiffs who received a diagnosis *before* the Carter Policy. And while a Plaintiff qualifying for the exception also will receive "medically necessary" care, there is no guarantee such care includes surgery, in light of the President's unequivocal pronouncements on the topic (which the Implementation Plan does not explicitly contradict). Moreover, in the shadow of an unequivocal ban announcing that transgender people are unfit for service, they suffer the "serious . . . injuries" that inhere in a policy branding a "disfavored group" as "innately inferior." PI Order at 8 (internal quotation marks omitted). Thus, the Grandfather Exception does not erase their credible threats of (and actual) harm. Nevertheless, Plaintiff Doe's continuing injuries are unimpeachable, rendering these inquiries irrelevant. *See Thorsted*, 841 F. Supp. at 1073 ("If one plaintiff has standing, it does not matter whether the others do.").

voluntary mootness. *See Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1053–54 (9th Cir. 2013). And, as yet a further strike against mootness, the government has unflaggingly asserted the constitutionality of the President's "original" policies. *See McCormack v. Herzog*, 788 F.3d 1017, 1024–26 (9th Cir. 2015) (no mootness under voluntary cessation doctrine when government never disclaimed legality of original practice). Here, the government does not even *attempt* to satisfy its high burden, instead only feebly offering that "if Plaintiffs fear future injury from the [Implementation Plan]," this Court can review it later. Dkt. 223 ("Mot.") at 7. But avoiding that result is *precisely* the point of the doctrine.

B. The March 23 Filings Do Not Change the Applicable Level of Scrutiny.

This Court has already concluded that heightened scrutiny provides the appropriate level of review. *See* PI Order at 15. The government now argues that because of the March 23 Filings, only rational basis review applies. *See* Mot. at 13. That is wrong.

The government claims that rational basis review applies because the Implementation Plan purportedly "draws lines on the basis of a medical condition (gender dysphoria) and an associated treatment (gender transition), not transgender status." Mot. at 9. But the lines drawn are inescapably based on transgender status, *see, e.g.*, 2018 Memorandum (referring seven times to transgender people, including in the subject line)—and therefore trigger the same level of scrutiny, *see Christian Legal Soc'y v. Martinez*, 561 U.S. 666, 689 (2010) (targeting same-sex conduct necessarily targets the status of being gay); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."); *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1159 n.23 (9th Cir. 2013). Moreover, and in any event, the lines are equally impermissible if they discriminate against only a subset of transgender individuals. "It is the individual . . . who is entitled to the equal protection of the laws—not merely a group." *Mitchell v. United States*, 313 U.S. 80, 97 (1941).[6]

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[6] *See also Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (*per curiam*) (discrimination against women with children is still sex discrimination even if women without children were not discriminated against).

The March 23 Filings do nothing to disturb the Court's prior (and correct) conclusion that heightened scrutiny applies to the President's discrimination against transgender individuals.[7]

C. The Challenged Ban Still Fails Heightened Scrutiny.

Under heightened scrutiny, the government bears the burden of justifying the discrimination at issue. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("*VMI*"). As explained in Plaintiffs' motion for summary judgment, the government does not justify its discriminatory policies. *See* Dkt. 129 at 14–21. The March 23 Filings do not change that.

i. The March 23 Filings Provide Only Impermissible Post Hoc Justifications for the Ban.

As explained above, the March 23 Filings are nothing more than the *implementation* of the ban on military service by transgender people, as conceived, announced, and ordered last summer. But under heightened scrutiny, the government is limited to the actual and "genuine" justifications that motivated its actions *at the time* it conceived of those actions; it cannot rely upon hypothetical or *post hoc* justifications. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1696–1697 (2017); *VMI*, 518 U.S. at 533; *W. States Paving Co. v. Wash State Dep't of Transp.*, 407 F.3d 983, 991, 993 (9th Cir. 2005). Accordingly, the March 23 Filings—which do not even purport to provide *any* justification for the President's 2017 policy directives (*i.e.*, the directives that commanded the production of the Implementation Plan)—are legally irrelevant to this Court's evaluation of the constitutionality of the government's policy against military service by transgender people.

This prohibition against *post hoc* justifications under heightened scrutiny applies equally in the military context. *See Witt*, 527 F.3d at 819 (rejecting that "Don't Ask, Don't Tell" could be justified by "some hypothetical, posthoc [sic] rationalization" under heightened scrutiny). The

[7] The government notes that "the tests and limitations to be applied may differ because of the military context." Mot. at 9 (internal citations omitted). But heightened scrutiny still applies in the military context, as Defendants have previously conceded. *See* Dkt. 69 at 30. Indeed, *Rostker* plainly rejected the Solicitor General's argument that, "on the basis of . . . cases emphasizing deference . . . in the area of military affairs and national security . . .[,] this Court should scrutinize the [Act] only to determine if the distinction drawn between men and women bears a rational relation to some legitimate Government purpose, and should not examine the Act under the heightened scrutiny with which we have approached gender-based discrimination." 453 U.S. at 69–70 (internal citation omitted); *see generally Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008) (applying heightened scrutiny to military justifications).

government's cited authorities, *Schlesinger v. Ballard*, 419 U.S. 498 (1975) and *Rostker v. Goldberg*, 453 U.S. 57 (1981), do not overcome that settled precedent. In *Ballard*, the government did not offer, and the Court did not consider, a single *post hoc* justification for the government's differential treatment of male and female naval officers. Rather, the Court examined what Congress was able to consider *at the time it passed the statute in question*, relying extensively (and exclusively) on the legislative history of the statute's *enactment*. *See* 419 U.S. at 508 (citing H.R. Rep. No. 216) & n.12 (citing same H.R. and S. Rep. No. 676).

Nor does *Rostker* support the government's position. Again, *Rostker* expressly rejected "any further 'refinement' in the applicable tests" for gender discrimination based on the military context, 453 U.S. at 69; *see also* n.6, *supra*; and under controlling precedent, those tests unquestionably prohibit *post hoc* justifications, *see VMI*, 518 U.S. at 533. While the *Rostker* Court looked beyond the "the views expressed by Congress in 1948, when the [Military Selective Service Act] was first enacted in its modern form," *id.* at 75, it did so only in the context of addressing an argument concerning the degree to which "appropriations legislation" should be considered to modify "substantive legislation." 453 U.S. at 75. In any event, that case is plainly inapposite. It had been over 32 years since Congress had passed the Act, and the Court found that in the meantime Congress had "thoroughly reconsidered the question of exempting women from [the Act's] provisions, and its basis for doing so." *Id.* Indeed, the President had recommended that Congress abolish the exemption of women from draft registration, *id.* at 60, and Congress had declined to do so only after extensive debate. The March 23 Filings, in contrast, are merely the implementation of the President's express 2017 directives—they are nothing more than *post hoc* responses to this pending litigation.[8] *Rostker* thus does not stand for the distinct and remarkable proposition urged by Defendants: that the military has the power to invent *post hoc* justifications out of whole cloth that could not have supported the challenged decision at the time it was made.

[8] While litigation was pending during the 1980 legislative debate in *Rostker*, there is not even a hint that the litigation played any role in motivating the careful consideration Congress gave the issue. Rather, Congress took up the issue to consider the President's recommendation that draft registration commence for all genders in response to military needs. *See* 453 U.S. at 60–62. Indeed, the litigation had been dormant for nearly six years. *See id.* at 62.

ii. Even If They Could Be Considered, the March 23 Filings Do Not Provide the "Exceedingly Persuasive" Justification Necessary.

Even if the Court were to consider the *post hoc* "evidence" contained in the March 23 Filings, it would be insufficient to justify the President's discriminatory policies. Indeed, the Report is strikingly light in offering any affirmative reasons for excluding transgender individuals from military service; rather, it reads like a legal rebuttal to the RAND Report (going so far as to contain its own severability clause), not a thoughtful policy analysis. Rather, it relies largely on the same "extremely overbroad" justifications this Court previously found constitutionally deficient as a matter of law. *See* PI Order at 17.[9]

Furthermore, no amount of rhetoric in the Report overcomes the undisputed facts: That the military, when it was not subject to a Presidential directive, conducted extensive studies on the exact same issues and reached the exact *opposite* conclusions, fewer than two years ago, when it concluded that "allowing transgender individuals to serve openly would not impact military effectiveness and readiness"; rather, "*prohibiting* open service would have negative impacts including loss of qualified personnel, erosion of unit cohesion, and erosion of trust in command." *See* PI Order at 16.[10] Nothing in the March 23 Filings—*post hoc*, or not—is sufficient to overcome those findings or the extensive record supplied by Plaintiffs in support of their motion for summary judgment, *see* Dkt. 130–149, to the degree necessary to pass heightened scrutiny.

CONCLUSION

Plaintiffs continue to be entitled to a permanent injunction and a declaratory judgment holding unconstitutional Defendants' policies on military service by transgender individuals.

[9] The Court has already properly ruled that the President's transgender service policies do not get *Rostker* deference because "the prohibition on military service by transgender individuals was announced by President Trump on Twitter, abruptly and without any evidence of considered reason or deliberation." PI Order at 18. As the March 23 Filings merely implement the President's 2017 directives, they do not contain an independent decision-making process entitled to deference. *See supra* Section 1, *see also* Dkt 121 at 4 ("Defendants' argument that Secretary Mattis has 'independent authority' . . . is unpersuasive . . . .Secretary Mattis does not have authority to effectuate an unconstitutional policy.").

[10] *See also* PI Order at 16 ("All of the reasons proffered by the President for excluding transgender individuals from the military [are] not merely unsupported, but [are] actually *contradicted* by the studies, conclusions, and judgment of the military itself.") (internal citation omitted).

1 Respectfully submitted April 3, 2018.
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3 **NEWMAN DU WORS LLP**
4
5 Derek A. Newman, WSBA #26967
dn@newmanlaw.com
6 Samantha Everett, WSBA #47533
samantha@newmanlaw.com
7 2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
8 (206) 274-2800
9 **LAMDBA LEGAL DEFENSE AND**
10 **EDUCATION FUND, INC.**
Tara Borelli, WSBA #36759
11 *tborelli@lambdalegal.org*
Camilla B. Taylor (admitted pro hac vice)
12 Peter C. Renn (admitted pro hac vice)
Natalie Nardecchia (admitted pro hac vice)
13 Sasha Buchert (admitted pro hac vice)
Kara Ingelhart (admitted pro hac vice)
14 Carl Charles (admitted pro hac vice)
15 **OUTSERVE-SLDN, INC.**
16 Peter Perkowski (admitted pro hac vice)
17 **KIRKLAND & ELLIS LLP**
18 James F. Hurst, P.C. (admitted pro hac vice)
Jordan M. Heinz (admitted pro hac vice)
19 Scott Lerner (admitted pro hac vice)
Vanessa Barsanti (admitted pro hac vice)
20 Daniel I. Siegfried (admitted pro hac vice)
Ben Tyson (admitted pro hac vice)
21
22 *Attorneys for Plaintiffs*
23
24
25
26
27
28

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 April 3, 2018.

Samantha Everett, WSBA #47533
samantha@newmanlaw.com
Newman Du Wors LLP
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800