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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AIDEN STOCKMAN; NICOLAS TALBOTT; TAMASYN REEVES; JAQUICE TATE; JOHN DOES 1-2; JANE DOE; and EQUALITY CALIFORNIA,

Plaintiffs,

v.

DONALD J. TRUMP, et al.

Defendants.

CASE NO. 5:17-CV-01799-JGB-KK

JOINT RULE 26(F) REPORT

Assigned to The Hon. Jesus G. Bernal

Scheduling Conference:

Date: May 14, 2018
Time: 9:00 a.m.
Place: Courtroom 1

STATE OF CALIFORNIA,
Plaintiff-Intervenor,

v.

DONALD J. TRUMP, et al.

Defendants.

In accordance with Federal Rule of Civil Procedure 26(f), Local Rule 26-1, and the Court's Standing Order Setting Scheduling Conferences, counsel for Aiden Stockman, Nicolas Talbott, Tamasyn Reeves, Jaquice Tate, John Does 1-2, Jane Doe, and Equality California (collectively, the "Named Plaintiffs") and counsel for Defendants initially conferred on January 4, 2018, and counsel for the Named Plaintiffs, Plaintiff-Intervenor the State of California (and collectively with the Named Plaintiffs, "Plaintiffs"), and Defendants conferred by email on several occasions throughout February and March 2018, and submit the following Rule 26(f) Report (the "Report") for the Court's consideration. Nothing stated herein shall be deemed an admission by any party, and this Report shall not be admissible in any subsequent hearing or trial in this or any other litigation.

1. Statement Of The Case

a. Named Plaintiffs' Statement

In June 2016, the United States Department of Defense announced a policy permitting transgender people to enlist in the military and serve openly. In response, transgender service members (including certain of the Named Plaintiffs in this case) identified themselves as transgender to their chain of command, and many took steps to obtain transition-related medical care. In addition, other transgender individuals (including certain of the Named Plaintiffs in this case) took steps to enlist.

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On July 26, 2017, Defendant President Donald J. Trump announced via Twitter that "the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military." On August 25, 2017, Defendant President Trump formalized that reversal of policy, directing his co-Defendants to reinstate the ban "on military service by transgender individuals that was in place prior to June 2016." The Defendants announced a plan to implement that ban on March 23, 2018 (the "Implementation Plan"). The Implementation Plan excludes transgender people from military service, as directed by President Trump; as such, it is substantively the same ban this Court preliminarily enjoined. Under its terms, those Plaintiffs who seek to enlist are barred from doing so; those transgender Plaintiffs who are already serving and who wish to come out and live consistent with their gender identity will be discharged if they do so; and those transgender Plaintiffs who already are serving and already have transitioned or begun to transition may continue to serve only on sufferance and under conditions of fundamental inequality.

Plaintiffs seek permanent injunctive relief prohibiting Defendants from implementing the ban on military service by transgender individuals as a violation of Plaintiffs' rights under the United States Constitution. The ban discriminates against Plaintiffs on its face—denying them the equal protection of the laws, their fundamental rights to liberty and privacy, and their right to freedom of expression—simply because they are transgender. No legitimate state interest, let alone one that is important or compelling, justifies Defendants' discrimination.

b. State of California's Statement

The State of California is home to approximately 92,000 transgender adults. Like their fellow Californians, transgender residents proudly serve in our nation's military and our State's National Guard and have done so, albeit silently, for decades. In August 2017, without any legitimate justification or deliberation, President Trump reversed policy and banned military service by transgender individuals.

In this action, California seeks to protect the State and its residents from this patently discriminatory federal policy. If left unchallenged, the transgender military ban would impede the California National Guard's ability to recruit and retain members to protect the State's natural resources in times of need; force California to violate its anti-discrimination laws and discriminate against its own residents in staffing the California National Guard; and threaten the State's ability to safeguard its public institutions of higher education from discrimination in their ROTC programs. California joins the Named Plaintiffs in seeking permanent injunctive relief prohibiting Defendants from implementing the ban on military service by transgender individuals.

c. Defendants' Statement

This case is moot. Plaintiffs filed this action challenging the President's August 25, 2017 Memorandum regarding military service by transgender individuals. ECF No. 1, Prayer for Relief, ¶¶1-2. That Memorandum has now been officially revoked, ECF No. 84-3, and the Department of Defense has announced a new policy regarding military service by transgender individuals that focuses on addressing a medical condition – gender dysphoria – and the medical treatments for that condition, ECF Nos. 83-1, 83-2. As the only action that Plaintiffs have challenged in their Complaint – the President's August 25, 2017 Memorandum – has been revoked and is no longer in effect, there is not a live case or controversy before this Court, and Plaintiffs' Complaint should be dismissed.

Even if Plaintiffs were to amend their complaint to challenge DoD's new policy, they would likely lack standing to bring their claims. DoD's new policy generally allows currently serving service members who have been diagnosed with gender dysphoria to continue serving in their preferred gender and receive medically necessary treatment for gender dysphoria. ECF No. 84-1.

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Issues of mootness and standing are presented to the Court in Defendants' motion to dissolve the preliminary injunction, and this case should not proceed until those threshold issues are decided.

2. Subject Matter Jurisdiction

The Court has subject matter jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. sections 1331 and 1343. The Court has further remedial authority under the Declaratory Judgment Act, 28 U.S.C. sections 2201 and 2202 *et seq*.

3. Legal Issues

a. Plaintiffs' Statement Of Legal Issues

i. Whether the ban of transgender people from military service (the "ban") constitutes discrimination based on sex and transgender status. .

ii. Whether the ban warrants heightened scrutiny.

iii. Whether the ban is rationally related to a legitimate government interest.

iv. Whether the ban substantially advances an important government interest.

v. Whether the ban is necessary to advance a compelling government interest.

vi. Whether the Constitution's guarantees of liberty and privacy protect a person's fundamental right to live in accord with their gender identity.

vii. Whether the ban impinges upon that fundamental right.

viii. Whether that impingement on a fundamental right is rationally related to a legitimate government interest.

ix. Whether that impingement on a fundamental right substantially advances an important government interest.

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x. Whether that impingement on a fundamental right is necessary to advance a compelling government interest.

xi. Whether the anti-retroactivity component of the Due Process Clause prohibits Defendants from penalizing transgender service members for conduct previously induced.

xii. Whether the ban suppresses speech or expression.

xiii. Whether the ban's suppression of speech or expression is based on the content or viewpoint of the speech or expression being suppressed.

xiv. Whether the ban's suppression of speech or expression is necessary to advance a compelling government interest.

b. Defendants' Statement Of Legal Issues

i. Whether this case is moot.

ii. Whether Plaintiffs can establish standing.

iii. Whether the final policy adopted by the Department of Defense is consistent with the guarantees of the Constitution.

4. <u>Parties, evidence, etc.</u>

Plaintiffs in this case are active service members in the United States military who are transgender (Jaquice Tate, John Doe 1, John Doe 2, and Jane Doe), transgender individuals who wish to enlist in the military (Aiden Stockman, Nicolas Talbott, Tamasyn Reeves), Equality California, the nation's largest statewide LGBTQ civil rights organization, whose members include transgender persons who serve in the Armed Forces and transgender persons who wish to enlist, and the State of California, which is home to approximately 92,000 transgender adults, many of whom serve proudly in the United States military and the California National Guard.

Defendants are officers of the United States of America with command and control of the United States military, including President Donald J. Trump, Secretary of Defense James N. Mattis, Chairman of the Joint Chiefs of Staff Joseph F. Dunford

Jr., Secretary of the Navy Richard V. Spencer, Secretary of the Army Mark T. Esper[1], Secretary of the Air Force Heather A. Wilson, and Secretary of Homeland Security Kirstjen Nielsen[2].

5. Damages

No monetary damages are sought in this case.

6. Insurance

Because this is a case for injunctive and declaratory relief, insurance coverage is not at issue.

7. Motions

Defendants' Motion to Dissolve the Preliminary Injunction (Dkt. No. 82) is currently pending before the Court. Plaintiffs filed an Opposition on April 25, 2018. (Dkt. No. 98.) Defendants' Reply, if any, is due May 7, 2018. (*See* Dkt. No. 89.) A hearing is set for May 14, 2018. (*Id.*)

8. Manual for Complex Litigation

The parties do not believe that, at this time, this case warrants the application of the procedures of the Manual for Complex Litigation.

9. Status of Discovery

a. Plaintiffs' Position

Defendants contend that the Implementation Plan renders Plaintiffs' claims moot and that this case is now governed by the Administrative Procedure Act, and, thus, are refusing to engage in discovery at this time. Defendants' positions are unreasonable; discovery should proceed as permitted under the Federal Rules of Civil Procedure.

First, and as an initial matter, to the extent Defendants claim the Implementation Plan materially changes this litigation (which it does not), those

[1] Mark T. Esper has been automatically substituted as the Secretary of the Army pursuant to Federal Rule of Civil Procedure 25(d).

[2] Kirstjen Nielsen has been automatically substituted as the Secretary of Homeland Security pursuant to Federal Rule of Civil Procedure 25(d).

issues will be resolved in connection with Defendants' pending Motion to Dissolve the Preliminary Injunction (Dkt. No. 82). In the event that Motion to Dissolve is denied, there is no basis for Defendants to contend that Plaintiffs' claims are moot or to bring further dispositive motions related to the very same issues. And, in any event, there is no legitimate basis to delay discovery at this time.

Second, Plaintiffs' constitutional claims are not subject to record review pursuant to the Administrative Procedure Act (the "APA"). As the courts in both *Doe, et al. v. Trump, et al.*, No. 17-CV-1597 (D.D.C.), and *Karnoski, et al. v. Trump, et al.*, No. 2:17-CV-1297 (W.D. Wash.) recently held, plaintiffs are not required to proceed under the APA where they assert direct constitutional claims, and discovery in a constitutional challenge is not limited to an administrative record. *Doe*, Dkt. 114 at 2; *Karnoski*, Dkt. 235 at 2; *see also Bolton v. Pritzker*, Case No. 15-cv-1607MJP, 2016 WL 4555467, at *4 (W.D. Wash. Sept. 1, 2016) ("a direct constitutional challenge is reviewed independent of the APA and as such the court is entitled to look beyond the administrative record in regard to such a claim").

Defendants should not be permitted to delay resolution of this case further by declining to participate in discovery. The parties have had extensive discussions regarding discovery over the last 4 months. In January 2018, Plaintiffs agreed not to serve discovery requests that would be duplicative of those served in the Related Cases (as defined below) so long as Defendants agreed to provide Plaintiffs with access to all documents and information produced by Defendants in those actions. Defendants agreed, and Plaintiffs relied on that representation. However, Defendants have repeatedly delayed and moved the line. Just a few weeks ago, Defendants assured Plaintiffs that they would provide the promised discovery promptly upon entry by the Court of the negotiated Uniform Protective Order and Cross-Use Agreement and the separate Federal Rule of Evidence 502(d) Order. The Court entered both orders on April 25, 2018 (Dkt. Nos. 96, 97), but Defendants still have not produced the discovery from the Related Cases in this case. On May 3,

2018, Defendants advised for the first time that they were still "evaluating" unspecified clawback issues and were unable to provide a date certain by which they would produce the information they are obligated under the Uniform Protective Order and Cross-Use Agreement to produce.

There is no good cause for further delay of discovery in this action. Defendants have declined to agree to a date for exchange of initial disclosures as required by Federal Rule of Civil Procedure 26(a)(1). However, Plaintiffs are prepared to provide their initial disclosures on May 18, 2018, and request that this Court set a deadline for the exchange of initial disclosure.

Plaintiffs reserve their rights with regard to all further discovery issues, and will raise those with the Magistrate Judge in the event they are unable to resolve any disputes informally.

b. Defendants' Position

This case is moot. If Plaintiffs choose not to amend their complaint, Defendants intend to file a fully dispositive motion and discovery should not proceed until Defendants' motion has been decided.

If Plaintiffs are planning to amend their complaint, they should be required to do so by June 1, 2018. If Plaintiffs' amended complaint challenges the Department of Defenses' decision to adopt a new policy regarding military service by transgender individuals, this case will be subject to record review pursuant to the Administrative Procedure Act, which is the avenue Congress has provided for judicial review of agency actions, and no discovery will be appropriate.

c. Joint Statement

If discovery proceeds in this case, the parties intend to coordinate as possible with the other pending actions challenging the Government's policy regarding military service by transgender individuals in an attempt to make the discovery process as efficient as possible. *See infra* § 10.b.

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10. Discovery Plan

a. Subjects on Which Discovery May Be Needed

i. **Plaintiffs' Statement**

Plaintiffs anticipate that depositions will be needed of some or all of the witnesses identified on the parties' Rule 26(a) Initial Disclosures. Plaintiffs submit that written and deposition discovery of parties, non-parties, and experts will be needed on, but not limited to, the following subjects:

- The scope and findings of any review by Defendants, or their agents, of the June 30, 2016 policy permitting open service by transgender individuals ("June 2016 Policy") before July 26, 2017.
- Planning or training sessions associated with the implementation of the June 2016 Policy.
- Planned policies, practices, or procedures to implement the June 2016 Policy with respect to accessions of transgender applicants into military service.
- Findings, if any, made by the Department of Defense or any Service Branch between June 30, 2016 and July 26, 2017 concerning the effect of open service by transgender persons on cohesion, readiness, or lethality.
- Findings, if any, made by the Department of Defense or any Service Branch between June 30, 2016 and July 26, 2017 concerning the effect of open service by transgender persons on cohesion, readiness, or lethality.
- Deliberations, studies, or reviews within the Executive Office of the President or Department of Defense concerning military service by transgender people between January 20, 2017 and July 26, 2017.
- Communications between any member of the United States Congress (or their staff) and Defendants, or any individual within the Executive

Office of the President, concerning military service by transgender people between January 20, 2017 and July 26, 2017.

- The planning and publication of the President's July 26, 2017 Twitter statement ("Twitter Statement") that "After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.]"
- The implementation or formalization of the President's Twitter Statement.
- The drafting, meaning, and implementation of the August 25, 2017 Directive and the ban.
- The basis for the President's statement included in the August 25, 2017 Directive that "the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources."
- Actual costs associated with funding "sex reassignment surgical procedures for military personnel" before August 25, 2017.
- Evidence, including any evidence that pre-dates August 25, 2017, that open service by transgender individuals would "hinder military effectiveness and lethality," and "disrupt unit cohesion."
- The drafting, meaning, and implementation of the Interim Guidance.
- The execution of the study referenced in the Interim Guidance, as well as the "panel of experts" performing the study.

- Any discussions or actions, taken between August 25, 2017 and the present, related to studying or investigating military service by transgender individuals.
- The Implementation Plan.

ii. **Defendants' Statement**

As set forth above, because Plaintiffs' claims are now moot, no discovery should be permitted in this case. If Plaintiffs amend their complaint to challenge the Department of Defense's new policy regarding military service by transgender individuals, this case will be subject to record review pursuant to the Administrative Procedure Act, which is the avenue Congress has provided for judicial review of agency actions. On April 20, 2018, Defendants filed the administrative record of the Department of Defense's decision to adopt a new policy regarding military service by transgender individuals with the Court. *See* ECF No. 93.

b. Discovery Coordination

This case is one of four pending lawsuits challenging President Trump's August 25 Directive regarding military service by individuals who are transgender (the "Related Cases"). The Related Cases are, in addition to this case: (i) *Doe, et al. v. Trump, et al.*, No. 17-CV-1597 (D.D.C.); (ii) *Stone, et al. v. Trump, et al.*, No. 1:17-CV-02459 (D. Md.); and (iii) *Karnoski, et al. v. Trump, et al.*, No. 2:17-CV-1297 (W.D. Wash.). Defendants' position is that discovery should not proceed in any of the four cases because the Department of Defense has issued a new policy regarding military service by transgender individuals. Defendants contend that the Department of Defense's new policy moots the Plaintiffs' claims and deprives them of standing. Plaintiffs disagree. As discussed above, Plaintiffs contend that the Implementation Plan is not a "new" policy, but a continuation of the ban announced last year, and that discovery should proceed here as it is proceeding in each of the Related Cases. Defendants disagree.

Four depositions have been taken in the related case *Doe v. Trump*. While two of these depositions were specific to declarations and issues in that case, counsel for Plaintiffs attended one of the two depositions that overlapped with the issues in this case, and participated telephonically in the other. Other depositions have been scheduled in the Related Cases, but postponed. Plaintiffs in this case and the plaintiffs in the three Related Cases either have named or have indicated their intent to name as witnesses the following six individuals: Brad Carson, former Under Secretary of Defense for Personnel and Readiness; Deborah Lee James, former Secretary of the Air Force; Raymond Mabus, Jr., former Secretary of the Navy; Eric K. Fanning, former Secretary of the Army; George Richard Brown, Professor of Psychiatry at East Tennessee State University; and Mark Eitelberg, Professor of Public Policy at the Naval Postgraduate School. These six individuals appear to be offering the same testimony in all four Related Cases. If discovery proceeds, Defendants intend to depose these individuals once for all four Related Cases.

The parties—along with the parties in the Related Cases—have agreed to and have entered Uniform Protective Order and Cross-Use Agreement to govern the confidentiality of materials and information produced in discovery, as well as the inadvertent disclosure of privileged materials and information (Dkt. Nos. 96, 97)

Discovery produced (including deposition testimony) by a party in *Doe*, *Stone*, or *Karnoski*—including third-party discovery—shall be deemed to have been produced in this case, and Plaintiffs shall be permitted to access, rely upon, and introduce evidence produced or obtained in any of the Related Cases, except to the extent that discovery produced in the Related Cases relates only to the individual plaintiffs (*e.g.*, individual service member records).

As for depositions, if Plaintiffs here choose to question a deponent in a deposition scheduled in one of the Related Cases, that deposition will account for one of Plaintiffs' deposition slots (*see infra* § 10.d "Discovery Limitations"). Similarly, if Defendants here choose to question a deponent in one of the Related

Cases, other than the named plaintiffs, that deposition will account for one of Defendants' deposition slots. The parties agree that attendance by counsel to this action at a deposition noticed in one of the Related Cases shall not count against the number of depositions each side is permitted to take unless such counsel presents questions to the deponent on the record.

c. Discovery Period and Phasing

The parties do not believe phased discovery is necessary. If discovery proceeds, the discovery period should conclude not later than October 1, 2018.

d. Discovery Limitations

If discovery proceeds, each side (Plaintiffs and Defendants) agrees that they shall be limited to 15 depositions, subject to the clarification in the preceding section (*see supra* § 10.b "Discovery Coordination"). A 30(b)(6) deposition accounts for one deposition slot, even if the recipient of the 30(b)(6) notice designates more than one individual to testify on the topics requested. Consistent with Rule 33 of the Federal Rules of Civil Procedure, the parties agree that each side shall be limited to 25 interrogatories. Other than these limitations, the parties do not anticipate the need for any changes to the limitations on discovery imposed under the Federal Rules of Civil Procedure or this Court's Local Rules. The parties will seek leave of Court if such changes become necessary.

e. Electronically-Stored Information

If discovery proceeds, the parties agree that electronically stored information ("ESI") is likely to be responsive to discovery requests in this case. The parties will negotiate an ESI protocol.

f. Confidentiality and Privilege Issues

i. **Plaintiffs' Statement**

This case concerns, in part, whether Defendants' ban on transgender military service violates the equal protection and substantive components of the Due Process Clause of the Fifth Amendment. Plaintiffs assert that President Trump's

actions in promulgating the ban lack a legitimate basis and reflect an improper discriminatory purpose, ; that Defendants complied with the President's order to develop a plan to implement the ban; that the resulting policy cannot satisfy examination under any level of scrutiny, much less the heightened scrutiny this Court has applied.

To litigate these issues, Plaintiffs are entitled to discovery regarding the basis of the President's initial decision and the subsequent implementation process. Should a particular confidentiality or privilege dispute arise in the course of discovery, the parties should work to resolve that dispute, and, if they cannot, to present the issue to the Court for resolution. This Joint Report, however, is not the appropriate forum to address such issues. Defendants' submission below is thus premature and inappropriate to the extent it asks this Court to predetermine Defendants' right to a blanket assertion of privilege and certain limitations on discovery on account of President Trump being named as a defendant. Defendants are not entitled to such blanket assertions of privilege. *See, e.g.*, *In re Sealed Case*, 121 F.3d 729, 749, 752-54 (D.C. Cir. 1997) (qualified privilege of presidential communication is to be construed narrowly, and is overcome where "the evidence sought [is] directly relevant to issues that are expected to be central to the trial," where such "evidence is not available with due diligence elsewhere"); *Dellums v. Powell*, 561 F.2d 242, 248-49 (D.C. Cir. 1977) (refusing to apply presidential communications privilege to recorded communications between the White House and Department of Justice officials where there was evidence "that the Department of Justice played a leading role" in "substantial violations of constitutional rights" and recordings were needed "to establish [the attorney general's] responsibility for the violations"); *In re Subpoena Duces Tecum Served on the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (the deliberative process privilege "is not appropriately asserted . . . when a plaintiff's cause of action turns on the government's intent."). Plaintiffs reserve their rights to raise these, and any other

arguments, to the extent Defendants decline to provide information or documents through the course of discovery.

ii. **Defendants' Statement**

Because Plaintiffs claims are moot, there should be no discovery in this case. Moreover, even if Plaintiffs amended their complaint to challenge the Department of Defense's new policy, their claims would be subject to record review under the Administrative Procedure Act.

If discovery does proceed in this case, there are likely to be significant privilege issues. Plaintiffs have named the President as a defendant in this case, and they have stated above their intent to conduct discovery regarding the "[d]eliberations, studies, or reviews within the Executive Office of the President or Department of Defense concerning military service by transgender people between January 20, 2017 and July 26, 2017"; "[c]ommunications between any member of the United States Congress (or their staff) and Defendants, or any individual within the Executive Office of the President, concerning military service by transgender people between January 20, 2017 and July 26, 2017"; and the "planning and publication," as well as the "implementation or formalization" of the President's July 26, 2017 statement.

Plaintiffs should not be permitted to seek discovery from the President. The Supreme Court has held that it has "no jurisdiction of a bill to enjoin the President in the performance of his official duties," *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866); *see also Franklin v. Massachusetts*, 505 U.S. 788, 802–03 (1992), and lower courts often have applied the same principle, *see, e.g.*, *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir.), *vacated on other grounds*, *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 377 (2017) (finding that the Government's position that "district court erred by issuing an injunction that runs against the President himself" is "well taken" and "vacat[ing] the district court's order to the extent the order runs against the President"). Because the Court lacks jurisdiction to enjoin

the President in the performance of his official duties, it cannot order discovery of the President.

Even assuming the President were a proper defendant and could be subject to a civil discovery order, discovery directed to the President in civil litigation would raise significant separation-of-powers concerns and should not be allowed. *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 385 (2004). The Court in *Cheney* noted that the public interest requires that a coequal branch of Government "'afford Presidential confidentiality the greatest protection consistent with the fair administration of justice.'" *Id*. at 382 (quoting *United States v. Nixon*, 418 U.S. 683, 715 (1974)). Moreover, "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Id*. at 385. Accordingly, the Court should, at a minimum, first require Plaintiffs to exhaust alternative sources of non-privileged discovery before subjecting the President to discovery.

In addition, the presidential communications privilege shields from discovery the President's "communications in performance of [his] responsibilities," *Nixon*, 418 U.S. at 711, or "documents or other materials that reflect presidential decisionmaking or deliberations," *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997). The privilege also protects communications authored or solicited and received by immediate White House advisers in the Office of the President and their staff. *See id*. at 752.

Finally, to the extent that Plaintiffs seek discovery from the President, the information sought may also be subject to other privileges, including, but not limited to, the deliberative process privilege, attorney-client privilege, and attorney work product.

Likewise, to the extent that Plaintiffs seek information from other defendants, that information may be subject to privileges, including, but not

limited to, the deliberative process privilege, attorney-client privilege, and attorney work product.

11. Discovery Cut-Off

If discovery proceeds, the parties request that the discovery cut-off in this case be set for October 1, 2018.

12. Expert Discovery

If discovery proceeds, expert depositions will be completed in advance of the general discovery cut-off.

13. Dispositive Motions

Defendants plan to file a motion to dismiss or, in the alternative, for summary judgment. Plaintiffs have not yet filed, but expect to file, a motion for summary judgment.

14. Settlement / Alternative Dispute Resolution

Counsel for the parties have discussed the nature and basis of their claims and defenses and the possibilities for prompt settlement of the case. They have not been able to reach an agreement to settle at this time and do not believe that further discussions would be fruitful at this stage of the litigation.

15. Trial Estimate

Plaintiffs have not demanded a jury trial and the Parties do not believe a bench trial should take more than 10 court days. The trial date in this action will need to be coordinated with any trials scheduled in *Doe v. Trump*, No. 17-1597 (D.D.C.), *Stone v. Trump*, No. 17-2459 (D. Md.), and *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash.).

16. Trial Counsel

Plaintiffs' trial counsel will be:

- Latham & Watkins LLP (Marvin S. Putnam, Amy C. Quartarolo, Adam S. Sieff, and Harrison J. White);

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- National Center for Lesbian Rights (Shannon P. Minter and Amy Whelan);
- GLBTQ Legal Advocates & Defenders (Jennifer Levi and Mary L. Bonauto); and,
- California Department of Justice (Mark R. Beckington, Gabrielle D. Boutin, Enrique A. Monagas).

Defendants' trial counsel will be:

- Ryan Parker, U.S. Department of Justice
- Andrew Carmichael, U.S. Department of Justice
- Ashley Cheung, U.S. Department of Justice
- Courtney Enlow, U.S. Department of Justice
- Robert Norway, U.S. Department of Justice
- Matthew Skurnik, U.S. Department of Justice

17. Independent Expert or Master

The parties do not believe appointment of a master pursuant to Rule 53 is necessary at this time, but will continue to evaluate this possibility as discovery progresses.

18. Timetable

Pursuant to the Court's Standing Order, Plaintiffs propose the case schedule attached as Exhibit A hereto. As set forth above, Defendants' position is that discovery should not proceed in this case because Plaintiffs' claims are moot and any claims challenging the Department of Defense's new policy should be governed by the APA. Should the Court direct discovery to proceed, however, Defendants have proposed a case schedule in Exhibit A.

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Dated: May 4, 2018

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Attorneys for Defendants Donald J. Trump, et. al.

ATTESTATION

Pursuant to Civil Local Rule 5-4.3.4(a)(2)(i), I, Amy C. Quartarolo, attest under penalty of perjury that I have obtained concurrence and authorization from Ryan B. Parker of the U.S. Department of Justice, and Enrique Monagas of the California Department of Justice, to affix their electronic signatures to this filing.

Dated: May 5, 2018 By: */s/ Amy C. Quartarolo*
Amy C. Quartarolo