

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs respectfully move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary judgment in their favor on Count I of their Second Amended Complaint for Declaratory and Injunctive Relief (ECF 148). Specifically, Plaintiffs move for issuance of an Order:

- (1) Granting Plaintiffs' Cross-Motion for Summary Judgment;
- (2) Denying Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, or, in the Alternative, Defendants' Motion for Summary Judgment;
- (3) Ruling that Defendants, excepting President Trump, are permanently enjoined from implementing and enforcing the policies and directives encompassed in President Trump's Memorandum for the Secretary of Defense and the Secretary of Homeland Security, dated August 25, 2017, and entitled "Military Service by Transgender Individuals," and in Secretary Mattis's February 22, 2018, memorandum regarding "Military Service by Transgender Individuals"; and
- (4) Declaring that the policies and directives encompassed in President Trump's Memorandum for the Secretary of Defense and the Secretary of Homeland Security, dated August 25, 2017, and entitled "Military Service by Transgender Individuals" and

in Secretary Mattis’s February 22, 2018, memorandum regarding “Military Service by Transgender Individuals” violate the equal protection component of the Fifth Amendment to the U.S. Constitution, and are invalid on their face and as applied to Plaintiffs.

* * *

For the reasons identified in the supporting Memorandum, Plaintiffs’ Cross-Motion for Summary Judgment should be granted. A proposed order is attached to this motion.

Dated: May 25, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of May 2018, a copy of the foregoing Cross-Motion for Summary Judgment was filed via ECF in the United States District Court for the District of Maryland.

/s/ Marianne Kies

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, et al.,

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Defendants.

Case No. 1:17-cv-02459-MJG

[PROPOSED] ORDER

**ORDER GRANTING PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT
AND DENYING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND
AMENDED COMPLAINT OR FOR SUMMARY JUDGMENT**

Upon consideration of Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, or, in the Alternative, Defendants' Motion for Summary Judgment, Plaintiffs' Opposition to the motion, Plaintiffs' Cross-Motion for Summary Judgment, and any opposition thereto, it is, on this ____ day of _____, 2018, hereby

ORDERED that Plaintiffs' Cross-Motion for Summary Judgment on Count I of their Second Amended Complaint for Declaratory and Injunctive Relief is GRANTED; it is further

ORDERED that Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, or, in the Alternative, Defendants' Motion for Summary Judgment, is DENIED; it is further

ORDERED that Defendants Mattis, Esper, Spencer, Wilson, Nielsen, and Zukunft are PERMANENTLY ENJOINED from implementing and enforcing the policies and directives encompassed in President Trump's Memorandum for the Secretary of Defense and the

Secretary of Homeland Security, dated August 25, 2017, and entitled “Military Service by Transgender Individuals,” and in Secretary Mattis’s February 22, 2018, memorandum regarding “Military Service by Transgender Individuals”; and it is further

DECLARED that the policies and directives encompassed in President Trump’s Memorandum for the Secretary of Defense and the Secretary of Homeland Security, dated August 25, 2017, and entitled “Military Service by Transgender Individuals” and in Secretary Mattis’s February 22, 2018, memorandum regarding “Military Service by Transgender Individuals” violate the equal protection component of the Fifth Amendment to the U.S. Constitution, and are invalid on their face and as applied to Plaintiffs.

DATED:

HON. MARVIN J. GARBIS
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 1:17-cv-02459-MJG

**MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR
FOR SUMMARY JUDGMENT, AND MEMORANDUM IN SUPPORT OF
PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

In July 2017, when President Trump announced on Twitter his decision to ban transgender individuals from serving in the military “in any capacity,” he claimed to have based his decision on concerns about military effectiveness. ECF 40-22. As this Court later found, that was not true: President Trump’s abrupt action was based on no evidence at all, and “was not driven by genuine concerns regarding military efficacy.” ECF 85, at 43 (internal quotation marks omitted). The Court further concluded that President Trump’s directive to the Department of Defense (“DoD”) to develop an “implementation plan” was “not a request for a study but an order to implement the Directives contained therein.” *Id.* at 50. This Court—and three others—enjoined enforcement and implementation of the President’s act of discrimination. ECF 85.

DoD has now issued the Implementation Plan that the President directed, together with a report purporting to justify the conclusions the President had already reached. But while DoD has made cosmetic changes, the bottom line is the same: transgender individuals are deemed unfit to serve and categorically barred from enlisting. Anyone who has completed a gender transition is denied the ability to serve their country, even if they have completed any needed surgery, their gender dysphoria has been treated successfully, their stability has been certified and confirmed, and they meet every other qualification for service.

Plaintiffs are all transgender individuals who are currently serving their country or seeking the chance to do so. The newly added Plaintiffs are several transgender individuals (the “Enlisting Plaintiffs”) who wish to serve, and now or in the near future would be eligible to serve, but for the Ban as implemented. Two of them, Niko Branco and Ryan Wood, have—contrary to Defendants’ assertions—already met every requirement for enlistment under the Open Service Directive. The Enlisting Plaintiffs unquestionably have standing to challenge Defendants’ unconstitutional attempt to bar them from service. And the claims of the original Plaintiffs (the

“Serving Plaintiffs”), whose standing this Court has already found, are not mooted by a “grandfather” provision in the Implementation Plan, which on its face casts doubt on how meaningful that protection is, and overtly threatens to withdraw it.

On the merits, the Second Amended Complaint alleges, and unrefuted evidence establishes, that the original Transgender Service Member Ban and its Implementation Plan are both unconstitutional. Defendants do not even attempt to address the former, effectively conceding this Court’s finding that it was motivated by discrimination, not legitimate military concerns. That reality dooms the Implementation Plan as well. Although Defendants insist that the new policy is independent of President Trump’s original decision, the record clearly establishes otherwise. Secretary Mattis has faithfully *implemented* the Commander-in-Chief’s directives. Indeed, on the key question of new enlistments, Secretary Mattis instructed his putatively independent “Panel of Experts” to simply follow the President’s direction.

But even if the origins of the Implementation Plan were ignored, it still could not withstand scrutiny. The “Panel of Experts” report is riddled with inaccuracies and illogic that betray its discriminatory animus. Among many glaring irrationalities, Defendants repeatedly justify the enlistment ban based on alleged limitations associated with surgical treatment, even though anyone attempting to enlist under the Open Service Directive must demonstrate that they *have already completed all necessary surgery*. And strikingly, in response to the Panel’s raw speculation about harms to “unit cohesion,” the service chiefs of the Army, Navy, Air Force, and Marine Corps have unanimously testified that they are not aware of any issues of unit cohesion, disciplinary problems, or morale related to the open service of transgender men and women.

It is thus Plaintiffs, not Defendants, who are entitled to summary judgment. But at a minimum, it would be impossible to grant summary judgment for *Defendants* without resolving

disputed issues of fact in their favor. Remarkably, moreover, Defendants argue that there is no genuine dispute of material fact *while withholding material facts from Plaintiffs*. Discovery is ongoing, and cannot be completed until this Court resolves significant privilege disputes. Under blackletter civil procedure rules, Defendants' summary judgment motion is obviously premature.

In Defendants' view, President Trump's unconstitutional act of discrimination has been effectively laundered, and this Court should now play the role of a powerless rubber stamp. They are wrong. The Court should deny Defendants' motions, grant Plaintiffs' cross-motion for summary judgment, and reaffirm that the steps Defendants have taken to exclude transgender individuals from military service are unconstitutional.

FACTUAL BACKGROUND¹

A. DoD's Historical Ban on Military Service by Transgender People

Starting some time before 1981, DoD barred men and women who are transgender from military service. DoD's policy categorically excluded individuals who had had a "change of sex" from enlisting, and it prohibited persons who are transgender from serving openly, regardless of whether they required any ongoing medical treatment and regardless of their fitness to serve. ECF 40-32 (Brown Decl.), ¶¶ 39–58; ECF 40-35 (RAND Report), at 1. The historical ban on military service by people who are transgender was based on the military's conclusion that so-called "Sexual Gender and Identity Disorders" rendered a service member "administratively unfit." ECF 40-32, ¶¶ 48–56.

¹ "When evaluating a 12(b)(6) motion to dismiss, a plaintiff's well-pleaded allegations are accepted as true, and the complaint is viewed in the light most favorable to the plaintiff." *Stone v. Trump*, 280 F. Supp. 3d 747, 769 (D. Md. 2017). At the summary judgment stage, "reasonable inferences should be drawn in favor of the nonmoving party." *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014).

The consensus of the medical community is that being transgender is not a mental disorder and “implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.” ECF 40-32, ¶ 25; Decl. of Augustus Golden (“Golden Decl.”), Ex. 1 (APA Position Statement). However, when transgender people are unable to live consistently with their gender identity, they may experience “gender dysphoria,” a diagnostic term used to describe the clinically significant distress a transgender person can experience from the incongruity between their gender identity and the sex assigned to them at birth. ECF 40-32, ¶ 26. If a transgender person is able to live consistently with his or her gender identity, he or she may never develop gender dysphoria. ECF 139-19 (Brown Supp. Decl.), ¶ 9. If a transgender person does develop gender dysphoria, appropriate transition-related treatment resolves the clinically significant distress by enabling the person to live consistently with their gender identity. *Id.* The American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (2013) (“DSM-V”) accordingly provides a “post-transition” diagnostic subtype for when a person’s gender dysphoria is in “remission.” Golden Decl., Ex. 2.

By categorically prohibiting transgender people from serving even when they transitioned and were stable in their gender, the military’s historical ban treated transgender people differently from people with other curable medical conditions. ECF 40-32, ¶ 39.

B. The Open Service Directive

On July 13, 2015, then-Secretary of Defense Ashton Carter acknowledged that the existing ban on military service by transgender people was “an outdated, confusing, inconsistent approach that’s contrary to our value of service and individual merit [and that is] causing uncertainty that distracts commanders from our core missions.” ECF 40-31. Secretary Carter created a DoD working group to study “the policy and readiness implications of welcoming transgender persons to serve openly.” *Id.* This DoD Working Group included representatives of

military leadership, including the Joint Chiefs of Staff; the service secretaries; and personnel, training, readiness, and medical specialists. *See id.*; ECF 40-37 (Carson Decl.), ¶¶ 1, 8–10. Over the next year, the Working Group performed a systematic review of military service by transgender people—including meeting with transgender service members deployed throughout the world, and consulting with outside experts, medical professionals, and others. *See* ECF 40-37, ¶ 10; ECF 40-8, at 4/17.²

Following its “thoughtful and deliberate” review (ECF 40-8, at 3/17), the DoD Working Group concluded that “[o]pen service by transgender service members would not impose any significant burdens on readiness, deployability, or unit cohesion,” ECF 40-38 (Wilmoth Decl.), ¶ 23.³ The Secretary of Defense agreed, determining that:

open service by transgender Service members while being subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability, and retention, is consistent with military readiness and with strength through diversity.

² Secretary Carter’s order directed the Working Group to “start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness, unless and except where objective, practical impediments are identified.” ECF 40-31. That mandate did not mean, as the Implementation Plan insinuates, that “standards were adjusted or relaxed to accommodate service by transgender persons.” ECF 120-2, at 19. Rather, instead of simply assuming that the medical needs of transgender service members were inconsistent with generally applicable standards for fitness or deployability, the Working Group conducted an evidence-based assessment to determine whether those prior assumptions were actually true. ECF 139-29 (Carson Supp. Decl.), ¶ 7.

³ DoD also commissioned a study by the Forces and Resources Policy Center of the non-partisan RAND National Defense Research Institute (“RAND”), which conducted an “extensive literature review”; examined data from inside and outside DoD; studied policies of foreign militaries that permit open service by persons who are transgender; and reviewed DoD’s instructions on enlistment, retention, separation, and deployment. ECF 40-35, at 2–3. RAND concluded that the impact on military readiness from open service would be “negligible,” and that associated health care costs would represent “an exceedingly small proportion” of DoD’s overall health care expenditures. *Id.* at xi–xii, 31, 70.

ECF 40-4 (DTM 16-005). On June 30, 2016, the Secretary issued a directive rescinding the historical policy of discriminating against men and women who are transgender (the “Open Service Directive”). *Id.*

The Open Service Directive announced that individuals wishing to join the military (a process known as “accession,” applicable to both new enlistees and officer candidates) would not be prohibited from doing so solely because they are transgender. *See generally* ECF 40-4, at Attachment. However, the Directive set out stringent accession requirements beyond those applicable to current service members, to “ensure that those entering service are free of medical conditions or physical defects that may require excessive time lost from duty.” *Id.* § 2(a). Namely, “[a] history of gender dysphoria” was disqualifying “unless, as certified by a licensed medical provider, the [prospective enlistee] ha[d] been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for [at least] 18 months.” *Id.* § 2(a)(1). “A history of sex reassignment or genital reconstruction surgery” was also disqualifying unless at least 18 months had passed since the surgery, no further surgery was required, and “no functional limitations or complications persist[ed].” *Id.* § 2(a)(3). Finally, a history of any medical treatment “associated with gender transition” was disqualifying, unless the enlistee had “completed all medical treatment” associated with the transition; had been “stable” in the transition for 18 months; and had been stable on any hormones for 18 months. *Id.* § 2(a)(2).⁴ The new accessions policy was scheduled to go into effect on July 1, 2017, a date that was subsequently extended to January 1, 2018. ECF 40-11.

⁴ The Open Service Directive’s enlistment policy is comparable to the enlistment standards for individuals with abnormal menstruation, dysmenorrhea, and endometriosis—all of whom may enlist if their conditions are adequately managed through hormone medication. ECF 139-19, ¶ 33 (citing DoDI 6130.03, Enclosure 4 §§ 14(a), (d), (e)).

C. Defendants' Transgender Service Member Ban

On July 26, 2017, President Trump abruptly rescinded the Open Service Directive, announcing that transgender persons would not be permitted to serve in the military “in any capacity.” ECF 40-22. While the President asserted that he had “consult[ed] with [his] Generals and military experts,” *id.*, the announcement came as a surprise to the Secretary of Defense and other military officials. *See* ECF 40-12; Golden Decl., Ex. 3 at USDOE00037695 (Gen. Dunford “was not consulted” before the Tweets); Golden Decl., Ex. 4 at 6 (due to President Trump’s growing frustration with Secretary Mattis, who “refus[ed] to enact a ban,” the “president finally went around him and tweeted it”). In fact, the President later stated that he had done the military a “great favor” by personally intervening to resolve this “confusing issue.” ECF 40-12.

The primary motivation for President Trump’s ban was based not on evidence, but on moral disapproval and political calculation; for example, Representative Vicky Hartzler pushed for the Ban based on her moral disapproval of transgender individuals. *See* ECF 40-2 at 10–11; *see also* Golden Decl., Ex. 5 (REP. HARTZLER 066–67, filed under seal).

On August 25, 2017, the President issued a memorandum with three directives formalizing his Tweets, comprising bans on enlistments, retention, and military funding for sex-reassignment surgery (together, the “Transgender Service Member Ban”). ECF 40-21. President Trump ordered Secretary Mattis to propose a “plan for *implementing*” those directives by February 21, 2018. ECF 40-21, § 3 (emphasis added); *see also* ECF 60-5 (Interim Guidance) (“Not later than February 21, 2018, I will present the President with a *plan to implement the [August 25, 2017] policy and directives.*” (emphasis added)).

On August 28, 2017, Plaintiffs filed the instant lawsuit, alleging that the Ban violates their rights to equal protection and substantive due process under the Fifth Amendment because it discriminates against them and other transgender persons on the basis of invidious stereotypes,

irrational fears, animus, and moral disapproval, which are not permissible bases for differential treatment. ECF 1, ¶ 142. Plaintiffs alleged that Defendants lacked any rational basis for imposing the Ban—much less a basis that would survive the heightened scrutiny applicable to discrimination against transgender people. *Id.* ¶¶ 141–42. Plaintiffs further alleged that the Ban is so arbitrary as to be an abuse of governmental authority. *Id.* ¶ 147. On September 14, 2017, Plaintiffs filed a first amended complaint containing similar allegations. ECF 39.

D. This Court’s Injunction

On November 21, 2017, this Court ruled that Plaintiffs had established a likelihood of success on their claim that President Trump’s decision to ban transgender persons from military service violates equal protection, that Plaintiffs would be irreparably harmed absent preliminary injunctive relief, and that the public interest and balance of hardships weighed in favor of granting injunctive relief. ECF 85, at 46 (finding all *Winter* factors weigh in favor of granting a preliminary injunction). In finding a likely equal protection violation, the Court observed that President Trump’s discriminatory decision to issue the Transgender Service Member Ban “‘was not driven by genuine concerns regarding military efficacy.’” *Id.* at 43 (quoting *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 213 (D.D.C. 2017)). The Court further rejected Defendants’ contention that the case was not ripe for review in light of DoD’s conduct of a study at President Trump’s direction: “The Court cannot interpret the plain text of the President’s [August 25, 2017] Memorandum as being a request for a study to determine whether or not the directives should be implemented. Rather, it *orders the directives to be implemented by specified dates.*” *Id.* at 29 (emphasis added). The Court ordered that Defendants “shall not enforce or implement the [] policies and directives encompassed in President Trump’s [August 25, 2017] Memorandum.” ECF 84, at 1.

E. The Defense Department's Implementation of the Transgender Service Member Ban

Shortly after President Trump's Twitter announcement of the Ban on July 26, 2017, DoD began studying how to implement the Ban. Among other steps, the Army quickly gathered data on its 108 service members who had come forward as transgender, and estimated the amount of time it would take to for all of those service members to be "eliminated" from service through attrition or involuntary discharge. *See* ECF 139-4, at Slides 12–13.

After President Trump issued his formal Transgender Service Member Ban on August 25, 2017, Secretary Mattis directed the Under Secretary for Personnel and Readiness and the Vice Chairman of the Joint Chiefs of Staff to assemble "a panel of experts" to "develop[] an Implementation Plan on military service by transgender individuals, to effect the policy and directives in [the] Presidential Memorandum." *See* ECF 139-5 (Sept. 14, 2017 "Terms of Reference" re "Implementation of Presidential Memorandum on Military Service by Transgender Individuals"). Secretary Mattis's "Terms of Reference" illustrate the limited scope of the task: DoD's "Panel of Experts" was assigned to conduct a study to "inform the Implementation Plan," *i.e.*, the Plan implementing the President's directives. *Id.* at USDOE00000443. With respect to accessions, the Panel's mandate was particularly limited. Secretary Mattis explained that DoD had been "direct[ed]" to "prohibit[] accession of transgender individuals into military service," and instructed the Panel simply to "update" the accessions policy's guidelines "to reflect currently accepted medical terminology." *Id.* DoD officials acknowledged that the Department had "received formal guidance from the White House reference to transgender personnel serving in the military" and committed to "develop a [sic] implementation plan to meet the President's intent"—*i.e.*, a ban on military service by

people who are transgender. Golden Decl., Ex. 6 at USDOE00213057 (Sept. 14, 2017 Talking Points); *see also* ECF 40-22 (Tweets).

The “Panel of Experts” provided its recommendations for how to implement the Ban on January 11, 2018. Political appointees at DoD then considered the recommendations, “as well as additional information within the Department,” and prepared an Implementation Plan for Secretary Mattis to deliver to the President on February 22, 2018. ECF 120-2, at 18. The recommendations were prepared “[p]ursuant to [the President’s] memorandum of August 25, 2017.” ECF 120-3, at 1 (emphasis added). Asked at a Press Briefing whether Secretary Mattis was “proud of the recommendations he[] made to the [P]resident,” DoD’s chief spokesperson answered: “The way that this was done, is it [sic] was a coordinated effort with the White House as well as the Department of Justice.” ECF 139-7 (Mar. 29, 2018 DoD Press Briefing), at 10.

The Implementation Plan (ECF 120-1, 120-2, 120-3) proposes a two-pronged approach governing new enlistments. First, transgender individuals who “require or have undergone gender transition” are disqualified from military service, without regard to whether they are otherwise fit to serve. ECF 120-2, at 32. Second, all other transgender individuals are permitted to serve only “*in their biological sex.*” *Id.* (emphasis added). Together, these provisions effectively exclude all transgender individuals from being able to enlist. ECF 148, ¶ 177.

In accordance with the President’s instruction in the August 25 memorandum to “determine how to address transgender individuals currently serving in the United States military,” ECF 40-21, § 3, the Implementation Plan contains a “grandfather” clause, which permits service members diagnosed with gender dysphoria since the Open Service Directive took effect and prior to the effective date of the Implementation Plan to “continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria,” ECF 120-1, at

2. However, Defendants threaten to terminate the grandfather provision depending on how this and related litigation play out: “[S]hould [DoD’s] decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption is and should be deemed severable from the rest of the policy.” ECF 120-2, at 43.

President Trump endorsed this Implementation Plan in a memorandum issued on March 23, 2018. ECF 120-3. The March 23 memorandum states that, “pursuant to” the August 2017 Transgender Service Member Ban, DoD had submitted to the President a proposed policy that disqualifies “transgender persons with a history or diagnosis of gender dysphoria” from serving in the military “except under certain limited circumstances.” *Id.* at 1. The March 23, 2018 memorandum then purports to “revoke” the August 2017 memorandum and any other directives the President may have made regarding military service by transgender individuals. *Id.* § 1. On the basis of the March 23 memorandum and the associated Implementation Plan, Defendants immediately moved to dissolve the preliminary injunction this Court had entered. ECF 120. That motion is fully briefed and pending.

F. Plaintiffs’ Second Amended Complaint, and Defendants’ Motion to Dismiss and Motion for Summary Judgment Before the Close of Discovery

After Defendants published their February 22 Implementation Plan on March 23, Plaintiffs promptly moved for leave to file a second amended complaint. ECF 135. That motion was granted, and the second amended complaint was filed, on April 27, 2018. ECF 147, 148. Among other things, the second amended complaint added six individual plaintiffs who are transgender and who have taken concrete steps to enlist in the Armed Forces:

- Niko Branco seeks to join the Army. ECF 148, ¶ 4. Mr. Branco is eligible to enlist under the Open Service Directive because he has submitted a signed certification from licensed physicians that: (1) he has been stable for more than 18 months while

being on hormones and since his transition-related surgery; and (2) he does not require any additional surgeries. ECF 139-32 (Branco Decl.), ¶ 16; Branco Supp. Decl. (attached hereto), ¶ 2.⁵

- Teddy D'Atri seeks to join the Air Force. ECF 148, ¶ 4. Mr. D'Atri is tentatively scheduled to undergo medically necessary surgery in August 2018, and he will not require any further surgery after that procedure. ECF 139-34 (D'Atri Decl.), ¶¶ 6, 8.
- Ryan Wood seeks to join the Marine Corps. ECF 148, ¶ 4. Mr. Wood is eligible to enlist under the Open Service Directive because he has submitted a signed certification from a licensed physician that: (1) he has been stable for more than 18 months while being on hormones and since his transition-related surgery; and (2) he does not require any additional surgeries. ECF 139-36 (Wood Decl.), ¶ 10; Wood Supp. Decl. (attached hereto), ¶¶ 3–5.⁶
- John Doe 2 seeks to join the Air Force. ECF 148, ¶ 4; ECF 140-1 (Doe 2 Decl.). John Doe 2 underwent medically necessary top surgery approximately one year ago and intends to seek a waiver of the 18-month stability period requirement through the process afforded him under the Open Service Directive. ECF 140-1, ¶ 14.
- Jane Roe 1 seeks to join the Air Force. ECF 148, ¶ 4. Jane Roe 1 is tentatively scheduled for facial feminization surgery in July 2018, and she will not require any

⁵ Defendants submitted a declaration by a Sgt. Osburn dated May 11, 2018 stating that Plaintiff Branco had not yet submitted all required paperwork. See Osburn Decl., Ex. 3 to Defs.' Motion for Summary Judgment (filed under seal). On May 17, Sgt. Osburn informed Plaintiff Branco that in fact all necessary paperwork was submitted. Branco Supp. Decl., ¶ 4.

⁶ Defendants submitted a declaration stating that Plaintiff Wood underwent transition-related surgery in November 2017. Flores Decl., Ex. 4 to Defs.' Motion for Summary Judgment (filed under seal), ¶ 10. That is incorrect; Plaintiff Wood's last transition-related surgery was in 2012. Wood Supp. Decl., ¶ 5.

- further surgery after that procedure. ECF 140-2 (Roe 1 Decl.), ¶¶ 8, 10. Moreover, she intends to seek a waiver of the 18-month stability period requirement through the process afforded her under the Open Service Directive. *Id.* ¶ 13.
- John Doe 3 is a 15-year-old minor who wishes to join the Coast Guard as soon as he is age-eligible. ECF 148, ¶ 4. He visited the U.S. Coast Guard Academy, took a tour, and talked to a Coast Guard cadet, who informed John Doe 3 and his family about the application process and pursuing a career in the U.S. Coast Guard. ECF 140-3 (Doe 3 Decl.), ¶ 8.

On May 11, 2018, Defendants filed the instant Motion. ECF 158. Although framed as a motion to dismiss or, in the alternative, a motion for summary judgment, the Motion largely avoids addressing the allegations in the Second Amended Complaint, and relies heavily on factual claims. Discovery in this case, however, is ongoing; Defendants have yet to complete their document productions or to supply interrogatory responses that comply with Rule 33(d). Rule 56(d) Decl. of Marianne F. Kies (attached hereto), ¶¶ 7, 35. The parties have not exchanged expert disclosures. *Id.* ¶¶ 37–38. There are also live disputes regarding many of Defendants’ privilege assertions, as well as the adequacy of their privilege logs. *See, e.g., id.* ¶¶ 19–21, 23–25, 28, 32. Plaintiffs have served a motion to compel, to which Defendants have not yet responded. *See, e.g.,* Golden Decl., Ex. 7 (Apr. 23, 2018 Motion to Compel); ECF 152. Neither Plaintiffs nor Defendants have taken a single deposition in this case; indeed, due to Defendants’ pervasive assertions of privilege for information critical to this case, Plaintiffs have been unable to determine which witnesses to depose and on what subjects. Kies Decl., ¶¶ 37–38.

ARGUMENT

Under President Trump’s directives and the Department of Defense’s Implementation plan, Plaintiffs Stone, Cole, Doe 1, George, Gilbert, and Parker (the “Serving Plaintiffs”) remain vulnerable, stigmatized, and at risk of discharge from the military, solely because they are transgender. They are now joined by Plaintiffs D’Atri, Wood, Branco, Doe 2, Roe 1, and Doe 3, who wish to enlist in the military but are prohibited from doing so under the Implementation Plan (the “Enlisting Plaintiffs”). Defendants’ assertion that these individuals nevertheless lack standing to pursue their claims, or that the claims are somehow now “moot,” is based on a misinterpretation of governing law and a misstatement of the facts. On the merits, the Transgender Service Member Ban and Implementation Plan are unconstitutional, and it is Plaintiffs—not Defendants—who are entitled to summary judgment on Plaintiffs’ Equal Protection claim. At a minimum, it would be impossible to render judgment in Defendants’ favor at this stage without resolving disputed issues of material fact, and it would be particularly inappropriate to reach such a conclusion while discovery is incomplete and Defendants continue to withhold evidence relevant to Plaintiffs’ claims.

I. This Court Has Jurisdiction Over Plaintiffs’ Claims.

“A defendant may challenge subject-matter jurisdiction [under Rule 12(b)(1)] in one of two ways: facially or factually.” *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017). Where, as here, Defendants assert what is essentially a facial challenge to the existence of subject-matter jurisdiction,⁷ “the facts alleged in the complaint are taken as true, and the motion must be denied

⁷ For the vast majority of Defendants’ jurisdictional arguments, Defendants merely cite Plaintiffs’ allegations and assert that, as they have pleaded their claims, Plaintiffs lack standing or their claims are moot. As to Plaintiffs Branco and Wood only, Defendants have submitted sealed (continued...)

if the complaint alleges sufficient facts to invoke subject matter jurisdiction.” *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009); *compare De La Fuente v. Lamone*, 2017 WL 2439143, at *4 (D. Md. June 5, 2017) (“Here, defendants argue, *inter alia*, that it is apparent from the face of the Complaint that the case is now moot. This challenge is a facial challenge, given that it is made on the basis of the four corners of the Complaint.” (internal citations omitted)), *with Kerns*, 585 F.3d at 192 (in a factual challenge, the defendant asserts that “the jurisdictional allegations of the complaint [are] not true” (internal quotation marks omitted)).

When a plaintiff has demonstrated standing as of the filing of the complaint, their ongoing interest in the litigation is assessed under the mootness doctrine. *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 396–97 (1980); *see also Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993) (explaining that the standing doctrine applies “as of the outset of the litigation,” and mootness applies “throughout the life of the lawsuit”). This Court has already determined that the Serving Plaintiffs have standing to challenge the retention ban (ECF 40-21, § 1); that Plaintiff Stone has standing to challenge the ban on funding for sex-reassignment surgeries (*id.* § 2(b)); and that Plaintiff George has standing to challenge the enlistment ban (*id.* § 2(a)). ECF 85, at 33, 38. Because the Enlisting Plaintiffs plainly have standing to assert their claims, and Defendants’ voluntary cessation of their unlawful conduct does not moot the Serving Plaintiffs’ claims, Defendants’ jurisdictional arguments should be rejected.

declarations addressing their eligibility for service. *See Osburn Decl.*, Ex. 3; *Flores Decl.*, Ex. 4. Those declarations are inaccurate, as explained below.

A. The Enlisting Plaintiffs Have Standing to Challenge the Implementation of the Enlistment Ban.

There is no question that the Enlisting Plaintiffs have alleged redressable injuries-in-fact under the Implementation Plan. An injury-in-fact sufficient to establish standing must include “‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). “Imminent” injuries include future injuries, where “‘the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.’” *Kobe v. Haley*, 666 F. App’x 281, 294 (4th Cir. 2016) (per curiam) (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014)); *see also Khan v. Children’s Nat’l Health Sys.*, 188 F. Supp. 3d 524, 529 (D. Md. 2016) (“[A plaintiff] need not demonstrate that it is literally certain that they will suffer harm . . . [Courts] have found standing based on a substantial risk [of harm].” (internal quotation marks omitted)).

Plaintiffs Branco’s and Wood’s injuries are not just imminent but immediate. Both have made concrete efforts to enlist. *See generally* ECF 139-32 (Branco); ECF 139-36 (Wood). Both completed all anticipated surgery in connection with their gender transition more than 18 months ago. ECF 139-32, ¶¶ 8–9; ECF 139-36, ¶ 6; Wood Supp. Decl., ¶ 5. And both otherwise meet the requirements for accession established in the Open Service Directive. *See* Branco Supp. Decl., ¶ 3; Wood Supp. Decl., ¶ 3. But under the Implementation Plan, both would be barred from service because they were successfully treated for gender dysphoria. Plaintiffs Branco and Wood are thus injured by the Implementation Plan in a straightforward manner, and a decision in their favor would redress that injury.

Defendants respond that Plaintiffs Branco and Wood “do not meet the Carter policy’s accessions standards.” ECF 158, at 17. Defendants do not actually provide evidence that they

“do not meet” those standards; their declarants just say that Branco and Wood have not yet provided “sufficient documentation” certifying their stability. *See* Osburn Decl., ¶¶ 3, 7–8; Flores Decl., ¶¶ 2, 13–16. In fact, Plaintiff Branco has provided all the required certifications. Branco Supp. Decl., ¶ 3. On May 17, 2018, Sgt. First Class Osburn—Defendants’ declarant—informed Plaintiff Branco that the Army had all necessary information concerning his gender transition. *Id.* ¶ 4. Plaintiff Branco is thus eligible to serve pursuant to the Open Service Directive, and indisputably has standing to challenge the decision to bar him from service. Defendants are equally mistaken with respect to Plaintiff Wood. In their haste to avoid judicial review, Defendants have submitted an inaccurate declaration claiming that Plaintiff Wood underwent transition-related surgery last year. But Plaintiff Wood, who knows his own medical history, affirms that he has had no transition-related surgery since 2012. Wood Supp. Decl., ¶ 5.

The other Enlisting Plaintiffs likewise face a substantial risk of harm. Defendants focus on the fact that for some of the Enlisting Plaintiffs, the full 18 months have not elapsed since their completion of surgery. But courts routinely find that 18 months is a sufficiently short time period to demonstrate an impending injury. For example, a plaintiff had standing to challenge a university’s admissions policies even though he did “not intend to apply . . . until next year,” after completing a necessary “prerequisite.” *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 595–96 (E.D. Va. 2004); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 212 (1995) (finding standing based on likelihood that plaintiff will bid on future construction contracts at least once per year without identifying any particular contract for which plaintiff intended to bid); *In re Naval Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012) (chaplains challenging discrimination in promotion process had standing because their “promotions will likely be considered by future selection boards”); *cf. Lee v. Weisman*, 505 U.S. 577, 584 (1992) (finding

“a live and justiciable controversy” even though the alleged injury-causing event was likely to occur at plaintiff’s high school graduation, which was several years away when the complaint was filed). Defendants have identified no authority supporting the notion that in order to challenge an unconstitutional enlistment ban, Plaintiffs must diligently continue planning for a military career, and challenge that ban only after the ink dries on their inevitable rejection.

Neither can Defendants defend their view that the hypothetical availability of waivers under the Implementation Plan deprives the Enlisting Plaintiffs of standing. *See* ECF 158, at 17. This Court has rejected that exact argument, ruling that Plaintiff George had standing to challenge the enlistment ban in spite of Defendants’ claim that he “could apply for a waiver.” ECF 85, at 32. The Court was correct, particularly in light of the fact that Plaintiffs are aware of no instance in which such a waiver was granted. *See* ECF 66-5 (Fanning Decl.), ¶ 17 (Army); ECF 66-7 (Mabus Decl.), ¶ 15 (Navy); ECF 66-6 (James Decl.), ¶ 13 (Air Force). Moreover, even if the grant of a hypothetical future waiver were not fanciful, Plaintiffs would be injured by this extra hurdle placed in their path. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (“The ‘injury in fact’ in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.”).

B. Defendants Have Failed to Show that the Serving Plaintiffs’ Claims Are Moot.

The Serving Plaintiffs have already established their standing, as this Court has found. ECF 85, at 31, 33, 38. Defendants have failed to satisfy their “heavy burden” of showing that intervening events have rendered the Serving Plaintiffs’ claims moot. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (per curiam) (internal quotation marks omitted). To carry that burden, Defendants must show that (i) “there is *no reasonable expectation* that the alleged

violation will recur,” and (ii) “interim relief or events have *completely and irrevocably eradicated* the effects of the alleged violation.” *Todd v. Prince George’s Cty., Md.*, 2015 WL 2129702, at *3 (D. Md. May 6, 2015) (emphases added). Because the burden of demonstrating mootness rests on Defendants, “there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); *see also Honig v. Doe*, 484 U.S. 305, 601 n.6 (1988) (in mootness analysis, showing a “reasonable expectation” of recurrence does not require proof that recurrence is “more probable than not”).

Here, Defendants have not even made a threshold showing that the challenged conduct has ceased, because the Implementation Plan causes many of the same fundamental harms as the August 2017 Transgender Service Member Ban it implements. ECF 148, ¶¶ 184–204. Because the Implementation Plan is “sufficiently similar” to the Ban, and Plaintiffs are disadvantaged “in the same fundamental way”—that is, by virtue of their transgender status—the challenged conduct continues and Plaintiffs’ claims are not moot. *Ne. Fla. Chapter*, 508 U.S. at 662 & n.3. As the district court in the Western District of Washington concluded, “the 2018 Memorandum and the Implementation Plan do not substantively rescind or revoke the Ban, but instead threaten the very same violations that caused it and other courts to enjoin the Ban in the first place.” *Karnoski v. Trump*, 2018 WL 1784464, at *6 (W.D. Wash. Apr. 13, 2018), *appeal filed*, No. 18-35347 (9th Cir. Apr. 30, 2018). Whatever differences exist between President Trump’s directives and the proposed Implementation Plan, Defendants have failed to establish that the latter has “completely and irrevocably eradicated” the harms of the unconstitutional Ban it effectuates. *Todd*, 2015 WL 2129702, at *3.

Moreover, even if Defendants could show that the unconstitutional conduct has ceased, it is well-established 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.” *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982); see *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (governor’s repeal of policy did not moot case where “there is no clearly effective barrier that would prevent the [Department] from reinstating [its] policy in the future” (internal quotation marks omitted)). Voluntary cessation cannot moot a claim unless the moving party satisfies the “heavy burden” of showing that it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *United States v. Concentrated Phosphate Exp. Ass’n*, 393 U.S. 199, 203 (1968). “[B]ald assertions of a defendant—whether governmental or private—that it will not resume a challenged policy fail to satisfy any burden of showing that a claim is moot.” *Wall v. Wade*, 741 F.3d 492, 498 (4th Cir. 2014). Defendants have not met their burden with respect to any of the directives.

1. *Plaintiffs’ Challenges to the Retention Ban Are Not Moot.*

This Court previously concluded that the Serving Plaintiffs had standing to challenge the retention ban because it threatens them with being “discharge[d] as administratively unfit *even if* they meet the military’s demanding medical fitness standards.” ECF 85, at 30. The Court explained that, “[w]hile it is possible, as Defendants contend, that none of the Plaintiffs will be discharged on March 23, 2018, they certainly face a substantial risk of being discharged solely on the basis of being transgender.” *Id.* The Court further stated that the retention ban inflicted an injury-in-fact by revoking “a right they have had since June 2016, withdrawing the guarantee that protects their ability to serve on terms equal to those applied to others.” *Id.* Finally, the Court noted that Plaintiffs’ “uncertainty, the destabilization of their lives and careers, and the stigma associated with being singled out as unfit for service” constituted “an additional alleged

harm that provides support to Plaintiffs’ standing arguments.” *Id.* at 31.

Defendants argue that Plaintiffs’ challenges to this and other aspects of the Ban are moot because the President has purported to revoke his August 2017 memorandum, and the Serving Plaintiffs are protected by the “grandfather provision” of the Implementation Plan. To establish mootness, Defendants must make “absolutely clear” that, as a result of the Implementation Plan’s “grandfather provision,” the Serving Plaintiffs no longer face a substantial risk of being discharged because they are transgender. *Concentrated Phosphate Exp. Ass’n*, 393 U.S. at 203. They cannot meet that burden.

First, Defendants assert that Plaintiffs can only “speculate” that the grandfather clause will actually be revoked. ECF 158, at 11. Relying heavily on a standing case, *Clapper v. Amnesty International USA*, 568 U.S. 398, 408 (2013), Defendants argue that Plaintiffs must establish a “*certainly impending*” likelihood of rescission to show that their claims are not moot. ECF 158, at 10. However, *Clapper* articulates the required showing for standing, not mootness. *See Friends of the Earth, Inc.*, 528 U.S. at 190. On the issue of mootness, it is Defendants who must establish that “there is no reasonable expectation” that the exemption could be rescinded. *Todd*, 2015 WL 2129702, at *3. Defendants do not even attempt to make this showing.

Nor could they: on its face, the grandfather provision is severable, “should [the DoD’s] decision to exempt these Service members be used by a court as a basis for invalidating the entire policy.” ECF 120-2, at 43. The prospect of a court doing so was certainly not remote to DoD, which decided to specifically address it in the Implementation Plan. By that plan’s very design, Defendants have left a Sword of Damocles hanging over the Serving Plaintiffs’ heads, threatening to end their careers at any moment due to events beyond their control. This overt threat has unsurprisingly caused Plaintiffs significant stress, ECF 139-33 (Stone Decl.), ¶ 6; ECF

139-35 (Cole Decl.), ¶ 5; ECF 139-3 (George Decl.), ¶ 7; Doe 1 Decl. (filed under seal), ¶ 5; ECF 139-38 (Gilbert Decl.), ¶ 5; ECF 139-39 (Parker Decl.), ¶ 4, a fact Defendants have not attempted to rebut, and that would suffice to establish injury-in-fact even if standing, not mootness, were the relevant question. *Moore v. Blibaum & Assocs., P.A.*, 693 F. App'x 205, 206 (4th Cir. 2017) (plaintiff who “suffered and continues to suffer” from “emotional distress, anger, and frustration” had “established the existence of an injury in fact”).

Second, even if the Implementation Plan had not itself threatened to rescind the grandfathering provision, it is not “absolutely clear” that President Trump will refrain from reissuing the Retention Ban, whether through a new set of abrupt and ill-considered tweets or otherwise. *See Concentrated Phosphate Exp. Ass’n*, 393 U.S. at 203.

Third, even if the grandfather provision remains in place and the Court considers it impossible to envision a scenario where President Trump changes his mind, Defendants fail to address Plaintiffs’ allegations that the grandfather provision may not protect their right to reenlist after their current terms of service are over. ECF 148, ¶¶ 178, 186, 199, 215–16. Those concerns are hardly speculative. As alleged in the Second Amended Complaint, the Implementation Plan does not explain how DoD intends to apply the grandfather provision to reenlistment, and some transgender service members have already been told that they may not reenlist under the revised policy. *Id.* ¶ 178. An internal Army document generated shortly after the President’s Twitter announcement reveals that the Army specifically examined how long it would take to “eliminate[]” all its transgender service members through attrition or involuntary discharge. *See* ECF 139-4, at Slides 12–13. There may well be other similar documents in Defendants’ files. Plaintiffs have not yet had an opportunity to review the tens of thousands of

documents Defendants produced the week *after* filing their summary judgment motion, or any they plan to produce in the coming weeks.

Fourth, the Serving Plaintiffs and other current service members continue to face a substantial risk of discharge because the Implementation Plan declares that post-transition hormone maintenance is incompatible with deployment. ECF 120-2, at 33. That stands in contrast to other medical conditions, where “military policy and practice allows service members to use a range of medications, including hormones, while in such [deployed] settings.” ECF 139-29, ¶ 16. It also diverges from the Open Service Directive, under which transgender service members could deploy while taking hormones, similar to service members receiving hormones for other medical conditions. *See infra* II.B.2.b (explaining why the Implementation Plan’s assertions regarding deployability are irrationally discriminatory). It appears likely that Plaintiffs will be improperly designated as nondeployable based on the Implementation Plan’s unsupported conclusions regarding hormone maintenance. ECF 148, ¶ 186.⁸

2. *Plaintiffs’ Challenges to the Surgery Ban Are Not Moot.*

This Court previously determined that Plaintiffs Stone and Cole had standing to challenge President Trump’s directive prohibiting the Department of Defense from funding sex-reassignment surgery as part of medically necessary treatment for gender dysphoria after March 23, 2018. ECF 85, at 33–38. At that time, Plaintiff Cole had an approved medical-treatment

⁸ Defendants incorrectly assert that Plaintiffs’ purported non-deployability arises from the new DoD Retention Policy for Non-Deployable Service Members, which is “different” from the Implementation Plan and, therefore, makes Plaintiffs’ claims nonredressable. ECF 158, at 12–13. Plaintiffs are not challenging the Retention Policy’s requirement that service members may not be classified as non-deployable for over a year. Plaintiffs *are* deployable and are fully capable of meeting that standard. Plaintiffs’ injuries plainly arise under the Implementation Plan and the DoD Report, which characterize hormone therapy as inconsistent with deployment, contrary to the facts. ECF 120-2, at 33.

plan calling for two surgeries that could not be performed before the March 23 deadline. *Id.* Plaintiff Stone had a near-final treatment plan that called for two surgeries. *Id.*

Defendants have not carried their burden of establishing that challenges to the surgery ban are mooted by the Implementation Plan’s statement that currently serving service members will continue to receive medically necessary care for gender dysphoria. *See* ECF 120-2, at 7–8. That statement is part of the grandfather provision that the Implementation Plan explicitly threatens to revoke, depending on the outcomes of legal challenges to the policy. *Id.* And, as with the retention ban, it is not “absolutely clear” that President Trump will not change his mind and re-impose a surgery ban for current service members.

Moreover, Defendants have not clearly stated that the grandfather provision’s reference to “medically necessary” care includes transition-related surgery. Under the Open Service Directive, “medically necessary” care was defined as “[t]hose health care services or supplies necessary to prevent, diagnose, or treat an illness, injury, condition, disease, or its symptoms and that meet accepted standards of medical care.” ECF 40-9, at 12. By contrast, Defendants’ “Report” in support of their Implementation Plan ignores the consensus standards of medical care and questions the efficacy of surgical care for treating gender dysphoria on the ground that it is not supported by “double-blind” scientific studies—a standard that the military and medical community do not apply to evaluate the efficacy of surgical treatment for other conditions. ECF 120-2, at 24–27; ECF 139–19, ¶¶ 13–16. Given the Report’s extreme (though baseless) skepticism regarding the efficacy of surgical treatment for gender dysphoria, Defendants have not shown that they will still regard surgery included in a treatment plan as “medically necessary.”

3. *Plaintiffs’ Challenge to the Enlistment Ban Is Not Moot.*

In its previous decision enjoining the Transgender Service Member Ban, this Court concluded that, as a result of the enlistment ban, “Plaintiff George is subject to a substantial risk

that his attempt to accede into the military as a commissioned officer will be prohibited solely on the basis of his transgender status.” ECF 85, at 33. The Court rejected Defendants’ assertion that Plaintiff George’s plans to commission were too speculative to support standing. *Id.*

Defendants have not established that Plaintiff George and other service members who seek officer commissions will be unharmed by the Implementation Plan’s ban on enlistments. ECF 158, at 14. Their motion conspicuously does not argue that Plaintiff George or others will be able to apply for a commission. Instead, Defendants contend that Plaintiff George’s challenge to the enlistment ban has been mooted because the Implementation Plan “revoked” the August 2017 Ban, including the accessions directive. Whether or not the Implementation Plan is truly independent of the August 2017 Ban, *but see infra* II.A, the end result remains the same: Plaintiff George, who wishes to go through the accession process to obtain a commission, is harmed by the Ban as implemented. Given this continuing harm, Plaintiff George’s claims cannot be moot.

C. The Court Has Jurisdiction to Award Declaratory Relief Against President Trump.

In their motion to dismiss, Defendants once again assert that this Court lacks authority to grant declaratory relief against the President, rendering Plaintiffs’ claims against him not redressable. ECF 158, at 19. Plaintiffs comprehensively rebutted that unsupported argument in their Opposition to Defendants’ Partial Motion for Judgment on the Pleadings, and incorporate those responses here in full. ECF 117, at 4–10. As Plaintiffs explained, the Supreme Court has never held that a President is immune from suit seeking a *declaration* that his actions are unlawful. To the contrary, the Supreme Court has *affirmed* declaratory relief in a case that named the President as a defendant. *See Clinton v. City of New York*, 524 U.S. 417, 425 & n.9 (1998) (granting declaratory relief to plaintiffs in holding that the President may not exercise line item veto); *see also, e.g., Nat’l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 616 (D.C. Cir.

1974) (finding the President’s failure to comply with his statutory duty to implement a pay increase for federal employees “a most appropriate instance for the use of declaratory decree.”); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 17-05205 (S.D.N.Y. May 23, 2018), ECF 72 (finding declaratory relief appropriate against President Trump, as “no government official” is “above the law”).

Presented with the very same arguments as Defendants make here, the district court in *Karnoski* concluded that “not only does it have jurisdiction to issue declaratory relief against the President, but that this case presents a most appropriate instance for such relief.” *Karnoski*, 2018 WL 1784464, at *13 (internal quotation marks omitted). President Trump is a proper defendant.

II. Plaintiffs’ Cross-Motion For Summary Judgment On Their Equal Protection Claim Should Be Granted.

Even drawing every factual inference in Defendants’ favor, the Implementation Plan violates the Equal Protection Clause. This conclusion can be reached on two independent grounds. First, the evidence already in Defendants’ purported “administrative record” clearly and indisputably establishes that the Implementation Plan was a product of, and is inextricably intertwined with, the original Transgender Service Member Ban, the unconstitutionality of which has been established and effectively conceded. Because Defendants’ administrative record fails to establish that the Implementation Plan would have been developed without President Trump’s unconstitutional directives, the Implementation Plan is just as unconstitutional as the directives it implements. *See Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (“Once racial discrimination is shown to have been a substantial or motivating factor behind enactment of the law, the burden shifts to the law’s defenders to demonstrate that the law would have been enacted without this factor.” (internal quotation marks omitted)).

Second, even if the Implementation Plan were truly independent of President Trump’s directives, it is still unconstitutional on its own terms. The Implementation Plan facially discriminates based on sex and transgender status, and therefore is subject to heightened scrutiny. *See* ECF 85, at 43–44. The Implementation Plan cannot survive such scrutiny, because it lacks a justification that is substantially related to an important government objective. *United States v. Virginia*, 518 U.S. 515, 533 (1996). And under any standard, Defendants’ decision to effectively ban transgender people from enlisting is “so attenuated” from Defendants’ stated justifications “as to render [the Implementation Plan] irrational.” *Cf. City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 466 (1985); *see also U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 535–36 (1973) (invalidating law on rational-basis review because “even if we were to accept as rational the Government’s wholly unsubstantiated assumptions concerning [hippies] . . . we still could not agree with the Government’s conclusion that the denial of essential federal food assistance . . . constitutes a rational effort to deal with these concerns”).

A. Plaintiffs Are Entitled to Summary Judgment Because Defendants Are Implementing President Trump’s Concededly Unconstitutional Decision to Ban Transgender Service.

This Court has already found that President Trump’s discriminatory decision to issue the Transgender Service Member Ban “was not driven by genuine concerns regarding military efficacy.” ECF 85, at 43 (citation and internal quotation marks omitted). Despite every opportunity to do so, Defendants have chosen to provide *no* evidence to support President Trump’s original directives. *See, e.g.*, ECF 107 (February 6, 2018 order memorializing counsel’s representation that “[Defendants] will not be defending the policy now at issue but will be defending the policy to be disclosed on February 21, 2018”). Because Plaintiffs’ claims challenging the August 2017 directives are not moot, *see supra* I.B, and Defendants refuse to defend the constitutionality of those directives, the Court should enter summary judgment

declaring that the August 2017 directives were unconstitutional. *See Brock-Smith v. Titan Indem. Co.*, 2018 WL 2321120, at *2 (D. Md. May 22, 2018) (“[T]he party opposing summary judgment must present evidence of specific facts from which the finder of fact could reasonably find for him or her.” (internal quotation marks omitted)).

The unconstitutionality of the Transgender Service Member Ban as President Trump originally conceived of it is also fatal to Defendants’ implementation of the Ban. Once unconstitutional discrimination “is shown to have been a ‘substantial’ or ‘motivating’ factor behind enactment of the law, the burden shifts to the law’s defenders to demonstrate that the law would have been enacted without this factor.” *Hunter*, 471 U.S. at 228. Thus, in order to defeat summary judgment, Defendants must now come forward with evidence that would allow a factfinder to conclude that the Implementation Plan would still have been issued even if President Trump had never issued his unconstitutional directives. Because Defendants have failed to satisfy their burden, Plaintiffs are entitled to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (summary judgment must be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial”).

Defendants’ own “administrative record” refutes any claim that the Implementation Plan would have been adopted in its current form without the President Trump’s directives as a motivating factor. The President’s directives stated that “[b]y February 21, 2018, the Secretary of Defense . . . shall submit to me a plan for implementing [the directives].” ECF 40-21, § 3. According to an internal DoD document, after it “received formal guidance from the White House reference to transgender personnel serving in the military,” the next step was that “DOD w[ould] develop a [sic] implementation plan *to meet the President’s intent*.” Golden Decl., Ex. 6

(emphasis added). Another internal DoD document outlining a “T[ransgender] Policy Development Timeline” *draws a literal straight line* through all of the steps connecting President Trump’s initial tweet to the Implementation Plan presented by Secretary Mattis. See ECF 139-10 (USDOE00101839), at Slide 1.

What Defendants have styled as an “independent multi-disciplinary review” was designed, according to Secretary Mattis’s own “Terms of Reference” directing that review, to “inform the Implementation Plan” referenced in the August 2017 memorandum. ECF 139-5; AR330. The Terms of Reference that Secretary Mattis provided to the putatively independent Panel of Experts are especially damning with respect to the accession ban. With respect to “Accessions,” the Terms of Reference document instructs in its entirety:

Accessions: The Presidential Memorandum directs DoD to maintain the policy currently in effect, which generally prohibits accession of transgender individuals into military service. The Panel will recommend updated accession policy guidelines to reflect currently accepted medical terminology.

ECF 139-5. This is not how one inaugurates an expert study designed to follow the evidence while “ma[king] ‘no assumptions’ at all.” ECF 158, at 5 (quoting ECF 120-2, at 19). It is a statement about what DoD has been “direct[ed]” to do. And it provides an extraordinarily limited mandate to the Panel of Experts: to search for the most acceptable “terminology” to describe the accession policy the President had “directed” the military to implement.

Unsurprisingly, that is exactly what the “Panel of Experts” did. It developed a version of the accession ban that accomplished what the President “directed” but that is reframed with updated “terminology.” Defendants insist that the Implementation Plan departs from the President’s Ban because it discriminates based on a medical condition (gender dysphoria) rather than a protected class (transgender people). See, e.g., ECF 158, at 6–7, 23. That is facially disingenuous, as even a cursory review of the Implementation Plan illustrates. Defendants

propose to disqualify from service any transgender person, regardless of whether they have gender dysphoria, who requires or has undergone gender transition. ECF 120-1.

In short, Defendants’ own administrative record demonstrates that President Trump’s directives inevitably shaped the Department of Defense’s plans to implement them. Whatever post hoc justifications Defendants now propose, and whatever independent judgment Secretary Mattis brought to bear on the issue, those additional justifications do not “render nugatory” the original “purpose to discriminate.” *Hunter*, 471 U.S. at 232. Any Implementation Plan Secretary Mattis adopted had to be approved by President Trump, who made his own intentions crystal clear. Even if Secretary Mattis did not share the President’s animus and disregard of military efficacy concerns, “the existence of a permissible motive” cannot “trump[] any proof of a parallel impermissible motive.” *Id.* at 231–32. Because President Trump’s decision to ban transgender service has been found unconstitutional by this Court and effectively conceded by Defendants, the plan to implement those unconstitutional directives is likewise unconstitutional.

B. Plaintiffs Are Also Entitled to Summary Judgment Because the Implementation Plan, Even if It Is Regarded as an Independent Policy, Fails Equal Protection Scrutiny.

Even examined on its own terms, on the assumption it had been developed independently, the Implementation Plan fails any level of constitutional scrutiny.

1. The Implementation Plan Is Subject To Heightened Scrutiny, Not the “Highly Deferential” Rubber-Stamp Review Defendants Propose.

This Court has already determined that discrimination against transgender persons in the military requires heightened scrutiny under the Equal Protection Clause—both because discrimination against transgender persons is a form of sex discrimination and because classifications based on transgender status independently satisfy all the criteria for triggering heightened scrutiny. *See* ECF 85, at 43–44 (adopting reasoning of *Doe 1*, 275 F. Supp. 3d at

208–10). Subsequent legal developments have only fortified that conclusion. *See Karnoski*, 2018 WL 1784464, at *1, *9–11 (holding that, “because transgender people have long been subjected to systemic oppression and forced to live in silence, they are a protected class”; “[t]herefore, any attempt to exclude them from military service will be looked at with the highest level of care”—specifically, “strict scrutiny”); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018) (holding that transgender status is “at least” a quasi-suspect classification); *F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho 2018) (same).

Defendants argue that rational basis review applies because the Implementation Plan classifies based on a medical condition, as opposed to sex. That argument is belied by the language of the Plan itself, which bans transgender people from enlisting even if their gender dysphoria has been fully treated through transition-related care, and even if they were able to transition before developing gender dysphoria in the first place. ECF 120-1. Indeed, one of the Implementation Plan’s principal justifications for banning transgender people from enlisting is that their presence in the military—and any gender nonconforming physical characteristics they may have—are allegedly incompatible with the military’s sex-based standards and would interfere with unit cohesion. ECF 120-2, at 35–41. These arguments are specifically based on sex, not medical condition. *See Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011) (firing employee because of her “intended gender transition” is sex discrimination); *Doe 1*, 275 F. Supp. 3d at 210 (“The defining characteristic of a transgender individual is that their inward identity, behavior, and possibly their physical characteristics, do not conform to stereotypes of how an individual of their assigned sex should feel, act and look.”).

In Defendants’ reply in support of their motion to dissolve the existing preliminary injunction, they assert that Plaintiffs “conflate transgender with transition” because “only ‘a

subset’ of transgender individuals ‘choose to *transition*, the term used to refer to the act of living and working in a gender different from one’s sex assigned at birth.’” ECF 159, at 3–4 (quoting AR114 (RAND Report 6)). To be sure, some transgender people may need to delay transition for a period of time, or attempt to suppress their identity, but *requiring* them to do so is discrimination. ECF 120-1, at 3; *Cf. Christian Legal Soc. v. Martinez*, 561 U.S. 661, 689 (2010) (recognizing that even though lesbian, gay, and bisexual people can choose to be celibate, requiring them to do so is discrimination based on status). As the district court in *Karnoski* concluded: “Requiring transgender people to serve in their ‘biological sex’ does not constitute ‘open’ service in any meaningful way, and cannot reasonably be considered an ‘exception’ to the Ban. Rather, it would force transgender service members to suppress the very characteristic that defines them as transgender in the first place.” *Karnoski*, 2018 WL 1784464, at *6 (footnotes omitted).

Defendants’ plea for “deference” does not affect the analysis. Even if the Implementation Plan warranted deference,⁹ that deference does not supplant heightened scrutiny. In *Rostker v. Goldberg*, on which Defendants heavily rely, the Supreme Court explicitly rejected the government’s request to apply rational-basis review rather than “the heightened scrutiny with which we have approached gender-based discrimination.” 453 U.S. 57, 69 (1981). The

⁹ This Court previously determined that President Trump’s Transgender Service Member Ban did not merit any deference because it was “[a] sharp departure from decades of precedent on the approach of the U.S. military to major personnel policy changes” and was imposed in the absence of “any considered military policymaking process.” ECF 85, at 43 (internal quotation marks omitted). Defendants’ attempts to legitimize their animus-driven policy as independent military judgment through a “process after-the-fact process” is similarly flawed and represents another sharp departure from military precedent: “an initial order that is tainted by an unconstitutional purpose cannot be cured by a later review that preserves the essence of the original.” ECF 149-1 (Br. of Retired Military Officers and Former National Security Officials as Amici Curiae), at 19–20 (citations omitted).

deference accorded to military decisionmaking is simply one factor to be taken into account as part of the heightened scrutiny standard. *See id.* at 71.

Far from bolstering Defendants’ case, the Supreme Court’s reasoning for deferring to Congress in *Rostker* highlights ways in which the Implementation Plan is, in contrast, constitutionally suspect. *Rostker* held that it was constitutional for Congress to require men, but not women, to register for the draft because—as a result of women’s ineligibility for combat roles at the time—“men and women . . . are simply not similarly situated for purposes of a draft.” *Id.* at 78. There was no allegation in *Rostker* that the statute was motivated by animus, and the Court emphasized that “[t]his is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups.” *Id.* Here, by contrast, transgender people who have otherwise shown that they are qualified to serve *are* similarly situated with respect to other service members—and can meet the same standards of fitness and deployability that apply to everyone else—but are nevertheless singled out for different and unequal treatment.¹⁰

Defendants also rely on the “inconsistencies resulting from line-drawing” that the Supreme Court found to be constitutional in *Goldman v. Weinberger*, 475 U.S. 503 (1986). ECF 158, at 27. But that approval rested on a critically distinguishable fact: the policy at issue in *Goldman* was a component of a facially neutral rule, while the Implementation Plan is discriminatory on its face. Policies that facially discriminate against a protected class are always

¹⁰ Defendants note that the Court upheld the policy in *Rostker* based on the reasons given by Congress in 1980, instead of limiting its review to the reasons Congress provided when the statute was enacted in 1948. ECF 158, at 25. However, as part of the review in 1980, the rationale for excluding women from the draft was “extensively considered by Congress in hearings, floor debate, and in committee,” where the justifications and motivations for the policy were out in the open for all to see. 453 U.S. at 72. Here, by contrast, the policy was spontaneously announced by the President over Twitter and then the plan to implement the policy was developed behind closed doors and under the cloak of “deliberative process” privilege.

reviewed under heightened or strict scrutiny, even in the military context. *See Berkley v. United States*, 287 F.3d 1076, 1084–85, 1090–91 (Fed. Cir. 2002) (holding that strict scrutiny applied to military reduction-in-force order that explicitly treated female and minority officers differently, and explaining that military deference does not preclude constitutional review of unlawful policies). Heightened scrutiny unquestionably applies.

2. *The Implementation Plan’s Enlistment Ban Violates Equal Protection Under any Standard.*

To survive heightened scrutiny, Defendants must show that the Implementation Plan is substantially related to an exceedingly important government objective. *Virginia*, 518 U.S. at 533. Such justification must be “genuine, not hypothesized or invented *post hoc* in response to litigation,” and it may not “rely on overbroad generalizations about the different talents, capacities, or preferences” about transgender people. *Id.* For the reasons outlined here and in Plaintiffs’ opposition to the Motion to Dissolve the Preliminary Injunction (ECF 139), Defendants cannot satisfy these requirements. Indeed, this Court has already found that Defendants created a policy that “set apart transgender service members to be treated differently from all other military service members,” and that such a policy would not survive Equal Protection review under heightened scrutiny. ECF 85, at 42–44.

Even under rational basis review, however, the Implementation Plan’s sweeping exclusion of transgender people from enlisting violates equal protection because it is not “rationally related to a legitimate governmental purpose.” *City of Cleburne*, 473 U.S. at 447. Defendants fail to explain how most of their stated concerns about transgender service even apply to the individuals they wish to ban from enlisting: those who have completed transitioning and demonstrated the requisite stability to serve. And even when the stated concerns are arguably relevant to such individuals, the Implementation Plan does not rationally explain why it

applies to transgender people a standard the military does not apply to similarly situated groups. The “sheer breadth” of the ban on transgender enlistment “is so discontinuous with the reasons offered for it that the [Plan] seems inexplicable by anything but animus toward the class it affects.” *Romer v. Evans*, 517 U.S. 620, 632 (1996).

a) The Enlistment Ban Is Not Rationally Related to the Implementation Plan’s Stated Concern About Fitness to Serve.

In order to enlist under the Open Service Directive, transgender individuals must have completed all medical transition and have been without any symptoms of gender dysphoria for 18 months. See ECF 40-4, at Attachment. They must then pass the same rigorous mental and physical health screening that is applied to all other service members. *Id.* Anyone with a history of depression—whether transgender or not—is barred from enlisting unless they have been stable and without treatment for 36 months. *Id.* Anyone with a history of anxiety—whether transgender or not—is barred from enlisting unless they have been stable and without treatment for 24 months. *Id.* Anyone with a history of suicidal behavior—whether transgender or not—is permanently disqualified. *Id.* By definition, any transgender person who is able to enlist under the Open Service Directive has been evaluated by the military and deemed physically and mentally fit for service.¹¹

The Implementation Plan nevertheless excludes transgender people who have transitioned from enlisting even when they satisfy these rigorous requirements and have demonstrated the same mental and physical fitness as any other applicant. ECF 120-1. The Implementation Plan reached that conclusion even though DoD did not receive *any* evidence

¹¹ Defendants state that the Open Service Directive’s “18-month period of stability for accessions” with respect to gender dysphoria had “no analog with respect to any other mental condition,” which allegedly require longer delays before enlistment is allowed. ECF 158, at 3 n.4. If that is a problem—and Defendants do not explain why it would be—the rational response would be to alter the length of the stability period, not to issue a blanket ban.

indicating that transgender people are incapable of meeting the same mental and physical fitness standards as everyone else. Kies Decl., Ex. S (USDOE00081113–16). Indeed, since the military began accepting applications from transgender recruits beginning on January 1, 2018, at least two transgender individuals have already successfully met those standards and enlisted. Golden Decl., Ex. 8.

The Implementation Report (ECF 120-2) asserts that a ban of transgender individuals who have undergone transition-related surgery in the past is necessary because of alleged “scientific uncertainty” with respect to whether transition-related surgeries “fully remedy . . . the mental health problems associated with gender dysphoria.” ECF 120-2, at 32. This alleged scientific “uncertainty” simply does not exist. If a transgender person is able to live consistently with his or her gender identity (i.e., has undergone a gender transition), he or she may never develop gender dysphoria. ECF 139-19, ¶ 9. If a transgender person does develop gender dysphoria, appropriate transition-related care resolves the clinically significant distress. *Id.* The American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (2013) (“DSM-V”) accordingly provides a “post-transition” diagnostic subtype to reflect when a person’s gender dysphoria is in “remission.” *Id.* Notably, the American Psychological Association has expressed “alarm[]” over “the administration’s misuse of psychological science to stigmatize transgender Americans and justify limiting their ability to serve in uniform and access medically necessary health care.” ECF 139-22.

In support of its “scientific uncertainty” conclusion, the Report principally relies on a recent decision by the U.S. Department of Health & Human Services Center for Medicare and Medicaid Services (“CMS”) for the proposition that there is “insufficient scientific evidence to conclude that [transgender medical] surgeries improve health outcomes for person with gender

dysphoria.” See ECF 120-2, at 24 n.82. To the contrary, the CMS report found that “surgical care to treat gender dysphoria is safe, effective, and not experimental.” ECF 139-19, ¶ 17.

Consistent with standard medical practice, as well as the Open Service Directive, the CMS report endorsed individualized treatment plans to treat gender dysphoria. *Id.*; see also Golden Decl., Ex 9, at 10 (“Perhaps the most misleading aspect of the Implementation Report’s discussion is the suggestion that the 2016 CMS review undercuts the case for inclusive policy and the provision of medically necessary care.”). In any event, there is no rational relationship between the alleged uncertainty about how to *prospectively* identify which individuals will benefit from surgery and a policy that excludes transgender people from serving after they have already had surgery, have demonstrated stability, and have shown they can meet the same mental and physical fitness standards as everyone else. Because of historical patterns of discrimination, transgender people as a class experience higher rates of depression, anxiety, and, as a result, suicidal ideation. ECF 139-19, ¶¶ 19–22. But the military has neutral policies to screen for all of these conditions before enlistment. There is no medical basis for using a transgender person’s history of gender dysphoria as a proxy for other medical conditions that the person does not actually have. *Id.* Defendants’ arguments are akin to saying that because depression is twice as common in women than in men, the military could simply treat all women as at risk for depression and categorically unfit for service. *Id.*

The Report’s only other “evidence”—“preliminary data” regarding the experiences of current service members with gender dysphoria—likewise has no logical relationship to the decision to ban transgender people from enlisting *after* their gender dysphoria has been treated. The data collected as part of the Department of Defense’s review all stemmed from the 22-month period from October 1, 2015 to July 26, 2017. See ECF 139-19, ¶ 26. The transgender service

members during those time periods were either (a) serving before the Open Service Directive went into effect and had been able to receive treatment for only a limited period or (b) just beginning their transition process. *See id.* Either way, the transgender service members were not evaluated after having sufficient time to complete their transition and demonstrate stability—18 months as required by the Open Service Directive. *See id.*, ¶ 28.¹²

Put simply, it is irrational to cite mental health experiences of a group that is *currently transitioning and experiencing gender dysphoria*, to draw conclusions about a group comprised entirely of people who *successfully transitioned, and no longer experience gender dysphoria*. There is no medical uncertainty about the fitness of transgender people seeking to enlist under the Open Service directive; the alleged “uncertainty” voiced by the Implementation Report is simply stigma and “vague, undifferentiated fear.” *Cleburne*, 473 U.S. at 449. The Constitution requires more when the government seeks to discriminate between two similarly situated groups.

b) The Enlistment Ban Is Not Rationally Related to the Implementation Plan’s Stated Concern About Deployability.

Defendants’ invocation of supposed limitations on deployability for transgender service members is also irrational. The Implementation Report’s assertions regarding the deployability of transgender service members focus almost entirely on the deployability of service members who are in the process of gender transition and may require monitoring while initiating hormones, or may be nondeployable for limited periods of time while recovering from transition-related

¹² Even with respect to service members in the process of transition, the Implementation Report also grossly mischaracterizes the underlying data. The Report represents that service members with gender dysphoria are “eight times more likely to attempt suicide than Service members as a whole.” ECF 120-2, at 12. In fact, the underlying data refer to “suicidal ideation,” not actual suicide attempts. ECF 139-27 (USDOE00002633), at 2641. The Implementation Report also uses mental health visits as a proxy for unfitness, but “ignores the critical fact that service members were required to meet with mental health providers numerous times to document their gender dysphoria as a precondition for receiving health care for gender dysphoria, and for continued access to cross-sex hormones.” ECF 139-19, ¶ 29.

surgery. ECF 120-2, at 32–34. Once again, these stated concerns are irrelevant for transgender individuals who have completed their transitions before enlisting under the Open Service Directive. It is entirely irrational to invoke deployability limitations relating to transition surgery as a reason to deny enlistment to a group that the military determines *will not need further surgery*.

The only deployability limitation suggested by the Report that even arguably relates to people who have already transitioned is its reference to hormones taken as part of long-term medication management. ECF 120-2, at 33. Defendants’ purported concern ignores the military’s well-established “effective system for distributing prescribed medications to deployed service members across the globe, including those in combat settings.” ECF 139-29, ¶ 16. Individuals with abnormal menstruation, dysmenorrhea, and endometriosis may all enlist if their conditions are adequately managed through hormone medication. ECF 139-19, ¶ 33 (citing DoDI 6130.03, Enclosure 4 §§ 14(a), (d), (e)). And “military policy and practice allows service members to use a range of medications, including hormones, while in such [deployed] settings.” ECF 139-29, ¶ 16.

Most strikingly, the Implementation Plan inexplicably ignores a detailed “white paper” memorandum regarding hormones and deployability that the Panel of Experts transmitted to Secretary Mattis on January 11, 2018, together with its proposed recommendations. That memo explained that “the long-term monitoring requirements, adverse outcomes, and deployment opportunities” for transgender service members receiving cross-sex hormone maintenance “are similar to other common hormone-based therapies” provided to other service members who are able to deploy. AR3068; *accord* ECF 139-19, ¶ 36 (“The risks associated with use of cross-sex hormone therapy to treat gender dysphoria are low and not any higher than for the hormones that

many non-transgender active duty military personnel currently take. The medications do not have to be refrigerated, and alternatives to injectables are readily available, further simplifying treatment plans.”). The “white paper” noted that there are many non-transgender service members with diagnostic codes for “low testosterone and low estrogen conditions who are receiving testosterone and estrogen therapy” and that “[i]ndividuals who are stable on their regimens are deployable.” AR3074 (emphasis added). In 2016–17 alone, 352 men and 19 women deployed while receiving hormones for these conditions. *See id.* During the same period, 602 service members were deployed while receiving hormones for hypothyroidism. AR3073.

Remarkably, the Implementation Report makes no attempt to explain why the same methods for providing hormones to other service members cannot be used to provide hormones to service members who are transgender. Instead, the Implementation Report simply *ignores* the memorandum entirely. Without any discussion of other service members who receive hormones, the Implementation Report’s analysis is fatally incomplete, if not intentionally misleading.

In short, Defendants’ stated concerns “ma[k]e no sense in light of how the [military] treat[s] other groups similarly situated in relevant respects.” *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001); *cf. City of Cleburne*, 473 U.S. at 450 (“[T]he expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home [for people with disabilities] for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.”); *Crawford v. Cushman*, 531 F.2d 1114, 1123 (2d Cir. 1976) (“Why the Marine Corps should choose, by means of the mandatory discharge of pregnant Marines, to insure its goals of mobility and readiness, but not to do so regarding other disabilities equally destructive of its goals, is subject to no rational explanation.”); *Bostic v. Schaefer*, 760 F.3d 352, 382 (4th

Cir. 2014) (rejecting justification that is “so underinclusive” that its real motivation “must have ‘rest[ed] on an irrational prejudice’” (quoting *City of Cleburne*, 473 U.S. at 450)).

c) The Enlistment Ban Is Not Rationally Related to the Implementation Plan’s Stated Concern About Costs.

The Implementation Report asserts that “transition-related treatment is also proving to be disproportionately costly.” ECF 120-2, at 41. Defendants once again do not explain how the cost of “transition-related treatment” justifies a ban on enlistees who have already transitioned, and will have to demonstrate that they will not require the surgeries that are the focus of Defendants’ cost concern. It is entirely irrational to invoke the cost of transition-related surgery as a reason to deny enlistment to people who can demonstrate *that they will not need such surgery*.¹³

d) The Enlistment Ban Is Not Rationally Related to the Implementation Plan’s Stated Concerns About Unit Cohesion and Privacy.

The Implementation Report drops any pretense of conducting an evidence-based assessment when it argues that transgender people must be excluded from the military to ensure unit cohesion and protect the privacy of non-transgender service members. The Report’s speculation is contrary to the experiences of actual transgender service members and their units. ECF 139-33, ¶ 5; ECF 139-35, ¶ 4; ECF 139-37, ¶ 6; Doe 1 Decl. ¶¶ 2, 4 (filed under seal); ECF 139-38, ¶ 4; ECF 139-39, ¶ 3. Indeed, after the Implementation Plan was released, every single

¹³ Moreover, the Report offers no support for its conclusion that the cost of providing transition-related care is “disproportionate.” ECF 120-2, at 41. Indeed, at no point does the Report actually quantify the cost of care, or compare it to the cost of other treatments the military routinely provides to service members. Neither does the Report undermine the conclusion reached by the RAND study that such costs are negligible relative to the military’s overall health care budget. See ECF 40-35, at xi–xii; see, e.g., *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (where interest in “cost savings and reducing administrative burdens” “depend[s] upon distinguishing between homosexual and heterosexual employees, similarly situated,” it “cannot survive rational basis review”); ECF 40-26.

service chief testified that they have seen no evidence of unit cohesion and morale being hurt by transgender troops. *See, e.g.*, Golden Decl., Ex. 10.

Defendants respond to this complete absence of evidence by noting that “reports of such issues would not have come up to the level of those officials due to limitations in the Carter policy on reporting information relating to transgender service members.” ECF 159, at 16 n.4; ECF 120-2, at 37. But this response just underscores the point. Without any evidence concerning alleged invasions of privacy or harm to unit cohesion, the Implementation Report simply engages in raw speculation. Despite 18 months of the Open Service Directive with more than 1,000 service members serving openly during some or all of that period, and a clear effort to find evidence of impairment to unit cohesion, the Report produces only a single anecdote about a single service member—and the details are so sparse that it is impossible even to tell how the issue was resolved. ECF 120-2, at 37.

When similar hypothetical concerns have been raised as justifications for excluding transgender people from restrooms and locker rooms in the civilian context, the courts have repeatedly found that those concerns had no actual basis in fact. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046–47 (7th Cir. 2017); *M.A.B.*, 286 F. Supp. 3d at 724–25; *Doe v. Boyertown Area Sch. Dist.*, 2017 WL 3675418, at *52–53 (E.D. Pa. Aug. 25, 2017), *appeal docketed*, No. 17-3113 (3d Cir. Sept. 28, 2017); *Students & Parents for Privacy v. U.S. Dep’t of Educ.*, 2016 WL 6134121, at *28–29 (N.D. Ill. Oct. 18, 2016), *report and recommendation adopted by* 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017).

The Report’s unsupported speculation about supposed invasions of privacy is eerily similar to the long-since debunked argument for excluding gay people from the military. The central justification for “Don’t Ask, Don’t Tell” was that it would undermine unit cohesion

because “heterosexuals who would prefer not to have someone of the same sex find them sexually attractive” would be forced “to share the most private facilities together, the bedroom, the barracks, the latrines, and showers” with fellow service members who are gay. S. Rep. No. 103-112, at 283 (1993) (statement of Gen. Colin Powell). Actual experience demonstrated that those concerns were unfounded. *See Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 954 (C.D. Cal. 2010), *vacated on other grounds*, 658 F.3d 1162 (9th Cir. 2011); ECF 139-17 (Jan. 25, 2018 Decl. of Adm. Michael Mullen).¹⁴ The military’s successful integration of women into the military, despite similar purported privacy concerns, further undercuts Defendants’ position. *See Virginia*, 518 U.S. at 540, 557 (rejecting argument that “the absence of privacy” is sufficient to preclude the admission of women to Virginia Military Institute).

Far from constituting a rational basis for reversing course and banning transgender persons from serving, the Report’s unsupported speculation illustrates that the driving force behind the ban is policymakers’ own prejudice, discomfort, or moral disapproval.

e) Defendants’ Stated Concern About “Proceeding Cautiously” Is Not A Rational Justification For The Enlistment Ban.

Defendants repeatedly defend the Implementation Plan’s ban on new enlistment as justified by a need to “proceed cautiously.” ECF 120-2, at 27; ECF 158, at 29. This is not a rational reason for precipitously *changing* the status quo and instituting a categorical ban. *See Perry v. Brown*, 671 F.3d 1052, 1090 (9th Cir. 2012) (“[T]here could be no rational connection between the asserted purpose of ‘*proceeding* with caution’ and the enactment of an absolute ban,

¹⁴ The Report attempts to poke holes in the RAND Report’s reliance on the experiences of the militaries of our allies as a basis for predicting that allowing transgender persons to serve would not negatively affect unit cohesion. But in deciding to proceed with the Open Service Directive DoD did not rely solely on RAND or on the experiences of other militaries. DoD also relied on its own extensive experience after the repeal of “Don’t Ask, Don’t Tell.” *See, e.g.*, ECF 39, ¶ 86. DoD now has an additional 18 months of experience under the Open Service Directive itself.

unlimited in time, on same-sex marriage in the state constitution.”), *vacated and remanded on other grounds sub nom. Hollingsworth v. Perry*, 570 U.S. 693 (2013).

Without any objective grounding in the views of the medical community, and in the face of “dispositive realit[y]” (*United States v. Virginia*, 518 U.S. at 550) that transgender people *are already* serving ably and honorably, Defendants’ rote invocation of caution is an insufficient reason to justify such a sweeping and discriminatory exclusion. *Cf. Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 345–46 (D. Conn. 2012) (“Categorizing a group of individuals as a “vast untested social experiment” . . . to justify their exclusion. . . until long-term evidence is available to establish that such a group will not have a harmful effect upon society is a rationale, which, if allowed to withstand constitutional scrutiny, would eviscerate the doctrine of equal protection by permitting discrimination until equal treatment is proven, by some unknown metric, to be warranted.”).

III. Defendants’ Motion to Dismiss and Motion For Summary Judgment Before The Completion Of Discovery Should Be Denied.

Even if the Court declines to grant summary judgment to Plaintiffs at this stage, there is certainly no merit to *Defendants’* motion to dismiss and motion for summary judgment, made even as they withhold key discovery. Unlike Plaintiffs’ summary judgment motion, Defendants’ motions raise disputed issues of material fact, which Plaintiffs are entitled to explore during discovery. Defendants’ motions must therefore be denied.

Summary judgment is properly granted only “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *See Celotex*, 477 U.S. at 323. The nonmovant “bears the burden of demonstrating that disputes of material fact preclude the entry of judgment as a matter of law.” *Hamilton v. Mayor & City Council of Balt.*, 807 F. Supp. 2d 331, 342 (D. Md. 2011) (citing *Matsushita Elec. Indus. Co. v.*

Zenith Radio Corp., 475 U.S. 574, 586 (1986)). A material fact is one that “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue over a material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

When considering a motion for summary judgment, the court “must view all of the facts, including reasonable inferences to be drawn from them, in the light most favorable to the nonmoving party.” *Hamilton*, 807 F. Supp. 2d at 343 (citing *Matsushita Elec. Indus. Co.*, 475 U.S. at 587). Moreover, “summary judgment [must] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986); see Fed. R. Civ. P. 56(d); *Harrods v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002).

Defendants’ argument that they are entitled to summary judgment rests on the premise that the Court may consider only their carefully limited “administrative record.” ECF 158, at 2 n.1. That is incorrect. Where, as here, a plaintiff lodges a facial constitutional challenge, no such limitations exist. The existing record, while incomplete, supports Plaintiffs’ cross-motion for summary judgment, but at a minimum it reveals genuine disputes of material fact on issues central to Plaintiffs’ constitutional arguments (including animus and the nature of the government’s decisionmaking process), precluding summary judgment for Defendants. And in any event, Defendants have withheld material discovery on the basis of privilege claims that Plaintiffs have challenged, thereby precluding Plaintiffs from the opportunity to oppose Defendants’ summary judgment motion to the full extent. See generally Kies Declaration. That motion should be denied because at a minimum it is premature.

A. Defendants’ Motion to Dismiss Pursuant to Rule 12(b)(6) Should Be Denied.

As a threshold matter, Defendants have not filed a real motion to dismiss for failure to state a claim. Apart from a conclusory statement in the introductory paragraph, Defendants’ Motion is replete with references to the record and various pieces of evidence, but it is devoid of any reference to Rule 12(b)(6), and it does not grapple with the allegations in the complaint. With one narrow exception noted below, Defendants’ Rule 12(b)(6) motion should be denied on that ground alone. *Loc. 1764, Amalgamated Transit Union v. WMATA*, 2015 WL 1471967, at *9 (D. Md. Mar. 30, 2015) (“raising [an] argument in a [summary fashion] without any legal citation, [will not] demonstrate that [granting movant’s motion] is justified, much less required.”).

Defendants do devote some, albeit minimal, effort to arguing Plaintiffs’ challenge to Defendants’ actions on the basis of substantive due process should be dismissed. ECF 158, at 41–43. Defendants previously moved to dismiss Plaintiff’s substantive due process claim against the Transgender Service Member Ban, and this Court soundly rejected their argument. ECF 84, at 1. Plaintiffs plausibly allege that the Implementation Plan is inextricably intertwined with the original Ban, and so suffers from the same fundamental constitutional defects. *See, e.g.*, ECF 148, ¶¶ 231–40. This Court must accept those allegations as true, *Twombly*, 550 U.S. at 572, and Defendants’ motion to dismiss the substantive due process claim must be denied.

Implicitly acknowledging they have no Rule 12(b)(6) arguments, Defendants quickly pivot to their alternative request for summary judgment. That motion is equally meritless, for the reasons that follow.

B. The Court’s Review Is Not Limited to the “Administrative Record.”

Defendants argue in a footnote, without citation to any authority, that the Court is limited to reviewing the “administrative record” they recently compiled. ECF 158, at 2 n.1; *see* ECF

133. Defendants then devote pages to arguing that certain files in the administrative record—which is, on its face, incomplete¹⁵—entitle them to summary judgment. ECF 158, at 23–40.

Defendants are wrong. A court’s review is restricted to an administrative record only when adjudicating claims brought pursuant to the Administrative Procedure Act (“APA”). *See, e.g., In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998). Plaintiffs have not brought an APA claim. Instead they have brought constitutional claims challenging Defendants’ discriminatory intent in imposing and implementing the Transgender Service Member Ban. ECF 148, ¶¶ 205–40. Accordingly—as the district courts in the related *Doe* and *Karnoski* cases have already held—Plaintiffs are entitled to full discovery. ECF 143-1 (explaining that because “Plaintiffs assert claims under the Fifth Amendment to the United States Constitution,” the APA’s limitations on discovery do not apply); ECF 143-2 (“[T]here is no reason for discovery to be confined to the administrative record” because Plaintiffs “raise direct constitutional claims.”); *see In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir.), *reh’g in part*, 156 F.3d 1279 (D.C. Cir. 1998); *see also Miccosukee Tribe of Indians of Fla. v. United States*, 2010 WL 337653, at *2 (S.D. Fla. Jan. 22, 2010) (“[D]iscovery related to the Plaintiff’s equal protection claim is not limited by the APA Act nor the agency record, but rather requires independent review.”); *Newport Pac. Inc. v. Cty. of San Diego*, 200 F.R.D. 628, 639 (S.D. Cal. 2001) (“[T]he evidence Plaintiffs seek . . . , namely that of a discriminatory intent, does not typically lay dormant in an administrative record.”).

¹⁵ Defendants have withheld “privileged” materials from the “administrative record,” but they failed to provide any log of the withheld materials.

C. Viewing The Full Record, Judgment in Defendants' Favor Could Not Be Granted Because It Would Require the Court to Resolve Numerous Genuine Disputes of Material Fact in Their Favor.

Even if this Court concluded that Plaintiffs are not entitled to judgment as a matter of law on their equal protection claim, there is at least a genuine dispute of material fact as to whether the Implementation Plan was in fact developed through an “independent” process, as Defendants claim—a key point for, among others, Plaintiffs’ argument that the Implementation Plan is tainted by the August 2017 Ban. ECF 158, at 23. As discussed at length in Part II, Plaintiffs have adduced evidence—including DoD’s “Terms of Reference” for the Ban—that the outcome of the “extensive study” was predetermined and that the process was influenced by third parties with an anti-transgender agenda. For similar reasons, at a minimum there is a genuine issue of fact as to whether the justifications for banning transgender service members were “invented *post hoc* in response to litigation,” *United States v. Virginia*, 518 U.S. at 533. Contrary to Defendants’ assertion, Plaintiffs do not claim that any change to the Open Service Directive would be unconstitutional. *See* ECF 158, at 49–50. They do claim—and there is at least a genuine dispute—that the change in policy at issue here was motivated by unconstitutional considerations.

Other documents Defendants have disclosed at a minimum create material fact issues as to both the independence of the Panel of Experts’ recommendations and the validity of those recommendations. For example, Defendants produced a heavily redacted dissent by one of the Panel’s members, revealing the dissenter’s belief that “[t]he recommendations are [redacted] are not supported by the data provided to the panel in terms of military effectiveness, lethality, or budget constraints, and are likely not consistent with applicable law.” Kies Decl., Ex. S. He continued: “during the course of our panel, neither the transgender service members, the military doctors, nor the civilian doctors suggested that a person serving outside of their birth gender

would necessarily be unable to meet medical or physical standards.” These snippets alone create a factual dispute regarding the nature of the process used to develop the Panel’s recommendations and the rationality of its conclusions.

This Court has already found that President Trump’s decision to issue the Transgender Service Member Ban “was not driven by genuine concerns regarding military efficacy.” ECF 85, at 43 (citation and internal quotation marks omitted). To withstand heightened scrutiny, any new justification for the Ban must be “genuine, not hypothesized or invented post hoc in response to litigation.” *United States v. Virginia*, 518 U.S. at 533; see *Karnoski*, 2018 WL 1784464, at *12. Defendants’ motions center on their claim that they have “revoked” the unconstitutional Ban and replaced it with an “independent” regime wholly unaffected by discriminatory animus. This claim turns on material facts that are plainly in dispute.

D. At Minimum, Plaintiffs Are Entitled to Complete Discovery so They Can Obtain Further Evidence Regarding Defendants’ Intent.

At a minimum, Plaintiffs are entitled to further discovery into, *inter alia*, the process by which the Implementation Plan was developed. Federal Rule of Civil Procedure 56(d) “mandates that summary judgment be [postponed] when the nonmovant ‘has not had the opportunity to discover information that is essential to his opposition.’” *Pisano v. Strach*, 743 F.3d 927, 931 (4th Cir. 2014) (quoting *Ingle ex rel. Estate of Ingle v. Yelton*, 439 F.3d 191, 195 (4th Cir. 2006)); see also *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 961 (4th Cir. 1996) (generally, “summary judgment is appropriate only after adequate time for discovery.” (internal quotation marks omitted)). Rule 56(d) “is intended as a safeguard against a premature grant of summary judgment”; thus, “[courts] should construe the rule liberally[.]” *Works v. Colvin*, 519 F. App’x 176, 182 (4th Cir. 2013) (per curiam) (internal quotation marks omitted).

There is no question that Plaintiffs have been deprived of essential discovery. It is

unclear whether Defendants have even finished their document productions in this case as of the time of this filing. Kies Decl., ¶ 35. Defendants have yet to correct their interrogatory answers to comply with Federal Rule of Civil Procedure 33(d), precluding Plaintiffs from identifying key documents in the existing productions. *Id.* ¶ 7. Multiple deficiency letters Plaintiffs have sent to Defendants have gone unanswered. *Id.* ¶¶ 29–29. No depositions have occurred in this case, and the parties have not yet exchanged expert reports. *Id.* ¶¶ 37–38. And, despite the centrality of their intent to this case, Defendants refuse to disclose thousands of documents that touch on their deliberations. Golden Decl., Ex. 7. Plaintiffs’ motion to compel regarding deliberative process privilege is currently pending.

Just as important, Defendants refuse even to discuss the validity of their privilege assertions for communications that went through the White House, claiming that they need not even *log* such communications and that it is premature to meet and confer regarding their assertions until the Court rules on their pending motion to dissolve the injunction against the President. Kies Decl., ¶¶ 20, 28. Plaintiffs have plausibly alleged that the Transgender Service Member Ban was improperly motivated, and evidence before this Court suggests that the White House influenced the purportedly independent DoD study. ECF 139–7. Plaintiffs know through third-party discovery that White House staffers discussed the Ban with certain Members of Congress, and understand from public reports that the White House may have influenced the work of the “Panel of Experts.” It would be fundamentally unfair for judgment to be entered in favor of Defendants prior to resolving the numerous privilege disputes. Defendants are prepared to move forward promptly with completion of discovery once these disputes are resolved.

CONCLUSION

For the foregoing reasons, Plaintiffs’ Cross-Motion for Summary Judgment should be granted and Defendants’ Motion to Dismiss or for Summary Judgment should be denied.

Dated: May 25, 2018

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

Case No. 1:17-cv-02459-MJG

**DECLARATION OF AUGUSTUS GOLDEN IN SUPPORT OF MEMORANDUM IN
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND FOR
SUMMARY JUDGMENT, AND MEMORANDUM IN SUPPORT OF
PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT**

I, AUGUSTUS GOLDEN, depose and say as follows:

1. I make this declaration in support of the remedies and relief sought by Plaintiffs in this case. The following facts are based on my own personal knowledge, except those stated upon information and belief, and as to all such facts stated upon information and belief, I am informed and believe that the same are true.

2. I am an attorney with Covington & Burling LLP, and I represent Plaintiffs in this action.

3. Attached hereto as "Exhibit 1" is a true and correct copy of the American Psychiatric Association's Position Statement on Discrimination Against Transgender & Gender Variant Individuals (Apr. 2013).

4. Attached hereto as “Exhibit 2” is a true and correct copy of an excerpt from the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (“DSM–V”), as published by the American Psychiatric Association.

5. Attached hereto as “Exhibit 3” is a true and correct copy of email correspondence produced by Defendants in this litigation bearing the document stamps USDOE00037688–696, including a July 27, 2017 email from General Joseph Dunford bearing the document stamp USDOE00037695.

6. Attached hereto as “Exhibit 4” is a true and correct copy of a March 15, 2018 article by Michael D. Shear and Maggie Haberman, titled “‘There Will Always Be Change,’ Trump Says as More Personnel Shake-Ups Loom,” as published by The New York Times.

7. Attached hereto as “Exhibit 5” is a true and correct copy of documents produced from the offices of the Honorable Representative Vicky Hartzler in response to a subpoena served in this litigation, bearing the document stamp REP. HARTZLER 066–67 (filed under seal).

8. Attached hereto as “Exhibit 6” is a true and correct copy of email correspondence produced by Defendants in this litigation bearing the document stamps USDOE00213055–057, including a document titled “Transgender Policy” bearing the document stamp USDOE00213057.

9. Attached hereto as “Exhibit 7” is a true and correct copy of Plaintiffs’ motion to compel supplemental interrogatory answers and production, and Plaintiffs’ memorandum in support of the same, served on Defendants in this litigation on April 23, 2018.

10. Attached hereto as “Exhibit 8” is a true and correct copy of a March 29, 2018 article by Richard Sisk titled “With Pentagon Policy on Hold, Transgender Troops, Advocates Speak Out,” as published by Military.com.

11. Attached hereto as “Exhibit 9” is a true and correct copy of a report published by the Palm Center in April 2018, and updated on May 4, 2018, titled “DoD’s Rationale for Reinstating the Transgender Ban Is Contradicted by Evidence,” authored by Vice Admiral Donald C. Arthur, USN (Ret.); Major General Gale Pollock, USA (Ret.); Rear Admiral Alan M. Steinman, USPHS/USCG (Ret.); Nathaniel Frank; Professor Diane H. Mazur; and Professor Aaron Belkin.

12. Attached hereto as “Exhibit 10” is a true and correct copy of an April 24, 2018 article authored by Tara Copp, titled “All 4 service chiefs on record: No harm to units from transgender service,” as published by Military Times.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of May, 2018.



Augustus Golden
Counsel for Plaintiffs (*pro hac vice*)

EXHIBIT 1

Position Statement on Discrimination Against Transgender and Gender Variant Individuals

Approved by the Board of Trustees, July 2012

Approved by the Assembly, May 2012

"Policy documents are approved by the APA Assembly and Board of Trustees...These are...position statements that define APA official policy on specific subjects..." – *APA Operations Manual*.

Issue: Being transgender gender or variant implies no impairment in judgment, stability, reliability, or general social or vocational capabilities; however, these individuals often experience discrimination due to a lack of civil rights protections for their gender identity or expression. As a result, transgender and gender variant persons face challenges in their marriage, adoption and parenting rights, are regularly discharged from uniformed services or are rejected from enlisting due to their gender identity, and have difficulty revising government identity documents. Incarcerated transgender and gender variant persons suffer risks to their personal safety and lack of access to comprehensive healthcare. Further, transgender and gender variant individuals may be inappropriately assigned space in gender-segregated facilities such as inpatient psychiatric units and residential treatment programs. Transgender and gender variant people are frequently harassed and discriminated against when seeking housing or applying to jobs or schools and are often victims of violent hate crimes.

The APA declares in its vision statement that it is, "the voice and conscience of modern psychiatry." Thus, this position statement is relevant to the APA because discrimination and lack of equal civil rights is damaging to the mental health of transgender and gender variant individuals. In addition, APA's values include "advocacy for patients." Speaking out firmly and professionally against discrimination and lack of equal civil rights is a critical advocacy role that the APA is uniquely positioned to take.

APA Position:

Therefore, the American Psychiatric Association:

- 1. Supports laws that protect the civil rights of transgender and gender variant individuals**
- 2. Urges the repeal of laws and policies that discriminate against transgender and gender variant individuals.**
- 3. Opposes all public and private discrimination against transgender and gender variant individuals in such areas as health care, employment, housing, public accommodation, education, and licensing.**
- 4. Declares that no burden of proof of such judgment, capacity, or reliability shall be placed upon these individuals greater than that imposed on any other persons.**

Authors: Jack Drescher, M.D., Ellen Haller, M.D., APA Caucus of Lesbian, Gay and Bisexual Psychiatrists.

Background to the Position Statement

In 1973, the American Psychiatric Association removed the diagnosis of homosexuality from the DSM-II (1, 2) and issued a position statement of support of gay and lesbian civil rights (3). In subsequent years, APA continued to expand its public positions regarding gay and lesbian civil rights. In 1990, APA issued a statement opposing “exclusion and dismissal from the armed services on the basis of sexual orientation” (4). In 1992, APA called on “all international health organizations, psychiatric organizations, and individual psychiatrists in other countries to urge the repeal in their own countries of legislation that penalizes homosexual acts by consenting adults in private” (5).

In 2000, following Vermont’s passage of civil union laws, APA endorsed “the legal recognition of same-sex unions and their associated legal rights, benefits and responsibilities” (6). In 2002, APA approved a position statement supporting “initiatives which allow same-sex couples to adopt and co-parent children and supports all the associated legal rights, benefits, and responsibilities which arise from such initiatives” (7).

In 2005, after Massachusetts’ 2004 legalization of marriage equality, APA issued a statement supporting “the legal recognition of same-sex civil marriage with all rights, benefits and responsibilities conferred by civil marriage, and opposes restrictions to those same rights, benefits, and responsibilities” (8).

In contrast to its strong affirmation of lesbian and gay civil rights since the 1973 decision to remove homosexuality from the DSM, APA has not issued position statements in support of transgender civil rights. The APA Committee on Gay, Lesbian, and Bisexual Issues often functioned as the default clearinghouse for queries to the APA about trans issues.

Gender variant and transgender individuals must cope with multiple unique challenges. They face significant discrimination, prejudice and hatred and the potential for victimization from violent hate crimes (9). In the workplace, bias may impact transgender people as part of the application process or during their employment precipitated by the individual coming out as transgender (either on their own or by being “outed” by others), or transitioning while an employee. These individuals also need to navigate numerous expensive and complex legal issues such as changing their identity documents including, in part, their social security, driver’s license, and passport (10). They often experience discrimination when accessing non-gender transition-related health care and are denied numerous basic civil rights and protections (11). Gender variant and transgender people have no federal protection against discrimination on the basis of their gender identity or expression in public accommodations, housing, credit, education, or federally-funded programs.

The mental health of gender variant and transgender people is hypothesized to be adversely impacted by discrimination and stigma. For example, gender-based discrimination and victimization were found to be independently associated with attempted suicide in a population of transgender individuals, 32% of whom had histories of trying to kill themselves (12). And, in the largest survey to date of gender variant and transgender people with an N of 6,450, 41% reported attempting suicide (13).

Other organizations, including the American Medical Association and the American Psychological Association, have endorsed strong policy statements deploring the discrimination experienced by gender variant and transgender individuals and calling for laws to protect their civil rights (14, 15).

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14. American Medical Association policies: Continued Support of Human Rights and Freedom, Nondiscrimination Policy, and Civil Rights Restoration. Accessed online May 16, 2011, from: <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-advocacy-committee/ama-policy-regarding-sexual-orientation.page?>
15. American Psychological Association. APA Policy Statement: Transgender, Gender Identity & Gender Expression Non-Discrimination. Accessed online May 16, 2011, from: <http://www.apa.org/about/governance/council/policy/transgender.aspx>

EXHIBIT 2

Gender Dysphoria

Diagnostic Criteria

Gender Dysphoria in Children

302.6 (F64.2)

- A. A marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least six of the following (one of which must be Criterion A1):
1. A strong desire to be of the other gender or an insistence that one is the other gender (or some alternative gender different from one's assigned gender).
 2. In boys (assigned gender), a strong preference for cross-dressing or simulating female attire; or in girls (assigned gender), a strong preference for wearing only typical masculine clothing and a strong resistance to the wearing of typical feminine clothing.
 3. A strong preference for cross-gender roles in make-believe play or fantasy play.
 4. A strong preference for the toys, games, or activities stereotypically used or engaged in by the other gender.
 5. A strong preference for playmates of the other gender.
 6. In boys (assigned gender), a strong rejection of typically masculine toys, games, and activities and a strong avoidance of rough-and-tumble play; or in girls (assigned gender), a strong rejection of typically feminine toys, games, and activities.
 7. A strong dislike of one's sexual anatomy.
 8. A strong desire for the primary and/or secondary sex characteristics that match one's experienced gender.
- B. The condition is associated with clinically significant distress or impairment in social, school, or other important areas of functioning.

Specify if:

With a disorder of sex development (e.g., a congenital adrenogenital disorder such as 255.2 [E25.0] congenital adrenal hyperplasia or 259.50 [E34.50] androgen insensitivity syndrome).

Coding note: Code the disorder of sex development as well as gender dysphoria.

Gender Dysphoria in Adolescents and Adults

302.85 (F64.1)

- A. A marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least two of the following:
1. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics).
 2. A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).
 3. A strong desire for the primary and/or secondary sex characteristics of the other gender.
 4. A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).
 5. A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).
 6. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).

- B. The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.

Specify if:

With a disorder of sex development (e.g., a congenital adrenogenital disorder such as 255.2 [E25.0] congenital adrenal hyperplasia or 259.50 [E34.50] androgen insensitivity syndrome).

Coding note: Code the disorder of sex development as well as gender dysphoria.

Specify if:

Posttransition: The individual has transitioned to full-time living in the desired gender (with or without legalization of gender change) and has undergone (or is preparing to have) at least one cross-sex medical procedure or treatment regimen—namely, regular cross-sex hormone treatment or gender reassignment surgery confirming the desired gender (e.g., penectomy, vaginoplasty in a natal male; mastectomy or phalloplasty in a natal female).

Specifiers

The posttransition specifier may be used in the context of continuing treatment procedures that serve to support the new gender assignment.

Diagnostic Features

Individuals with gender dysphoria have a marked incongruence between the gender they have been assigned to (usually at birth, referred to as *natal gender*) and their experienced/expressed gender. This discrepancy is the core component of the diagnosis. There must also be evidence of distress about this incongruence. Experienced gender may include alternative gender identities beyond binary stereotypes. Consequently, the distress is not limited to a desire to simply be of the other gender, but may include a desire to be of an alternative gender, provided that it differs from the individual's assigned gender.

Gender dysphoria manifests itself differently in different age groups. Prepubertal natal girls with gender dysphoria may express the wish to be a boy, assert they are a boy, or assert they will grow up to be a man. They prefer boys' clothing and hairstyles, are often perceived by strangers as boys, and may ask to be called by a boy's name. Usually, they display intense negative reactions to parental attempts to have them wear dresses or other feminine attire. Some may refuse to attend school or social events where such clothes are required. These girls may demonstrate marked cross-gender identification in role-playing, dreams, and fantasies. Contact sports, rough-and-tumble play, traditional boyhood games, and boys as playmates are most often preferred. They show little interest in stereotypically feminine toys (e.g., dolls) or activities (e.g., feminine dress-up or role-play). Occasionally, they refuse to urinate in a sitting position. Some natal girls may express a desire to have a penis or claim to have a penis or that they will grow one when older. They may also state that they do not want to develop breasts or menstruate.

Prepubertal natal boys with gender dysphoria may express the wish to be a girl or assert they are a girl or that they will grow up to be a woman. They have a preference for dressing in girls' or women's clothes or may improvise clothing from available materials (e.g., using towels, aprons, and scarves for long hair or skirts). These children may role-play female figures (e.g., playing "mother") and often are intensely interested in female fantasy figures. Traditional feminine activities, stereotypical games, and pastimes (e.g., "playing house"; drawing feminine pictures; watching television or videos of favorite female characters) are most often preferred. Stereotypical female-type dolls (e.g., Barbie) are often favorite toys, and girls are their preferred playmates. They avoid rough-and-tumble play and competitive sports and have little interest in stereotypically masculine toys (e.g., cars, trucks). Some may pretend not to have a penis and insist on sitting to urinate. More

EXHIBIT 3

Neller Gen Robert B

From: Neller Gen Robert B
Sent: Sunday, August 06, 2017 15:23
To: Dunford Gen Joseph F
Cc: (b)(6) Walters Gen Glenn M
Subject: Re: Draft Transgender Memo (UNCLASSIFIED)

(b)(5)

V/R Neller

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

Original Message

From: Dunford, Joseph F Jr Gen USMC JS (US)
Sent: Monday, August 7, 2017 6:06 AM
To: Neller Gen Robert B
Cc: (b)(6) Walters Gen Glenn M
Subject: RE: Draft Transgender Memo (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Commandant, ACMC--

(b)(5)

(b)(5) More to follow as this develops ... I saw it yesterday and immediately asked that it be forwarded to the Chiefs.

VR
Joe

-----Original Message-----

From: Neller Gen Robert B [mailto:(b)(6)]
Sent: Saturday, August 5, 2017 9:50 PM
To: Dunford, Joseph F Jr Gen USMC JS (US)

<(b)(6)>

Neller Gen Robert B

From: Neller Gen Robert B
Sent: Saturday, August 05, 2017 21:50
To: Dunford, Joseph F Jr Gen USMC JS (US)
Cc: (b)(6) Walters LtGen Glenn M (b)(6)
Subject: FW: Draft Transgender Memo
Attachments: Draft PM -- Transgender in Military 4 Aug 2017.docx; Warning.txt; Warning.txt; Warning.txt

Chairman,
Read the statement. Have not discussed with the POTUS but only with the SECDEF.

(b)(5)

Getting ready to land on Guadalcanal.
Will check in later.
Understand min distribution/close hold.
V/R Neller

-----Original Message-----

From: (b)(6)
Sent: Sunday, August 06, 2017 8:04 AM
To: Neller Gen Robert B <(b)(6)>

Pages 3 through 4 redacted for the following reasons:

Not an Agency Record

Not an Agency Record

CJCS_00001082

USDOE00037690

Subject: Fw: Draft Transgender Memo

Commandant

Attached is the draft PM to SD.

(b)(5)

CJCS requested min distro

Very Respectfully

(b)(6)

Headquarters, U.S. Marine Corps

Military Secretary to the Commandant of the Marine Corps

Office: (b)(6)

Cell: (b)(6)

Tanberg (b)(6)

NIPR: (b)(6)

SIPR: (b)(6)

From: (b)(6)

< (b)(6)

Sent: Saturday, August 5, 2017 9:42 AM

To: (b)(6)

(b)(6)

Cc: (b)(6)

Subject: Fwd: Draft Transgender Memo

Gentlemen,

**Please see below for closehold information for your bosses'.
Likely this is a final draft and will be released soon.**

**Our legal team has had a chance to review but the Chairman
wanted you all to have visibility.**

Please protect with minimal distribution.

V/r

(b)(6)

(C)+

(b)(6)

-----Original Message-----

From: Dunford, Joseph F Jr Gen USMC JS (US)

Sent: Saturday, August 5, 2017 12:51 PM

To: Kremer, Kyle J Brig Gen USAF JS J1 (US)

<(b)(6)>

<mailto:(b)(6)>

Cc: Selva, Paul J Gen USAF JS OCJCS (US)

<(b)(6)>

>; (b)(6)

<(b)(6)>

<mailto:(b)(6)>

(b)(6)

(b)(6)

>; Crandall, Darse E Jr RDML USN JS OCJCS (US)

(b)(6)

(b)(6)

Subject: Re: Draft Transgender Memo (UNCLASSIFIED)

Kyle, All

I don't have additional changes to the memo beyond those from LC and I understand Del's assessment of paragraph 3.

I'll defer to OSD from here. Please make sure the Chiefs have an opportunity to review.

VR & Thanks

JFD

Begin forwarded message:

Resent-From: (b)(6)

(b)(6)

From: (b)(6)

(b)(6)

(b)(6)

Date: August 5, 2017 at 9:47:04 AM EDT

To: "Selva, Paul J Gen USAF JS OCJCS (US)"

(b)(6)

>, "Dunford, Joseph F Jr Gen USMC JS (US)"

(b)(6)

(b)(6)

Cc: (b)(6), (b)(7)(C)

(b)(6), (b)(7)(C)

>, "Crandall, Darse E Jr RDML USN JS OCJCS (US)"

(b)(6)

"Kremer, Kyle J Brig Gen USAF JS J1 (US)"

(b)(6)

(b)(6)

Subject: Fwd: Draft Transgender Memo

Chairman, Vice Chairman,

Given the articulated timeline and high profile nature of this issue, I am flat tracking it to you directly and a slightly broader team to ensure full visibility.

Pending guidance,

V/r

(b)(6)

Begin forwarded message:

From: (b)(6)

(b)(6)

(b)(6)

Date: August 4, 2017 at 10:26:51 PM EDT

To: (b)(6)

(b)(6)

(b)(6)

(b)(6)

Philip SD Raymond

(b)(6)

(b)(6)

(b)(6)

(b)(6)

(b)(6)

Cc: (b)(6)

< (b)(6)

(b)(6)

(b)(6)

(b)(6)

Subject: Draft Transgender Memo

DoD colleagues,

Attached, please find a close-hold draft of the POTUS memo on transgender. Per APNSA McMaster's promise to Secretary Mattis, we wanted to make sure you have seen it before going final.

I understand that OGC has already reviewed. We are waiting on DOJ review by noon tomorrow, before POTUS considers it. If you have any concerns, can you please let us know prior to noon tomorrow?

Again, I respectfully ask for your help in protecting this.

Many thanks

(b)(6)

From: [Neller Gen Robert B](#)
To: [Dunford Gen Joseph F](#)
Subject: RE: Transgender policy message (UNCLASSIFIED)
Date: Thursday, July 27, 2017 11:07:00 AM

Can you talk today?

-----Original Message-----

From: Dunford, Joseph F Jr Gen USMC JS (US) (b)(6)
Sent: Thursday, July 27, 2017 10:57 AM
To: Milley, Mark A GEN USARMY HQDA CSA (US); Richardson ADM John M; Neller Gen Robert B; Goldfein, David L Gen USAF AF-CC (US); Lengyel, Joseph L Gen USAF NG NGB (US)
Subject: RE: Transgender policy message (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

P.S. When asked, I will state that I was not consulted ... expect that question will come NLT than my September hearing.

VR
Joe

-----Original Message-----

From: Dunford, Joseph F Jr Gen USMC JS (US)
Sent: Thursday, July 27, 2017 7:55 AM
To: Milley, Mark A GEN USARMY HQDA CSA (US) (b)(6) 'Richardson, John M ADM CNO' (b)(6) 'Neller Gen Robert B' (b)(6) Goldfein, David L Gen USAF AF-CC (US) (b)(6) Lengyel, Joseph L Gen USAF NG NGB (US) (b)(6)
Subject: Transgender policy message (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Chiefs,

I know yesterday's announcement was unexpected. The message below is provided in advance of an official letterhead memo from me. It's as much as we can say right now. I'd ask that you ensure widest dissemination ...

VR
Joe

From: CJCS
To: Service Chiefs, Commanders and Senior Enlisted Leaders

I know there are questions about yesterday's announcement on the transgender policy by the President. There will be no modifications to the current policy until the President's direction has been received by the Secretary of Defense and the Secretary has issued implementation guidance.

In the meantime, we will continue to treat all of our personnel with respect. As importantly, given the current fight and the challenges we face, we will all remain focused on accomplishing our assigned missions.

CLASSIFICATION: UNCLASSIFIED
CLASSIFICATION: UNCLASSIFIED

CJCS_00001087

USDOE00037695

From: [Neller Gen Robert B](#)
To: [Dunford, Joseph F Jr Gen USMC JS \(US\)](#); [Milley, Mark A GEN USARMY HQDA CSA \(US\)](#); [Richardson ADM John M; Goldfein, David L Gen USAF AF-CC \(US\)](#); [Lengyel, Joseph L Gen USAF NG NGB \(US\)](#)
Cc: [Walters LtGen Glenn M](#) (b)(6); [Laster LtGen James B; Brilakis LtGen Mark A; Ewers MajGen John R; Hogue SES Robert D](#) (b)(6); [Wissler LtGen John E; Berger LtGen David H](#) (b)(6); [McMillian LtGen Rex C](#) (b)(6); [Kennedy BGen Paul J](#) (b)(6); [Renforth BGen Austin E; Jumev BGen William M](#)
Subject: RE: Transgender policy message (UNCLASSIFIED)
Date: Thursday, July 27, 2017 8:59:00 AM

Roger over.
V/R Neller

-----Original Message-----

From: Dunford, Joseph F Jr Gen USMC JS (US) (b)(6)
Sent: Thursday, July 27, 2017 7:55 AM
To: Milley, Mark A GEN USARMY HQDA CSA (US); Richardson ADM John M; Neller Gen Robert B; Goldfein, David L Gen USAF AF-CC (US); Lengyel, Joseph L Gen USAF NG NGB (US)
Subject: Transgender policy message (UNCLASSIFIED)

CLASSIFICATION: UNCLASSIFIED

Chiefs,

I know yesterday's announcement was unexpected. The message below is provided in advance of an official letterhead memo from me. It's as much as we can say right now. I'd ask that you ensure widest dissemination ...

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Joe

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I know there are questions about yesterday's announcement on the transgender policy by the President. There will be no modifications to the current policy until the President's direction has been received by the Secretary of Defense and the Secretary has issued implementation guidance.

In the meantime, we will continue to treat all of our personnel with respect. As importantly, given the current fight and the challenges we face, we will all remain focused on accomplishing our assigned missions.

CLASSIFICATION: UNCLASSIFIED

CJCS_00001088

USDOE00037696

EXHIBIT 4

The New York Times

WHITE HOUSE MEMO

‘There Will Always Be Change,’ Trump Says as More Personnel Shake-Ups Loom

By Michael D. Shear and Maggie Haberman

March 15, 2018

WASHINGTON — In his first full cabinet meeting last June, President Trump invited a chorus of gushing praise from his top aides by boasting that he had assembled a “phenomenal team of people, a great group of talent.”

But in the nine months since then, Mr. Trump has fired or forced out a half-dozen of the “incredible, talented” people in the Cabinet Room that day: his secretaries of state and health, along with his chief strategist, his chief of staff, his top economic aide and his press secretary.

And the purge at the top may not be over. Mr. Trump, who is famously fickle, appears to have soured on additional members of his senior leadership team — and his frequent mulling about making changes has some people around him convinced that he could act soon.

“There will always be change. I think you want to see change,” Mr. Trump said, ominously, on Thursday. “I want to also see different ideas.”

John F. Kelly, the White House chief of staff, met early Friday morning with Ben Carson, the secretary of housing and urban development, according to one official briefed on the meeting, amid speculation that Mr. Carson would be pushed out of the cabinet because of the bad publicity he received for the purchase of \$31,000 in furniture for his office.

Mr. Trump is also facing new reports that he plans to replace Lt. Gen. H.R. McMaster, the national security adviser. Three people close to Mr. Trump said that he has concluded that he should remove General McMaster, but he has not disclosed when he will do it and who he will appoint as Mr. McMaster’s successor.

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General McMaster has often been at odds with Mr. Trump on policy. But unlike last year, when General McMaster tried to conform to please the president, he is now ready to leave and is merely waiting for Mr. Trump to ask, two people familiar with the adviser’s thinking said.

Among those strongly pushing for him to go is Mr. Kelly, according to four officials familiar with West Wing staffing discussions. Mr. Kelly, who is a former four-star Marine general, also feuded frequently with General McMaster.

The four officials said that Mr. Kelly had become increasingly angry at what he viewed as General McMaster’s prolonged effort to undermine Rex W. Tillerson, whom Mr. Trump fired as secretary of state this week.

Mr. Kelly repeatedly staved off efforts to get rid of Mr. Tillerson. After Mr. Tillerson was ousted, Mr. Kelly loudly criticized the decision to colleagues and accelerated his efforts to remove General McMaster, the officials said, adding that Mr. Kelly appeared more eager to act swiftly than the president.

One person close to the president said General McMaster, whom officials have described as never having clicked with the president personally, could be replaced as early as Friday.

But Sarah Huckabee Sanders, the White House press secretary, denied late Thursday a report in The Washington Post that Mr. Trump had already decided to fire General McMaster.

“Just spoke to @POTUS and Gen. H.R. McMaster — contrary to reports they have a good working relationship and there are no changes at the NSC,” she wrote on Twitter.



Attorney General Jeff Sessions, a regular target of President Trump's ire, has resisted Mr. Trump's obvious desire for him to leave his post. Tom Brenner/The New York Times

If General McMaster does depart the White House, the name most often mentioned as a replacement has been John R. Bolton, a hawkish former ambassador to the United Nations whom Mr. Trump likes seeing on television.

But another option is Keith Kellogg, a retired Army lieutenant general who is currently the chief of staff at the National Security Council, according to two people briefed on the discussions. Mr. Kellogg is a favorite of Mr. Trump's from the 2016 campaign, but there has been resistance to him among White House staff, those briefed on the discussions said.

Mr. Kelly himself is also on thin ice, according to officials in the White House. He is said to have angered the president by privately saying "no" to the boss too often.

Mr. Trump grew frustrated with Mr. Kelly, in part for stalling on the president’s desire for tariffs. The president finally forced the issue a few weeks ago, announcing tariffs on steel and aluminum, which prompted Gary D. Cohn, his top economic adviser, who had opposed the policy, to announce his resignation.

In recent days, Mr. Kelly has sought to repair his standing with the president by moving more aggressively to address issues that have festered, including staffing concerns at the White House and cabinet secretaries with political liabilities.

Several high-level people in the administration are at risk.

Mr. Carson and David J. Shulkin, the secretary of veterans affairs, have both embarrassed the president by generating scandalous headlines. Mr. Carson could be cut over an eye-popping \$31,000 dining set, and Mr. Shulkin might be replaced over a 10-day, \$122,000 European trip with his wife.

And then there is Attorney General Jeff Sessions, whose original sin — the decision to recuse himself from oversight of the Russia investigation — made him the regular target of presidential ire. The attorney general has threatened to resign at least once, but has more recently indicated his determination to resist Mr. Trump’s obvious desire for him to leave his post at the Justice Department.

Mr. Trump could act as early as Friday to remove one or more of them, though the president is known to enjoy keeping people off kilter.

In his remarks on Thursday, Mr. Trump assailed predictions of further staff shake-ups by saying such reports were “a very exaggerated and false story.” But he hinted that his choices for a cabinet might have been different had he known then what he knows now.

“I’ve gotten to know a lot of people over the last year,” Mr. Trump said.

Whether that means the president is about to exercise his option to find new people for his White House is unclear.

Mr. Trump has a long habit of musing about staff changes that he does not enact. He does his own version of poll-testing different possibilities, asking aides what they think of one another and asking outside friends and top advisers whether different people would be better in specific jobs, but he often drops the topic without acting.

That was certainly the case with Mr. Tillerson, whom he needled for months before finally firing him in a tweet on Tuesday. It has also been true of Mr. Sessions, who has had to endure a series of Twitter attacks from the president, each of which prompts new reports about whether Mr. Trump is about to dump his top law enforcement official.

“It’s devastating,” said William M. Daley, who served as former President Barack Obama’s chief of staff for about a year. “No business could handle this, much less the government. It’s supposed to be about stability and continuity. That’s just not in his lexicon.”

Just last month, Mr. Trump lamented that Mr. Sessions had failed to investigate the Obama administration’s handling of Russian election meddling, and later called it “DISGRACEFUL!” that Mr. Sessions was not investigating surveillance abuse.

“How Trump’s Saturday Night Massacre Might Start With Jeff Sessions,” blared a headline this month in New York magazine. Some White House officials believe that Scott Pruitt, an ambitious lawyer who is the head of the Environmental Protection Agency, is behind rumors that he is in line to replace Mr. Sessions.

And yet, Mr. Sessions remains in his job, at least for now. Some associates speculate that Mr. Trump realizes that firing his attorney general would cross a red line for many in his own party, including Senator Mitch McConnell, the Republican leader.

“When the shoe drops on Sessions or Kelly, no one is going to be surprised,” Mr. Daley said. “But the long goodbye totally deflates their ability to be effective.”

At times, when Mr. Trump is focused on a specific person, he has taken action — hiring Mr. Kelly to replace Reince Priebus, for instance, or empowering Mr. Kelly to expedite the departure of Stephen K. Bannon, the president’s onetime chief strategist.

Recently, people close to Mr. Trump say that he has begun to feel more confident that he understands the job of president. He is relying more on his own instincts, putting a premium on his personal chemistry with people and their willingness to acknowledge that his positions are ultimately administration policy, rather than on their résumé or qualifications for the job.

That could explain the president’s decision to replace Mr. Tillerson and his choice of successor for Mr. Cohn. If people are unwilling to do what he wants, one adviser said, Mr. Trump now believes that he can get things done himself.

Right now, Mr. Trump is surrounded by cabinet officials and a chief of staff who either have caused him negative headlines, such as Mr. Carson and Mr. Shulkin, or have declined to do what he wants, such as Mr. McMaster, Mr. Kelly and Mr. Sessions.

Contrary to the notion that Mr. Trump is surrounded by sycophants, the president has aides who are willing to say “no.” But he has increasingly grown frustrated when they do.

Mr. Trump also grew frustrated last year with Jim Mattis, the defense secretary, for refusing to enact a ban on transgender members of the military. Mr. Mattis essentially ignored Mr. Trump for several weeks, White House officials said, until the president finally went around him and tweeted it. But Mr. Mattis appears to be safe, even when he ignores the president, in part because he is a general who in Mr. Trump’s mind “looks the part” of a military leader.

Mr. Kelly has not fared as well.

A few weeks ago, when the scandal surrounding Rob Porter, the staff secretary, exploded into view, Mr. Trump began working the phones to old friends, telling them that he needed his former advisers back and complaining that he was surrounded by people he did not know. He told them that Mr. Kelly had badly botched the Porter issue. (His language was saltier and unfit for publication, according to several people with knowledge of the calls.)

This week, he was not in the loop for some of Mr. Trump’s decisions, people briefed on the discussions said, including that he was not immediately aware that Mr. Trump was seriously considering Larry Kudlow for the director of the National Economic Council.

Since the Porter scandal, the president has mulled over a number of potential replacements for Mr. Kelly, but he has kept his own counsel about his plans, according to several people close to him.

In remarks on Tuesday at Marine Corps Air Station Miramar in San Diego, Mr. Trump praised Mr. Kelly, calling him a “four star” general who is “doing a great job in Washington.”

But in a bit of potential foreshadowing, the president also told the Marines in the audience: “I think he likes what you do better than what he does, but he’s doing a great job. He misses you.”

Correction: March 16, 2018

An earlier version of this article misstated the day that Sarah Huckabee Sanders, the White House press secretary, denied a report in The Washington Post. It was Thursday, not Friday.

Correction: March 16, 2018

An earlier version of this article misstated who Ben Carson, the secretary of housing and urban development, met with at the White House on Friday. Mr. Carson met with John F. Kelly, the chief of staff, not President Trump.

Michael D. Shear reported from Washington, and Maggie Haberman from New York. Adam Goldman contributed reporting from Washington.

Get politics and Washington news updates via [Facebook](#), [Twitter](#) and the [Morning Briefing](#) newsletter.

A version of this article appears in print on March 16, 2018, on Page A19 of the New York edition with the headline: Six Gone From ‘Phenomenal Team’; How Many More to Go?

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Brock Stone, et al.

Plaintiff,

v.

Donald J. Trump, et al.

Defendant.

*

*

*

*

Case No. 17-cv-02459

NOTICE OF FILING OF DOCUMENT UNDER SEAL

Check one.



Exhibit 5 which is an attachment to Plaintiffs' Opposition to Defendants' Motion to Dismiss
and for Summary Judgment and Memorandum in Support of Plaintiffs' Cross-Motion for Summary Judgment
will be electronically filed under seal within 24 hours of the filing of this Notice.

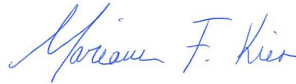


(title of document)
will be electronically filed under seal within 24 hours of the filing of this Notice.

I certify that at the same time I am filing this Notice, I will serve copies of the document
identified above by CM/ECF.

May 25, 2018

Date



Signature

Marianne F. Kies (Bar No. 18606)

Printed Name and Bar Number

850 Tenth Street, NW, Washington DC 20001

Address

mkies@cov.com

Email Address

202-662-5005

Telephone Number

202-778-5005

Fax Number

EXHIBIT 6

Transgender TPs.msg

From: Thurman, Melissa Maj SD
Sent: Monday, October 02, 2017 3:51 PM
To: Bushman, William CIV SD
Subject: Transgender TPs
Attachments: Transgender TPs.docx

Will,

As requested.

V/r,

MELISSA R. THURMAN, Maj, USAF
Secretary of Defense Action Group, Pentagon, 3E877
DSN: 222-7117 / Comm: (703) 692-7117
NIPR: <mailto:melissa.thurman@sd.mil>
SIPR: melissa.thurman@sd.smil.mil

Transgender Policy

Key Points:

- DOD has received formal guidance from the White House reference to transgender personnel serving in the military.
- DOD will develop a implementation plan to meet the President's intent. Information on interim guidance will be forthcoming.
- DOD continues to focus on our mission of defending our nation and on-going operations against our foes, while ensuring all service members are treated with respect.
- Any further discussion until the President approves DODs implementation plan would be speculative

EXHIBIT 7

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, et al.,
Plaintiffs,

vs.

DONALD J. TRUMP, et al.,
Defendants.

Case No. 1:17-cv-02459-MJG

**MOTION TO COMPEL
SUPPLEMENTAL INTERROGATORY ANSWERS AND PRODUCTION**

Pursuant to Federal Rule of Civil Procedure 37(a), Plaintiffs respectfully move the Court for an order as follows:

1. Finding and declaring that the deliberative process privilege does not protect from discovery in this case: (1) deliberative materials relating to the President’s original July 2017 Tweets and August 2017 Memorandum banning transgender individuals from military service; (2) deliberative materials relating to the activities of the Department of Defense’s so-called “panel of experts” and its working groups tasked with developing a plan to study and implement that decision; and (3) deliberative materials relating to the Department of Defense’s Implementation Plan and the President’s acceptance of that Plan in his March 23 memorandum, including any participation or interference in that process by anti-transgender activists and lobbyist;

2. Compelling Defendants, no later than May 15, 2018, to: (1) supplement their interrogatory responses and document production to produce all information and documents previously withheld on the ground of deliberative process privilege that are not protected by that privilege under the Court’s finding above, and for which there is no good faith basis for

withholding such documents and information under another privilege or protection; and (2) comply with their obligation under Rule 26(e) to timely supplement their discovery responses to take account of developments since they served their initial responses; and

3. Compelling Defendants, to the extent that they respond to interrogatories by reference to their document production, to adhere to Federal Rule of Civil Procedure 33(d)(1), by specifying documents “in sufficient detail to enable [Plaintiffs] to locate and identify them as readily as [Defendants] could.”

This motion is based on Plaintiffs’ memorandum of law and accompanying declarations and exhibits, filed concurrently with this motion; on the record in this action; and on other oral or written argument that may be offered by the parties at or before any hearing on this motion. A proposed order is attached hereto.

This motion, and all supporting documentation, was served on Defendants pursuant to Local Rule 104.8(a) on April 23, 2018.

Dated: April 23, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of April 2018, I served a copy of the foregoing *Motion to Compel Supplemental Interrogatory Answers and Production* and all supporting documents thereto on counsel for Defendants in this action via electronic mail, in accordance with Local Rule 104.8(a) and Federal Rule of Civil Procedure 5(a).

/s/ Marianne F. Kies

Bar No. 18606

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, et al.,
Plaintiffs,

vs.

DONALD J. TRUMP, et al.,
Defendants.

Case No. 1:17-cv-02459-MJG

**MEMORANDUM IN SUPPORT OF MOTION TO COMPEL
SUPPLEMENTAL INTERROGATORY ANSWERS AND PRODUCTION**

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INTRODUCTION

This case is about President Trump’s decision to ban transgender people from serving in the military, and the Department of Defense’s implementation of the President’s directives. As this Court has already recognized in its memorandum opinion granting a preliminary injunction, President Trump’s reasons and motivations for issuing the original ban via Twitter in July 2017 and in a formal memorandum in August 2017 are central issues in this case:

President Trump’s tweets did not emerge from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest. Based on the circumstances surrounding the President’s announcement and the departure from normal procedure, . . . there is sufficient support for Plaintiffs’ claims that the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy.

Stone v. Trump, 280 F. Supp. 3d 747, 768 (D. Md. 2017) (internal quotation marks omitted).

The process followed by the other Defendants in implementing President Trump’s decision is similarly central. Defendants attempt to portray the Implementation Plan released by the Department of Defense (“DoD”) on March 23, 2018—consisting of an unsigned February 2018 report released by DoD (ECF 120-2, the “Implementation Report”) and the “recommendations” that Secretary of Defense Mattis sent to the President on February 22, 2018 (ECF 120-1, the “Implementation Memo”)—as the result of a putatively independent policy-making process. However, the President’s directives and Secretary Mattis’s own statements make clear that the scope of DoD’s “independent judgment” was limited to determining *how* to implement the Ban, not *whether* to implement it. Indeed, it has already emerged that the White House itself participated in crafting the ostensibly independent “recommendations” that Secretary Mattis sent to the President.

In January 2018, Plaintiffs served interrogatories and requests for production of documents seeking information about the process and the bases (or lack thereof) for President Trump’s decision and the other named Defendants’ implementation of it—information that was then, and remains, central to Plaintiffs’ ability to prove their case. Defendants have refused to answer a broad swath of Plaintiffs’ requests, asserting that numerous categories of information and documents are protected by the deliberative process privilege.¹

After months of unsuccessful attempts to resolve discovery disputes through meet and confer communications with Defendants, Plaintiffs now bring this motion to compel regarding Defendants’ assertion of the deliberative process privilege. Specifically, Plaintiffs seek a declaration that no deliberative process privilege attaches to three categories of documents:

- (1) Deliberative materials regarding the President’s original July 2017 Tweets and August 2017 Memorandum;
- (2) Deliberative materials regarding the activities of DoD’s so-called “panel of experts” and its working groups (the “Panel”) tasked with developing a plan to study and implement the President’s decision; and
- (3) Deliberative materials regarding DoD’s Implementation Plan and the President’s acceptance of the Plan in his March 23 memorandum, including any participation or interference in that process by anti-transgender activists and lobbyists.

The case law is clear that the deliberative process privilege is inapplicable in a case such as this one where the motive underlying government deliberations is central to the claims at issue, there is evidence of government misconduct (here, unlawful discrimination), or where the government

¹ Defendants also claimed the protection of other privileges, including the presidential communications privilege, for some information and documents, but they have refused to confer regarding the latter privilege pending a decision on their partial motion for judgment on the pleadings addressing claims against the President. Declaration of Marianne F. Kies (attached hereto) ¶ 32. For that reason, this motion is confined to the dispute regarding the deliberative process privilege.

has engaged in selective waiver by publicly relying on portions of the withheld deliberative material in justifying a challenged policy. The three categories of materials listed above fall within these exceptions to the privilege.

Plaintiffs further request that the Court order Defendants to supplement their prior interrogatory responses and document production, consistent with the above-requested declaration and Rule 26(e), including production of more recent documents related to the Implementation Plan, and President Trump's acceptance of that Plan, released on March 23. Plaintiffs have attempted to resolve or narrow the disputes concerning Defendants' assertion of the deliberative process privilege through a lengthy meet and confer process, but these efforts have been unsuccessful. *See* pp. 27–28, *infra*; Kies Decl. ¶¶ 10–20. An order addressed to the points raised here should help to move this litigation forward, by overruling Defendants' unfounded assertions of the deliberative process privilege and its application to this case, providing guidance for future discovery negotiations and the conduct of depositions, and reducing the need for future motions practice.²

BACKGROUND

On June 30, 2016, then-Secretary of Defense Ashton Carter issued a directive to all military departments: “Effective immediately, no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity,” and “[t]ransgender Service members will be subject to the same standards as any other Service member of the same gender.” ECF 40-4. This announcement

² Plaintiffs reserve all rights to move to compel on other grounds at a later date if other deficiencies in Defendants' discovery responses cannot be corrected without Court intervention.

followed DoD's year-long analysis of the policy and readiness implications of welcoming transgender persons to serve openly. *See, e.g.*, ECF 40-35.

On July 26, 2017, President Trump announced, via Twitter, his decision to ban all individuals who are transgender from serving in the military. ECF 40-22. While the President asserted that he had "consult[ed] with [his] Generals and military experts," the announcement reportedly came as a surprise to the Secretary of Defense and other military officials. *See, e.g.*, ECF 39 (Am. Compl.) ¶¶ 97, 101, 104. The President formalized his decision in an August 25, 2017 memorandum to the Secretaries of Defense and Homeland Security, which directed Secretary Mattis to "implement" three directives: (1) a prohibition on new enlistment of transgender persons (§ 2(a)); (2) a requirement that transgender persons become automatically subject to discharge because they are transgender (§ 1(b)); and (3) denial of gender transition-related surgical care to currently serving transgender service members (§ 2(b)) (collectively, "the Transgender Service Member Ban" or "the Ban"). ECF 40-21.

The President also directed Defense Secretary Mattis to provide an "implementation plan" by February 21, 2018, which would also address "how to address transgender individuals currently serving in the United States military." *Id.* As this Court has explained, the instruction to provide an implementation plan "[wa]s not a request for a study but an order to implement the Directives contained therein." ECF 85 at 50. That is precisely what Secretary Mattis did. On September 14, 2017, Secretary Mattis issued a "Terms of Reference" regarding "Implementation of the Presidential Memorandum on Military Service By Transgender Individuals." Kies Decl., Ex. 20. In the memorandum, Secretary Mattis "direct[ed] the Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff to lead [DoD] in developing an Implementation Plan to effect the policies and directives in [the] Presidential Memorandum." *Id.* Secretary Mattis

also instructed them to convene a “panel of experts” from within DoD to conduct a study that is “planned and executed to inform the Implementation Plan.” *Id.* at 2.

Plaintiffs filed this lawsuit on August 28, 2017; an amended complaint followed on September 14, 2017. ECF 1, 39. Plaintiffs allege that the Ban violates their rights to equal protection and substantive due process under the Fifth Amendment because it discriminates against transgender persons on the basis of invidious stereotypes, irrational fears, animus, and moral disapproval, which are not permissible bases for differential treatment. ECF 39 ¶ 152. Plaintiffs also allege that Defendants lacked any rational basis for imposing the Ban—much less a basis that would survive the heightened scrutiny applicable to discrimination against members of a quasi-suspect class. *Id.* ¶¶ 150–51. Plaintiffs further allege that the Ban is so arbitrary as to be an abuse of governmental authority. *Id.* ¶ 157. In response, Defendants argued that the President’s decision is entitled to deference as an exercise of “essentially professional military judgment [.]” ECF 52-1 at 24 (*quoting Rostker v. Goldberg*, 453 U.S. 57, 65 (1981)).

On November 21, 2017, this Court ruled that Plaintiffs have established a likelihood of success on their claim that President Trump’s decision to ban transgender persons from military service violates equal protection, and the Court preliminarily enjoined the Ban. ECF 85 at 41–44. A scheduling order required the parties to serve their written discovery requests by January 9, 2018 and to complete discovery by April 24, 2018. ECF 100.

Plaintiffs served their first set of interrogatories and requests for production of documents (“RFPs”) on January 3, 2018. Kies Decl., Exs. 1, 2. The RFPs and interrogatories seek documents and information relating to President Trump’s grounds for issuing his Twitter announcement and the August 25 Memorandum formalizing the Transgender Service Member Ban; his communications with others relating to development of the Ban; Defendants’ efforts to

implement the Ban; the costs allegedly associated with military service by transgender individuals; and the effects (if any) of military service by transgender persons on unit cohesion and military readiness. *See, e.g., id.*, Ex. 1 at 8–12; Ex. 2 at 10–14. Plaintiffs need this information to prove their claims that the Ban was motivated by animus and lacked a legitimate government rationale, and that steps Defendants have taken to implement the Ban are similarly infected.

On February 9, 2018, Defendants served objections and responses to Plaintiffs’ interrogatories and requests for production of documents. *See, e.g., id.*, Exs. 3, 4.³ Defendants objected to every single request on privilege grounds, asserting presidential communications privilege, deliberative process privilege, attorney-client privilege, and the attorney work product doctrine for every request. *Id.* President Trump refused to provide any information at all. *Id.*, Exs. 6, 7. The vast majority of the other Defendants’ interrogatory responses state merely that the answer “may be derived” from a review of “certain documents” in Defendants’ document productions, “to the extent” the information is not privileged. But Defendants have not identified those documents, as required by Rule 33(d)(1). *See, e.g., id.*, Ex. 3 at 6–8.⁴

On February 9, 2018, Defendants produced approximately 17,000 documents. Kies Decl. ¶ 11. This production was identical to their January 2018 productions in *Doe, et al. v. Trump, et al.*, No. 17-1597 (D.D.C.), minus information pertinent to the individual *Doe* plaintiffs. *Id.*

³ In the interest of not overburdening the Court, Plaintiffs have not included as exhibits the objections and responses served by each and every Defendant. The objections and responses served on behalf of DoD are representative of those served by all Defendants (other than President Trump) for the deliberative process privilege matters here at issue.

⁴ Despite promising in March that they would supplement their interrogatory responses in the future to (at a minimum) direct Plaintiffs to particular Bates numbers, Defendants have not done so as of the date of this filing. Kies Decl. ¶ 10.

Defendants made a supplemental production of a similar number of documents on March 9, 2018. *Id.* ¶ 12. Defendants have not yet completed their production of documents and have advised that they are not likely to complete production until sometime in May. *Id.*

On February 13, 2018, Defendants produced twelve privilege logs from the President, DoD, each of the military services, the Chairman of the Joint Chiefs of Staff, and the Defense Health Agency. Kies Decl. ¶ 13. On March 20, 2018, Defendants produced six additional privilege logs. *Id.* ¶ 14. The President’s privilege log presents “categories” of documents within broad date ranges, with boiler plate descriptions and no identification of individual senders or recipients, document titles, or specific dates. *Id.*, Ex. 22. Several of the other logs omit critical information, such as the authors or recipients of withheld documents. *E.g., id.*, Ex. 5. All twelve of the privilege logs feature repetitive, boilerplate justifications for withholding the allegedly privileged materials. *E.g., id.*

Despite the fact that the government’s decision-making is *the* key issue in this case, Defendants have broadly and categorically invoked privilege for *any* information about President Trump’s grounds for imposing the Ban and the other Defendants’ rationale in implementing it—including interrogatories that merely seek the *date* on which President Trump decided to issue the Ban and the *identities* of the “generals and military experts” whom President Trump publicly (via Twitter) claimed to have consulted. Kies Decl., Ex. 6. Plaintiffs have attempted to confer with Defendants over their failure to adequately respond to interrogatories and to identify and produce documents responsive to Plaintiffs’ requests, as well as Defendants’ facially deficient objections and privilege logs, including their broad claims of deliberative process privilege. Kies Decl. ¶¶ 15–20. Despite Plaintiffs’ extensive efforts to engage Defendants on this issue, the parties have been unable to resolve their differences.

On March 23, 2018, Defendants released DoD's Implementation Plan publicly for the first time, and President Trump accepted that Implementation Plan in a further directive. ECF 120-1, -2, -3. That same day, Defendants moved to dissolve the Court's preliminary injunction (ECF 120) and for a protective order (ECF 121), seeking to halt all discovery in this case pending resolution of the motion to dissolve the preliminary injunction—including all interlocutory appeals.

Reports have already emerged that the White House itself participated in crafting the ostensibly independent "recommendations" that Secretary Mattis sent to the President. Chris Johnson, *DoD Appears to Contradict White House on Process for Trans Military Ban*, Washington Blade (Mar. 29, 2018), <http://www.washingtonblade.com/2018/03/29/dod-appears-to-contradict-white-house-on-process-for-trans-military-ban/>. Additional reports have indicated that the Panel's findings were further tainted by the outside influence of anti-transgender lobbyists and activists operating under the aegis of Vice President Mike Pence. *See, e.g.,* Zack Ford, *Pence Secretly Drafted Trump's Latest Transgender Military Ban*, Think Progress (Mar. 25, 2018), <https://thinkprogress.org/pence-responsible-for-trump-transgender-military-ban-f4d3b67bde47/>; Mark Joseph Stern, *Trump's Trans Troops Ban Will Never Take Effect*, Slate (Mar. 24 2018), <https://slate.com/news-and-politics/2018/03/trumps-new-trans-troops-ban-is-still-unconstitutional.html> (reporting that an anti-transgender activist and the head of an anti-LGBTQ lobbying group played leading roles in the creation of the Implementation Plan).

On April 20, 2018, Defendants produced in this case a collection of documents they characterize as an "administrative record" for the Implementation Plan. ECF 133-1. According to the certification included with the "administrative record," it "comprises all non-privileged material directly or indirectly considered by the Department in preparing these

recommendations. ***Privileged documents, including those reflecting internal agency deliberations, are not part of this administrative record.***” *Id.* (emphasis added). Although the “administrative record” contains some documents relating to the three categories of decision making addressed in this motion, such as minutes from some of the meetings of the Panel, many of these documents contain extensive redactions for anything deemed a “deliberative document.” *E.g.*, ECF 133-14 at 458–89. Based on the accompanying certification, it appears likely that Defendants have withheld many more documents in their entirety based on the deliberative process privilege. ECF 133-1. Defendants did not produce a privilege log with the “administrative record.”

Defendants have recently attempted to “claw back” several inadvertently produced documents on the ground that they are allegedly protected by the deliberative process privilege. Kies Decl., Ex. 19. Plaintiffs intend to dispute these claims of privilege for the same reasons set forth here. At a small number of depositions that the *Doe* plaintiffs have been able to schedule to date, Defendants’ counsel has asserted the deliberative process privilege to prevent the witness from responding to a number of questions. *See, e.g., id.*, Ex. 21.

ARGUMENT

I. In The Circumstances Of This Case, The Deliberative Process Privilege Does Not Shield Deliberative Materials Concerning The Issuance Of The Ban, The “Panel of Experts,” Or The Implementation Plan And The President’s Acceptance Of That Plan.

Litigants are entitled to discovery of any relevant, nonprivileged matter that is proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). Where a party fails to make a disclosure required by Rule 26, a “party . . . may move for an order compelling” an answer and production. Fed. R. Civ. P. 37(a)(3)(B). “[T]he party or person resisting discovery, not the party

moving to compel discovery, bears the burden of persuasion.” *Kinetic Concepts, Inc. v. ConvaTec Inc.*, 268 F.R.D. 226, 243 (M.D.N.C. 2010) (collecting cases).

Here, Defendants have refused to produce most information sought by Plaintiffs’ interrogatories—and thousands of responsive documents—largely on the basis of the deliberative process privilege. Given the matters at issue in this case, however, that privilege does not apply to many of the categories of documents for which Defendants have asserted it. For several reasons the deliberative process privilege, as defined by federal courts, does not shield: (1) deliberative materials relating to the President’s original July 2017 Tweets and August 2017 Memorandum; (2) deliberative materials relating to the activities of the DoD’s so-called “panel of experts” and its working groups tasked with developing a plan to study and implement that decision; and (3) deliberative materials relating to DoD’s Implementation Plan and the President’s acceptance of that Plan in his March 23 memorandum, including any participation or interference in that process by anti-transgender activists and lobbyists. The Court should issue an order (1) declaring that such materials are outside the protection of the deliberative process privilege, (2) requiring Defendants to supplement their prior interrogatory responses and document production to provide such material, and (3) requiring Defendants to update their interrogatory responses and document production through the present, as required by Rule 26(e).

A. Deliberative Process Privilege Does Not Apply To These Categories Of Deliberative Materials Because Plaintiffs’ Claims Turn On Governmental Intent.

The deliberative process privilege protects government documents that are both predecisional and deliberative. *City of Va. Beach v. U.S. Dep’t of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993). However, this privilege does not apply at all when “a plaintiff’s cause of action turns on the government’s intent.” *See In re Subpoena Duces Tecum Served on the*

Comptroller of the Currency, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (“[I]f either the Constitution or a statute makes the nature of governmental officials’ deliberations *the* issue, the privilege is a nonsequitur.”), *clarified on rehearing in part*, 156 F.3d 1279 (D.C. Cir. 1998); *see also, e.g., Jones v. City of Coll. Park, Ga.*, 237 F.R.D. 517, 521 (N.D. Ga. 2006) (the deliberative process privilege is “simply inapplicable” where government intent is “at the heart of the issue in this case”); *United States v. Lake Cty. Bd. of Comm’rs*, 233 F.R.D. 523, 526 (N.D. Ind. 2005) (“[T]he deliberative process privilege simply does not apply in civil rights cases in which the defendant’s intent to discriminate is at issue.”); *McPeck v. Ashcroft*, 202 F.R.D. 332, 335 (D.D.C. 2001) (“It is certainly true that this privilege yields when the lawsuit is directed at the government’s subjective motivation in taking a particular action.”).

Plaintiffs’ claims here turn on Defendants’ intent. Plaintiffs assert that the Ban violates the equal protection guarantee of the United States Constitution, and that the discrimination it effectuates cannot withstand any level of review. ECF 40-2 at 20–21. This Court has already held that discrimination against transgender people is subject to heightened scrutiny. ECF 85 at 43–44. Under that demanding standard, the asserted justifications for the policy must be “genuine, not hypothesized or invented *post hoc* in response to litigation.” *United States v. Virginia*, 518 U.S. 515, 533 (1996). As another federal court held in the parallel *Karnoski v. Trump* case, whether President Trump’s Ban and DoD’s implementation of it were “sincerely motivated by compelling state interests, rather than by prejudice or stereotype[,]” *necessarily* “turns on facts related to Defendants’ deliberative process.” *Karnoski v. Trump*, 2018 WL 1784464, at *13 (W.D. Wash. Apr. 13, 2018).

In addition, even under rational basis review, unequal treatment “motived by an improper animus or purpose” is unconstitutional. *Windsor v. United States*, 570 U.S. 744, 770 (2013). In

analyzing a challenged policy under rational basis review, “the disadvantage imposed” on a discrete group of individuals may not be “born of animosity toward the class of persons affected.” *Romer v. Evans*, 517 U.S. 620, 634 (1996). As this Court wrote in holding that Plaintiffs were likely to succeed on their equal protection claims, “Plaintiffs must demonstrate that they have been treated differently from others who are similarly situated ***and also show that the unequal treatment was the result of ‘intentional or purposeful discrimination.’***” ECF 85 (quoting *Morrison v. Garrahty*, 239 F.3d 648, 654 (4th Cir. 2001) (emphasis added)). Making this showing necessarily requires Plaintiffs to take discovery directed to Defendants’ intent in crafting and implementing the policies here at issue.

Each of the three categories of deliberative materials that are the subject of this motion is likely to contain evidence reflecting Defendants’ intent. The July 2017 Tweets and August 2017 Memorandum were issued without any supporting evidence, to the surprise of senior DoD leadership, and abruptly reversed course on the DoD’s own evaluation of transgender service in 2015 and 2016. *See* ECF 40-13; ECF 40-11. As this Court has already observed, “President Trump’s tweets did not emerge from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest.” ECF 85 at 43. Based on those circumstances “and the departure from normal procedure,” this Court held that there is “sufficient support” for Plaintiffs’ claims that this decision was motivated by something other than “genuine concerns regarding military efficacy.” *Id.* (internal quotation marks omitted). The deliberative materials generated by Defendants in the months leading up to the July 2017 Tweets and August 2017 Memorandum should help reveal exactly what those true motivations were.

The deliberative materials generated by the “panel of experts” will, in turn, demonstrate whether the Panel ever considered—or had authority to consider—retaining the Open Service policy or whether the Panel was intentionally constructed with a presupposed result in mind, in order to add a veneer of legitimacy to support the President’s already-issued policy. Deliberative materials related to the final issuance of the Implementation Plan and the President’s acceptance of that plan will similarly reveal whether DoD’s drafting of the Implementation Memo was a neutral assessment of genuine military interests, or whether DoD simply sought to provide justifications for the directives President Trump had ordered it to implement.

B. Deliberative Process Privilege Is Inapplicable To The Deliberative Materials Sought By Plaintiffs, Which May Shed Light On Government Misconduct.

The deliberative process privilege also “disappears altogether when there is any reason to believe government misconduct occurred.” *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997).⁵ Politically and ideologically motivated discrimination of the kind alleged by Plaintiffs here is sufficient reason to suspect that government misconduct has occurred. *See Waters v. U.S. Capitol Police Bd.*, 216 F.R.D. 153, 162–63 (D.D.C. 2003) (“it is inconceivable” that Congress intended deliberative process privilege to apply to information bearing on alleged agency discrimination); *see also Dominion Cogen, D.C., Inc. v. District of Columbia*, 878 F. Supp. 258, 268 (D.D.C. 1995) (holding that allegations of decision-making based on “illegitimate political motives” raised questions of governmental misconduct sufficient to place deliberative processes

⁵ Where the deliberative materials sought may shed light on government malfeasance, “the privilege is routinely denied. *Texaco P.R., Inc. v. Dep’t of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995). This is because, where there is “any reason” to believe such material “may shed light on” government misconduct, “public policy (as embodied by the law) demands that the misconduct not be shielded merely because it happens to be predecisional and deliberative.” *Alexander v. FBI*, 186 F.R.D. 170, 177–78 (D.D.C. 1999).

in issue); *Chaplaincy of Full Gospel Churches v. Johnson*, 217 F.R.D. 250 (D.D.C. 2003) (finding documents alleged to show unlawful “discrimination against non-liturgical chaplains” implicated misconduct exception and could not be withheld under deliberative process privilege), *rev’d in part, vacated in part on other grounds sub nom., In re England*, 375 F.3d 1169 (D.C. Cir. 2004).

Here, Plaintiffs have alleged that the Ban was driven not by legitimate military considerations, but by political and discriminatory animus. ECF 39 ¶¶ 112-19, 150-52. The “judgment” reflected in President Trump’s decision to issue the Ban reflected nothing more than a desire to cater to “negative attitudes,” “fear,” and “irrational prejudice” for political gain. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 450 (1985); *cf. Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 592 (4th Cir. 2017) (en banc) (“IRAP”) (stated national security interest was provided in bad faith, as pretext for discriminating on the basis of religion). As this Court has held, “The lack of any justification for the abrupt policy change, combined with the discriminatory impact to a group of our military service members who have served our country capably and honorably, cannot possibly constitute a legitimate governmental interest.” ECF 85 at 44. The illegitimate motivation animating the July 2017 Tweets and August 2017 Memorandum—a species of “command influence”—inevitably flows down to the work done by the Panel to study how to implement the President’s stated goal, the Implementation Plan that was the end result of that study, and the President’s acceptance of that plan. Deliberative materials related to each of these topics are thus sufficiently likely to “shed light” on governmental malfeasance that no deliberative process privilege is applicable.

C. If Deliberative Process Privilege Did Apply To The Panel’s Findings, Defendants Have Waived That Privilege By Selectively Disclosing Those Findings Publicly In The Implementation Report.

Any protection offered by the deliberative process privilege is waived “through voluntary, authorized release of the material to a nongovernmental recipient.” *City of Va. Beach, Va. v. U.S. Dep’t of Commerce*, 995 F.2d at 1253. This protection may also be lost when material is adopted as an official position or “used by the agency in its dealings with the public.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Under Exemption 5 to the Freedom of Information Act, which incorporates the deliberative process privilege, “[w]here an authorized disclosure is voluntarily made to a non-federal party . . . the government waives any claim that the information is exempt from disclosure under the deliberative process privilege.” *Shell Oil Co. v. IRS*, 772 F. Supp. 202, 209 (D. Del. 1991). “If an agency chooses expressly to adopt or incorporate by reference” deliberative material in a public disclosure, no deliberative process privilege should attach to that material. *See N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975). It also is fundamentally unfair—and therefore impermissible—for a party to wield his claims of privilege as both a “shield and a sword.” *See, e.g., HSH Nordbank AG N.Y. Branch v. Swerdlow*, 259 F.R.D. 64, 74 (S.D.N.Y. 2009) (explaining that the “at issue” doctrine “precludes a party from disclosing only self-serving communications, while barring discovery of other communications that an adversary could use to challenge the truth of the claim” (internal citation and quotation marks omitted)). Impermissible “[s]elective disclosure occurs not only when a party reveals part of one privileged communication, but also when a party reveals one beneficial communication but fails to reveal another, less helpful, communication on the same matter.” *U.S. ex rel. Mayman v. Martin Marietta Corp.*, 886 F. Supp. 1243, 1252 (D. Md. 1995).

Here, even if deliberative process privilege did attach to any deliberative materials generated by the Panel—and it does not—Defendants have waived that privilege to the extent they have publicly relied on those materials to support the Implementation Plan. The Implementation Memo cites the Implementation Report as its basis for adhering to a policy disqualifying transgender persons from military service (ECF 120-1); President Trump, in adopting the Plan, described its findings as reflecting an “exercise” of Secretary Mattis’s “independent judgment” (ECF 120-3). The Implementation Memo states that it is “[b]ased on the work of the Panel [of Experts] and the Department’s best military judgment.” ECF 120-1 at 2. The Implementation Report itself extensively references certain findings and conclusions made by the Panel, yet it is rife with reference to anecdotal incidents or factual circumstances for which little or no meaningful underlying data are provided. *See, e.g.*, ECF 120-2 at 33–34 (citing reports made to the Panel “that, from the time of diagnosis to the completion of a transition plan, the transitioning Service members would be non-deployable for two to two-and-a-half years”); *id.* at 37 (citing incidents reported to the Panel concerning transgender access to bathroom facilities as evidence of the threat transgender service poses to unit cohesion); *id.* at 41 (citing Panel data as evidence that “medical costs for Service members with gender dysphoria have increased nearly three times—or 300%—compared to Service members without gender dysphoria”). The reliability of these findings, the existence of any contradictory findings, the manner in which the findings were developed, and the way in which the Panel of Experts considered and presented them all represent critical evidence bearing on Plaintiffs’ claims that implementation of the Ban merely constitutes a repackaging of the original Ban and reflects the same animus-driven discrimination.

Through this selective citation to Panel findings, Defendants have cherry picked the portions of the Panel’s findings they believe support President Trump’s chosen policy, while withholding all other (potentially contradictory) findings. This puts the Panel’s findings squarely at issue and ripe for discovery. Equity does not permit Defendants to rely upon the published findings of the Panel while frustrating Plaintiffs’ attempts to take discovery on other aspects of the Panel’s work that may support Plaintiffs’ position. This is a classic case of the government disclosing only self-serving communications while blocking discovery of other communications that could be used against it. *See United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (holding “[s]elective disclosure for tactical purposes waives” attorney-client privilege); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 46 (D. Md. 1974) (“A party cannot choose to disclose only so much of allegedly privileged matter as is helpful to his case.”).⁶

D. Even Were Deliberative Process Privilege Applicable, The Operative Balancing Test Still Compels Production Of These Documents.

Even if the deliberative process privilege were applicable to the three categories of documents sought by this motion, and it is not, operation of the balancing test used to test such privilege claims in this Circuit would still favor their production. Deliberative process privilege is both qualified and narrowly construed, and courts use a balancing test to determine whether protection is warranted in a particular case. *FDIC v. Hatziyannis*, 180 F.R.D. 292, 293 (D. Md. 1998). The balancing test requires courts to consider: “(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government’s

⁶ Plaintiffs’ need for access to the full complement of documents considered and developed by the Panel is particularly pressing in light of reports that the White House was directly involved in creating the Implementation Memo (Johnson, *supra*) and that the Panel’s findings were further tainted by the outside influences of anti-transgender lobbyists and activists operating under the imprimatur of Vice President Mike Pence (Ford, *supra*; Stern, *supra*).

role (if any) in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.” *Cipollone v. Liggett Grp. Inc.*, 812 F.2d 1400 (Table), 1987 WL 36515, at *2 (4th Cir. 1987) (internal quotation marks omitted). When the key issue in a lawsuit is the process that led to a particular governmental decision, the balancing test heavily favors the party seeking discovery. *See Holmes v. Hernandez*, 221 F. Supp. 3d 1011, 1021 (N.D. Ill. 2016) (“Where a plaintiff directly challenges a government agency’s deliberative process, courts routinely find that there is a particularized need for disclosure”—particularly where the issue “is the deliberative process.” (internal quotation marks omitted)); *Children First Found., Inc. v. Martinez*, 2007 WL 4344915, at *7 (N.D.N.Y. Dec. 10, 2007) (“[W]hen the decision-making process itself is the subject of the litigation, the deliberative process privilege cannot be a bar to discovery.”); *United States v. Bd. of Educ. of the City of Chi.*, 610 F. Supp. 695, 699–700 (N.D. Ill. 1985) (a party “make[s] a very powerful showing of necessity” where “the decisionmaking process . . . is the case”).

Here, as explained above, there is no question that Defendants’ decision-making “is the case.” *Bd. of Educ. of the City of Chi.*, 610 F. Supp. at 700. And all four of the balancing factors set forth in *Cipollone* favor disclosure. First, the government’s decision-making processes are critical to determining whether the Ban and the implementation policies stemming from it violate Plaintiffs’ equal protection and substantive due process rights. Second, the requested evidence relevant to Defendants’ intent and rationale is available *only* from Defendants. Third, the government’s role is central to this case; Defendants are government officials sued in their official capacities based on their issuance and implementation of a government policy. Fourth, it is unlikely that disclosure of the evidence Plaintiffs seek concerning the decision-making that went into the initial Ban, the Implementation Plan, and the President’s acceptance of that Plan

would hinder future policy discussions. The decision to ban transgender persons from the military has already been made, and disclosure will not chill that deliberative process. Prospectively, the specific circumstances of these deliberations are so unique that disclosure should not chill future legitimate policy discussion.

Defendants have recently filed a purported “administrative record” in this case (ECF 133) and have taken the position that additional information about the decision making process leading to the Implementation Plan is not relevant and that review in this case should be confined to this “administrative record.” ECF 121 at 5-6. As discussed above, in view of the extensive redactions and omission of “[p]rivileged documents, including those reflecting internal agency deliberations,” this “administrative record” is far from adequate. This Court should reject any attempt to limit discovery to the administrative record, consistent with recent rulings by the courts in the parallel *Doe* and *Karnoski* cases. *See Doe v. Trump*, No. 1:17-cv-01597-CKK, ECF 114 at 2 (D.D.C. Apr. 18, 2018) (explaining that because “Plaintiffs assert claims under the Fifth Amendment to the United States Constitution,” the APA’s limitations on discovery do not apply); *Karnoski v. Trump*, No. 2:17-cv-01297-MJP, ECF 235 at 2 (W.D. Wa. Apr. 19, 2018) (“[T]here is no reason for discovery to be confined to the administrative record” because Plaintiffs “raise direct constitutional claims.”).

II. Defendants Have Withheld Deliberative Materials That Bear On Their Challenged Intent, Rationale, And Potential Misconduct.

As demonstrated below, Defendants have withheld documents responsive to a number of Plaintiffs’ discovery requests, and objected to responding to interrogatories that seek materials and information directly relevant to Defendants’ intent and rationale (or lack thereof) in developing and implementing the Transgender Service Member Ban. Defendants’ objections to

these and other document requests and interrogatories on grounds of deliberative process privilege are inappropriate for the reasons described above. Defendants' privilege logs demonstrate that the documents Defendants have withheld contain information that should be disclosed.

A. Defendants' Written Discovery Objections Show That They Have Improperly Invoked Deliberative Process Privilege To Withhold Information And Documents Responsive To Plaintiffs' Requests Regarding The Decisions At Issue In This Case.

Plaintiffs' first set of discovery requests—served on January 3, 2018, nearly four months ago—requested information and documents directly related to the three categories of materials described above. Plaintiffs sought information and documents concerning the “panel of experts,” requesting, *inter alia*:

- “All Documents and Communications Concerning the purpose, composition, structure, research, analysis, findings, and conclusions of the Panel of Experts” (Kies Decl., Ex. 2, RFP No. 15);
- “All Documents and Communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, Including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018” (Kies Decl., Ex. 2, RFP No. 16); and
- “[Identification of] all Documents and Communications Concerning military service by transgender individuals that were requested, received, considered directly or indirectly, or consulted by Defendants—including the Panel of Experts—since January 20, 2017, and, for each such Document, Identify the Person who transmitted it to You and state the Date(s) of transmission and receipt” (Kies Decl., Ex. 1, Interrog. No. 15).

Plaintiffs also sought information and documents relevant to governmental decision-making relating to the announcement of the Transgender Service Member Ban in the July 2017 Tweets and the August 25, 2017 Presidential Memorandum, and up through the subsequent

deliberations that resulted in the Implementation Plan, and the President's acceptance of the Plan, by requesting:

- “All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed that embody, constitute, comprise, or reflect the reaction of the Department of Defense or any of its components (including Military Services), or any individuals within the Department of Defense or its components, to the Tweets” (Kies Decl., Ex. 2, RFP No. 14);
- “[Identification of] all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of, Defendants between June 30, 2016 and August 25, 2017, concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion” (Kies Decl., Ex. 1, Interrog. No. 18); and
- “[Identification of] all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of Defendants from August 25, 2017 through the present Concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion” (Kies Decl., Ex. 1, Interrog. No. 19).

Finally, in addition to the above requests related to the development of the original Ban and the Implementation Plan, which should capture evidence of any outside political or ideological influences on the decision making process, Plaintiffs specifically requested any deliberative materials shared with several of the very outside groups reported to have been involved in the development of the Implementation Plan. Plaintiffs requested:

- “All Documents and Communications Concerning military service by transgender individuals shared between or amongst Defendants and organizations opposed to military service by transgender individuals, Including but not limited to representatives and agents of the “Alliance Defending Freedom,” “Focus on the Family,” the “Family Research Council,” “Heritage Action for America,” and

“Breitbart News,” from January 2017 to the present” (Kies Decl., Ex. 2, RFP No. 13).

All of these requests seek materials directly relevant to Defendants’ intent and rationale underlying the key policy decisions Plaintiffs challenge in this case. Defendants have objected to each and every one of these discovery requests “to the extent” that they seek material protected by the deliberative process privilege. *E.g.*, Kies Decl., Ex. 3. These objections should be overruled as a matter of law in light of the nature of Plaintiffs’ claims in this case. *See In re Subpoena*, 145 F.3d at 1424.

B. Defendants’ Privilege Log Entries Demonstrate They Have Withheld Documents Not Subject To The Deliberative Process Privilege.

Review of Defendants’ redactions and privilege logs confirms that Defendants are withholding numerous documents based on their improper assertions of the deliberative process privilege. Rather than analyzing all redactions or providing a line-by-line review of the logs, Plaintiffs provide here a handful of examples to demonstrate the types of documents Defendants are withholding based on the deliberative process privilege. Because Defendants’ intent and rationale underlying the development and implementation of the Transgender Service Member Ban are at the heart of Plaintiffs’ constitutional claims, the privilege should “not enter the picture at all” (*In re Subpoena*, 145 F.3d at 1425) for these documents.

For example, Defendants are withholding numerous documents (or portions of documents) that relate to the work of the Panel, but that are not reflected in the “administrative record” Defendants recently produced. Review of the documents produced to date has only reinforced the need for Defendants to produce the allegedly “privileged” documents “reflecting internal agency deliberations” that they continue to withhold. For example, a redacted document dated December 14, 2017, is a “memorandum for the record” from Acting Under Secretary of

the Navy Thomas Dee, recording his “dissenting opinion” to conclusions of the Panel. Kies Decl., Ex. 12. The few unredacted portions of the document state that the Panel’s recommendations “are not supported by the data provided to the panel in terms of military effectiveness, lethality, or budget constraints, and are likely not consistent with applicable law.” *Id.* The further description of the dissenting opinion is redacted, apparently based on a claim of deliberative process privilege. Kies Decl., Ex. 18. This dissenting opinion is not mentioned in the February 22 Implementation Plan, nor is it included in the “administrative record” recently produced by Defendants.

Several privilege log entries provide other examples of documents Defendants have withheld solely on the basis of deliberative process privilege:

- The Army is withholding documents bearing the Bates range ARMY_352-383, described as “Presentation to the panel of experts summarizing health and readiness data of Active Duty members with gender dysphoria.” Kies Decl., Ex. 13.
- The Joint Chiefs of Staff privilege log alone contains approximately 65 different entries reflecting documents being withheld that were received by the “Panel of Experts.” *Id.*, Ex. 14.
- The Air Force is withholding documents bearing the Bates range AF_00000446-448, described as “UPDATE & DECISION: Transgender Working Group Meeting in Prep for Panel of Experts Prep Session (Read: HTML).msg,” and numerous other documents described as “RE: REQUEST -- Support to the Panel of Experts Reviewing DoD Policy on Service by Transgender Persons.msg,” see, e.g., AF_000010454-10456. *Id.*, Ex. 15.
- The Department of Defense is withholding documents bearing the Bates range SOPER DEP RFP_21 01268-01271, described as “E-mail re: Transgender Panel of Experts Question (with Attachments).” *Id.*, Ex. 5.
- The Navy is withholding a document bearing the Bates number Navy_00042147, described as “Request for information for panel of experts,” as well as a document bearing the Bates range Navy_000004460, described as “Request for Military Medical Providers to Brief Medical Personnel Services (MEDPERS) and the Secretary of Defense (SECDEF) Panel of Experts.” *Id.*, Ex. 16.

Based on the information provided, these documents appear to be deliberative materials related to work done by the Panel to evaluate the fitness of transgender service members and data or reports submitted to the Panel. These materials are likely to contain evidence bearing on Defendants' intent in forming the policies at issue in this case, the process by which Defendants developed their recommendations, and potentially illegitimate political motivations suggesting misconduct. In view of the central role of Defendants' intent and rationale in this case, the deliberative process privilege does not apply at all to such documents. In addition, Defendants have waived privilege to the extent they have disclosed or incorporated these materials by reference into the Implementation Report. Materials of this type should be produced.

Defendants have also withheld numerous documents created during the time period when the original Transgender Service Member Ban was being considered and formulated. For example:

- The Navy is withholding a document bearing the Bates number NAVY_000003363, described as "Transgender Policy Status Briefing Card" and dated July 26, 2017, the same day the July 2017 tweets were sent. *Id.*, Ex. 16.
- The Defense Health Agency is withholding numerous documents generated between July 24 and 26, 2017 identified as "Intradepartment email concerning implementation of transgender policy." *Id.*, Ex. 17.
- The Army is withholding documents dated August 10, 2017 bearing the Bates range Army_722-724, and described as "Execution matrix used in preparation for the release of the Presidential Memorandum;" documents dated August 17, 2017 bearing the Bates range ARMY_1300-04, described as "Presentation discussing the impact of transgender service on readiness;" and documents dated August 17, 2017 bearing the Bates range ARMY_725-728, described as "Presentation showing timeline of events in preparation for release of the Presidential Memorandum." *Id.*, Ex. 13.

These are but a handful of illustrative examples; there are many more similar log entries. The examples demonstrate that Defendants are withholding materials likely to contain evidence

of their subjective intent and rationale in developing the original policy at issue in this case—the policy Defendants subsequently worked to implement at the President’s direction. Materials of this type are not protected by the deliberative process privilege and should be produced.

Because Defendants last produced a privilege log to Plaintiffs on March 20, Plaintiffs are unable to determine exactly what other materials related to the Implementation Plan and President Trump’s acceptance of the Plan Defendants may be withholding, and it is unclear when Defendants will produce further documents. As discussed above, however, the “administrative record” Defendants produced makes clear that they continue to withhold deliberative materials related to the Panel’s work to develop and support the Implementation Plan. Such deliberative materials bear directly on Defendants’ subjective intent and rationale in formulating the policies challenged in this lawsuit, and the deliberative process privilege therefore does not apply. And having publicly relied on such materials in preparing the Implementation Plan—and by citing liberally to Panel findings and materials throughout the Implementation Report—Defendants have put such material at issue. To the extent any deliberative materials have been disclosed or incorporated by reference into the Implementation Report, whatever privilege may have existed has been waived. Accordingly, the Court should declare that the deliberative process privilege does not protect information and documents relating to the decisions at issue in this case, and order Defendants to make a supplemental production consistent with that declaration.

III. Requested Relief

For the reasons explained in Part I above, the deliberative process privilege does not attach to: (1) deliberative materials relating to the President’s original July 2017 Tweets and August 2017 Memorandum; (2) deliberative materials relating to the activities of DoD’s so-called “panel of experts” and its working groups tasked with developing a plan to study and

implement the President's decision; and (3) deliberative materials relating to the DoD's February 2018 Implementation Plan and the President's acceptance of that Plan in his March 23, 2018 memorandum, including materials reflecting any participation or interference in that process by anti-transgender activists and lobbyists. Plaintiffs request that the Court make findings and issue a declaration to this effect.

Plaintiffs further request that the Court order Defendants, no later than May 15, 2018, to: (1) supplement their interrogatory responses and document production to include deliberative information and documents relating to these decisions that they have improperly withheld based on the deliberative process privilege; and (2) comply with their obligation under Rule 26(e) to timely supplement their discovery responses to take account of developments since they served their initial responses. Plaintiffs also request that the order state that, to the extent that Defendants respond to interrogatories by reference to their document production, they must adhere to Federal Rule of Civil Procedure 33(d)(1), by specifying documents "in sufficient detail to enable [Plaintiffs] to locate and identify them as readily as [Defendants] could."

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion to compel. A proposed order is submitted herewith.

CERTIFICATE OF GOOD-FAITH CONFERENCE OF COUNSEL

Pursuant to Federal Rule of Civil Procedure 37(a)(1) and Local Rule 104.7, Plaintiffs' counsel hereby certify that they have conferred in good faith regarding the subject of this motion, as described in more detail in the accompanying Declaration of Marianne F. Kies.

On February 21, 2018, Plaintiffs' counsel Augustus Golden sent a letter to Defendants' counsel Ryan Parker outlining numerous deficiencies in Defendants' discovery objections and privilege logs. Kies Decl., Ex. 8. In this letter, Plaintiffs explained that the deliberative process privilege does not apply where, as here, "a plaintiff's cause of action turns on the government's intent." *Id.* (quoting *In re Subpoena*, 145 F.3d at 1424). Defendants did not substantively respond to Plaintiffs' letter; instead, they attempted to shift the burden back to Plaintiffs to challenge specific log entries for Defendants' re-consideration—a highly burdensome and in some cases virtually impossible task given the inadequate descriptions in the log entries. Kies Decl. ¶¶ 16–17.

On March 13, 2018, Plaintiffs' counsel visited the offices of Defendants' counsel for a meet and confer session that lasted from approximately 3:00 p.m. to 4:00 p.m. EST. *Id.* ¶ 18. In attendance were Mark Lynch, Marianne Kies, and Mark Neuman-Lee, for Plaintiffs, and Ryan Parker and other Department of Justice attorneys, for Defendants. *Id.* That meeting did not resolve the parties' dispute, and following that conversation, Plaintiffs provided a further written description of the deficiencies in Defendants' production by letter dated March 16, 2018, requesting a response on several issues by no later than March 23, 2018. *Id.*, Ex. 10. No response has been provided. Kies Decl. ¶ 19.

On April 9, 2018, Ms. Kies wrote to Mr. Parker, repeating Plaintiffs' request for a response to the March 16 letter, and further explaining why Defendants' assertions of the

deliberative process privilege fail as to documents related to the decision-making at issue in this case and the Panel study. Kies Decl., Ex. 11. No response has been provided to this letter, either. Kies Decl. ¶ 20.

The matters addressed in this motion thus require resolution by the Court.

Dated: April 23, 2018

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EXHIBIT 8

With Pentagon Policy on Hold, Transgender Troops, Advocates Speak Out

[M military.com/daily-news/2018/03/29/pentagon-policy-hold-transgender-troops-advocates-speak-out.html](https://www.military.com/daily-news/2018/03/29/pentagon-policy-hold-transgender-troops-advocates-speak-out.html)

March 29, 2018



Lieutenant Colonel Bryan (Bree) Fram is an active duty aeronautical engineer and transgender service member in the US Air Force promoted at the National Archives and reaffirming his oath administered by Congresswoman Madeleine Bordallo (D-GU). (SPC S. NIC MALONE - U.S. ARMY)

Military.com 29 Mar 2018 By Richard Sisk

Despite a recent White House memo announcing the intent to ban most transgender people from military service, ongoing court cases are keeping the military in a holding pattern on the issue.

While Defense Department officials say nothing has changed or will change regarding transgender recruitment or retention until the courts decide, a debate continues to rage over just what the costs and implications are regarding allowing transgender troops to serve openly.

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Several active-duty transgender troops, including an officer who advised the Pentagon's "panel of experts" on the matter, said the costs and risks are not as high as some have claimed.

"We will continue to access and retain" transgender individuals in compliance with the rulings of four federal courts despite directives from President Donald Trump and Defense Secretary Jim Mattis based on the recommendations of a thus-far secret Pentagon panel of experts, said Maj. Dave Eastburn, a Pentagon spokesman.

Related content:

Eastburn said two transgender individuals had been recruited under court orders to resume enlistments Jan. 1, and no transgender troops currently serving have been forced out pending a final resolution of the legal actions.

Active-duty Air Force Lt. Col. Bryan "Bree" Fram, a 15-year intelligence officer and astronautical engineer, was among nine transgender service members who met with the Pentagon's panel to make the case that they be allowed to continue to serve.

Fram described coming out to colleagues when then-Defense Secretary Ashton Carter in June 2016 directed that transgender troops could serve openly.

"One by one, they came up to me and said, 'It's an honor to serve with you,' " he said.

Fram said he told the Pentagon's panel of experts that the views he was expressing were his own and do not reflect those of the Air Force or the Defense Department.

He declined to give specifics but said, "If people are forced from the military, it would be incredibly unfortunate to be treated differently than any other American. I'm definitely hopeful that, at some point, legislative or judicial action will allow us to continue to serve."

In an article for the Spart*A advocacy group in response to the Pentagon's actions, Fram wrote that despite the proposed ban, "transgender service members will lace up their boots and go to work in service to this nation, just as they have done for their entire career.

"However, those same service members are faced with a reversal of policy that removes their opportunity to better themselves and tells them to leave the military or, if in a narrow segment, stay as a second-class citizen."

Fram took particular issue with the Pentagon study's assertion that transgender service members would be at greater risk of suicide due to mental stress over their sexual identities.

"As far as I am aware, there have been no known suicides of active-duty transgender service members since the policy change," he wrote, referring to the 2016 decision under Carter that permitted transgender troops to serve openly.

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On Tuesday, for the second time in as many days, Mattis declined comment on an order announced late Friday night by the DoD and Trump. Advocacy groups claim that order would effectively ban transgender individuals from serving.

"I really don't want to go into that," Mattis said at an off-camera session with Pentagon reporters. "I'm not going to discuss transgender," he added, while court proceedings are underway.

On Monday, Mattis said the transgender directives from the DoD and the White House are part of the overall effort to "build the most lethal service."

But Matt Thorn, head of the OutServe-SLDN (Servicemembers Legal Defense Network) advocacy group, said the proposals would have the opposite effect.

"This is a categorical ban" on transgender individuals serving in the military, Thorn said, and the result would be to "undermine our readiness and lethality."

Panel of Experts

In August, Trump renewed his call for a ban but said he would await the findings of a study ordered by Mattis from a panel of experts, including combat veterans.

The Justice Department has refused to name the experts, but a 46-page report on the panel's findings was issued by the office of Robert Wilkie, undersecretary of defense for personnel and readiness.

In a memo to Trump, Mattis said the study group "included the representatives of the service Secretaries and senior military officers, many with combat experience."

In a memo concurring with Mattis, Trump said the study group's recommendations on transgender service would also apply to the Coast Guard, which is under the Department of Homeland Security.

Trump said he agrees with Mattis that "transgender persons with a history or diagnosis of gender dysphoria -- individuals who the policies state may require substantial medical treatment, including medications and surgery -- are disqualified from military service except under limited circumstances."

Gender Dysphoria

Gender dysphoria is generally described as the condition or feeling that one's emotional and psychological identity as male or female is the opposite of one's biological gender.

In his memo to Trump, Mattis also referenced gender dysphoria. He said the Obama administration had "adopted a policy that allowed for the accession and retention in the Armed Forces of transgender persons who had a history or diagnosis of gender dysphoria. The policy also created a procedure by which such Service members could change their gender."

Mattis said, "There are substantial risks associated with allowing the accession and retention of individuals with a history or diagnosis of gender dysphoria" who would "require, or have already undertaken, a course of treatment to change their gender."

Allowing transgender troops to continue to serve "could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality," he wrote.

The Pentagon's study can be read [here](#); Trump's memo to Mattis can be read [here](#).

In a statement, Dr. Arthur Evans, head of the American Psychological Association, rejected the conclusions of the White House and Pentagon on gender dysphoria and the ability of transgender people to serve.

Evans said the APA "is alarmed by the administration's misuse of psychological science to stigmatize transgender Americans and justify limiting their ability to serve in uniform and access medically necessary health care."

"Substantial psychological research shows that gender dysphoria is a treatable condition, and does not, by itself, limit the ability of individuals to function well and excel in their work, including in military service," he said.

Medical Costs

One of the arguments against the service of transgender troops involves the medical costs of keeping them in the ranks. But Fram said the military currently spends about \$80 million annually to treat erectile dysfunction, including about \$40 million for Viagra.

"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," Trump said in his series of tweets last year.

However, an [analysis by Military Times](#) showed that total military spending on erectile dysfunction amounts to \$84 million annually, or about 10 times the cost of the annual transition-related medical care for active-duty transgender service members.

[Navy](#) Lt. Cmdr. Blake Dremann, a 12-year active-duty supply officer who underwent transition from female to male in the military, said that as a female he helped with the integration of women aboard submarines.

Dremann, now stationed at [Fort Belvoir](#), Virginia, served more than three years aboard the [Ohio-class](#) ballistic submarine *Maine*, and went on patrol five times. He was also among the transgender troops who met with the Pentagon's panel of experts.

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Dremann, who made clear that the views he was expressing were his own and not those of the Navy, said he stressed that medical treatments for transgender service members would not impact readiness any more than a person being treated for a shoulder or a leg injury.

During his own transition from female to male, Dremann said he never missed training or a deployment.

"You just don't miss deployments," he said. "You handle your medical problems" to comply with the needs of the service.

Dremann, president of the Spart*A advocacy group, which represents about 800 transgender active-duty, reserve and National Guard service members, said the latest memos from the White House and Pentagon, and the ongoing court cases, had put transgender service members "in a technical state of limbo" and had already led to confusion among commanders.

Dremann said he has had to advise several transgender service members whose commanders mistakenly thought they were to begin administrative separations immediately.

Court Rulings

OutServe and other advocacy groups have joined the suit brought by Washington State Attorney General Bob Ferguson in federal district court in Seattle (*Karnoski v. Trump*) that won a temporary injunction against any changes in the current rules.

On Tuesday, the plaintiffs argued to make the injunction permanent. Judge Marsha Pechman withheld a ruling but ordered both sides to submit briefs on constitutional questions.

She also signaled the government will have an uphill fight in changing the current rules enacted under the Obama administration.

Pechman dismissed the main argument of Justice Department lawyer Ryan Parker that the Pentagon should be given deference on issues of national defense. Pechman noted that the courts once gave deference in allowing the military to segregate troops by race, to ban women from serving, to ban women from combat, and to ban gays.

"In retrospect, all of that deference was in error," Pechman said, according to The Associated Press.

In testimony in the Seattle case, transgender Army Staff Sgt. Catherine Schmid, stationed at Joint Base Lewis-McChord, said the Trump administration proposals would deny her the civil right to serve the country in uniform.

"When people say that transgender can't serve, that our units are negatively influenced by our presence, or that my medical care makes me unable to do the most basic parts of my duties, what they're really saying is that I'm not capable of performing the duties of the job for which I've been trained," Schmid said.

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In addition to the Seattle case, federal district courts in Washington, D.C.; Baltimore; and Riverside, California, have all initially ruled against the government on transgender military service.

The court cases were the aftermath of Trump's Tweets last July calling for a ban on transgender individuals serving or being recruited. The Tweets caught the Pentagon by surprise, and Joint Chiefs Chairman Gen. Joseph Dunford quickly issued a memo to the services telling them to stand pat until there was clarification.

Opposition

Advocacy groups lined up to reject the Pentagon's action and join in the legal battles to reverse the directives.

The Trump administration's "continued insistence on viciously targeting our military families for discrimination is appalling, reckless, and unpatriotic," said Ashley Broadway-Mack, president of the American Military Partner Association and spouse of an active-duty U.S. Army officer.

"Military experts already thoroughly studied this issue and found transgender service members should be able to serve openly with dignity and honor -- as they proudly do now -- with the full support they need and deserve," Broadway-Mack said in a statement.

One of the most conservative members of Congress, Sen. Joni Ernst, R-Iowa, a member of the Senate Armed Services Committee and an Army veteran of Iraq, also expressed doubts about the moves against transgender individuals in the ranks.

On CBS-TV's "Face the Nation" program on Sunday, Ernst said, "I've asked transgenders [sic] myself, if you were willing to lay down your life beside mine, I would welcome you into our military."

Ernst said that transgender individuals would have to meet the standards of the military, "but if there are transgenders [sic] that meet those qualifications, certainly I would gladly have them serve in our United States military."

Sen. Jack Reed, D-Rhode Island, a former Army Ranger and ranking member of the committee, said of the ban, "President Trump may think it helps him with his political base, but it's a real disservice to the professionalism of all our troops."

"Thousands of transgender soldiers are currently serving in all branches of the U.S. Armed Forces, and the Trump administration still has not made a compelling, fact-based case for kicking them out, or preventing highly qualified Americans from enlisting," Reed said.

Rand Study

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A previous study by the Rand Corp. commissioned by the DoD backed former Defense Secretary Carter's decision to allow transgender individuals to serve openly and said medical costs would be minimal.

Rand estimated that medical treatments for transgender troops would cost between \$2.4 million and \$8.4 million in an annual budget of more than \$6 billion for military health care.

"The implication is that even in the most extreme scenario that we were able to identify, we expect only a 0.13 percent [\$8.4 million out of \$6.2 billion] increase in [military] health care spending," the Rand report said.

The 46-page report from the Pentagon's panel of experts disputed much of the Rand study while at the same time citing Rand's research to support different conclusions.

Thorn, of OutServe-SLDN, charged that the Pentagon study amounted to "an attempt to ban a problem that doesn't really exist. Their own data doesn't even support their claims" on the burden to the military of having transgender troops serving.

Various estimates from advocacy groups and Rand have concluded that there are anywhere from 5,000 to 15,000 transgender individuals on active duty, or in the Guard and reserves.

The Pentagon's report said that "8,980 service members reportedly identify as transgender, and yet there are currently only 937 active-duty service members who have been diagnosed with gender dysphoria since June 30, 2016," when Carter allowed them to serve openly.

"In any event, rates for genital surgery are exceedingly low -- two percent of transgender men and 10 percent of transgender women," the report said.

The Pentagon report said that "of the 424 approved service member treatment plans available for study, 388 included cross-sex hormone treatment, but only 34 non-genital sex reassignment surgeries and one genital surgery have been completed thus far."

In addition, "only 22 service members have requested a waiver for a genital sex reassignment surgery," the report said.

"Given the limited data, however, it is difficult to predict with any precision the impact on readiness of allowing gender transition," it said.

Conflicting Views

The panel of experts received conflicting views from commanders on the impact of transgender service on unit cohesion, deployments and readiness.

"On one hand, some commanders with transgender service members reported that, from the time of diagnosis to the completion of a transition plan, the transitioning service members would be non-deployable for two to two-and-a-half years," the panel of experts said.

"On the other hand, some commanders, as well as transgender service members themselves,

In a blog post, Rand senior political scientist Agnes Gereben Schaefer defended Rand's research and disputed the Pentagon study on the effects of transgender service on deployability and unit cohesion.

"Our analysis estimated that the readiness impact of transition-related treatment would lead to a loss of less than 0.0015 percent of total available labor-years in the active component," Gereben Schaefer said.

As for unit cohesion, she said the available research is mixed on how "friendship, liking, caring and closeness among group members" impacts performance.

"In other words, unit members' ability to contribute effectively to the efforts of the group matters more for unit performance than unit member similarity or liking for one another," she said.

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BLUEPRINTS FOR SOUND PUBLIC POLICY

DoD's Rationale for Reinstating the Transgender Ban Is Contradicted by Evidence

Vice Admiral Donald C. Arthur, USN (Ret.)
Former Surgeon General of the U.S. Navy

Major General Gale Pollock, USA (Ret.)
Former Acting Surgeon General of the U.S. Army

Rear Admiral Alan M. Steinman, USPHS/USCG (Ret.)
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Director, Palm Center

April 2018 (updated May 4, 2018)

PALM CENTER

BLUEPRINTS FOR SOUND PUBLIC POLICY

Executive Summary

On March 23, 2018, the White House released a report, endorsed by Defense Secretary James Mattis, entitled, “Department of Defense Report and Recommendations on Military Service by Transgender Persons” (“Implementation Report”). The 44-page document contains recommendations that, if enacted into policy, would have the effect of banning many transgender individuals from military service. As of the writing of this study, inclusive policy for transgender individuals remains in effect because federal courts have enjoined the administration from reinstating the ban, and because the Report’s recommendations have not yet been entered into the Federal Register or enacted into policy. The Justice Department, however, has asked the courts to allow the administration to reinstate the ban.

Given the possibility that the Implementation Report’s recommendations could become policy, it is important to assess the plausibility of DoD’s justification for reinstating the ban. This report undertakes that assessment and finds its rationale wholly unpersuasive.

The Implementation Report claims that inclusive policy would compromise medical fitness because there is “considerable scientific uncertainty” about the efficacy of medical care for gender dysphoria (incongruity between birth gender and gender identity), and because troops diagnosed with gender dysphoria are medically unfit and less available for deployment. Cohesion, privacy, fairness, and safety would be sacrificed because inclusive policy blurs the “clear lines that demarcate male and female standards and policies.” Finally, according to the Report, financial costs would burden the military’s health care system because the annual cost of medical care for service members diagnosed with gender dysphoria is three times higher than for other troops.

After carefully considering the recommendations and their justification in the Implementation Report, we have concluded that the case for reinstating the transgender ban is contradicted by ample evidence clearly demonstrating that transition-related care is effective, that transgender personnel diagnosed with gender dysphoria are deployable and medically fit, that inclusive policy has not compromised cohesion and instead promotes readiness, and that the financial costs of inclusion are not high. Specifically, we make the following eight findings:

1. **Scholars and experts agree that transition-related care is reliable, safe, and effective.** The Implementation Report makes a series of erroneous assertions and mischaracterizations about the scientific research on the mental health and fitness of individuals with gender dysphoria. Relying on a highly selective review of the evidence, and distorting the findings of the research it cites, the Report

inaccurately claims there is “considerable scientific uncertainty” about the efficacy of transition-related care, ignoring an international consensus among medical experts that transition-related care is effective and allows transgender individuals to function well.

2. **The proposed ban would impose double standards on transgender service members, applying medical rules and expectations to them that do not apply to any other members.** The Implementation Report’s claim that individuals who transition gender are unfit for service only appears tenable when applying this double standard. When service members diagnosed with gender dysphoria are held to the same standards as all other personnel, they meet medical, fitness, and deployability standards.
3. **Scholarly research and DoD’s own data confirm that transgender personnel, even those with diagnoses of gender dysphoria, are deployable and medically fit.** Research shows that individuals who are diagnosed with gender dysphoria and receive adequate medical care are no less deployable than their peers. DoD’s own data show that 40 percent of service members diagnosed with gender dysphoria deployed to the Middle East and only one of those individuals could not complete deployment for mental health reasons.
4. **The Implementation Report offers no evidence that inclusive policy has compromised or could compromise cohesion, privacy, fairness, or safety.** Despite the lack of evidence, DoD advances these implausible claims anyway, citing only hypothetical scenarios and “professional military judgment.” Yet the military’s top Admirals and Generals have explicitly stated that, while the impact on cohesion is being “monitored very closely,” they have received “precisely zero reports of issues of cohesion, discipline, morale,” and related concerns after two years of inclusive service.
5. **The Report’s contention that inclusive policy could compromise cohesion, privacy, fairness, and safety echoes discredited rationales for historical prohibitions against African Americans, women, and gays and lesbians.** In each of these historical cases, military leaders advanced unsupported arguments about cohesion, privacy, fairness, and safety. In each case, evidence showed that inclusive policies did not bring about the harmful consequences that were predicted, suggesting the fears were misplaced and unfounded.
6. **Research shows that inclusive policy promotes readiness, while exclusion harms it.** A more rigorous and comprehensive assessment of the implications of transgender service shows that a policy of equal treatment improves readiness by promoting integrity, reinforcing equal standards, increasing morale for minorities, and expanding the talent pool available to the military, while banning transgender service or access to health care harms readiness through forced dishonesty, double standards, wasted talent, and barriers to adequate care.

7. **The Implementation Report fails to consider the readiness benefits of inclusive policy or the costs to readiness of the proposed ban.** All policy changes involve costs and benefits, yet DoD's research focuses solely on the costs of inclusion, entirely ignoring the readiness benefits of inclusion and the costs of exclusion.
8. **The Implementation Report's presentation of financial cost data inaccurately suggests that transition-related care is expensive.** The Report states that medical costs for troops with gender dysphoria are higher than average, but isolating any population for the presence of a health condition will raise the average cost of care for that population. In truth, DoD's total cost for transition-related care in FY2017 was just \$2.2 million, less than one tenth of one percent of its annual health care budget for the Active Component, amounting to just 9¢ (nine cents) per service member per month, or \$12.47 per transgender service member per month.

Introduction¹

On March 23, 2017, the White House released “Department of Defense Report and Recommendations on Military Service by Transgender Persons” (“Implementation Report”), a 44-page document whose recommendations would, if enacted into policy, have the effect of banning many transgender individuals from military service. Alongside the Implementation Report, the White House released a “Memorandum for the President” in which Defense Secretary James Mattis endorsed the Implementation Report’s recommendations. As of the writing of this study, inclusive policy for transgender individuals remains in effect because federal courts have enjoined the administration from reinstating the ban, and because the Report’s recommendations have not yet been entered into the Federal Register or enacted into policy. Although inclusive policy remains in effect at this time, the Justice Department has asked courts to dissolve the preliminary injunctions that prevent the administration from banning transgender service members. If courts grant the request, the administration will almost certainly reinstate the ban by implementing recommendations contained in the Implementation Report.

Given the possibility that the Implementation Report’s recommendations could be enacted into policy, it is important to assess the plausibility of DoD’s justification for the proposed reinstatement of the ban. According to DoD’s Implementation Report, inclusive policy for transgender service members could compromise the medical fitness of the force; undermine unit cohesion, privacy, fairness, and safety; and impose burdensome financial costs. According to the Report, inclusive policy would compromise medical fitness because there is “considerable scientific uncertainty” about the efficacy of medical care for gender dysphoria (incongruity between birth gender and gender identity), and because troops diagnosed with gender dysphoria are medically unfit and less available for deployment. Cohesion, privacy, fairness, and safety would be sacrificed because inclusive policy “blur[s] the clear lines that demarcate male and female standards and policies.”² Finally, according to the Report, financial costs would burden the military’s health care system because the annual cost of medical care for service members diagnosed with gender dysphoria is three times higher than for other troops.

After carefully considering the recommendations and their justification in the Implementation Report, we have concluded that the case for reinstating the transgender ban is contradicted by the evidence: (1) Scholars and experts agree that transition-related care is, in fact, reliable, safe, and effective; (2) The proposed ban would impose double standards on transgender service members, in that DoD would apply medical rules and expectations to them that it does not apply to any other members; (3) Scholarly research as well as DoD’s own data confirm that transgender personnel, even those with diagnoses of gender dysphoria, are deployable and medically fit; (4) The Report does not offer any evidence that inclusive policy has compromised or could compromise cohesion, privacy, fairness, and safety, and assertions and hypothetical scenarios offered in support of these concerns are implausible; (5) The Report’s contention that inclusive policy could compromise cohesion, privacy, fairness, and safety echoes discredited rationales for historical prohibitions against African Americans, women, and gays and lesbians; (6) A more comprehensive assessment of costs and benefits indicates that inclusive policy

promotes readiness, while the proposed ban would compromise it; (7) The Report fails to consider the benefits of inclusive policy or the costs of the proposed ban; and (8) The Report's presentation of financial cost data inaccurately suggests that transition-related care is expensive.

Gender Transition Is Effective

The Implementation Report relies on a series of erroneous assertions and mischaracterizations about the substantial scientific research on the mental health and fitness of transgender individuals with gender dysphoria. As a result, it draws unfounded conclusions about the efficacy of gender transition and related care in successfully treating gender dysphoria and the health conditions that are sometimes associated with it. The Implementation Report argues that there is "considerable scientific uncertainty" about the efficacy of transition-related care, and that the military cannot be burdened with a group of service members for whom medical treatment may not restore medical fitness and "fully remedy" symptoms. This assertion, however, relies on a highly selective review of the relevant scientific evidence. In truth, the data in this field show a clear scholarly consensus, rooted in decades of robust research, that transgender individuals who have equal access to health care can and do function effectively.³

Consensus about the efficacy of care

An international consensus among medical experts affirms the efficacy of transition-related health care. The consensus does not reflect advocacy positions or simple value judgments but is based on tens of thousands of hours of clinical observations and on decades of peer-reviewed scholarly studies. This scholarship was conducted using multiple methodologies, study designs, outcome measures, and population pools widely accepted as standard in the disciplinary fields in which they were published. In many cases, the studies evaluated the complete universe of a country or region's medically transitioning population, not a selection or a sample.

The American Medical Association (AMA) has stated that "An established body of medical research demonstrates the effectiveness and medical necessity of mental health care, hormone therapy and sex reassignment surgery as forms of therapeutic treatment" for those with gender dysphoria. In response to the publication of DoD's Implementation Report, the AMA reiterated its view that "there is no medically valid reason—including a diagnosis of gender dysphoria—to exclude transgender individuals from military service." The AMA stated that the Pentagon's rationale for banning transgender service "mischaracterized and rejected the wide body of peer-reviewed research on the effectiveness of transgender medical care."⁴

The American Psychological Association responded to the publication of the Implementation Report by stating that "substantial psychological research shows that gender dysphoria is a treatable condition, and does not, by itself, limit the ability of individuals to function well and excel in their work, including in military service." A statement released by six former U.S. Surgeons General cited "a global medical

consensus” that transgender medical care “is reliable, safe, and effective.” The American Psychiatric Association has recognized that “appropriately evaluated transgender and gender variant individuals can benefit greatly from medical and surgical gender transition treatments.” The World Professional Association for Transgender Health has stated that gender transition, when “properly indicated and performed as provided by the Standards of Care, has proven to be beneficial and effective in the treatment of individuals with transsexualism, gender identity disorder, and/or gender dysphoria” and that “sex reassignment plays an undisputed role in contributing toward favorable outcomes” in transgender individuals.⁵

The global consensus reflected in this scholarship—that gender transition is an effective treatment for gender dysphoria—is made clear in numerous comprehensive literature reviews conducted across the last thirty years (which themselves confirm conclusions reached in earlier research). By conducting systematic, global literature searches and classifying the studies generated by the search, researchers and policymakers can avoid basing conclusions and policies on cherry-picked evidence that can distort the full range of what is known by scholars in the field.

Most recently, researchers at Cornell University’s “What We Know Project” conducted a global search of peer-reviewed studies that addressed transgender health to assess the findings on the impact of transition-related care on the well-being of transgender people. The research team conducted a keyword search that returned 4,347 articles on transgender health published over the last 25 years. These were evaluated by reading titles, abstracts, and text to identify all those that directly address the impact of transition-related care on overall well-being of transgender individuals. Of the final 56 peer-reviewed studies that conducted primary research on outcomes of individuals who underwent gender transition, the team found that 52, or 93 percent, showed overall improvements, whereas only 4, or 7 percent, found mixed results or no change. No studies were found that showed harms. The research team concluded there was a “robust international consensus in the peer-reviewed literature that gender transition, including medical treatments such as hormone therapy and surgeries, improves the overall well-being of transgender individuals.”⁶

The “What We Know” researchers assessed evidence from the last 25 years because it represents the most recent generation of scholarship. But the consensus dates to well before this period. In 1992, one of the first comprehensive literature reviews on transitioning outcomes was published in Germany. It examined 76 follow-up studies from 12 countries published between 1961 and 1991, covering more than 2,000 individuals. The review concluded that overall outcomes of gender transition were positive, stating that “sex reassignment, properly indicated and performed, has proven to be a valuable tool in the treatment of individuals with transgenderism.”⁷ A 1999 study notes that, throughout the 1990s, comparative research found uniformly positive outcomes from gender transition surgery, stating: “A review of postoperative cases [during this decade] concluded that transsexuals who underwent such surgery were many times more likely to have a satisfactory outcome than transsexuals who were denied this surgery.”⁸

The positive results of research on transition-related care have only grown more robust with time. For more detailed information on the global consensus that transition-related care is effective, please see the Appendix.

DoD's critique of efficacy literature is contradicted by evidence

The Implementation Report claims that permitting service by transgender individuals treated for gender dysphoria poses an unacceptable risk to military effectiveness because “the available scientific evidence on the extent to which such treatments fully remedy all of the issues associated with gender dysphoria is unclear.” The Report argues that the evidence that does exist is insufficient or of too poor quality to form a robust consensus. In support of that claim, the Implementation Report cites one government report by the U.S. Centers for Medicare and Medicaid Services (CMS) concluding that there is “not enough high quality evidence to determine whether gender reassignment surgery improves health outcomes” for individuals with gender dysphoria. In addition, the Implementation Report cites two literature reviews and one research study suggesting that the quality of efficacy evidence is low.

Yet DoD's findings rely on a selective reading of scholarship. Despite decades of peer-reviewed research, the Implementation Report could identify only four studies to sustain its conclusion. Critically, even these four studies, supposedly representing the best evidence documenting the uncertainty about transition-related care's efficacy, all conclude that such care mitigates symptoms of gender dysphoria. As we show below, these four studies do not sustain the Implementation Report's assertion about scientific uncertainty.

Before addressing each study that the Implementation Report relies on individually, several observations about standards of evidence require elaboration. To begin, the Implementation Report's critique that efficacy studies are not randomized controlled trials does not, in and of itself, impeach the quality or the force of the evidence. The Implementation Report places considerable weight on the absence of randomized controlled trials in the efficacy literature, but it fails to acknowledge that there are many criteria for assessing the quality of clinical research and many acceptable study designs. The CMS study that the Implementation Report relies on to indict the efficacy literature explains that while “randomized controlled studies have been typically assigned the greatest strength, . . . a well-designed and conducted observational study with a large sample size may provide stronger evidence than a poorly designed and conducted randomized controlled trial.” CMS concludes that “Methodological strength is, therefore, a multidimensional concept that relates to the design, implementation, and analysis of a clinical study.”⁹

Elsewhere, CMS explains that random trials are not the only preferred form of evidence, which can include “randomized clinical trials or other definitive studies.”¹⁰ CMS continues that other forms of evidence can support Medicare policy as well, including “scientific data or research studies published in peer-reviewed journals” and “Consensus of expert medical opinion.”¹¹ Finally, there is a good reason why the efficacy literature

does not include randomized controlled trials of treatments for gender dysphoria: the condition is rare, and treatments need to be individually tailored. Given these circumstances, randomized controlled trials are unrealistic.¹²

The Implementation Report mentions four times that transition-related care does not “fully remedy” symptoms of gender dysphoria, but that is not a standard that the military or other public health entities apply to efficacy evaluation. Using this phrase falsely implies that the military enjoys a level of complete certainty about the medical evidence on which it relies in all other areas of health policy formulation. Yet as six former U.S. Surgeons General explain in a recent response to the Implementation Report, “An expectation of certainty is an unrealistic and counterproductive standard of evidence for health policy—whether civilian or military—because even the most well-established medical treatments could not satisfy that standard. Indeed, setting certainty as a standard suggests an inability to refute the research.”¹³ Many medical conditions are not categorically disqualifying for accession or retention, and none come with a guarantee that available treatments always “fully remedy” them, suggesting that a double standard is being applied to the transgender population. As documented above, decades of research confirm the efficacy of medical treatments for gender dysphoria, and recent research underscores that as treatments have improved and social stigma has decreased, transgender individuals who obtain the care that they need can achieve health parity with non-transgender individuals.

Parallel to its “fully remedy” double standard, the Implementation Report attempts to indict the efficacy literature because studies do not “account for the added stress of military life, deployments, and combat.”¹⁴ Given the historical transgender ban, it is unclear how efficacy literature could ever meet this standard, as DoD did not allow treatment for gender dysphoria while the ban was in effect, so service members could not have participated as subjects in efficacy studies. Generally, service members are not subjects in civilian research studies, and while service member medical and performance data, such as disability separation statistics, are studied to inform policy decisions about accession standards, civilian studies on the efficacy of medical treatments are not.¹⁵

CMS Study

The Implementation Report relies heavily on a 2016 CMS review of literature to sustain its claim about scientific uncertainty concerning the efficacy of gender transition surgery. According to the Implementation Report, CMS “conducted a comprehensive review of the relevant literature, [including] over 500 articles, studies, and reports, [and] identified 33 studies sufficiently rigorous to merit further review.” It then cited CMS’s conclusion that “the quality and strength of evidence were low.”¹⁶

Yet the Implementation Report’s interpretation and application of the CMS findings are highly misleading. By omitting a crucial point of context, the Implementation Report implies that CMS ultimately found insufficient evidence for the efficacy of gender reassignment surgery, when in fact it found the opposite. That point of context turns on the distinction between negative and affirmative National Coverage Determinations

(NCDs). Negative NCDs are blanket denials of coverage that prohibit Medicare from reimbursing for the cost of medical treatment. Prior to 2014, a negative NCD prohibited Medicare from covering the cost of gender reassignment surgery, but a Department of Health and Human Services Appeals Board (“Board”) overturned the NCD after a comprehensive review of the efficacy literature determined surgery to be safe, effective, and medically necessary. As a result, under Medicare policy the need for gender reassignment surgery is determined on a case-by-case basis after consultation between doctor and patient, and there is no surgical procedure that is required in every case.

An affirmative NCD, by contrast, is a blanket entitlement mandating reimbursement of a treatment, the mirror opposite of a negative NCD. Affirmative NCDs are rare. The CMS review that the Implementation Report relies on did not contradict the Board’s 2014 conclusion that there is “a consensus among researchers and mainstream medical organizations that transsexual surgery is an effective, safe and medically necessary treatment for transsexualism.”¹⁷ Nor did it contradict the Board’s 2014 findings that “concern about an alleged lack of controlled, long-term studies is not reasonable in light of the new evidence”¹⁸ and that “Nothing in the record puts into question the authoritativeness of the studies cited in new evidence based on methodology (or any other ground).” Rather, CMS concluded in 2016 that there was not enough evidence to sustain a blanket mandate that would automatically entitle *every* Medicare beneficiary diagnosed with gender dysphoria to surgery.

In addition, CMS only found that the evidence was “inconclusive *for the Medicare population*,” not for all persons with gender dysphoria. CMS acknowledged that gender reassignment surgery “may be a reasonable and necessary service for certain beneficiaries with gender dysphoria,” and confined its conclusions to the Medicare population, noting that “current scientific information is not complete for CMS to make a NCD that identifies *the precise patient population for whom the service would be reasonable and necessary*.” CMS explained that the Medicare population “is different from the general population” and “due to the biology of aging, older adults may respond to health care treatments differently than younger adults. These differences can be due to, for example, multiple health conditions or co-morbidities, longer duration needed for healing, metabolic variances, and impact of reduced mobility. All of these factors can impact health outcomes.”¹⁹

The Board’s 2014 repeal of the negative NCD and CMS’s 2016 decision not to establish an affirmative NCD means that, like most medical treatments, the need for gender reassignment surgery is determined on a case-by-case basis after consultation between doctor and patient under Medicare policy. The Implementation Report’s depiction of the 2016 CMS review, however, obscures that point. In noting that CMS “decline[d] to require all Medicare insurers to cover sex reassignment surgeries,” DoD mischaracterizes the CMS decision and erroneously states that its review “found insufficient scientific evidence to conclude that such surgeries improve health outcomes for persons with gender dysphoria.” CMS did not bar transition-related coverage for the Medicare population, but determined that care should be offered on an individualized basis, which is the general standard applied to most medical care.

Perhaps the most misleading aspect of the Implementation Report's discussion is the suggestion that the 2016 CMS review undercuts the case for inclusive policy and the provision of medically necessary care. Quite to the contrary, both the 2014 Board review and the 2016 CMS review closely align Medicare policy with DoD's inclusive policy established by former Defense Secretary Ashton Carter. Under the Carter policy, treatment for gender dysphoria is determined on a case-by-case basis after consultation between doctor and patient, and there is no blanket entitlement to care for service members diagnosed with gender dysphoria. The 2016 CMS review may undercut the case for a blanket entitlement to gender reassignment surgery for Medicare beneficiaries. But it does not, as the Implementation Report insists, undercut the rationale for providing care to service members on an individualized basis as determined by doctor and patient.

According to Andrew M. Slavitt, Acting Administrator of CMS from March 2015 to January 2017, "It is dangerous and discriminatory to fire transgender service members and deny them the medical care they need. It is particularly disingenuous to justify it by a purposeful misreading of an unrelated 2016 CMS decision. Both the 2014 Board review and the 2016 CMS review closely align Medicare policy with DoD's inclusive policy established by former Secretary Carter. Under both Medicare and military policy, treatment for gender dysphoria is determined on a case-by-case basis after consultation between doctor and patient."²⁰

Hayes Directory

DoD's Implementation Report cites the Hayes Directory in arguing that there is "considerable scientific uncertainty" about whether transition-related treatment fully remedies symptoms of gender dysphoria:

According to the Hayes Directory, which conducted a review of 19 peer-reviewed studies on sex reassignment surgery, the "evidence suggests positive benefits," . . . but "because of serious limitations," these findings "permit only weak conclusions." It rated the quality of evidence as "very low" due to the numerous limitations in the studies . . . With respect to hormone therapy, the Hayes Directory examined 10 peer-reviewed studies and concluded that a "substantial number of studies of cross-sex hormone therapy each show some positive findings suggesting improvement in well-being after cross-sex hormone therapy." Yet again, it rated the quality of evidence as "very low" . . . Importantly, the Hayes Directory also found: "Hormone therapy and subsequent [gender transition surgery] failed to bring the overall mortality, suicide rates, or death from illicit drug use in [male-to-female] patients close to rates observed in the general male population."²¹

Hayes is not a scholarly organization and the Hayes Reports have not been published in a peer-reviewed journal, unlike the numerous literature reviews cited above. But Dr. Nick Gorton, a nationally recognized expert on transgender health, conducted a critical

analysis of the report cited by DoD as well as a 2004 Hayes Report addressing related research, and he shared his findings with us in a memo. “The Hayes Reports evaluating transition-related care,” writes Dr. Gorton, “make repeated substantive errors, evidence poor systematic review technique, are inconsistent in applying their criteria to the evidence, make conclusions not supported by the evidence they present, misrepresent the statements made by professional organizations treating transgender patients, and have a strong systematic negative bias.” He concludes that “these problems fatally damage the credibility of their analysis, casting substantial doubt on their conclusions. The reports cannot be relied upon as a valid systematic clinical review of the evidence on transition-related health care.”²²

For example, Hayes claims that its reports are comprehensive, but its 2004 report omitted dozens of relevant studies from its analysis. Dr. Gorton identified 31 applicable scholarly articles that Hayes failed to include in its review.²³ Hayes labels 13 studies it chose for one analysis as consisting only of “chart reviews or case series studies” and concludes that the “studies selected for detailed review were considered to be very poor.” But Hayes does not explain why it selected what it considered to be poor quality studies when numerous high quality studies were available. Furthermore, the 13 studies Hayes did choose to review were not, in fact, only chart reviews and case series studies, but included cohort studies, which are considered higher quality evidence. “By mislabeling all the studies as ‘chart reviews or case series,’” Dr. Gorton observed, Hayes is “saying they are lower level evidence than what is actually found in that group of studies.”²⁴ Finally, Hayes erroneously states that none of the 13 studies “assessed subjective outcome measures before treatment.” Dr. Gorton’s review of the studies, however, shows that three of the studies included such baseline measures.

Hayes also asserts that a 2012 Task Force report of the American Psychiatric Association “concluded that the available evidence for treatment of gender dysphoria was low for all populations and treatments, and in some cases insufficient for support of evidence-based practice guidelines.” Yet Hayes misrepresents the conclusion of the Task Force by taking quotes out of context and omitting mention of the higher quality evidence the APA also cites—and uses as a basis for recommending consensus-based treatment options that include gender transition. The “insufficient” evidence conclusion that Hayes cites applied only to studies of children and adolescents. What the Task Force concluded about adults with gender dysphoria was that there is sufficient evidence to recommend that treatment including gender transition be made available.²⁵

Quoting the APA fully on this matter illustrates Hayes’s misrepresentation: “The quality of evidence pertaining to most aspects of treatment in all subgroups was determined to be low; however, areas of broad clinical consensus were identified and were deemed sufficient to support recommendations for treatment in all subgroups. With subjective improvement as the primary outcome measure, current evidence was judged sufficient to support recommendations for adults in the form of an evidence-based APA Practice Guideline with gaps in the empirical data supplemented by clinical consensus.”²⁶

Finally, Dr. Gorton observes that, “Hayes writes reports that are aimed to please their customers who are all health care payers interested in being able to refuse to cover expensive or, in the case of transgender patients, politically controversial care. They obscure the nature of their systematically biased analysis by preventing scientists and clinicians from reading the reports and calling attention to their poor quality and systematic bias as would happen to any other evidence based review of health care treatments.” Thus, clients of Hayes who may have paid for the meta-analyses could have a financial interest in declining to reimburse patients for transition-related care.²⁷

Swedish research

Of the four studies that the Implementation Report cited to sustain its claim that there is scientific uncertainty about the efficacy of transition-related care, only one, a 2011 study from Sweden co-authored by Cecilia Dhejne, offers original research. According to the Swedish study, individuals receiving gender transition surgery had higher mortality rates than a healthy control group.

Yet much of the data on which the 2011 Swedish study relied in assessing outcomes was collected decades prior, when life for transgender individuals was more grim, with many subjects in the study undergoing gender transition as long ago as 1973. Importantly, the Swedish study, which assessed health data across three decades, compared outcomes from the first 15 years to those from the more recent 15 years and found that individuals who underwent transition since 1989 fared far better. This “improvement over time” is elaborated on in a more recent study co-authored by the same Swedish scholar in 2016 that states, “Rates of psychiatric disorders and suicide became more similar to controls over time; for the period 1989–2003, there was *no difference* in the number of suicide attempts compared to controls.”²⁸

Dhejne’s 2016 study reviewed more than three dozen cross-sectional and longitudinal studies of prevalence rates of psychiatric conditions among people with gender dysphoria. The authors found, contrary to research cited in the Implementation Report, that transgender individuals who obtain adequate care can be just as healthy as their peers. Among its study sample, most diagnoses were of the common variety (general anxiety and depression) whereas “major psychiatric disorders, such as schizophrenia and bipolar disorder, were rare and were no more prevalent than in the general population.” They concluded that, even when individuals start out with heightened anxiety or depression, they “improve following gender-confirming medical intervention, in many cases reaching *normative values*.”²⁹

In a 2015 interview, Dhejne explained that anti-transgender advocates consistently “misuse the study” she published in 2011 “to support ridiculous claims,” including that transition-related care is not efficacious, which is not what her study found. She said that, “If we look at the literature, we find that several recent studies conclude that WPATH Standards of Care compliant treatment decrease[s] gender dysphoria and improves mental health.”³⁰

Mayo Clinic research

Similar to the CMS study, the Hayes Directory, and the Swedish research, the Mayo Clinic study actually concludes that transition-related care mitigates the symptoms of gender dysphoria, with 80 percent of subjects reporting “significant improvement” in gender dysphoria and quality of life, and 78 percent reporting “significant improvement” in psychological symptoms. Moreover, data cited in the Mayo Clinic report reach as far back as 1966, more than 50 years ago, covering a period when the social and medical climates for gender transition were far less evolved than they are today. As we show in this report, more recent research demonstrates even more positive results.³¹

As we note above, the AMA responded to the release of the Implementation Report by stating that DoD “mischaracterized and rejected the wide body of peer-reviewed research on the effectiveness of transgender medical care,” and six former U.S. Surgeons General responded to DoD by citing “a global medical consensus” that transgender medical care “is reliable, safe, and effective.” Similar to AMA, both APAs, WPATH, and the former Surgeons General, we are wholly unpersuaded by the Implementation Report’s contention that there is “considerable scientific uncertainty” about the efficacy of transition-related care. Such a conclusion relies on a selective reading of a much larger body of evidence that flatly contradicts these claims.

Ban Would Create Separate Standards for Transgender Personnel

DoD’s current, inclusive regulations hold transgender personnel to the same medical, fitness, and deployability standards as all other personnel. Contrary to the Implementation Report’s assertion that former Defense Secretary Carter “relaxed” standards for transgender personnel,³² the policy that he established requires transgender service members to meet all general medical, fitness, and deployability requirements. There are no exceptions for transgender personnel or for gender transition. The proposed ban, in contrast, would impose double standards on transgender troops, as DoD would apply unique rules and expectations to them that it does not apply to any other members. The Implementation Report’s recommendations are not about requiring transgender personnel to meet military standards, because they already do. Under the guise of maintaining standards, the recommendations are about establishing separate standards that target transgender people alone. Separate standards, in other words, are bans in disguise.

The Implementation Report frequently emphasizes the importance of military standards and the necessity that all service members be required to meet them. It refers to “standards” well over one hundred times in the course of the Report. In endorsing the Implementation Report, the Secretary of Defense also pointed to the importance of standards, writing the following with respect to accession and retention of individuals with a history of gender dysphoria:

Furthermore, the Department also finds that exempting such persons from well-established mental health, physical health, and sex-based standards,

which apply to all Service members, including transgender Service members without gender dysphoria, could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.³³

No one objects to the fundamental principle that a single standard should apply equitably to all service members. But the Implementation Report redefines the usual military understanding of a “standard” in order to create what are in fact two separate standards, one for transgender service members and one for everyone else.

DoD’s regulation on disability evaluation offers a pertinent example of a true single standard, applicable to all. It states that service members will be referred for medical evaluation possibly leading to separation if they have a medical condition that may “prevent the Service member from reasonably performing the duties of their office, grade, rank, or rating . . . for more than 1 year after diagnosis”; or that “represents an obvious medical risk to the health of the member or to the health or safety of other members”; or that “imposes unreasonable requirements on the military to maintain or protect the Service member.”³⁴

A February 2018 memo from the Under Secretary of Defense, Personnel and Readiness, announced a stricter enforcement of this retention policy with respect to availability for deployment. It directed, consistent with the DoD regulation, that “Service members who have been non-deployable for more than 12 consecutive months, for any reason” will be processed for administrative or disability separation, absent a waiver at the service headquarters level.³⁵ Again, however, the standard that service members cannot remain non-deployable for more than 12 consecutive months is presumably a standard that applies across the board to all who are subject to the policy.

The Implementation Report on transgender policy turns the idea of a single standard on its head. Rather than determining whether transgender service members, who have been serving openly for almost two years now, have met this or other generally applicable standards, the Implementation Report recommends a behavior-based standard that only affects transgender personnel. Moreover, the only way to meet this targeted standard is to behave as if one is not transgender. The Implementation Report attempts to cast this as a single standard—that no one can behave as if they are transgender—but it obviously works as a ban targeted only at transgender personnel.

According to the Implementation Report, transgender individuals are eligible to serve if they can prove themselves indistinguishable from individuals who are not transgender. For example, at accession, transgender applicants with a history of gender dysphoria must submit medical documentation showing they are stable living in birth gender—not the gender in which they identify—for at least three years.³⁶ For transgender persons already in uniform (other than a specifically excepted registry of service members diagnosed with gender dysphoria prior to an effective date), retention is technically permitted but only if they serve in birth gender for the duration and receive no medical care in support of gender identity.³⁷

In other words, transgender service members can be retained only if they suppress or conceal their identity as transgender. The Implementation Report characterized this as an equal treatment of, and a single standard for, all service members, whether transgender or not. Nominally, everyone must serve in birth gender, and no one can receive medical care in support of a gender identity that is inconsistent with birth gender:

Service members who are diagnosed with gender dysphoria after entering military service may be retained without waiver, provided that they are *willing and able to adhere to all standards associated with their biological sex*, the Service member *does not require gender transition*, and the Service member is not otherwise non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months).³⁸

This is the “standard” to which all service members will be held. According to the Implementation Report, this standard is necessary to maintain equity not only with colleagues who are not transgender, but also with transgender colleagues who, “like all other persons, satisfy all mental and physical health standards and are capable of adhering to the standards associated with their biological sex.”³⁹ This incorrectly suggests that the problem with transgender personnel is that they cannot meet the standard, but the “standard” is drafted to target them by definition. The Implementation Report also casts those needing to transition gender as simply “unwilling” to meet standards, as in “unwilling to adhere to the standards associated with their biological sex.”⁴⁰

The Implementation Report carefully avoids any direct evaluation of transgender service members under a true single standard of fitness. It even misstates current accession standards in a way that makes it appear transgender individuals cannot meet them. For example, the Implementation Report incorrectly states that a history of chest surgery is disqualifying for enlistment.⁴¹ The actual enlistment standard states that a history of chest surgery is only disqualifying for six months, assuming no persistent functional limitations.⁴² The Implementation Report also incorrectly states that hormone therapy is specifically disqualifying.⁴³ It is not. The actual enlistment standard in fact permits enlistment by women who are prescribed hormones for medical management of gynecological conditions.⁴⁴

The consistent theme of the Implementation Report is that transgender service members are so uniquely unfit and uniquely disruptive that they must be measured by unique and separate standards. But the strength of a traditional and single standard is that each service member is measured by the same expectation. Standards are no longer standards when they are not consistent across all members and are instead targeted narrowly to exclude or disqualify only one group.

This is why the current DoD regulation that governs gender transition in military service made clear that not only must transgender members be “subject to the same standards and procedures as other members with regard to their medical fitness,” but also that command

decisions and policies should ensure individuals in comparable circumstances are treated comparably. For example, the primary regulation governing gender transition directs as follows:

Any determination that a transgender Service member is non-deployable at any time will be consistent with established Military Department and Service standards, as applied to other Service members whose deployability is similarly affected in comparable circumstances unrelated to gender transition.⁴⁵

The Implementation Report's recommendations are not about requiring transgender personnel to meet military standards because, as we show in the next section of this study, they already do. The recommendations are about establishing separate standards that target transgender people alone. Those separate standards are nothing less than bans in disguise.

Transgender Service Members Are Medically Fit

According to a statement by six former U.S. Surgeons General, “transgender troops are as medically fit as their non-transgender peers and there is no medically valid reason—including a diagnosis of gender dysphoria—to exclude them from military service or to limit their access to medically necessary care.”⁴⁶ The Implementation Report concludes, however, that individuals who transition gender are uniquely unfit for service. As we demonstrate below, when service members diagnosed with gender dysphoria are held to the same standards as all other personnel, they meet medical, fitness, and deployability standards. The Implementation Report's characterization of unfitness depends on the application of standards that apply only to transgender service members, but not to anyone else.

DOD's claim: Medically unfit by definition

The Implementation Report contends that service members with gender dysphoria who need to transition gender are, *by definition*, medically unfit. According to the Report, transgender service members may or may not be medically fit. But any transgender service member with a medical need to transition gender is automatically unfit. The Report observes that, “Today, transsexualism is no longer considered by most mental health practitioners as a mental health condition . . . Gender dysphoria, by contrast, is a mental health condition that can require substantial medical treatment . . . According to the APA, the ‘condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.’”⁴⁷

Although the Implementation Report is correct in noting that “clinically significant distress or impairment” is a criterion of the diagnosis, it failed to contextualize the observation in terms of the American Psychiatric Association's (APA) reasoning for defining gender dysphoria in this way. In creating the diagnosis, APA was well aware that many transgender individuals who need to transition are fully functional. In the

American medical system, however, patients cannot obtain treatment without a diagnosis code. Insurance companies tend not to reimburse care for mental health conditions that do not include the “clinically significant distress or impairment” language.

At the same time, APA was mindful that defining gender dysphoria in terms of clinically significant symptoms could risk stigmatizing transgender individuals as mentally ill. According to Dr. Jack Drescher, who helped create the gender dysphoria diagnosis during his service on the APA’s DSM-5 Workgroup on Sexual and Gender Identity Disorders, “one challenge has been to find a balance between concerns related to the stigmatization of mental disorders and the need for diagnostic categories that facilitate access to healthcare.”⁴⁸ Dr. Drescher explained to us in a personal communication why a diagnosis of gender dysphoria should not be conflated with unfitness:

Many transgender individuals who receive gender dysphoria diagnoses are fully functional in all aspects of their lives. When APA revised the diagnosis, words were chosen carefully. Thus, making a diagnosis requires the presence of distress *or* impairment, not distress *and* impairment. One cannot and should not conflate “clinically significant distress” with impairment, as many recipients of the diagnosis experience no impairment whatsoever. In addition, “clinically significant distress” is a purely subjective measure that is difficult to objectively quantify. Many fully functional individuals may have clinically significant distress, such as a soldier separated from his family during deployment. However, being distressed does not mean the individual is impaired.⁴⁹

The fact that DoD’s own data reveal, as we discuss below, that 40 percent of service members diagnosed with gender dysphoria have deployed in support of Operations Enduring Freedom, Iraqi Freedom, or New Dawn, and that after the ban was lifted only one individual deploying with a diagnosis of gender dysphoria was unable to complete the deployment for mental health reasons, underscores the inaccuracy of conflating a diagnosis of gender dysphoria with unfitness. In response to DoD’s release of the Implementation Report, the American Psychiatric Association’s CEO and Medical Director Saul Levin stated that, “Transgender people do not have a mental disorder; thus, they suffer no impairment whatsoever in their judgment or ability to work.”⁵⁰

Artificial restrictions on deployment status

The Implementation Report’s discussion of deployability illustrates how attributions of unfitness to transgender personnel depend on double standards. The Report overlooks that the small minority of transgender service members who are unfit, or who become unfit as a result of gender transition, can be managed under existing standards that apply to all service members. This includes the small minority of transgender personnel who, like other personnel, may be temporarily non-deployable. As with its recommendation for accession and retention policy, however, the Implementation Report avoids evaluating transgender members under existing deployability standards and instead assumes a separate standard that no one else will be required to meet. It assumes that transgender

members are uniquely at risk of becoming non-deployable and then concludes—contrary to policy—that therefore they must be measured by unique standards.

The Implementation Report makes the uncontroversial observation that deployment is a universal military obligation. No one disagrees that all must take their fair share of the burden:

Above all, whether they serve on the frontlines or in relative safety in non-combat positions, every Service member is important to mission accomplishment and must be available to perform their duties globally whenever called upon . . . To access recruits with higher rates of anticipated unavailability for deployment thrusts a heavier burden on those who would deploy more often.⁵¹

Determination of medical eligibility for deployment, however, requires an individual assessment of fitness. Army deployment standards, as a representative example, state: “Because of certain medical conditions, some Soldiers may require administrative consideration when assignment to combat areas or certain geographical areas is contemplated.”⁵² The Army guidance goes on in greater detail to describe considerations that should be taken into account when evaluating certain conditions, including mental health conditions. For example, most psychiatric disorders are not disqualifying, provided the individual can “demonstrate a pattern of stability without significant symptoms for at least 3 months prior to deployment.”⁵³ Medications are also generally not disqualifying for deployment, although the regulation includes a list of medications “most likely to be used for serious and/or complex medical conditions that could likely result in adverse health consequences,” and these medications should be reviewed as part of a complete medical evaluation. Hormones, however, are not on this list of medications most likely to be used for serious or complex medical conditions.⁵⁴

Given that medical deployment standards would not appear to be a significant obstacle for service members who are *not* transgender but have been diagnosed with a mental health condition or may be taking prescription medication, the Implementation Report’s conclusion that gender transition makes someone uniquely unfit for deployment is difficult to understand. The Implementation Report does not rely on general standards that apply to service members across the board. Instead, the Report shifts focus to what “could” happen to “render Service members with gender dysphoria non-deployable for a significant period of time—perhaps even a year” or longer.⁵⁵

Neither does the Implementation Report take into account the prior DoD professional judgment that gender transition can often be planned in ways that do not interfere with deployment or pose a risk to service member health. Instead, the Implementation Report sets up a false choice between assuming the risk of treatment and assuming the risk of complete denial of treatment.⁵⁶ In contrast, the Commander’s Handbook—a DoD document containing military judgment on best practices for managing gender transition—relies on planning a schedule of transition care “that meets the individual’s medical requirements and unit readiness requirements.”⁵⁷ The policy explicitly authorizes

commanders to schedule gender transition so as not to interfere with deployment, and this balance is no different from the balance that commanders apply in managing deployment readiness for any other service member. Indeed, current military regulation requires that all service members be determined fit or unfit for deployment in accordance with established standards, “as applied to other Service members whose deployability is similarly affected in comparable circumstances unrelated to gender transition.”⁵⁸

The Implementation Report claims that “limited data” make it “difficult to predict with any precision the impact on readiness of allowing gender transition,” but it cites the “potential” that individuals who transition gender will be “sent home from the deployment and render the deployed unit with less manpower.”⁵⁹ But DoD’s own data on deployment of service members diagnosed with gender dysphoria show these conclusions to be incorrect. Out of 994 service members diagnosed with gender dysphoria in FY2016 and the first half of 2017, 393 (40 percent) deployed in support of Operation Enduring Freedom, Operation Iraqi Freedom, or Operation New Dawn. *Exactly one* individual deploying with a diagnosis of gender dysphoria was unable to complete the deployment for mental health reasons since policy protecting transgender personnel from arbitrary dismissal was established in June 2016.⁶⁰ While the Implementation Report stated that “the Panel’s analysis was informed by the Department’s own data and experience obtained since the Carter policy took effect,”⁶¹ the Panel’s use of data is selective in nature. This information about actual deployment did not appear in the Implementation Report.

What did appear in the Implementation Report instead was a reference to service data showing that “cumulatively, transitioning Service members in the Army and Air Force have averaged 167 and 159 days of limited duty, respectively, over a one-year period.”⁶² This data was not connected to deployment and did not demonstrate any failure to meet a deployment obligation. What it did demonstrate, however, is the arbitrary way in which separate standards for fitness, targeted specifically against transgender personnel, can make them appear less medically fit and less deployable than their peers. Note that the Implementation Report’s discussion of limited-duty status did not include the Navy. That is because, as the data source itself explains, the Navy does not automatically assign limited-duty status for gender transition without specific justification, which leads to a much smaller percentage of individuals on limited duty.⁶³ It stands to reason that average days of limited duty will be higher if the status is assigned arbitrarily without individual assessment, unlike the standard practice for personnel who are not transgender.

The Implementation Report cites the specific deployment guidelines⁶⁴ applicable to the U.S. Central Command (CENTCOM) combatant command in support of its contention that gender dysphoria limits ability to deploy and also presents risk to the service member and to others in a deployed environment.⁶⁵ First, as was the case with respect to accession standards, the Implementation Report mischaracterizes the content of CENTCOM deployment standards in order to buttress its case that service members who will transition gender cannot meet them. Second, the CENTCOM deployment standards supply another example of creating a separate standard that targets only transgender

service members, rather than applying a single standard that evaluates fitness in comparable fashion to personnel who are not transgender.

It is correct, as the Implementation Report states, that diagnosed psychiatric conditions can, in some circumstances, require individual waiver prior to deployment. However, it is not correct that “most mental health conditions, as well as the medication used to treat them, limit Service members’ ability to deploy.”⁶⁶ Waivers are normally required only if the condition presents special risk: residual impairment of social and/or occupational performance, substantial risk of deterioration, or need for periodic counseling.⁶⁷ A judgment based on these factors would necessarily be individual and case-by-case. All other psychiatric concerns in the CENTCOM standard are tied to the use of particular psychiatric medication such as benzodiazepines, recent hospitalization or suicide ideation/attempt, or recent treatment for substance abuse.⁶⁸

Gender dysphoria, however, stands apart as the only condition requiring waiver regardless of lack of impairment, regardless of lack of risk of deterioration, and regardless of need for counseling. The CENTCOM standard automatically designates gender dysphoria as a condition with “complex needs” that must be treated differently. Not only does the standard require waiver in every instance regardless of mental fitness and stability, it specifically recommends that waiver should *not* be granted (“generally disqualified”) for the duration of gender transition, “until the process, including all necessary follow-up and stabilization, is completed.”⁶⁹

Standards that designate anyone as automatically unfit for indefinite periods of time, without consideration of individual fitness, are extremely rare. In fact, the only mental health diagnoses that CENTCOM designates as a greater risk than gender dysphoria are psychotic and bipolar disorders, which are “strictly” disqualifying rather than “generally” disqualifying. This is clearly a circumstance in which gender dysphoria and gender transition are being evaluated under a standard that is unique to transgender service members. No other service members with mental health diagnoses are so completely restricted from deployment, with extremely rare and justified exception. This artificial restriction on deployment is then used to justify a ban on transgender service members and gender transition.

Service members routinely deploy with medication requirements, including hormones, but a transgender person’s use of hormones is again assessed in unique fashion. The CENTCOM standard states that hormone therapies for endocrine conditions must be stable, require no laboratory monitoring or specialty consultation, and be administered by oral or transdermal means.⁷⁰ Part of the justification for the Implementation Report’s conclusion that gender transition is inconsistent with deployment is the assumption that hormone therapy requires quarterly lab monitoring for the first year of treatment.⁷¹ The Implementation Report cited civilian Endocrine Society guidelines in support of that monitoring requirement. According to the Implementation Report:

Endocrine Society guidelines for cross-sex hormone therapy recommend quarterly bloodwork and laboratory monitoring of hormone levels during the

first year of treatment . . . If the operational environment does not permit access to a lab for monitoring hormones (and there is certainly debate over how common this would be), then the Service member must be prepared to forego treatment, monitoring, or the deployment. Either outcome carries risks for readiness.⁷²

While it is true that Endocrine Society standards of care recommend one year of monitoring after the commencement of hormone therapy, the Implementation Report did not disclose that the author of those guidelines communicated in writing to DoD to explain his medical judgment that monitoring hormone levels for three months prior to deployment, not twelve, was easily sufficient and that “there is no reason to designate individuals as non-deployable after the commencement of hormone replacement therapy.”⁷³ Dr. Wylie C. Hembree, author of the Endocrine Society’s standards of care, wrote the following in an October 2015 letter to the Pentagon’s transgender policy group:

- (1) The recommendation for clinical monitoring was intended to cover a diverse, civilian population, including older, unreliable and/or unhealthy individuals who are not characteristic of the population of service members;
- (2) An initial monitoring at the 2–3 month mark is important to determine whether the initial prescribed hormone dose is appropriate for bringing an individual’s hormone levels into the desired range. The initial dose will be accurate for approximately 80% of young, healthy individuals. Of the remaining 20% whose hormone levels will be discovered to be slightly too high or too low at the initial monitoring, adjusting the dose to bring levels into the desired clinical range is a simple matter;
- (3) Of the approximately 20% whose hormone levels will be discovered to be slightly too high or too low at initial monitoring, the health consequences of being slightly out of range are not significant;
- (4) The monitoring and, if necessary, re-adjustment of prescribed doses do not need to be performed by endocrinologists or specialists. Any physicians or nurses who have received a modest amount of training can perform these tasks;
- (5) Research is quite clear that hormone replacement therapy, especially for young, healthy individuals, is safe, with complication rates of less than 5%.

Hembree concluded that “There is no reason to designate individuals as non-deployable after the commencement of hormone replacement therapy. While individuals might be placed on limited duty (office work) until the initial monitoring at the 2–3 month mark, they can perform their jobs overseas in a wide range of deployed settings both before and after the initial monitoring.”

The Hembree letter was provided directly to a Pentagon official who played a prominent role on the Transgender Service Review Working Group (TSRWG) that former Defense Secretary Carter created to study readiness implications of inclusive policy. The TSRWG, in turn, relied on the letter in determining how to implement inclusive policy without compromising readiness. That same official played a prominent role in Secretary Mattis’s Panel of Experts, but the Implementation Report did not mention the Hembree

letter. Instead, it inaccurately claimed that a need for long-term monitoring would preclude deployment. The Report then established a false choice in claiming that service members commencing hormone therapy would have to “forego treatment, monitoring, or the deployment.”⁷⁴ The Report added that “some experts in endocrinology . . . found no harm in stopping or adjusting hormone therapy treatment to accommodate deployment during the first year of hormone use.”⁷⁵ As the author of the Endocrine Society’s standards of care explained, however, there is no need to forego deployment after the initial 2–3 month period of monitoring.

Nor is refrigeration an obstacle to deployment. The Implementation Report cites a RAND study observation that British service members taking hormones serve in deployed settings, but that “deployment to all areas may not be possible, depending on the needs associated with any medication (e.g. refrigeration).”⁷⁶ However, hormone medications do not require refrigeration.

More broadly, singling out transgender service members as warranting a downgrade in medical fitness or deployment status is at odds with the way that the Defense Department treats hormone therapy for non-transgender troops. In 2014, former U.S. Surgeon General Joycelyn Elders co-directed a commission with a co-author of this study (Steinman), and the commission published a peer-reviewed study addressing hormones, gender identity, deployability, and fitness. While the commission’s discussion of hormones is lengthy, we quote it in full because it underscores the contrast between the Implementation Report’s treatment of hormone therapy for transgender personnel and the way that non-transgender service members requiring hormones are managed. The commission conducted its research before the implementation of inclusive policy, yet its observations about the double standards of the historical ban are fully applicable to the Implementation Report’s proposed ban:

[T]he military consistently retains non-transgender men and women who have conditions that may require hormone replacement. For example, the military lists several gynecological conditions (dysmenorrhea, endometriosis, menopausal syndrome, chronic pelvic pain, hysterectomy, or oophorectomy) as requiring referral for evaluation only when they affect duty performance. And the only male genitourinary conditions that require referral for evaluation involve renal or voiding dysfunctions. The need for cross-sex hormone treatment is not listed as a reason for referral for either men or women. The military also allows enlistment in some cases despite a need for hormone replacement. DoDI 6130.03, for example, does not disqualify all female applicants with hormonal imbalance. Polycystic ovarian syndrome is not disqualifying unless it causes metabolic complications of diabetes, obesity, hypertension, or hypercholesterolemia. Virilizing effects, which can be treated by hormone replacement, are expressly not disqualifying.

Hormonal conditions whose remedies are biologically similar to cross-sex hormone treatment are grounds neither for discharge nor even for referral for medical evaluation, if service members develop them once they join the

armed forces. Male hypogonadism, for example, is a disqualifying condition for enlistment, but does not require referral for medical evaluation if a service member develops it after enlisting. Similarly, DoDI 6130.03 lists “current or history of pituitary dysfunction” and various disorders of menstruation as disqualifying enlistment conditions, but personnel who develop these conditions once in service are not necessarily referred for evaluation. Conditions directly related to gender dysphoria are the only gender-related conditions that carry over from enlistment disqualification and continue to disqualify members during military service, and gender dysphoria appears to be the only gender-related condition of any kind that requires discharge irrespective of ability to perform duty.

Military policy allows service members to take a range of medications, including hormones, while deployed in combat settings. According to a Defense Department study, 1.4 percent of all US service members (approximately 31,700 service members) reported prescription anabolic steroid use during the previous year, of whom 55.1 percent (approximately 17,500 service members) said that they obtained the medications from a military treatment facility. One percent of US service members exposed to high levels of combat reported using anabolic steroids during a deployment. According to Defense Department deployment policy, “There are few medications that are inherently disqualifying for deployment.” And, Army deployment policy requires that “A minimum of a 180-day supply of medications for chronic conditions will be dispensed to all deploying Soldiers.” A former primary behavioral health officer for brigade combat teams in Iraq and Afghanistan told Army Times that “Any soldier can deploy on anything.” Although Tricare officials claimed not to have estimates of the amounts and types of medications distributed to combat personnel, Tricare data indicated that in 2008, “About 89,000 antipsychotic pills and 578,000 anti-convulsants [were] being issued to troops heading overseas.” The Military Health Service maintains a sophisticated and effective system for distributing prescription medications to deployed service members worldwide.⁷⁷

The Implementation Report’s contention that transgender service members commencing hormone therapy must “forego treatment, monitoring, or the deployment” is inaccurate. Such therapy is not grounds for characterizing transgender service members as non-deployable or medically unfit beyond the initial 2–3 month monitoring period. Nor are such characterizations consistent with DoD’s willingness to access, retain, and deploy tens of thousands of non-transgender service members who require hormones.

DoD’s rationale for reinstating the ban cannot be about lost duty time during gender transition, because DoD’s latest policy recommendation disqualifies from enlistment applicants who have already transitioned gender. The consistent theme across the Implementation Report is to create separate standards that target gender dysphoria and gender transition as uniquely disqualifying circumstances requiring uniquely

disqualifying measures, but to disregard generally applicable standards that transgender members would in fact meet. This allows the Implementation Report to suggest that transgender service members must be seeking “special accommodations,”⁷⁸ when the only accommodation they seek is the opportunity to meet general standards that apply to all.

Mental health encounters mandated by policy

The Implementation Report observes that “Service members with gender dysphoria are also nine times more likely to have mental health encounters than the Service member population as a whole (28.1 average encounters per Service member versus 2.7 average encounters per Service member).”⁷⁹ [The encounters took place over 22 months, from October 2015 to July 2017.] However, the Implementation Report overlooked the main reason why service members diagnosed with gender dysphoria have high mental health utilization, leaving the incorrect impression that high usage is a reflection of medical unfitness or the difficulty of treating gender dysphoria.

In particular, the Implementation Report neglected to consider over-prescription of appointments for administrative rather than medical reasons. We determined in our research that service members with gender dysphoria diagnoses have high rates of utilization not because they are medically unfit, but because the military has over-prescribed visits as part of the process of providing transition-related care, requiring numerous medically unnecessary encounters for service members diagnosed with gender dysphoria, but not other medical conditions.

The over-prescription of appointments in the military has resulted from two distinct considerations, neither of which reflects medical unfitness. First, it has resulted from the medicalization of administrative matters, as aspects of care that would normally be handled administratively have been assigned to medical providers. As a result, the gender transition process can require a dozen or more mental health appointments regardless of the individual’s actual mental health status and without regard to stability, fitness, or need for care. For example, a command decision to grant permission to wear a different uniform to work (exception to policy) requires a mental health workup and recommendation. Each step of the transition process, regardless of import or need, requires mental health workup and recommendation, and the medicalization of non-medical decisions inevitably increases usage.

The reason for the extra layer of administrative “ticket-punching” is not medical. It is the result, rather, of a military determination that it cannot allow transition-related medical care to occur without command supervision designed to ensure that changes in uniforms, grooming standards, facilities use, and the like do not undermine good order and discipline. And while these considerations are important and necessary to maintain operational readiness, they are not indicators of impaired mental health in the transgender member. The military, of course, follows standard professional guidelines for the diagnosis of gender dysphoria, the prescription of hormone therapy, and the authorization of surgery. The generation of unnecessary mental health visits comes not from these

decisions directly, but from the fact that, in the military, mental health providers serve as emissaries between the medical system and commanders. Mental health providers need to sign off on various administrative decisions along the way that have no counterpart in the civilian system, and no counterpart in the military's treatment of other mental health conditions. The military adds on an extra layer of medical approval to what otherwise would be purely administrative or workplace decisions, and this necessarily affects the degree to which medical providers are involved.

We reviewed a range of documents that mandate or guide the steps taken by military medical teams responsible for the care of transgender service members. For example, the principal DoD regulation governing gender transition⁸⁰ expands a medical provider's responsibility beyond making medical diagnoses and determining medically necessary treatment. In addition to those traditional and necessary aspects of health care, medical providers are responsible for justifying those medical judgments "for submission to the commander."⁸¹ Medical providers must "advise the commander" on matters of gender transition, and in turn commanders must "coordinate with the military medical provider regarding any medical care or treatment provided to the Service member, and any medical issues that arise in the course of a Service member's gender transition."⁸² The commander must approve every step along the path of gender transition, including the timing of any medical treatment and the timing of gender transition itself. Even with respect to military matters such as an exception to policy to wear a different-gender uniform, a military medical provider is responsible for consultation as part of requesting a commander's approval. These extra administrative consultations cannot help but increase medical utilization, even though they are not medically necessary in a traditional sense and do not reflect any lack of medical fitness.

The Commander's Handbook similarly emphasizes the unusual dual layer of justification and approval for decisions affecting transgender service members: "The oversight and management of the gender transition process is a team effort with the commander, the Service member, and the military medical provider."⁸³ Our observations are not intended to suggest there is anything inappropriate or militarily unnecessary about regulatory requirements that medical providers serve as emissaries between the medical system and the command structure. The point is simply that these dual layers of consultation and approval cannot help but drive up utilization of mental health care, but for reasons that are unrelated to mental health or fitness for duty.

Service-specific regulations produce over-prescriptions as well. According to interim guidance contained in a Navy Bureau of Medicine and Surgery document, a mental health diagnosis of gender dysphoria, coupled with a provider's determination that gender transition is medically necessary to relieve gender dysphoria, is only the first step in a series of requirements for approval of that medical care. Once a diagnosis and a recommendation for treatment is made, that diagnosis and recommendation must be referred for another layer of medical approval from the Transgender Care Team (TGCT). The TGCT will either validate or revise those medical decisions and forward the plan back to the originating provider. These decisions must then be documented once again as part of the package prepared to obtain a commander's approval: "Once the . . . medical

provider has received the validated medical treatment plan from the TGCT, the Service member and . . . medical provider should incorporate the validated medical treatment plan into the full gender transition plan for the Service member's commanding officer's review."⁸⁴

Even at the end of the process of gender transition, the service member's "psychological stability" must be validated by a treating provider, validated a second time by the TGCT, and then validated a third time by a commander, all before an official gender marker change can occur. It might make sense to rely on a service member's duty performance as part of the judgment of whether he or she "consistently demonstrated psychological stability to transition to the preferred gender,"⁸⁵ but service-level procedures can instead substitute arbitrary numbers of mental-health visits over arbitrary minimums of time to satisfy a finding of "psychological stability." An "Individualized TGCT Care Plan" obtained from the Naval Medical Center in San Diego recommends that "At a minimum, the service member [undergoing transition] should follow up with a mental health provider or psychosocial support group on a monthly basis." These at-least-monthly visits are used to demonstrate a "6 month period of stability in real life experience documented by a mental health professional" and a "6 month period of emotional/psychosocial stability documented by a mental health professional."⁸⁶

A senior military psychologist who has worked with transgender military members confirmed to us that in order to transition gender, a medical team must document several benchmarks of readiness for treatment and also for permission to change one's gender marker in the military identification system. As a result, he explained, many transgender service members may be required to attend multiple, inexpensive support group sessions that are essentially used as "ticket-punching" to verify administrative requirements. "It almost requires them to have those individual sessions on an ongoing basis," the psychologist said.⁸⁷ These requirements established by departments throughout the military health system are far more voluminous than anything required by the civilian medical system. Satisfying them necessitates extensive documentation, which creates incentives for over-prescribing health care appointments.

Lack of experience is the second reason for the over-prescribing of mental health visits, as well-intentioned medical providers inexperienced in transition-related care have been overly cautious in documenting gender stability. It is inevitable that an adjustment period would be needed for the military medical system, given how new it is to transgender health care. A survey of military medical providers found that even after the lifting of the ban, physicians were unprepared to treat transgender service members, as most respondents "did not receive any formal training on transgender care, most had not treated a patient with known gender dysphoria, and most had not received sufficient training" to oversee cross-hormone therapy.⁸⁸ This inevitable learning curve is closely connected to the over-prescribing of visits, in that overly cautious medical providers are requiring numerous, medically unnecessary appointments to document stability.

One social worker who is a clinical case manager for transgender service members explained that "The only way to verify that someone has been stable in their gender for

six months is if they communicate with someone showing that they're stable. So they must be checking in at least once per month," and sometimes more. As a result of that requirement, he said his department put recommendations in their transition treatment plans that service members check in with either a primary care provider or mental health provider regularly, or that they attend one of the transgender support groups. "Most of the naval hospitals within our region have a weekly trans support group," he said, "and that tends to be provided through the mental health department. People may be attending those meetings every week and that would show up in their notes as going to a mental health appointment every week." In short, to establish required stability, individuals "have to be reporting that to someone so it's documented so we can point to it and say, 'See? They're stable,' so we can draft a memo verifying it."⁸⁹

A Veterans Affairs psychiatrist familiar with the military's management of transgender personnel told us that doctors "could be requiring the person to go to a mental health provider to check on their stability, and they *have* to go. These are situations that would be absent any specific need for mental health on the part of the service member. They're either explicitly required to go or implicitly required: you can't demonstrate stability if you're not seen by someone." He estimated that "people may have four to seven appointments, *absent any particular need*, just to demonstrate that they're stable in the course of their in-service transition." He added that most military clinicians "are unfamiliar with the process, and they don't yet have capacity. They're trying to learn this as they go along, and so they're being cautious. There's a kind of learning curve. As the system becomes more adept at working with this population, it could be that the number of visits goes down because the clinicians don't need the comfort of seeing the people as often as they do now."⁹⁰

Transgender service members confirm that most of their mental health encounters are the result of over-prescribing visits, not medical need. We assessed the experiences of ten Active Duty transgender troops who transitioned or started to transition over the past two years. Out of 81 total mental health visits reported, 97.5 percent (79 visits) were classified as obligatory. A large number of these visits were mandated monthly counseling sessions that helped provide administrators with ways to document readiness and stability of transitioning service members. An Army First Lieutenant told us that upon beginning hormone therapy, he had "monthly checkups with my behavioral health clinical social worker, monthly checkups with my nurse case manager." A sailor reported that "I have to go for a five-minute consultation for them just to say, 'this is when your surgery is.'"⁹¹

An analysis by the Veterans Health Administration demonstrates that when a system is not characterized by over-prescribing, mental health care utilization among transgender individuals is far lower than the rate reported by DoD, and also that utilization among transgender and non-transgender individuals is roughly equivalent (as suggested below by the California Health Interview Survey). VHA data reveal that from FY2011 to FY2016, transgender patients averaged between 2.3 and 4.4 mental health encounters per year, as compared to slightly lower utilization among non-transgender patients diagnosed with depression.⁹² These data suggest that DoD's finding that service members diagnosed

with gender dysphoria have an average of 15.3 mental health encounters per year is not a reflection of medical need.

Table 1. Incidence proportion of mental health utilization among VA patients by FY

	FY11	FY12	FY13	FY14	FY15	FY16
TRANSGENDER GROUP	n	n	n	n	n	n
Total unique patients	396	487	562	680	879	1089
Total # of mental health encounters	923	1454	1584	2653	2943	4806
Incidence of encounters/patient	2.3	3.0	2.8	3.9	3.3	4.4
SAMPLE OF NONTRANSGENDER PATIENTS						
Total unique patients	1188	1461	1686	2040	2637	3267
Total patients with depression diagnosis	173	201	230	276	338	446
Total # of mental health encounters	248	274	432	438	745	1381
Incidence of encounters/patient	1.4	1.4	1.9	1.6	2.2	3.1

Research indicates that when health care delivery is not over-prescribed, utilization among transgender and non-transgender adults is roughly equivalent. A 2018 study drew on California Health Interview Survey (CHIS) data to assess “utilization rates in access to primary and specialty care among a large cohort of insured transgender and cisgender [i.e., not transgender] patients.” The authors calculated the “percentage of patients accessing primary care providers or specialty care providers among patients who reported having insurance coverage” and categorized patients as low, medium, or high utilizers. The results were that transgender patients “accessed both primary and specialty care services at a lower frequency than cisgender individuals and were more likely to fall into the low and medium utilizer groups.” Fully 72.9 percent of transgender individuals were low utilizers (0–3 annual visits) compared to 70.9 percent of non-transgender individuals. Just 0.8 percent of transgender individuals were high utilizers (13–25 annual visits) compared to 4.6 percent of non-transgender people. The authors concluded that “transgender individuals are less likely to utilize healthcare services” than the overall population.⁹³

Table 2: Frequency of Doctor Visits by Gender Identity

NUMBER OF DOCTOR VISITS IN PAST YEAR	GENDER IDENTITY					
	Not transgender (i.e., cisgender)		Transgender or gender non-conforming		All	
Low Utilizers (0–3 visits)	70.9%	15,117,000	72.9%	81,000	70.9%	15,197,000
Medium Utilizers (4–12 visits)	24.4%	5,203,000	26.3%	29,000	24.4%	5,232,000
High Utilizers (13–25 visits)	4.6%	990,000	0.8%	1,000	4.6%	991,000
Total	100%	21,310,000	100%	110,000	100%	21,421,000

High utilization is not evidence of unfitness, the burdensome needs of transgender troops, or the difficulty of treating gender dysphoria. To the extent that service members diagnosed with gender dysphoria log more mental health visits than average, it is because the system treats them differently and requires more engagement with mental health providers. It has little to do with need for care or fitness for duty. Military medical providers are taking extra steps, sometimes to comply with regulations, and other times out of excessive caution, to justify medical and administrative decisions during the transition process. DoD's failure to address this possibility in its research creates the misimpression that excessive utilization demonstrates the medical unfitness of transgender troops. But it is the military bureaucracy that creates elevated usage figures, not transgender service members.

Suicide is a military problem, not a transgender problem

Children of service members are more than 50 percent more likely to have attempted suicide than the general population, yet the military does not bar individuals in this high-risk group from entry.⁹⁴ The Implementation Report, however, attempts to invoke an analogous risk factor among transgender people in general as a basis for disqualification. The Implementation Report claims that "high rates of suicide ideation, attempts, and completion among people who are transgender are also well documented in the medical literature," and cites research indicating lifetime rates of suicide attempts among transgender civilians ranging from 41 percent to as high as 57 percent. But neither applicants for military service nor serving members in uniform are evaluated by characteristics of larger groups; they are measured by standards as individuals.

The Implementation Report also mischaracterizes and selectively cites DoD data on military personnel that, if accurately presented, would in fact demonstrate that rates of suicidal ideation among transgender and non-transgender service members are roughly equivalent. The Implementation Report claims that among military personnel, "Service members with gender dysphoria are eight times more likely to attempt suicide than Service members as a whole (12% versus 1.5%)" during a 22-month study window.⁹⁵ This is an inaccurate reading of DoD's own data as well as an inaccurate interpretation of what the data mean. First, the DoD data do not show that service members with gender dysphoria were eight times more likely to *attempt* suicide than other service members during the 22-month study period, but to *contemplate* suicide, a major distinction that the Implementation Report misconstrued.

Second, service members with gender dysphoria are not eight times more likely to contemplate suicide than other service members, because the data under-report the frequency of suicidal thoughts among service members as a whole. The reported 1.5 percent suicidal ideation rate among service members as a whole was based on a review of administrative records.⁹⁶ When DoD used more sophisticated methods to determine rates of suicidality among service members not being treated for behavioral health problems, military researchers determined that 14 percent of service members have had suicidal thoughts at some time in their lives, 11 percent had suicidal thoughts at some

point during their military careers, and 6 percent had suicidal thoughts during the past year.⁹⁷ Suicide is a military problem. It is not a transgender problem.

Finally, while DoD data indicate that service members diagnosed with gender dysphoria are slightly more prone to suicidal ideation than other service members, the Implementation Report did not take the historical legacy of the transgender ban into account. Extensive research has confirmed that both stigma and the denial of medically necessary care can lead to suicidality.⁹⁸ The historical transgender ban, in other words, contributed to stigma and deprivation of health care, which exacerbates the problems the Implementation Report has deemed disqualifying.

The reaction of professional mental health providers to this circular reasoning—denying necessary health care to transgender troops and then citing suboptimal health as the reason for exclusion—is summed up by statements recently released by two of the largest mental health associations in America. The CEO of the American Psychological Association recently stated that he was “alarmed by the administration’s misuse of psychological science to stigmatize transgender Americans and justify limiting their ability to serve in uniform and access medically necessary health care.”⁹⁹ And the American Psychiatric Association stated that the Pentagon’s anti-transgender “discrimination has a negative impact on the mental health of those targeted.”¹⁰⁰ If inclusive policy remains in effect, DoD will continue to provide medically necessary care to transgender service members. As a result, we would expect the slightly elevated ideation rate among service members diagnosed with gender dysphoria to disappear over time.

Unit Cohesion Has Not Been Compromised

The Implementation Report concludes that inclusive policy for transgender personnel could compromise unit cohesion, privacy, fairness, and safety by allowing transgender men who retain some physiological characteristics of their birth sex and transgender women who retain some physiological characteristics of their birth sex to serve in the military, thus blurring the line that distinguishes male and female bodies:

[B]y allowing a biological male who retains male anatomy to use female berthing, bathroom, and shower facilities, it [inclusive policy] undermines the reasonable expectations of privacy and dignity of female Service members. By allowing a biological male to meet the female physical fitness and body fat standards and to compete against females in gender-specific physical training and athletic competition, it undermines fairness (or perceptions of fairness) because males competing as females will likely score higher on the female test than on the male test and possibly compromise safety.¹⁰¹

According to the Implementation Report, “sex-based standards ensure fairness, equity, and safety; satisfy reasonable expectations of privacy; reflect common practice in society; and promote core military values of dignity and respect between men and women—all of which promote good order, discipline, steady leadership, unit cohesion, and ultimately

military effectiveness and lethality.”¹⁰² Yet the Report does not include any evidence to support its contention that inclusive policy has had these effects. Three weeks after the Report’s publication, Army Chief of Staff General Mark Milley responded to Senator Kirsten Gillibrand, who asked whether he had heard “anything about how transgender service members are harming unit cohesion,” by testifying that “I have received precisely zero reports of issues of cohesion, discipline, morale and all those sorts of things.”¹⁰³ Chief of Naval Operations Admiral John Richardson, Air Force Chief of Staff General David Goldfein, and Marine Corps Commandant General Robert Neller subsequently confirmed that inclusive policy has not compromised cohesion.¹⁰⁴

The Implementation Report’s explanation for failing to provide evidence is that cohesion “cannot be easily quantified” and that “Not all standards . . . are capable of scientific validation or quantification. Instead, they are the product of professional military judgment acquired from hard-earned experience leading Service members in peace and war or otherwise arising from expertise in military affairs. Although necessarily subjective, this judgment is the best, if not only, way to assess the impact of any given military standard on the intangible ingredients of military effectiveness mentioned above—leadership, training, good order and discipline, and unit cohesion.”¹⁰⁵

This contention, however, does not withstand scrutiny. In response to Senator Gillibrand’s question about whether transgender troops have harmed unit cohesion, General Milley testified that “it is monitored very closely because I am concerned about that.”¹⁰⁶ In addition, many military experts have quantified cohesion and other dimensions of readiness, and have assessed cause-and-effect claims about those phenomena in their research.¹⁰⁷ In 2011 and 2012, for example, a group of Service Academy professors used multiple methods including surveys, interviews, field observations, and longitudinal analysis to assess whether the repeal of “don’t ask, don’t tell” (DADT) had impacted readiness and its component dimensions, including unit cohesion and morale, and results were published in a leading peer-reviewed military studies journal.¹⁰⁸

In the case at hand, DoD could have studied the validity of its contentions about cohesion, privacy, fairness, and safety without difficulty. For example, DoD could have (1) assessed readiness by comparing the performance of units that include a service member diagnosed with gender dysphoria with units that do not include anyone with a diagnosis; (2) measured cohesion via interviews, surveys, and/or field observations and then compared results from units that include a service member diagnosed with gender dysphoria with units that do not include anyone with a diagnosis; (3) assessed privacy and fairness via interviews, surveys, and/or field observations and then compared results from units that include a service member diagnosed with gender dysphoria with units that do not include anyone with a diagnosis; and (4) assessed safety by comparing disciplinary records of units that include a service member diagnosed with gender dysphoria with units that do not include anyone with a diagnosis.

Instead, and in lieu of evidence, the Implementation Report offers three scenarios, two of which are hypothetical, to sustain its assertions. The scenarios, however, do not sustain

the conclusion that inclusive policy has compromised or could compromise cohesion, privacy, fairness, or safety. Under the first hypothetical scenario, fairness and safety are compromised when transgender women compete with cisgender women in sporting events, for example boxing competitions.¹⁰⁹ The Report assumes incorrectly that “biologically-based standards will be applied uniformly to all Service members of the same biological sex,” contrary to current practice in which gender-based presumptions are adjustable based on circumstances. At the U.S. Military Academy, for example, the Implementation Report observes that “Matching men and women according to weight may not adequately account for gender differences regarding striking force.” But the Report ignores that Cadets’ skill level and aggression, not just weight, are factored into safety decisions, and West Point allows men and women to box each other during training.¹¹⁰

While sex-based standards are used in concert with other factors to promote fairness and safety, male-female segregation is not absolute—and it is not sufficient. Ensuring fairness and safety in combative training is always a command concern because of the wide variation in body size and weight within gender even when gender is defined by birth. Commanders at all levels are able to make judgments about how to conduct training in ways that adequately protect the participants, and they are able to do the same thing for transgender service members when and if needed. This hypothetical scenario does not lend any credence to the contention that inclusive policy has compromised or could compromise cohesion, privacy, fairness, or safety.

Under the second hypothetical scenario, a transgender man who has not had chest-reduction surgery wants to perform a swim test with no shirt and breasts exposed. It is farfetched to imagine a transgender service member making such a request, and the Implementation Report does not offer any actual examples to buttress this hypothetical concern despite almost two years of inclusive policy. Despite the low likelihood of such a scenario, the Commander’s Handbook guides commanders in what to do, and the guidance is sufficient. The Handbook holds the transgender service member responsible for maintaining decorum: “It is courteous and respectful to consider social norms and mandatory to adhere to military standards of conduct.”¹¹¹ Then, the Handbook advises commanders that they may counsel the service member on this responsibility, but also may consider other options such as having everyone wear a shirt. Ultimately, according to the Handbook, the fundamental principle for commanders is that, “It is within your discretion to take measures ensuring good order and discipline.”¹¹² Similar to the first hypothetical scenario, this scenario does not sustain a conclusion that inclusive policy has compromised or could compromise cohesion, privacy, fairness, or safety.

The third scenario, the only scenario that is not hypothetical, describes a cisgender female who claimed that the presence in shower facilities of a transgender female who retained some physiological characteristics of birth sex undermined her privacy, and the transgender service member claimed that her commander had not been supportive of her rights.¹¹³ DoD guidance offers commanders tools that should have been sufficient for resolving the matter. The situation closely matches scenarios 11 and 15 in the Commander’s Handbook, which emphasize that all members of the command should be

treated with dignity and respect: “In every case, you may employ reasonable accommodations to respect the privacy interests of Service members.”¹¹⁴ Commanders are given the following guidance on reasonable accommodations: “If concerns are raised by Service members about their privacy in showers, bathrooms, or other shared spaces, you may employ reasonable accommodations, such as installing shower curtains and placing towel and clothing hooks inside individual shower stalls, to respect the privacy interests of Service members. In cases where accommodations are not practicable, you may authorize alternative measures to respect personal privacy, such as adjustments to timing of the use of shower or changing facilities.”¹¹⁵

The Commander’s Handbook also makes clear that the transgender service member has responsibility: “Maintaining dignity and respect for all is important. You will need to consider both your own privacy needs and the privacy needs of others. This includes, but is not limited to, maintaining personal privacy in locker rooms, showers, and living quarters. One strategy might include adjusting personal hygiene hours.”¹¹⁶

Inclusive policy cannot be blamed if commanders fail to follow the guidance or to implement it properly, and this scenario does not lend any credibility to the Implementation Report’s contention that inclusive policy has compromised or could compromise cohesion, privacy, fairness, or safety. Army training materials are even more straightforward, essentially reminding Soldiers that military life involves a loss of privacy and instructing them that it is not the Army’s job to protect tender sensibilities: “Understand that you may encounter individuals in barracks, bathrooms, or shower facilities with physical characteristics of the opposite sex despite having the same gender marker in DEERS.”¹¹⁷

Cohesion and Related Concerns Have Historically Proven Unfounded

The Implementation Report’s contention that inclusive policy could compromise cohesion, privacy, fairness, and safety echoes discredited rationales for historical prohibitions against African Americans, women, and gays and lesbians. In each case, military leaders made arguments about cohesion, privacy, fairness, and safety.¹¹⁸ In the case of “don’t ask, don’t tell,” for example, leaders insisted that because heterosexual service members did not like or trust gay and lesbian peers, lifting the ban would undermine unit cohesion. One of the principal architects of the policy, the late professor Charles Moskos, insisted that allowing gay men and lesbians to shower with heterosexuals would compromise privacy, and a judge advocate general argued that a “privacy injury” would take place every time an openly gay or lesbian service member witnessed the naked body of a heterosexual peer.¹¹⁹ Others argued that the repeal of DADT would lead to an increase in male-male sexual assault.¹²⁰ One year after the ban’s repeal, military professors published a study repudiating these predictions, and the New York Times editorialized that “politicians and others who warned of disastrous consequences if gay people were allowed to serve openly in the military are looking pretty foolish.”¹²¹

Inclusive Policy Promotes Readiness

Scholarly research has shown that inclusive policy for transgender personnel promotes military readiness. According to a comprehensive implementation analysis by retired General Officers and scholars writing before the 2016 lifting of the ban, “when the US military allows transgender personnel to serve, commanders will be better equipped to take care of the service members under their charge.”¹²² While scholars have explored the relationship between readiness and inclusive policy for transgender personnel from a variety of angles including medical fitness, implementation, command climate, and deployability, all available research has reached the same conclusion: At worst, inclusive policy does not compromise readiness. At best, it enhances readiness by holding all service members to a single standard and promoting medical readiness.¹²³

After a year of in-depth research, the Pentagon’s Transgender Service Review Working Group (TSRWG) reached that very conclusion. Former Secretary of Defense Carter created the TSRWG on July 28, 2015, to study “the policy and readiness implications of welcoming transgender persons to serve openly.”¹²⁴ The TSRWG included dozens of civilian and military policy analysts who engaged in extensive research, and who concluded that holding transgender service members “to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability, and retention, is consistent with military readiness.”¹²⁵ DoD senior civilian leaders as well as the Service Chiefs signed off on the lifting of the transgender ban on June 30, 2016, because they concluded that inclusive policy would be “consistent with military readiness.” The Office of the Secretary of Defense as well as the Services published 257 pages of implementing guidance spread across 14 documents and regulations.¹²⁶ These documents instruct commanders and service members how to implement inclusive policy without compromising readiness.

As part of the TSRWG’s research, DoD commissioned the RAND Corporation to study whether inclusive policy for transgender personnel would compromise readiness. RAND studied the health care needs of transgender service members and estimated expected health care utilization rates as well as the expected financial cost of providing care following the lifting of the ban. In addition, RAND studied the impact of inclusive policy on unit cohesion and availability to deploy. Finally, RAND studied whether readiness had been compromised in foreign militaries that allow transgender personnel to serve openly. RAND published a 91-page study concluding that the impact of inclusive policy would be “negligible.”¹²⁷

Organizational experiences confirm the findings of the scholarly research. Eighteen foreign militaries allow transgender personnel to serve openly, and none has reported any compromise to readiness, cohesion, or any other indicator of military performance. A peer-reviewed study of 22 years of inclusive policy for transgender personnel in the Canadian Forces concluded that “allowing transgender personnel to serve openly has not harmed the CF’s effectiveness.”¹²⁸ According to RAND’s analysis of foreign militaries that allow transgender personnel to serve openly, “In no case was there any evidence of

an effect on the operational effectiveness, operational readiness, or cohesion of the force.”¹²⁹

In the U.S., transgender service members have been serving openly for almost two years and have been widely praised by commanders. We interviewed four former senior DoD officials who oversaw personnel policy for more than 6 months of inclusive policy, as well as one current senior DoD official who oversaw personnel policy for more than 9 months of inclusive policy. During their combined 35 months of collective responsibility for personnel policy, none of these senior officials was aware of any evidence that inclusive policy compromised readiness. According to one of the former officials, “As of the time we left office, we had not seen any evidence that the Department’s new transgender policy had resulted in a negative impact on readiness.” When we asked former Navy Secretary Ray Mabus if inclusive policy for transgender personnel promoted readiness, he observed, “Absolutely . . . A more diverse force enhances readiness and combat effectiveness.”¹³⁰

DoD’s critique of prior readiness research is unsupported by evidence

In recommending reinstatement of the ban, however, the Implementation Report takes aim at RAND’s methodology as well as the validity of its conclusions. According to a memorandum from Secretary Mattis that accompanied the release of the Implementation Report, the RAND study “contained significant shortcomings. It referred to limited and heavily caveated data to support its conclusions, glossed over the impacts of healthcare costs, readiness, and unit cohesion, and erroneously relied on the selective experiences of foreign militaries with different operational requirements than our own.”¹³¹ The Implementation Report elaborated:

The RAND report thus acknowledged that there will be an adverse impact on health care utilization, readiness, and unit cohesion, but concluded nonetheless that the impact will be “negligible” and “marginal” because of the small estimated number of transgender Service members . . . Because of the RAND report’s macro focus, however, it failed to analyze the impact at the micro level of allowing gender transition by individuals with gender dysphoria. For example, . . . the report did not examine the potential impact on unit readiness, perceptions of fairness and equity, personnel safety, and reasonable expectations of privacy at the unit and sub-unit levels, all of which are critical to unit cohesion. Nor did the report meaningfully address the significant mental health problems that accompany gender dysphoria—from high rates of comorbidities and psychiatric hospitalizations to high rates of suicide ideation and suicidality—and the scope of the scientific uncertainty regarding whether gender transition treatment fully remedies those problems.¹³²

Referring to both the TSRWG as well as the RAND study, the Implementation Report concludes that “the realities associated with service by transgender individuals are more complicated than the prior administration or RAND had assumed.”¹³³

The Implementation Report's critique of the RAND study is unsupported by evidence. Before addressing flaws in the critique, we underscore the depth of RAND's military expertise and trustworthiness. The RAND Corporation is perhaps the most distinguished and trusted research institute in the U.S. on matters of defense and national security, and RAND operates three federally funded research and development centers engaging in military research: RAND Arroyo Center, sponsored by the U.S. Army, RAND Project Air Force, sponsored by the U.S. Air Force, and RAND National Defense Research Institute, sponsored by the Office of the Secretary of Defense, the Joint Staff, the Unified Combatant Commands, the Department of the Navy, and other defense agencies.

While these centers are not government entities, they cooperate closely with their Defense Department sponsors. According to RAND Arroyo's 2015 annual report, for example, the Arroyo Center Policy Committee consisted of 17 General Officers (including the U.S. Army Vice Chief of Staff, the Chief of the National Guard Bureau, five Deputy Chiefs of Staff, and the Commanding General of U.S. Army Forces Command) and five Assistant Secretaries of the Army. RAND Arroyo's Director reported that "We collaborate closely with our Army sponsors not only as we develop our research agenda and design individual analysis, but also as we conduct our research."¹³⁴

The Defense Department relies on RAND to provide nonpartisan, methodologically sophisticated research studies on strategy, doctrine, resources, personnel, training, health, logistics, weapons acquisition, intelligence, and other critically important topics. During the past several decades, RAND has published more than 2,500 military reports, and three of those reports concerned military service by LGBT individuals. In 1993, DoD commissioned RAND to do a \$1.3 million study of whether allowing gays and lesbians to serve openly in the military would undermine readiness. RAND assembled a team of 53 researchers who studied foreign militaries, police and fire departments, prior experiences of minority integration into the military, and other aspects of the topic. RAND then published a 518-page report concluding that sexual orientation was "not germane" to military service and that lifting the ban would not undermine readiness. Military and political leaders disagreed with that conclusion, however, and the report was shelved. Seventeen years later, in 2010, DoD hired RAND to replicate its earlier study, and RAND again engaged in comprehensive research and again concluded that allowing gay men and lesbians to serve openly would not compromise readiness. DADT was repealed shortly after the publication of the second RAND study, and subsequent research confirmed the validity of RAND's 1993 and 2010 analyses, in that inclusion did not undermine any aspect of readiness including unit cohesion, morale, retention, and recruitment.¹³⁵

The Implementation Report's critique of the 2016 RAND study on transgender military service is no more persuasive than earlier critiques of RAND's studies on gays and lesbians in the military. First, as argued throughout this study, and despite almost two years of inclusive policy, the Implementation Report has not produced any evidence showing that inclusive policy for transgender personnel has compromised any aspect of readiness, including medical fitness, unit cohesion, or good order and discipline. It is instructive that in its extensive analysis of the ways in which inclusive policy is expected

to undermine cohesion, privacy, fairness, and safety, the Implementation Report did not offer any supporting data. The Implementation Report critiques RAND for failing to assess unit cohesion “at the unit and sub-unit levels,” but as noted above, the Service Chiefs confirmed after the Report’s publication that inclusive policy has not compromised unit cohesion, including Army Chief of Staff Milley’s testimony that cohesion “is monitored very closely because I am concerned about that and want to make sure that they [transgender Soldiers] are in fact treated with dignity and respect and no, I have received precisely zero reports of issues of cohesion, discipline, morale and all those sorts of things.”

Second, DoD data validate most of RAND’s statistical predictions. RAND estimated that between 1,320 and 6,630 transgender service members serve in the Active Component, and DoD data now show that there are 8,980 active duty transgender troops. RAND estimated that transgender service members in the Active Component would require an overall total of 45 surgeries per year, and DoD data indicate that the actual number was 34 surgeries during a 12-month window, from September 1, 2016, to August 31, 2017.¹³⁶ RAND estimated that transition-related health care would cost between \$2.4 and \$8.4 million per year, and DoD data indicate that the cost in FY2017 was \$2.2 million.¹³⁷

Third, the Implementation Report mischaracterized RAND’s overall finding by drawing selectively from the study. According to the Implementation Report, RAND “acknowledged that there will be an adverse impact on health care utilization, readiness, and unit cohesion, but concluded nonetheless that the impact will be ‘negligible’ and ‘marginal’ because of the small estimated number of transgender Service members.” But the Implementation Report misconstrues RAND’s analysis. Any policy change yields some costs and some benefits, and RAND found that inclusive policy for transgender troops would have some negative effects, such as the financial cost of health care. But RAND found that inclusive policy would have some positive effects as well, and that continuing to ban transgender troops would entail some costs.¹³⁸ RAND did conclude that the effect of lifting the ban would be “negligible” because of the small number of transgender troops, but the Implementation Report fails to acknowledge the context of that conclusion, namely that RAND identified the benefits of inclusive policy and the costs of reinstating the ban, both of which would offset the minor downsides of the policy shift.

Fourth, while it is true that RAND did not address “perceptions of fairness and equity, personnel safety, and reasonable expectations of privacy at the unit and sub-unit levels, all of which are critical to unit cohesion,” RAND had a good reason for restricting the scope of its analysis, in that available evidence indicated that cohesion was not compromised in any military force allowing transgender personnel to serve openly. Hence, there was no reason to focus on cohesion at a more granular level. Given that DoD has not offered any evidence to sustain any of its assertions about cohesion, privacy, fairness, and safety despite almost two years of inclusive policy, it seems unreasonable to critique RAND for neglecting to address a problem that does not exist.

Fifth and finally, the Implementation Report's critique of RAND's analysis of foreign militaries is unsupported by evidence. Neither RAND nor DoD has identified any evidence that any foreign military that allows transgender personnel to serve openly has experienced a decline in readiness or cohesion. But the Implementation Report mischaracterizes evidence in the RAND study to obscure that simple fact. An in-depth study of transgender military service in the Canadian Forces (CF) "found no evidence of any effect on unit or overall cohesion," but did find that the CF's failure to provide commanders with sufficient guidance and failure to train service members in inclusive policy led to implementation problems. But the CF's failure to provide implementation guidance does not mean that inclusive policy compromised readiness or cohesion. Rather, it means that the CF should have provided more guidance. Secretary Carter's TSRWG studied the Canadian example, learned from it, and issued extensive guidance and training materials, thus avoiding the CF's implementation challenges.

The Implementation Report claims that because the CF chain of command "has not fully earned the trust of the transgender personnel," there are "serious problems with unit cohesion." But according to the authors of the study, one of whom is a professor at the Canadian Forces College and one of the world's leading experts on personnel policy in the CF, the lack of trust is not evidence that inclusive policy has compromised unit cohesion. Rather, it is a reflection of the CF's failure to implement inclusive policy effectively, for the reasons discussed above.

The study of the CF that informed the RAND report was published in a leading, peer-reviewed military studies journal and was based on careful methodology, including an "extensive literature review, using 216 search permutations, to identify all relevant media stories, governmental reports, books, journal articles and chapters."¹³⁹ In addition, the authors received written, interview, and focus group data from 26 individuals, including 2 senior military leaders, 10 commanders, 2 non-transgender service members who served with transgender peers, 4 transgender service members and veterans, and 8 scholarly experts on readiness in the CF. By contrast, the Implementation Report presents exactly zero original research on the CF. If a professor in the Canadian Forces College concludes in a peer-reviewed study, and on the basis of extensive research, that inclusive policy, despite implementation problems, has not compromised readiness or cohesion, DoD cannot dismiss the weight of the conclusion by selectively relying on a handful of quotes.

The Implementation Report makes a similar attempt to dismiss RAND's conclusions about readiness and inclusive policy in the Israel Defense Forces (IDF). Available research on transgender service in the IDF is not as thorough as research on the CF, but RAND nonetheless analyzed a study that was based on several interviews, including interviews with two senior IDF leaders who confirmed that inclusive policy had not compromised readiness or cohesion. The Implementation Report dismisses these "sweeping and categorical claims," but offers no evidence to the contrary. If two senior leaders in a military organization confirm that a policy has a certain effect, that counts as data, especially absent contradictory evidence, and especially when the data line up with evidence from other military forces.

The Implementation Report is correct that operational and other differences distinguish the U.S. armed forces from other militaries. That does not detract, however, from the fact that RAND was unable to find any evidence that readiness or cohesion had declined as a result of inclusive policy in any of the 18 nations that allow transgender personnel to serve openly.

DoD Does Not Consider Benefits of Inclusive Policy or Costs of Ban

Every change of policy involves costs and benefits, and when analysts study whether or not to abandon the status quo in favor of an alternative policy option, typically they address the costs and benefits of both the status quo as well as the contemplated policy modification. DoD's research, however, was artificially narrowed at the outset to focus exclusively on the costs of inclusion, and the Implementation Report did not include any assessment of the benefits of inclusive policy or the costs of the proposed ban. DoD could have framed its research question broadly by asking, "What impact has inclusive policy for transgender troops had on military readiness?" Instead, the Implementation Report addressed only the costs of inclusive policy and failed to consider overall readiness implications. A more rigorous and comprehensive assessment of readiness indicates that inclusive policy for transgender personnel promotes readiness, while banning transgender personnel and denying them medically necessary care compromises it.

Failure to consider benefits of inclusive policy

If DoD researchers had studied benefits as well as costs, they could have assessed promotion rates, time-in-service, and commendations to determine whether transgender personnel have served successfully. They could have conducted case studies of transgender personnel who have completed gender transition to determine whether transitions have been effective. DoD researchers could have studied the experience of Lieutenant Colonel Bryan (Bree) Fram, an astronautical engineer currently serving as the Air Force's Iraq Country Director at the Pentagon, overseeing all Air Force security cooperation and assistance activity for operations in Iraq. They could have evaluated the experience of Air Force Staff Sergeant Logan Ireland, who deployed to Afghanistan after transitioning gender and was named "NCO of the Quarter." DoD could have studied the experience of Staff Sergeant Ashleigh Buch, whose commander said that "She means the world to this unit. She makes us better. And we would have done that [supported gender transition] for any airman but it made it really easy for one of your best." Or DoD could have assessed the experience of Lance Corporal Aaron Wixson, whose commander reported that "We are lucky to have such talent in our ranks and will benefit from his retention if he decides to undertake a subsequent tour of duty . . . Enabling LCpl Wixson to openly serve as a transgender Marine necessarily increases readiness and broadens the overall talent of the organization."¹⁴⁰

The Implementation Report's explanation for failing to study the performance of transgender troops is that "Limited data exists regarding the performance of transgender Service members due to policy restrictions . . . that prevent the Department from tracking individuals who may identify as transgender as a potentially unwarranted invasion of

personal privacy.”¹⁴¹ But this excuse is unpersuasive, as DoD researchers could have asked data analysts to match medical records of service members diagnosed with gender dysphoria with administrative records concerning promotion rates, time-in-service, commendations, and other indicators of performance without revealing names or identifying details. Instead, DoD failed to consider any benefits of inclusive policy, and it focused exclusively on costs.

By omitting any analysis of benefits, the Implementation Report failed to address critical ways in which the accession and retention of transgender personnel promote readiness. To begin, inclusive policy for transgender service members promotes medical readiness by ensuring adequate health care to a population that would otherwise serve “underground.” As we mention in our discussion of efficacy, a robust body of scholarly research shows that transgender people who receive the care they need are better off and function well at work and beyond.¹⁴²

After the repeal of “don’t ask, don’t tell,” gay and lesbian service members experienced a decline in harassment, because they could approach offending colleagues and politely point out that unprofessional behavior was no longer acceptable in the workplace, or could safely report inappropriate behavior if it persisted.¹⁴³ Inclusive policy for transgender personnel is expected to produce a similar effect, but the Implementation Report does not address this possibility.

Finally, the Implementation Report ignores the financial gains of retaining transgender personnel. DoD data indicate that the per-person cost of care in FY2017 was \$18,000 for each service member diagnosed with gender dysphoria, but the Report does not mention that by DoD’s own estimate, recruiting and training one service member costs \$75,000.¹⁴⁴ It is much cheaper to provide medical care than to replace service members who need it.

Failure to consider costs of the ban

In response to DoD’s release of the Implementation Report, the American Psychiatric Association’s CEO and Medical Director Saul Levin stated that the proposed transgender ban “not only harms those who have chosen to serve our country, but it also casts a pall over all transgender Americans. This discrimination has a negative impact on the mental health of those targeted.” The Implementation Report, however, seems premised on the notion that the proposed ban would incur no costs. In addition to evidence that enables us to assess costs directly, scholars and experts have produced a great deal of evidence concerning the costs of “don’t ask, don’t tell,” and it is not unreasonable to expect that some of the burdens associated with that failed policy could recur if the transgender ban were reinstated.

Research on transgender military service as well as DADT suggests that reinstating the ban could (1) undermine medical readiness by depriving 14,700 transgender service members of medically necessary care should they require it;¹⁴⁵ (2) increase harassment of transgender personnel, just as DADT promoted harassment of gay men and lesbians;¹⁴⁶ and (3) drain financial resources due to the cost of replacing transgender personnel and

the cost of litigation.¹⁴⁷ In addition, the ban could (4) compromise unit cohesion by introducing divisiveness in the ranks; (5) discourage enlistment and re-enlistment by lesbians, gays, and bisexuals, who would be wary of serving in an anti-LGBT atmosphere; (6) discourage enlistment and re-enlistment by women, because this ban is based on discomfort with people who cross gender lines or otherwise violate traditional gender roles; and (7) promote policy instability. The ban would constitute the fifth policy on transgender military service over the past two years. As former U.S. Navy Judge Advocate General Admiral John D. Hutson observed, “Whatever one thinks about transgender service . . . , there is no question that careening personnel policy from one pole to the other is bad for the armed forces.”¹⁴⁸

Similar to DADT, the reinstatement of the ban would (8) force many transgender service members to hide their gender identity, given the stigma that the Implementation Report implicitly authorizes. Scholars have demonstrated that the requirement to serve in silence effectively forces troops to lie about their identity, leading to elevated incidence of depression and anxiety.¹⁴⁹ (9) When service members lie about their identity, peers suspect that they are not being forthcoming, and both social isolation and general distrust can result.¹⁵⁰ In turn, (10) forcing service members to lie about their identity compromises military integrity. Prior to the repeal of DADT, former Chairman of the Joint Chiefs of Staff Admiral Mike Mullen said that, “I cannot escape being troubled by the fact that we have in place a policy which forces young men and women to lie about who they are in order to defend their fellow citizens. For me, personally, it comes down to integrity—theirs as individuals and ours as an institution.”¹⁵¹

Finally, (11) the ban would signal to the youth of America that the military is not a modern institution. Scholarly research established that DADT was an ongoing public relations embarrassment for the Pentagon and that ripple effects impacted recruitment. Every major editorial page in the U.S. opposed DADT, and anti-military activists used the policy to rally opposition.¹⁵² Approximately three-quarters of the public opposed DADT.¹⁵³ According to one report, high schools denied military recruiters access to their campuses on 19,228 separate occasions in 1999 alone, in part as an effort “to challenge the Pentagon’s policy on homosexuals in the military.”¹⁵⁴ In the case of military service by transgender personnel, the Implementation Report cites one poll suggesting that service members oppose inclusive policy. Other polling, however, indicates that service members, veterans, retirees, and military family members favor inclusion, as does the public at large.¹⁵⁵ There is every reason to believe that the transgender ban would be just as unpopular as was DADT.

DoD Cites Misleading Figures on Financial Costs of Inclusion

The Implementation Report observed that “Since the implementation of the Carter policy, the medical costs for Service members with gender dysphoria have increased nearly three times—or 300 percent—compared to Service members without gender dysphoria.”¹⁵⁶ While the Implementation Report’s claim is correct, the cost data are taken out of context and reported in a misleading way. DoD data indicate that the average annual per-person cost for service members diagnosed with gender dysphoria is approximately \$18,000, as

opposed to the \$6,000 annual cost of care for other service members.¹⁵⁷ But the higher average per-person cost would appear any time a population is selected *for the presence of a specific health condition* and then compared to an average cohort of all other service members.

The Report's claim that medical costs for service members diagnosed with gender dysphoria are three times, or 300 percent, higher than for other troops implies that medical care for transgender personnel is expensive. But the Report does not mention that DoD's total cost for transition-related care in FY2017 was only \$2.2 million, which is less than one tenth of one percent of DoD's annual health care budget for the Active Component.

Insurance actuaries sometimes calculate costs in terms of the cost of care per plan member per month of coverage. With financial costs of transition-related care distributed force-wide, the cost of providing transition-related care is 9¢ (nine cents) per service member per month.¹⁵⁸ Even if the per-member/per-month cost estimate were restricted to the cohort of transgender service members, the financial impact of providing care would be low, because very few of the currently serving 14,700 transgender troops required *any* transition-related care during FY2017: $\$2.2 \text{ million} / 14,700 = \$149.66$ per transgender service member per year; $\$149.66 / 12 = \$12.47$ per transgender service member per month.

Higher average per-person costs would appear any time a population is selected for the presence of a specific condition and then compared to an average cohort of other service members. Even setting this qualification aside, reporting the cost of care for service members with gender dysphoria as 300 percent higher than the cost of care for other troops, without contextualizing the observation in terms of the low overall cost, could mislead readers into believing that transition-related care is expensive, which it is not.

Conclusion

Scholars and experts agree that transition-related care is reliable, safe, and effective, and medical research as well as DoD's own data confirm that transgender personnel, even those with diagnoses of gender dysphoria, are deployable and medically fit. In advancing its case for the reinstatement of the transgender ban, however, the Implementation Report mischaracterized the medical research that sustains these conclusions. The proposed transgender ban is based on double standards consisting of rules and expectations that DoD would apply only to transgender service members, but to no one else. The Report did not present any evidence showing that inclusive policy has compromised or could compromise cohesion, privacy, fairness, or safety. Finally, the Implementation Report's justification depends on partial and misleading assessments of costs and benefits, as DoD neglected to assess the benefits of inclusive policy or the costs of the ban.

The RAND study was correct in concluding that inclusive policy was unlikely to pose a meaningful risk to the readiness of the armed forces. If anything, the evidence suggests that inclusive policy for transgender service members has promoted readiness. Just like

justifications for prohibitions against women and African Americans in the military as well as the failed DADT policy, the case for banning transgender individuals from the armed forces is not supported by evidence and is unpersuasive.

Appendix

Efficacy of transition-related care

As we described earlier, an international consensus among medical experts affirms the efficacy of transition-related health care. This Appendix details that scholarship, showing that the DoD Report selected only a small slice of available evidence to reach its conclusions about the efficacy of transition-related care.

A large Dutch study published in 2007 reported follow-up data of 807 individuals who underwent surgical gender transition. Summarizing their results, the authors reaffirmed the conclusion of a much-cited 1990 study that gender transition dramatically reduces the symptoms of gender dysphoria, and hence “is the most appropriate treatment to alleviate the suffering of extremely gender dysphoric individuals.” They found that, across 18 outcome studies published over two decades, 96 percent of subjects were satisfied with transitioning, and “regret was rare.” The authors wrote that, even though there were “methodological shortcomings” to many of the studies they reviewed (lacking controls or randomized samples), “we conclude that SRS [sex reassignment surgery] is an effective treatment for transsexualism and the only treatment that has been evaluated empirically with large clinical case series.” Gender transition, they stated, “is not strongly theory driven, but a pragmatic and effective way to strongly diminish the suffering of persons with gender dysphoria.” It must be noted that not all studies of the efficacy of gender transition lack controls. The Dutch authors cite a controlled study from 1990 that compared a waiting-list condition with a treatment condition and found “strong evidence for the effectiveness” of surgical gender transition.¹⁵⁹

In a 2010 meta-analysis noted by the Implementation Report, researchers at the Mayo Clinic conducted a systematic review of 28 scholarly studies enrolling 1,833 participants who underwent hormone therapy as part of gender transition. The reviewed studies were published between 1966 and February 2008. Results indicated that 80 percent of individuals reported “significant improvement” in gender dysphoria and in quality of life, and 78 percent reported “significant improvement” in psychological symptoms. The authors concluded that “sex reassignment that includes hormonal interventions... likely improves gender dysphoria, psychological functioning and comorbidities, sexual function and overall quality of life.”¹⁶⁰

A 2015 Harvard and University of Houston longitudinal study of testosterone treatment also reviewed prior literature and found that numerous recent cross-sectional studies “suggest that testosterone treatment among transgender men is associated with improved mental health and well-being,” including improved quality of life, less anxiety, depression and social distress, and a reduction in overall mental stress.¹⁶¹

A 2016 literature review screened 647 studies to identify eleven longitudinal studies providing data on transgender individuals. Ten of them found “an improvement of psychiatric morbidity and psycho-pathology following” medical intervention (hormone therapy and/or gender-confirming surgery). Sizing up the overall research body on

transgender psychiatric outcomes, Cecilia Dhejne and her co-authors wrote: “This review found that longitudinal studies investigating the same cohort of trans people pre- and post-interventions showed an overall improvement in psychopathology and psychiatric disorders post-treatment. In fact, the findings from *most studies showed that the scores of trans people following GCMH were similar to those of the general population.*”¹⁶²

Another 2016 study, a systematic review of literature, identified numerous longitudinal studies finding that “depression, global psychopathology, and psychosocial functioning difficulties appear to reduce” in transgender individuals who get treatment for gender dysphoria, leading to “improved mental health.”¹⁶³

Copious studies reflecting a wide range of methodologies, population samples, and nationalities reached similarly positive conclusions to what was found by the researchers mentioned above, namely that individuals who obtain the care they need achieve health parity with non-transgender individuals. A 2009 study using a probability sample of 50 transgender Belgian women found “no significant differences” in overall health between subjects and the general population, which the study noted was “in accordance with a previous study in which no differences in psychological and physical complaints between transsexuals and the general Belgian population were found.”¹⁶⁴ A 2012 study reported that “Most transsexual patients attending a gender identity unit reported subclinical levels of social distress, anxiety, and depression” and did “not appear to notably differ from the normative sample in terms of mean levels of social distress, anxiety, and depression.” Patients who were not yet treated for gender dysphoria had “marginally higher distress scores than average, and treated subjects [were] *in the normal range.*”¹⁶⁵ An Italian study that assessed the impact of hormonal treatment on the mental health of transgender patients found that “the majority of transsexual patients have no psychiatric comorbidity, suggesting that transsexualism is not necessarily associated with severe comorbid psychiatric findings.”¹⁶⁶ A Croatian study from the same year concluded that, “Despite the unfavorable circumstances in Croatian society, participants demonstrated stable mental, social, and professional functioning, as well as a relative resilience to minority stress.”¹⁶⁷

Efficacy of hormone therapy

Studies show clearly that hormone treatment is effective at treating gender dysphoria and improving well-being. In 2015, Harvard and University of Houston researchers published the first controlled longitudinal follow-up study to examine the immediate effects of testosterone treatment on the psychological functioning of transgender men. The study used the Minnesota Multiphasic Personality Inventory test (2nd ed.) to take an empirical measure of psychological well-being after hormone treatment, assessing outcomes before and after treatment. (The MMPI-2 is one of the oldest, most commonly used psychological tests and is considered so rigorous that it typically requires many years of intensive psychotherapy to generate notable improvements in outcomes.) The results showed marked change in just three months: Transgender subjects who presented with clinical distress and demonstrated “poorer psychological functioning than nontransgender males” prior to treatment functioned “as well as male and female controls and demonstrated positive gains in multiple clinical domains” after just three months of

testosterone. “There were no longer statistically significant differences between transgender men and male controls” on a range of symptoms including hypochondria, hysteria, paranoia, and others after three months of treatment, the study concluded. “Overall findings here,” concluded the study, “suggest significant, rapid, and positive effects of initiating testosterone treatment on the psychological functioning in transgender men.”¹⁶⁸

These findings echoed earlier research on the efficacy of hormone therapy for treating gender dysphoria. A 2006 U.S. study of 446 female-to-male (FTM) subjects found improvements when comparing those who had and had not received hormone treatment: “FTM transgender participants who received testosterone (67 percent) reported statistically significant higher quality of life scores ($p < 0.01$) than those who had not received hormone therapy.” The study concluded that providing transgender individuals “with the hormonal care they request is associated with improved quality of life.”¹⁶⁹ A 2012 study assessed outcome differences between transgender patients who obtained hormone treatment and those who did not among 187 subjects. It found that “patients who have not yet initiated cross-sex hormonal treatment showed significantly higher levels of social distress and emotional disturbances than patients under this treatment.”¹⁷⁰

An Italian study published in 2014 that assessed hormone therapy found that “when treated, transsexual patients reported less anxiety, depression, psychological symptoms and functional impairment” with the improvements between baseline and one-year follow-up being “statistically significant.” The study stated that “psychiatric distress and functional impairment were present in a significantly higher percentage of patients before starting the hormonal treatment than after 12 months.”¹⁷¹ Another study published in 2014 found that “participants who were receiving testosterone endorsed fewer symptoms of anxiety and depression as well as less anger than the untreated group.”¹⁷²

Efficacy of surgery

A wide body of scholarly literature also demonstrates the effectiveness of gender-transition surgery. A 1999 follow-up study using multi-point questionnaires and rigorous qualitative methods including in-depth, blind follow-up interviews evaluated 28 MTF subjects who underwent transition surgery at Albert Einstein College of Medicine. The study was authored by four physicians who conducted transition surgeries at university centers in New York and Israel. *All* their subjects reported satisfaction in having transitioned, and they responded positively when asked if their lives were “becoming easier and more comfortable” following transition. Large majorities said that reassignment surgery “solved most of their emotional problems,” adding in follow-up assessments comments such as: “I am now a complete person in every way,” “I feel more self-confident and more socially adapted,” “I am more confident and feel better about myself,” and “I am happier.” Summarizing their conclusions, the authors noted “a marked decrease of suicide attempts, criminal activity, and drug use in our postoperative population. This might indicate that there is a marked improvement in antisocial and self-destructive behavior, that was evident prior to sex reassignment surgery. Most patients

were able to maintain their standard of living and to continue working, usually at the same jobs.”¹⁷³

A 2010 study of thirty patients found that “gender reassignment surgery improves the QoL [quality of life] for transsexuals in several different important areas: most are satisfied of their sexual reassignment (28/30), their social (21/30) and sexual QoL (25/30) are improved.”¹⁷⁴ A long-term follow-up study of 62 Belgian patients who underwent gender transition surgery, published in 2006, found that, while transgender subjects remain a vulnerable population “in some respects” following treatment, the vast majority “proclaimed an overall positive change in their family and social life.” The authors concluded that “SRS proves to be an effective therapy for transsexuals even after a longer period, mainly because of its positive effect on the gender dysphoria.”¹⁷⁵

Efficacy of the combination of hormone therapy and surgery

Some studies assessed global outcomes from a combination of hormone treatment and transition surgery, or they did not isolate one form of treatment from the other in reporting their overall results. They consistently found improved outcomes when transgender individuals obtained the specific care recommended by their doctor.

A 2011 Canadian study found that “the odds of depression were 2.8 times greater for FTMs not currently using hormones compared with current users” and that FTM subjects “who were planning to medically transition (hormones and/or surgery) but had not begun were five times more likely to be depressed than FTMs who had medically transitioned.” The finding shows that gender transition is strongly correlated with improved well-being for transgender individuals.¹⁷⁶ An Australian study found that “the combination of current hormone use and having had some form of gender affirmative surgery provided a significant contribution to lower depressive symptoms over and above control variables.”¹⁷⁷

A 2015 study conducted in Germany with follow-up periods up to 24 years, with a mean of 13.8 years, tracked 71 transgender participants using a combination of quantitative and qualitative outcome measures that included structured interviews, standardized questionnaires, and validated psychological assessment tools. It found that “positive and desired changes were determined by all of the instruments.” The improvements included that “participants showed significantly fewer psychological problems and interpersonal difficulties as well as a strongly increased life satisfaction at follow-up than at the time of the initial consultation.” The authors cautioned that, notwithstanding the positive results, “the treatment of transsexualism is far from being perfect,” but noted that, in addition to the positive result they found in the current study, “numerous studies with shorter follow-up times have already demonstrated positive outcomes after sex reassignment” and that this study added to that body of research the finding that “these positive outcomes persist even 10 or more years” beyond their legal gender transition.¹⁷⁸

Regrets low

A strong indicator of the efficacy of gender transition is the extremely low rate of regrets that studies have found across the board. A recent focus in popular culture on anecdotes by individuals who regretted their gender transition has served to obscure the overall statistics on regret rates. A 2014 study co-authored by Cecilia Dhejne evaluated the entirety of individuals who were granted a legal gender change in Sweden across the 50-year period from 1960 through 2010. Of the total number of 681 individuals, the number who sought a reversal was 15, a regret rate of 2.2 percent. The study also found a “significant decline of regrets over the time period.” For the most recent decade covered by Dhejne’s data, 2000 to 2010, the regret rate was just three tenths of one percent. Researchers attribute the improvements over time to advances in surgical technique and in social support for gender minorities, suggesting that today’s transgender population is the most treatable in history, while also sounding a caution that institutional stigma and discrimination can themselves become barriers to adequate care.¹⁷⁹

The low regret rate is consistent in the scholarly literature, and it is confirmed by qualitative studies and quantitative assessments. A 1992 study authored by one of the world’s leading researchers on transgender health put the average regret rate at between 1 and 1.5 percent. This figure was based on cumulative numbers from 74 different follow-up studies conducted over three decades, as well as a separate clinical follow-up sample of more than 600 patients.¹⁸⁰ A 2002 literature review also put the figure at 1 percent.¹⁸¹ A 1998 study put the figure as high as 3.8 percent, but attributed most regret to family rejection of the subjects’ transgender identity.¹⁸² The 1999 study of transition surgery outcomes at Albert Einstein College of Medicine found that “None of the patients regretted or had doubts about having undergone sex-reassignment surgery.”¹⁸³ The 2006 Belgian study mentioned elsewhere followed 62 subjects who underwent transition surgery and “none of them showed any regrets” about their transition. “Even after several years, they feel happy, adapt well socially and feel no regrets,” the authors concluded.¹⁸⁴ And the 2015 German follow-up study of adults with gender dysphoria found that none of its 71 participants expressed a wish to reverse their transition.¹⁸⁵

¹ The authors wish to thank John Blosnich, Drew Cameron, Jack Drescher, Jesse Ehrenfeld, Nick Gorton, Evan Schofer, Andy Slavitt, Hugh Waddington, and the many medical experts and service members who provided feedback. We are grateful for their invaluable assistance in preparing this study.

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⁵ American Psychological Association, “Statement Regarding Transgender Individuals Serving in Military,” March 26, 2018; Palm Center (news release), “Former Surgeons General Debunk Pentagon Assertions about Medical Fitness of Transgender Troops,” March 28, 2018; American Psychiatric Association, “APA Reiterates Its Strong Opposition to Ban of Transgender Americans from Serving in U.S. Military” (News Release), Mar. 24, 2018; World Professional Association for Transgender Health, “WPATH Policy Statements: Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.,” December 21, 2016.

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⁹ Tamara Jensen, Joseph Chin, James Rollins, Elizabeth Koller, Linda Gousis, and Katherine Szarama. “Final Decision Memorandum on Gender Reassignment Surgery for Medicare Beneficiaries with Gender Dysphoria,” Centers for Medicare and Medicaid Services (CMS), August 30, 2016, 71.

¹⁰ CMS 100-08, Medicare Program Integrity Manual (2000), 13.7.1, <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-Items/CMS019033.html>, accessed April 23, 2018.

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¹² Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna Johansson, Niklas Langstrom, and Mikael Landen (2011), “Long-Term Follow-up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden,” *PLoS One* 6(2).

¹³ Palm Center (news release), “Former Surgeons General Debunk Pentagon Assertions about Medical Fitness of Transgender Troops,” March 28, 2018. At the time of writing, the publicly released version of the statement has been signed by two former Surgeons General. Since the statement’s release, however, four additional former Surgeons General have signed. The revised signatory list will be released soon.

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¹⁵ Department of Defense Instruction 6130.03, Medical Standards for Appointment, Enlistment, or Induction in the Military Services (April 28, 2010, incorporating Change 1, September 13, 2011), 9. Also see <http://www.amsara.amedd.army.mil/>.

¹⁶ DoD Report, 24, quoting Jensen, et al. “Final Decision Memorandum,” 62.

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¹⁸ HHS, Transsexual Surgery Docket, 20.

¹⁹ Jensen et al. “Final Decision Memorandum,” 54, 57, emphasis added.

²⁰ Personal communication with the authors, April 21, 2018.

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²² R. Nick Gorton, “Research Memo Evaluating the 2014 Hayes Report: ‘Sex Reassignment Surgery for the Treatment of Gender Dysphoria’ and the 2004 Hayes Report: ‘Sex Reassignment Surgery and Associated Therapies for Treatment of GID,’ April 2018.”

²³ *Ibid.*

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- ³⁴ Department of Defense Instruction 1322.18, Disability Evaluation System (August 5, 2014), 23.
- ³⁵ Memorandum, Under Secretary of Defense, Personnel and Readiness, DoD Retention Policy for Non-Deployable Service Members (February 14, 2018).
- ³⁶ DoD Report, 5
- ³⁷ Ibid., 5–6.
- ³⁸ Ibid., 5 (emphasis added).
- ³⁹ Ibid., 32.
- ⁴⁰ Ibid., 6, 32.
- ⁴¹ Ibid., 10.
- ⁴² DoDI 6130.03, 18.
- ⁴³ DoD Report, 11.
- ⁴⁴ DoDI 6130.03, 25.
- ⁴⁵ Department of Defense Instruction 1300.28, In-Service Transition for Transgender Service Members (October 1, 2016), 3.
- ⁴⁶ Palm Center, “Former Surgeons General.”
- ⁴⁷ DoD Report, 20–21.
- ⁴⁸ Jack Drescher et al. (2012), “Minding the Body: Situation Gender Identity Diagnoses in the ICD-11,” *International Review of Psychiatry*, 24(6): 568; See also Jack Drescher (2010), “Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual,” *Archives of Sexual Behavior*, 39(2): 427–60.
- ⁴⁹ Personal communication with the authors, April 10, 2018.
- ⁵⁰ American Psychiatric Association, “APA Reiterates Its Strong Opposition.”
- ⁵¹ DoD Report, 27.
- ⁵² Army Regulation 40-501, Standards of Medical Fitness (December 22, 2016), 60.
- ⁵³ Ibid., 62.
- ⁵⁴ Ibid., 63.
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- ⁵⁷ Department of Defense, Transgender Service in the U.S. Military: An Implementation Handbook (September 30, 2016), 31 (“Commander’s Handbook”).
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- ⁶² Ibid., 33
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- ⁶⁴ Modification Thirteen to U.S. Central Command Individual Protection and Individual, Unit Deployment Policy, Tab A (March 2017).

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- ⁶⁶ Ibid., 34.
- ⁶⁷ Modification Thirteen, 8.
- ⁶⁸ Ibid., 9–10.
- ⁶⁹ Ibid., 8.
- ⁷⁰ Ibid., 4.
- ⁷¹ DoD Report, 33.
- ⁷² Ibid.; See also DoD Report, 22–23, 34 and 41n164.
- ⁷³ Letter from Dr. Wylie C. Hembree, M.D. (October 25, 2015).
- ⁷⁴ DoD Report, 33.
- ⁷⁵ Ibid., 34.
- ⁷⁶ Ibid., 33n123, citing Agnes Schaefer et al. (2016), “Assessing the Implications of Allowing Transgender Personnel to Serve Openly,” RAND Corporation, 59.
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- ⁹² John Blosnich, Letter to the Editor (draft in preparation for peer-review submission, forthcoming, 2018). Unlike the military, VHA does not provide transition surgery. VHA mental health utilization among transgender individuals could increase if VHA provided surgery, because patients might need additional mental health approval to qualify. At the same time, mental health utilization might decrease if VHA provided surgery, because surgery can mitigate gender dysphoria, which would diminish the need for mental health care.
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EXHIBIT 10

Earn more points on
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All 4 service chiefs on record: No harm to units from transgender service

By: **Tara Copp** □ April 24



Plaintiff Cathrine Schmid, second from left, listens as attorney Natalie Nardecchia speaks in front of a federal courthouse following a hearing March 27, 2018, in Seattle. U.S. District Judge Marsha Pechman says she won't immediately consider President Donald Trump's new policy banning transgender people from serving in the military. (Elaine Thompson/AP)

Air Force Chief of Staff Gen. Dave Goldfein told Congress Tuesday he was not aware of any negative effects from [transgender personnel serving](#), joining all three other service chiefs in a

rare public split with President Donald Trump over the issue.

Sen. Kristen Gillibrand, D-N.Y., as she had with the top military leaders of the Army, Navy and Marine Corps when they appeared before the Senate Armed Services Committee for their budget hearings, used the opportunity to question Goldfein as to whether he was aware of any “issues of unit cohesion, disciplinary problems or issues of morale resulting from open transgender service.”

“In the last two weeks Gen. [Mark] Milley, Gen. [Robert] Neller, and Adm. [John] Richardson have told me that they have seen zero reports of issues of cohesion, discipline, morale as a result of open transgender service in their respective service branches,” Gillibrand said, referring to the chiefs of staff of the Army, Marine Corps and Navy, respectively.

Goldfein said he was not aware of any issues with transgender service members, but emphasized that each case is unique. Goldfein said among the transgender service members he had talked to, he had found a “commitment to serve by each of them.”



Here is the Mattis guidance and Pentagon study behind the Trump transgender decision

The White House's late Friday announcement was influenced by the these documents.

By: Tara Copp

Likewise, in earlier testimonies, when the three other service secretaries were asked if they had

heard of any harm to unit cohesion or other problems, they responded:

Navy: “By virtue of being a Navy sailor, we treat every one of those Navy sailors, regardless, with dignity and respect,” said [Chief of Naval Operations Adm. John Richardson](#). “That is warranted by wearing the uniform of the United States Navy. By virtue of that approach, I am not aware of any issues.”

Marine Corps: “By reporting those Marines that have come forward, there’s 27 Marines that have identified as transgender, one sailor serving. I am not aware of any issues in those areas,” said Marine Commandant Gen. Robert Neller.

Army: “We have a finite number. We know who they are, and it is monitored very closely, because, you know, I’m concerned about that, and want to make sure that they are, in fact, treated with dignity and respect. And no, I have received precisely zero reports,” said Army Chief of Staff Gen. Mark Milley.

Last month the White House announced that it would leave the decision to the service secretaries on whether or not to allow transgender personnel to serve; but also directed that a subset of transgender personnel — those with a diagnosis of gender dysphoria — would be prohibited from serving. Gender dysphoria is a condition where a person experiences discomfort with their biological sex.

In his [February guidance to President Trump](#), Mattis also listed several other limitations on transgender service, including an extension of the amount of time someone would need to be stable in their preferred sex to 36 months and a prohibition on service members who have undergone corrective surgery.

Critics have said the gender dysphoria argument is an attempt to keep all transgender

personnel from serving, because "gender dysphoria" is a broadly used diagnosis used by the medical community for transgender persons and not indicative of a more serious issue.

The four service chiefs, along with the chief of the National Guard Bureau and Chairman of the Joint Chiefs of Staff Gen. Joseph Dunford, comprise the president's top circle of military advisers. Each service chief's testimony marked an unusual split with the president and Defense Secretary Jim Mattis, who have advised that allowing personnel with gender dysphoria to serve would harm unit cohesion and present an "unreasonable burden on the military."

The administration's prohibitions on transgender service are still being challenged in the courts; four federal courts have already overturned Trump's previous ban on new accessions by transgender personnel and the other aspects of the administration's transgender policy are now part of ongoing lawsuits.

**About
this
Author**



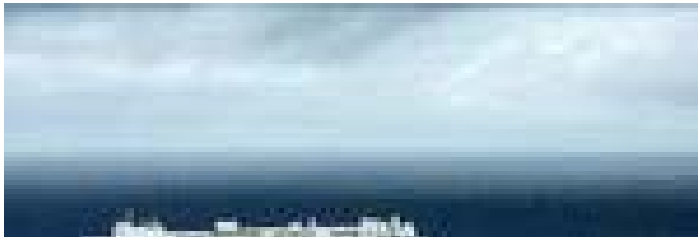
About Tara Copp

Tara Copp is the Pentagon Bureau Chief for Military Times and author of the award-winning military nonfiction "The Warbird: Three Heroes. Two Wars. One Story."

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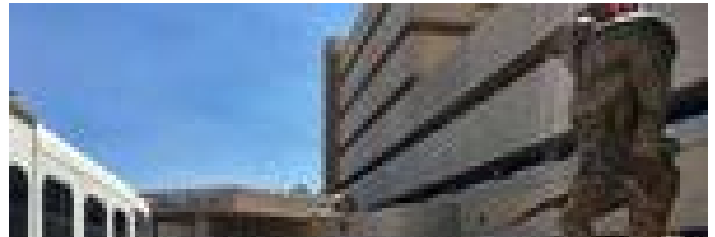
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Pat Ziegler · Bismarck, North Dakota

The US spends more on the military than it did when the Soviet Union was still around (using constant dollars). There are those who say they need even more money but money isn't the problem. It's never been the problem. The problem is very simple.

The military wastes far too much time trying to find reasons to kick qualified people out of the military because the majority of the people in the military are unfit. They voted for Trump and the gop after they spent years lying about every major issue in the country.

Until the military ups its standards for enrollment, the world will laugh at it. Just the other day China said it won't give in to Trump on trade and said the US isn't strong enough to do anything about it. So true. We lack the intellect, morals or common decency to vote for good people because racism is now considered normal.

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James Simpson · Works at Self Employed Investigative Journalist

Why would anyone expect anything else? Diversity training would communicate to all but the most intellectually challenged dolts that to report any kind of problems under a military run by Obama seditionists would be an immediately career-killing move. The self-censorship is stifling! Joe Miller adds: "Of course, none of these brown-nosing Obama acolytes bothered to share with Congress the OVERWHELMING opposition of our service members to trannies serving with them in foxholes, tanks, subs, ships, barracks, etc."

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Pat Ziegler · Bismarck, North Dakota

Ah, you voted for the man who spent years lying about where Obama was born and you think you have what it takes to do anything other than whine. Trust me, no one cares what racists think.

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Michael Winkler · Works at Retired

What do you expect after Obama FORCED a lot of the Top Military Brass to Resign and REPLACED them with people he liked....

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Charles Hill · Usually reclined at Retired

There are five service chiefs, not four.

[Like](#) · [Reply](#) · 4w



James Leach

Fire the chiefs. They are all Obama appointees anyway. Any person who can't recognize what their own plumbing is for obviously has mental health issues.

[Like](#) · [Reply](#) · [👍 1](#) · 4w



Michelle McGill

Why because they don't go along with what you them to?

Like · Reply · 5 · 4w



James Simpson · Works at Self Employed Investigative Journalist

Michelle McGill No because they are political fraud hirelings of a seditious ex-president.

Like · Reply · 4w



Amanda Hunter · Barrie, Ontario

James Simpson triggered much

Like · Reply · 3w

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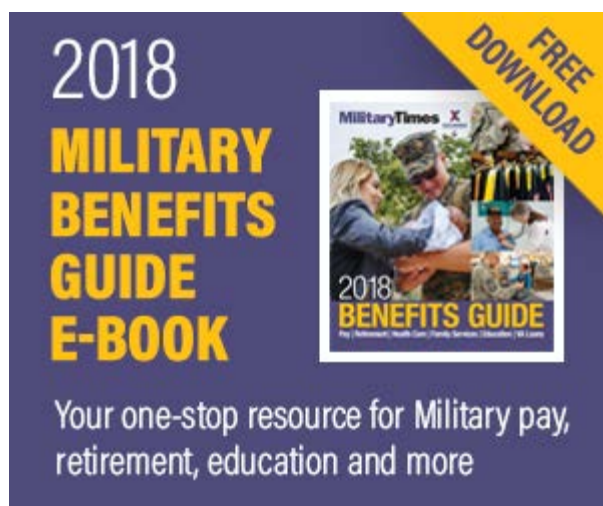
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

Case No. 1:17-cv-02459-MJG

**SUPPLEMENTAL DECLARATION OF NIKO BRANCO IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS PLAINTIFFS'
SECOND AMENDED COMPLAINT, OR, IN THE ALTERNATIVE,
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I, Niko Branco, hereby declare:

1. The facts set forth in this declaration are based on my personal knowledge.
2. On or about May 17, 2018, the Army recruiter that I have been working with informed me that the recruiting center was in possession of all necessary medical paperwork related to my transition that it needed from me to process my application for enlistment.
3. The completed paperwork includes a letter from two of my physicians certifying that: (a) I do not require any further surgeries as part of my treatment plan; (b) I have been stable on my hormone therapy for more than three years; (c) throughout that time I have been free from any distress; and (d) throughout that time I have been free from any impairment.
4. Sergeant First Class Donald D. Osburn informed me on May 17, 2018 that the Army did not require any further information related to my gender transition.

5. On May 21, 2018, Sergeant First Class Donald D. Osburn informed me that the recruiting center was in possession of all necessary paperwork related to my prior knee injury and surgery.
6. He stated that the recruiting center would submit my completed paperwork to the United States Military Entrance Processing Command.

Executed on the 24 day of May, 2018 in Torrington, Connecticut.

Nikolai Branco

NIKO BRANCO

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

Case No. 1:17-cv-02459-MJG

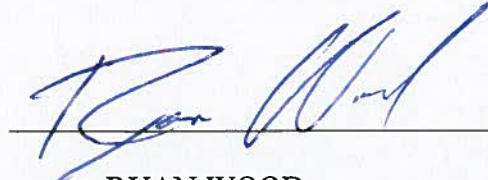
**SUPPLEMENTAL DECLARATION OF RYAN WOOD IN SUPPORT OF PLAINTIFFS'
OPPOSITION TO MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED
COMPLAINT, OR, IN THE ALTERNATIVE, DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

I, RYAN WOOD, hereby declare:

1. The facts set forth in this declaration are based on my personal knowledge.
2. On May 22, 2018, I provided updated medical paperwork to the United States Marine Corps recruiter that I have been working with. I understand that the recruiting center is now in possession of all necessary medical paperwork related to my transition that it needs from me to process my application for enlistment.
3. The completed paperwork includes a letter from my physician certifying that: (a) I do not require any further surgeries as part of my treatment plan; (b) I have been stable as a man for more than 18 months; and (c) I have been stable on my hormone therapy for more than 18 months.
4. My physician further certified in that letter that I have been mentally stable throughout this time, without any clinically significant distress or impairment for at least the previous 18 months.

5. I did not undergo any transition-related surgery in November 2017. As I have stated previously (Dkt. 139-36, ¶ 6), I last underwent transition-related surgery in 2012, and do not anticipate requiring any further transition-related surgery in the future.

Executed on the 25th day of May, 2018 in Puyallup, Washington.



RYAN WOOD

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

Case No. 1:17-cv-02459-MJG

**RULE 56(d) AFFIDAVIT OF MARIANNE F. KIES IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I, MARIANNE F. KIES, depose and say as follows:

1. I make this declaration in support of the remedies and relief sought by Plaintiffs in this case, and in opposition to Defendants' motion for summary judgment, ECF 158. The following facts are based on my own personal knowledge, except those stated upon information and belief, and as to all such facts stated upon information and belief, I am informed and believe that the same are true.

2. I am an attorney with Covington & Burling LLP, and I represent Plaintiffs in this action.

Defendants Withheld Essential Discovery

3. Defendants have withheld from Plaintiffs critical documents and information bearing directly on Plaintiffs' claims, and which Plaintiffs have requested via requests for production and interrogatories. As set forth in further detail below, Defendants' conduct in discovery has denied Plaintiffs the opportunity to discover specific evidence and present facts

essential to justify their opposition to Defendants' pending motion for summary judgment. Further, the essential information Plaintiffs seek is possessed only by Defendants.

4. Plaintiffs served their first sets of interrogatories and requests for production on Defendants on January 3, 2018.

5. Attached hereto as "Exhibit A" is a true and correct copy of Plaintiffs' First Set of Interrogatories to Defendants, served on January 3, 2018.

6. Attached hereto as "Exhibit B" is a true and correct copy of Plaintiffs' First Set of Requests for Production of Documents, served on January 3, 2018.

7. Defendants served objections and responses to Plaintiffs' requests for production and interrogatories on February 9, 2018. These objections and responses included a litany of boilerplate objections based on, *inter alia*, the presidential communications privilege and the deliberative process privilege. Defendants' February 9, 2018 objections and responses to Plaintiffs' interrogatories do not comply with the requirements of Federal Rule of Civil Procedure 33(d), and they have not been supplemented to comply with those requirements.

8. Attached hereto as "Exhibit C" is a true and correct copy of Defendants' Objections and Responses to Plaintiffs' First Set of Interrogatories to Secretary Mattis, served by Defendants on February 9, 2018.

9. Attached hereto as "Exhibit D" is a true and correct copy of Defendants' Objections and Responses to Plaintiffs' First Set of Requests for Production of Documents to Secretary Mattis, served by Defendants on February 9, 2018.

10. Attached hereto as "Exhibit E" is a true and correct copy of Defendants' Objections and Responses to Plaintiffs' First Set of Interrogatories to Defendant Donald J. Trump, served by Defendants on February 9, 2018.

11. Attached hereto as “Exhibit F” is a true and correct copy of Defendants’ Objections and Responses to Plaintiffs’ First Set of Requests for Production of Documents to Defendant Donald J. Trump, served by Defendants on February 9, 2018.

12. Attached hereto as “Exhibit G” is a true and correct copy of Defendants’ Objections and Responses to Plaintiffs’ First Set of Interrogatories to the Air Force and Secretary Wilson, served by Defendants on February 9, 2018.

13. Attached hereto as “Exhibit H” is a true and correct copy of Defendants’ Objections and Responses to Plaintiffs’ First Set of Requests for Production of Documents to the Air Force and Secretary Wilson, served by Defendants on February 9, 2018.

14. Attached hereto as “Exhibit I” is a true and correct copy of Defendants’ Objections and Responses to Plaintiffs’ First Set of Interrogatories to the Army and Secretary Esper, served by Defendants on February 9, 2018.

15. Attached hereto as “Exhibit J” is a true and correct copy of Defendants’ Objections and Responses to Plaintiffs’ First Set of Requests for Production of Documents to the Army and Secretary Esper, served by Defendants on February 9, 2018.

16. Attached hereto as “Exhibit K” is a true and correct copy of Defendants’ Objections and Responses to Plaintiffs’ First Set of Interrogatories to the Navy and Secretary Spencer, served by Defendants on February 9, 2018.

17. Attached hereto as “Exhibit L” is a true and correct copy of Defendants’ Objections and Responses to Plaintiffs’ First Set of Requests for Production of Documents to the Navy and Secretary Spencer, served by Defendants on February 9, 2018.

18. Defendants made an initial production in this matter on February 9, 2018, containing approximately 17,000 documents. This production was identical to their initial

production in *Doe, et al. v. Trump, et al.*, No. 17-1597 (D.D.C.), minus information pertinent to the individual *Doe* plaintiffs.

19. On February 13, 2018, Defendants produced twelve privilege logs to Plaintiffs from the President, the Department of Defense, each of the military services, the Chairman of the Joint Chiefs of Staff, and the Defense Health Agency. These logs indicated that Defendants were withholding or had redacted an extremely high number of documents based on various privileges. The quality of the information of the privilege logs overall was poor, with key information missing in many cases, such as the sender or recipient of communications, the subject of those communications, or a clear articulation of the basis on which documents were being withheld. Many entries contained non-substantive, boilerplate descriptions.

20. The privilege log provided by Defendant Trump failed even to identify any specific documents or any specific individuals involved with those documents, but instead merely listed categories of documents and personnel.

21. The privilege logs in many cases failed to provide sufficient detail to permit Plaintiffs to evaluate the validity of the asserted privileges.

22. Attached hereto as “Exhibit M” is a true and correct copy of an initial, partial privilege log listing Department of Defense documents, served by Defendants on February 13, 2018.

23. Plaintiffs thereafter endeavored to meet and confer with Defendants regarding the deficiencies in Defendants’ document production. Attached hereto as “Exhibit N” is a true and correct copy of a letter from my colleague and co-counsel Augustus Golden sent to defense counsel Ryan Parker on February 21, 2018, outlining numerous deficiencies in Defendants’

discovery objections and privilege logs, including their claims of deliberative process privilege and presidential communications privilege.

24. Defendants did not substantively respond to this letter. Instead, during a March 1, 2018 conference with the Court, Defendants requested that Plaintiffs identify particular privilege log entries for re-consideration. Plaintiffs advised that this proposal was likely not feasible given the inadequacy of the information provided in Defendants' privilege logs.

25. On March 9, 2018, I sent an email to Mr. Parker confirming Plaintiffs' view that it was not possible to provide a line-by-line identification of deficient entries, and requesting a further meet and confer session to discuss the ongoing deficiencies in Defendants' discovery responses. Attached hereto as "Exhibit O" is a true and correct copy of that correspondence.

26. Defendants made a supplemental production of approximately 17,000 additional documents on March 9, 2018.

27. On March 13, 2018, counsel for Plaintiffs and Defendants met and conferred in person at defense counsel's offices. I was in attendance for Plaintiffs, as were my colleagues and co-counsel Mark Lynch and Mark Neuman-Lee. In attendance for Defendants were Mr. Parker and other Department of Justice attorneys. This meet and confer session did not resolve the parties' dispute regarding Defendants' assertion of the deliberative process privilege.

28. During that same meeting, Plaintiffs' counsel also sought to engage Defendants' counsel in a discussion regarding Defendants' assertions of the presidential communications privilege. Defendants' counsel categorically refused to meet and confer on that topic at that time, and advised they would not do so until after the Court had ruled on Defendants' partial motion for judgment on the pleadings addressing claims against the President.

29. Attached hereto as “Exhibit P” is a true and correct copy of a letter I sent to Mr. Parker on March 16, 2018, further describing the deficiencies in Defendants’ document productions and interrogatory responses. Defendants have not, to date, provided any substantive response to this letter.

30. On March 20, 2018, Defendants produced six additional privilege logs to Plaintiffs. The privilege logs continued to reflect that Defendants are withholding documents on the same grounds discussed in the meet and confer communications.

31. Attached hereto as “Exhibit Q” is a true and correct copy of a letter I sent to Mr. Parker on April 9, 2018, requesting a response to my letter of March 16 and further explaining why Defendants’ assertions of the deliberative process privilege were deficient. Defendants did not respond.

32. Lacking any substantive response to their multiple deficiency letters—and after attempting to meet and confer for more than two months—Plaintiffs served a motion to compel on Defendants on April 23, 2018. This motion was narrowly tailored to a subset of the documents Defendants had withheld on the basis of the deliberative process privilege. Specifically, Plaintiffs’ motion seeks a ruling that the deliberative process privilege does not apply in this case to: (1) deliberative materials relating to the President’s original July 2017 Tweets and August 2017 Memorandum banning transgender individuals from military service; (2) deliberative materials relating to the activities of the Department of Defense’s (“DoD”) so-called “panel of experts” and its working groups tasked with developing a plan to study and implement that decision; and (3) deliberative materials relating to DoD’s Implementation Plan and the President’s acceptance of that Plan in his March 23 memorandum, including any

participation or interference in that process by anti-transgender activists and lobbyists.

Defendants have indicated they intend to oppose this motion, and their opposition is due May 29.

33. Defendants have continued to produce documents subsequent to service of Plaintiffs' motion to compel. On May 22, 2018, just three days before the due date of Plaintiffs' opposition to Defendants' motion for summary judgment, Defendants produced an additional 43,763 documents. The cover letter included with that production stated that Defendants would provide additional privilege logs in connection with that production, but they have not yet done so.

34. Based on prior correspondence from Defendants, Plaintiffs understand Defendants to take the position that they have now adequately responded to Plaintiffs' first requests for production to the original set of Defendants, and no further production is presently anticipated.

35. Defendants have yet to respond to Plaintiffs' second sets of interrogatories and requests for production to the original Defendants, served May 21, 2018, or Plaintiffs' first set of interrogatories and requests for production to Defendants Nielsen and Zukunft, served May 23, 2018. It is unclear whether Defendants plan to produce further documents in response to these discovery requests.

36. Defendants advised Plaintiffs by phone on May 1, 2018 that they continue to assert the deliberative process privilege over the same categories of documents that are subject to Plaintiffs' motion to compel, both for prior and future productions. Defendants' May 22 production, therefore, does not cure the significant deficiencies in Defendants' productions to date.

37. Discovery in this case is ongoing. In addition to raising expansive and unsupported privilege claims, Defendants have not taken a single deposition. Nor have Defendants produced any expert disclosures.

38. Due to Defendants' delays in producing certain documents, and outright refusal to produce others, and their delay in producing adequate initial disclosures, Plaintiffs have not yet been able to take a single deposition in this matter. Nor have Plaintiffs been able to produce any expert disclosures.

Specific Evidence and Discovery Essential to Plaintiffs' Opposition

39. Due to Defendants' discovery delays and broad withholding of documents, described above, Plaintiffs at minimum need further discovery to fully oppose Defendants' motion for summary judgment. The following are specific exemplary facts that are yet to be discovered, where the information sought would be sufficient to create a genuine issue of material fact that would preclude Defendants' requested summary judgment.

The Influence of the President over the Implementation Plan

40. Defendants claim that the Implementation Plan should be accorded deference because it is the product of independent military judgment, unconnected to the President's prior tweets and August 2017 Ban. *See, e.g.*, ECF 158 at 23–28, 47–48. Specifically, Defendants ask this Court to “credit the unambiguous statements of senior military leadership, and categorically reject any argument that the new policy does not reflect the independent, professional judgment of the United States military.” *Id.* at 48.

41. Plaintiffs have sought, but have been denied, discovery into the truthfulness of Defendants' claim, which is critical to Plaintiffs' opposition to Defendants' motion for summary determination. Plaintiffs have requested all documents and communications received by the panel of experts responsible for the process that culminated in the Implementation Plan, as well

as the identity of all persons involved in that process. *See* Ex. A at 10 (Interrogatory No. 15), 11 (Interrogatory No. 17). On information and belief, the Office of the President was involved in the process that culminated in the Implementation Plan, and the allegedly “independent” process was, in fact, “a coordinated effort with the White House as well as the Department of Justice.” *See, e.g.*, ECF 139-7.

42. The involvement of the President or the White House in the work of the “Panel of Experts” could show that the Implementation Plan suffers from the same taint of animus as the tweets, directly contradicting Defendants’ claims that deference is due to the Implementation Plan as an independent military decision. Plaintiffs’ requested discovery on this issue is therefore critical to ensuring that Plaintiffs can fully oppose Defendants’ motion for summary judgment.

The Influence of Third Parties over the Implementation Plan

43. Plaintiffs have also sought, but have been denied, discovery into the influence of third parties over the supposed independence of the Implementation Plan. This information is critical to Plaintiffs’ opposition to Defendants’ motion for summary determination. Plaintiffs have requested all documents and communications within Defendants’ possession that were received from outside parties opposed to military service by transgender individuals. *See* Ex. B at 12 (Request for Production No. 13). On information and belief, outside parties who are politically and morally opposed to military service by transgender individuals—including Vice President Mike Pence, Ryan T. Anderson of the Heritage Foundation, and Tony Perkins of the Family Research Council—had “a leading role” in creating the report that formed the basis of the Implementation Plan. *See* ECF 139-8.

44. The involvement of third parties in the process underlying the Implementation Plan would create a significant issue of material fact regarding whether the Implementation Plan

actually reflects the alleged “independent, professional judgment of the United States military.” ECF 158 at 48. Plaintiffs’ requested discovery on this issue is therefore critical to ensuring that Plaintiffs can fully oppose Defendants’ motion for summary judgment.

The Process by which the Implementation Plan Was Crafted

45. Defendants’ motion for summary judgment asserts that the Implementation Plan is due deference as the product of an independent and unbiased military study executed by the Department of Defense’s so-called “Panel of Experts.” ECF 158 at 47.

46. Plaintiffs have sought, but have been denied, discovery into the workings of DoD’s “Panel of Experts” in order to determine whether the process it conducted in evaluating military service by transgender individuals, and the plan it ultimately recommended, were in fact independent, and whether that Panel’s findings, which form the basis for the Implementation Plan, are credible. This information is critical to Plaintiffs’ opposition to Defendants’ motion for summary determination. Plaintiffs have requested: all documents and communications concerning the purpose, composition, structure, research, analysis, findings, and conclusions of the Panel of Experts (*see* Ex. B at 13 (Request for Production No. 15)); all documents and communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018 (*see id.* (Request for Production No. 16)); and identification of all documents and communications concerning military service by transgender individuals that were requested, received, considered directly or indirectly, or consulted by Defendants—including the Panel of Experts—since January 20, 2017 (*see* Ex. A at 10 (Interrogatory No. 15)). On information and belief, the Panel of Experts did not operate independently or with an open mind as to its eventual findings, but instead conducted its activities with the preconceived objective of effectuating

President Trump's Transgender Service Member Ban, was tainted by the outside influence of anti-transgender activists, and did not employ scientifically or medically sound methodologies.

47. Information about these aspects of the work of the Panel of Experts would create a significant issue of material fact regarding whether the Implementation Plan reflects the alleged “independent, professional judgment of the United States military.” ECF 158 at 48. Plaintiffs’ requested discovery on this issue is therefore critical to ensuring that Plaintiffs can fully oppose Defendants’ motion for summary judgment. In addition to documents reflecting the workings of the Panel of Experts—which Defendants have refused to produce based on an invalid assertion of the deliberative process privilege—members of the Panel of Experts and the people on whom they relied are critical witnesses in this case. But Defendants have refused to provide the names of individuals who attended and/or provided information for meetings of the Panel of Experts.

The Directives Underlying the Implementation Plan

48. As explained above, Defendants’ motion for summary judgment asserts that the Implementation Plan is due deference as an independent military decision. Defendants further assert that the Implementation Plan is not an extension of the prior Transgender Service Member Ban (ECF 158 at 44–50).

49. Plaintiffs have sought, but have been denied, discovery into the directives underlying the Implementation Plan. This information is critical to Plaintiffs’ opposition to Defendants’ motion for summary determination. Plaintiffs have requested all documents and communications that any Defendants considered, reviewed, referenced, or relied upon as a basis or impetus for the Transgender Service Member Ban. See Ex. B at 11 (Request for Production No. 8). Plaintiffs have also requested identification of all documents and communications concerning transgender individuals considered, reviewed, requested, or consulted by Defendants since January 20, 2017. See Ex. A at 10 (Interrogatory No. 15). On information and belief, the

Implementation Plan was designed to effectuate the policies embodied by the Transgender Service Member Ban, and was not in fact a new exercise of independent, unbiased military judgment. *See, e.g.*, USDOE00000442–43, a true and correct copy of which is attached hereto as “Exhibit R” (Secretary Mattis directing military officials “in developing an Implementation Plan on military service by transgender individuals, to **effect the policy and directives in Presidential Memorandum, *Military Service by Transgender Individuals*, dated August 25, 2017**” (emphasis added)).

50. The fact that the Implementation Plan was designed to effectuate the Transgender Service Member Ban would create a significant issue of material fact regarding whether the Implementation Plan reflects the alleged “independent, professional judgment of the United States military.” ECF 158 at 48. Plaintiffs’ requested discovery on this issue is therefore critical to ensuring that Plaintiffs can fully oppose Defendants’ motion for summary judgment.

The Alternatives to the Implementation Plan

51. Plaintiffs have sought discovery into Defendants’ decision to adopt the Implementation Plan, including any potential alternatives to the Implementation Plan that Defendants considered or dissenting opinions voiced within the “Panel of Experts.” This information is critical to Plaintiffs’ opposition to Defendants’ motion for summary determination. As discussed above, Plaintiffs have requested documents and communications concerning the purpose, composition, structure, research, analysis, findings, and conclusions of the Panel of Experts (*see* Ex. B at 13 (Request for Production No. 15)) and all documents and communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018 (*see id.* (Request for Production No. 16)).

52. On information and belief, the Implementation Plan was not the only plan evaluated by the Panel of Experts; certain individuals on the Panel of Experts disagreed with the decision to adopt the Implementation Plan, and these alternatives and dissenting opinions were not fairly considered and evaluated by the Panel of Experts. *See, e.g.*, USDOE00081113–16, a true and correct copy of which is attached hereto as “Exhibit S” (“The recommendations... are not supported by the data provided to the panel in terms of military effectiveness, lethality, or budget constraints, and are likely not consistent with applicable law.”). Plaintiffs have sought discovery into the data presented to the Panel of Experts discussed in Exhibit S, but Defendants have produced only the data that support Defendants’ position, withholding evidence that supports the dissent in Exhibit S.

53. The facts that there existed alternatives to, and dissenting opinions from, the Implementation Plan within the Panel of Experts, and that these alternatives and dissenting opinions were silenced or not fairly considered, at least create a significant issue of material fact regarding whether the Implementation Plan reflects the alleged “independent, professional judgment of the United States military.” ECF 158 at 48. Plaintiffs’ requested discovery on this issue is therefore critical to ensuring that Plaintiffs can fully oppose Defendants’ motion for summary judgment.

Animus Underlying Efforts to Exclude Transgender Individuals from the Military

54. Defendants’ motion for summary judgment asserts that the Implementation Plan is due deference as an independent military decision, in part, because the Implementation Plan supposedly promotes the military values of military readiness, order, discipline, leadership unit cohesion, and avoiding the expense of disproportionate costs. ECF 158 at 28–40.

55. Plaintiffs have sought, but have been denied, discovery into President Trump’s initial decision to issue the Transgender Service Member Ban, in order to assess whether that

decision was motivated by the military considerations Defendants cite, or whether that decision was, in fact, motivated by unconstitutional animus. This information is critical to Plaintiffs' opposition to Defendants' motion for summary determination. Plaintiffs have requested extensive information concerning President Trump's decision to issue the Ban and the tweets that prefaced that decision, including *inter alia* the documents reviewed in that connection and identification of the "Generals and military experts consulted." See Ex. A at 8–9 (Interrogatories 1–10). On information and belief, the decision to issue the Ban was motivated by unconstitutional animus and not the military considerations Defendants cite. See ECF 40-12, 40-14.

56. Defendants have refused to provide any discovery from the President, and have withheld all relevant documents based on broad and ill-defined privilege claims. As explained above, Defendants' privilege log for President Trump's documents fails even to identify any specific documents or any specific individuals involved with those documents. To date, defense counsel has categorically refused to discuss any discovery regarding documents or communications the President considered when issuing the Transgender Service Member Ban. See *supra*, ¶¶ 25–26.

57. The fact that the Transgender Service Member Ban was the product of unconstitutional animus would create a significant issue of material fact regarding whether the Implementation Plan reflects the alleged "independent, professional judgment of the United States military." ECF 158 at 48. Plaintiffs' requested discovery on this issue is therefore critical to ensuring that Plaintiffs can fully oppose Defendants' motion for summary judgment.

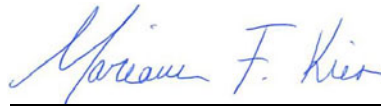
* * *

58. As explained above, Defendants have delayed the production of discovery and withheld considerable amounts of documents under broad, ill-defined privilege claims. On information and belief, Defendants possess further discoverable information not available from any other source that would create additional genuine issues of material fact necessary to allow Plaintiffs to fully oppose Defendants' motion for summary judgment.

59. Accordingly, as set forth above, Defendants have denied Plaintiffs critical factual evidence essential to fully oppose Defendants' Motion for Summary Judgment.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25 day of May, 2018.



Marianne F. Kies (Bar No. 18606)
Counsel for Plaintiffs

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:17-cv-02459-MJG
	)	
DONALD J. TRUMP, <i>et al.</i> ,	)	
	)	
Defendants. ¹	)	

**PLAINTIFFS' FIRST SET OF INTERROGATORIES
TO DEFENDANTS**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure and D. Md. Local Rule 104, Plaintiffs hereby request that Defendants answer the following interrogatories separately, fully, and under oath, by serving written responses on the undersigned counsel, to the attention of Marianne F. Kies at the offices of Covington & Burling LLP, One CityCenter, 850 Tenth Street, NW, Washington, DC 20001-4956.

DEFINITIONS

Notwithstanding any definition set forth below, each word, term, or phrase used in these Requests is intended to have the broadest meaning permitted under the Federal Rules of Civil Procedure and Local Rules.

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

1. “Person” means any natural person, firm, proprietorship, partnership, joint venture, group, trust, estate, governmental entity, agency, association, corporation, or any other type of organization or entity.

2. “Communication” means any transmission of information (whether formal or informal) by one or more Persons and/or between two or more Persons by means including, but not limited to, telephone conversations, letters, faxes, electronic mail, text messages, instant messages, other computer linkups, written memoranda, and face-to-face conversations.

3. “Document” has the full meaning ascribed to it by Federal Rule of Civil Procedure 34(a), and means the complete original (or complete copy where the original is unavailable) and each non-identical copy (where different from the original because of notes made on the copy or otherwise) of any writing or record, including, but not limited to, all written, typewritten, handwritten, printed, or graphic matter of any kind or nature, however produced or reproduced, any form of collected data for use with electronic data processing equipment, and any mechanical or electronic visual or sound recordings or text messages in Defendants’ possession, custody, or control. “Documents” include, but are not limited to, books, papers, contracts, memoranda, invoices, correspondence, notes, studies, reports, manuals, photographs, drawings, charts, graphs, data compilations, other writings, microfilm, microfiche, audio recordings, video recordings, electronic mail, and any other information stored in electronic form, and each different version or copy of each Document, including, but not limited to, drafts.

4. “Identify,” when used with respect to: (a) an individual, shall mean to provide the individual’s full name, job title, and employer during the period referred to, and current or last known address and telephone number and business address and telephone number; (b) any entity other than an individual, shall mean to provide the entity’s full name and current or last-known address (designating which is provided).

5. “Including” or “Includes” means “including, but not limited to” or “including without limitation.”

6. “Relating to,” “Referring to,” or “Concerning,” when referring to any given subject matter, means any information or Document that constitutes, comprises, involves, contains, embodies, reflects, identifies, states, mentions, alludes to, refers directly or indirectly to, or is in any way relevant to the particular subject matter identified.

7. “Date” means the exact date, month, and year, if ascertainable, or, if not, the best available approximation.

8. “Describe” means to state what is requested to be described, Including all facts and opinions known and held Relating to what is requested to be described, and Identifying (i) each Person involved or having any knowledge of each fact or opinion that Relates to what is so described; (ii) each Document evidencing the answer or response given or Relating to said subject-matter in any way; and (iii) all relevant or material Dates and time periods, specifying the way in which said Dates or time periods Relate to the subject-matter described.

9. “Individual Defendants” means Donald J. Trump, James Mattis, Mark Esper, Richard Spencer, and Heather Wilson.

10. “Military Services” refers to any of the United States Army, the United States Marine Corps, the United States Navy, the United States Air Force, or the United States Coast Guard.

11. “You,” “Your,” or “Defendants” refers to the Individual Defendants, their predecessors (where applicable), and their respective agencies and agency components (Including the Executive Office of the President and Military Services) and all others acting or purporting to act on behalf of the Individual Defendants, their predecessors, or their agencies or agency components, Including current or former officials, officers, subordinates, employees, contractors, agents, and attorneys.

12. The “Working Group” shall refer to the working group directed by former Secretary of Defense Ashton Carter in his “Memorandum for Secretaries of the Military Departments,” dated July 28, 2015. (Ex. A in ECF No. 13-4, *Doe v. Trump*, No. 17-1597 (D.D.C.).)

13. The “Open Service Directive” shall refer to the directive issued by former Secretary of Defense Ashton Carter titled “Memorandum for Secretaries of the Military Departments,” *et al.*, dated June 30, 2016. (ECF No. 40-4.)²

14. The “Accessions Readiness Memorandum” shall refer to the memorandum issued by Deputy Secretary of Defense Robert O. Work titled

² Unless otherwise stated, ECF numbers refer to documents filed in this case.

“Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services,” dated May 8, 2017.

15. The “Accessions Deferral Memorandum” shall refer to the memorandum issued by Secretary of Defense James N. Mattis titled “Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff,” dated June 30, 2017. (ECF No. 40-11.)

16. The “Tweets” shall refer to the series of tweets issued by President Trump on Twitter on July 26, 2017 that stated: “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.” (ECF No. 40-22.)

17. The “Transgender Service Member Ban” or “Ban” shall refer to the memorandum issued by President Trump on August 25, 2017 titled “Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security.” (ECF No. 40-21.)

18. The “Interim Guidance” shall refer to the memorandum issued by Secretary of Defense James N. Mattis with the subject line “Military Service by Transgender Individuals — Interim Guidance,” dated September 14, 2017. (ECF No. 60-5.)

19. “Panel of Experts” means the individuals who collectively comprise the “panel of experts” referred to in the Interim Guidance.

20. The words “and” as well as “or” shall be construed either conjunctively or disjunctively as necessary to bring within the scope of these requests any information that might otherwise be construed as falling outside the scope of these requests.

21. Words used in the singular shall, when the context permits, be deemed to include the plural, and words used in the plural shall, when the context permits, be deemed to include the singular. The masculine gender shall, when the context permits, be deemed to include the feminine or neuter genders.

INSTRUCTIONS

1. Pursuant to Federal Rule of Civil Procedure 26(e), these interrogatories are continuing and You must revise or supplement Your responses whenever new or additional responsive information becomes known.

2. Each interrogatory solicits all information that is known to You or in Your possession, custody, or control, and all information available to You from Your employees, contractors, agents, representatives, consultants, attorneys, accountants, advisors, or other person(s) directly or indirectly connected with You or subject to your control.

3. Each interrogatory is to be construed independently and not by or with reference to any other paragraph for purposes of limiting the scope of any particular interrogatory.

4. These interrogatories are to be answered in detail. If You cannot answer any interrogatory in full, You should answer it to the extent possible and explain your inability to answer any further.

5. If You claim that the language of any interrogatory is vague or ambiguous, then You must identify the language you believe is ambiguous and describe the different interpretations that You believe may apply to such language. Regardless of any vagueness or ambiguity You claim, You are to answer the interrogatory to the best of your ability.

6. If any of the answers to these interrogatories are derived from Documents in Your possession or under Your control, please attach a copy thereof to Your answers; in the alternative, please describe each of the Documents with specificity and state when and where they will be available to Plaintiffs' counsel for inspection and copying. Each page of every Document You attach or produce must be marked with a unique identifier or "Bates stamp."

7. If You contend that information responsive to any interrogatory is protected from disclosure pursuant to any privilege, then You must comply with Federal Rule of Civil Procedure 26(b)(5) and the operative scheduling order (ECF No. 100) and describe that information to the extent possible and the nature of the privilege claimed.

8. Unless otherwise specified, these Interrogatories cover the period July 13, 2015 through the present.

INTERROGATORIES

TO BE ANSWERED BY DEFENDANT TRUMP

Interrogatory No. 1: State the Date on which President Trump decided that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.”

Interrogatory No. 2: Identify all Documents and Communications reviewed, referenced, relied upon directly or indirectly, or considered by President Trump on or before July 26, 2017 as a basis or impetus for deciding that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.”

Interrogatory No. 3: Identify each one of the “Generals and military experts” referenced in the Tweets.

Interrogatory No. 4: For each of the “Generals and military experts” referenced in the Tweets, Identify and Describe all Communications between that individual and President Trump Concerning military service by transgender people, Including the Date of the Communication.

Interrogatory No. 5: Identify and Describe the basis for President Trump’s assertion that his Tweets announcing the Ban did the military a “great favor.”

Interrogatory No. 6: Identify all Persons with whom President Trump (or others acting or purporting to act on his behalf) has communicated Concerning the Tweets or the Ban, Including any Defendants, informal advisors, members of the United States Congress, and representatives or agents of the “Alliance Defending Freedom,” “Focus on the Family,” the “Family Research Council,” “Heritage Action

for America,” and “Breitbart News,” and Including the Date of any such Communication.

Interrogatory No. 7: Describe the basis for President Trump’s assertion in the Tweets that military service by transgender individuals would entail (i) “tremendous medical costs” and (ii) “disruption,” Including Identifying any Documents or Communications that support the basis for those two assertions.

Interrogatory No. 8: State whether President Trump received advice from any attorney Concerning the Tweets or the Ban and for each such attorney (a) state the Date the advice was communicated to President Trump; (b) state the subject matter of such advice; (c) Identify all Communications containing or transmitting such advice; and (d) Identify all persons to whom the substance of this advice has ever been disclosed.

Interrogatory No. 9: Describe the “meaningful concerns” referenced in the Ban, and Identify all Persons who expressed those concerns to President Trump, including the specific “meaningful concern[]” articulated by each such Person and the Date on which the concern was expressed.

Interrogatory No. 10: Identify all Documents and Communications reviewed, relied upon directly or indirectly, or considered by President Trump in preparing and issuing the Transgender Service Member Ban, indicating which component of the Ban each Document or Communication pertains to (medical care, accessions, discharge).

TO BE ANSWERED BY DEFENDANT MATTIS

Interrogatory No. 11: Describe the basis for Secretary Mattis's assertion in the Accessions Deferral Memorandum that "it is necessary to defer the start of accessions [of transgender individuals into the military] for six months [until January 1, 2018]."

Interrogatory No. 12: Identify all Communications between Secretary Mattis or his staff, on the one hand, and President Trump or any officer or employee of the Executive Office of the President (Including Vice President Pence), on the other, Concerning the issue of military service by transgender individuals.

TO BE ANSWERED BY ALL DEFENDANTS

Interrogatory No. 13: Identify the members of the Working Group, Including name, title, contact information, and qualifications.

Interrogatory No. 14: Identify all meeting or conference Dates of the Working Group, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

Interrogatory No. 15: Identify all Documents and Communications Concerning military service by transgender individuals that were requested, received, considered directly or indirectly, or consulted by Defendants—including the Panel of Experts—since January 20, 2017, and, for each such Document, Identify the Person who transmitted it to You and state the Date(s) of transmission and receipt.

Interrogatory No. 16: For every meeting attended by You between January 20, 2017 and the present, at which military service by transgender individuals was

discussed, (a) state the Date of the meeting; (b) Identify all participants in the meeting; (c) Describe the topics discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and (e) Identify all Documents memorializing such meeting.

Interrogatory No. 17: Identify all Persons involved in drafting or publishing:

(i) the Accessions Readiness Memorandum, (ii) the Accessions Deferral Memorandum, (iii) the Tweets, (iv) the Ban, (v) the Interim Guidance, and (vi) any forthcoming recommendations of the Panel of Experts, Including the implementation plan due on February 21, 2018. For each such Person, (a) Describe that Person's role in drafting the document; (b) state the Date(s) of that Person's participation in drafting the document; and (c) Identify all Documents memorializing or reflecting such participation.

Interrogatory No. 18: Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of, Defendants between June 30, 2016 and August 25, 2017, concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Interrogatory No. 19: Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted,

performed by, or at the request of Defendants from August 25, 2017 through the present Concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Interrogatory No. 20: Identify all members of the Panel of Experts, including each individual's name, title, contact information, and qualifications.

Interrogatory No. 21: Identify all meeting or conference Dates of the Panel of Experts, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

Interrogatory No. 22: State, broken down by Military Service, the number of current and former service members who have identified to their chain of command as transgender since June 30, 2016.

Interrogatory No. 23: State, broken down by Military Service, the number of current and former service members whom military medical personnel have diagnosed with gender dysphoria since June 30, 2016.

Interrogatory No. 24: State, broken down by Military Service, the number of surgeries performed as treatment for gender dysphoria that the military has performed on current and former service members since June 30, 2016, Including as to each surgery the date, description of the procedure, and cost to the military of the procedure.

Dated: January 3, 2018

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Carolyn F. Corwin*
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Jaclyn E. Martínez Resly*
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Respectfully submitted,

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Attorneys for Plaintiffs

* Admitted *pro hac vice*

† *Pro hac vice* application forthcoming

‡ Admitted to the Bars of Pennsylvania and New Jersey, admission to the District of Columbia pending; and supervised by the principals of the firm.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January 2018, a true and correct copy of the foregoing Plaintiffs' First Set of Interrogatories to Defendants was served by e-mail on counsel of record for Defendants.

/s/ Mitchell A. Kamin

Mitchell A. Kamin

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:17-cv-02459-MJG
	)	
DONALD J. TRUMP, <i>et al.</i> ,	)	
	)	
Defendants. ¹	)	

**PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF
DOCUMENTS**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and D. Md. Local Rule 104, Plaintiffs hereby serve their First Set of Requests for Production of Documents to Defendants.

DEFINITIONS

Notwithstanding any definition set forth below, each word, term, or phrase used in these Requests is intended to have the broadest meaning permitted under the Federal Rules of Civil Procedure and Local Rules.

1. "Person" means any natural person, firm, proprietorship, partnership, joint venture, group, trust, estate, governmental entity, agency, association, corporation, or any other type of organization or entity.

2. "Communication" means any transmission of information (whether formal or informal) by one or more Persons and/or between two or more Persons by means including, but not limited to, telephone conversations, letters, faxes,

¹ Mark T. Esper has been substituted as the Secretary of the Army pursuant to

electronic mail, text messages, instant messages, other computer linkups, written memoranda, and face-to-face conversations.

3. “Document” has the full meaning ascribed to it by Federal Rule of Civil Procedure 34(a), and means the complete original (or complete copy where the original is unavailable) and each non-identical copy (where different from the original because of notes made on the copy or otherwise) of any writing or record, including, but not limited to, all written, typewritten, handwritten, printed, or graphic matter of any kind or nature, however produced or reproduced, any form of collected data for use with electronic data processing equipment, and any mechanical or electronic visual or sound recordings or text messages in Defendants’ possession, custody, or control. “Documents” include, but are not limited to, books, papers, contracts, memoranda, invoices, correspondence, notes, studies, reports, manuals, photographs, drawings, charts, graphs, data compilations, other writings, microfilm, microfiche, audio recordings, video recordings, electronic mail, and any other information stored in electronic form, and each different version or copy of each Document, including, but not limited to, drafts.

4. “Including” or “Includes” means “including, but not limited to” or “including without limitation.”

5. “Relating to,” “Referring to,” or “Concerning,” when referring to any given subject matter, means any information or Document that constitutes, comprises, involves, contains, embodies, reflects, identifies, states, mentions,

Federal Rule of Civil Procedure 25(d).

alludes to, refers directly or indirectly to, or is in any way relevant to the particular subject matter identified.

6. “Date” means the exact date, month, year, and time if ascertainable, or, if not, the best available approximation.

7. “Social Media” means all forms of electronic communication through which users create online communities to share information, ideas, personal messages, and other content, including, but not limited to, Facebook, Twitter, LinkedIn, Google+, YouTube, Pinterest, Instagram, Tumblr, Flickr, Reddit, Snapchat, and WhatsApp.

8. “Individual Defendants” means Donald J. Trump, James Mattis, Mark Esper, Richard Spencer, and Heather Wilson.

9. “Military Services” refers to any of the United States Army, the United States Marine Corps, the United States Navy, the United States Air Force, or the United States Coast Guard.

10. “You,” “Your,” or “Defendants” refers to the Individual Defendants, their predecessors (where applicable), and their respective agencies and agency components (Including the Executive Office of the President and Military Services) and all others acting or purporting to act on behalf of the Individual Defendants, their predecessors, or their agencies or agency components, Including current or former officials, officers, subordinates, employees, contractors, agents, and attorneys.

11. The “Working Group” shall refer to the working group directed by former Secretary of Defense Ashton Carter in his “Memorandum for Secretaries of the Military Departments,” dated July 28, 2015. (Ex. A in ECF No. 13-4, *Doe v. Trump*, No. 17-1597 (D.D.C.).)

12. The “Open Service Directive” shall refer to the directive issued by former Secretary of Defense Ashton Carter titled “Memorandum for Secretaries of the Military Departments,” *et al.*, dated June 30, 2016. (ECF No. 40-4.)²

13. The “Accessions Readiness Memorandum” shall refer to the memorandum issued by Deputy Secretary of Defense Robert O. Work titled “Memorandum for Secretaries of the Military Departments, Chiefs of the Military Services,” dated May 8, 2017.

14. The “Accessions Deferral Memorandum” shall refer to the memorandum issued by Secretary of Defense James N. Mattis titled “Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff,” dated June 30, 2017. (ECF No. 40-11.)

15. The “Tweets” shall refer to the series of tweets issued by President Trump on Twitter on July 26, 2017 that stated: “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

² Unless otherwise stated, ECF numbers refer to documents filed in this case.

and disruption that transgender in the military would entail. Thank you.” (ECF No. 40-22.)

16. The “Transgender Service Member Ban” or “Ban” shall refer to the memorandum issued by President Trump on August 25, 2017 titled “Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security.” (ECF No. 40-21.)

17. The “Interim Guidance” shall refer to the memorandum issued by Secretary of Defense James N. Mattis with the subject line “Military Service by Transgender Individuals — Interim Guidance,” dated September 14, 2017. (ECF No. 60-5.)

18. “Panel of Experts” means the individuals who collectively comprise the “panel of experts” referred to in the Interim Guidance.

19. The words “and” as well as “or” shall be construed either conjunctively or disjunctively as necessary to bring within the scope of these requests any information that might otherwise be construed as falling outside the scope of these requests.

20. Words used in the singular shall, when the context permits, be deemed to include the plural, and words used in the plural shall, when the context permits, be deemed to include the singular. The masculine gender shall, when the context permits, be deemed to include the feminine or neuter genders.

INSTRUCTIONS

1. Unless otherwise agreed in writing, all Documents are to be produced to the attention of Marianne Kies at the offices of Covington & Burling LLP, One CityCenter, 850 Tenth Street, NW, Washington, DC 20001-4956.
2. Each page of every Document must be marked with a unique identifier or “Bates stamp.”
3. If Defendants object to any portion of any Request, Defendants shall identify the portion to which Defendants object, state the basis for the objection, and respond to the remainder. Pursuant to Federal Rule of Civil Procedure 34(b)(2)(C), Defendants’ objection must state whether any responsive materials are being withheld on the basis of the objection(s).
4. Produce all Documents within Your possession, custody, or control, Including all Documents in the possession, custody, or control of any of Your agency and its components, officials, officers, subordinates, employees, contractors, agents, representatives, consultants, attorneys, accountants, advisors, or other person(s) directly or indirectly connected with You or subject to your control.
5. Documents that are in paper form or that constitute other physical objects from which recorded information may be visually read, as well as audio or video tapes or text messages or Social Media data and similar recordings, including drafts, should be produced in their original form or in copies that are exact duplicates of the originals. Computer files and similar electronic records should be produced in a readable form mutually agreed upon by the parties.

6. Produce all Documents in the order in which they appear in Your files. Documents that, in their original condition, are stapled, clipped, or otherwise fastened together shall be produced in this same condition.

7. Produce password-protected Documents with any applicable passwords.

8. Pursuant to Federal Rule of Civil Procedure 26(b)(5) and the operative scheduling order (ECF No. 100), if You contend that any responsive Document is protected from disclosure pursuant to any privilege, please specify the nature of the privilege that is being claimed. In addition: for (A) oral Communications, please specify (i) the name of the Person making the communication and the names of Persons present while the communication was made, and, where not apparent, the relationship of the Persons present to the Person making the communication, (ii) the Date and place of the Communication, and (iii) the general subject matter of the Communication; and for (B) Documents, please specify: (i) the type of document, (ii) the general subject matter of the Document; (iii) the Date of the Document, and (iv) such other information as is sufficient to identify the Document, Including, where appropriate, the author, addressee, custodian, and any other recipient of the Document, and, when not apparent, the relationship of the author, addressee, custodian, and any other recipient to each other.

9. If no Documents responsive to a particular Request exist, or if such Documents exist but are not in Your possession, custody, or control, then Your response to that Request shall so state.

10. If any of the requested Documents was previously, but is no longer, in Defendants' possession or subject to Defendants' control, state what disposition was made of the Document and when, including the Date it left Defendants' possession or control, identify the Person to whom Defendants transferred it if applicable, and explain the reasons for such disposition.

11. If a Request asks for a Document which no longer exists, then in response to such a Request, Defendants shall identify each such Document; identify all information that was contained in each such Document; state the Date on which each such Document ceased to exist; state what happened to cause each such Document to cease to exist; state why each such Document was caused to or happened to cease to exist; state the time periods during which such types of Documents were maintained; identify each Person having knowledge of the circumstances under which each such Document ceased to exist; and identify each Person having knowledge of each such Document and state the substance of said knowledge.

12. Each paragraph is to be construed independently and not by or with reference to any other paragraph for purposes of limiting the scope of any particular Request.

13. Pursuant to Federal Rule of Civil Procedure 26(e), these Requests are continuing and You must revise or supplement Your responses and production whenever new or additional responsive information becomes known.

14. Unless otherwise specified, these Requests cover the period July 13, 2015 through the present.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1: All Documents and Communications that You have conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning military service by transgender individuals.

REQUEST FOR PRODUCTION NO. 2: All Documents and Communications Concerning the Working Group's composition, structure, research, findings, and conclusions, Including the Working Group's interview notes, evaluations, analyses, summaries, and memoranda, and Including any Communications between the Working Group and You.

REQUEST FOR PRODUCTION NO. 3: All Documents and Communications prepared between November 2015 and June 2016 and submitted to the Secretary of Defense via the Undersecretary of Defense for Personnel & Readiness Concerning military service and accessions into the Military Services by transgender individuals, Including assessments from service medical commands, other Defense Department health care agencies, and the Office of Cost Assessment and Program Evaluation ("CAPE").

REQUEST FOR PRODUCTION NO. 4: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Readiness Memorandum.

REQUEST FOR PRODUCTION NO. 5: All Documents and

Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Deferral Memorandum.

REQUEST FOR PRODUCTION NO. 6: All Documents and

Communications Concerning military service by transgender individuals between President Trump or Persons acting or purporting to act on President Trump's behalf (Including White House officials and senior staff to the President, such as President Trump's National Security Adviser and Chief of Staff), on the one hand, and the other Defendants and Persons acting or purporting to act on the other Defendants' behalf, on the other hand.

REQUEST FOR PRODUCTION NO. 7: All Documents and

Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Tweets, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

REQUEST FOR PRODUCTION NO. 8: All Documents and

Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Transgender Service Member Ban, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

REQUEST FOR PRODUCTION NO. 9: All Documents and

Communications that Secretary Mattis or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Interim Guidance, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

REQUEST FOR PRODUCTION NO. 10: All Documents and

Communications that embody, comprise, or constitute the “appropriate evidence and information” referenced in the Interim Guidance.

REQUEST FOR PRODUCTION NO. 11: All Documents and

Communications Concerning military service by transgender individuals shared between or amongst You and any current or former member of the United States Congress, Including Representative Vicky Hartzler, Scott Perry, or Steve King, from January 2017 to the present.

REQUEST FOR PRODUCTION NO. 12: All Documents and

Communications Concerning military service by transgender individuals shared between or amongst You and the Office of the Vice President of the United States, Including Vice President Pence himself.

REQUEST FOR PRODUCTION NO. 13: All Documents and

Communications Concerning military service by transgender individuals shared between or amongst Defendants and organizations opposed to military service by transgender individuals, Including but not limited to representatives and agents of the “Alliance Defending Freedom,” “Focus on the Family,” the “Family Research Council,” “Heritage Action for America,” and “Breitbart News,” from January 2017

to the present.

REQUEST FOR PRODUCTION NO. 14: All Documents and

Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed that embody, constitute, comprise, or reflect the reaction of the Department of Defense or any of its components (including Military Services), or any individuals within the Department of Defense or its components, to the Tweets.

REQUEST FOR PRODUCTION NO. 15: All Documents and

Communications Concerning the purpose, composition, structure, research, analysis, findings, and conclusions of the Panel of Experts.

REQUEST FOR PRODUCTION NO. 16: All Documents and

Communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, Including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018.

REQUEST FOR PRODUCTION NO. 17: All Documents and

Communications that You contend support the Tweets' assertion regarding the "tremendous" costs associated with transgender individuals in the Military Services (ECF No. 40-22), Including the military's provision of medical care to transgender individuals.

REQUEST FOR PRODUCTION NO. 18: All Documents and

Communications that You contend support the Tweets' assertion regarding the

“disruptive” effect of military service by openly transgender individuals (ECF No. 40-22), Including any purported effect on unit cohesion or military readiness.

REQUEST FOR PRODUCTION NO. 19: All Documents and Communications Concerning the Department of Defense’s implementation of accessions of openly transgender individuals into the Military Services as of January 1, 2018.

REQUEST FOR PRODUCTION NO. 20: All Documents that You referred to or considered in connection with any defense raised in Your Answer to Plaintiffs’ First Amended Complaint.

REQUEST FOR PRODUCTION NO. 21: All Documents and Communications that You referred to or considered in connection with responding to Plaintiffs’ First Set of Interrogatories.

Dated: January 3, 2018

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Jaclyn E. Martínez Resly*
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Respectfully submitted,

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January 2018, a true and correct copy of the foregoing Plaintiffs' First Set of Requests for Production of Documents was served by e-mail on counsel of record for Defendants.

/s/ Mitchell A. Kamin

Mitchell A. Kamin

EXHIBIT C

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, *et al.*,

Defendants.

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

**DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF
INTERROGATORIES TO SECRETARY MATTIS**

Pursuant to Federal Rules of Civil Procedure 26 and 33, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' First Set of Interrogatories to James N. Mattis, in his official capacity as Secretary of Defense, served January 3, 2017.¹ In presenting these objections and responses, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Objections to Definitions

1. Defendants object to Plaintiffs' Definition 3 of "Document" as encompassing "any form of collected data for use with electronic data processing equipment;" "data compilations;" and "any other information stored in electronic form;" insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

¹ These objections and responses are limited to Secretary Mattis. Defendants will produce, or already have produced, separate objections and responses for other Defendants.

2. Defendants object to Plaintiffs' Definition 8 of "Describe" to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 8, which applies to Interrogatories 11, 16, 17, and 21, includes both (1) information about the subject matter being described, and (2) "each Document evidencing the answer or response given or Relating to said subject-matter in any way." Thus, Plaintiffs have served more than the allowed 25 interrogatories. *See Smith v. Cafe Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009) (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 572–73 (D. Md. 2010) ("[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omission in original) (quoting *Kendall v. GES Exposition Servs.*, 174 F.R.D. 684, 685–86 (D.Nev.1997).).

Specific Objections and Responses to Interrogatories to be Answered by Defendant Mattis

Interrogatory No. 11: Describe the basis for Secretary Mattis's assertion in the Accessions Deferral Memorandum that "it is necessary to defer the start of accessions [of transgender individuals into the military] for six months [until January 1, 2018]."

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis objects to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 8 of "Describe" seeks information related to "each Person involved or having any knowledge or each fact or opinion," "each Document evidencing the answer or response given or Relating to said subject-matter in any way," and "all relevant or material Dates and time periods." Thus, this interrogatory contains at least three distinct subparts, and Plaintiffs have served more than the allowed 25 interrogatories. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *Mezu*, 269 F.R.D. at 572–73 ("[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Response:

Considering the responses from the Secretaries of the Military Departments and Chiefs of the Military Services to the Deputy Secretary of Defense's May 8, 2017 directive to assess their readiness to begin accessing transgender applicants into military service on July 1, 2017, and after consulting with the Service Chiefs and Secretaries, Secretary Mattis concluded it was necessary to defer the July 1, 2017 accessions date for six months in order to evaluate more carefully the impact of transgender accessions on readiness and lethality and to ensure that he personally had the benefit of the views of the military leadership and senior civilian officials who were then arriving in the Department of Defense.

Interrogatory No. 12: Identify all Communications between Secretary Mattis or his staff, on the one hand, and President Trump or any officer or employee of the Executive Office of the President (Including Vice President Pence), on the other, Concerning the issue of military service by transgender individuals.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) communications or information protected by the attorney-client privilege; (b) communications or information protected by the deliberative process privilege; or (c) communications or information protected by the presidential communications privilege.

Specific Objections and Responses to Interrogatories to be Answered by All Defendants

Interrogatory No. 13: Identify the members of the Working Group, Including name, title, contact information, and qualifications.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 14: Identify all meeting or conference Dates of the Working Group, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Response:

The Working Group held formal meetings on the following dates:

- August 19, 2015
- September 3, 2015
- September 16, 2015
- October 1, 2015
- October 14, 2015
- November 2, 2015
- November 18, 2015
- November 24, 2015
- December 8, 2015
- December 15, 2015
- January 12, 2016
- January 19, 2016
- March 11, 2016

- April 27, 2016
- May 23, 2016

Additional information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 15: Identify all Documents and Communications Concerning military service by transgender individuals that were requested, received, considered directly or indirectly, or consulted by Defendants—including the Panel of Experts—since January 20, 2017, and, for each such Document, Identify the Person who transmitted it to You and state the Date(s) of transmission and receipt.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "all Documents and Communications" purports to require Defendants to search for and identify documents in any and all locations, regardless of whether (a) the documents are in their possession, (b) they have personal knowledge of the documents, (c) the documents would be redundant, and/or (d) such documents would be likely to yield information that is distinct or that

is relevant. Additionally, the phrase “considered [] indirectly” is problematic to the extent that it could be construed to apply to documents and communications with mere peripheral connections to the claims and defenses in this case, and identifying all such documents and communications would be excessively burdensome and disproportionate to the needs of the case.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 16: For every meeting attended by You between January 20, 2017 and the present, at which military service by transgender individuals was discussed, (a) state the Date of the meeting; (b) Identify all participants in the meeting; (c) Describe the topics discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and (e) Identify all Documents memorializing such meeting.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis also objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1).

Interrogatory No. 16 contains at least two discrete subparts: (1) a request for information about the meetings, and (2) a separate request for documents distributed, considered, or discussed at the meetings or memorializing such meetings (which exists both because it is stated explicitly and due to the Plaintiffs' definition of "Describe"). See *Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *Mezu*, 269 F.R.D. at 572–73 ("[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Finally, Secretary Mattis objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "every meeting" purports to require the Defendants to identify all meetings in this time period of over one year, despite how briefly or informally military service by transgender individuals was discussed at the meeting. Further, the references to "all Documents" purport to require the Defendants to search for and identify documents in any and all locations, regardless of whether (a) the documents are in their possession, (b) they have personal knowledge of the documents, (c) the documents would be redundant, and/or (d) such documents would be likely to yield information that is distinct or that is relevant.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 17: Identify all Persons involved in drafting or publishing: (i) the Accessions Readiness Memorandum, (ii) the Accessions Deferral Memorandum, (iii) the Tweets, (iv) the Ban, (v) the Interim Guidance, and (vi) any forthcoming recommendations of the Panel of Experts, Including the implementation plan due on February 21, 2018. For each such Person, (a) Describe that Person's role in drafting the document; (b) state the Date(s) of that Person's participation in drafting the document; and (c) Identify all Documents memorializing or reflecting such participation.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis also objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 17 contains at least seven discrete subparts. It asks for information about people involved in drafting (1) the Accessions Readiness Memorandum, (2) the Accessions Deferral Memorandum, (3) the Tweets, (4) the Ban, (5) the Interim Guidance, and (6) any forthcoming recommendations of the Panel of Experts. Due to Plaintiffs' definition of "Describe," it also asks for (7) any documents relating to, or evidencing information about, the roles of individuals in drafting each document or policy. The first through sixth subparts relate to information about discrete documents or policies, and none of those subparts is secondary to another subpart. *See Mezu*, 269 F.R.D. at 572–73 ("Probably the best test of whether subsequent

questions, within a single interrogatory, are subsumed and related is to examine whether the first question is primary and subsequent questions are secondary to the primary question. . . . Genuine subparts should not be counted as separate interrogatories. However, discrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omissions in original) (quoting *Kendall*, 174 F.R.D. at 685–86).). The seventh subpart is a separate request for actual documents. *See Smith*, 256 F.R.D. at 254 (explaining that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”). Together, these represent seven distinct interrogatories.

Interrogatory No. 18: Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of, Defendants between June 30, 2016 and August 25, 2017, concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis also objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of

discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1).

Interrogatory No. 18 contains three discrete subparts: (1) documents concerning the effect of transgender individuals serving in the military on military readiness, (2) documents concerning medical costs associated with transgender individuals serving in the military, and (3) documents concerning the impact of transgender individuals serving in the military on unit cohesion. *See Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).)

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 19: Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of Defendants from August 25, 2017 through the present Concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Secretary Mattis also object to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 19 contains three discrete subparts: (1) documents concerning the effect of transgender individuals serving in the military on military readiness, (2) documents concerning medical costs associated with transgender individuals serving in the military, and (3) documents concerning the impact of transgender individuals serving in the military on unit cohesion. See *Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).)

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 20: Identify all members of the Panel of Experts, including each individual’s name, title, contact information, and qualifications.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

The Panel of Experts is composed of the following individuals who held or hold the following positions:

Chair

- Anthony M. Kurta – Performing the Duties of Under Secretary of Defense (Personnel & Readiness)
- Robert Wilkie – Under Secretary of Defense for Personnel and Readiness

Members

- Thomas Kelly III – Performing the Duties of the Under Secretary of the Army
- Thomas Dee – Performing the Duties of the Under Secretary of the Navy
- Matthew Donovan – Under Secretary of the Air Force
- Charles D. Michel – Vice Commandant of the Coast Guard
- James McConville – Vice Chief of Staff of the Army
- William Moran – Vice Chief of Naval Operations
- Stephen Wilson – Vice Chief of Staff of the Air Force
- Glenn Walters – Assistant Commandant of the Marine Corps
- Daniel Hokanson – Vice Chief of Staff National Guard Bureau
- John Wayne Troxell – Senior Enlisted Advisor to the Vice Chairman of the Joint Chiefs of Staff

- Daniel Daily – Sergeant Major of the Army
- Steven S. Giordano – Master Chief Petty Officer of the Navy
- Kaleth O. Wright – Chief Master Sergeant of the Air Force
- Ronald L. Green – Sergeant Major of the Marine Corps
- Steven W. Cantrell – Master Chief Petty Officer of the Coast Guard
- Christopher Kepner – Senior Enlisted Advisor National Guard Bureau

Additional information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 21: Identify all meeting or conference Dates of the Panel of Experts, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Secretary Mattis also objects to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs’ Definition 8 of “Describe” seeks both (1) information about the subject-matter being described, and (2) “each Document evidencing the answer or response given or

Relating to said subject-matter in any way.” Thus, Interrogatory No. 21 contains at least two discrete subparts, and Plaintiffs have served more than the allowed 25 interrogatories. *See Smith*, 256 F.R.D. at 254 (explaining that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”); *Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Response:

The Panel of Experts held formal meetings on the following dates:

- October 13, 2017
- October 19, 2017
- October 26, 2017
- November 2, 2017
- November 9, 2017
- November 16, 2017
- November 21, 2017
- November 30, 2017
- December 7, 2017
- December 13, 2017
- December 22, 2017
- January 4, 2018
- January 11, 2018

Additional information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs

in Defendants' document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 22: State, broken down by Military Service, the number of current and former service members who have identified to their chain of command as transgender since June 30, 2016.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. Secretary Mattis will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 23: State, broken down by Military Service, the number of current and former service members whom military medical personnel have diagnosed with gender dysphoria since June 30, 2016.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

	Current	Former
AIR FORCE	225	44
ARMY	342	85
COAST GUARD	25	2
MARINE CORPS	62	17
NAVY	279	67
OTHER	4	0
TOTAL	937	215

Interrogatory No. 24: State, broken down by Military Service, the number of surgeries performed as treatment for gender dysphoria that the military has performed on current and former service members since June 30, 2016, Including as to each surgery the date, description of the procedure, and cost to the military of the procedure.

Specific Objections:

Secretary Mattis objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; (b) communications or information protected by the presidential communications privilege; or (c) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Response:

	Procedure	Date (Month-Year)	
		Current	Former
AIR FORCE	MASTECTOMY	Nov-17	
		Jan-18	
	ORCHIECTOMY	Oct-17	
ARMY	HYSTERECTOMY	Apr-17	
		May-17	
		Jun-17	
		Sep-17	
		Oct-17	
		Nov-17	
	MASTECTOMY	May-17	
		Jun-17	
		Aug-17	
		Aug-17	
		Sep-17	
		Nov-17	
		Dec-17	
		Dec-17	
	ORCHIECTOMY	Feb-17	
			Apr-17

		Oct-17	
		Dec-17	
		Dec-17	
MARINE CORPS	HYSTERECTOMY		Jun-17
		Jul-17	
	MASTECTOMY	May-17	
		Jun-17	
		Jun-17	
		Aug-17	
		Sep-17	
		Sep-17	
		Nov-17	
		Dec-17	
		Aug-17	
	HYSTERECTOMY	Nov-16	
		Dec-16	
			Mar-17
		May-17	
		Sep-17	
		Nov-17	
		Nov-17	
		Nov-17	
	MASTECTOMY	Jun-17	

		Aug-17	
		Sep-17	
		Sep-17	
		Oct-17	
		Oct-17	
			Oct-17
		Oct-17	
		Oct-17	
		Nov-17	
		Nov-17	
		Nov-17	
		Nov-17	
		Dec-17	
		Dec-17	
		Jan-18	
	ORCHIECTOMY		Jul-17
		Jul-17	
		Jan-18	

Secretary Mattis cannot provide the cost for each of the foregoing procedures. Expenses are based on costs stepped down from work centers and assigned based on weighted workload and intermediate products. The Department of Defense does not have a Patient Level Cost Accounting system that can track individual costs to a unique patient.

As to the responses to the interrogatories, see Attachment A.

As to the objections:

Date: February 9, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
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/s/ Ryan Parker
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Counsel for Defendants

ATTACHMENT A

VERIFICATION

Based on information that I obtained in the course of my official duties, I declare under penalty of perjury that the substance of the responses to these interrogatories are true and correct to the best of my knowledge and belief.

Date: Feb. 9, 2018

Signature: Stephanie P. Miller
STEPHANIE P. MILLER

CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

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/s/ Ryan Parker
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U.S. Department of Justice

EXHIBIT D

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, *et al.*,

Defendants.

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

**DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS TO SECRETARY MATTIS**

Pursuant to Federal Rules of Civil Procedure 26 and 34 and the Local Rules of the U.S. District Court for the District of Columbia, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' First Set of Requests for Production of Documents to James Mattis, in his official capacity as Secretary of Defense, served January 3, 2017.¹ In presenting these objections and responses, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground. ESI will be produced in TIF format.

¹ These objections and responses are limited to Secretary Mattis. Defendants will produce, or already have produced, separate objections and responses for other Defendants.

Objection to Definitions

Defendants object to Plaintiffs' Definition 3 of "Document" as encompassing "any form of collected data for use with electronic data processing equipment;" "data compilations;" and "any other information stored in electronic form;" insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

Specific Objections to Requests for Production

RFP No. 1: All Documents and Communications that You have conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning military service by transgender individuals.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 2: All Documents and Communications Concerning the Working Group's composition, structure, research, findings, and conclusions, Including the Working Group's interview notes, evaluations, analyses, summaries, and memoranda, and Including any Communications between the Working Group and You.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 3: All Documents and Communications prepared between November 2015 and June 2016 and submitted to the Secretary of Defense via the Undersecretary of Defense for Personnel & Readiness Concerning military service and accessions into the Military Services by transgender individuals, Including assessments from service medical commands, other Defense Department health care agencies, and the Office of Cost Assessment and Program Evaluation (“CAPE”).

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 4: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Readiness Memorandum.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 5: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Deferral Memorandum.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential

communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 6: All Documents and Communications Concerning military service by transgender individuals between President Trump or Persons acting or purporting to act on President Trump's behalf (Including White House officials and senior staff to the President, such as President Trump's National Security Adviser and Chief of Staff), on the one hand, and the other Defendants and Persons acting or purporting to act on the other Defendants' behalf, on the other hand.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the

privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 7: All Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Tweets, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 8: All Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Transgender Service Member Ban, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 9: All Documents and Communications that Secretary Mattis or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Interim Guidance, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the

privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 10: All Documents and Communications that embody, comprise, or constitute the “appropriate evidence and information” referenced in the Interim Guidance.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 11: All Documents and Communications Concerning military service by transgender individuals shared between or amongst You and any current or former member of the United States Congress, Including Representative Vicky Hartzler, Scott Perry, or Steve King, from January 2017 to the present.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The foregoing objections do not foreclose the possibility that, to the extent any responsive documents exist, a Member of Congress may seek to oppose the production of information in this case based on the Speech or Debate Clause.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 12: All Documents and Communications Concerning military service by transgender individuals shared between or amongst You and the Office of the Vice President of the United States, Including Vice President Pence himself.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 13: All Documents and Communications Concerning military service by transgender individuals shared between or amongst Defendants and organizations opposed to military service by transgender individuals, Including but not limited to representatives and agents of the "Alliance Defending Freedom," "Focus on the Family," the "Family Research Council," "Heritage Action for America," and "Breitbart News," from January 2017 to the present.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 14: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed that embody, constitute, comprise, or reflect the reaction of the Department of Defense or any of its components (including Military Services), or any individuals within the Department of Defense or its components, to the Tweets.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log

will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 15: All Documents and Communications Concerning the purpose, composition, structure, research, analysis, findings, and conclusions of the Panel of Experts.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 16: All Documents and Communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, Including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 17: All Documents and Communications that You contend support the Tweets' assertion regarding the "tremendous" costs associated with transgender individuals in the Military Services (ECF No. 40-22), Including the military's provision of medical care to transgender individuals.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 18: All Documents and Communications that You contend support the Tweets' assertion regarding the "disruptive" effect of military service by openly transgender individuals (ECF No. 40-22), Including any purported effect on unit cohesion or military readiness.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential

communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 19: All Documents and Communications Concerning the Department of Defense's implementation of accessions of openly transgender individuals into the Military Services as of January 1, 2018.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 20: All Documents that You referred to or considered in connection with any defense raised in Your Answer to Plaintiffs' First Amended Complaint.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

RFP No. 21: All Documents and Communications that You referred to or considered in connection with responding to Plaintiffs' First Set of Interrogatories.

Specific Objections:

Secretary Mattis objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Mattis will produce any non-privileged documents responsive to this RFP in his possession, custody, and control.

Date: February 9, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
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/s/ Ryan B. Parker
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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

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s/ Ryan Parker
RYAN B. PARKER
Senior Trial Counsel
U.S. Department of Justice

EXHIBIT E

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, *et al.*,

Defendants.

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' FIRST SET OF
INTERROGATORIES TO DEFENDANT DONALD J. TRUMP**

Pursuant to Federal Rules of Civil Procedure 26 and 33, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs' First Set of Interrogatories to Defendant Donald J. Trump, served January 3, 2017.¹ In presenting these objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Objections to Definitions

1. Defendants object to Plaintiffs' Definition 3 of "Document" as encompassing "any form of collected data for use with electronic data processing equipment;" "data compilations;" and "any other information stored in electronic form;" insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

¹ These objections are limited to President Trump. Defendants will produce, or already have produced, separate objections for other Defendants.

2. Defendants object to Plaintiffs' Definition 8 of "Describe" to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 8, which applies to Interrogatories Nos. 5, 7, 9, 16, 17, and 21 includes both (1) information about the subject-matter being described, and (2) "each Document evidencing the answer or response given or Relating to said subject-matter in any way." Thus, Plaintiffs have served more than the allowed 25 interrogatories. *See Smith v. Cafe Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009) (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 572–73 (D. Md. 2010) ("[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omission in original) (quoting *Kendall v. GES Exposition Servs.*, 174 F.R.D. 684, 685–86 (D. Nev. 1997).).

General Objection to All Interrogatories

Defendants object to any discovery directed to the President of the United States in this case, on several grounds, including that such discovery should be foreclosed in this case based on separation of powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege.

First, such discovery requests are inappropriate where, as here, they are premised on claims for declaratory and injunctive relief brought directly against the President of the United States, who is not a proper defendant on such claims. 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); *id.* at 500 (“The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department.”). A plurality of the Court later reiterated this principle in *Franklin v. Massachusetts*, 505 U.S. 788, 802–803 (1992). The plurality in *Franklin* found it “extraordinary” that the district court in that case had issued an injunction against the President and two other government officials. *Id.* at 802, 806. “At the threshold,” it said, “the District Court should have evaluated whether injunctive relief against the President was available, and if not, whether appellees’ injuries were nonetheless redressable.” *Id.* at 803. Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827–28 (noting that such principle is “a functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history”). He reasoned that just as the President is absolutely immune from official capacity damages suits, so is he immune from efforts to enjoin him in his official capacity. *Id.* at 827 (“Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President’s performance of executive functions”). The lower courts have often applied this settled principle. See *e.g.*, *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) (“similar considerations regarding a court’s power to issue [injunctive] relief against the President himself apply to [the] request for a declaratory judgment”); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (“With regard to the President, courts do not have jurisdiction

to enjoin him and have never submitted the President to declaratory relief.”) (citations omitted). Under that principle, the President should not be subject to discovery in this case.

Second, the Supreme Court has made clear that discovery directed to the President in civil litigation raises significant separation of powers concerns and should be strictly circumscribed. In *Cheney v. U.S. District Court for District of Columbia*, the Supreme Court explained that where the discovery requests were directed to the Vice President and other senior officials of the Executive Branch who gave advice and made recommendations to the President, it was “not a routine discovery dispute.” 542 U.S. 367, 385 (2004). The Court emphasized that “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. The Supreme Court “has held, on more than one occasion, that ‘[t]he highest respect that is owed to the office of the Chief Executive ... is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.’” *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Further, the Court has held that the Executive’s “constitutional responsibilities and status [are] factors counseling judicial deference and restraint” in the conduct of the litigation against it. *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

In *Cheney*, the district court permitted broad discovery directed to the Vice President and other senior officials, and the D.C. Circuit dismissed the government’s mandamus petition to vacate the district court’s discovery orders, holding that the government officials, “to guard against intrusion into the President’s prerogatives, must first assert privilege.” 542 U.S. at 375–76. In vacating the D.C. Circuit’s decision, the Supreme Court described as “anything but appropriate” the “overly broad discovery requests” directed to the Vice President and other

senior officials, which were “unbounded in scope,” and asked for “everything under the sky.” *Id.* at 387–88 (“The Government [] did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored.”). Noting the separation of powers concerns, the Supreme Court instructed the D.C. Circuit to analyze, on remand, whether the district court’s actions in permitting discovery against the Vice President and other senior officials constituted “an unwarranted impairment of another branch in the performance of its constitutional duties.” *Id.* at 390. It rejected the D.C. Circuit’s “mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government’s separation-of-powers objections.” *Id.* at 391. *Cf. United States v. Poindexter*, 727 F. Supp. 1501, 1503–04 (D.D.C. 1989) (agreeing with the President that “it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents” and deciding to narrow, on its own, the scope of the discovery directed to the President). These separation of powers concerns were also recognized in *American Historical Association v. National Archives & Records Administration*, 402 F. Supp. 2d 171, 181 (D.D.C. 2005) (Kollar-Kotelly, J.). The Court there found the reasoning in *Cheney* instructive, reiterating the *Cheney* Court’s view that “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 181 (quoting *Cheney*, 542 U.S. at 385) (internal quotation marks omitted).

In light of these compelling separation of powers concerns, the Court should, at a minimum, require Plaintiffs to exhaust alternative sources of discovery before subjecting the President to discovery. Indeed, on February 21, 2018—a mere two weeks from now—the Secretary of Defense is expected to submit an implementation plan to the President, which could

narrow, if not completely eliminate, any purported reason for such broad discovery directed to the President. Military policy concerning transgender persons will be set forth in that plan, and any discovery, if permitted at all, into the basis for that policy should be directed at DoD in the first instance at that time. This timeline alone weighs heavily in favor of not subjecting the sitting President to discovery.

Finally, virtually all of the discovery directed to the President in this case is subject to the presidential communications privilege. The “presumptive privilege” that attaches to presidential communications is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon*, 418 U.S. 683, 708 (1974); *see In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (describing the privilege’s “constitutional origins”). The privilege is broad, protecting the “confidentiality of Presidential communications in performance of the President’s responsibilities.” *United States v. Nixon*, 418 U.S. at 711. *See also In re Sealed Case*, 121 F.3d at 744 (“The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations.”). Documents subject to the presidential communications privilege are shielded in their entirety, and the privilege “covers final and post-decisional material as well as pre-deliberative ones.” *In re Sealed Case*, 121 F.3d at 745.

Although the presidential communications privilege is not absolute, the bar to overcoming the privilege is high; it is “more difficult to surmount” than the deliberative process privilege. *In re Sealed Case*, 121 F.3d at 746. A party seeking otherwise privileged presidential material must demonstrate a “focused demonstration of need.” *Id.*; *See also Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). Courts will balance “the public

interests served by protecting the President’s confidentiality in a particular context with those furthered by requiring disclosure.” *In re Sealed Case*, 121 F.3d at 753. To meet this heavy burden of “specific need” in a criminal matter, the party seeking the privileged material must first demonstrate “that each discrete group of the subpoenaed materials likely contains important evidence”—that is, evidence “directly relevant to issues that are expected to be central to the trial,” and not evidence that is “only tangentially relevant or would relate to side issues.” *Id.* at 753–55. The party seeking the discovery must also show “that this evidence is not available with due diligence elsewhere”—that is, notwithstanding other sources of information, the privileged documents are “still needed.” *Id.* (explaining that this standard reflects the Supreme Court’s “insistence that privileged presidential communications should not be treated as just another source of information”).

Where privileged material is sought for use in a civil case, the burden to overcome the presidential communications privilege is even greater. The greater scrutiny is appropriate because “the right to production of relevant evidence in civil proceedings does not have the same ‘constitutional dimensions’” as a request for information in a criminal case. *Cheney*, 542 U.S. at 384 (quoting *United States v. Nixon*, 418 U.S. at 713); *see also Am. Historical Ass’n*, 402 F. Supp. 2d at 181 (explaining that the *Cheney* Court noted that “while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch’s essential functions, the same could not be said of document requests in the civil context”); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) (“[T]he sufficiency of the Committee’s showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee’s functions.”) (emphasis added).

In this case—a civil matter seeking discovery directly from the President, in his capacity as Commander-in-Chief, related to his decisionmaking process on a topic involving national security and military concerns—Plaintiffs face a significant burden in order to negate a valid assertion of the presidential communications privilege. Plaintiffs cannot meet this burden, especially where the requested discovery seeks information that, on its face, is privileged (including information about presidential communications, attorney-client and work product materials, and drafts of presidential documents) and would plainly intrude on core presidential deliberations, or where the requested discovery seeks information that could be sought from the Department of Defense or other sources, including publicly available ones.

Accordingly, Defendants object to any discovery requests directed to the President of the United States in this case based on these compelling separation of powers concerns, and in particular object to the discovery sought that is subject to the presidential communications privilege.

Specific Objections to Interrogatories to be Answered by Defendant Trump

Interrogatory No. 1: State the Date on which President Trump decided that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.”

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege, or (b) communications or information protected by the presidential communications privilege.

The President objects to this interrogatory to the extent that “decided” is vague and ambiguous, as well as undefined by Plaintiffs.

Interrogatory No. 2: Identify all Documents and Communications reviewed, referenced, relied upon directly or indirectly, or considered by President Trump on or before July 26, 2017 as a basis or impetus for deciding that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.”

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 3: Identify each one of the “Generals and military experts” referenced in the Tweets.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 4: For each of the “Generals and military experts” referenced in the Tweets, Identify and Describe all Communications between that individual and President Trump Concerning military service by transgender people, Including the Date of the Communication.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 5: Identify and Describe the basis for President Trump’s assertion that his Tweets announcing the Ban did the military a “great favor.”

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects on the grounds that the basis for the President’s assertion is set forth in the August 25, 2017 Presidential Memorandum.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs’ Definition 8 of “Describe” seeks both (1) information about the subject-matter being described, and (2) “each Document evidencing the answer or response given or Relating to said subject-matter in any way.” Thus, Interrogatory No. 5 contains at least two discrete subparts, and Plaintiffs have served more than the allowed 25 interrogatories. *See Smith*, 256 F.R.D. at 254 (explaining that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”); *Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Interrogatory No. 6: Identify all Persons with whom President Trump (or others acting or purporting to act on his behalf) has communicated Concerning the Tweets or the Ban, Including any Defendants, informal advisors, members of the United States Congress, and representatives or agents of the “Alliance Defending Freedom,” “Focus on the Family,” the “Family Research Council,” “Heritage Action for America,” and “Breitbart News,” and Including the Date of any such Communication.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The foregoing objections do not foreclose the possibility that, to the extent any responsive communications exist, a Member of Congress may seek to oppose the production of information in this case based on the Speech or Debate Clause.

Interrogatory No. 7: Describe the basis for President Trump’s assertion in the Tweets that military service by transgender individuals would entail (i) “tremendous medical costs” and (ii) “disruption,” Including Identifying any Documents or Communications that support the basis for those two assertions.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects on the grounds that the basis for the President's assertion is set forth in the August 25, 2017 Presidential Memorandum.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Interrogatory No. 7 contains at least four discrete subparts: (1) a request for information about the basis for President Trump's assertion regarding "tremendous medical costs," (2) a separate request for documents supporting that basis, (3) a request for information about the basis for President Trump's assertion regarding "disruption," and (4) a separate request for documents supporting that basis. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *Mezu*, 269 F.R.D. at 572–73 ("[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86)).

Interrogatory No. 8:

State whether President Trump received advice from any attorney Concerning the Tweets or the Ban and for each such attorney (a) state the Date the advice was communicated to President Trump; (b) state the subject matter of such advice; (c) Identify all Communications containing or transmitting such advice; and (d) Identify all persons to whom the substance of this advice has ever been disclosed.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Interrogatory No. 8 contains at least two discrete subparts: (1) a request for information about communications with any attorney, and (2) a separate request for information about all persons to whom the substance of any advice has ever been disclosed. *See Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Interrogatory No. 9: Describe the “meaningful concerns” referenced in the Ban, and Identify all Persons who expressed those concerns to President Trump, including the specific “meaningful concern[]” articulated by each such Person and the Date on which the concern was expressed.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 9 contains at least two discrete subparts: (1) a request to identify the “meaningful concerns,” (2) a separate request to identify people and the “meaningful concerns” they articulated. *See Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Interrogatory No. 10: Identify all Documents and Communications reviewed, relied upon directly or indirectly, or considered by President Trump in preparing and issuing the Transgender

Service Member Ban, indicating which component of the Ban each Document or Communication pertains to (medical care, accessions, discharge)

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

**President Trump's Specific Objections to Interrogatories
to be Answered by All Defendants**

Interrogatory No. 13: Identify the members of the Working Group, Including name, title, contact information, and qualifications.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; (b) communications or information protected by the presidential communications privilege; or (c)

material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Interrogatory No. 14: Identify all meeting or conference Dates of the Working Group, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Interrogatory No. 15: Identify all Documents and Communications Concerning military service by transgender individuals that were requested, received, considered directly or indirectly, or consulted by Defendants—including the Panel of Experts—since January 20, 2017, and, for each such Document, Identify the Person who transmitted it to You and state the Date(s) of transmission and receipt.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “all Documents and Communications” purports to require the President to search for and identify documents in any and all locations, regardless of whether (a) the documents are in his possession, (b) he has personal knowledge of the documents, (c) the documents would be redundant, and/or (d) such documents would be likely to yield information that is distinct or that is relevant. Additionally, the phrase “considered [] indirectly” is problematic to the extent that it could be construed to apply to documents and communications with mere peripheral connections to the claims and defenses in this case, and identifying all such documents and communications would be excessively burdensome and disproportionate to the needs of the case.

Interrogatory No. 16: For every meeting attended by You between January 20, 2017 and the present, at which military service by transgender individuals was discussed, (a) state the Date of the meeting; (b) Identify all participants in the meeting; (c) Describe the topics discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and (e) Identify all Documents memorializing such meeting.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “every meeting” purports to require the President to identify all meetings in this time period of over one year, despite how briefly or informally military service by transgender individuals was discussed at the meeting. Further, the references to “all Documents” purport to require the President to search for and identify documents in any and all locations, regardless of whether (a) the documents are in his possession, (b) he has personal knowledge of the documents, (c) the documents would be redundant, and/or (d) such documents would be likely to yield information that is distinct or that is relevant.

The President also objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 16 contains at least two discrete subparts: (1) a request for information about the meetings, and (2) a separate request for documents distributed, considered, or discussed at the meetings or memorializing such meetings (which exists both because it is stated explicitly and due to the Plaintiffs’ definition of “Describe”). *See Smith*, 256 F.R.D. at 254 (explaining

that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”); *Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Interrogatory No. 17: Identify all Persons involved in drafting or publishing: (i) the Accessions Readiness Memorandum, (ii) the Accessions Deferral Memorandum, (iii) the Tweets, (iv) the Ban, (v) the Interim Guidance, and (vi) any forthcoming recommendations of the Panel of Experts, Including the implementation plan due on February 21, 2018. For each such Person, (a) Describe that Person’s role in drafting the document; (b) state the Date(s) of that Person’s participation in drafting the document; and (c) Identify all Documents memorializing or reflecting such participation.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 17 contains at least seven discrete subparts. It asks for information about

people involved in drafting (1) the Accessions Readiness Memorandum, (2) the Accessions Deferral Memorandum, (3) the Tweets, (4) the Ban, (5) the Interim Guidance, and (6) any forthcoming recommendations of the Panel of Experts. Due to Plaintiffs' definition of "Describe," it also asks for (7) any documents relating to, or evidencing information about, the roles of individuals in drafting each document or policy. The first through sixth subparts relate to information about discrete documents or policies, and none of those subparts is secondary to another subpart. *See Mezu*, 269 F.R.D. at 572–73 ("Probably the best test of whether subsequent questions, within a single interrogatory, are subsumed and related is to examine whether the first question is primary and subsequent questions are secondary to the primary question. . . . Genuine subparts should not be counted as separate interrogatories. However, discrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omissions in original) (quoting *Kendall*, 174 F.R.D. at 685–86).). The seventh subpart is a separate request for actual documents. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"). Together, these represent seven distinct interrogatories.

Interrogatory No. 18: Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of, Defendants between June 30, 2016 and August 25, 2017, concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 18 contains three discrete subparts: (1) documents concerning the effect of transgender individuals serving in the military on military readiness, (2) documents concerning medical costs associated with transgender individuals serving in the military, and (3) documents concerning the impact of transgender individuals serving in the military on unit cohesion. *See Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86)).

Interrogatory No. 19: Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of Defendants from August 25, 2017 through the present Concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in

the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President objects to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 18 contains three discrete subparts: (1) documents concerning the effect of transgender individuals serving in the military on military readiness, (2) documents concerning medical costs associated with transgender individuals serving in the military, and (3) documents concerning the impact of transgender individuals serving in the military on unit cohesion. *See Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Interrogatory No. 20: Identify all members of the Panel of Experts, including each individual’s name, title, contact information, and qualifications.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

Interrogatory No. 21: Identify all meeting or conference Dates of the Panel of Experts, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

The President also objects to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 8 of "Describe" seeks both (1) information about the subject-matter being

described, and (2) “each Document evidencing the answer or response given or Relating to said subject-matter in any way.” Thus, Interrogatory No. 21 contains at least two discrete subparts, and Plaintiffs have served more than the allowed 25 interrogatories. *See Smith*, 256 F.R.D. at 254 (explaining that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”); *Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Interrogatory No. 22: State, broken down by Military Service, the number of current and former service members who have identified to their chain of command as transgender since June 30, 2016.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Interrogatory No. 23: State, broken down by Military Service, the number of current and former service members whom military medical personnel have diagnosed with gender dysphoria since June 30, 2016.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Interrogatory No. 24: State, broken down by Military Service, the number of surgeries performed as treatment for gender dysphoria that the military has performed on current and former service members since June 30, 2016, Including as to each surgery the date, description of the procedure, and cost to the military of the procedure.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; (b) communications or information protected by the presidential communications privilege; or (c) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Date: February 9, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

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EXHIBIT F

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, *et al.*,

Defendants.

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS TO DEFENDANT DONALD J. TRUMP**

Pursuant to Federal Rules of Civil Procedure 26 and 34 and the Local Rules of the U.S. District Court for the District of Columbia, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs' First Set of Requests for Production of Documents to Defendant Donald J. Trump, served January 3, 2017.¹ In presenting these objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Objection to Definitions

Defendants object to Plaintiffs' Definition 3 of "Document" as encompassing "any form of collected data for use with electronic data processing equipment;" "data compilations;" and "any other information stored in electronic form;" insofar as data collection and translation are

¹ These objections are limited to President Trump. Defendants will produce, or already have produced, separate objections for other Defendants.

appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

General Objection to All Requests for Production

Defendants object to any discovery directed to the President of the United States in this case, on several grounds, including that such discovery should be foreclosed in this case based on separation of powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege.

First, such discovery requests are inappropriate where, as here, they are premised on claims for declaratory and injunctive relief brought directly against the President of the United States, who is not a proper defendant on such claims. 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); *id.* at 500 (“The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department.”). A plurality of the Court later reiterated this principle in *Franklin v. Massachusetts*, 505 U.S. 788, 802–803 (1992). The plurality in *Franklin* found it “extraordinary” that the district court in that case had issued an injunction against the President and two other government officials. *Id.* at 802, 806. “At the threshold,” it said, “the District Court should have evaluated whether injunctive relief against the President was available, and if not, whether appellees’ injuries were nonetheless redressable.” *Id.* at 803. Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827–28 (noting that such principle is “a functionally mandated incident of the President’s unique

office, rooted in the constitutional tradition of the separation of powers and supported by our history”). He reasoned that just as the President is absolutely immune from official capacity damages suits, so is he immune from efforts to enjoin him in his official capacity. *Id.* at 827 (“Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President’s performance of executive functions”). The lower courts have often applied this settled principle. *See e.g., Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) (“similar considerations regarding a court’s power to issue [injunctive] relief against the President himself apply to [the] request for a declaratory judgment”); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (“With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.”) (citations omitted). Under that principle, the President should not be subject to discovery in this case.

Second, the Supreme Court has made clear that discovery directed to the President in civil litigation raises significant separation of powers concerns and should be strictly circumscribed. In *Cheney v. U.S. District Court for District of Columbia*, the Supreme Court explained that where the discovery requests were directed to the Vice President and other senior officials of the Executive Branch who gave advice and made recommendations to the President, it was “not a routine discovery dispute.” 542 U.S. 367, 385 (2004). The Court emphasized that “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. The Supreme Court “has held, on more than one occasion, that ‘[t]he highest respect that is owed to the office of the Chief Executive ... is a matter that should inform

the conduct of the entire proceeding, including the timing and scope of discovery.’” *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Further, the Court has held that the Executive’s “constitutional responsibilities and status [are] factors counseling judicial deference and restraint” in the conduct of the litigation against it. *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

In *Cheney*, the district court permitted broad discovery directed to the Vice President and other senior officials, and the D.C. Circuit dismissed the government’s mandamus petition to vacate the district court’s discovery orders, holding that the government officials, “to guard against intrusion into the President’s prerogatives, must first assert privilege.” 542 U.S. at 375–76. In vacating the D.C. Circuit’s decision, the Supreme Court described as “anything but appropriate” the “overly broad discovery requests” directed to the Vice President and other senior officials, which were “unbounded in scope,” and asked for “everything under the sky.” *Id.* at 387–88 (“The Government [] did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored.”). Noting the separation of powers concerns, the Supreme Court instructed the D.C. Circuit to analyze, on remand, whether the district court’s actions in permitting discovery against the Vice President and other senior officials constituted “an unwarranted impairment of another branch in the performance of its constitutional duties.” *Id.* at 390. It rejected the D.C. Circuit’s “mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government’s separation-of-powers objections.” *Id.* at 391. *Cf. United States v. Poindexter*, 727 F. Supp. 1501, 1503–04 (D.D.C. 1989) (agreeing with the President that “it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents” and deciding to narrow, on its own, the scope of the discovery directed to

the President). These separation of powers concerns were also recognized in *American Historical Association v. National Archives & Records Administration*, 402 F. Supp. 2d 171, 181 (D.D.C. 2005) (Kollar-Kotelly, J.). The Court there found the reasoning in *Cheney* instructive, reiterating the *Cheney* Court’s view that “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 181 (quoting *Cheney*, 542 U.S. at 385) (internal quotation marks omitted).

In light of these compelling separation of powers concerns, the Court should, at a minimum, require Plaintiffs to exhaust alternative sources of discovery before subjecting the President to discovery. Indeed, on February 21, 2018—a mere two weeks from now—the Secretary of Defense is expected to submit an implementation plan to the President, which could narrow, if not completely eliminate, any purported reason for such broad discovery directed to the President. Military policy concerning transgender persons will be set forth in that plan, and any discovery, if permitted at all, into the basis for that policy should be directed at DoD in the first instance at that time. This timeline alone weighs heavily in favor of not subjecting the sitting President to discovery.

Finally, virtually all of the discovery directed to the President in this case is subject to the presidential communications privilege. The “presumptive privilege” that attaches to presidential communications is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon*, 418 U.S. 683, 708 (1974); see *In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (describing the privilege’s “constitutional origins”). The privilege is broad, protecting the “confidentiality of Presidential communications in performance of the President’s responsibilities.” *United States v. Nixon*, 418

U.S. at 711. *See also In re Sealed Case*, 121 F.3d at 744 (“The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations.”). Documents subject to the presidential communications privilege are shielded in their entirety, and the privilege “covers final and post-decisional material as well as pre-deliberative ones.” *In re Sealed Case*, 121 F.3d at 745.

Although the presidential communications privilege is not absolute, the bar to overcoming the privilege is high; it is “more difficult to surmount” than the deliberative process privilege. *In re Sealed Case*, 121 F.3d at 746. A party seeking otherwise privileged presidential material must demonstrate a “focused demonstration of need.” *Id.*; *See also Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). Courts will balance “the public interests served by protecting the President’s confidentiality in a particular context with those furthered by requiring disclosure.” *In re Sealed Case*, 121 F.3d at 753. To meet this heavy burden of “specific need” in a criminal matter, the party seeking the privileged material must first demonstrate “that each discrete group of the subpoenaed materials likely contains important evidence”—that is, evidence “directly relevant to issues that are expected to be central to the trial,” and not evidence that is “only tangentially relevant or would relate to side issues.” *Id.* at 753–55. The party seeking the discovery must also show “that this evidence is not available with due diligence elsewhere”—that is, notwithstanding other sources of information, the privileged documents are “still needed.” *Id.* (explaining that this standard reflects the Supreme Court’s “insistence that privileged presidential communications should not be treated as just another source of information”).

Where privileged material is sought for use in a civil case, the burden to overcome the presidential communications privilege is even greater. The greater scrutiny is appropriate because “the right to production of relevant evidence in civil proceedings does not have the same ‘constitutional dimensions’” as a request for information in a criminal case. *Cheney*, 542 U.S. at 384 (quoting *United States v. Nixon*, 418 U.S. at 713); *see also Am. Historical Ass’n*, 402 F. Supp. 2d at 181 (explaining that the *Cheney* Court noted that “while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch’s essential functions, the same could not be said of document requests in the civil context”); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) (“[T]he sufficiency of the Committee’s showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee’s functions.”) (emphasis added).

In this case—a civil matter seeking discovery directly from the President, in his capacity as Commander-in-Chief, related to his decisionmaking process on a topic involving national security and military concerns—Plaintiffs face a significant burden in order to negate a valid assertion of the presidential communications privilege. Plaintiffs cannot meet this burden, especially where the requested discovery seeks information that, on its face, is privileged (including information about presidential communications, attorney-client and work product materials, and drafts of presidential documents) and would plainly intrude on core presidential deliberations, or where the requested discovery seeks information that could be sought from the Department of Defense or other sources, including publicly available ones.

Accordingly, Defendants object to any discovery requests directed to the President of the United States in this case based on these compelling separation of powers concerns, and in

particular object to the discovery sought that is subject to the presidential communications privilege. Based on the foregoing objections, the President will not produce privileged or non-privileged documents and information that have been identified as potentially responsive.

Specific Objections to Requests for Production

RFP No. 1: All Documents and Communications that You have conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning military service by transgender individuals.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 2: All Documents and Communications Concerning the Working Group's composition, structure, research, findings, and conclusions, Including the Working Group's interview notes, evaluations, analyses, summaries, and memoranda, and Including any Communications between the Working Group and You.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 3: All Documents and Communications prepared between November 2015 and June 2016 and submitted to the Secretary of Defense via the Undersecretary of Defense for Personnel & Readiness Concerning military service and accessions into the Military Services by transgender individuals, Including assessments from service medical commands, other Defense Department health care agencies, and the Office of Cost Assessment and Program Evaluation (“CAPE”).

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 4: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Readiness Memorandum.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 5: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Deferral Memorandum.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 6: All Documents and Communications Concerning military service by transgender individuals between President Trump or Persons acting or purporting to act on President Trump's behalf (Including White House officials and senior staff to the President, such as President Trump's National Security Adviser and Chief of Staff), on the one hand, and the other Defendants and Persons acting or purporting to act on the other Defendants' behalf, on the other hand.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 7: All Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or

impetus for the Tweets, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 8: All Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Transgender Service Member Ban, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 9: All Documents and Communications that Secretary Mattis or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Interim Guidance, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 10: All Documents and Communications that embody, comprise, or constitute the "appropriate evidence and information" referenced in the Interim Guidance.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 11: All Documents and Communications Concerning military service by transgender individuals shared between or amongst You and any current or former member of the United States Congress, Including Representative Vicky Hartzler, Scott Perry, or Steve King, from January 2017 to the present.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the

privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

The foregoing objections do not foreclose the possibility that, to the extent any responsive documents exist, a Member of Congress may seek to oppose the production of information in this case based on the Speech or Debate Clause.

RFP No. 12: All Documents and Communications Concerning military service by transgender individuals shared between or amongst You and the Office of the Vice President of the United States, Including Vice President Pence himself.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 13: All Documents and Communications Concerning military service by transgender individuals shared between or amongst Defendants and organizations opposed to military service by transgender individuals, Including but not limited to representatives and agents of the “Alliance Defending Freedom,” “Focus on the Family,” the “Family Research Council,” “Heritage Action for America,” and “Breitbart News,” from January 2017 to the present.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 14: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed that embody, constitute, comprise, or reflect the reaction of the Department of Defense or any of

its components (including Military Services), or any individuals within the Department of Defense or its components, to the Tweets.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 15: All Documents and Communications Concerning the purpose, composition, structure, research, analysis, findings, and conclusions of the Panel of Experts.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 16: All Documents and Communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, Including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 17: All Documents and Communications that You contend support the Tweets' assertion regarding the "tremendous" costs associated with transgender individuals in the Military Services (ECF No. 40-22), Including the military's provision of medical care to transgender individuals.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 18: All Documents and Communications that You contend support the Tweets' assertion regarding the "disruptive" effect of military service by openly transgender individuals (ECF No. 40-22), Including any purported effect on unit cohesion or military readiness.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log

will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 19: All Documents and Communications Concerning the Department of Defense's implementation of accessions of openly transgender individuals into the Military Services as of January 1, 2018.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 20: All Documents that You referred to or considered in connection with any defense raised in Your Answer to Plaintiffs' First Amended Complaint.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 21: All Documents and Communications that You referred to or considered in connection with responding to Plaintiffs' First Set of Interrogatories.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

Date: February 9, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
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CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

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s/ Ryan Parker
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U.S. Department of Justice

EXHIBIT G

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, *et al.*,

Defendants.

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

**DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF
INTERROGATORIES TO THE AIR FORCE AND SECRETARY WILSON**

Pursuant to Federal Rules of Civil Procedure 26 and 33, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' First Set of Interrogatories to the Air Force and Secretary Wilson, in her official capacity as Secretary of the Air Force, served January 3, 2017.¹ In presenting these objections and responses, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Objections to Definitions

1. Defendants object to Plaintiffs' Definition 3 of "Document" as encompassing "any form of collected data for use with electronic data processing equipment;" "data compilations;" and "any other information stored in electronic form;" insofar as data collection

¹ These objections and responses are limited to the Air Force and Secretary Wilson. Defendants will produce, or already have produced, separate objections and responses for other Defendants.

and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

2. Defendants object to Plaintiffs' Definition 8 of "Describe" to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 8, which applies to Interrogatories 16, 17, and 21, includes both (1) information about the subject matter being described, and (2) "each Document evidencing the answer or response given or Relating to said subject-matter in any way." Thus, Plaintiffs have served more than the allowed 25 interrogatories. *See Smith v. Cafe Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009) (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 572–73 (D. Md. 2010) ("[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omission in original) (quoting *Kendall v. GES Exposition Servs.*, 174 F.R.D. 684, 685–86 (D.Nev.1997).).

Specific Objections and Responses to Interrogatories

Interrogatory No. 13: Identify the members of the Working Group, Including name, title, contact information, and qualifications.

Specific Objections:

The Air Force and Secretary Wilson object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client

privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Response:

The Air Force has identified this working group as the Department of Defense's Transgender Service Review Working Group that was chaired by Mr. Brad Carson and began its work in or around August 2015. The Air Force members of this working group are: Mr. John Fedrigo, Deputy Assistant Secretary for Reserve Affairs, and Airman Readiness; john.a.fedrigo.civ@mail.mil, (703) 697-6375; Lieutenant General Mark Ediger, Surgeon General of the Air Force, mark.a.ediger.mil@mail.mil, (703) 692-6800; Major General Roosevelt Allen, Director of Medical Operations and Research, Office of the Surgeon General of the Air Force, roosevelt.allen4.mil@mail.mil; Major General Brian Kelly, Commander, Air Force Personnel Center, brian.t.kelly.mil@mail.mil; Mr. Daniel Sitterly, Acting Assistant Secretary of the Air Force, Manpower, Personnel, and Services, Daniel.r.sitterly.civ@mail.mil, (703) 697-2302; Ms. Martie Soper, Assistant Deputy of Health Policy, Office of the Secretary of the Air Force, martha.p.soper.civ@mail.mil, (703) 693-9512.

Additional information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. The Air Force and Secretary Wilson will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 14: Identify all meeting or conference Dates of the Working Group, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

Specific Objections: The Air Force and Secretary Wilson object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. The Air Force and Secretary Wilson will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 15: Identify all Documents and Communications Concerning military service by transgender individuals that were requested, received, considered directly or indirectly, or consulted by Defendants—including the Panel of Experts—since January 20, 2017, and, for each such Document, Identify the Person who transmitted it to You and state the Date(s) of transmission and receipt.

Specific Objections: The Air Force and Secretary Wilson object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Air Force and Secretary Wilson object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to

“all Documents and Communications” purports to require Defendants to search for and identify documents in any and all locations, regardless of whether (a) the documents are in their possession, (b) they have personal knowledge of the documents, (c) the documents would be redundant, and/or (d) such documents would be likely to yield information that is distinct or that is relevant. Collecting the requested information for each meeting and discussion, to include emails, at all levels of the Air Force and those that occurred at Air Force facilities around the world in order to individually identify “the Person who transmitted it and state the date(s) of transmission and receipt” would potentially require tens of thousands of hours of work to collect, identify, and produce from Air Force personnel, many of whom are in remote locations with limited access. Additionally, the phrase “considered [] indirectly” is problematic to the extent that it could be construed to apply to documents and communications with mere peripheral connections to the claims and defenses in this case, and identifying all such documents and communications would be excessively burdensome and disproportionate to the needs of the case.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. The Air Force and Secretary Wilson will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 16: For every meeting attended by You between January 20, 2017 and the present, at which military service by transgender individuals was discussed, (a) state the Date of the meeting; (b) Identify all participants in the meeting; (c) Describe the topics

discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and
(e) Identify all Documents memorializing such meeting.

Specific Objections: The Air Force and Secretary Wilson object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Air Force and Secretary Wilson also object to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 16 contains at least two discrete subparts: (1) a request for information about the meetings, and (2) a separate request for documents distributed, considered, or discussed at the meetings or memorializing such meetings (which exists both because it is stated explicitly and due to the Plaintiffs' definition of "Describe"). *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *Mezu*, 269 F.R.D. at 572–73 ("[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

The Air Force objects to this interrogatory because the term "meeting" is vague and insufficiently defined. DoD is large and complex agency with many forms of gatherings occurring through many mediums on a daily basis. Plaintiffs' have failed to provide sufficient information for the Air Force to identify the "meeting[s]" that are the subject of this interrogatory.

The Air Force also objects to this interrogatory on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. To the extent that “meeting” is intended to be some form of gathering through a particular medium, meetings where discussions regarding military service by transgender individuals occur at all levels across all Air Force installations world-wide, not just at the Pentagon or Washington, D.C., and also would involve hundreds, if not thousands of meetings. Collecting the requested information for each meeting involving transgender individuals and issues that occurred at Air Force facilities across the world, as well as any Air Force official who participated in such meetings who are stationed in those installations, and identifying all documents “distributed, considered, or discussed” at these meetings would potentially require tens of thousands of hours of work from Air Force personnel. Moreover, information regarding the vast majority of these meetings is not relevant to Plaintiffs’ claims, let alone proportionate to the needs of the case.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. The Air Force and Secretary Wilson will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 17: Identify all Persons involved in drafting or publishing: (i) the Accessions Readiness Memorandum, (ii) the Accessions Deferral Memorandum, (iii) the Tweets, (iv) the Ban, (v) the Interim Guidance, and (vi) any forthcoming recommendations of the Panel of Experts, including the implementation plan due on February 21, 2018. For each such Person, (a) Describe that Person’s role in drafting the document; (b) state the Date(s) of that

Person's participation in drafting the document; and (c) Identify all Documents memorializing or reflecting such participation.

Specific Objections: The Air Force and Secretary Wilson object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Air Force and Secretary Wilson also object to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 17 contains at least seven discrete subparts. It asks for information about people involved in drafting (1) the Accessions Readiness Memorandum, (2) the Accessions Deferral Memorandum, (3) the Tweets, (4) the Ban, (5) the Interim Guidance, and (6) any forthcoming recommendations of the Panel of Experts. Due to Plaintiffs' definition of "Describe," it also asks for (7) any documents relating to, or evidencing information about, the roles of individuals in drafting each document or policy. The first through sixth subparts relate to information about discrete documents or policies, and none of those subparts is secondary to another subpart. *See Mezu*, 269 F.R.D. at 572–73 ("Probably the best test of whether subsequent questions, within a single interrogatory, are subsumed and related is to examine whether the first question is primary and subsequent questions are secondary to the primary question. . . . Genuine subparts should not be counted as separate interrogatories. However, discrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omissions in original) (quoting *Kendall*, 174 F.R.D. at 685–86)). The seventh subpart is a

separate request for actual documents. *See Smith*, 256 F.R.D. at 254 (explaining that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”). Together, these represent seven distinct interrogatories.

The Air Force and Secretary Wilson further object to this interrogatory as vague and overbroad to the extent that the phrases “all Persons involved” and “drafted or published” could be construed to apply to individuals with mere peripheral involvement, as the identity of such individuals is not relevant, such individuals are unlikely to have relevant information, and identifying all such individuals would be excessively burdensome and disproportionate to the needs of the case.

Interrogatory No. 18: Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of, Defendants between June 30, 2016 and August 25, 2017, concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Specific Objections:

The Air Force and Secretary Wilson object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Air Force and Secretary Wilson also object to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 18 contains three discrete subparts: (1) documents concerning the effect of transgender individuals serving in the military on military readiness, (2) documents concerning medical costs associated with transgender individuals serving in the military, and (3) documents concerning the impact of transgender individuals serving in the military on unit cohesion. *See Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. The Air Force and Secretary Wilson will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 19: Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of Defendants from August 25, 2017 through the present Concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Specific Objections:

The Air Force and Secretary Wilson object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Air Force and Secretary Wilson also object to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 18 contains three discrete subparts: (1) documents concerning the effect of transgender individuals serving in the military on military readiness, (2) documents concerning medical costs associated with transgender individuals serving in the military, and (3) documents concerning the impact of transgender individuals serving in the military on unit cohesion. *See Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. The Air Force and Secretary Wilson will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 20: Identify all members of the Panel of Experts, including each individual’s name, title, contact information, and qualifications.

Specific Objections:

The Air Force and Secretary Wilson object to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

The Air Force and Secretary Wilson have no information responsive to this interrogatory.

Interrogatory No. 21: Identify all meeting or conference Dates of the Panel of Experts, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

Specific Objections: The Air Force and Secretary Wilson object to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

The Air Force and Secretary Wilson also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 8 of "Describe" seeks both (1) information about the subject-matter being described, and (2) "each Document evidencing the answer or response given or Relating to said subject-matter in any way." Thus, Interrogatory No. 21 contains at least two discrete subparts, and Plaintiffs have served more than the allowed 25 interrogatories. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories");

Mezu, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86)).

Response:

The Department of Defense is the proper custodian of this information. The Air Force and Secretary Wilson refer Plaintiffs to Secretary Mattis’s response to this interrogatory.

Interrogatory No. 22: State, broken down by Military Service, the number of current and former service members who have identified to their chain of command as transgender since June 30, 2016.

Specific Objections: The Air Force and Secretary Wilson object to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

The Air Force and Secretary Wilson have no information responsive to this interrogatory.

Interrogatory No. 23: State, broken down by Military Service, the number of current and former service members whom military medical personnel have diagnosed with gender dysphoria since June 30, 2016.

Specific Objections:

The Air Force and Secretary Wilson object to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

As of 1 February 2018, the total number of active duty Air Force members who had been diagnosed with gender dysphoria is 211.

Interrogatory No. 24: State, broken down by Military Service, the number of surgeries performed as treatment for gender dysphoria that the military has performed on current and former service members since June 30, 2016, Including as to each surgery the date, description of the procedure, and cost to the military of the procedure.

Specific Objections: The Air Force and Secretary Wilson object to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; (b) communications or information protected by the presidential communications privilege; or (c) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

The Air Force and Secretary Wilson also object to this interrogatory to the extent it seeks personally identifiable information regarding current or former service members.

Response:

The Air Force and Secretary Wilson have no information responsive to this interrogatory.

As to the responses to the interrogatories, see Attachment A.

As to the objections:

Date: February 9, 2018

Respectfully submitted,

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Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
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Counsel for Defendants

VERIFICATION

Based on information that I obtained in the course of my official duties, I declare under penalty of perjury that the substance of the responses to these interrogatories are true and correct to the best of my knowledge and belief.

Date: 19 Feb 18

Signature: 
[PRINTED NAME]
MARTHA P. SOPER

CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

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/s/ Ryan Parker
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U.S. Department of Justice

EXHIBIT H

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, *et al.*,

Defendants.

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

**DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS TO SECRETARY WILSON AND
THE AIR FORCE**

Pursuant to Federal Rules of Civil Procedure 26 and 34 and the Local Rules of the U.S. District Court for the District of Columbia, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' First Set of Requests for Production of Documents to the Air Force and Heather Wilson, in her official capacity as Secretary of the Air Force, served January 3, 2017.¹ In presenting these objections and responses, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground. ESI will be produced in TIF format.

¹ These objections and responses are limited to Secretary Wilson and the Air Force. Defendants will produce, or already have produced, separate objections and responses for other Defendants.

Objection to Definitions

Defendants object to Plaintiffs' Definition 3 of "Document" as encompassing "any form of collected data for use with electronic data processing equipment;" "data compilations;" and "any other information stored in electronic form;" insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

Specific Objections to Requests for Production

RFP No. 1: All Documents and Communications that You have conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning military service by transgender individuals.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Wilson and the Air Force will produce any non-privileged documents responsive to this RFP in the Secretary Wilson and the Air Force's possession, custody, and control.

RFP No. 2: All Documents and Communications Concerning the Working Group's composition, structure, research, findings, and conclusions, Including the Working Group's interview notes, evaluations, analyses, summaries, and memoranda, and Including any Communications between the Working Group and You.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Wilson and the Air Force will produce any non-privileged documents responsive to this RFP in the Secretary Wilson and the Air Force's possession, custody, and control.

RFP No. 3: All Documents and Communications prepared between November 2015 and June 2016 and submitted to the Secretary of Defense via the Undersecretary of Defense for Personnel & Readiness Concerning military service and accessions into the Military Services by transgender individuals, Including assessments from service medical commands, other Defense Department health care agencies, and the Office of Cost Assessment and Program Evaluation (“CAPE”).

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Wilson and the Air Force will produce any non-privileged documents responsive to this RFP in the Secretary Wilson and the Air Force’s possession, custody, and control.

RFP No. 4: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Readiness Memorandum.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Wilson and the Air Force will produce any non-privileged documents responsive to this RFP in the Secretary Wilson and the Air Force's possession, custody, and control.

RFP No. 5: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Deferral Memorandum.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Wilson and the Air Force will produce any non-privileged documents responsive to this RFP in the Secretary Wilson and the Air Force's possession, custody, and control.

RFP No. 6: All Documents and Communications Concerning military service by transgender individuals between President Trump or Persons acting or purporting to act on President Trump's behalf (Including White House officials and senior staff to the President, such as President Trump's National Security Adviser and Chief of Staff), on the one hand, and the other Defendants and Persons acting or purporting to act on the other Defendants' behalf, on the other hand.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 7: All Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Tweets, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes

the privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 8: All Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Transgender Service Member Ban, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 9: All Documents and Communications that Secretary Mattis or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Interim Guidance, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Wilson and the Air Force will produce any non-privileged documents responsive to this RFP in the Secretary Wilson and the Air Force's possession, custody, and control.

RFP No. 10: All Documents and Communications that embody, comprise, or constitute the "appropriate evidence and information" referenced in the Interim Guidance.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the

presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Wilson and the Air Force will produce any non-privileged documents responsive to this RFP in the Secretary Wilson and the Air Force's possession, custody, and control.

RFP No. 11: All Documents and Communications Concerning military service by transgender individuals shared between or amongst You and any current or former member of the United States Congress, Including Representative Vicky Hartzler, Scott Perry, or Steve King, from January 2017 to the present.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The foregoing objections do not foreclose the possibility that, to the extent any responsive documents exist, a Member of Congress may seek to oppose the production of information in this case based on the Speech or Debate Clause.

Response:

Subject to and without waiving the above objections, Secretary Wilson and the Air Force will produce any non-privileged documents responsive to this RFP in the Secretary Wilson and the Air Force's possession, custody, and control.

RFP No. 12: All Documents and Communications Concerning military service by transgender individuals shared between or amongst You and the Office of the Vice President of the United States, Including Vice President Pence himself.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 13: All Documents and Communications Concerning military service by transgender individuals shared between or amongst Defendants and organizations opposed to military service by transgender individuals, Including but not limited to representatives and agents of the “Alliance Defending Freedom,” “Focus on the Family,” the “Family Research Council,” “Heritage Action for America,” and “Breitbart News,” from January 2017 to the present.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Wilson and the Air Force will produce any non-privileged documents responsive to this RFP in the Secretary Wilson and the Air Force’s possession, custody, and control.

RFP No. 14: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed

that embody, constitute, comprise, or reflect the reaction of the Department of Defense or any of its components (including Military Services), or any individuals within the Department of Defense or its components, to the Tweets.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Wilson and the Air Force will produce any non-privileged documents responsive to this RFP in the Secretary Wilson and the Air Force's possession, custody, and control.

RFP No. 15: All Documents and Communications Concerning the purpose, composition, structure, research, analysis, findings, and conclusions of the Panel of Experts.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client

privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Wilson and the Air Force will produce any non-privileged documents responsive to this RFP in the Secretary Wilson and the Air Force's possession, custody, and control.

RFP No. 16: All Documents and Communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, Including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a

privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Wilson and the Air Force will produce any non-privileged documents responsive to this RFP in the Secretary Wilson and the Air Force's possession, custody, and control.

RFP No. 17: All Documents and Communications that You contend support the Tweets' assertion regarding the "tremendous" costs associated with transgender individuals in the Military Services (ECF No. 40-22), Including the military's provision of medical care to transgender individuals.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Wilson and the Air Force will produce any non-privileged documents responsive to this RFP in the Secretary Wilson and the Air Force's possession, custody, and control.

RFP No. 18: All Documents and Communications that You contend support the Tweets' assertion regarding the "disruptive" effect of military service by openly transgender individuals (ECF No. 40-22), Including any purported effect on unit cohesion or military readiness.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Wilson and the Air Force will produce any non-privileged documents responsive to this RFP in the Secretary Wilson and the Air Force's possession, custody, and control.

RFP No. 19: All Documents and Communications Concerning the Department of Defense's implementation of accessions of openly transgender individuals into the Military Services as of January 1, 2018.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Wilson and the Air Force will produce any non-privileged documents responsive to this RFP in the Secretary Wilson and the Air Force's possession, custody, and control.

RFP No. 20: All Documents that You referred to or considered in connection with any defense raised in Your Answer to Plaintiffs' First Amended Complaint.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client

privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Wilson and the Air Force will produce any non-privileged documents responsive to this RFP in the Secretary Wilson and the Air Force's possession, custody, and control.

RFP No. 21: All Documents and Communications that You referred to or considered in connection with responding to Plaintiffs' First Set of Interrogatories.

Specific Objections:

Secretary Wilson and the Air Force object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes

the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Wilson and the Air Force will produce any non-privileged documents responsive to this RFP in the Secretary Wilson and the Air Force's possession, custody, and control.

Date: February 9, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

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s/ Ryan Parker
RYAN B. PARKER
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U.S. Department of Justice

EXHIBIT I

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, *et al.*,

Defendants.

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

**DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF
INTERROGATORIES TO THE ARMY AND SECRETARY ESPER**

Pursuant to Federal Rules of Civil Procedure 26 and 33, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' First Set of Interrogatories to the Army and Mark T. Esper, in his official capacity as Secretary of the Army, served January 3, 2017.¹ In presenting these objections and responses, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Objections to Definitions

1. Defendants object to Plaintiffs' Definition 3 of "Document" as encompassing "any form of collected data for use with electronic data processing equipment;" "data compilations;" and "any other information stored in electronic form;" insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

¹ These objections and responses are limited to the Army and Secretary Esper. Defendants will produce, or already have produced, separate objections and responses for other Defendants.

2. Defendants object to Plaintiffs' Definition 8 of "Describe" to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 8, which applies to Interrogatories 16, 17, and 21, includes both (1) information about the subject matter being described, and (2) "each Document evidencing the answer or response given or Relating to said subject-matter in any way." Thus, Plaintiffs have served more than the allowed 25 interrogatories. *See Smith v. Cafe Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009) (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 572–73 (D. Md. 2010) ("[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omission in original) (quoting *Kendall v. GES Exposition Servs.*, 174 F.R.D. 684, 685–86 (D.Nev.1997).).

Specific Objections to Interrogatories

Interrogatory No. 13: Identify the members of the Working Group, Including name, title, contact information, and qualifications.

Specific Objections:

The Army and Secretary Esper object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. The Army and Secretary Esper will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 14: Identify all meeting or conference Dates of the Working Group, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

Specific Objections: The Army and Secretary Esper object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Response:

The Department of Defense is the proper custodian of this information. The Army and Secretary Esper refer Plaintiffs to Secretary Mattis's response to this interrogatory.

Interrogatory No. 15: Identify all Documents and Communications Concerning military service by transgender individuals that were requested, received, considered directly or indirectly, or consulted by Defendants—including the Panel of Experts—since January 20, 2017, and, for each such Document, Identify the Person who transmitted it to You and state the Date(s) of transmission and receipt.

Specific Objections: The Army and Secretary Esper object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Army and Secretary Esper object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “all Documents and Communications” purports to require Defendants to search for and identify documents in any and all locations, regardless of whether (a) the documents are in their possession, (b) they have personal knowledge of the documents, (c) the documents would be redundant, and/or (d) such documents would be likely to yield information that is distinct or that is relevant. Additionally, the phrase “considered [] indirectly” is problematic to the extent that it could be construed to apply to documents and communications with mere peripheral connections to the claims and defenses in this case, and identifying all such documents and communications would be excessively burdensome and disproportionate to the needs of the case.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. The Army and Secretary Esper will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 16: For every meeting attended by You between January 20,

2017 and the present, at which military service by transgender individuals was discussed, (a) state the Date of the meeting; (b) Identify all participants in the meeting; (c) Describe the topics discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and (e) Identify all Documents memorializing such meeting.

Specific Objections: The Army and Secretary Esper object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Army and Secretary Esper also object to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 16 contains at least two discrete subparts: (1) a request for information about the meetings, and (2) a separate request for documents distributed, considered, or discussed at the meetings or memorializing such meetings (which exists both because it is stated explicitly and due to the Plaintiffs' definition of "Describe"). *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *Mezu*, 269 F.R.D. at 572–73 ("[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Finally, the Army and Secretary Esper object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "every meeting" purports to require the Defendants to identify all meetings in this

time period of over one year, despite how briefly or informally military service by transgender individuals was discussed at the meeting. The Army and Secretary Esper object to this interrogatory on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. The United States Army consists of approximately 990,000 uniformed service members² and approximately 330,000 civilian employees³ stationed throughout the world. During the relevant period, the Army has conducted countless meetings throughout its various units ranging from informal meetings involving the leadership of a particular unit to high level policy meetings by Army leadership. For example, the Army conducted training of all of its uniformed and civilian employees regarding military service by transgender individuals and much of that training occurred during the date range provided in this interrogatory. Collecting the requested information for each meeting and each training session that occurred at Army facilities across the world would potentially require tens of thousands of hours of work from Army personnel. Moreover, information regarding the vast majority of these meetings is not relevant to Plaintiffs' claims, let alone proportionate to the needs of the case.

Further, the references to "all Documents" purport to require the Defendants to search for and identify documents in any and all locations, regardless of whether (a) the documents are in their possession, (b) they have personal knowledge of the documents, (c) the documents would be redundant, and/or (d) such documents would be likely to yield information that is distinct or that is relevant.

² See <https://www.defense.gov/News/News-Releases/News-Release-View/Article/652687/departments-of-defense-dod-releases-fiscal-year-2017-presidents-budget-proposal/> last visited on January 30, 2018.

³ See <https://www.goarmy.com/careers-and-jobs/army-civilian-careers.html> last visited on January 30, 2018.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. The Army and Secretary Esper will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 17: Identify all Persons involved in drafting or publishing: (i) the Accessions Readiness Memorandum, (ii) the Accessions Deferral Memorandum, (iii) the Tweets, (iv) the Ban, (v) the Interim Guidance, and (vi) any forthcoming recommendations of the Panel of Experts, Including the implementation plan due on February 21, 2018. For each such Person, (a) Describe that Person's role in drafting the document; (b) state the Date(s) of that Person's participation in drafting the document; and (c) Identify all Documents memorializing or reflecting such participation.

Specific Objections: The Army and Secretary Esper object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Army and Secretary Esper also object to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 17 contains at least seven discrete subparts. It asks for information about people involved in drafting (1) the Accessions Readiness Memorandum,

(2) the Accessions Deferral Memorandum, (3) the Tweets, (4) the Ban, (5) the Interim Guidance, and (6) any forthcoming recommendations of the Panel of Experts. Due to Plaintiffs' definition of "Describe," it also asks for (7) any documents relating to, or evidencing information about, the roles of individuals in drafting each document or policy. The first through sixth subparts relate to information about discrete documents or policies, and none of those subparts is secondary to another subpart. *See Mezu*, 269 F.R.D. at 572–73 ("Probably the best test of whether subsequent questions, within a single interrogatory, are subsumed and related is to examine whether the first question is primary and subsequent questions are secondary to the primary question. . . . Genuine subparts should not be counted as separate interrogatories. However, discrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omissions in original) (quoting *Kendall*, 174 F.R.D. at 685–86)). The seventh subpart is a separate request for actual documents. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"). Together, these represent seven distinct interrogatories.

The Army and Secretary Esper further object to this interrogatory as vague and overbroad to the extent that the phrases "all Persons involved" and "drafted or published" could be construed to apply to individuals with mere peripheral involvement, as the identity of such individuals is not relevant, such individuals are unlikely to have relevant information, and identifying all such individuals would be excessively burdensome and disproportionate to the needs of the case.

Interrogatory No. 18: Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the

request of, Defendants between June 30, 2016 and August 25, 2017, concerning transgender individuals serving in the military, including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Specific Objections:

The Army and Secretary Esper object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Army and Secretary Esper also object to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 18 contains three discrete subparts: (1) documents concerning the effect of transgender individuals serving in the military on military readiness, (2) documents concerning medical costs associated with transgender individuals serving in the military, and (3) documents concerning the impact of transgender individuals serving in the military on unit cohesion. *See Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in

Defendants' document production. The Army and Secretary Esper will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 19: Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of Defendants from August 25, 2017 through the present Concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Specific Objections:

The Army and Secretary Esper object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Army and Secretary Esper also object to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 18 contains three discrete subparts: (1) documents concerning the effect of transgender individuals serving in the military on military readiness, (2) documents concerning medical costs associated with transgender individuals serving in the military, and (3) documents concerning the impact of transgender individuals serving in the military on unit cohesion. *See Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions

should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. The Army and Secretary Esper will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 20: Identify all members of the Panel of Experts, including each individual’s name, title, contact information, and qualifications.

Specific Objections:

The Army and Secretary Esper object to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. The Army and Secretary Esper will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 21: Identify all meeting or conference Dates of the Panel of Experts, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

Specific Objections: The Army and Secretary Esper object to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

The Army and Secretary Esper also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 8 of "Describe" seeks both (1) information about the subject-matter being described, and (2) "each Document evidencing the answer or response given or Relating to said subject-matter in any way." Thus, Interrogatory No. 21 contains at least two discrete subparts, and Plaintiffs have served more than the allowed 25 interrogatories. *See Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *Mezu*, 269 F.R.D. at 572–73 ("[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86)).

Response:

The Panel of Experts held formal meetings on the following dates:

- October 13, 2017
- October 19, 2017
- October 26, 2017
- November 2, 2017
- November 9, 2017

- November 16, 2017
- November 21, 2017
- November 30, 2017
- December 7, 2017
- December 13, 2017
- December 22, 2017
- January 4, 2018
- January 11, 2018

Additional information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. The Army and Secretary Esper will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 22: State, broken down by Military Service, the number of current and former service members who have identified to their chain of command as transgender since June 30, 2016.

Specific Objections:

The Army and Secretary Esper object to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in

Defendants' document production. The Army and Secretary Esper will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 23: State, broken down by Military Service, the number of current and former service members whom military medical personnel have diagnosed with gender dysphoria since June 30, 2016.

Specific Objections:

The Army and Secretary Esper object to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

The Department of Defense is the proper custodian of this information. The Army and Secretary Esper refer Plaintiffs to Secretary Mattis's response to this interrogatory.

Interrogatory No. 24: State, broken down by Military Service, the number of surgeries performed as treatment for gender dysphoria that the military has performed on current and former service members since June 30, 2016, Including as to each surgery the date, description of the procedure, and cost to the military of the procedure.

Specific Objections:

The Army and Secretary Esper object to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; (b) communications or information protected by the presidential communications privilege; or (c)

material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Response:

The Department of Defense is the proper custodian of this information. The Army and Secretary Esper refer Plaintiffs to Secretary Mattis's response to this interrogatory.

As to the responses to the interrogatories, see Attachment A.

As to the objections:

Date: February 9, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Ryan Parker
RYAN B. PARKER
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Counsel for Defendants

VERIFICATION

Based on information that I obtained in the course of my official duties, I declare under penalty of perjury that the substance of the responses to these interrogatories are true and correct to the best of my knowledge and belief.

Date: 9 Feb 18

Signature: 

[PRINTED NAME]

Mary V. Krueger
COL, USA

CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

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/s/ Ryan Parker
RYAN B. PARKER
Senior Trial Counsel
U.S. Department of Justice

EXHIBIT J

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, *et al.*,

Defendants.

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

**DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS TO SECRETARY ESPER AND
THE ARMY**

Pursuant to Federal Rules of Civil Procedure 26 and 34 and the Local Rules of the U.S. District Court for the District of Columbia, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' First Set of Requests for Production of Documents to the Army and Mark T. Esper, in his official capacity as Secretary of the Army, served January 3, 2017.¹ In presenting these objections and responses, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground. ESI will be produced in TIF format.

¹ These objections and responses are limited to Secretary Esper and the Army. Defendants will produce, or already have produced, separate objections and responses for other Defendants.

Objection to Definitions

Defendants object to Plaintiffs' Definition 3 of "Document" as encompassing "any form of collected data for use with electronic data processing equipment;" "data compilations;" and "any other information stored in electronic form;" insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

Specific Objections to Requests for Production

RFP No. 1: All Documents and Communications that You have conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning military service by transgender individuals.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Esper and the Army will produce any non-privileged documents responsive to this RFP in the Secretary Esper and the Army's possession, custody, and control.

RFP No. 2: All Documents and Communications Concerning the Working Group's composition, structure, research, findings, and conclusions, Including the Working Group's interview notes, evaluations, analyses, summaries, and memoranda, and Including any Communications between the Working Group and You.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Esper and the Army will produce any non-privileged documents responsive to this RFP in the Secretary Esper and the Army's possession, custody, and control.

RFP No. 3: All Documents and Communications prepared between November 2015 and June 2016 and submitted to the Secretary of Defense via the Undersecretary of Defense for Personnel & Readiness Concerning military service and accessions into the Military Services by transgender individuals, Including assessments from service medical commands, other Defense Department health care agencies, and the Office of Cost Assessment and Program Evaluation (“CAPE”).

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Esper and the Army will produce any non-privileged documents responsive to this RFP in the Secretary Esper and the Army’s possession, custody, and control.

RFP No. 4: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Readiness Memorandum.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Esper and the Army will produce any non-privileged documents responsive to this RFP in the Secretary Esper and the Army's possession, custody, and control.

RFP No. 5: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Deferral Memorandum.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Esper and the Army will produce any non-privileged documents responsive to this RFP in the Secretary Esper and the Army's possession, custody, and control.

RFP No. 6: All Documents and Communications Concerning military service by transgender individuals between President Trump or Persons acting or purporting to act on President Trump's behalf (Including White House officials and senior staff to the President, such as President Trump's National Security Adviser and Chief of Staff), on the one hand, and the other Defendants and Persons acting or purporting to act on the other Defendants' behalf, on the other hand.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 7: All Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Tweets, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the

privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 8: All Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Transgender Service Member Ban, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 9: All Documents and Communications that Secretary Mattis or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Interim Guidance, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Esper and the Army will produce any non-privileged documents responsive to this RFP in the Secretary Esper and the Army's possession, custody, and control.

RFP No. 10: All Documents and Communications that embody, comprise, or constitute the "appropriate evidence and information" referenced in the Interim Guidance.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential

communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Esper and the Army will produce any non-privileged documents responsive to this RFP in the Secretary Esper and the Army's possession, custody, and control.

RFP No. 11: All Documents and Communications Concerning military service by transgender individuals shared between or amongst You and any current or former member of the United States Congress, Including Representative Vicky Hartzler, Scott Perry, or Steve King, from January 2017 to the present.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The foregoing objections do not foreclose the possibility that, to the extent any responsive documents exist, a Member of Congress may seek to oppose the production of information in this case based on the Speech or Debate Clause.

Response:

Subject to and without waiving the above objections, Secretary Esper and the Army will produce any non-privileged documents responsive to this RFP in the Secretary Esper and the Army's possession, custody, and control.

RFP No. 12: All Documents and Communications Concerning military service by transgender individuals shared between or amongst You and the Office of the Vice President of the United States, Including Vice President Pence himself.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 13: All Documents and Communications Concerning military service by transgender individuals shared between or amongst Defendants and organizations opposed to military service by transgender individuals, Including but not limited to representatives and agents of the “Alliance Defending Freedom,” “Focus on the Family,” the “Family Research Council,” “Heritage Action for America,” and “Breitbart News,” from January 2017 to the present.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Esper and the Army will produce any non-privileged documents responsive to this RFP in the Secretary Esper and the Army’s possession, custody, and control.

RFP No. 14: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed

that embody, constitute, comprise, or reflect the reaction of the Department of Defense or any of its components (including Military Services), or any individuals within the Department of Defense or its components, to the Tweets.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Esper and the Army will produce any non-privileged documents responsive to this RFP in the Secretary Esper and the Army's possession, custody, and control.

RFP No. 15: All Documents and Communications Concerning the purpose, composition, structure, research, analysis, findings, and conclusions of the Panel of Experts.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Esper and the Army will produce any non-privileged documents responsive to this RFP in the Secretary Esper and the Army's possession, custody, and control.

RFP No. 16: All Documents and Communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, Including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log

will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Esper and the Army will produce any non-privileged documents responsive to this RFP in the Secretary Esper and the Army's possession, custody, and control.

RFP No. 17: All Documents and Communications that You contend support the Tweets' assertion regarding the "tremendous" costs associated with transgender individuals in the Military Services (ECF No. 40-22), Including the military's provision of medical care to transgender individuals.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Esper and the Army will produce any non-privileged documents responsive to this RFP in the Secretary Esper and the Army's possession, custody, and control.

RFP No. 18: All Documents and Communications that You contend support the Tweets' assertion regarding the "disruptive" effect of military service by openly transgender individuals (ECF No. 40-22), Including any purported effect on unit cohesion or military readiness.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Esper and the Army will produce any non-privileged documents responsive to this RFP in the Secretary Esper and the Army's possession, custody, and control.

RFP No. 19: All Documents and Communications Concerning the Department of Defense's implementation of accessions of openly transgender individuals into the Military Services as of January 1, 2018.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Esper and the Army will produce any non-privileged documents responsive to this RFP in the Secretary Esper and the Army's possession, custody, and control.

RFP No. 20: All Documents that You referred to or considered in connection with any defense raised in Your Answer to Plaintiffs' First Amended Complaint.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Esper and the Army will produce any non-privileged documents responsive to this RFP in the Secretary Esper and the Army's possession, custody, and control.

RFP No. 21: All Documents and Communications that You referred to or considered in connection with responding to Plaintiffs' First Set of Interrogatories.

Specific Objections:

Secretary Esper and the Army object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the

privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Esper and the Army will produce any non-privileged documents responsive to this RFP in the Secretary Esper and the Army's possession, custody, and control.

Date: February 9, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Ryan B. Parker
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CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

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s/ Ryan Parker
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EXHIBIT K

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, *et al.*,

Defendants.

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

**DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF
INTERROGATORIES TO THE NAVY AND SECRETARY SPENCER**

Pursuant to Federal Rules of Civil Procedure 26 and 33, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' First Set of Interrogatories to the Navy and Richard Spencer, in his official capacity as Secretary of the Navy, served January 3, 2017.¹ In presenting these objections and responses, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Objections to Definitions

1. Defendants object to Plaintiffs' Definition 3 of "Document" as encompassing "any form of collected data for use with electronic data processing equipment;" "data compilations;" and "any other information stored in electronic form;" insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

¹ These objections and responses are limited to the Navy and Secretary Spencer. Defendants will produce, or already have produced, separate objections and responses for other Defendants.

2. Defendants object to Plaintiffs' Definition 8 of "Describe" to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 8, which applies to Interrogatories 16, 17, and 21, includes both (1) information about the subject matter being described, and (2) "each Document evidencing the answer or response given or Relating to said subject-matter in any way." Thus, Plaintiffs have served more than the allowed 25 interrogatories. *See Smith v. Cafe Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009) (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories"); *Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 572–73 (D. Md. 2010) ("[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related" (omission in original) (quoting *Kendall v. GES Exposition Servs.*, 174 F.R.D. 684, 685–86 (D.Nev.1997).).

Specific Objections and Responses to Interrogatories

Interrogatory No. 13: Identify the members of the Working Group, Including name, title, contact information, and qualifications.

Specific Objections:

The Navy and Secretary Spencer object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Response:

Department of the Navy members of the Working Group were then-Vice Admiral William Moran² (now Admiral, Vice Chief of Naval Operations), Ms. Ann Davis³, then-Acting ASN M&RA (now retired), and Lieutenant General Mark A. Brilakis⁴, then-Deputy Commandant, Manpower and Reserve Affairs (now Commander, U.S. Marine Corps Forces Command) and Ms. Sheryl Murray⁵, then-Assistant Deputy Commandant, Manpower and Reserve Affairs (now retired).

Further information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. The Navy and Secretary Spencer will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 14: Identify all meeting or conference Dates of the Working Group, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

Specific Objections: The Navy and Secretary Spencer object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by

² E-mail address for ADM Moran – william.moran@navy.mil; Biography - <http://www.navy.mil/navydata/bios/navybio.asp?bioID=483>

³ E-mail address for Ms. Davis – anne.davis@navy.mil; Biography - <http://www.secnv.navy.mil/donhr/About/Senior-Executives/Biographies/Davis,%20A.pdf>

⁴ E-mail address for Lieutenant General Brilakis – mark.brilakis@usmc.mil; Biography - <http://www.marforcom.marines.mil/Leaders/article-view-display/Article/634186/lieutenant-general-mark-a-brilakis/>

⁵ Biography for Ms. Murray - <http://docs.house.gov/meetings/AS/AS02/20140325/101943/HHRG-113-AS02-Bio-MurrayS-20140325.pdf>

the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Response:

The Working Group held formal meetings on the following dates:

- August 19, 2015
- September 3, 2015
- September 16, 2015
- October 1, 2015
- October 14, 2015
- November 2, 2015
- November 18, 2015
- November 24, 2015
- December 8, 2015
- December 15, 2015
- January 12, 2016
- January 19, 2016
- March 11, 2016
- April 27, 2016
- May 23, 2016

Additional information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs

in Defendants' document production. The Navy and Secretary Spencer will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 15: Identify all Documents and Communications Concerning military service by transgender individuals that were requested, received, considered directly or indirectly, or consulted by Defendants—including the Panel of Experts—since January 20, 2017, and, for each such Document, Identify the Person who transmitted it to You and state the Date(s) of transmission and receipt.

Specific Objections: The Navy and Secretary Spencer object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Navy and Secretary Spencer object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “all Documents and Communications” purports to require Defendants to search for and identify documents in any and all locations, regardless of whether (a) the documents are in their possession, (b) they have personal knowledge of the documents, (c) the documents would be redundant, and/or (d) such documents would be likely to yield information that is distinct or that is relevant. Additionally, the phrase “considered [] indirectly” is problematic to the extent that it could be construed to apply to documents and communications with mere peripheral connections to the claims and defenses in this case, and identifying all such documents and communications would be excessively burdensome and disproportionate to the needs of the case.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. The Navy and Secretary Spencer will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 16: For every meeting attended by You between January 20, 2017 and the present, at which military service by transgender individuals was discussed, (a) state the Date of the meeting; (b) Identify all participants in the meeting; (c) Describe the topics discussed; (d) Identify all Documents distributed, considered, or discussed at such meeting; and (e) Identify all Documents memorializing such meeting.

Specific Objections:

The Navy and Secretary Spencer object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Navy and Secretary Spencer also object to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 16 contains at least two discrete subparts: (1) a request for information about the meetings, and (2) a separate request for documents distributed, considered, or discussed at the meetings or memorializing such meetings (which exists both because it is stated explicitly and due to the Plaintiffs' definition of "Describe"). *See Smith*, 256

F.R.D. at 254 (explaining that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”); *Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Finally, the Navy and Secretary Spencer object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “every meeting” purports to require the Defendants to identify all meetings in this time period of over one year, despite how briefly or informally military service by transgender individuals was discussed at the meeting. Further, the references to “all Documents” purport to require the Defendants to search for and identify documents in any and all locations, regardless of whether (a) the documents are in their possession, (b) they have personal knowledge of the documents, (c) the documents would be redundant, and/or (d) such documents would be likely to yield information that is distinct or that is relevant.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. The Navy and Secretary Spencer will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 17: Identify all Persons involved in drafting or publishing: (i) the Accessions Readiness Memorandum, (ii) the Accessions Deferral Memorandum, (iii) the Tweets, (iv) the Ban, (v) the Interim Guidance, and (vi) any forthcoming recommendations of the Panel of Experts, Including the implementation plan due on February 21, 2018. For each such

Person, (a) Describe that Person's role in drafting the document; (b) state the Date(s) of that Person's participation in drafting the document; and (c) Identify all Documents memorializing or reflecting such participation.

Specific Objections:

The Navy and Secretary Spencer object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Navy and Secretary Spencer also object to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 17 contains at least seven discrete subparts. It asks for information about people involved in drafting (1) the Accessions Readiness Memorandum, (2) the Accessions Deferral Memorandum, (3) the Tweets, (4) the Ban, (5) the Interim Guidance, and (6) any forthcoming recommendations of the Panel of Experts. Due to Plaintiffs' definition of "Describe," it also asks for (7) any documents relating to, or evidencing information about, the roles of individuals in drafting each document or policy. The first through sixth subparts relate to information about discrete documents or policies, and none of those subparts is secondary to another subpart. *See Mezu*, 269 F.R.D. at 572–73 ("Probably the best test of whether subsequent questions, within a single interrogatory, are subsumed and related is to examine whether the first question is primary and subsequent questions are secondary to the primary question. . . . Genuine subparts should not be counted as separate interrogatories. However, discrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related")

(omissions in original) (quoting *Kendall*, 174 F.R.D. at 685–86).). The seventh subpart is a separate request for actual documents. See *Smith*, 256 F.R.D. at 254 (explaining that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”). Together, these represent seven distinct interrogatories.

Interrogatory No. 18: Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of, Defendants between June 30, 2016 and August 25, 2017, concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Specific Objections:

The Navy and Secretary Spencer object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Navy and Secretary Spencer also object to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 18 contains three discrete subparts: (1) documents concerning the effect of transgender individuals serving in the military on military readiness, (2) documents concerning medical costs associated with transgender individuals serving in the

military, and (3) documents concerning the impact of transgender individuals serving in the military on unit cohesion. *See Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. The Navy and Secretary Spencer will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 19: Identify all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of Defendants from August 25, 2017 through the present Concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion.

Specific Objections:

The Navy and Secretary Spencer object to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Navy and Secretary Spencer also object to this interrogatory to the extent that it contains multiple discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that Plaintiffs may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 18 contains three discrete subparts: (1) documents concerning the effect of transgender individuals serving in the military on military readiness, (2) documents concerning medical costs associated with transgender individuals serving in the military, and (3) documents concerning the impact of transgender individuals serving in the military on unit cohesion. *See Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. The Navy and Secretary Spencer will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 20: Identify all members of the Panel of Experts, including each individual’s name, title, contact information, and qualifications.

Specific Objections:

The Navy and Secretary Spencer object to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

Department of the Navy members of the Panel of Experts: Mr. Thomas Dee, then-Performing the Duties of the Under Secretary of the Navy, Mr. Thomas Modly, Under Secretary of the Navy, General Glenn M. Walters, Assistant Commandant of the Marine Corps , Admiral William Moran, Vice Chief of Naval Operations, Sergeant Major Ronald L. Green, Sergeant Major of the Marine Corps, and Master Chief Petty Officer Steven S. Giordano, Master Chief Petty Officer of the Navy.

Additional information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. The Navy and Secretary Spencer will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 21: Identify all meeting or conference Dates of the Panel of Experts, Including Identifying the attendees of each meeting or conference and Describing what was discussed during each meeting or conference.

Specific Objections: The Navy and Secretary Spencer object to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

The Navy and Secretary Spencer also object to the extent that this interrogatory contains multiple, discrete subparts, and thus Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Specifically, Plaintiffs' Definition 8 of "Describe" seeks both (1) information about the subject-matter being described, and (2) "each Document evidencing the answer or response

given or Relating to said subject-matter in any way.” Thus, Interrogatory No. 21 contains at least two discrete subparts, and Plaintiffs have served more than the allowed 25 interrogatories. *See Smith*, 256 F.R.D. at 254 (explaining that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”); *Mezu*, 269 F.R.D. at 572–73 (“[D]iscrete or separate questions should be counted as separate interrogatories, notwithstanding they . . . may be related” (omission in original) (quoting *Kendall*, 174 F.R.D. at 685–86).).

Response:

The Panel of Experts held formal meetings on the following dates:

- October 13, 2017
- October 19, 2017
- October 26, 2017
- November 2, 2017
- November 9, 2017
- November 16, 2017
- November 21, 2017
- November 30, 2017
- December 7, 2017
- December 13, 2017
- December 22, 2017
- January 4, 2018
- January 11, 2018

Additional information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. The Navy and Secretary Spencer will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 22: State, broken down by Military Service, the number of current and former service members who have identified to their chain of command as transgender since June 30, 2016.

Specific Objections:

The Navy and Secretary Spencer object to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

The Department of the Navy does not collect or track the number of current and former service members who have identified to their chain of command as transgender in accordance with Department of Defense policy. However, the number of current and former Navy and Marine Corps service members who have identified to their chain of command as suffering from gender dysphoria is approximately 298, as of the most recent data collection date.

Further information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. The Navy and Secretary Spencer will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 23: State, broken down by Military Service, the number of current and former service members whom military medical personnel have diagnosed with gender dysphoria since June 30, 2016.

Specific Objections:

The Navy and Secretary Spencer object to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

The number of current and former Navy and Marine Corps service members whom military medical personnel have diagnosed with gender dysphoria since June 30, 2016 is approximately 358.

Further information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production. The Navy and Secretary Spencer will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 24: State, broken down by Military Service, the number of surgeries performed as treatment for gender dysphoria that the military has performed on current and former service members since June 30, 2016, Including as to each surgery the date, description of the procedure, and cost to the military of the procedure.

Specific Objections:

The Navy and Secretary Spencer object to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; (b) communications or information protected by the presidential communications privilege; or (c) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Response:

The Navy is currently attempting to generate cost data and compiling the dates. The data may, however, not be accurate and complete as some of the procedures were conducted due to medical issues derived from treatment of gender dysphoria. The following data is current as of November 14, 2017: for Navy and Marine Corps personnel “male-to-female” procedures, there were 2 orchiectomies; for Navy and Marine Corps personnel “female-to-male” procedures, there were 27 chest surgeries, and 8 hysterectomies.

Further, information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants’ document production. The Navy and Secretary Spencer will supplement this interrogatory response, as needed, following the document production.

As to the responses to the interrogatories, see Attachment A.

As to the objections:

Date: February 9, 2018

Respectfully submitted,

CHAD A. READLER

Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
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Counsel for Defendants

VERIFICATION

Based on information that I obtained in the course of my official duties, I declare under penalty of perjury that the substance of the responses to these interrogatories are true and correct to the best of my knowledge and belief.

Date: 2/8/2018

Signature: 
Ms. Juliet Beyler

CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

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/s/ Ryan Parker
RYAN B. PARKER
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U.S. Department of Justice

EXHIBIT L

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND**

BROCK STONE, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, *et al.*,

Defendants.

Case 1:17-cv-02459-MJG

Hon. Marvin J. Garbis

**DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS TO SECRETARY SPENCER AND
THE NAVY**

Pursuant to Federal Rules of Civil Procedure 26 and 34 and the Local Rules of the U.S. District Court for the District of Columbia, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' First Set of Requests for Production of Documents to the Navy and Richard Spencer, in his official capacity as Secretary of the Navy, served January 3, 2017.¹ In presenting these objections and responses, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground. ESI will be produced in TIF format.

¹ These objections and responses are limited to Secretary Spencer and the Navy. Defendants will produce, or already have produced, separate objections and responses for other Defendants.

Objection to Definitions

Defendants object to Plaintiffs' Definition 3 of "Document" as encompassing "any form of collected data for use with electronic data processing equipment;" "data compilations;" and "any other information stored in electronic form;" insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

Specific Objections to Requests for Production

RFP No. 1: All Documents and Communications that You have conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning military service by transgender individuals.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Spencer and the Navy will produce any non-privileged documents responsive to this RFP in Secretary Spencer and the Navy's possession, custody, and control.

RFP No. 2: All Documents and Communications Concerning the Working Group's composition, structure, research, findings, and conclusions, Including the Working Group's interview notes, evaluations, analyses, summaries, and memoranda, and Including any Communications between the Working Group and You.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Spencer and the Navy will produce any non-privileged documents responsive to this RFP in Secretary Spencer and the Navy's possession, custody, and control.

RFP No. 3: All Documents and Communications prepared between November 2015 and June 2016 and submitted to the Secretary of Defense via the Undersecretary of Defense for Personnel & Readiness Concerning military service and accessions into the Military Services by transgender individuals, Including assessments from service medical commands, other Defense Department health care agencies, and the Office of Cost Assessment and Program Evaluation (“CAPE”).

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Spencer and the Navy will produce any non-privileged documents responsive to this RFP in Secretary Spencer and the Navy’s possession, custody, and control.

RFP No. 4: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Readiness Memorandum.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Spencer and the Navy will produce any non-privileged documents responsive to this RFP in Secretary Spencer and the Navy's possession, custody, and control.

RFP No. 5: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed Concerning the Accessions Deferral Memorandum.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Spencer and the Navy will produce any non-privileged documents responsive to this RFP in Secretary Spencer and the Navy's possession, custody, and control.

RFP No. 6: All Documents and Communications Concerning military service by transgender individuals between President Trump or Persons acting or purporting to act on President Trump's behalf (Including White House officials and senior staff to the President, such as President Trump's National Security Adviser and Chief of Staff), on the one hand, and the other Defendants and Persons acting or purporting to act on the other Defendants' behalf, on the other hand.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 7: All Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Tweets, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the

privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 8: All Documents and Communications that President Trump or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Transgender Service Member Ban, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 9: All Documents and Communications that Secretary Mattis or any other of the Defendants considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for the Interim Guidance, Including reports, studies, analyses, advice, letters, speeches, articles, columns, commentaries, interviews, and Social Media posts.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Spencer and the Navy will produce any non-privileged documents responsive to this RFP in Secretary Spencer and the Navy's possession, custody, and control.

RFP No. 10: All Documents and Communications that embody, comprise, or constitute the "appropriate evidence and information" referenced in the Interim Guidance.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential

communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Spencer and the Navy will produce any non-privileged documents responsive to this RFP in Secretary Spencer and the Navy's possession, custody, and control.

RFP No. 11: All Documents and Communications Concerning military service by transgender individuals shared between or amongst You and any current or former member of the United States Congress, Including Representative Vicky Hartzler, Scott Perry, or Steve King, from January 2017 to the present.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The foregoing objections do not foreclose the possibility that, to the extent any responsive documents exist, a Member of Congress may seek to oppose the production of information in this case based on the Speech or Debate Clause.

Response:

Subject to and without waiving the above objections, Secretary Spencer and the Navy will produce any non-privileged documents responsive to this RFP in Secretary Spencer and the Navy's possession, custody, and control.

RFP No. 12: All Documents and Communications Concerning military service by transgender individuals shared between or amongst You and the Office of the Vice President of the United States, Including Vice President Pence himself.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

RFP No. 13: All Documents and Communications Concerning military service by transgender individuals shared between or amongst Defendants and organizations opposed to military service by transgender individuals, Including but not limited to representatives and agents of the “Alliance Defending Freedom,” “Focus on the Family,” the “Family Research Council,” “Heritage Action for America,” and “Breitbart News,” from January 2017 to the present.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court’s order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Spencer and the Navy will produce any non-privileged documents responsive to this RFP in Secretary Spencer and the Navy’s possession, custody, and control.

RFP No. 14: All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed

that embody, constitute, comprise, or reflect the reaction of the Department of Defense or any of its components (including Military Services), or any individuals within the Department of Defense or its components, to the Tweets.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Spencer and the Navy will produce any non-privileged documents responsive to this RFP in Secretary Spencer and the Navy's possession, custody, and control.

RFP No. 15: All Documents and Communications Concerning the purpose, composition, structure, research, analysis, findings, and conclusions of the Panel of Experts.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Spencer and the Navy will produce any non-privileged documents responsive to this RFP in Secretary Spencer and the Navy's possession, custody, and control.

RFP No. 16: All Documents and Communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, Including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log

will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Spencer and the Navy will produce any non-privileged documents responsive to this RFP in Secretary Spencer and the Navy's possession, custody, and control.

RFP No. 17: All Documents and Communications that You contend support the Tweets' assertion regarding the "tremendous" costs associated with transgender individuals in the Military Services (ECF No. 40-22), Including the military's provision of medical care to transgender individuals.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Spencer and the Navy will produce any non-privileged documents responsive to this RFP in Secretary Spencer and the Navy's possession, custody, and control.

RFP No. 18: All Documents and Communications that You contend support the Tweets' assertion regarding the "disruptive" effect of military service by openly transgender individuals (ECF No. 40-22), Including any purported effect on unit cohesion or military readiness.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Spencer and the Navy will produce any non-privileged documents responsive to this RFP in Secretary Spencer and the Navy's possession, custody, and control.

RFP No. 19: All Documents and Communications Concerning the Department of Defense's implementation of accessions of openly transgender individuals into the Military Services as of January 1, 2018.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Spencer and the Navy will produce any non-privileged documents responsive to this RFP in Secretary Spencer and the Navy's possession, custody, and control.

RFP No. 20: All Documents that You referred to or considered in connection with any defense raised in Your Answer to Plaintiffs' First Amended Complaint.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Spencer and the Navy will produce any non-privileged documents responsive to this RFP in Secretary Spencer and the Navy's possession, custody, and control.

RFP No. 21: All Documents and Communications that You referred to or considered in connection with responding to Plaintiffs' First Set of Interrogatories.

Specific Objections:

Secretary Spencer and the Navy object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, pursuant to the Court's order, which describes the

privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Secretary Spencer and the Navy will produce any non-privileged documents responsive to this RFP in Secretary Spencer and the Navy's possession, custody, and control.

Date: February 9, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

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s/ Ryan Parker
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EXHIBIT M

Stone v. Trump,

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Department of Defense Privilege Log

Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP__8 00001-00005	3	15-Sep-17	E-mail re: TG Interim Guidance (with attachments)	N/A	N/A
SOPER DEP RFP__8 00006-00010	5	15-Sep-17	E-mail re: Terms of Reference - Implementation of Presidential Memo on Military Service by Transgender Individuals	N/A	N/A
SOPER DEP RFP__8 000011-00013	3	15-Sep-17	E-mail re: Mil Svc by Transgender Individuals - Interim Guidance	N/A	N/A
SOPER DEP RFP__8 00014-00015	2	31-May-17	Readiness of Military Departments to Implement Accession of Transgender Applicants into Military Service	Deliberate Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP__10 00016-00042	27	Oct-16	AFMS Transgender Training - Draft	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP__10 00043-00069	26	3-Oct-16	AFMS Transgender Training	N/A	N/A
SOPER DEP RFP__10 00070-00090	20	13-Apr-17	E-mail re: AFRC Transgender Training for Medics (with attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP__10 00091-00094	4	12-Oct-16	E-mail re: Routine/Info/Transgender Policy Update	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.

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Department of Defense Privilege Log

Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_10 00095-00166	71	30-Sep-16	Transgender Service in the U.S. Military	N/A	N/A
SOPER DEP RFP_10 00167-00182	15	6-Oct-16	Air Force Policy Memo for In-Service Transition of Airmen Identifying as Transgender	N/A	N/A
SOPER DEP RFP_10 00183-00187	5	16-Oct	USAF PA Guidance re: Transgender Policy Implementation - Draft	Deliberate Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_10 00188-00209		14-Apr-17	Updated Training Slides for AFRC Medics	Deliberate Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_10 00210	1	31-Jul-17	SHARED SERVICE EDUCATION & TRAINING LIBRARY - Transgender Course	N/A	N/A
SOPER DEP RFP_11 00211-00225	14	Jan-18	DoD Inst 1300.XX - Military Service by Transgender Service Members	Deliberate Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_11 00226-00228	3	UNK	Transgender: In-Service Transition and Accession Policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.

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Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_11 00229-00248	19		Draft Memo - Interim Procedures - Guidance for Medical Care of Transgender Servicemembers with a Diagnosis of Gender Dysphoria	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_13 00249	1	19-Oct-17	E-mail re: Panel of Experts Meeting	N/A	N/A
SOPER DEP RFP_14 00250-00252	3 - Possible Dup see 00226-00228	UNK	In-Service Transition and Accession Policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_14 00253-00272	19 -Possible Dup see 00229-00248	UNK	Draft Memo - Interim Procedures - Guidance for Medical Care of Transgender Servicemembers with a Diagnosis of Gender Dysphoria	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00273-00285	12	15-Dec-17	Transgender Policy - Recommendations from the Transgender Panel	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00286-00304	18	12-Dec-17	Transgender Processing for Recruiters	N/A	N/A
SOPER DEP RFP_15 00305-00306	2	30-Jun-17	SecDef Memo re: Accession of Transgender Individuals Into the Military Services	N/A	N/A

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Department of Defense Privilege Log

Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_15 00307-00321	14 - Possible Dup for 00211-00225	Jan-18	DoDI 1300.XX - Military Service by Transgender Service Members	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00322-00323	2	8-Dec-17	SecDef Memo re: Med Standards for Appointment, Enlistment, Induction of Transgender Applicants into Military Service	N/A	N/A
SOPER DEP RFP_15 00324-00335	12	29-Dec-17	FW: 6130.03 DoDI for Coordination	Deliberative Process Privilege - W/H in part	Predecisional and deliberative internal agency email created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00340-00342	2	14-Sep-17	SecDef Memo re: Military Service by Transgender Individuals	N/A	N/A
SOPER DEP RFP_15 00343-00344	2	14-Jul-17	Email: FW: 6130.03 DoDI for Coordination	Deliberative Process Privilege - W/H in part	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00345-00393	48	UNK	Draft DoDI	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00394-00396	3	30-Jun-17	TG Guidance from SecDef	N/A	N/A
SOPER DEP RFP_15 00397	1	27-Jul-17	E-mail re: No SCCC Meeting This Week	N/A	N/A

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Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_15 00398-00448	50	UNK	Transgender Service Q&As	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00449-00540	91	30-Nov-17	E-mail re: RHA POE Meeting (with attachments)	Deliberative Process Privilege; Attorney-Client Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness. Also contains legal advice provided on the document's draft language as part of the aforementioned process.
SOPER DEP RFP_15 00541-00543	4	20-Dec-17	E-mail re: Service Central Coordination Cells (with attachment)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00544-00547	4	8-Dec-17	DoD Complying with Court Orders	N/A	N/A
SOPER DEP RFP_15 00545-00547	3	Unk	RTQ Questions & Answers	N/A	N/A
SOPER DEP RFP_15 00548-00549	2	19-Dec-17	Clarifying Guidance to USMEPCOM Policy Memorandum 2-5, Transgender Applicant Processing	N/A	N/A
SOPER DEP RFP_15 00550-00556	7	8-Dec-17	USMEPCOM Policy Memorandum 2-5, Transgender Applicant Processing	N/A	N/A
SOPER DEP RFP_15 00557-00558	2	2-Jul-17	E-mail re: TG Guidance from SecDef (with attachments)	N/A	N/A

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Department of Defense Privilege Log

Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_15 00559-00561	2 - Possible Dup see 00226-00228	UNK	Transgender: In-Service Transition and Accession Policy	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_15 00562-00566	5	UNK	Transgender Review Panel Policy Recommendation Worksheet	Deliberative Process Privilege; Attorney-Client Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness. Also contains legal advice provided on the document's draft language as part of the aforementioned process.
SOPER DEP RFP_15 00567-00586	Possible Dup see 00229-00248	UNK	Draft Memo - Interim Procedures - Guidance for Medical Care of Transgender Servicemembers with a Diagnosis of Gender Dysphoria	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_16 00587	1	UNK	Action Memo for USD, P&R re: Medical Standards for Appointment, Enlistment or Induction of Transgender Applicants into the Military Service	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_16 00588-00607	20	UNK	Action Memo forDepSecDef re: Medical Standards for Appointment, Enlistment or Induction of Transgender Applicants into the Military Service	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_18 00608-00661	20	1-Nov-17	Health Data for Members with Gender Dysphoria	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.

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Department of Defense Privilege Log

Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_18 00662-00685	23	2-Nov-17	E-mail re: RAH for Pre-Brief	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_20 00686-00688	3	3-Nov-17	E-mail re: Civilian Exec Session and Transgender Panel	N/A	N/A
SOPER DEP RFP_21 00689-00690	2	UNK	Memo re: Military Service by Transgender Individuals - Panel of Experts	N/A	N/A
SOPER DEP RFP_21 00691-00764	73	UNK	PPT slides: "Health Data on Active Duty Service Members with Gender Dysphoria"	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 00765-00820	55	UNK	PPT slides: "Health Data on Active Duty Service Members with Gender Dysphoria"	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 00821-00839	18	25-Oct-17	E-mail re: RAH for PoE Meeting 3	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 00840-00850	10	21-Nov-17	E-mail re: FW: RAH for PoE Meeting Today, 21 Nov 17	Deliberative Process Privilege; Attorney-Client Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness. Also contains legal advice provided on the document's draft language as part of the aforementioned process.

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Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_21 00851-00856	6	11-Oct-17	E-mail re: Slides (with attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 00857-00919	62	8-Nov-17	E-mail re: PoE Documents (with attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 00920-00922	3	21-Dec-17	E-mail re: PoE Meeting of 22 Dec 2017	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 00923-01184	261	15-Nov-17	E-mail re: PoE RAHs (with attachments)	Deliberative Process Privilege; Attorney-Client Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness. Also contains legal advice provided on the document's draft language as part of the aforementioned process.
SOPER DEP RFP_21 01185-01214	29	11-Oct-17	E-mail re: Transgender - Interim Guidance and Terms of Reference (with Attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 01215-01231	16	11-Oct-17	E-mail re: Updated Transgender Policy for Sr Leader Review (with Attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.

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Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_21 01232-01267	35	21-Nov-17	E-mail re: RHA for PoE Meeting Today, 21 Nov 17 (with Attachments)	Deliberative Process Privilege; Attorney-Client Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness. Also contains legal advice provided on the document's draft language as part of the aforementioned process.
SOPER DEP RFP_21 01268-01271	4	16-Nov-17	E-mail re: Transgender Panel of Experts Question (with Attachments)	Deliberative Process Privilege; Attorney-Client Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness. Also contains legal advice provided on the document's draft language as part of the aforementioned process.
SOPER DEP RFP_21 01272-01320	48	13-Nov-17	E-mail re: MedPers Meeting 14 Nov (with Attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 01321-01440	119	16-Oct-17	E-mail re: Oct 2017 Accession Medical Standards Working Group (AMWSG) Meeting (with Attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_21 01441-01486	45	6-Nov-17	E-mail re: MEDPERs Meeting 6 Nov (with Attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.

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Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_24 01487-01502	15	20-Dec-17	E-mail re: Service Central Coordination Cells (with Attachments)	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_24 01503-01539	36	20-Sep-17	E-mail re: No SCC Meeting Tomorrow21 Sept 2017 (with Attachments)	N/A	N/A
SOPER DEP RFP_24 01540	1	20-Sep-17	E-mail re: No SCC Meeting Tomorrow21 Sept 2017 (with Attachments)	N/A	N/A
SOPER DEP RFP_24 01541-01542	2	2-Aug-17	E-mail re: No SCC Meeting This Week - 03 Aug 17	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_24 01543	1	25-Jul-17	E-mail re: No SCC Meeting This Week - 27 July 2017	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_24 01544-01545	2	11-Oct-17	E-mail re: SCCC Update for 12 Oct 2017. No In-Person Meeting	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_24 01546	1	UNK	Memo for MAJCOM - Exception to Policy (ETP) Request	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.

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Bates Range	Number of Pages	Date	Document Description	Basis for Withholding	Withholding Justification
SOPER DEP RFP_24 01547-01548	2	18-Oct-17	E-mail re: SCCC Update for 19 Oct 2017. No Meeting Tomorrow	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_24 01549	1	9-Aug-17	E-mail re: No SCCC Meeting This Week - 10 Aug 2017	Deliberative Process Privilege	Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.
SOPER DEP RFP_24 01550	1	20-Dec-17	E-mail re: SCCC Meeting for Thursday, 21 Dec 2017	N/A	N/A
SOPER DEP RFP_25 01551-01566	15	20-Dec-17	E-mail re: Service Central Coordination Cells	N/A	N/A

EXHIBIT N

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Via Email

February 21, 2018

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Civil Division, Federal Programs Branch
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**Re: *Stone, et al. v. Trump, et al.*,
Case No. 1:17-cv-02459-MJG (D. Md.)**

Dear Mr. Parker:

We write regarding Defendants' responses to Plaintiffs' interrogatories and requests for production in the above-captioned litigation.

Defendants have objected to Plaintiffs' interrogatories as seeking privileged information, including information purportedly covered by the deliberative process privilege and the presidential communication privilege, and have withheld information on the basis of such objections. Defendants have similarly withheld allegedly privileged documents that are relevant to this matter and responsive to Plaintiffs' requests for production, including documents Defendants claim are protected by the deliberative process privilege and the presidential communication privilege. As discussed below, neither the deliberative process privilege nor the presidential communications privilege appear to be applicable in this litigation. Plaintiffs request that you promptly withdraw these privilege claims and provide the requested information and documents, or, in the alternate, provide adequate justifications for your claims of privilege.

I. The Deliberative Process Privilege

A. Defendants' Assertion of the Deliberative Process Privilege Is Inappropriate.

Plaintiffs' lawsuit asserts, in part, that Defendants have violated the equal protection and substantive components of the Due Process Clause of the Fifth Amendment through their promulgation and attempted implementation of President Trump's August 25, 2017 Memorandum titled "Military Service by Transgender Individuals" (the "Transgender Service Member Ban"). Plaintiffs assert that President Trump's actions in promulgating the ban are improperly motivated by discriminatory intent and animus against transgender individuals; that the discriminatory intent underlying the ban tainted Defendant's implementation plans; that the implementation study conducted by the "panel of experts" was engineered to reach a pre-determined outcome; and that such actions cannot satisfy examination under a heightened scrutiny standard, which requires a court to examine the actual purpose motivating a policy. To

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litigate this issue, Plaintiffs must obtain evidence regarding the intent underlying the Transgender Service Member Ban.

Defendants' intent in promulgating and attempting to implement the Transgender Service Member Ban is directly at issue in this litigation. The deliberative process privilege "is not appropriately asserted . . . when a plaintiff's cause of action turns on the government's intent." *In re Subpoena Duces Tecum Served on the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998). For example, when a plaintiff has alleged government misconduct – including the promulgation of unconstitutionally discriminatory policies on the basis of animus – the government may not assert deliberative process privilege, and the plaintiff is not obligated to make any further showing of need for the requested discovery. *See Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 135 (D.D.C. 2005) ("Under the government misconduct exception, there is no need to engage in a balancing test because the privilege does not apply at all."); *Alexander v. F.B.I.*, 186 F.R.D. 154, 163–65 (D.D.C. 1999) (rejecting the government's contention that misconduct is merely a factor to be weighed in connection with the privilege claim); *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997) ("Moreover, the privilege disappears altogether when there is any reason to believe government misconduct occurred.").

Defendants' invocation of the deliberative process privilege is therefore inappropriate in connection with the present lawsuit. We request that you promptly withdraw all objections on the basis of deliberative process privilege, and promptly produce all documents that you have withheld based on that privilege. In the alternative, and at a minimum, defendants must properly justify their claims of privilege which, as discussed below, are inadequate.

B. Defendants' Privilege Logs are Insufficient.

Even if the deliberative process privilege could be invoked with respect to some documents in this litigation, Defendants fail to assert the privilege in an appropriate manner. Defendants' privilege logs are insufficient in several respects, and fail to meet the standard required to establish that Defendants are entitled to assert the deliberative process privilege.¹

Under Federal Rule of Civil Procedure 26(b)(5) a party withholding documents on the basis of privilege must provide information that will enable other parties to assess the claim. Defendants have the burden to provide the requisite information to establish that each withheld or redacted document should be shielded by the deliberative process privilege. *See City of Virginia Beach v. U.S. Dep't of Commerce*, 995 F.2d 1247, 1253-54 (4th Cir. 1993) ("the burden is on the agency to correlate, with reasonable specificity, materials within a document with applicable exemptions"). A privilege log should provide more than vague, boilerplate descriptions that merely identify a broad policy topic and generally allege the document was related to some deliberative activity. *See Burns v. Imagine Films Entm't, Inc.*, 164 F.R.D. 589, 594 (W.D.N.Y. 1996) (the description of a document in a privilege log "should be specific enough to permit the court or opposing counsel to determine whether the privilege asserted applies to that document"). A privilege log should "mirror" the requirements of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir.

¹ As explained below, Defendants' logs also fail to meet the standards required to support their other privilege claims.

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1973), which holds that a party asserting a privilege must provide sufficient detail to allow the assertions to be fully assessed. *United States v. Exxon Corp.*, 87 F.R.D. 624, 637 (D.D.C. 1980). Those requirements are set forth in cases such as *Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 368-69 (4th Cir. 2009) (an index that only supplies information on authors, recipients, dates, and “a brief description” is “patently inadequate” to permit a court or opposing counsel to assess whether deliberative process privilege applies to that document); *Coastal States Gas Corp. v. D.O.E.*, 617 F.2d 854, 868 (D.C. Cir. 1980) (the agency claiming deliberative process privilege “has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process”); and *Morley v. C.I.A.*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (“minimal information” in a privilege log is inadequate for a court to make a privilege determination, the log must enable the court or opposing counsel “to pinpoint an agency decision or policy to which these documents contributed”).

Even a cursory look at Defendants’ privilege logs reveals multiple entries that fail to meet the required standard. For example:

- *Stone v. Trump – Air Force Privilege Log* (13 Feb 2018): 16 separate entries, including the entry on row 14 (AF_00000061 - AF_00000064), claim deliberative process privilege based on the justification “Predecisional and deliberative internal Air Force document created for the purpose of preparing for and responding to the President’s announcement of the transgender service policy.” On the face of it, neither preparing for nor responding to a Presidential announcement is an action related to deliberation about a future policy decision. This entry fails to identify with sufficient specificity any agency policy-making decision it was related to or the deliberative nature of the document, and thus fails to provide sufficient detail.
- *Stone v. Trump – Army Privilege Log* (13 Feb 2018): 74 separate entries, including the entry on row 3 (ARMY_15-75, 79), claim deliberative process privilege with a description of “Predecisional and deliberative internal agency document created as part of the agency’s process of developing courses of action for implementing DoD’s policy on the service and accessions of military personnel and the continuous process of assessing the policy’s impact on military readiness.” While this description asserts that the document is “Predecisional and deliberative,” the rest of the entry reveals that this document relates to implementation of an existing policy and assessment of that policy’s impact. There is insufficient information to tie this document to any policy-making deliberative process eligible for deliberative process privilege, and thus these entries fail to provide sufficient detail.
- *Stone v. Trump - Navy Production 1 Privilege Log* (13 Feb 2018): the entry on row 2 (Navy_00000026) claims deliberative process privilege with a description of “Draft DoD Instruction 6130.03 ‘Medical Standards for Appointment, Enlistment, or Induction in the Military Services.’” This description fails to provide any information regarding any policy-making decision the document relates to and what deliberative elements it may contain. Thus this entry fails to provide sufficient detail.

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- Stone v. Trump - Navy Production 3 Privilege Log (13 Feb 2018): dozens of documents are claimed to be protected by the deliberative process privilege for reasons such as “No signature, so it’s a draft document” (rows 25 and 26), “This is not signed so it is a draft document” (row 27), “This is marked draft” (row 155), “This is a draft document” (rows 14, 45, 46, and 136), “Appears to be a draft letter” (row 695), “Much of this is non responsive –” (row 1152), and “Draft; not final” (row 1897). None of these entries provide sufficient detail.
- Stone v. Trump – DoD Privilege Log for Soper Depo Docs (13 Feb 2018) and Stone v. Trump – DHA – Privilege Log (13 Feb 2018): the 85 separate entries for which Defendants claim privilege in these two logs state the same boilerplate justification for the deliberative process privilege claim: “Predecisional and deliberative internal agency document created as part of the agency’s process of developing courses of action for implementing DoD’s policy on the service and accessions of military personnel and the continuous process of assessing the policy’s impact on military readiness.” Neither implementing an existing policy nor assessing its impact involves a pre-decisional deliberation, and thus these entries fail to provide sufficient detail. As noted below, on the face of the entries some of these documents do not appear to be deliberative or pre-decisional.

Defendants have thus failed to adequately assert the deliberative process privilege under Federal Rule of Civil Procedure 26(b)(5). We request that Defendants promptly provide privilege logs that meet the required standard, or withdraw the privilege claims and produce all withheld documents.

C. Plaintiffs’ Need Overcomes Any Deliberative Process Privilege Claims.

Even if the deliberative process privilege could apply here and Defendants had met the standards required to claim the privilege, Plaintiffs’ need for the requested discovery would overcome the deliberative process privilege claims. The requested materials are highly relevant to Plaintiffs’ lawsuit, are available only from Defendants, are directly tied to Defendants’ defenses, and production of the discovery Plaintiffs seek would not hamper future policy discussions.

When a party correctly asserts a claim of deliberative process privilege, courts apply a balancing test to determine if the privilege can be overcome: “(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government’s role (if any) in the litigation, and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.” *Cipollone v. Liggett Grp., Inc.*, 812 F.2d 1400, 1987 WL 36515, at *2 (4th Cir. 1987) (per curiam) (unpublished); *F.T.C. v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Had Defendants correctly presented their deliberative process privilege claims, this balancing test would weigh heavily in favor of requiring production of the evidence Plaintiffs seek.

When the underlying issue in a lawsuit is the process behind a decision, the balancing test weighs heavily in favor of the party seeking discovery. *See United States v. Bd. of Educ. of the City of Chi.*, 610 F. Supp. 695, 699–700 (N.D. Ill. 1985) (holding a party would “probably be able to make a very powerful showing of necessity” in a case where “the decisionmaking process . . . is the

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case.”); *see also* *Holmes v. Hernandez*, 221 F. Supp. 3d 1011, 1021 (N.D. Ill. 2016) (same); *Newport Pac. Inc. v. Cty. of San Diego*, 200 F.R.D. 628, 639 (S.D. Cal. 2001) (same); *United States v. Irvin*, 127 F.R.D. 169, 174 (C.D. Cal. 1989) (same). In this litigation, the decisionmaking process relating to the Transgender Service Member Ban is a core issue. Plaintiffs allege that the Transgender Service Member Ban was improperly motivated, and the decisionmaking process by which Defendants developed the Transgender Service Member Ban is thus a central issue. Because the evidence Plaintiffs seek is highly relevant to the present lawsuit, the balancing test would weigh in Plaintiffs’ favor.

The other elements of the balancing test also weigh in Plaintiffs’ favor: the requested evidence is available only from Defendants and there is no alternative source, the government is defending the policy at issue, and it is unlikely that disclosure of this evidence subject to a protective order (where appropriate) would hinder future policy discussions. Even if Defendants had properly asserted deliberative process privilege claims, the balancing test would weigh in favor of requiring production of the requested discovery.

D. Defendants Assert the Privilege for Ineligible Materials.

The deliberative process privilege protects only material that is pre-decisional and deliberative. *See Virginia Beach*, at 1253; *Coastal States*, 617 F.2d at 866. However, many of Defendants’ privilege claims are for post-decisional, non-deliberative, or factual materials that are not eligible for protection under the deliberative process privilege.

1. Post-Decisional Materials

Defendants improperly claim deliberative process privilege for post-decisional material. In *Doe v. Trump*, Case No. 17-cv-1597 (D.D.C.), Defendants contended that while President Trump’s July 26, 2017 Tweets constituted a decision, “that decision had sort of a ripple effect and required the defendants to make a series of additional decisions based on the tweets and that those decisions themselves can give rise to privileged deliberative material.” (Telephone Conf. Tr. at 33:10-15 (Feb 13, 2017)). However, the discussion of how to apply a policy, once promulgated, is not entitled to deliberative process privilege protection. *See Coastal States*, 617 F.2d at 866 (to be “pre-decisional,” a document must be “generated before the adoption of an agency policy”); *Petroleum Info. Corp. v. U.S. Dep’t of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (pre-decisional documents are “prepared in order to assist an agency decisionmaker in arriving at [a] decision, rather than to support a decision already made.”) (internal quotations omitted); *see also Safeway, Inc. v. I.R.S.*, No. C 05-3182 SBA, 2006 WL 3041079, at *9 (N.D. Cal. Oct. 24, 2006) (“discussion of how to apply established policy and law to [] particular facts” not entitled to deliberative process privilege); *Ford Motor Co. v. U.S. Customs & Border Prot.*, No. 06-13346, 2008 WL 4899402, at *17 (E.D. Mich. Aug. 1, 2008) (magistrate’s report and recommendation), adopted in part and rejected in part on other grounds, 2008 WL 4899401 (E.D. Mich. Nov. 12, 2008) (“discussions of how agency policies and decisions are to be enforced are by nature post-decisional”).

To the extent that material is being withheld because it relates to “additional decisions,” it is Defendants’ burden to identify any such decisions and to justify withholding discovery with reference to those decisions. To satisfy Rule 26(b)(5), Defendants must specify what pre-

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decisional role a withheld or redacted document played in a particular policy-forming process; they cannot merely allege generally that a document relates to some vague category of policy decisions. *See Animal Legal Def. Fund, Inc. v. Dep't of the Air Force*, 44 F. Supp. 2d 295, 299 (D.D.C. 1999) (rejecting privilege claim because agency “utterly failed to specify the role played by each withheld document” in policy-formulation process).

For all materials that post-date President Trump’s July 26, 2017 decision to enact the Transgender Military Service Ban, Defendants must withdraw any claims of deliberative process privilege for documents and information that relate to the implementation or assessment of the Transgender Military Service Ban.² Please confirm that you will withdraw these claims or, in the alternative, provide updated privilege logs and objections that provide sufficient specificity so that Plaintiffs may fully evaluate such claims, including whether each allegedly privileged document or interrogatory response relates to any policy decisionmaking process.

2. *Non-Deliberative Materials*

Deliberative process privilege “does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment.” *Ethyl Corp. v. E.P.A.*, 25 F.3d 1241, 1248 (4th Cir. 1994) (“When material could not reasonably be said to reveal an agency’s or official’s mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable.”). To be protected under deliberative process privilege, a document must be “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

Defendants repeatedly claim deliberative process privilege protection for documents that appear on their face to be, at most, peripheral to a deliberative process. For example:

- *Stone v. Trump* – Air Force Privilege Log (13 Feb 2018): documents such as row 708 (AF_00009948 – 967; AFRC Transgender Training for Medics.pptx) relate to training regarding the implementation for current policy, which would not reflect any deliberation about a policy decision.
- *Stone v. Trump* – Army Privilege Log (13 Feb 2018): documents such as row 7 (ARMY_212-217; Presentation used during SCCC discussions, outlining the Army’s readiness to begin accessions) relate to capabilities to implement current policy, which would not reflect any deliberation about a policy decision. Documents such as row 17 (ARMY_322-323; Memorandum from ASD-HA to ASA-M&RA requesting data on transgender Soldiers) and row 21 (ARMY_330-331; Memorandum from DASD-HSP&O to Army DSG requesting data on transgender Soldiers) relate to peripheral information-gathering activities, and do not reflect any deliberation about a policy decision.

² To the extent this implementation process required additional policy decisions, please identify those decisions.

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- Stone v. Trump - Navy Production 1 Privilege Log (13 Feb 2018): documents such as row 62 (Navy_00002897; Definitions for Medical Accessions.) and row 126 (Navy_00004419; Criteria for Sex Reassignment Surgery Waiver) relate to peripheral activities not related to making recommendations or expressing opinions on legal or policy matters, and are not entitled to deliberative process privilege.
- Stone v. Trump – DoD Privilege Log for Soper Depo Docs (13 Feb 2018): documents such as row 13 (SOPER DEP RFP_10 00188-00209; Updated Training Slides for AFRC Medics) relate to training for implemented policies, and would not reflect any deliberation about a policy decision. Documents such as row 68 (SOPER DEP RFP_24 01543; E-mail re: No SCC Meeting This Week - 27 July 2017) are one-page emails stating that a meeting will not be held; it is highly unlikely that these short emails contain any deliberative content.

Non-deliberative materials are not entitled to deliberative process privilege just because they are alleged to be peripheral to a deliberative process. We request that Defendants immediately confirm they will withdraw any claim of deliberative process privilege for non-deliberative documents and information.

3. *Factual Materials*

“[P]urely factual material” does not fall within the deliberative process privilege. *See Virginia Beach*, 995 F.2d at 1253; *see also Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975) (“it is beyond dispute” that factual documents such as reports or summaries are not covered by deliberative process privilege, and to be covered a document “must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters”). The deliberative process privilege does not cover factual material simply because it is used in a deliberative context. *Id.*

Defendants repeatedly claim deliberative process privilege protection for factual information. For example:

- Stone v. Trump – DoD Privilege Log for Soper Depo Docs (13 Feb 2018): the entry on row 45 (SOPER DEP RFP_18 00608-00661) describes the withheld document as “Health Data for Members with Gender Dysphoria,” and the entry on row 50 (SOPER DEP RFP_21 00765-00820) describes the withheld document as “PPT slides: ‘Health Data on Active Duty Service Members with Gender Dysphoria.’” Health data is factual material.
- Stone v. Trump – Army Privilege Log (13 Feb 2018): the entry on row 28 (ARMY_341) describes the withheld document as “Presentation slide showing TG surgical procedures performed at MTFs,” and the entry on row 32 (ARMY_352-383) describes the withheld document as “Presentation to the panel of experts summarizing health and readiness data of Active Duty members with gender

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dysphoria.” Surgery statistics and “health and readiness data” are factual materials.

- *Stone v. Trump - Navy Production 3 Privilege Log* (13 Feb 2018): there are several entries showing the document title “Transgender Information_27 Dec 17” or a variant thereof. Information is factual material. Additionally, 21 documents withheld solely on deliberative process privilege grounds are identified as “Information supporting draft internal agency document which consists of predecisional and deliberative process information.” Information used to support a deliberative process is factual material, and not itself privileged.

Factual material cannot be protected under the deliberative process privilege. At a minimum, documents containing factual material should be redacted and the factual portions produced to Plaintiffs. We request that Defendants immediately confirm they will withdraw any claim of deliberative process privilege for factual documents and information, including when factual material is found within deliberative documents.

II. The Presidential Communications Privilege

The presidential communications privilege is a qualified privilege that can be overcome by a showing of sufficient need. *See In re Sealed Case*, 121 F.3d at 749. This privilege should be construed narrowly, and it applies only to “communications authored or solicited and received by those . . . [with] broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate.” *Id.* at 752. For advisers with dual responsibilities, the government bears the burden to show that the communication was “in conjunction with the process of advising the President” on official government matters. *Id.*

Defendants have asserted the presidential communications privilege for 3,664 documents in “*Stone v. Trump – POTUS Privilege Log* served on 2.13.18”. The documents are not individually identified, but instead are grouped into 51³ categories, some of which cover hundreds of documents within a date range. The privilege log fails to identify any specific individual who authored or received such communications.

By refusing to identify the other parties involved in the communications, Defendants have forced Plaintiffs to seek discovery directly from the President. Information about the President’s decisionmaking process (including his motivation for acting and the basis for his decision) is critical to multiple issues in this litigation and cannot be obtained from other sources when the identities of such sources are purposefully withheld. Additionally, the presidential communications privilege may not be claimed where communications are unrelated to decisionmaking by the President. And regardless of Defendants’ position on the applicability of the presidential communications privilege and whether Plaintiffs’ need for the requested

³ Only a single entry on the privilege log – row 35 – identifies documents that are not claimed to be protected by the presidential communications privilege.

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Ryan B. Parker
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Page 9

discovery would outweigh the privilege, Defendants must submit a proper privilege log that complies with their obligations under the Federal Rules of Civil Procedure.

A. Presidential Communications Are at the Heart of this Litigation.

The core issues in this litigation are why President Trump decided to promulgate the Transgender Service Member Ban and the basis for such an action. In his July 26, 2017 tweets, President Trump publicly asserted that he decided to promulgate the Transgender Service Member Ban based on communications with others, thereby putting at issue communications he now seeks to withhold. *See* Dkt. No. 40-22 (Sept. 14, 2017) (“After consultation with my Generals and military experts”). Indeed, the President’s references to his personal involvement in relevant communications in the tweets strongly evidences Plaintiffs’ need for discovery into materials where Defendants have claimed the presidential communications privilege. *See, e.g., Sun Oil Co. v. United States*, 514 F.2d 1020, 1025 (Ct. Cl. 1975) (denying motion for protective order claiming presidential communications privilege over documents providing advice to President on a particular decision where President publicly admitted to personally making that decision and decision was alleged to be based on impermissible extraneous or political reasons).

Because President Trump’s decisions and actions are at the heart of this case and because he has relied on presidential communications to support his decisions, we request that Defendants promptly either withdraw their claims of presidential communications privilege and provide all withheld information and documents or provide adequate justification for their assertions.

B. The Withheld Information is Critical, and there are No Alternative Sources.

The presidential communications privilege may be overcome where “the evidence sought [is] directly relevant to issues that are expected to be central to the trial,” and “this evidence is not available with due diligence elsewhere.” *In re Sealed Case*, 121 F.3d at 754. Evidence of unique information possessed only by the President, or top presidential advisors, establishes a strong need for discovery directly from the President. *See Dellums v. Powell*, 561 F.2d 242, 248-49 (D.C. Cir. 1977) (“the substantial violations of constitutional rights” at issue, the evidence “that the Department of Justice played a leading role” in the activity at issue, and “the attendance of a White House aide and briefing of [the] attorney general on these matters” all demonstrated a substantial need for White House recordings “to establish [the attorney general’s] responsibility for the violations.”).

As explained above, the evidence Plaintiffs seek is critical to both Plaintiffs’ claims and Defendants’ defenses in this litigation, and is directly relevant to issues that will be central at trial, including whether the Transgender Military Service Ban violates the Fifth Amendment because it was motivated by discriminatory intent and animus. So long as Defendants decline to name the “Generals and military experts” and any other parties who allegedly were involved in developing the Transgender Military Service Ban, the evidence at issue is available only from a single source: the White House. In these circumstances, Defendants must withdraw their claims of presidential communications privilege and provide all withheld information and documents.

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C. Defendants Fail to Identify Any Presidential Decisionmaking After July 26, 2017.

As the party asserting the presidential communications privilege, it is Defendants' burden to identify the individuals involved in the communications, that these individuals are responsible for advising the President on the subject at issue, and that the communication was "in conjunction with the process of advising the President" on official government matters, as opposed to "information regarding governmental operations that do not call ultimately for direct decision making by the President." *In re Sealed Case*, 121 F.3d at 752.

Defendants have admitted that President Trump's July 26, 2017 tweets were a decision. *See Doe v. Trump*, Case No. 17-cv-1597 (D.D.C.) (Telephone Conf. Tr. at 33:10-15 (Feb 13, 2017)). They also appear to take the position that the August 25 memorandum was a decision, but that document merely implemented the July 26 decision. Defendants have taken the position in this litigation that there will not be any *further* Presidential decision until February 21, 2018. *See* Order re: Rule 26(a) Compliance, Dkt. No. 107 (Feb. 6, 2018); *see also* Defendants' Amendment Initial Disclosures (Feb. 16, 2018) (indicating that no materials requiring ultimate Presidential decisionmaking will be presented to the President until February 21, 2018). In the absence of a presidential decision, the presidential communications privilege does not apply. Thus, unless Defendants can show that documents related to the Transgender Service Member Ban between July 26, 2017 and February 21, 2018 are related to advising the President on an issue that calls for direct presidential decisionmaking, such documents are presumptively not eligible for protection under the presidential communications privilege, and Defendants must demonstrate that some other privilege provides grounds to withhold such documents.

D. Defendants Claim Privilege for Non-Privileged Material.

Rows 49-52 of the POTUS privilege log claim presidential communications privilege for communications with "outside third parties." Such communications are not protected by the presidential communications privilege, because such communications have not been maintained as confidential. *See In re Sealed Case*, 121 F.3d at 744 (privilege applies only to documents "that the President believes should remain confidential"); *see also id.* at 741-42 (determining that the President's sharing of a communication with counsel for a cabinet secretary waived any privilege claim). All claims of presidential communications privilege related to such documents should be withdrawn.

E. Defendants Must Serve a Proper Privilege Log.

The POTUS privilege log fails to meet the standards set forth in the Federal Rules of Civil Procedure. The log identifies only broad categories of documents and communications, does not describe the individual nature of withheld documents and communications, and fails to provide information sufficient to enable Plaintiffs to assess Defendants' privilege claims.

Unless Defendants are prepared to abandon their claims of presidential communications privilege, we request that they promptly produce a privilege log that meets the requirements of the Federal Rules of Civil Procedure, setting forth individual entries for each document withheld with enough detailed information to enable Plaintiffs to assess Defendants' claims.

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III. Other Privilege Issues

While the focus of this letter is the flaws in Defendants' claims of deliberative process privilege and presidential communications privilege, we note that Defendants' privilege logs are deficient in other respects as well. Plaintiffs reserve the right to identify further issues in future correspondence. However, we make the following points to identify some of the numerous errors we have seen.

A. Failure to Identify Attorneys in Some Logs

The privilege logs provided by the President, the U.S. Air Force, the U.S. Navy, and the Department of Defense fail to indicate who, if anyone, is the attorney that received or sent a particular document for which Defendants claim the attorney-client communications privilege.⁴ Please promptly serve new logs that provide this information, so that Plaintiffs can assess Defendants' privilege claims.

B. Failure to Correctly Assert Attorney-Client Privilege

"A party asserting privilege has the burden of demonstrating its applicability." *N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011) (citing *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (per curiam)). To claim attorney-client privilege, a party must, among other things, show that the document or communication was provided for the purpose of obtaining or providing legal advice, and that the advice was maintained in confidence. *Id.* at 501-02; see also *id.* at 502 ("[T]he attorney-client privilege does not apply simply because documents were sent to an attorney.") (citing *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 403 (8th Cir. 1987)). Defendants' logs fail to provide this required level of detail. For example, the "Stone v. Trump – Navy Production 3 Privilege Log (13 Feb 2018)" state the basis for withholding 61 documents solely on the grounds of "Attorney-Client Privilege" as "Communication between client and attorney" or some variant thereof. This description fails to state whether such documents were obtaining or providing legal advice on any issue, and fail to show that the document was maintained in confidence.

C. Failure to Identify Individuals on Many Logs

Many of Defendants' privilege logs fail to identify the individuals who authored, sent, or received the withheld documents. For example, the Department of Defense and the POTUS privilege logs do not include specific author, sender, or recipient information; and the privilege log for the Chairman of the Joint Chiefs of Staff frequently identifies groups as authors, senders,

⁴ Defendants presumably are aware of the requirement to identify attorneys. The privilege logs for the U.S. Army and the Chairman of the Joint Chiefs of Staff identified the names of attorneys with asterisks.

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and recipients, often using an acronym, without specifying which individuals were involved.⁵ Please promptly serve new logs that provide this information, so that Plaintiffs can assess Defendants' privilege claims.

D. Asserting Privilege over Non-Confidential Communications

An examination of Defendants' privilege logs shows that several withheld documents have not been maintained as confidential documents, and thus are not entitled to privilege. For example, rows 18, 25, 26, and 38 of the DHA's privilege log claim privilege for documents that were shared with external addresses (dodmerb1@gmail.com and thebohreffect@gmail.com).

E. Deficient Descriptions

Defendants' failure to meet the standards established by the Federal Rules are not limited to the deliberative process and presidential communications privileges. Their entries for other privileges are similarly deficient. For example, the privilege log for the U.S. Air Force states the basis for withholding 31 documents as attorney-client communications as "Attorney Client privileged confidential communications," and the privilege log for the Chairman of the Joint Chiefs of Staff states the basis for withholding 18 documents as attorney-client communications – alongside other privileges – as "Predecisional and deliverative [sic] document created for the purpose [sic] of analyzing proposed regulatory changes." These descriptions fail to provide sufficient information for Plaintiffs to test Defendants' claims.

* * * * *

With respect to Defendants' privilege logs, it would be unduly burdensome for Plaintiffs to identify every flaw in the thousands of entries, particularly in light of the number of systematic errors that pervade the logs. If Defendants continue to claim privilege in the face of the arguments presented in this letter, we request that they promptly serve corrected privilege logs.

⁵ See *Stone v. Trump* – CJCS Privilege and Redaction Log (13 Feb 2018) rows 25-85 (recipient is "Panel of Experts"), 92 (author is "DOJ"), 95-97 (one recipient is "Transgender Senior Implementation Working Group"), 161 (author is "U.S. Department of Defense"), and 168 (same).

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We are available to further discuss the above issues. Please either confirm that Defendants will take the steps we have requested or explain your reasons for failing to do so by Friday, February 23, 2018. If we cannot resolve these matters promptly, we may be forced to seek the assistance of the Court. We look forward to hearing from you soon.

Sincerely,

/s/ Augustus Golden

Augustus Golden

EXHIBIT O

From: Kies, Marianne
Sent: Friday, March 09, 2018 4:14 PM
To: Parker, Ryan (CIV)
Cc: Kamin, Mitchell A; Carmichael, Andrew E. (CIV)
Subject: RE: Discovery issues in Stone v. Trump

Ryan,

I'm following up on our March 1 meet-and-confer, particularly with respect to issues relating to Plaintiffs' forthcoming motion to compel on privilege issues. As you recall, Plaintiffs served a deficiency letter on February 21, 2018. Defendants have not responded to that letter; instead, you requested during the parties' March 1 call that Plaintiffs identify particular log entries for Defendants' re-consideration. As Mitch and I anticipated on the call, this is an impossible task in light of the lack of information in Defendants' logs. Plaintiffs have nevertheless attempted to narrow the scope of the privilege dispute, and we would like to further confer with you over our proposals. Are you available on Monday afternoon to discuss?

In addition, since February 9, you have advised on several occasions that Defendants would be making "rolling" productions over the course of the next several weeks. Plaintiffs in *Stone* have not received a production from Defendants since February 9, although you stated during our March 1 call that Defendants would be sending us another production on March 5 (this past Monday). You further indicated during the March 1 call that Defendants have simply been producing documents that they already produced in *Doe*, minus individual-plaintiff-specific information. This email confirms that Defendants need not cull individual-plaintiff-specific information before producing documents to Plaintiffs in *Stone*. Do you still estimate that document production will be complete by early April?

As for the ESI protocol: You stated that the March 5 production (which did not occur) would be "more consistent" with Plaintiffs' proposed ESI protocol, which Plaintiffs have been attempting to discuss with Defendants since January 2018. We would like to resolve these issues as soon as possible. Since there is no new production to use as a frame of reference, we request that you redline Plaintiffs' proposed order.

I look forward to hearing from you about a time for a meet-and-confer session on Monday afternoon.

Sincerely,
Marianne

Marianne Kies

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One CityCenter, 850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 5005 | mkies@cov.com
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From: Kies, Marianne
Sent: Thursday, March 01, 2018 3:49 PM
To: 'Parker, Ryan (CIV)' <Ryan.Parker@usdoj.gov>
Cc: Kamin, Mitchell A <MKamin@cov.com>; 'Carmichael, Andrew E. (CIV)' <Andrew.E.Carmichael@usdoj.gov>
Subject: RE: Discovery issues in Stone v. Trump

Ryan, following up on our conference this morning. Will Defendants agree to lift the expert report deadline?

As discussed in Plaintiffs' February 21 letter, the parties disagree over the proper scope of the presidential communications and deliberative process privileges. We would like to get a legal ruling on these discrete legal questions, which are a predicate to resolving whether Defendants have properly asserted the privileges in response to Plaintiffs' discovery requests and in Defendants' logs. To that end, we propose the following briefing schedule on Defendants' Partial Motion for Judgment on the Pleadings and Motion to Partially Dissolve the Preliminary Injunction, in addition to Plaintiffs' forthcoming Motion to Compel:

March 9: Plaintiffs move to compel and oppose Defendants' motion.

March 16: Defendants oppose Plaintiffs' motion and reply in support of their motion.

March 21: Plaintiffs reply in support of their motion.

Sincerely,
Marianne

Marianne Kies

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From: Kies, Marianne

Sent: Tuesday, February 27, 2018 12:36 PM

To: 'Parker, Ryan (CIV)' <Ryan.Parker@usdoj.gov>

Cc: Kamin, Mitchell A <MKamin@cov.com>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>

Subject: RE: Discovery issues in Stone v. Trump

Thank you, Ryan. We can use the following dial-in:

1.866.798.7071
14306328

Marianne Kies

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From: Parker, Ryan (CIV) [<mailto:Ryan.Parker@usdoj.gov>]

Sent: Tuesday, February 27, 2018 12:28 PM

To: Kies, Marianne <MKies@cov.com>

Cc: Kamin, Mitchell A <MKamin@cov.com>; Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>

Subject: RE: Discovery issues in Stone v. Trump

Marianne,

11:00 ET on Thursday works for me.

Best,

Ryan B. Parker

Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: 202-514-4336 | ryan.parker@usdoj.gov

From: Kies, Marianne [<mailto:MKies@cov.com>]
Sent: Tuesday, February 27, 2018 12:25 PM
To: Parker, Ryan (CIV) <ryparker@CIV.USDOJ.GOV>
Cc: Kamin, Mitchell A <MKamin@cov.com>
Subject: RE: Discovery issues in Stone v. Trump

How about 11:00 a.m. ET on Thursday?

Best,
Marianne

Marianne Kies

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From: Parker, Ryan (CIV) [<mailto:Ryan.Parker@usdoj.gov>]
Sent: Tuesday, February 27, 2018 12:12 PM
To: Kies, Marianne <MKies@cov.com>
Cc: Kamin, Mitchell A <MKamin@cov.com>
Subject: RE: Discovery issues in Stone v. Trump

Marianne,

I have a brief due in another matter on Wednesday, and a 5:30 call could be difficult. Are you and Mitch available on Thursday morning?

Best,

Ryan B. Parker

Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: 202-514-4336 | ryan.parker@usdoj.gov

From: Kies, Marianne [<mailto:MKies@cov.com>]
Sent: Monday, February 26, 2018 9:20 PM
To: Parker, Ryan (CIV) <ryparker@CIV.USDOJ.GOV>
Cc: Kamin, Mitchell A <MKamin@cov.com>
Subject: RE: Discovery issues in Stone v. Trump

Ryan,

Could we please set up a call to discuss the pending discovery issues, before our Thursday conference with the Court? Are you available at 5:30 p.m. on Wednesday?

Sincerely,
Marianne

Marianne Kies

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From: Parker, Ryan (CIV) [<mailto:Ryan.Parker@usdoj.gov>]
Sent: Friday, February 23, 2018 1:40 PM
To: Kies, Marianne <MKies@cov.com>
Cc: Kamin, Mitchell A <MKamin@cov.com>
Subject: RE: Discovery issues in Stone v. Trump

Marianne,

I received your email and letter. We plan to respond early next week.

Best,

Ryan B. Parker
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: 202-514-4336 | ryan.parker@usdoj.gov

From: Kies, Marianne [<mailto:MKies@cov.com>]
Sent: Wednesday, February 21, 2018 5:30 PM
To: Parker, Ryan (CIV) <ryparker@CIV.USDOJ.GOV>
Cc: Kamin, Mitchell A <MKamin@cov.com>
Subject: Discovery issues in Stone v. Trump

Ryan:

I write in regard to several discovery issues in *Stone v. Trump* (D. Md.):

1. Attached is a deficiency letter that regards Defendants' privilege claims. We look forward to conferring with you about the issues raised therein.
2. During our February 9, 2018 telephone conference about the draft ESI protocol, you committed to send us Defendants' redlines by the end of last week (February 16). We have not received them. As you know, the parties agreed to negotiate an ESI protocol several weeks ago (DE 102). As discovery is well underway, can you please send us your redlines to the draft so we can get the protocol on file?

3. During our February 9, 2018 telephone conference, you also indicated that Defendants would be making rolling productions over the course of the next several weeks. When should we expect Defendants' next production, and what will it contain?

4. In accordance with Judge Garbis's February 6, 2018 order (DE 107), Plaintiffs will contact the Court tomorrow to arrange a case-planning conference. Can you please let us know your availability for the conference?

5. Defendants' amended initial disclosures state: *"The Department of Defense is currently undertaking a comprehensive study of policies concerning transgender service members, which will culminate in an implementation plan currently due to be presented to the President on February 21, 2018. Defendants intend to rely upon and defend both the policies within the implementation plan and the support given for those policies."* As today is February 21, please confirm that you will send us the implementation plan, the policies within the implementation plan, and the support given for those policies to us, by the end of the day.

Thank you,
Marianne

Marianne Kies

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EXHIBIT P

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By Electronic Mail

March 16, 2018

Ryan B. Parker
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Washington, DC 20530
T: (202) 514-4336
ryan.parker@usdoj.gov

**Re: Meet-and-Confer in *Stone, et al. v. Trump, et al.*, Case No.
1:17-cv-02459-MJG (D. Md.)**

Dear Ryan:

I write to summarize and follow up on our March 13, 2018 meet-and-confer session at your office, during which we discussed Defendants' privilege claims.

I. Discovery Directed to President Trump

Defendants have, in conclusory and categorical terms, asserted privilege in response to all of Plaintiffs' requests that are directed to the President and/or that involve presidential or White House communications. In an attempt to narrow the dispute, Plaintiffs began our meeting by proposing that Defendants answer Interrogatories Nos. 1–10 (directed to President Trump), which seek information regarding President Trump's reasons for issuing the Transgender Service Member Ban. On their face, the interrogatories seek information central to the case. Plaintiffs' need for the information presumptively overcomes the qualified presidential-communications privilege and the qualified deliberative-process privilege, where neither of these privileges has been adequately supported or justified.¹ You responded that Defendants are unwilling even to discuss any discovery directed to the President until Defendants' pending motion to dismiss (ECF No. 115) is decided. You even refused to tell us whether the 3,672 documents covered by the POTUS log have been de-duplicated or whether that number is an exaggerated tally of the White House documents at issue. As I stated during our meeting, we believe that Defendants' position lacks merit, and that Defendants' refusal to meaningfully meet-and-confer over Defendants' privilege assertions at this time is inconsistent with Defendants' obligations under the federal rules and Judge Garbis' March 1 order, which contemplates that Plaintiffs' motion to compel on privilege issues will be briefed in "due course"

¹ The same is true of—at least—Interrogatory No. 12 (directed to Secretary Mattis) and Requests for Production Nos. 6, 7, and 8.

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Ryan B. Parker
March 16, 2018
Page 2

as opposed to *seriatim* following consideration of Defendants' pending motion. ECF No. 116. We understand that the parties are at impasse on this issue.

II. Other Defendants' Assertions of Privilege with Respect to Communications with the White House

Regardless of whether President Trump remains a party to this suit or is subject to discovery requests, Plaintiffs have also served discovery requests on the other Defendants regarding their own communications with the White House and with the Office of the Vice President. *See, e.g.*, Requests for Production Nos. 6, 7, 8, 12; Interrogatory No. 12. In their written responses, each Defendant objected to these requests based on the presidential communications privilege (and the deliberative process privilege). However, with the exception of the log of the Chairman of the Joint Chiefs of Staff, the logs produced to date by Defendants other than President Trump do not identify materials purportedly protected by the presidential communications privilege.

Please promptly clarify whether Defendants other than President Trump are asserting both the presidential communications privilege and the deliberative process privilege in response to Requests for Production Nos. 6, 7, 8, and 12 and Interrogatory No. 12 to Secretary Mattis. If so, by Friday, March 23, 2018, please provide Plaintiffs with a privilege log for those documents reflecting, at a minimum, the sender(s), recipient(s), date, and subject matter of each document or communication. We are requesting this minimal identifying information so that we may make a preliminary assessment as to which of the thousands of documents are of greatest relevance to our case. By requesting only this identifying information at this point, we are not waiving our opportunity to seek a full and proper justification for the claims of privilege.

III. Other Documents on Defendants' Privilege Logs

We have repeatedly requested that Defendants provide compliant and adequate privilege logs. In response, Defendants continue to insist that Plaintiffs undertake the impracticable task of identifying discrete documents for Defendants to re-consider. Without waiving Plaintiffs' objections to Defendants' inadequate privilege logs, Plaintiffs will identify, on a rolling basis, a nonexhaustive list of particular withheld documents for which Plaintiffs will request that Defendants either provide an adequate explanation for why the privilege applies or withdraw the assertion of privileges. Based on Defendants' responses, Plaintiffs will determine which documents are necessary to pursue in a motion to compel. Please confirm that Defendants will provide responses to the challenged entries within 10 calendar days of receipt.

IV. Federal Rule of Civil Procedure 33(d) (*see Defendants' Answers to Interrogs. Nos. 13–16, 18–22*)

As we discussed during our meeting, Defendants are required to provide interrogatory answers that either contain adequate narrative responses or comply with Rule 33(d). You indicated that you intended to provide compliant answers for all Defendants, aside from President Trump. If Defendants object to answering any interrogatory (or portion of an interrogatory), Defendants must object with the specificity required by Rule 33(b)(4). You indicated that, to the extent Defendants choose to rely upon Rule 33(d), Defendants will identify

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specific documents, as required by Rule 33(d)(1). If Defendants withhold such documents on the basis of a privilege, we expect that Defendants will object with the specificity required by Rule 34(b)(2)(B). By March 23, 2018, please provide corrected interrogatory answers that comply with the foregoing Rules.

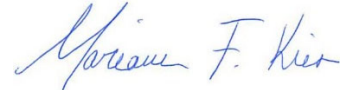
V. Federal Rule of Civil Procedure 34(b)(2)

Defendants' written responses to Plaintiffs' requests for production do not comply with Rule 34(b)(2)(B) and (C). By March 23, 2018, please provide corrected responses to Plaintiffs' requests for production that state *with specificity* the grounds for objecting to each request—i.e., a full explanation of why a particular response is subject to the privileges asserted—and indicate whether responsive material is being withheld on the basis thereof.

VI. Deadline for Discovery Requests

The Joint Status Report in this case requires all additional written discovery requests to be served by March 24, 2018. ECF No. 102. Please let me know by Monday, March 19, 2018, if Defendants will stipulate to suspend this deadline in light of the pending discovery disputes.

Sincerely,

A handwritten signature in blue ink, appearing to read "Marianne F. Kies".

Marianne F. Kies

EXHIBIT Q

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Marianne F. Kies

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By Electronic Mail

April 9, 2018

Ryan B. Parker
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW,
Washington, DC 20530
T: (202) 514-4336
ryan.parker@usdoj.gov

**Re: Discovery Issues in *Stone, et al. v. Trump, et al.*, Case No.
1:17-cv-02459-MJG (D. Md.)**

Dear Ryan:

I write to follow up on our March 16, 2018 letter, to which Defendants have not responded (nor acknowledged receipt). Please provide a prompt response to that letter, which we previously requested you do no later than March 23, 2018. That date has long since lapsed.

In light of Defendants' March 23 filings, I also write to follow up on several of Plaintiffs' pending discovery requests. For the following reasons, Defendants should promptly and fully respond to Plaintiffs' Requests for Production Nos. 13, 14, 15, and 16 and Interrogatory Nos. 15, 18, and 19, the original responses to which were due on February 9, 2018. Barring a prompt and complete response, Plaintiffs will move to compel.

* * *

As you know, Plaintiffs served their first set of discovery requests on January 3, 2018. Plaintiffs requested, *inter alia*:

- "All Documents and Communications Concerning military service by transgender individuals shared between or amongst Defendants and organizations opposed to military service by transgender individuals, Including but not limited to representatives and agents of the 'Alliance Defending Freedom,' 'Focus on the Family,' the 'Family Research Council,' 'Heritage Action for America,' and 'Breitbart News,' from January 2017 to the present" (RFP No. 13);
- "All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed that embody, constitute, comprise, or reflect the reaction of the Department of Defense

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April 9, 2018
Page 2

or any of its components (including Military Services), or any individuals within the Department of Defense or its components, to the Tweets” (RFP No. 14);

- “All Documents and Communications Concerning the purpose, composition, structure, research, analysis, findings, and conclusions of the Panel of Experts” (RFP No. 15);
- “All Documents and Communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, Including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018” (RFP No. 16);
- “[Identification of] all Documents and Communications Concerning military service by transgender individuals that were requested, received, considered directly or indirectly, or consulted by Defendants—including the Panel of Experts—since January 20, 2017, and, for each such Document, Identify the Person who transmitted it to You and state the Date(s) of transmission and receipt” (Interrog. No. 15);
- “[Identification of] all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of, Defendants between June 30, 2016 and August 25, 2017, concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion” (Interrog. No. 18); and
- “[Identification of] all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of Defendants from August 25, 2017 through the present Concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion” (Interrog. No. 19).

Defendants objected to RFPs Nos. 13 through 16 “to the extent” that each seeks: (a) attorney work product; (b) attorney-client communications; (c) communications or information protected by the deliberative process privilege; (d) material “the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation”; or (e) communications or information protected by the presidential communications privilege. Defendants similarly objected to Interrogatory Nos. 15, 18, and 19; moreover, all Defendants save President Trump¹ stated that, “[t]he information responsive to this

¹ President Trump has objected “to any discovery requests directed to the President” and has not provided a response to any interrogatory.

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interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in Defendants' document production."²

Defendants' privilege logs indicate that numerous documents were withheld on the basis of a purported deliberative process privilege. Many documents pertinent to Defendants' so-called "Panel of Experts"—convened after President Trump categorically banned transgender people from serving in the Armed Forces in August 2017—were withheld. A small sampling follows:

- **Army Defendants** withheld documents bearing the Bates range ARMY_352-383, described as "Presentation to the panel of experts summarizing health and readiness data of Active Duty members with gender dysphoria."
- **The CJCS** privilege log alone contains approximately 65 different entries reflecting documents withheld that were received by the "Panel of Experts."
- **Air Force Defendants** withheld documents bearing the Bates range AF_00000446-448, described as "UPDATE & DECISION: Transgender Working Group Meeting in Prep for Panel of Experts Prep Session (Read: HTML).msg," and numerous other documents described as "RE: REQUEST -- Support to the Panel of Experts Reviewing DoD Policy on Service by Transgender Persons.msg," *see, e.g.*, AF_000010454-10456.
- **Department of Defense Defendants** withheld documents bearing the Bates range SOPER DEP RFP_21 01268-01271, described as "E-mail re: Transgender Panel of Experts Question (with Attachments)."
- **Navy Defendants** withheld a document bearing the Bates number Navy_00042147, on the stated privilege basis of "Request for information for panel of experts," as well as a document bearing the Bates range Navy_000004460, described as "Request for Military Medical Providers to Brief Medical Personnel Services (MEDPERS) and the Secretary of Defense (SECDEF) Panel of Experts."

On March 23, 2018, Defendants released the February 22, 2018 "recommendations" (ECF No. 120-1) and a February 2018 "report" regarding military service by people who are transgender (ECF No. 120-2, the "Report"). The Report extensively references findings and conclusions of the "Panel of Experts." *See, e.g.*, Report at 33–34 (citing reports made to the Panel "that, from the time of diagnosis to the completion of a transition plan, the transitioning Service members would be non-deployable for two to two-and-a-half years"); *id.* at 37 (citing incidents reported to the Panel concerning transgender access to bathroom facilities as evidence of the threat transgender service poses to unit cohesion); *id.* at 41 (citing Panel data as evidence that "medical costs for Service members with gender dysphoria have increased nearly three times—or 300%—compared to Service members without gender dysphoria").

Defendants now insist that the existing preliminary injunction should be "dissolved" in light of the February 2018 recommendations and the Report and President Trump's response.

² As Plaintiffs have previously advised Defendants, this response does not comply with Federal Rule of Civil Procedure 33(d).

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Accordingly, the bases for both the recommendations and Report are of central importance to Defendants' defenses, Plaintiffs' claims, and Plaintiffs' continued entitlement to injunctive relief.

Defendants' numerous assertions of deliberative process privilege over materials regarding the Panel of Experts are fundamentally misplaced.³ As a threshold matter, the deliberative process privilege does not apply at all when, as here, "a plaintiff's cause of action turns on the government's intent." *See In re Subpoena Duces Tecum Served on the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998). Moreover, this privilege is qualified and narrowly construed, and is overcome under the circumstances here. *FDIC v. Hatziyannis*, 180 F.R.D. 292, 293 (D. Md. 1998); *Bd. of Educ. of the City of Chi.*, 610 F. Supp. 695, 699–700 (N.D. Ill. 1985) (a party "make[s] a very powerful showing of necessity" where "the decisionmaking process . . . is the case"). The process leading to the recommendations "is the case" here, as is Defendants' intent in implementing the ban on military service by transgender persons that President Trump announced in July 2017 and in developing the proposed policy in response to his August 2017 memorandum. This material is relevant to Plaintiffs' claims that the original ban on transgender military service and the implementation of that ban violate equal protection and substantive due process. Moreover, since Defendants are now using the work of the "Panel of Experts" to defend the Recommendations and Report, they may not withhold documents and information relating to the work of the Panel. *See, e.g., HSH Nordbank AG N.Y. Branch v. Swerdlow*, 259 F.R.D. 64, 74 (S.D.N.Y. 2009) (explaining that the "at issue" doctrine "precludes a party from 'disclos[ing] only self-serving communications,' while 'barr[ing] discovery of other communications that an adversary could use to challenge the truth of the claim'").

In addition to withholding documents regarding the Panel of Experts, Defendants have improperly withheld responsive materials comprising, *inter alia*:

- Materials leading up to President's Trump announcement of the Transgender Service Member Ban via Twitter (*see, e.g.,* NAVY_00003363, described as "Transgender Policy Status Briefing Card" and dated July 26, 2017; numerous entries on the DHA privilege log dated July 24-26, 2017 and identified as "Intradepartment email concerning implementation of transgender policy");
- Materials created in between the Tweets and the August 2017 presidential memorandum (*see, e.g.,* ARMY_722-724, described as "Execution matrix used in preparation for the release of the Presidential Memorandum;" and dated August 10, 2017; ARMY_1300-04, described as "Presentation discussing the impact of transgender service on readiness" and dated August 17, 2017; ARMY_725-728, described as "Presentation showing timeline of events in preparation for release of the Presidential Memorandum" and undated); and
- Materials related to the September 2017 "Interim Guidance" (*see, e.g.,* ARMY_744-46, described as "Documents providing comments on the draft DoD

³ It is impossible for Plaintiffs to determine how many documents President Trump withheld on any specific ground, given that he has refused even to provide a log of withheld communications.

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Ryan B. Parker
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Interim Guidance” and dated August 30, 2017; CJCS_00001113, described as “Final draft of interim transgender policy guidance” and dated September 6, 2017).

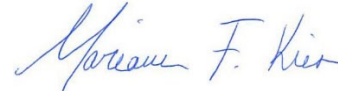
Although the limited and often boilerplate information provided in Defendants’ privilege logs makes it difficult to evaluate conclusively, Defendants also appear to have withheld materials generated in between the finalization of the “Panel of Experts” report and the issuance of the February 2018 recommendations and Report. *See, e.g.*, SOPER DEP RFP_15 00562-566, described as “Transgender Review Panel Policy Recommendation Worksheet” and undated.

Once again, this is but a small sampling of the documents Defendants have improperly withheld. All of these categories of documents must be produced; they all concern the critical “decisionmaking” process that “is the case” here. *See Bd. of Educ. of the City of Chi.*, 610 F. Supp. at 699–700.

Please promptly produce any documents responsive to Requests for Production Nos. 13, 14, 15, and 16, and provide supplemental responses to Plaintiffs’ Interrogatory Nos. 15, 18, and 19 that comply with Rule 33(d). If Defendants assert attorney-client, attorney work-product, or any other privilege over documents and information responsive to these requests, Defendants should supply a full and complete privilege log that complies with District of Maryland Discovery Guideline 10(d).

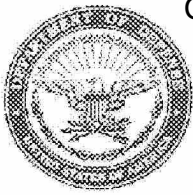
If Defendants do not fully comply with the above paragraph by April 18, 2018, Plaintiffs will move to compel on the issues raised in this letter and in our March 16, 2018 letter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Marianne F. Kies".

Marianne F. Kies

EXHIBIT R



SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

9/14/17

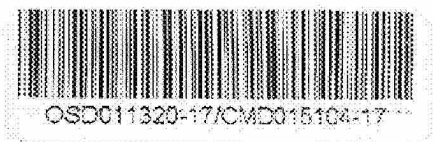
MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDANT, U.S. COAST GUARD
DEPUTY CHIEF MANAGEMENT OFFICER
CHIEF, NATIONAL GUARD BUREAU
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF COST ASSESSMENT AND PROGRAM
EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF OPERATIONAL TEST AND EVALUATION
CHIEF INFORMATION OFFICER OF THE DEPARTMENT OF
DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE
AFFAIRS
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC
AFFAIRS
DIRECTOR OF NET ASSESSMENT
DIRECTOR, STRATEGIC CAPABILITIES OFFICE
DIRECTORS OF DEFENSE AGENCIES
DIRECTORS OF DOD FIELD ACTIVITIES

SUBJECT: Terms of Reference - Implementation of Presidential Memorandum on Military
Service by Transgender Individuals

Reference: Military Service by Transgender Individuals — Interim Guidance

I direct the Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff to lead the Department of Defense (DoD) in developing an Implementation Plan on military service by transgender individuals, to effect the policy and directives in Presidential Memorandum, *Military Service by Transgender Individuals*, dated August 25, 2017 ("Presidential Memorandum"). The implementation plan will establish the policy, standards and procedures for service by transgender individuals in the military, consistent with military readiness, lethality, deployability, budgetary constraints, and applicable law.

The Deputy Secretary and the Vice Chairman, supported by a panel of experts drawn from DoD and the Department of Homeland Security (DHS) ("Panel"), shall propose for my consideration recommendations supported by appropriate evidence and information, not later than January 15, 2018. The Deputy Secretary and the Vice Chairman will be supported by the Panel, which will be comprised of the Military Department Under Secretaries, Service Vice Chiefs, and Service Senior Enlisted Advisors. The Deputy Secretary and Vice Chairman shall



designate personnel to support the Panel's work to ensure Panel recommendations reflect senior civilian experience, combat experience, and expertise in military operational effectiveness. The Panel and designated support personnel shall bring a comprehensive, holistic, and objective approach to study military service by transgender individuals, focusing on military readiness, lethality, and unit cohesion, with due regard for budgetary constraints and consistent with applicable law. The Panel will be chaired by the Under Secretary of Defense for Personnel and Readiness and will report to the Deputy Secretary and the Vice Chairman at least every 30 days and address, at a minimum, the following three areas:

Accessions: The Presidential Memorandum directs DoD to maintain the policy currently in effect, which generally prohibits accession of transgender individuals into military service. The Panel will recommend updated accession policy guidelines to reflect currently accepted medical terminology.

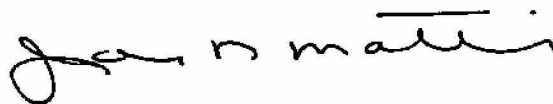
Medical Care: The Presidential Memorandum halts the use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel, effective March 23, 2018, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex. The implementation plan will enumerate the specific surgical procedures associated with sex reassignment treatment that shall be prohibited from DoD or DHS resourcing unless necessary to protect the health of the Service member.

Transgender Members Serving in the Armed Forces: The Presidential Memorandum directs that the Department return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016. The Presidential Memorandum also allows the Secretary to determine how to address transgender individuals currently serving in the Armed Forces. The Panel will set forth, in a single policy document, the standards and procedures applicable to military service by transgender persons, with specific attention to addressing transgender persons currently serving. The Panel will develop a universal retention standard that promotes military readiness, lethality, deployability, and unit cohesion.

To support its efforts, the Panel will conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members. The study will be planned and executed to inform the Implementation Plan. The independent multi-disciplinary review and study will address aspects of medical care and treatment, personnel management, general policies and practices, and other matters, including the effects of the service of transgender persons on military readiness, lethality, deployability, and unit cohesion.

The Panel may obtain advice from outside experts on an individual basis. The recommendations of the Deputy Secretary and the Vice Chairman will be coordinated with senior civilian officials, the Military Departments, and the Joint Staff.

All DoD Components will cooperate fully in, and will support the Deputy Secretary and the Vice Chairman in their efforts, by making personnel and resources available upon request in support of their efforts.



cc:
Secretary of Homeland Security

EXHIBIT S

Thomas P. Dee
SES
703-819-1314
December 14, 2017

MEMORANDUM FOR THE RECORD

Subj: Dissenting Opinion from the Majority Recommendations of the “Military Service by Transgender Individuals - Panel of Experts”

This memorandum records my dissent from the majority opinion of the DoD “Military Service by Transgender Individuals - Panel of Experts” which has recommended the following policy be adopted concerning the military service of transgender individuals:

Redacted

Redacted

The recommendations are

Redacted

Redacted

are not supported by the data provided to the panel in terms of military effectiveness, lethality, or budget constraints, and are likely not consistent with applicable law.

Recommendation 1.

Redacted

During the course of our panel, neither the transgender service members, the military doctors, nor the civilian doctors suggested that a person serving outside of their birth

gender would necessarily be unable to meet medical or physical standards, nor did any of our briefers suggest that those standards should be loosened or waived to allow transgender service. [Redacted]

Redacted

DODI 6130.03 governs the physical standards for the appointment, enlistment, or induction of Service personnel. Those standards should apply to everyone regardless of gender identity. The instruction states that individuals under consideration for appointment, enlistment, or induction into the Military Services should be:

1. Free of contagious diseases that probably will endanger the health of other personnel.
2. Free of medical conditions or physical defects that may require excessive time lost from duty for necessary treatment or hospitalization, or probably will result in separation from the Service for medical unfitness.
3. Medically capable of satisfactorily completing required training.
4. Medically adaptable to the military environment without the necessity of geographical area limitations.
5. Medically capable of performing duties without aggravation of existing physical defects or medical conditions.

Enclosure (4) of that instruction provides the specific medical conditions that are disqualifying for service. [Redacted] The instruction makes no mention of transgenderism or gender dysphoria, but enclosure (4) paragraph 29.r. states that a “current or history of psychosexual conditions including but not limited to transsexualism... tranvestism... and other paraphilias” is disqualifying. The language in that section is no longer consistent with current medical guidelines, the DSM V, which distinguishes gender dysphoria (identity disorder) from psychosexual conditions and paraphilia’s (sexual attraction or behavioral disorder). [Redacted]

Redacted

[Redacted] Of note, the FAA allows persons with a history of gender dysphoria to serve as commercial pilots or air traffic controllers after a stability period of five years.

DODI 1304.26, “Qualification Standards for Enlistment, Appointment, and Induction”, states that waivers for otherwise disqualifying current or past medical conditions may be considered based on a “whole person” review of the applicant. Redacted

Redacted

Redacted

Redacted No data was presented during the course of the panel to conclude that such separate accommodation would be required Redacted
Redacted As the total cost of all medical treatment of the entire DoD transgender population over the past few years is \$3.3M (exclusive of unit incurred costs) Redacted

Redacted

Recommendation 2.

Redacted

Redacted

Recommendation.

Redacted

//S//
Thomas P. Dee