

The Honorable Marsha J. Pechman

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

RYAN KARNOSKI, et al.,
Plaintiffs, and
STATE OF WASHINGTON,
Plaintiff-Intervenor,
v.
DONALD J. TRUMP, in his official capacity
as President of the United States, *et al.*,
Defendants.

CASE No. 2:17-cv-01297-MJP
**DECLARATION OF DANIEL
SIEGFRIED IN SUPPORT OF
PLAINTIFFS' MOTION TO COMPEL
DEFENDANTS' DISCOVERY
WITHHELD UNDER THE
DELIBERATIVE PROCESS PRIVILEGE**

NOTE ON MOTION CALENDAR:
May 25, 2017

ORAL ARGUMENT REQUESTED

1 I, Daniel Siegfried, swear under penalty of perjury under the laws of the United States to the
2 following:

3 1. I am counsel of record for Plaintiffs in this action, am over the age of 18, and am
4 competent to be a witness. I make this declaration in support of Plaintiffs' Motion to Compel
5 Defendants' Discovery Responses Withheld Under the Deliberative Process Privilege based on facts
6 within my personal knowledge.

7 2. On December 29, 2017, Plaintiffs served their First Set of Interrogatories and First Set
8 of Requests for Production on Defendants, true and correct copies of which are attached hereto as
9 Exhibits 1 and 2. On January 26, 2018, Plaintiffs served their First Set of Requests for Admission on
10 Defendants, a true and correct copy of which is attached hereto as Exhibit 3.

11 3. Defendants served responses to Plaintiffs' First Set of Interrogatories and First Set of
12 Requests for Production on February 9, 2018. Defendants issued responses on behalf of Secretary
13 James Mattis and the Department of Defense. A true and correct copy of those responses are attached
14 hereto as Exhibits 4 and 5. Defendants also issued separate responses on behalf of President Donald
15 Trump. A true and correct copy of those responses are attached hereto as Exhibits 6 and 7.

16 4. On February 23, 2018, my colleague Jordan Heinz sent a letter to Defendants' counsel
17 regarding deficiencies in their responses to Plaintiffs' interrogatories and requests for production. A
18 true and correct copy of that letter is attached hereto as Exhibit 8. Among other things, Plaintiffs'
19 February 23, 2018 letter asked Defendants to withdraw their assertions of the deliberative process
20 privilege and also to provide privilege logs identifying any documents withheld pursuant to the
21 privilege. Defendants did not respond to this letter, supplement or amend their discovery responses,
22 or accept any request to meet and confer.

23 5. On February 26, 2018, Defendants served responses to Plaintiffs' First Set of Requests
24 for Admission, again serving one set of responses for Secretary Mattis and the Department of the
25 Defense and another set for President Trump. True and correct copies of those responses are attached
26 hereto as Exhibits 9 and 10.

27 6. On March 20, 2018, Defendants served 17 privilege logs on behalf of 6 entities: the
28 Department of Defense, the Defense Health Agency, the Navy, the Army, the Air Force, and the

1 Chairman of the Joint Chiefs of Staff. Native versions of Defendants’ privilege logs are submitted as
2 Exhibits 11 through 27.

3 7. On April 26, 2018, I sent a letter to Defendants’ counsel regarding their privilege logs,
4 a copy of which is attached hereto as Exhibit 28. My letter reiterated Plaintiffs’ request that Defendants
5 withdraw their assertions of the deliberative process privilege entirely, and requested a meet and confer
6 if Defendants were unwilling to do so.

7 8. On May 2, 2018, counsel for Plaintiffs and counsel for Defendants held a telephonic
8 conference in compliance with Federal Rule of Civil Procedure 37 and Local Civil Rule 37(a)(1) to
9 make a good faith effort to resolve the parties’ dispute regarding the deliberative process privilege.
10 The parties were unable to resolve their dispute regarding Plaintiffs’ positions that (1) the deliberative
11 process privilege does not apply in this case, and (2) the privilege, even if applicable, would not shield
12 information and documents that are post-deliberative (*i.e.* after the President’s July 26, 2017 tweets),
13 non-deliberative (*i.e.* discussing how to implement the Ban following the President’s decision), or
14 factual.

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

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17 DATED: May 10, 2018

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19 /s/Daniel Siegfried
Daniel Siegfried

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on May 10, 2018.



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Exhibit 1

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

**PLAINTIFFS' FIRST SET OF
INTERROGATORIES TO DEFENDANTS**

Honorable Marsha J. Pechman

Pursuant to Federal Rules of Civil Procedure 26 and 33, Plaintiffs propound the following interrogatories to Defendants and hereby request that Defendants serve a written response within thirty (30) days of the date of service hereof, at the law offices of Kirkland & Ellis LLP, 300 N. LaSalle, Chicago, IL 60654.

INTERROGATORIES

1. Identify and describe each of the governmental purposes or interests that you contend will be advanced by the Policy (including, but not limited to, any purported interest in military readiness, lethality, unit cohesion, and military resources).

2. For each governmental purpose or interest identified in Your answers to Interrogatory 1 above, describe in detail all facts that You contend establish the need or justification to further each purpose or interest, including all Documents that You contend might establish the existence of such facts.

3. For each governmental purpose or interest identified in Your answers to Interrogatory 1 above, describe in detail all facts that You contend demonstrate that the Policy furthers that purpose or interest, including all Documents that You contend might establish the existence of such facts.

4. Identify all individuals with whom President Trump has discussed or corresponded with regarding the United States' past, present, or potential future governmental policies on

transgender military service or related healthcare, and the dates of each discussion, from November 9, 2016 to the present.

5. 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.”

6. Identify all individuals with whom President Trump communicated or consulted in deciding that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military,” including each of the “Generals and military experts” referenced in President Trump’s July 26, 2017 tweet.

7. Explain the process You used to formulate the Tweets, the Presidential Memorandum, the Interim Guidance, and the Implementation Plan, and identify all sources of fact or opinion You consulted, considered, or otherwise referred to and the dates on which You first consulted, considered, or otherwise referred to such sources of information or opinion.

8. Explain President Trump’s purported concerns regarding the RAND Report or any other study or review that the Department of Defense relied upon when adopting Secretary Ash Carter’s policy allowing transgender people to serve openly in the military.

9. Identify all members of the “panel of experts serving within the Departments of Defense and Homeland Security to provide advice and recommendations on the implementation of the president’s direction.” Statement of Secretary Jim Mattis, Release No: NR-312-17.

10. Identify all Department of Defense and Department of Homeland Security employees who worked with, provided information to, or communicated with employees of the RAND National Defense Research Institute concerning the studies and/or fact gathering that resulted in the RAND Report.

11. Identify all persons with authority to approve medical waivers requested by transgender service members or transgender individuals seeking to join the U.S. military during the period from January 1, 2010 to the present.

12. Identify all persons with authority, during the period from January 1, 2010 to the present, to involuntarily discharge or separate service members on account of transgender status (including those individuals with authority to initiate any necessary proceedings for involuntary discharge or separation, even if final adjudicatory authority resides elsewhere).

13. Describe in detail the circumstances leading to Secretary James Mattis's June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff with Subject: Accession of Transgender Individuals in the Military Services, including all reasons for the decision set forth in the memo (whether or not such reasons were publicly stated or acknowledged).

14. Identify all persons with knowledge or information concerning the facts set forth in your response to Interrogatory No. 13, including all persons who requested, advised, or consulted on the result set forth in the June 30, 2017 memorandum.

15. Identify all communications between a member of Congress, on the one hand, and President Trump or any officer or employee of the Executive Office of the President, on the other, from January 20, 2017 to July 26, 2017, concerning military service by transgender people.

DEFINITIONS AND INSTRUCTIONS

1. "You," "your," and "yours," whether or not capitalized, shall mean the Defendants, individually and/or collectively, including Defendants' current and former employees, agents, affiliates, contractors, consultants, representatives, and other persons engaged directly or indirectly by or under the control of Defendants.

2. "The Policy" shall mean any of President Trump's July 26, 2017 tweets (the "Tweets") regarding transgender military service or related healthcare together with the

August 25, 2017 Presidential Memorandum regarding the same (the “Presidential Memorandum”), and all changes in United States government policies regarding transgender military service or related healthcare undertaken or contemplated as a direct or indirect result of Tweets and/or the Presidential Memorandum, including but not limited to, “The Implementation Plan” (defined *infra*) and the “Interim Guidance” (defined *infra*).

3. “The Implementation Plan” shall mean the implementation plan referenced in Secretary of Defense Jim Mattis’ August 28, 2017 Release (No: NR-312-17).

4. The “Interim Guidance” shall mean the memorandum titled “Military Service by Transgender Individuals - Interim Guidance” and dated September 14, 2017.

5. “Communication” shall mean any transmission of information by one or more persons to one or more persons by any means including, without limitation, telephone conversations, letters, telegrams, teletypes, telexes, telecopies, e-mail, text messages, computer linkups, written memoranda, and face-to-face conversations; “communication” includes all documents and electronically stored information (“ESI”) containing, summarizing, or memorializing any communication.

6. “Document” or “documents” shall have the full meaning ascribed to it by Federal Rule of Civil Procedure 34(a) including ESI, and includes the original and any identical or nonidentical copy, regardless of origin or location, of any writing or record of any type or description, including but not limited to, all writings; records; contracts; agreements; communications (intra or inter-company); correspondence; memoranda; letters; facsimiles; electronic mail (e-mail); text messages; minutes, recordings, transcripts, and summaries of meetings, or recordings of meetings, speeches, presentations, conversations, or telephone calls (whether recorded in writing, mechanically, or electronically); handwritten and typewritten notes of any kind; statements; reports; voice recordings; desk calendars; diaries; logs; drafts; studies; analyses; schedules; forecasts; surveys; invoices; receipts; computer data; computer printouts;

financial statements; balance sheets; statements of operations; audit reports; financial summaries; statements of lists of assets; work papers; pictures; photographs; drawings; computer cards; tapes; discs; printouts and records of all types; instruction manuals; policy manuals and statements; books; pamphlets; and every other device or medium by which information or intelligence of any type is transmitted, recorded, or preserved, or from which intelligence or information can be perceived.

7. “Identify,” whether or not capitalized, 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); and (c) a document, shall mean to provide the date, title, subject matter, author(s), recipient(s), and Bates number(s).

8. “Including” or “includes,” whether or not capitalized, shall mean “including but not limited to” or “including without limitation.”

9. “Member of Congress,” whether or not capitalized, shall mean any Senator, Representative, committee, sub-committee, or group (formal or informal) of the United States Congress (or individual or staff member acting on behalf of any such Senator, Representative, committee, sub-committee, or group (formal or informal)).

10. The “RAND Report” means the study performed by the RAND Corporation regarding the impact of transgender military service or healthcare for current or prospective transgender service members (such report appears on the docket in this case at Dkt. 34-10).

11. “Relating to” or “related to,” whether or not capitalized, when referring to any given subject matter, shall mean any 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.

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 the Federal Rules of Civil Procedure, these requests are continuing and you must revise or supplement your responses and production whenever new or additional responsive information becomes known.

Dated: December 29, 2017

/s/ Jordan M. Heinz

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Chicago, IL 60654

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on December 29, 2017, I caused a true and correct copy of the foregoing document to be served by email on the following counsel of record for Defendants:

Ryan B. Parker
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
ryan.parker@usdoj.gov

s/ Jordan M. Heinz

Exhibit 2

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

**PLAINTIFFS' FIRST REQUESTS FOR
PRODUCTION TO DEFENDANTS**

Honorable Marsha J. Pechman

Pursuant to Federal Rules of Civil Procedure 26 and 34, Plaintiffs propound the following requests for production of documents to Defendants to be responded to within 30 days of service. Plaintiffs request that all documents and electronically stored information responsive to the following discovery requests be produced electronically, or alternatively, at the offices of Kirkland & Ellis LLP, 300 North LaSalle Street, Chicago, Illinois 60654.

REQUESTS FOR PRODUCTION

1. All Documents and Communications related to the Policy.
2. All Documents supporting, refuting, or relating to Your contention that transgender service members hinder military readiness and lethality.
3. All Documents supporting, refuting, or relating to Your contention that transgender service members disrupt unit cohesion.
4. All Documents supporting, refuting, or relating to Your contention that transgender service members tax military resources.
5. All documents relating to any justification considered by Defendants for the Policy other than those identified in Requests for Production Nos. 1-4.

6. All Documents and Communications relating to, including all drafts of, the August 25, 2017, memorandum entitled “Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security.”

7. All Documents and Communications related to President Trump’s consultation with employees, agents, contractors, or consultants of the United States Armed Forces regarding transgender military service or related healthcare.

8. All studies, reports, instructions, directives, or other Documents relating to the “panel of experts serving within the Departments of Defense and Homeland Security to provide advice and recommendations on the implementation of the president’s direction.” Statement of Secretary Jim Mattis, Release No: NR-312-17.

9. All Documents and Communications between January 20, 2017 and July 28, 2017 related to military spending on gender confirmation surgeries.

10. For the period starting January 20, 2017 up to and including July 28, 2017, all Communications between any member of Congress and President Trump or any individual within the Executive Office of the President concerning military service by transgender people or healthcare for current or prospective transgender service members, and any Documents constituting, summarizing, reflecting, or evidencing such Communications.

11. All Documents reflecting visits to the White House on July 10, 2017 by President Trump’s Evangelical Advisory Board members or his campaign’s Evangelical Advisors, including but not limited to, visitor logs.

12. All Documents related to, and Communications with, President Trump’s Evangelical Advisory Board members or his campaign’s Evangelical Advisors related to transgender military service or healthcare for current or prospective transgender service members.

13. All currently operative military policies, directives, or procedures that pertain exclusively to transgender service members.

14. All Documents and Communications relating to the RAND Report.

15. All documents or communications relating to Secretary of Defense Ash Carter's Directive Type Memo 16-005, issued on June 30, 2016, regarding transgender military service and related healthcare.

16. All Documents or Communications relating to any application (including any action taken on such application) by a transgender person for a waiver sought for the purpose of accessing into the U.S. military.

17. With respect to waivers sought by transgender people for the purpose of accessing into the U.S. military, Documents sufficient to show the number of such waivers requested, the number of such waivers granted, and the number of such waivers denied.

18. With respect to waivers sought by transgender people for the purpose of accessing into the U.S. military, all Documents or Communications relating to the purpose or bases for the denial of such waivers.

19. All Documents or Communications, between June 30, 2017 and the present, relating to discharge proceedings against any transgender service member serving in the U.S. military.

20. All Documents or Communications, between June 30, 2017 and the present, relating to any transgender person who has applied to join the U.S. military.

21. All Documents and Communications produced by You to any party in any of the following lawsuits: *Doe v. Trump*, No. 17-cv-1597 (D.D.C.); *Stone v. Trump*, No. 1:17-cv-02459 (D. Md.); *Stockman v. Trump*, No. 17-cv-1799 (C.D. Cal.), and any cases consolidated therewith.

22. All Documents and Communications relating to the subject matter set forth in a June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff from Secretary James Mattis with Subject: Accession of Transgender Individuals in the Military Services.

23. All Documents or Communications relating to the reasons, grounds, or bases for the decision set forth in a June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff from Secretary James Mattis with Subject: Accession of Transgender Individuals in the Military Services.

24. All Documents or Communications relating to the cost of implementing the policy set forth in the August 25, 2017, memorandum entitled “Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security.”

25. All estimates or calculations, and related Documents and Communications, relating to the cost of separating currently serving transgender people from the military.

DEFINITIONS AND INSTRUCTIONS

1. “You,” “your,” and “yours,” whether or not capitalized, shall mean the Defendants, individually and/or collectively, including Defendants’ current and former employees, agents, affiliates, contractors, consultants, representatives, and other persons engaged directly or indirectly by or under the control of Defendants.

2. “The Policy” shall mean any of President Trump’s July 26, 2017 tweets (the “Tweets”) regarding transgender military service and related healthcare together with the August 25, 2017 Presidential Memorandum regarding the same (the “Presidential Memorandum”), and all changes in United States government policies regarding transgender military service undertaken or related healthcare or contemplated as a direct or indirect result of Tweets and/or the Presidential Memorandum, including but not limited to, “The Implementation Plan” (defined *infra*) and the “Interim Guidance” (defined *infra*).

3. “The Implementation Plan” shall mean the implementation plan referenced in Secretary of Defense Jim Mattis’ August 28, 2017 Release (No: NR-312-17).

4. The “Interim Guidance” shall mean the memorandum titled “Military Service by Transgender Individuals - Interim Guidance” and dated September 14, 2017.

5. “Communication” shall mean any transmission of information by one or more persons to one or more persons by any means including, without limitation, telephone conversations, letters, telegrams, teletypes, telexes, telecopies, e-mail, text messages, computer linkups, written memoranda, and face-to-face conversations; “communication” includes all documents and electronically stored information (“ESI”) containing, summarizing, or memorializing any communication.

6. “Document” or “documents” shall have the full meaning ascribed to it by Federal Rule of Civil Procedure 34(a) including ESI, and includes the original and any identical or nonidentical copy, regardless of origin or location, of any writing or record of any type or description, including but not limited to, all writings; records; contracts; agreements; communications (intra or inter-company); correspondence; memoranda; letters; facsimiles; electronic mail (e-mail); text messages; minutes, recordings, transcripts, and summaries of meetings, or recordings of meetings, speeches, presentations, conversations, or telephone calls (whether recorded in writing, mechanically, or electronically); handwritten and typewritten notes of any kind; statements; reports; voice recordings; desk calendars; diaries; logs; drafts; studies; analyses; schedules; forecasts; surveys; invoices; receipts; computer data; computer printouts; financial statements; balance sheets; statements of operations; audit reports; financial summaries; statements of lists of assets; work papers; pictures; photographs; drawings; computer cards; tapes; discs; printouts and records of all types; instruction manuals; policy manuals and statements; books; pamphlets; and every other device or medium by which information or intelligence of any type is transmitted, recorded, or preserved, or from which intelligence or information can be perceived.

7. “Identify,” whether or not capitalized, 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); and (c) a document, shall mean to provide the date, title, subject matter, author(s), recipient(s), and Bates number(s).

8. "Including" or "includes," whether or not capitalized, shall mean "including but not limited to" or "including without limitation."

9. "Member of Congress," whether or not capitalized, shall mean any Senator, Representative, committee, sub-committee, or group (formal or informal) of the United States Congress (or individual or staff member acting on behalf of any such Senator, Representative, committee, sub-committee, or group (formal or informal)).

10. The "RAND Report" means the study performed by the RAND Corporation regarding the impact of transgender military service or healthcare for current or prospective transgender service members (such report appears on the docket in this case at Dkt. 34-10).

11. "Relating to" or "related to," whether or not capitalized, when referring to any given subject matter, shall mean any 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.

12. 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.

13. Produce all documents within your possession, custody, or control including all documents in the possession, custody, or control of any United States government employee, agent, representative, consultant, attorney, accountant, advisors, or other persons directly or indirectly connected with you or subject to your control, any government department, agency or any other government subdivision.

14. If any responsive document has been lost, destroyed, removed from, or is no longer in your possession, custody, or control for any reason, please identify the document, its last known location, and the circumstances surrounding its loss, destruction, or removal.

15. If you contend that any responsive document is protected from disclosure pursuant to any privilege or work-product doctrine, please specifically set forth the privilege being asserted and any factual or legal basis for its assertion. Also set forth the date and title of the document, its subject matter generally, its author(s) and recipient(s), and its Bates number(s).

16. 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.

17. 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.

18. Pursuant to the Federal Rules of Civil Procedure, these requests are continuing and you must revise or supplement your responses and production whenever new or additional responsive information becomes known.

Dated: December 29, 2017

/s/ Jordan M. Heinz

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Scott Lerner (admitted pro hac vice)

Vanessa Barsanti (admitted pro hac vice)

Daniel I. Siegfried (admitted pro hac vice)

300 North LaSalle

Chicago, IL 60654

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on December 29, 2017, I caused a true and correct copy of the foregoing document to be served by email on the following counsel of record for Defendants:

Ryan B. Parker
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
ryan.parker@usdoj.gov

s/ Jordan M. Heinz

Exhibit 3

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

**PLAINTIFFS' FIRST SET OF REQUESTS
FOR ADMISSION TO DEFENDANTS**

Honorable Marsha J. Pechman

Pursuant to Federal Rules of Civil Procedure 26 and 36, Plaintiffs hereby request that Defendants answer the following requests for admission (“Requests”) within 30 days from the date of service hereof, in accordance with Rule 36, the Local Rules of this Court, and the Definitions and Instructions set forth below.

Requests

1. Admit that on July 26, 2017, President Trump stated via Twitter that: “[a]fter consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow [t]ransgender 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[.]”

2. Admit that on or before July 26, 2017, 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[.]”

3. Admit that prior to President Trump’s July 26, 2017 statements on Twitter, President Trump did not inform General Joseph F. Dunford, Jr. or any other member of the Joint Chiefs of Staff that the United States Government would not accept or allow transgender individuals to serve in any capacity in the U.S. military.

4. Admit that on or about June 19, 2017, General Joseph F. Dunford, Jr. stated: “[t]ransgender personnel are serving right now, and there is no review ongoing that would affect the ability of those currently serving to continue serving, provided they can meet the physical and mental qualifications of service, be worldwide deployable, and the same standards that every other soldier, sailor, airmen, and Marine meets.”

5. Admit that between July 26, 2017 and September 26, 2017, General Joseph F. Dunford, Jr. communicated to President Trump that transgender service members who otherwise meet the physical and mental standards for military service and are worldwide deployable should be able to continue serving.

6. Admit that between January 20, 2017 and July 26, 2017, Secretary Mattis did not recommend that President Trump adopt a policy that the United States Government not accept or allow transgender individuals to serve in any capacity in the U.S. military.

7. Admit that before July 26, 2017, Secretary Mattis advised President Trump against adopting a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

8. Admit that when President Trump issued the Tweets, Secretary Mattis had not communicated to President Trump a reversal of his previous advice that President Trump not adopt a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

9. Admit that before President Trump issued the Tweets, no individual within the Department of Defense holding, at the time of providing any such advice, the title of Secretary, Deputy Secretary, or Under Secretary, advised President Trump to adopt a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

10. Admit that before President Trump issued the Tweets, no individual serving in the U.S. Military holding at least, at the time of providing any such advice, the rank of Brigadier General, Major General, Lieutenant General, Chief of Staff, or General (for any individual serving

in the U.S. Army, Air Force, or Marine Corps) or Rear Admiral Lower Half, Rear Admiral, Vice Admiral, Chief of Naval Operations, or Admiral (for any individual serving in the U.S. Navy or Coast Guard), advised President Trump to adopt a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

11. Admit that between January 20, 2017 and July 26, 2017, Lieutenant General H.R. McMaster did not recommend that President Trump adopt a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

12. Admit that on or about January 12, 2017, at a Senate confirmation hearing, a Senator asked Secretary Mattis: “Is there something innate in being a woman or LGBT that would cause you to believe that they could not be part of a lethal force?” And Secretary Mattis responded: “No.”¹

13. Admit that prior to July 26, 2017, President Trump never spoke to any person he believed to be or knew to be transgender regarding his decision “that the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. military.”

14. Admit that as of July 25, 2017, Secretary Mattis had not expressed any intention to further extend, past January 1, 2018, the date on which a policy permitting transgender people to access into the U.S. military under the conditions set forth in Directive-Type Memorandum 16-005 would go into effect.

15. Admit that had President Trump not issued the Tweets or the August 25 Memorandum, You would have been prepared no later than January 1, 2018 to implement a policy permitting transgender people to access into the U.S. military under the conditions set forth in Directive-Type Memorandum 16-005.

¹ See https://www.armed-services.senate.gov/imo/media/doc/17-03_01-12-17.pdf.

16. Admit that You have never granted a medical waiver allowing a transgender individual to access into the U.S. military when otherwise applicable medical requirements would disqualify that individual from accession solely on account of the individual's transgender status, gender transition, or gender dysphoria.

Definitions and Instructions

1. "You," "your," and "yours," whether or not capitalized, shall mean the Defendants, individually and/or collectively, including Defendants' current and former employees, agents, affiliates, contractors, consultants, representatives, and other persons engaged directly or indirectly by or under the control of Defendants.

2. The "Tweets" shall mean any of President Trump's July 26, 2017 tweets regarding transgender military service or related healthcare.

3. The "August 25 Memorandum" shall mean the memorandum issued by President Trump on August 25, 2017 titled "Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security."

4. If You contend that any Request is objectionable in whole or in part, please state with particularity each objection, the basis for it, and the categories of information to which the objection applies, and respond to the Request insofar as it is deemed not objectionable.

5. If You find the meaning of any term in these Requests unclear, You shall assume a reasonable meaning, state what the assumed meaning is, and respond to the Request according to the assumed meaning.

6. If You intend to refuse to answer any Request by reason of the attorney-client privilege, work-product doctrine, or other privilege, doctrine, or immunity, please identify all bases, factual and legal, upon which such protection from discovery rests.

7. 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.

8. Pursuant to the Federal Rules of Civil Procedure, these requests are continuing and you must revise or supplement your responses and production whenever new or additional responsive information becomes known.

Dated: January 26, 2018

/s/ Jordan M. Heinz
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on January 26, 2018 I caused a true and correct copy of the foregoing document to be served by email on the following counsel of record for Defendants:

Ryan B. Parker
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
ryan.parker@usdoj.gov

/s/ Jordan M. Heinz_____

Exhibit 4

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

**DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS TO SECRETARY MATTIS AND
THE UNITED STATES DEPARTMENT OF DEFENSE**

Pursuant to Federal Rules of Civil Procedure 26 and 34 and the Local Rules of the U.S. District Court for the Western District of Washington, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' First Set of Requests for Production of Documents to Defendant James N. Mattis, in his official capacity as Secretary of Defense, and the United States Department of Defense, served December 29, 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,

¹ These objections and responses are limited to Secretary Mattis and the Department of Defense. Defendants will produce, or already have produced, separate objections for other Defendants.

materiality, privilege, competency, or any other appropriate ground. ESI will be produced in TIF format.

Objection to Definitions

Defendants object to Plaintiffs' Definition 6 of "Document" as encompassing "every other device or medium by which information or intelligence of any type is transmitted, recorded, or preserved, or from which intelligence or information can be perceived," 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 and Responses to Requests for Production

RFP No. 1:

All Documents and Communications related to the Policy.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further 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 produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 2:

All Documents supporting, refuting, or relating to Your contention that transgender service members hinder military readiness and lethality.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further 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” purports to require Defendants to search for and produce documents in any and all

locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 3:

All Documents supporting, refuting, or relating to Your contention that transgender service members disrupt unit cohesion.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further 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" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 4:

All Documents supporting, refuting, or relating to Your contention that transgender service members tax military resources.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further 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" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 5:

All documents relating to any justification considered by Defendants for the Policy other than those identified in Requests for Production Nos. 1-4.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further 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" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

RFP No. 6:

All Documents and Communications relating to, including all drafts of, the August 25, 2017, memorandum entitled “Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security.”

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further 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 produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 7:

All Documents and Communications related to President Trump's consultation with employees, agents, contractors, or consultants of the United States Armed Forces regarding transgender military service or related healthcare.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further 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 produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, Defendants object to the extent that "consultation" is vague and undefined.

RFP No. 8:

All studies, reports, instructions, directives, or other Documents relating to the "panel of experts serving within the Departments of Defense and Homeland Security to provide advice and

recommendations on the implementation of the president's direction." Statement of Secretary Jim Mattis, Release No: NR-312-17.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All studies, reports, instructions, directives, or other Documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 9:

All Documents and Communications between January 20, 2017 and July 28, 2017 related to military spending on gender confirmation surgeries.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, 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, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 10:

For the period starting January 20, 2017 up to and including July 28, 2017, all Communications between any member of Congress and President Trump or any individual within the Executive Office of the President concerning military service by transgender people or healthcare for current or prospective transgender service members, and any Documents constituting, summarizing, reflecting, or evidencing such Communications.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, 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, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 11:

All Documents reflecting visits to the White House on July 10, 2017 by President Trump's Evangelical Advisory Board members or his campaign's Evangelical Advisors, including but not limited to, visitor logs.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object to the extent that “reflecting” is vague and undefined.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 12:

All Documents related to, and Communications with, President Trump’s Evangelical Advisory Board members or his campaign’s Evangelical Advisors related to transgender military service or healthcare for current or prospective transgender service members.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further 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 related to, and Communications with” purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 13:

All currently operative military policies, directives, or procedures that pertain exclusively to transgender service members.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, 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, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 14:

All Documents and Communications relating to the RAND Report.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further 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 produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

RFP No. 15:

All documents or communications relating to Secretary of Defense Ash Carter's Directive Type Memo 16-005, issued on June 30, 2016, regarding transgender military service and related healthcare.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further 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 or Communications" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 16:

All Documents or Communications relating to any application (including any action taken on such application) by a transgender person for a waiver sought for the purpose of accessing into the U.S. military.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, 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, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 17:

With respect to waivers sought by transgender people for the purpose of accessing into the U.S. military, Documents sufficient to show the number of such waivers requested, the number of such waivers granted, and the number of such waivers denied.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object to the extent that “sufficient to show” is vague and undefined.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 18:

With respect to waivers sought by transgender people for the purpose of accessing into the U.S. military, all Documents or Communications relating to the purpose or bases for the denial of such waivers.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, 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, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 19:

All Documents or Communications, between June 30, 2017 and the present, relating to discharge proceedings against any transgender service member serving in the U.S. military.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, 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, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 20:

All Documents or Communications, between June 30, 2017 and the present, relating to any transgender person who has applied to join the U.S. military.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, 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, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 21:

All Documents and Communications produced by You to any party in any of the following lawsuits: *Doe v. Trump*, No. 17-cv-1597 (D.D.C.); *Stone v. Trump*, No. 1:17-cv-02459 (D. Md.); *Stockman v. Trump*, No. 17-cv-1799 (C.D. Cal.), and any cases consolidated therewith.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, 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, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 22:

All Documents and Communications relating to the subject matter set forth in a June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff from Secretary James Mattis with Subject: Accession of Transgender Individuals in the Military Services.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further 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 produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, Defendants object to the extent that “subject matter set forth in” is vague and undefined.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 23:

All Documents or Communications relating to the reasons, grounds, or bases for the decision set forth in a June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff from Secretary James Mattis with Subject: Accession of Transgender Individuals in the Military Services.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further 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 or Communications” purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, Defendants object to the extent that “reasons, grounds, or bases” is vague and undefined.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 24:

All Documents or Communications relating to the cost of implementing the policy set forth in the August 25, 2017, memorandum entitled “Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security.”

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, 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, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 25:

All estimates or calculations, and related Documents and Communications, relating to the cost of separating currently serving transgender people from the military.

Specific Objections:

Defendants 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 objections, a privilege log will be provided by the government, 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, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' 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 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
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U.S. Department of Justice

Exhibit 5

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

**DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET
OF INTERROGATORIES TO SECRETARY MATTIS AND
THE UNITED STATES DEPARTMENT OF DEFENSE**

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, and the United States Department of Defense (collectively, "Department of Defense"), served December 29, 2017.¹ In presenting these objections and responses, Defendants do not waive any further

¹ These objections and responses are limited to Secretary Mattis and the Department of Defense. Defendants will produce, or already have produced, separate objections and responses for other Defendants.

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 and Instructions

1. The Department of Defense objects to Definition 1 of “You,” “your,” and “yours” as substantially overbroad and problematic because the Department of Defense has more than three million current personnel, and millions more former personnel.

2. The Department of Defense objects to Plaintiffs’ Definition 5 of “Communication” as encompassing “electronically stored information (ESI) containing, summarizing, or memorializing any communication,” insofar as electronic information 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.

2. The Department of Defense objects to Plaintiffs’ Definition 6 of “Document” and “documents” as encompassing “ESI,” and “computer data,” 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 Interrogatories

Interrogatory No 1:

Identify and describe each of the governmental purposes or interests that you contend will be advanced by the Policy (including, but not limited to, any purported interest in military readiness, lethality, unit cohesion, and military resources).

Specific Objections:

The Department of Defense 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 an upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 2:

For each governmental purpose or interest identified in Your answers to Interrogatory 1 above, describe in detail all facts that You contend establish the need or justification to further each purpose or interest, including all Documents that You contend might establish the existence of such facts.

Specific Objections:

The Department of Defense 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 Department of Defense also objects to this interrogatory 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). Interrogatory No. 2 includes at least two discrete subparts: (1) a detailed description of the facts that establish a government interest, and (2) all documents that establish

the existence of those facts. See *Paananen v. Cellco P'ship*, No. C08-1042 RSM, 2009 WL 3327227, at *3 (W.D. Wash. Oct. 8, 2009) (concluding that an interrogatory had two discrete subparts where it asked both for “a defendant to summarize and state all the facts that support an affirmative defense,” and for “a defendant to identify the evidence (documents and witnesses) that support that affirmative defense”); *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”).

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 an upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 3:

For each governmental purpose or interest identified in Your answers to Interrogatory 1 above, describe in detail all facts that You contend demonstrate that the Policy furthers that purpose or interest, including all Documents that You contend might establish the existence of such facts.

Specific Objections:

The Department of Defense 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 Department of Defense also objects to this interrogatory 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). Interrogatory No. 3 includes at least two discrete subparts: (1) a detailed description of the facts that demonstrate that the policy furthers a particular government interest, and (2) all documents that establish the existence of those facts. *See Paananen*, No. C08-1042 RSM, 2009 WL 3327227, at *3 (concluding that an interrogatory had two discrete subparts where it asked both for “a defendant to summarize and state all the facts that support an affirmative defense,” and for “a defendant to identify the evidence (documents and witnesses) that support that affirmative defense”); *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”).

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 an upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 4:

Identify all individuals with whom President Trump has discussed or corresponded with regarding the United States’ past, present, or potential future governmental policies on transgender military service or related healthcare, and the dates of each discussion, from November 9, 2016 to the present.

Specific Objections:

The Department of Defense 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 Department of Defense also objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “all individuals” purports to require the Department of Defense to identify every single person President Trump has communicated with regarding transgender policies, regardless of the (a) type, (b) location, (c) amount, or (d) context of the communication.

Interrogatory No. 5:

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 Department of Defense 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. 6:

Identify all individuals with whom President Trump communicated or consulted in deciding that “the United States Government will not accept or allow Transgender individuals to

serve in any capacity in the U.S. military,” including each of the “Generals and military experts” referenced in President Trump’s July 26, 2017 tweet.

Specific Objections:

The Department of Defense 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. 7:

Explain the process You used to formulate the Tweets, the Presidential Memorandum, the Interim Guidance, and the Implementation Plan, and identify all sources of fact or opinion You consulted, considered, or otherwise referred to and the dates on which You first consulted, considered, or otherwise referred to such sources of information or opinion.

Specific Objections:

The Department of Defense 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 Department of Defense also objects to this interrogatory 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). Interrogatory No. 7 includes at least two discrete subparts: (1) an explanation of the process used to develop various policies, (2) all sources of fact or opinion

consulted in developing those policies, and the dates of such consultation. *See Paananen*, No. C08-1042 RSM, 2009 WL 3327227, at *3 (concluding that an interrogatory had two discrete subparts where it asked both for “a defendant to summarize and state all the facts that support an affirmative defense,” and for “a defendant to identify the evidence (documents and witnesses) that support that affirmative defense”); *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”).

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 an upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 8:

Explain President Trump’s purported concerns regarding the RAND Report or any other study or review that the Department of Defense relied upon when adopting Secretary Ash Carter’s policy allowing transgender people to serve openly in the military.

Specific Objections:

The Department of Defense 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. 9:

Identify all members of the “panel of experts serving within the Departments of Defense and Homeland Security to provide advice and recommendations on the implementation of the president’s direction.” Statement of Secretary Jim Mattis, Release No: NR-312-17.

Specific Objections:

The Department of Defense 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

Interrogatory No. 10:

Identify all Department of Defense and Department of Homeland Security employees who worked with, provided information to, or communicated with employees of the RAND National Defense Research Institute concerning the studies and/or fact gathering that resulted in the RAND Report.

Specific Objections:

The Department of Defense 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 an

upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 11:

Identify all persons with authority to approve medical waivers requested by transgender service members or transgender individuals seeking to join the U.S. military during the period from January 1, 2010 to the present.

Specific Objections:

The Department of Defense 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.

The Department of Defense further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, due to Plaintiffs' definition of "Identify," the reference to "Identify all persons" purports to require the Department of Defense to provide the full name, job title, employer from January 1, 2010 to present, current or last known address and telephone number, and business address and telephone number, of likely hundreds of individuals who had medical waiver authority during the designated time period.

Response:

Department of Defense Instruction 6130.03, which is publicly available at <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003p.pdf>, directs the

Secretaries of the Military Departments and the Commandant of the Coast Guard to “[a]uthorize the waiver of the [medical] standards [for appointment, enlistment, or induction in the military services] in individual cases for applicable reasons and ensure uniform waiver determinations.” DoDI 6130.03, Enclosure 2, paragraph 3b. The Services have implemented this direction and authority in different ways.

Army. In the Army, for example, the Army’s medical waiver authorities are identified in Army Regulation 40-501, paragraph 1-6. The current version of this regulation is available at: https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN3801_AR40-501_Web_FINAL.pdf. The appropriate waiver authority varies depending on the applicable accession program. For example, the Commanding General, United States Army Recruiting Command (USAREC) is the waiver authority for original enlistments, *see* AR 40-501, paragraph 1-6d, while the waiver authority for commissioning United States Military Academy (USMA) cadets is the Superintendent, USMA, following consultation with the USMA Surgeon. *Id.* at paragraph 1-6c(2). By previously produced memorandum, *see* Bates ARMY_00000582, the Secretary of the Army on April 20, 2017, withdrew and re-delegated medical waiver authority for transgender applicants to the Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA)(M&RA).

Navy. In the Navy, assignment of authority to grant a medical waiver is by position/title and outlined in the Manual of the Medical Department (MANMED), specifically section 15-31, which provides:

15-31 Waivers of the Physical Standards

(1) For some applicants, their current level of functioning and/or state of health in spite of the presence of a disqualifying medical condition warrants a waiver of the standards.

(2) Waivers of the standards do not make an applicant “physically qualified” but rather provide the applicant the opportunity to enlist or commission despite the fact that a disqualifying condition exists.

(3) The authority to grant a waiver lies with the commander charged with enlisting or commissioning the applicant and the specific program desired (e.g., Commander, Marine Corps Recruiting Command is the authority for applicants desiring enlistment in the Marine Corps). The medical authority to recommend a waiver of the standards to these various commands resides with the Chief, Bureau of Medicine and Surgery. By direction authority to carry out this function has been granted to:

(a) The Director, BUMED Qualifications and Standards. Provides waiver recommendations to: Commander, Marine Corps Recruiting Command; Commander, Naval Services Training Command (NROTC entry, commission of NROTC enrollees, commission of MMR, USNR enrollees); Commander, Naval Medical Education and Training Command; Commander, Officer Candidate School; Superintendent, U.S. Naval Academy; Superintendent, United States Merchant Marine Academy (USMMA entry); Commander, Navy Recruiting Command (Health Professions Scholarship Program, Nurse Commissioning Program). Additionally, the Director, Bureau of Medicine and Surgery, Qualifications and Standards provides guidance to the Navy and Marine Corps Reserve commands regarding physical qualification for retention of service members in the reserves and to the recruit training commands regarding retention of recruits found to have disqualifying medical conditions.

(b) The Senior Medical Officer, Naval Recruiting Command. Provides waiver recommendations to: Commander, Naval Recruiting Command (including Reserve Recruiting Command, excepting the programs listed in article 15-31 (3)(a) above).

(c) The Navy Brigade Surgeon, Uniformed Services University of Health Sciences. Provides waiver recommendations to: Assistant Secretary of Defense for Health Affairs (enrollment and graduation commissions).

(4) The processes for requesting a waiver vary based on the program the applicant is seeking. Review the pertinent guidance issued by the enlisting or commissioning authority above. However, regardless of the specific procedures involved, most delays in waiver recommendations result from inadequate information provided with the waiver request. When assembling a waiver request package ensure, at a minimum, the following information is included: most recent complete physical examination, all pertinent past medical records, documentation regarding past and current limitations of activity associated with the condition, and the results of any laboratory testing or specialty evaluation initiated by the examiner.

(5) Results of waiver requests (approved or denied) should be recorded in block 76 or 77 of the DD 2808.

(6) Waiver processes for special duty examinations and assignments are contained in Section IV within the description of the standards for each specific program.

(7) The Navy Medicine Operational Training Center Detachment, Naval Aerospace Medical Institute, (NAMI Code 342) is designated as the Program Manager for assessment and determination of the qualification of applicants, both enlisted and commissioned, for duties involving aviation. In this capacity, NAMI is authorized to issue correspondence recommending

waivers of physical standards to the commander charged with enlisting or commissioning and the specific program desired. Such correspondence shall include letters recommending commissioning by the appropriate authority.

Air Force. The Air Force medical waiver authority is discussed in Air Force Instruction 48-123, Section 6 B, but particularly paragraph 6.4 and Attachment 2. This instruction is publicly available at http://static.e-publishing.af.mil/production/1/af_sg/publication/afi48-123/afi48-123.pdf.

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 an upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 12:

Identify all persons with authority, during the period from January 1, 2010 to the present, to involuntarily discharge or separate service members on account of transgender status (including those individuals with authority to initiate any necessary proceedings for involuntary discharge or separation, even if final adjudicatory authority resides elsewhere).

Specific Objections:

The Department of Defense 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:

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 an upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 13:

Describe in detail the circumstances leading to Secretary James Mattis's June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff with Subject: Accession of Transgender Individuals in the Military Services, including all reasons for the decision set forth in the memo (whether or not such reasons were publicly stated or acknowledged).

Specific Objections:

The Department of Defense 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:

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. 14:

Identify all persons with knowledge or information concerning the facts set forth in your response to Interrogatory No. 13, including all persons who requested, advised, or consulted on the result set forth in the June 30, 2017 memorandum.

Specific Objections:

The Department of Defense 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; (d) communications or information protected by the presidential communications privilege; or (e) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Response:

Individuals with relevant knowledge and information include:

- Former Acting Secretary of the Navy, Sean J. Stackley
- Chief of Naval Operations, Admiral John M. Richardson
- Former Director of the Navy Staff, Admiral James G. Foggo
- Commandant of the Marine Corps, General Robert B. Neller

- Secretary of the Air Force, Heather Wilson
- Air Force Chief of Staff, General David L. Goldfein
- Former Acting Secretary of the Army, Robert M. Speer
- Chief of Staff of the Army, General Mark A. Milley.

Interrogatory No. 15:

Identify all communications between a member of Congress, on the one hand, and President Trump or any officer or employee of the Executive Office of the President, on the other, from January 20, 2017 to July 26, 2017, concerning military service by transgender people.

Specific Objections:

The Department of Defense 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; (d) communications or information protected by the presidential communications privilege; or (e) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

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
RYAN B. PARKER
Senior Trial Counsel
U.S. Department of Justice

Exhibit 6

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' FIRST REQUESTS FOR
PRODUCTION 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 December 29, 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.

¹ These objections are limited to President Trump. Defendants will produce, or already have produced, separate objections for other Defendants.

Objection to Definitions

Defendants object to Plaintiffs' Definition 6 of "Document" as encompassing "every other device or medium by which information or intelligence of any type is transmitted, recorded, or preserved, or from which intelligence or information can be perceived," 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.

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 related to the Policy.

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, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President also objects to the scope of this RFP on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the

reference to “[a]ll Documents and Communications” purports to require the President to search for and produce documents and communications in any and all locations, regardless of whether the documents and communications would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 2: All Documents supporting, refuting, or relating to Your contention that transgender service members hinder military readiness and lethality.

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, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further 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” purports to require the President to search for and produce documents in any and all

locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 3: All Documents supporting, refuting, or relating to Your contention that transgender service members disrupt unit cohesion.

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, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further 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” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 4: All Documents supporting, refuting, or relating to Your contention that transgender service members tax military resources.

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, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further 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” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 5: All documents relating to any justification considered by Defendants for the Policy other than those identified in Requests for Production Nos. 1-4.

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, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further 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” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 6: All Documents and Communications relating to, including all drafts of, the August 25, 2017, memorandum entitled “Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security.”

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, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further 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 produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 7: All Documents and Communications related to President Trump’s consultation with employees, agents, contractors, or consultants of the United States Armed Forces regarding transgender military service or related healthcare.

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, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further 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 produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, the President objects to the extent that “consultation” is vague and undefined.

The President will not produce any documents responsive to this RFP.

RFP No. 8: All studies, reports, instructions, directives, or other Documents relating to the “panel of experts serving within the Departments of Defense and Homeland Security to

provide advice and recommendations on the implementation of the president's direction.”

Statement of Secretary Jim Mattis, Release No: NR-312-17.

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, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All studies, reports, instructions, directives, or other Documents” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents

would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 9: All Documents and Communications between January 20, 2017 and July 28, 2017 related to military spending on gender confirmation surgeries.

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, 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: For the period starting January 20, 2017 up to and including July 28, 2017, all Communications between any member of Congress and President Trump or any individual within the Executive Office of the President concerning military service by transgender people or

healthcare for current or prospective transgender service members, and any Documents constituting, summarizing, reflecting, or evidencing such Communications.

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, 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. 11: All Documents reflecting visits to the White House on July 10, 2017 by President Trump's Evangelical Advisory Board members or his campaign's Evangelical Advisors, including but not limited to, visitor logs.

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, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects to the extent that “reflecting” is vague and undefined.

The President will not produce any documents responsive to this RFP.

RFP No. 12: All Documents related to, and Communications with, President Trump’s Evangelical Advisory Board members or his campaign’s Evangelical Advisors related to transgender military service or healthcare for current or prospective transgender service members.

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, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further 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 related to, and Communications with” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 13: All currently operative military policies, directives, or procedures that pertain exclusively to transgender service members.

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, 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 relating to the RAND Report.

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, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further 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 produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 15: All documents or communications relating to Secretary of Defense Ash Carter’s Directive Type Memo 16-005, issued on June 30, 2016, regarding transgender military service and related healthcare.

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, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further 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 or Communications” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 16: All Documents or Communications relating to any application (including any action taken on such application) by a transgender person for a waiver sought for the purpose of accessing into the U.S. military.

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, 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: With respect to waivers sought by transgender people for the purpose of accessing into the U.S. military, Documents sufficient to show the number of such waivers requested, the number of such waivers granted, and the number of such waivers denied.

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, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects to the extent that “sufficient to show” is vague and undefined.

The President will not produce any documents responsive to this RFP.

RFP No. 18: With respect to waivers sought by transgender people for the purpose of accessing into the U.S. military, all Documents or Communications relating to the purpose or bases for the denial of such waivers.

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, 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 or Communications, between June 30, 2017 and the present, relating to discharge proceedings against any transgender service member serving in the U.S. military.

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, 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 or Communications, between June 30, 2017 and the present, relating to any transgender person who has applied to join the U.S. military.

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, 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 produced by You to any party in any of the following lawsuits: *Doe v. Trump*, No. 17-cv-1597 (D.D.C.); *Stone v. Trump*, No. 1:17-cv-02459 (D. Md.); *Stockman v. Trump*, No. 17-cv-1799 (C.D. Cal.), and any cases consolidated therewith.

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, 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. 22: All Documents and Communications relating to the subject matter set forth in a June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff from Secretary James Mattis with Subject: Accession of Transgender Individuals in the Military Services.

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, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President furthers 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 produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, the President objects to the extent that “subject matter set forth in” is vague and undefined.

The President will not produce any documents responsive to this RFP.

RFP No. 23: All Documents or Communications relating to the reasons, grounds, or bases for the decision set forth in a June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff from Secretary James Mattis with Subject: Accession of Transgender Individuals in the Military Services.

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, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further 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 or Communications” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, the President objects to the extent that “reasons, grounds, or bases” is vague and undefined.

The President will not produce any documents responsive to this RFP.

RFP No. 24: All Documents or Communications relating to the cost of implementing the policy set forth in the August 25, 2017, memorandum entitled “Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security.”

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, 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. 25: All estimates or calculations, and related Documents and Communications, relating to the cost of separating currently serving transgender people from the military.

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, 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,

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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 7

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

**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 December 29, 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.

¹ These objections are limited to President Trump. Defendants will produce, or already have produced, separate objections for other Defendants.

Objections to Definitions and Instructions

1. Defendants object to Plaintiffs' Definition 5 of "Communication" as encompassing "electronically stored information (ESI) containing, summarizing, or memorializing any communication," insofar as electronic information 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.

2. Defendants object to Plaintiffs' Definition 6 of "Document" and "documents" as encompassing "ESI," and "computer data," 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.

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

Interrogatory No. 1: Identify and describe each of the governmental purposes or interests that you contend will be advanced by the Policy (including, but not limited to, any purported interest in military readiness, lethality, unit cohesion, and military resources).

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. 2: For each governmental purpose or interest identified in Your answers to Interrogatory 1 above, describe in detail all facts that You contend establish the need

or justification to further each purpose or interest, including all Documents that You contend might establish the existence of such facts.

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 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). Interrogatory No. 2 includes at least two discrete subparts: (1) a detailed description of the facts that establish a government interest, and (2) all documents that establish the existence of those facts. *See Paananen v. Cellco P'ship*, No. C08-1042 RSM, 2009 WL 3327227, at *3 (W.D. Wash. Oct. 8, 2009) (concluding that an interrogatory had two discrete subparts where it asked both for “a defendant to summarize and state all the facts that support an affirmative defense,” and for “a defendant to identify the evidence (documents and witnesses) that support that affirmative defense”); *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”).

Interrogatory No. 3: For each governmental purpose or interest identified in Your answers to Interrogatory 1 above, describe in detail all facts that You contend demonstrate that the Policy furthers that purpose or interest, including all Documents that You contend might establish the existence of such facts.

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 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). Interrogatory No. 3 includes at least two discrete subparts: (1) a detailed description of the facts that demonstrate that the policy furthers a particular government interest, and (2) all documents that establish the existence of those facts. *See Paananen*, No. C08-1042 RSM, 2009 WL 3327227, at *3 (concluding that an interrogatory had two discrete subparts where it asked both for “a defendant to summarize and state all the facts that support an affirmative defense,” and for “a defendant to identify the evidence (documents and witnesses) that support that affirmative defense”); *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”).

Interrogatory No. 4: Identify all individuals with whom President Trump has discussed or corresponded with regarding the United States' past, present, or potential future governmental policies on transgender military service or related healthcare, and the dates of each discussion, from November 9, 2016 to the present.

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 on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "all individuals" purports to require Defendants to identify every single person President Trump has communicated with regarding transgender policies, regardless of the (a) type, (b) location, (c) amount, or (d) context of the communication.

Interrogatory No. 5: 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. 6: Identify all individuals with whom President Trump communicated or consulted in deciding that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military,” including each of the “Generals and military experts” referenced in President Trump’s July 26, 2017 tweet.

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. 7: Explain the process You used to formulate the Tweets, the Presidential Memorandum, the Interim Guidance, and the Implementation Plan, and identify all sources of fact or opinion You consulted, considered, or otherwise referred to and the dates on which You first consulted, considered, or otherwise referred to such sources of information or opinion.

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 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). Interrogatory No. 7 includes at least two discrete subparts: (1) an explanation of the process used to develop various policies, (2) all sources of fact or opinion consulted in developing those policies, and the dates of such consultation. *See Paananen*, No. C08-1042 RSM, 2009 WL 3327227, at *3 (concluding that an interrogatory had two discrete subparts where it asked both for “a defendant to summarize and state all the facts that support an affirmative defense,” and for “a defendant to identify the evidence (documents and witnesses) that support that affirmative defense”); *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”).

Interrogatory No. 8: Explain President Trump’s purported concerns regarding the RAND Report or any other study or review that the Department of Defense relied upon when adopting Secretary Ash Carter’s policy allowing transgender people to serve openly in the 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. 9: Identify all members of the “panel of experts serving within the Departments of Defense and Homeland Security to provide advice and recommendations on the implementation of the president’s direction.” Statement of Secretary Jim Mattis, Release No: NR-312-17.

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. 10: Identify all Department of Defense and Department of Homeland Security employees who worked with, provided information to, or communicated with employees of the RAND National Defense Research Institute concerning the studies and/or fact gathering that resulted in the RAND Report.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD and DHS.

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. 11: Identify all persons with authority to approve medical waivers requested by transgender service members or transgender individuals seeking to join the U.S. military during the period from January 1, 2010 to the present.

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. 12: Identify all persons with authority, during the period from January 1, 2010 to the present, to involuntarily discharge or separate service members on account of transgender status (including those individuals with authority to initiate any necessary proceedings for involuntary discharge or separation, even if final adjudicatory authority resides elsewhere).

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; or (c) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Interrogatory No.13: Describe in detail the circumstances leading to Secretary James Mattis's June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff with Subject: Accession of Transgender Individuals in the Military Services, including all reasons for the decision set forth in the memo (whether or not such reasons were publicly stated or acknowledged).

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) 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. 14: Identify all persons with knowledge or information concerning the facts set forth in your response to Interrogatory No. 13, including all persons who requested, advised, or consulted on the result set forth in the June 30, 2017 memorandum.

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) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) communications or information protected by the presidential communications privilege; or (e) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Interrogatory No. 15: Identify all communications between a member of Congress, on the one hand, and President Trump or any officer or employee of the Executive Office of the President, on the other, from January 20, 2017 to July 26, 2017, concerning military service by transgender people.

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 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.

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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/s/ Ryan 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
RYAN B. PARKER
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U.S. Department of Justice

Exhibit 8

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February 23, 2018

BY E-MAIL

Mr. Ryan B. Parker
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Re: *Karnoski et al. v. Trump et al.*, 2:17-cv-01297-MJP

Dear Ryan:

I write regarding deficiencies in Defendants' Responses to Plaintiffs' First Set of Interrogatories and First Set of Requests for Production of Documents to (1) Secretary Mattis and the United States Department of Defense, and (2) President Donald Trump:

1. The Deliberative Process Privilege

Defendants both incorrectly assert the deliberative process privilege in response to Plaintiffs' two sets of discovery requests. In this case, Plaintiffs allege that Defendants have violated their constitutional rights to equal protection and substantive due process under the U.S. Constitution by enacting a military ban motivated by improper animus and discriminatory intent. To support their claims, Plaintiffs seek discovery of evidence regarding the intent underlying the Policy, which would include discovery into the deliberations, if any, leading up to President Trump's July 26, 2017 tweet announcing the Policy. Because of Plaintiffs' allegations, what process, if any, prompted the President's abruptly tweeted reversal of the military policy permitting service by transgender people is squarely at issue. *See Doe v. Trump*, 2017 WL 4873042, at *30 ("These circumstances provide additional support for Plaintiffs' claim that the decision to exclude transgender individual was not driven by genuine concerns regarding military efficacy.") Moreover, Defendants have put their predecisional conduct in dispute by defending the President's decision as sound military judgment based on "significant concerns," rather than the product of any animus or discriminatory intent. *See* Docket No. 69 at 30-32 (arguing that the President's

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abrupt policy shift was based on “significant concerns” such as military effectiveness, lethality, and unit cohesion rather than animus). Discovery on these issues is clearly warranted.

Given the core role of Defendants’ deliberation to the case, Plaintiffs’ need for this discovery overcomes any deliberative process privilege claim. Courts assessing whether to override the privilege engage in a balancing test that weighs “1) the relevance of the evidence; 2) the availability of other evidence; 3) the government’s role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.” *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Where, as here, the Constitution “makes the nature of governmental officials deliberations *the issue*, the privilege is a nonsequitur,” *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998), and “disappears altogether.” *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997); *see also United States v. Bd. of Educ. of City of Chicago*, 610 F. Supp. 695, 700 (N.D. Ill. 1985) (finding, in case alleging violation of desegregation consent decree, that “[i]t is hard to imagine a case in which the government’s deliberative process is more relevant or crucial”); *Newport Pacific Inc. v. County of San Diego*, 200 F.R.D. 628, 640 (S.D. Cal. 2001) (“[I]t is the very nature of the allegations [of misconduct] and the role of the government in the litigation itself that tip the scales in favor of disclosure.”).

Since the Court has already recognized “that the policy prohibiting openly transgender individuals from serving in the military is likely unconstitutional” (12/11/17 Order, at 2), there is a heavy presumption that the privilege does not apply. Besides the clear relevance of this discovery and the government’s core role in the litigation, the remaining two balancing test factors weigh in Plaintiffs’ favor too. This information is only available from Defendants and there is no alternative source from which Plaintiffs can obtain it. And it is also unlikely that disclosure would hinder future policy considerations or “erode the fundamental principles of the privilege.” *Newport Pacific Inc.*, 200 F.R.D. at 639.

Even if Plaintiffs’ needs did not completely override the privilege, Defendants could still not avoid disclosing discovery of post-decisional or non-deliberative materials. The privilege does not shield discovery into post-deliberative materials that “support a decision already made.” *Petroleum Info. Corp. v. United States Dep’t of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992); *see also Abteu v. U.S. Dep’t of Homeland Sec’y*, 808 F.3d 895, 898 (D.C. Cir. 2015) (holding information withheld under the deliberative process privilege must precede “in temporal sequence, the ‘decision’ to which it relates”).¹ The vast majority of Plaintiffs’ discovery requests—Plaintiffs’

¹ Defendants asserted in *Doe v. Trump*, Case No. 17-cv-1597 (D.D.C.) that President Trump’s July 26, 2017 tweets constituted a decision, but argued in that case that the 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.” (2/13/2018 Telephone Conf. Tr. at 33:10-15.) To the extent Defendants intend to make the same

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Interrogatory Nos. 1-4, 7-12 and RFP Nos. 1-8, 12-14, 16-21, 24-25—are not temporally limited to matters before July 26, 2017. Therefore, an assertion of the deliberative process privilege over matters after July 26, 2017 that discuss how to implement or apply the Policy is improper and Defendants may not use it to withhold discoverable information. *See Safeway, Inc. v. I.R.S.*, No. C 05-3182 SBA, 2006 WL 3041079, at *9 (N.D. Cal. Oct. 24, 2006) (holding “discussion of how to apply established policy and law to [] particular facts” not entitled to deliberative process privilege).

Second, the privilege also does not “protect a document which is merely peripheral to actual policy formation,” *Ethyl Corp. v. E.P.A.*, 25 F.3d 1241, 1248 (4th Cir. 1994), or any that is “purely factual” in nature. *FTC v. Warner Communications*, 742 F.3d at 1161. Many of Plaintiffs’ Interrogatories request non-deliberative, factual information such as the identities of individuals or dates. *See* Interrogatory Nos. 4, 5, 9, 11-12. Nothing in these requests call for the disclosure of any specific deliberative information and therefore the assertion of the privilege is baseless for each. *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1026 (E.D. Cal. Feb. 19, 2010) (holding interrogatory that requested identities of individuals called for “factual information” that was not deliberative).

In any event, given that Defendants have specifically asserted this privilege to every single one of Plaintiffs’ RFPs and interrogatories, they must either withdraw those assertions or provide a document-by-document privilege log with sufficient information to allow Plaintiffs to assess these claims. *See Wagafe v. Trump*, 2017 WL 5990134, at *3 (W.D. Wash. Oct. 19, 2017) (“The Court finds that the Government must provide a proper privilege log if it means to assert a deliberative-process privilege over certain documents.”). It is Defendants’ burden under Rule 26(b)(5) to identify any withheld materials and specify what pre-decision role it played in the policy-forming process. *Animal Legal Def. Fund, Inc. v. Dep’t of the Air Force*, 44 F. Supp. 2d 295, 299 (D.D.C. 1999) (“Although the Air Force has identified the deliberative process at issue . . . it has utterly failed to specify the role played by each withheld document in the course of developing that policy.”).

argument in *Karnoski*, that position is unsupported. The discussion of how to apply a policy, once promulgated, is not entitled to deliberative process privilege protection. *See Coastal States Gas Corp. v. D.O.E.*, 617 F.2d 854, 866 (D.C. Cir. 1980) (holding that to be “pre-decisional,” a document must be “generated before the adoption of an agency policy”); *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) (explaining that “discussions of how agency policies and decisions are to be enforced are by nature post-decisional”).

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Plaintiffs request that Defendants: (1) supplement their interrogatory responses to Interrogatory Nos. 4, 5, 9, 11 and 12 to withdraw their deliberative process privilege claim and provide any responsive information; (2) provide a privilege log identify every document withheld pursuant to the privilege and the basis for that claim including what pre-decisional role it played in the deliberative process leading up to the President's announcement of the Policy.

2. The Presidential Communications Privilege

Defendants also assert the presidential communications privilege at numerous points throughout their responses. The presidential communications privilege is “qualified, not absolute, and can be overcome by an adequate showing of need.” *In re Sealed Case*, 121 F.3d at 745. A party's need overcomes the privilege where the evidence is “directly relevant to the issues that are expected to be central to the trial” and is not available from other sources despite due diligence. *Id.* at 754. Again, these considerations weigh in favor of overcoming the privilege in this case. The Court has already recognized that the circumstances surrounding the Policy are suggestive of constitutional violations and Defendants themselves have put their communications at issue by defending the President's actions as the product of significant military concerns. *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.”).

Even if disclosure of the communications were not warranted, Plaintiffs are still entitled to a document-by-document log that contains sufficient information for them to assess Defendants' privilege claims. This would include the existence of any oral or written communication, its date, and the identity of the participants. It is no answer to say that the very existence of a communication is privileged from disclosure. The privilege only applies to “communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate.” *In re Sealed Case*, 121 F.3d at 752. If an adviser serves multiple functions and wears a “dual hat,” it is the government's burden to prove the the communication occurred specifically in conjunction with the process of advising the President. *Id.*

Put simply, Plaintiffs cannot assess Defendants' claims of presidential communications privilege if they do not provide any information whatsoever including the identity of individuals with whom the President communicated. The law is clear that Plaintiffs are entitled to a privilege log consistent with the requirements of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). *See Loving v. Dep't of Def.*, 550 F.3d 32, 36 (D.C. Cir. 2008) (government provided *Vaughn* index, including

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“documents reflect[ing] the sequential transmission of Loving’s case—and recommendation on it—to the President”); *Judicial Watch Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1110-11 (D.C. Cir. 2004) (government provided *Vaughn* index of 4,341 documents concerning individual pardon petition, including letters and reports from the Deputy Attorney General to the President); *In re Sealed Case*, 121 F.3d 729, 735 (D.C. Cir. 1997) (“[T]he White House produced a privilege log identifying the date, author, and recipient of each document withheld as well as a general statement of the nature of each document and the basis for the privilege on which the document was withheld.”); *U.S. Dep’t of the Treasury v. Pension Benefit Guaranty Corp.*, 222 F. Supp. 3d 38, 45 (D.D.C. 2016) (ordering privilege log where presidential communications privilege was asserted); *CREW v. Dep’t of Homeland Security*, 592 F. Supp. 2d 111, 117-19 (D.D.C. 2009). Please provide such a log as soon as practicable.

3. Interrogatory Responses Referring To Documents Generally

Defendants’ responses to Interrogatory Nos. 1-3, 7, and 10-12 directed to General Mattis and the U.S. Department of Defense all state that answers “may be derived from a review of certain documents that will be provided to Plaintiffs in an upcoming document production.” These responses are improper for three reasons:

First, Defendants have put forth no claim or evidence that the burden of identifying responses to Plaintiffs’ interrogatories is equally burdensome to Defendants as it is to Plaintiffs. Therefore, Defendants’ reliance on Rule 33(d) is facially improper.

Second, Defendants’ generic references to documents is a clear violation of the Rule 33(d) requirement to specify responsive records “in sufficient detail.” In other words, if Defendants’ reliance on Rule 33(d) was proper (which they have failed to show), Defendants still have not specified any records to enable Plaintiffs to identify the documents that would purportedly provide an answer to these interrogatories. This is improper and Defendants must supplement their responses as soon as possible to specify the documents that allegedly respond to the interrogatories. *See Laryngeal Mask Co. v. Ambu A/S*, 2009 WL 9530360, at *1 (S.D. Cal. Feb. 13, 2009), *sanctions order vacated on reconsideration*, 2009 WL 9530357 (S.D. Cal. Mar. 20, 2009) (“[Defendant] did not meet the requirements of Rule 33(d)...the documents had not yet been produced, thus there was no way to identify the specific responsive documents.”).

Third, Plaintiffs’ Interrogatory Nos. 1-3 specifically request that Defendants identify “governmental purposes or interests” and supporting facts that Defendants “contend” are supportive of various aspects of the Policy. Defendants answer these three interrogatories by again pointing Plaintiffs to unspecified documents. But regardless of whether Defendants identify specific documents or not, any use of Rule 33(d) in this situation would be improper—contention interrogatories may not be answered by simply referring to documents. *See Apple Inc. v. Wi-LAN*

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Inc., 2018 WL 733740, at *2 (S.D. Cal. Feb. 6, 2018) (“Because the interrogatory seeks [defendant’s] contentions, the burden of ascertaining that answer from the documents is not the same for [plaintiff and defendant].”); *Fleming v. Escort, Inc.*, 2011 WL 573599, at *2 (D. Idaho Feb. 13, 2011); *Mancini v. Ins. Corp. of N.Y.*, 2009 WL 1765295, at *3 (S.D. Cal. June 18, 2009). The only parties who can ascertain the specific purposes, interests, and facts Defendants’ contend are supportive of the Policy are the Defendants. It is not Plaintiffs’ burden to divine what Defendants contend based on any documents they identify.

Please supplement Defendants’ responses to Interrogatory Nos. 1-3 with specific written responses regarding the contentions at issue in each.

4. Non-Privilege Based Objections

Besides lodging privilege objections, Defendants also object to Plaintiffs’ RFPs on the grounds that they are purportedly “overbroad, unduly burdensome, and disproportionate to the needs of the case” or would result in production of documents that are “redundant” or not relevant. For example, Defendants provide no substantive response to RFP No. 14, which calls for all documents and communications relating to the RAND Report. Defendants are in no position to outright refuse production of *all* documents related to the Rand Report based on purported overbreadth, relevance, or proportionality objections. Plaintiffs are available to meet and confer regarding custodians or search terms to address Defendants’ purported concerns, but it is unacceptable for Defendants to refuse to search for and produce any documents without making any reasonable efforts to locate responsive documents.

Additionally, under Rule 34, Defendants are obligated to clarify whether any responsive documents are being withheld on the basis of any objection they have asserted. FED. R. CIV. P. 34(b)(2)(C) (“An objection must state whether any responsive materials are being withheld on the basis of that objection.”). Please confirm whether Defendants are withholding any responsive documents based on any objections that would not be identified in a privilege log. *Loop Al Labs Inc. v. Gatti*, 2016 WL 9132846, at *2 (N.D. Cal. May 6, 2016) (ordering amended RFP responses to “state whether any responsive materials are being withheld on the basis of objections”).

* * *

Please identify your availability to meet and confer regarding the above issues the week of February 26, 2018.

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Sincerely,

/s/ Jordan M. Heinz

Jordan M. Heinz

Exhibit 9

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

**DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET
OF REQUESTS FOR ADMISSION TO DEFENDANTS THE UNITED STATES
DEPARTMENT OF DEFENSE AND SECRETARY MATTIS**

Pursuant to Federal Rules of Civil Procedure 26 and 36 and the Local Rules of the U.S. District Court for the Western District of Washington, Defendants, through their undersigned counsel, hereby submit objections and responses to Plaintiffs' First Set of Requests for Admission ("RFA") to Defendants The United States Department of Defense and James N. Mattis, in his official capacity as Secretary of Defense (collectively, "Department of Defense"), served January 26, 2018.¹ In presenting these objections and responses, Defendants do not

¹ These objections and responses are limited to Secretary Mattis and the Department of Defense. Defendants will produce, or already have produced, separate objections and responses for other Defendants.

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.

General Objection

Plaintiffs and Intervenor have both moved for summary judgment under Federal Rule of Civil Procedure 56, arguing that there is “no genuine dispute as to any material fact” and that they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Accordingly, since Plaintiffs and Intervenor claim that there are no genuine disputes as to any material fact, discovery is inappropriate and not proportionate to the needs of the case.

Specific Objections and Responses to Requests for Admission

Request for Admission No 1:

Admit that on July 26, 2017, President Trump stated via Twitter that: “[a]fter consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow [t]ransgender 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[.]”

Response:

Admitted.

Request for Admission No. 2:

Admit that on or before July 26, 2017, 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 Department of Defense objects that “decided” is vague and ambiguous, as well as undefined by Plaintiffs.

Response:

After making a reasonable inquiry, the Department of Defense lacks information it knows or can readily obtain sufficient to admit or deny this RFA.

Request for Admission No. 3:

Admit that prior to President Trump’s July 26, 2017 statements on Twitter, President Trump did not inform General Joseph F. Dunford, Jr. or any other member of the Joint Chiefs of Staff that the United States Government would not accept or allow transgender individuals to serve in any capacity in the U.S. military.

Response:

After making a reasonable inquiry, the Department of Defense lacks information it knows or can readily obtain sufficient to admit or deny this RFA.

Request for Admission No. 4:

Admit that on or about June 19, 2017, General Joseph F. Dunford, Jr. stated:
“[t]ransgender personnel are serving right now, and there is no review ongoing that would affect the ability of those currently serving to continue serving, provided they can meet the physical

and mental qualifications of service, be worldwide deployable, and the same standards that every other soldier, sailor, airmen, and Marine meets.”

Response:

The Department of Defense admits that General Dunford made this statement, but denies that the selected quotation encompasses or reasonably represents General Dunford’s entire statement. Specifically, General Dunford immediately followed this statement with the following:

“The issue now is, the challenges of accession, individuals and the criteria for accession. So that’s—there have been some issues raised with regard to challenges of accessing transgender individuals, and that’s what the Secretary is reviewing. So this is not a reversal of the policy that was implemented before, this is the next phase of implementation, was accessions. There have been issues identified with accessions that, you know, the Service chiefs, some of the Service chiefs, believe need to be resolved before we move forward. And so that’s where we are right now.”

See <https://www.c-span.org/video/?429977-1/general-dunford-decision-additional-forces-afghanistan&start=3121> (last accessed February 13, 2018).

Request for Admission No. 5:

Admit that between July 26, 2017 and September 26, 2017, General Joseph F. Dunford, Jr. communicated to President Trump that transgender service members who otherwise meet the physical and mental standards for military service and are worldwide deployable should be able to continue serving.

Response:

After making a reasonable inquiry, the Department of Defense lacks information it knows or can readily obtain sufficient to admit or deny this RFA.

Request for Admission No. 6:

Admit that between January 20, 2017 and July 26, 2017, Secretary Mattis did not recommend that President Trump adopt a policy that the United States Government not accept or allow transgender individuals to serve in any capacity in the U.S. military.

Specific Objections:

The Department of Defense objects to this RFA 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.

Request for Admission No. 7:

Admit that before July 26, 2017, Secretary Mattis advised President Trump against adopting a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

Specific Objections:

The Department of Defense objects to this RFA 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.

Request for Admission No. 8:

Admit that when President Trump issued the Tweets, Secretary Mattis had not communicated to President Trump a reversal of his previous advice that President Trump not adopt a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

Specific Objections:

The Department of Defense objects to this RFA 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.

Request for Admission No. 9:

Admit that before President Trump issued the Tweets, no individual within the Department of Defense holding, at the time of providing any such advice, the title of Secretary, Deputy Secretary, or Under Secretary, advised President Trump to adopt a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

Specific Objections:

The Department of Defense objects to this RFA 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.

Request for Admission No. 10:

Admit that before President Trump issued the Tweets, no individual serving in the U.S. Military holding at least, at the time of providing any such advice, the rank of Brigadier General,

Major General, Lieutenant General, Chief of Staff, or General (for any individual serving in the U.S. Army, Air Force, or Marine Corps) or Rear Admiral Lower Half, Rear Admiral, Vice Admiral, Chief of Naval Operations, or Admiral (for any individual serving in the U.S. Navy or Coast Guard), advised President Trump to adopt a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

Specific Objections:

The Department of Defense objects to this RFA 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 Department of Defense also objects to this request for admission as overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the requirement to verify that no flag or general officers in the Department of Defense advised the President regarding a policy of excluding transgender individuals is overbroad because, of the general and flag officers in the Department of Defense, only the seven members of the Joint Chiefs of Staff have statutory authority to advise the President. *See* 10 U.S.C. 151. The request is unduly burdensome because a complete response requires confirmation or denial from more than 950 general and flag officers in the Department of Defense who are assigned worldwide. Individuals without legal authority to advise the President are unlikely to have relevant information, and identifying and contacting all such individuals would be excessively burdensome and disproportionate to the needs of the case.

Request for Admission No. 11:

Admit that between January 20, 2017 and July 26, 2017, Lieutenant General H.R. McMaster did not recommend that President Trump adopt a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

Response:

After making a reasonable inquiry, the Department of Defense lacks information it knows or can readily obtain sufficient to admit or deny this RFA.

Request for Admission No. 12:

Admit that on or about January 12, 2017, at a Senate confirmation hearing, a Senator asked Secretary Mattis: “Is there something innate in being a woman or LGBT that would cause you to believe that they could not be part of a lethal force?” And Secretary Mattis responded: “No.”²

Response:

Admitted.

Request for Admission No. 13:

Admit that prior to July 26, 2017, President Trump never spoke to any person he believed to be or knew to be transgender regarding his decision “that the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. military.”

² See https://www.armed-services.senate.gov/imo/media/doc/17-03_01-12-17.pdf.

Response:

After making a reasonable inquiry, the Department of Defense lacks information it knows or can readily obtain sufficient to admit or deny this RFA.

Request for Admission No. 14:

Admit that as of July 25, 2017, Secretary Mattis had not expressed any intention to further extend, past January 1, 2018, the date on which a policy permitting transgender people to access into the U.S. military under the conditions set forth in Directive-Type Memorandum 16-005 would go into effect.

Specific Objections:

The Department of Defense objects to this RFA 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.

Request for Admission No. 15:

Admit that had President Trump not issued the Tweets or the August 25 Memorandum, You would have been prepared no later than January 1, 2018 to implement a policy permitting transgender people to access into the U.S. military under the conditions set forth in Directive-Type Memorandum 16-005.

Specific Objections:

The Department of Defense objects on the grounds that this RFA calls for speculation about a hypothetical situation.

Response:

Denied.

Request for Admission No. 16:

Admit that You have never granted a medical waiver allowing a transgender individual to access into the U.S. military when otherwise applicable medical requirements would disqualify that individual from accession solely on account of the individual's transgender status, gender transition, or gender dysphoria.

Specific Objections:

The Department of Defense objects on the basis that this RFA is vague, overly broad, unduly burdensome, and disproportionate to the needs of the case, as it is not confined to any particular time period. Specifically, requiring the Department of Defense to search through all accession records of all of the Services for an undefined period of time would require an unreasonable number of hours of work from an unreasonably large number of Department of Defense employees.

The Department of Defense also objects on the grounds that the RFA is ambiguous, as it requests information regarding medical qualification determinations based on terms that are not used in making medical qualification determinations.

Response:

Because this RFA is vague, overly broad, and unduly burdensome, after making a reasonable inquiry, the Department of Defense lacks information it knows or can readily obtain sufficient to admit or deny this RFA.

Date: February 26, 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

CERTIFICATE OF SERVICE

I hereby certify that, on February 26, 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 10

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' FIRST SET
OF REQUESTS FOR ADMISSION TO DEFENDANT DONALD J. TRUMP**

Pursuant to Federal Rules of Civil Procedure 26 and 36 and the Local Rules of the U.S. District Court for the Western District of Washington, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs' First Set of Requests for Admission to Defendant Donald J. Trump, in his official capacity as President of the United States, served January 26, 2018.¹ 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.

¹ These objections are limited to President Trump. Defendants will produce, or already have produced, separate objections and responses for other Defendants.

General Objection to All Requests for Admission

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, the Secretary of Defense has submitted an implementation plan to the President, which the President is now reviewing. Implementation of that plan could narrow, if not completely eliminate, any purported reason for such broad discovery directed to the President. Any discovery into the basis for the military policy concerning transgender individuals contained in that plan, if permitted at all, 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.

Finally, Plaintiffs and Intervenor have both moved for summary judgment under Federal Rule of Civil Procedure 56, arguing that there is “no genuine dispute as to any material fact” and

that they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Accordingly, since Plaintiffs and Intervenor claim that there are no issues of fact, discovery is inappropriate.

Specific Objections to Requests for Admission

Request for Admission No 1:

Admit that on July 26, 2017, President Trump stated via Twitter that: “[a]fter consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow [t]ransgender 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[.]”

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection. Defendants respectfully refer the Court to the July 26, 2017 tweets for a complete statement of their contents.

Request for Admission No. 2:

Admit that on or before July 26, 2017, 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 objects to this RFA 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.

The President also objects that “decided” is vague and ambiguous, as well as undefined by Plaintiffs.

Request for Admission No. 3:

Admit that prior to President Trump’s July 26, 2017 statements on Twitter, President Trump did not inform General Joseph F. Dunford, Jr. or any other member of the Joint Chiefs of Staff that the United States Government would 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 RFA 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.

Request for Admission No. 4:

Admit that on or about June 19, 2017, General Joseph F. Dunford, Jr. stated: “[t]ransgender personnel are serving right now, and there is no review ongoing that would affect the ability of those currently serving to continue serving, provided they can meet the physical

and mental qualifications of service, be worldwide deployable, and the same standards that every other soldier, sailor, airmen, and Marine meets.”

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

Request for Admission No. 5:

Admit that between July 26, 2017 and September 26, 2017, General Joseph F. Dunford, Jr. communicated to President Trump that transgender service members who otherwise meet the physical and mental standards for military service and are worldwide deployable should be able to continue serving.

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 RFA 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.

Request for Admission No. 6:

Admit that between January 20, 2017 and July 26, 2017, Secretary Mattis did not recommend that President Trump adopt a policy that the United States Government 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 RFA 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.

Request for Admission No. 7:

Admit that before July 26, 2017, Secretary Mattis advised President Trump against adopting a policy of excluding transgender individuals from serving 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 RFA 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.

Request for Admission No. 8:

Admit that when President Trump issued the Tweets, Secretary Mattis had not communicated to President Trump a reversal of his previous advice that President Trump not

adopt a policy of excluding transgender individuals from serving 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 RFA 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.

Request for Admission No. 9:

Admit that before President Trump issued the Tweets, no individual within the Department of Defense holding, at the time of providing any such advice, the title of Secretary, Deputy Secretary, or Under Secretary, advised President Trump to adopt a policy of excluding transgender individuals from serving 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 RFA 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.

Request for Admission No. 10:

Admit that before President Trump issued the Tweets, no individual serving in the U.S. Military holding at least, at the time of providing any such advice, the rank of Brigadier General, Major General, Lieutenant General, Chief of Staff, or General (for any individual serving in the U.S. Army, Air Force, or Marine Corps) or Rear Admiral Lower Half, Rear Admiral, Vice Admiral, Chief of Naval Operations, or Admiral (for any individual serving in the U.S. Navy or Coast Guard), advised President Trump to adopt a policy of excluding transgender individuals from serving 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 RFA 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.

Request for Admission No. 11:

Admit that between January 20, 2017 and July 26, 2017, Lieutenant General H.R. McMaster did not recommend that President Trump adopt a policy of excluding transgender individuals from serving 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 RFA 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.

Request for Admission No. 12:

Admit that on or about January 12, 2017, at a Senate confirmation hearing, a Senator asked Secretary Mattis: “Is there something innate in being a woman or LGBT that would cause you to believe that they could not be part of a lethal force?” And Secretary Mattis responded: “No.”²

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

Request for Admission No. 13:

Admit that prior to July 26, 2017, President Trump never spoke to any person he believed to be or knew to be transgender regarding his decision “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.

² See https://www.armed-services.senate.gov/imo/media/doc/17-03_01-12-17.pdf.

The President further objects to this RFA 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.

Request for Admission No. 14:

Admit that as of July 25, 2017, Secretary Mattis had not expressed any intention to further extend, past January 1, 2018, the date on which a policy permitting transgender people to access into the U.S. military under the conditions set forth in Directive-Type Memorandum 16-005 would go into effect.

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 RFA 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.

Request for Admission No. 15:

Admit that had President Trump not issued the Tweets or the August 25 Memorandum, You would have been prepared no later than January 1, 2018 to implement a policy permitting transgender people to access into the U.S. military under the conditions set forth in Directive-Type Memorandum 16-005.

Specific Objections:

The President objects on the grounds that this RFA is not properly directed to him.

To the extent that this RFA 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 also objects on the grounds that this RFA calls for speculation about a hypothetical situation.

Request for Admission No. 16:

Admit that You have never granted a medical waiver allowing a transgender individual to access into the U.S. military when otherwise applicable medical requirements would disqualify that individual from accession solely on account of the individual's transgender status, gender transition, or gender dysphoria.

Specific Objections:

The President objects on the grounds that this RFA is not properly directed to him.

To the extent that this RFA 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 on the basis that this RFA is vague, as it is not confined to any particular time period.

Date: February 26, 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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Counsel for Defendants

CERTIFICATE OF SERVICE

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/s/ Ryan Parker
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U.S. Department of Justice

Exhibit 11

Filename: Karnoski - CJCS Index.XLSX

This document will be distributed in native format for party review.

Exhibit 12

Filename: Karnoski - DHA Privilege
Log.XLSX

This document will be distributed in native
format for party review.

Exhibit 13

Filename: Karnoski - DoD Privilege Log for
Soper Depo Docs.XLSX

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format for party review.

Exhibit 14

Filename: Karnoski - Navy Production 1
Privilege Log.XLSX

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format for party review.

Exhibit 15

Filename: Karnoski - Navy Production 1
Redaction Log.XLSX

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format for party review.

Exhibit 16

Filename: Karnoski - Navy Production 2
Privilege Log.XLSX

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format for party review.

Exhibit 17

Filename: Karnoski - Navy Production 2
Redaction Log.XLSX

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format for party review.

Exhibit 18

Filename: Karnoski - Navy Production 3
Privilege Log.XLSX

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format for party review.

Exhibit 19

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Redaction Log.XLSX

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format for party review.

Exhibit 20

Filename: Karnoski - Navy Production 4
Privilege Log.XLSX

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format for party review.

Exhibit 21

Filename: Karnoski - Navy Production 4
Redaction Log.XLSX

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format for party review.

Exhibit 22

Filename: Karnoski - Prod. No. 4 - DoD -
Revisions.XLSX

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format for party review.

Exhibit 23

Filename: Karnoski - Prod. No. 4 - DoD.XLSX

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Exhibit 24

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Exhibit 25

Filename: Karnoski - Prod. No. 6 - DoD.XLSX

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Exhibit 26

Filename: Karnoski - Prod. Nos. 1-3 - Air
Force.XLSX

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format for party review.

Exhibit 27

Filename: Karnoski - Prod. Nos. 1-3 -
Army.XLSX

This document will be distributed in native
format for party review.

Exhibit 28

KIRKLAND & ELLIS LLP

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April 26, 2018

BY E-MAIL

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Re: *Karnoski et al. v. Trump et al.*, 2:17-cv-01297-MJP

Dear Ryan:

I write regarding the privilege logs that Defendants' produced on March 20, 2018. As we explained in our February 23, 2018 letter, Plaintiffs do not believe the deliberative process and presidential communication privileges apply here given the constitutional issues in dispute and Plaintiffs' clear need for discovery into the process surrounding the announcement and implementation of the Ban. Plaintiffs reiterate the positions set forth in our February 23 letter and believe that Defendants should withdraw any assertion of these two privileges. Additionally, after having reviewed Defendants' privilege logs, there are several issues that remain in dispute.

First, the President has failed to produce a privilege log as required by Rule 26(b)(5) of the Federal Rules of Civil Procedure and the Court's April 19, 2018 Order denying Defendants' motion for a protective order. (Dkt. 235.) *Second*, Defendants improperly rely on the deliberative process privilege to withhold thousands of documents. *Third*, Defendants violate Rule 26(b)(5) in several ways, including relying on boilerplate justifications and failing to identify authors of documents purportedly covered by a privilege.

1. The President Must Produce A Privilege Log.

As a threshold matter, Defendants have provided no privilege log for the President. Contrary to Defendants' assertions, the President is not immune from responding to properly propounded civil discovery based on separation-of-powers principles or matters of executive

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privilege. The authority Defendants have repeatedly relied upon does not stand for such a sweeping proposition, as explained in our April 23, 2018 letter to you. Plaintiffs have served proper discovery on the President that is narrowly tailored to obtain highly relevant information, and nothing in the law allows the President to stonewall these discovery efforts.

The President should respond fully and in good faith to Plaintiffs' requests for production, interrogatories, and requests for admission. In conjunction with these responses, the President is obligated to serve a privilege log in compliance with Rule 26(b)(5). While Defendants have already provided a purported log for the President in the *Stone* case, it is plainly inadequate and should not simply be reproduced in this case. Importantly, the Court has already ordered that, "[t]o the extent that Defendants intend to claim Executive privilege, they must 'expressly make the claim' and provide a privilege log 'describ[ing] the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.' Fed. R. Civ. P. 26(b)(5)(i)-(ii)." (4/19/2018 Order Denying Mot. Prot. Order, Dkt. 235.) The *Stone* log, which generically categorizes documents and provides little to no information about the underlying documents, is plainly inadequate and would not suffice here. Please timely supplement Defendants' discovery response with a privilege log from the President containing sufficient information to allow Plaintiffs to assess any privilege claim including, but not limited to, the presidential communications privilege and the deliberative process privilege.

2. The Deliberative Process Privilege.

Defendants' privilege logs indicate that over 15,000 responsive documents have been withheld pursuant to the deliberative process privilege. As we explained in our February letter, the deliberative process privilege does not apply where, as here, the Constitution "makes the nature of governmental officials deliberations *the issue*." *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998). In such instances, the privilege "is a non-sequitur," *id.*, and "disappears altogether." *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997).¹ The Court's recent summary judgment opinion confirms that the deliberative process privilege has no application in this case. The question of whether the Ban withstands strict scrutiny "necessarily turns on facts related to Defendants' deliberative process," including "the timing and thoroughness of [the DoD's] study and the soundness of medical and other evidence it relied

¹ See also *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.")

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upon.” (4/13/18 Op. and Order at 26, 28, Dkt. 233.) But even if the privilege did apply—and it does not—the Ninth Circuit’s four-factor balancing test would undoubtedly weigh in favor of overcoming the privilege for the reasons stated in our earlier letter. *See FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Put simply, Defendants cannot seek the Court’s deference for their deliberative processes while shielding those processes from discovery and constitutional scrutiny. Defendants should withdraw their privilege assertions and produce any documents that have been withheld based on the deliberative process privilege.

Finally, Defendants have also waived the deliberative process privilege by relying on the underlying deliberative materials as support for the Implementation Plan. *City of Va. Beach v. U.S. Dep’t of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993) (“[T]he agency may waive that protection through voluntary, authorized release of the material to a nongovernmental recipient.”); *Coastal State Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (holding document is no longer privileged if it “adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public”).

Setting aside the fact that the privilege does not apply at all or has been waived, Defendants’ privilege logs nevertheless reveal that Defendants have improperly withheld thousands of documents that do not fall within the scope of the privilege:

Post-Decisional Materials. Based on Plaintiffs’ review, Defendants have fully withheld over 5,500 documents under the deliberative process privilege even though the documents were created *after* the President’s July 26, 2017 tweets announcing the Ban. It is well established that the privilege does not prevent disclosure of post-decisional materials. *See Abtew v. U.S. Dep’t of Homeland Sec’y*, 808 F.3d 895, 898 (D.C. Cir. 2015) (holding information withheld under the deliberative process privilege must precede “in temporal sequence, the ‘decision’ to which it relates”); *Coastal States Gas Corp. v. D.O.E.*, 617 F.2d 854, 866 (D.C. Cir. 1980) (holding that to be “pre-decisional,” a document must be “generated before the adoption of an agency policy”); *Greenpeace v. Nat’l Marine Fisheries Serv.*, 198 F.R.D. 540, 543 (W.D. Wash. 2000) (“In order to qualify for the privilege, a document must be both ‘predecisional’ and ‘deliberative,’ meaning it must actually be related to the process by which policies are formulated.”). Any documents that were created after the President’s decision to announce a discriminatory policy against transgender individuals are necessarily post-decisional and cannot fall within the scope of the privilege. Please withdraw your deliberative process privilege assertion for all documents that post-date the President’s July 26, 2017 announcement.

Non-Deliberative Materials. Defendants have likewise improperly withheld documents that are either non-deliberative or pertain only to the implementation of an already established policy. *See 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) (explaining that

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“discussions of how agency policies and decisions are to be enforced” do not fall within the scope of the deliberative process privilege); *Greenpeace*, 198 F.R.D. at 543 (“In order to qualify for the privilege, a document must be both ‘predecisional’ and ‘deliberative,’ meaning it must actually be related to the process by which policies are formulated.”); *Columbia Snake River Irrigators Ass’n v. Lohn*, No. C07-1388MJP, 2008 WL 750574, at *3 (W.D. Wash. Mar. 19, 2008) (Pechman, J.) (“Although all information generated by a regulatory agency is presumably useful, at least potentially, in some decision-making process, a predecisional document must relate to a final decision or policy. . . . [T]he agency must identify a specific decision to which the document is predecisional.”).

For example, the Defense Health Agency’s log withholds 33 documents that relate solely to the “*implementation* of transgender policy.”² Similarly, the DoD, Air Force, and Army each assert privilege over documents clearly pertaining to the implementation of the Ash Carter policy, not any deliberations about the formulation or creation of new agency policies.³ These sorts of documents relating to implementation of preexisting policies cannot be withheld under the deliberative process privilege. *See Nat’l Day Laborer Organizing Network v. U.S. Immigration & Customs Enforcement Agency*, 811 F. Supp. 2d 713, 752 (S.D.N.Y. 2011) (overruling withholding of “Email on Implementation of Policy” under deliberative process privilege); *Davis v. City of New York*, 2011 WL 1742748, at *6 (S.D.N.Y. May 5, 2011) (denying deliberative process privilege for documents written to explain “implementation” of an “existing policy”); *Bell v. Bd. of Educ.*, 2008 WL 4107445, at *3 (D. N.M. Apr. 22, 2008) (“[T]he privilege primarily protects deliberations about what the broad policies should be, not individual decisions implementing existing policy.”).

Nor does the process shield documents relating to the so-called “panel of experts.”⁴ The Court’s recent opinion underscored that the panel was charged with developing a “plan for *how*” to implement the Ban, not “*whether* or not the directives should be implemented.” (4/13/18 Op. and Order at 12, Dkt. 233.) In other words, all of their activities were non-deliberative (and post-decisional) and therefore not within the scope of the privilege.

² *See, e.g.*, Entry No. 1, DHA_00000001-009_UR (emphasis added).

³ *See, e.g.*, SOPER DEP RFP_8 00014-00015 (“Readiness of Military Departments to *Implement* Accession of Transgender Applicants into Military Service” (emphasis added)); SOPER DEP RFP_10 00070-00090 (“AFMS Transgender Training - Draft); AF_00009948-967 (May 2017 power point re “AFRC Transgender Training For Medics”); ARMY_15-75, 79 (January 2017 presentation for “training leaders”).

⁴ *See e.g.*, DoD00001367 (“RE: (U) Proposed Email to Members of the Panel of Experts Considering the Matter of Service by Transgender Persons (UNCLASSIFIED)”); DoD00001959 (email “RE: Panel of Experts - Military Physicians); DoD00009404 (“Email chain concerning Meeting Notes from 11/09/17 Transgender Panel of Experts”).

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Factual Materials. The privilege likewise does not permit withholding of documents that are purely factual in nature, including any professional judgments or interpretations of the underlying factual information. *See Columbia Snake River Irrigators Ass'n v. Lohn*, 2008 WL 750574, at *2 (“The privilege protects only expressions of opinion or recommendations, not purely factual material.”); *Seafirst*, 644 F. Supp. at 1163 (“[T]he statements characterized . . . as opinion or professional judgment are essentially expert interpretations of facts. . . . [R]eliance on expertise does not transform interpretations of facts into communications protected by the deliberative process privilege.”); *Greenpeace*, 198 F.R.D. at 544 (quoting *Seafirst* and stating that “expressions of expert opinion and professional judgment must relate to the exercise of policy-oriented judgment” to benefit from the privilege). Defendants’ privilege logs demonstrate they are improperly withholding numerous documents containing purely factual data or information that is responsive to Plaintiffs’ discovery requests.⁵

As stated above, the deliberative process privilege cannot be asserted in this case for three reasons: (1) it does not apply in cases, like this one, focusing on the deliberative process itself; (2) even if it did apply, the facts and circumstances of this case overcome it; and (3) Defendants have waived the privilege by relying on the underlying deliberative materials in the public Implementation Plan. As Plaintiffs first requested in February, please withdraw all of Defendants’ assertions of the deliberative process privilege.

3. Other Deficiencies.

Rule 26(b)(5) commands a party withholding documents on the basis of any privilege to provide sufficient information to enable the adverse party to assess the claim. Defendants bear the burden of providing sufficient information to justify a privilege claim whether based on the deliberative process privilege, presidential communications privilege, or attorney-client privilege. *See MKB Constructors v. Am. Zurich Ins. Co.*, 2014 WL 2526901, at *10 (W.D. Wash. May 27, 2014) (“The party asserting the privilege or protection from disclosure beard the burden of proving the privilege’s or protection’s applicability to the given documents.”). They have not met this burden in several respects.

Boilerplate Justifications. Defendants rely on improper boilerplate objections that fail to provide Plaintiffs sufficient information to assess the claimed privilege. *Judicial Watch, Inc. v. U.S. Dep’t of Homeland Sec.*, 841 F. Supp. 2d 142, 162 (D.D.C. 2012) (finding “legal boilerplate

⁵ *See* SOPER DEP RFP_18 00608-661 (withholding document containing “Health Data for Members with Gender Dysphoria”); SOPER DEP RFP_21 00765-00820 (withholding power point presentation regarding “Health Data on Active Duty Service Members with Gender Dysphoria”); ARMY_341 (withholding document re “surgical procedures performed at MTFs”); ARMY 352-383 (withholding presentation “summarizing health and readiness data of Active Duty members with gender dysphoria”).

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about the deliberative process privilege” was insufficient); *Greenpeace*, 198 F.R.D. at 543 (holding that “blanket assertions” of deliberative process privilege are improper and agency must provide “precise and certain” reasons why document is covered). For example, Defendants’ logs for the DHA and DoD’s Soper Deposition Documents all assert the same blanket deliberative process privilege justification: “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.” This boilerplate and non-specific justification is insufficient to allow Plaintiffs to assess this claim of privilege, particularly where the description of the document provides no indication of what it is or how it played a role in the deliberative process. *See, e.g.* SOPER DEP RFP_21 00851-856 (document description: “Email re: Slides (with attachments)”). Defendants must provide specific justifications that demonstrate how the document fits within the scope of the privilege. The vague and generic justifications currently provided are insufficient.

Unidentified Authors and Recipients. Defendants’ privilege logs fail to adequately identify the author or recipients of thousands of documents. For example, the Navy’s privilege logs contains approximately 3,750 entries that do not identify an author or recipient of a document being withheld as privileged, including on the basis of attorney-client privilege. Of course, to properly assert the attorney-client privilege, Defendants must first identify “the attorney and client involved.” *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992). The hundreds of entries in Defendants’ privilege logs that identify neither are plainly improper.

In other instances, Defendants have identified authors or recipients by acronyms or institutional titles without providing an explanation of the specific individuals contained within a group. For instance, the Joint Chief’s log identifies various authors only by acronyms (P&R, DSD, SD, OSD(PA), HQ USPMPCOM, OUSD (P&R), etc.) with no explanation of who comprises those groups or what specific individual(s) actually authored the document. Similarly, the log refers to groups with no identification of the individuals within that group, e.g. “Panel of Experts” or “Transgender Senior Implementation Working Group.” Plaintiffs are entitled to know which individuals drafted or received the documents in order to evaluate Defendants’ privilege claims.

* * *

In light of the foregoing deficiencies, Plaintiffs request that Defendants: (1) provide a privilege log for the President that complies with Rule 26(b)(5); (2) withdraw their deliberative process privilege assertions; and (3) revise their current privilege logs to provide sufficient information to test privilege assertions by removing boilerplate justifications and by identifying the authors of all documents.

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Please confirm that Defendants will promptly remedy these deficiencies by May 1, 2018, or, alternatively, propose a time to meet and confer prior to that date if your position is that Defendants' privilege assertions are proper and adequately documented. If the parties are unable to promptly discuss these issues, Plaintiffs will seek necessary relief from the Court.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel I. Siegfried". The signature is written in a cursive, flowing style.

Daniel I. Siegfried