IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Case 1:17-cv-02459-MJG Hon. Marvin J. Garbis

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL SUPPLEMENTAL INTERROGATORY ANSWERS AND PRODUCTION

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INTRODUCTION

After serving broad discovery requests touching on numerous policies and decisions made by the President and the Department of Defense ("DoD") related to military service by transgender persons, Plaintiffs now seek a sweeping ruling from the Court that the deliberative process privilege does not apply, purely as a matter of law, to documents or discovery responses withheld on the basis of that privilege. As explained below, such a broad-brush ruling would be contrary to law. The deliberative process privilege is a critical protection to enable effective governmental decision-making, and the Court cannot set it aside *per se* as a matter of law in this case.

As a threshold matter, however, the Court should not even issue a ruling on the applicability of the deliberative process privilege in this case because significant events have occurred since Plaintiffs served the discovery requests at issue that could obviate the need for discovery altogether—or, at the least, impact the outcome of the motion to compel. Indeed, there are no fewer than five pending motions that address these subsequent events. To begin, much of the discovery Plaintiffs seek is related to a policy challenged in Plaintiffs' original complaint—the President's August 2017 Memorandum addressing military service by transgender individuals—that has been expressly revoked. While Plaintiffs now seek to compel all deliberative documents and information related to that August 2017 Memorandum (and preceding statements by the President on Twitter), two of Defendants' currently pending motions (to dissolve a prior preliminary injunction and to dismiss the original claims) question whether the Court continues to have jurisdiction in this case. Specifically, Defendants contend that any challenge to the revoked August 2017 policy is moot, which should obviate the need for any discovery related to that policy.

In addition, after Plaintiffs amended their complaint to challenge the Department of Defense's new March 2018 policy related to military service by transgender individuals, Defendants also sought dismissal on the grounds that Plaintiffs lack standing to challenge the new policy and have failed to state a valid claim on the merits as to that policy. In the alternative, Defendants sought summary

judgment based on an extensive administrative record of the new policy. Defendants also moved to stay all discovery in this case, in part because numerous motions were pending that would impact the scope of discovery and because judicial review going forward should be limited to the administrative record.[1] Separately, Defendants have also moved to dismiss the President as a Defendant, which would also impact whether the discovery Plaintiffs seek of presidential materials, at issue in the motion to compel, is appropriate at all. All of these issues remain pending before the district court, and all of them bear on whether or to what extent any discovery should occur. Moreover, on May 25, 2018, Plaintiffs themselves moved for summary judgment, contending there is no genuine dispute as to any material fact to preclude the entry of judgment in their favor. Their filing of that motion implicitly acknowledges that they view discovery as unnecessary in this case.

In these circumstances, Plaintiffs' demand that the deliberative process privilege be set aside as a matter of law—not only as to all materials related to the President's deliberations leading to the now-revoked August 2017 Memorandum, but also as to all deliberative documents related to DoD's new policy issued in March 2018—would, at the very least, be highly premature. But even on the merits, the notion that the deliberative process privilege does not apply to deliberations that led to the actions and policies that Plaintiffs seek to put at issue in this case is otherwise plainly meritless and should be denied.

BACKGROUND

Defendants first set forth the background of the policy changes at issue and the procedural history of this case in order to provide the Court with the full context in which the pending motion to compel arises.

[1] *See* Defs.' Mot. 5–6, Dkt. 121; Defs.' Reply 5–6, Dkt. 146. The Government filed the administrative record on April 20, 2018. *See* Dkt. 133. The administrative record is numbered "Administrative_Record_000001—003075," but this brief cites to the record as "AR__."

I. Department of Defense Policy Decisions Prior to this Litigation

For decades prior to the onset of this litigation, the Department of Defense maintained a long-standing policy, rooted in medical concerns, that presumptively disqualified transgender persons from military service. As explained in its recent report on the issue, the Department "has historically taken a conservative and cautious approach" in setting standards for military service given the unique demands of military life. *See* DoD Report and Recommendations ("Report") 3, Dkt. 120-2. "Most mental health conditions" are "automatically disqualifying" absent a waiver, even when an individual no longer suffers from that condition. *Id.* at 20. In general, the military has aligned these disqualifying conditions with the ones listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association (APA). *Id.* at 10. Military standards for decades therefore presumptively disqualified individuals with a history of "transsexualism" from military service, consistent with the inclusion of that term in the third edition of the DSM. *Id.* at 7, 10–11.[2]

In 2015, then-Secretary of Defense Ashton Carter ordered the creation of a working group "to study the policy and readiness implications of welcoming transgender persons to serve openly," and instructed it to "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness." *Id.* at 13. As part of this review, DoD commissioned the RAND National Defense Research Institute to conduct a study. *Id.* The resulting

[2] In 2013, the APA published a new edition of the DSM, which replaced the term "gender identity disorder" (itself a replacement for "transsexualism") with "gender dysphoria." Report 10, 12. In doing so, the APA explained that a subset of transgender people suffer from the medical condition of gender dysphoria, a "marked incongruence between one's experience/expressed gender and assigned gender, of at least 6 months duration" that is "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning." *Id.* at 12–13; *see id.* at 20–21; *see also* Op. 8 n.9, Dkt. 85 (recognizing that "some transgender individuals experience significant distress due to the gender-sex mismatch and are considered to have a medical condition called gender dysphoria"). Individuals diagnosed with gender dysphoria sometimes transition genders—including through cross-sex hormone therapy or sex-reassignment surgery—to treat this condition. AR114–15, 128.

RAND report concluded that the proposed policy change would have "an adverse impact on health care utilization and costs, readiness, and unit cohesion," but that these harms would be "'negligible' and 'marginal' because of the small estimated number" of transgender servicemembers relative to the size of the armed forces as a whole. *Id.* at 14; *see* AR102–03, 145–48, 150, 152–53, 172–73.

After this review, Secretary Carter ordered the Defense Department on June 30, 2016, to implement various changes to its policies (hereinafter, the "Carter policy"). First, the Department had until July 1, 2017, to revise its accession standards. Report 14. Under this revision, a history of "gender dysphoria," "medical treatment associated with gender transition," or "sex reassignment or genital reconstruction surgery" would remain disqualifying unless an applicant provided a certificate from a licensed medical provider attesting that the applicant had been stable or free from associated complications for 18 months. *Id.* at 15. Second, and effective immediately, current service members could not be discharged "solely on the basis of their gender identity" or their "expressed intent to transition genders," AR323, but instead, if diagnosed with gender dysphoria, could transition genders, Report 14. Transgender service members who did not meet the clinical criteria for gender dysphoria, however, had to continue to serve in their biological sex. *Id.* at 15.

On June 30, 2017, the day before the Carter accession standards were set to take effect, Secretary of Defense Mattis, on the recommendation of the services and in the exercise of his discretion, decided that it was "necessary to defer" those standards until January 1, 2018, so that the military could "evaluate more carefully" the effect of accessions by transgender individuals "on readiness and lethality." AR326. Without "presuppos[ing] the outcome," he ordered a five-month study that would "include all relevant considerations" and give him "the views of the military leadership and of the senior civilian officials who are now arriving in the Department." *Id.*

While this study was ongoing, the President stated on Twitter on July 26, 2017, that the government "will not accept or allow Transgender individuals to serve in any capacity in the U.S.

Military." *See* Op. 10, Dkt. 85. He then issued a memorandum on August 25, 2017, explaining that, in his judgment, former-Secretary Carter had "failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy"—which generally disqualified transgender individuals from service—"would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." AR327. The President therefore called for "further study" to ensure that implementation of the Carter policy "would not have those negative effects." *Id.* In the interim, he directed the military to "return to the longstanding policy" on "service by transgender individuals … until such time as a sufficient basis exists upon which to conclude that terminating [it] would not have the negative effects discussed." AR327–28. The President also ordered the Secretary of Defense to prepare a "plan for implementing" this directive by February 2018 that would also "determine how to address transgender individuals currently serving." AR328. The President stressed, however, that the Secretary of Defense, after consultation with the Secretary of Homeland Security, "may advise [him] at any time, in writing, that a change to this policy is warranted." *Id.* Thereafter, on September 14, 2017, Secretary Mattis established a Panel of Experts to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." Report 17. The Panel consisted of senior military members who had "the statutory responsibility to organize, train, and equip military forces" and were "uniquely qualified to evaluate the impact of policy changes on the combat effectiveness and lethality of the force." *Id.* at 18; *see also* AR330.

II. This Litigation and Subsequent Policy Decisions by the Department of Defense

On August 28, 2017, Plaintiffs filed their complaint, which they amended on September 14, 2017. *See* Compl., Dkt. 1; Am. Compl., Dkt. 39. Plaintiffs alleged that the President's August 2017 Memorandum violated their equal protection and substantive due process rights under the Fifth Amendment to the Constitution, and also violated 10 U.S.C. § 1074. Am. Compl. ¶¶ 135–69. Plaintiffs also filed a motion for a preliminary injunction, and Defendants moved to dismiss the

amended complaint. *See* Pls.' Mot., Dkt. 40; Defs.' Mot., Dkt. 52.

On November 21, 2017, the Court dismissed the alleged statutory violation, but otherwise denied Defendants' motion to dismiss the first amended complaint. Op., Dkt. 85. It also granted Plaintiffs' motion for a preliminary injunction. *Id.* Although the Court stated that it "does not disagree" with Defendants' argument that "deference is owed to military personnel decisions and the military's policymaking process," the Court found that Plaintiffs demonstrated a likelihood of success on the merits of their constitutional challenges to the President's August 2017 Memorandum based upon the "circumstances surrounding the President's announcement and the departure from normal procedure." *Id.* at 43. The Court also "found persuasive the D.C. Court's ruling for applying intermediate scrutiny" to Plaintiffs' challenge to the August 2017 Presidential Memorandum and concluded that the directives in that memorandum likely would not survive either intermediate scrutiny or rational basis review. *Id.* at 43–44.

On March 1, 2018, Defendants filed a motion to dismiss Plaintiffs' claims against the President and dissolve the preliminary injunction as to the President. Dkt. 115. Defendants argued that the President is not a proper defendant in this case because the Court may not enter injunctive or declaratory relief against the President in his official capacity in the performance of discretionary actions. *Id.* at 3–8. That motion is fully briefed and pending before the Court.

Meanwhile, while this case has been pending, the DoD Panel of Experts, established by the Secretary of Defense in September 2017, met 13 times over the span of 90 days with military and civilian medical professionals, commanders of transgender servicemembers, and transgender servicemembers themselves. Report 18. The Panel reviewed information regarding gender dysphoria, its treatment, and the effects of gender dysphoria on military effectiveness, unit cohesion, and resources. *Id.* And unlike in prior reviews, the Panel relied on the "the Department's own data and experience obtained since the Carter policy took effect." *Id.* After "extensive review and

deliberation," which included consideration of evidence that supported and cut against its proposals, the Panel "exercised its professional military judgment" and presented its recommendations to the Secretary. *Id.*

After considering these recommendations along with additional information, Secretary Mattis, with the agreement of the Secretary of Homeland Security, sent the President a memorandum in February 2018 proposing a new policy, consistent with the panel's conclusions, that differed from both the Carter policy and the longstanding policy that preceded it. *See* Mattis Mem., Dkt. 120-1. The Secretary's memorandum was accompanied by a 44-page report explaining the military's position. *See id.*; Report. Noting that the President had "made clear" that the Secretaries "could advise" him "'at any time, in writing, that a change to [the pre-Carter] policy was warranted," Secretary Mattis recommended that the President "revoke" his 2017 memorandum, "thus allowing" the military to adopt this new policy. Mattis Mem. 3.

Like the Carter policy before it, the Department's 2018 policy turns on the medical condition of gender dysphoria, not on transgender status. Under each policy, transgender individuals without a history or diagnosis of gender dysphoria may serve if they meet the standards associated with their biological sex, whereas those with gender dysphoria are presumptively disqualified. Report 4–6; AR323–24. The main difference between the two policies is the nature of the exceptions to that presumptive disqualification. Under the 2018 policy, individuals with a history or diagnosis of gender dysphoria may join or remain in the military if they neither require nor have undergone gender transition, are willing and able to adhere to the standards associated with their biological sex, and can meet additional criteria. Report 5. For accession into the military, they must demonstrate 36 months of stability (*i.e.*, absence of gender dysphoria) before applying. *Id.* They may then remain in the military as long as they can satisfy deployability standards. *Id.* These exceptions rest on the Department's judgment that "a history of gender dysphoria should not alone" be disqualifying given evidence that

the presence of this condition in children does not always persist into adulthood and given the military's interest in retaining those in whom "it has made substantial investments." *Id.* at 42.

By contrast, individuals with gender dysphoria who require or have undergone gender transition are disqualified absent an individualized waiver. *Id.* at 5. "In the Department's military judgment," this was a "necessary departure from the Carter policy" because service by these individuals was "not conducive to, and would likely undermine, the inputs—readiness, good order and discipline, sound leadership, and unit cohesion—that are essential to military effectiveness and lethality." *Id.* at 32, 41. This judgment was based on numerous military concerns, including evidence that these individuals continued to have higher rates of psychiatric hospitalization and suicidal behavior even after transition, evidence that transition-related treatment could render these individuals non-deployable for a significant period of time, the creation of irreconcilable privacy demands particularly in austere or deployed environments, the safety risks and perceptions of unfairness arising from having training and athletic standards turn on gender identity, the frustration of non-transgender servicemembers who also wish to be exempted from uniform and grooming standards for identity purposes, and disproportionate transition-related costs. *See id.* 19–41.

Recognizing, however, that a number of individuals with gender dysphoria had "entered or remained in service following the announcement of the Carter policy," the Department included a categorical reliance exemption in its 2018 policy. *Id.* at 43. Specifically, those servicemembers "who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy, may continue to receive all medically necessary care" as well as "serve in their preferred gender, even after the new policy commences." *Id.*[3]

After DoD presented its new policy to the President, the President "revoke[d]" his 2017

[3] A chart describing the differences between the military's pre-Carter policy, the Carter policy, and the 2018 policy is set forth at Exhibit 1.

memorandum on March 23, 2018, along with "any other directive [he] may have made with respect to military service by transgender individuals," thereby allowing the Secretaries of Defense and Homeland Security to "exercise their authority to implement any appropriate policies concerning military service by transgender individuals." 2018 Presidential Mem., Dkt. 119-1.

III. Discovery and Further Proceedings in This Case

After the Court entered its preliminary injunction, and while the DoD policy process described above proceeded to conclusion, the parties also engaged in discovery. Plaintiffs served broad discovery requests on all Defendants, including the President. Plaintiffs issued requests for production and interrogatories seeking information on: (1) the Carter policy and the RAND report; (2) the decision by Secretary Mattis to defer the start of accessions by transgender individuals under the Carter policy; (3) the President's statements on Twitter in July 2017 and the August 2017 Presidential Memorandum; (4) the work by the Panel of Experts that was convened to develop policy proposals in fall 2017; (5) Secretary Mattis's February 2018 decision memorandum and the accompanying Report regarding the new policy; and (6) the March 2018 Presidential Memorandum that revoked the 2017 Memorandum. *See* Kies Decl. Exh. 1, 2; Exh. 2 (Pls.' Second Set of Interrogatories and Requests for Production, May 21, 2018).

In response to discovery requests on these topics, Defendants conducted an extensive search and have produced over 30,000 non-privileged, responsive documents (consisting of over 150,000 pages). Defendants also objected to some discovery requests and withheld information and thousands of documents that are protected by the deliberative process privilege (among others). *See* Kies Decl. Exh. 3, 4, 6, 7. Finally, Defendants objected to interrogatories when they called for privileged information, but otherwise responded. *See id.* Although they have had ample opportunity to do so, Plaintiffs have not taken any depositions, and declined to participate in at least one deposition scheduled in the related case, *Doe v. Trump*, No. 17-cv-1597 (D.D.C.). *See* Exh. 3 (email from Marianne

Kies to Ryan Parker, Apr. 11, 2018).

On February 22, 2018, after the Department of Defense completed its study of the policies at issue, Secretary Mattis sent the Department's policy proposal to the President. Mattis Mem., Dkt. 120-1. The President subsequently issued his March 23, 2018 Memorandum, which revoked the August 2017 Memorandum. *See* 2018 Presidential Mem., Dkt. 119-1. Immediately thereafter, on March 23, 2018, Defendants filed a motion to dissolve the preliminary injunction, arguing that the bases for the preliminary injunction no longer exist because Plaintiffs' challenge to the revoked August 2017 Memorandum is moot. *See* Defs.' Mot. 9–11, Dkt. 120. Defendants also contended that the Department's new policy—which turns on a medical condition (gender dysphoria) and an associated treatment (gender transition), not transgender status—is subject to rational basis review and withstands constitutional scrutiny. *See id.* at 11–29. This motion is fully briefed and pending before the Court.

That same day, Defendants filed a motion for a protective order, arguing that discovery should be stayed pending the resolution of the motion to dissolve the preliminary injunction. *See* Defs.' Mot., Dkt. 121. In particular, Defendants argued that because the August 2017 Presidential Memorandum had been revoked, any discovery related to that Memorandum or to the President's preceding statements on Twitter is irrelevant and, in any event, disproportionate to the needs of the case under Rule 26 of the Federal Rules of Civil Procedure. *Id.* at 5. Defendants further argued that because the new policy resulted from an administrative process by the Department of Defense, further litigation should be confined to the administrative record provided by the agency.[4] *Id.* at 5–6. This motion also is fully briefed and pending before the Court.

On April 27, 2018, Plaintiffs filed their second amended complaint, adding new Plaintiffs and raising constitutional challenges to both the revoked August 2017 Presidential Memorandum and the

[4] Defendants subsequently filed the administrative record with the Court. *See* Dkt. 133.

Department's new policy. *See* Second Am. Compl. ¶¶ 205–40. Defendants then filed a motion to dismiss, or, in the alternative, for summary judgment. Dkt. 158. Defendants argued that the Court does not possess jurisdiction over the case because Plaintiffs lack standing to challenge the Department's new policy and any challenge to the revoked 2017 Memorandum is moot. *Id.* at 9–19, 21–23. Defendants also argued that the Department's new policy is subject to rational basis review and withstands constitutional scrutiny. *See id.* at 23–50. Finally, Defendants argued that even if the Court did not dismiss the case or enter judgment for Defendants, the Court should dismiss the President from the case because Plaintiffs' claims against him are not redressable. *See id.* at 19–21. Plaintiffs cross-moved for summary judgment, simultaneously arguing that they are entitled to judgment in their favor because there is no genuine dispute as to any material fact, while also arguing that a dispute of material facts precludes judgment for Defendants and entitles Plaintiffs to additional discovery. *See* Pls.' Mot., Dkt. 163. These motions will be fully briefed in June.

IV. The Current Discovery Dispute

By letter dated February 21, 2018, Plaintiffs advised counsel for the Defendants that they plan to challenge *all* of Defendants' withholdings on the basis of the deliberative process privilege. *See* Kies Decl. Exh. 8. The parties met and conferred twice in an attempt to resolve the dispute. During a call on March 1, 2018, defense counsel requested that Plaintiffs identify specific documents or discovery responses to which Plaintiffs contest Defendants' privilege assertions. Enlow Decl. ¶ 2. Defense counsel further stated that if Plaintiffs identified specific documents, Defendants could review the documents to determine whether to perfect the deliberative process privilege over those documents or whether to withdraw the assertion of privilege over the documents with the goal of narrowing the dispute.[5] *Id.* Defense counsel reiterated this request when the parties met in person on March 13,

[5] As defense counsel informed Plaintiffs' counsel, this procedure is occurring in the related case, *Doe v. Trump*, No. 17-cv-1597 (D.D.C.). Enlow Decl. ¶ 2. In *Doe*, plaintiffs' counsel identified specific

2018. *Id.*

On April 23, 2018, Plaintiffs served Defendants with a motion to compel broad categories of documents and discovery responses that Defendants have withheld under the deliberative process privilege.[6] *See* Pls.' Mot. 2. Plaintiffs seek the disclosure of each and every document and discovery response withheld on the basis of the deliberative process privilege regarding: (1) the President's statements on Twitter in July 2017 and the August 2017 Presidential Memorandum; (2) the activities of the Department's Panel of Experts and its working groups; and (3) the February 2018 Memorandum issued by Secretary Mattis and the March 2018 Presidential Memorandum. *Id.* Plaintiffs request that the Court "order Defendants . . . to supplement their interrogatory responses and document production to include deliberative information and documents relating to these decisions that they have improperly withheld based on the deliberative process privilege." *Id.* at 26.[7]

Because Plaintiffs' broad request implicated perfecting the privilege over thousands of documents and appeared to challenge documents and information subject to the presidential communications privilege, Defendants requested a conference with the Court. *See* Exh. 4 (email from Ryan Parker to Chambers of Judge Garbis, May 2, 2018). In response, Plaintiffs clarified that they do not seek to compel any particular document with their motion. *See id.* (email from Mitchell Kamin to

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documents, and, upon further review of the documents, Defendants produced some of the documents and maintained the assertion of privilege over others.

[6] Plaintiffs also appear to contest the sufficiency of Defendants' privilege logs, *see* Pls.' Mot. 7, but they do not move to compel Defendants to supplement the logs. Therefore, this response does not address the sufficiency of the privilege logs, aside from noting that to the extent there may be defects in the logs, it is a result of the broad discovery requests issued by Plaintiffs. *See Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 370 n.24 (4th Cir. 2009) ("Parties who frame massive and all-inclusive requests for documents should expect some fall-off from perfection when the agency responds.").

[7] Plaintiffs also "request that the Court order Defendants to supplement their prior interrogatory responses and document production," arguing that Defendants' responses were not compliant with Rule 33(d) of the Federal Rules of Civil Procedure. Pls.' Mot. 3, 6, 6 n.4, 26. Defendants produced more than 13,000 documents to Plaintiffs on May 22, 2018. Defendants will serve supplemental interrogatory responses concurrently with this response (or shortly thereafter). This aspect of Plaintiffs' request should be moot.

Chambers of Judge Garbis). Plaintiffs stated that their motion is "not a dispute about whether particular documents are privileged" and instead presents "a legal question that does not require review of thousands of documents." *Id.* Plaintiffs also clarified that despite their request that the Court order Defendants to supplement their discovery responses with deliberative information related the President's statements on Twitter and his August 2017 and March 2018 Memoranda, "the motion to compel does not raise any issues specific to President Trump, such as the presidential communications privilege."[8] *Id.*

Accordingly, Plaintiffs do not identify specific documents that they presently seek to compel. Nor do Plaintiffs seek to compel any document or information withheld on the basis of the presidential communications privilege (or other privileges, such as the attorney-client privilege). Rather, the only issue before the Court at this time is the threshold legal issue of whether the deliberative process privilege *per se* does not apply as a matter of law to any information at issue in discovery in this case.[9]

[8] Despite this latter representation, Plaintiffs' instant motion to compel still puts implicates information and documents concerning presidential communications and deliberations. At least two of the three categories of information at issue in their motion expressly concern presidential materials and communications, even if the motion itself purports to be limited solely to the application of the deliberative process privilege as a matter of law to these materials. Because many of the materials at issue concern discovery directed at the President and his deliberations, and encompass materials that would also be subject to the presidential communications privilege, *see* Kies Decl. Exh. 6, 7, Defendants expect to file a motion for a protective order to preclude discovery directed at the President and at information concerning presidential communications and deliberations. Indeed, on May 21, 2018, Plaintiffs served additional sets of interrogatories and requests for production on all Defendants, including the President. Exh. 2 (Pls.' Second Set of Interrogatories and Requests for Production, May 21, 2018). Defendants' responses are not due until mid-June, but Plaintiffs' requests again appear to seek information and documents that may be subject to the presidential communications privilege as well as the deliberative process privilege (among others). *See id.* Thus, the notion that Plaintiffs' motion does not implicate the President's deliberations is wrong—it specifically targets those deliberations, among others.

[9] As a result, Defendants are not required to perfect the privilege at this time as to documents or information contained in each of the thousands of documents, or with respect to information that has been withheld on the basis of the deliberative process privilege in response to other discovery requests.

ARGUMENT

I. The District Court Should Decide Pending Threshold Matters Before Resolving Plaintiffs' Motion to Compel.

As a preliminary matter, there are five motions pending before the Court, all of which raise threshold issues that directly affect the extent and scope of discovery in this case and thus should be decided before the Court rules on this discovery dispute. The pending motions are as follows:

Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment: This fully dispositive motion raises jurisdictional issues of standing and mootness and addresses the merits of the new policy, explaining the proper standard of review and demonstrating that the new policy withstands scrutiny. *See* Defs.' Mot. 9–50, Dkt. 158. If the Court grants Defendants' motion and dismisses the case or enters judgment for Defendants, then Plaintiffs would not be entitled to any discovery and Plaintiffs' Motion to Compel would be moot.

Even if the Court does not dismiss the case in its entirety or enter judgment for Defendants, the Court's ruling on the motion could at least narrow the issues in dispute, such as whether the President's 2017 Memorandum is still at issue, the appropriate level of scrutiny, or what genuine issues of material fact may exist as to which discovery is potentially necessary. Any of these issues could impact whether or to what extent any discovery should proceed, and obviate the need to reach the motion to compel regarding the deliberative process privilege.

Defendants' Motion to Dissolve the Preliminary Injunction: Similar to the motion to dismiss, Defendants' Motion to Dissolve the Preliminary Injunction raises mootness as a threshold jurisdictional issue. *See* Defs.' Mot. 9–11, Dkt. 120. A ruling that Plaintiffs' challenge to the 2017 Presidential Memorandum is moot would at least significantly narrow the scope of discovery, as discovery related to the 2017 Presidential Memorandum would be irrelevant to any challenge to the new policy.

Defendants' Motion to Dismiss the President: Defendants have also moved to dismiss the

President as a party from this case. *See* Defs.' Mot. 19–21, Dkt. 158; *see also* Defs.' Mot. 1–8, Dkt. 115. Yet Plaintiffs have served 22 interrogatories and 21 requests for production directly on the President, seeking information concerning the President's deliberations and decisionmaking process. *See* Kies Decl. Exh. 1, 2. If the Court dismisses the President from the case, that alone would substantially impact the scope of the discovery being sought and at issue in the motion to compel. Indeed, even assuming *arguendo* that the President could ever be subject to civil discovery, as a non-party the President would be under no obligation to respond to interrogatories under Rule 33 or requests for production of documents under Rule 34. *See Horne v. Methodist Home for Children, Inc.*, No. 2:12CV12, 2013 WL 856175, at *2 (W.D.N.C. Feb. 28, 2013) ("Interrogatories served on a defendant requesting that a non-party answer the interrogatory is improper under Rule 33." (citations omitted)); *Maynard v. City of Huntington*, No. CIV.A. 3:09-0101, 2009 WL 4675788, at *1 (S.D.W. Va. Dec. 8, 2009) (stating that "a party seeking documents from a non-party must obtain and serve a subpoena upon that non-party in accordance with Rule 45"). Dismissal of the President from the case would therefore significantly narrow the scope of the discovery dispute at issue in the motion to compel. *See NetJets Large Aircraft, Inc. v. United States*, No. 2:11-CV-1023, 2015 WL 1526346, at *1 (S.D. Ohio Apr. 3, 2015) (noting that the district court's resolution of "certain motions for summary judgment . . . altered the scope of the pending discovery motions").[10]

Defendants' Motion for a Protective Order: Defendants have also moved for a protective order to stay discovery pending the resolution of Defendants' dispositive motions. *See* Defs.' Mot., Dkt. 121; *see also* Defs.' Reply, Dkt. 146. If that motion is granted, then the Court would not need to rule on this discovery dispute until the Court rules on Defendants' pending dispositive motions. In

[10] As noted above, Defendants expect to bring a separate motion for protective order related to the discovery sought of the President and concerning presidential deliberations, materials, and communications. Since much of the instant motion to compel implicates presidential materials and deliberations, that forthcoming motion also should also be decided before the instant motion to compel is resolved.

their motion for a protective order, Defendants also argue that because the new policy resulted from an administrative process by the Department of Defense, any further litigation should be confined to the administrative record prepared by the Department. *See* Defs.' Mot. 5–6, Dkt. 121. If the Court agrees with Defendants on this question, then Plaintiffs' motion seeking broad discovery would be moot and any challenge to the sufficiency of that record—including whether the record properly omitted materials covered by the deliberative process privilege[11]—would need to be addressed by a separate motion.

Plaintiffs' Cross-Motion for Summary Judgment: Plaintiffs themselves now argue that judgment should be entered in their favor because there is no genuine dispute of material fact that the Department's new policy violates the Equal Protection Clause. *See* Pls.' Mot. 26–44, Dkt. 163-2. If the Court enters judgment for Plaintiffs or Defendants in response to their respective motions for summary judgment, the motion to compel of course would be moot. And if the Court does not enter summary judgment based on the administrative record, then any discovery should at least be limited to any identified genuine issues of material fact. In the meantime, categorical rejection of the deliberative process privilege as a matter of law would be improper.

Accordingly, because there are five pending motions before the District Court that bear

[11] Plaintiffs appear to allege that the Government improperly withheld deliberative documents from the administrative record and failed to produce a privilege log with the record. Pls.' Mot. 8–9. But it is well established that privileged materials are not part of an administrative record, and there is no requirement for the Government to provide a privilege log with an administrative record. *See Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec.*, No. ELH-16-1015, 2017 WL 3189446, * (D. Md. July 27, 2017) ("[A] complete administrative record does not include privileged materials, such as documents that fall within the deliberative process privilege[.]" (quoting *Tafas v. Dudas*, 530 F. Supp. 2d 786, 794 (E.D. Va. 2008)); *Am. Petroleum Tankers Parent, LLC v. United States*, 952 F. Supp. 2d 252, 265 (D.D.C. 2013) ("As a corollary to th[e] principle [that privileged materials are not part of the administrative record], the agency need not provide a privilege log of the documents withheld pursuant to the privilege."); *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F.Supp.2d 15, 32 (D.D.C. 2013) ("[P]redecisional and deliberative documents are not part of the administrative record to begin with, so they do not need to be logged as withheld from the administrative record.") (internal citation omitted)).

directly on the resolution of Plaintiffs' motion to compel, the Court should deny Plaintiffs' premature motion, or, at the very least, defer ruling on the motion until those motions are resolved.

II. If the Court Reaches the Merits of Plaintiffs' Motion, the Motion Should Be Denied.

Not only is Plaintiffs' motion premature, it is meritless as well. As an initial matter, Plaintiffs do not dispute that the documents the Government has withheld under the deliberative process privilege are predecisional and deliberative. Instead, Plaintiffs contend that the privilege does not apply as a matter of law either because the Government's intent is at issue or because there the Government's "discriminatory" policy amounts to misconduct. But Plaintiffs' contention finds no basis in Fourth Circuit precedent. Rather, application of the appropriate balancing test applied by courts in this Circuit demonstrates that the Government's interest in non-disclosure of deliberative information concerning the development of a military policy outweighs Plaintiffs' generalized need for thousands of deliberative documents. Finally, Plaintiffs' contention that Defendants have waived the privilege by selectively relying on privileged information is simply wrong, as Defendants are not relying on privileged information to establish that the Department's new policy withstands constitutional scrutiny.

A. The Deliberative Process Privilege Generally

The deliberative process privilege protects the Government's decision-making process by shielding from disclosure documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). "This privilege is designed to protect the quality of administrative decisionmaking by ensuring that it is not done 'in a fishbowl.'" *City of Va. Beach v. Dep't of Commerce*, 995 F.2d 1247, 1252 (4th Cir. 1993) (quoting *Envt'l Prot. Agency v. Mink*, 410 U.S. 73, 87 (1973)). "Thus, the privilege encourages free-ranging discussion of alternatives; prevents public confusion that might result from the premature release of such nonbinding

deliberations; and insulates against the chilling effect likely were officials to be judged not on the basis of their final decisions, but for matters they considered before making up their minds." *Id.* at 1252–53 (quotation omitted); *see also Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001) ("The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government." (quotation omitted)).

"Documents withheld or redacted pursuant to the deliberative process privilege must be both 'predecisional' and 'deliberative.'" *Rein*, 553 F.3d at 372 (quoting *City of Va. Beach*, 995 F.2d at 1253). "Predecisional documents are 'prepared in order to assist an agency decisionmaker in arriving at his decision.'" *City of Va. Beach*, 995 F.2d at 1253 (quoting *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975)). "Deliberative material 'reflects the give-and-take of the consultative process,' by revealing the manner in which the agency evaluates possible alternative policies or outcomes." *Id.* (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

"The deliberative process privilege is a qualified one; that is, where a party can establish the existence of a sufficient need for the information that outweighs any harm from its production, the privilege may be overcome." *Heyer v. U.S. Bureau of Prisons*, No. 5:11-CT-03118-D, 2014 WL 4545946, at *3 (E.D.N.C. Sept. 12, 2014) (citing *Scott v. PPG Indus., Inc.*, 142 F.R.D. 291, 294 (N.D. W.Va. 1992)). "The burden of showing an overriding need for the information rests with the party seeking it." *Id.* (citing *Redland Soccer Club, Inc. v. Dep't of Army*, 55 F.3d 827, 853 (3d Cir. 1995) ("The party seeking discovery bears the burden of showing that its need for the documents outweighs the government's interest.")); *see also United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) (stating that the plaintiff had to show a "particularized need" for specific documents to overcome the privilege); *Marriott Int'l Resorts, L.P. v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006) (stating that a plaintiff must show a

"compelling need" to overcome the privilege). Courts have used a four factor test in balancing the deliberative process privilege with the need of the party seeking disclosure: "(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government's role (if any) in the litigation, and (4) 'the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.'" *Cipollone v. Liggett Grp. Inc.*, 812 F.2d 1400 (4th Cir. 1987) (table) (quoting *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)); *see also Heyer*, 2014 WL 4545946, at *3 (quoting *Scott*, 142 F.R.D. at 294).

B. Plaintiffs' Contention that the Deliberative Process Privilege Does Not Apply as a Matter of Law is Meritless.

Plaintiffs argue that the deliberative process privilege does not apply as a matter of law to any deliberative materials at issue in this case, including materials "regarding" the "July 2017 Tweets and August 2017 Memorandum," the "Panel of Experts and its working groups," and the so-called "Implementation Plan and the President's acceptance of the Plan" because "Plaintiffs' claims turn on governmental intent" and there is "reason to suspect government misconduct has occurred."[12] Pls.' Mot. 2, 10–14. But Plaintiffs do not cite to any authority within the Fourth Circuit for their contention that the deliberative process privilege does not apply as a matter of law to broad categories of deliberative materials when the party seeking discovery challenges the Government's intent or alleges governmental discrimination or misconduct. *See id.* at 10–14. Indeed, Plaintiffs' assertion is contrary

[12] Plaintiffs' argument that the Government committed misconduct by engaging in "unlawful discrimination" is merely a reiteration of their argument that the Government's intent is at issue because they have brought a discrimination claim. *See id.* But the intent behind a policy is not the same as governmental misconduct, which turns on specific actions taken by Government officials. *See, e.g.*, *Alexander v. FBI*, 186 F.R.D. 170, 171 (D.D.C. 1999) (allegations the "FBI improperly handed over to the White House hundreds of FBI files of former political appointees and government employees from the Reagan and Bush Administrations"); *Convertino v. Dep't of Justice*, 674 F. Supp. 2d 97, 100 (D.D.C. 2009) (allegations that the Department of Justice leaked information regarding an investigation into purported prosecutorial misconduct by an Assistant United States Attorney); *Tax Reform Research Grp. v. IRS*, 419 F. Supp. 415, 426 (D.D.C. 1976) (no privilege where documents concerned recommendation to use the powers of the Internal Revenue Service against "enemies" of the Nixon administration). No such allegation of "misconduct" credibly exists in this case.

to the Fourth Circuit's approach in *Cipollone*, 812 F.2d at 1400, which requires a balancing of an articulated need for specific deliberative documents or information being sought against the Government's interests in non-disclosure to determine whether the privilege can be overcome. *See Brown v. Meehan*, No. 3:14-CV-442, 2014 WL 4701170, at *3 (E.D. Va. Sept. 22, 2014) (finding that the court must analyze whether the deliberative process privilege applies "on a case-by-case basis by balancing the damage to the executive department or the public interest and the potential harm to the plaintiffs from nondisclosure"); *Spell v. McDaniel*, 591 F. Supp. 1090, 1116 (E.D.N.C. 1984) (finding that the deliberative process privilege "must be demonstrated on a case by case basis by performance of a balancing function"); *see also Murray Energy Corp.*, 2016 WL 6902359, at *4 ("[T]he deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process.") (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980))). District courts in this Circuit have applied the *Cipollone* balancing test to determine whether plaintiffs' need for specific privileged documents or information outweighs the Government's interest in non-disclosure, even when intent is at issue or misconduct is alleged. *See, e.g.*, *Murray Energy Corp. v. McCarthy*, No. 5:14-CV-39, 2016 WL 6902359, at *3 (N.D. W. Va. July 20, 2016) ("[P]ossible government misconduct or deficiencies in the deliberative process are factored into any analysis and, where present, weigh in favor of denying the privilege."); *F.D.I.C. v. Hatziyannis*, 180 F.R.D. 292, 294 (D. Md. 1998) (applying the balancing test even when defendants "raised allegations of bad faith and unfair dealing"); *Heyer*, 2014 WL 4545946, at *5–6 (applying the balancing test even where plaintiffs alleged deliberate indifference); *cf. Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 339 (E.D. Va. 2015) (applying the balancing test from the deliberative process privilege context to the state legislative privilege context, even where plaintiffs alleged unlawful racial gerrymanders in violation of the Equal Protection Clause). To hold otherwise would have the extraordinary consequence of eviscerating the deliberative process privilege for broad categories of deliberative

materials in any case in which plaintiffs challenge the Government's intent as a *per se* legal matter, and without a party seeking any particular information or challenging its withholding. *See In re United States*, 678 F. App'x 981, 990 (Fed. Cir. 2017) ("The privilege would be meaningless if all a litigant had to do was raise a question of intent to warrant disclosure."); *Utah Med. Prods. v. McClellan*, No. 2:03–cv–525–PGC, 2004 WL 988877, at *8 (D. Utah Mar. 31, 2004) (finding that a *per se* rule that the deliberative process privilege did not apply when a party challenges the decision-making process would lead plaintiffs to "recast [their] complaints as a challenge to the decision-making process").

Moreover, even assuming that "intent" or "misconduct" were at issue in the challenged policies, Plaintiffs' argument misapplies nonbinding authority, in particular a D.C. Circuit case, *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998), which held that the deliberative process privilege did not apply in a fraudulent transfer action in which the plaintiff was required to show that the transfers were made "with actual intent to hinder, delay, or defraud." Notably, the Fourth Circuit has not followed *In re Subpoena,* nor held that the deliberative process privilege categorically does not apply as matter of law in cases in which the plaintiffs challenge the Government's intent or allege misconduct. Indeed, other courts have been skeptical of the categorical approach applied in *In re Subpoena,* 145 F.3d at 1424. *See, e.g.*, *In re Delphi Corp.*, 276 F.R.D. 81, 84–85 (S.D.N.Y. 2011) (rejecting plaintiff's argument that the deliberative process privilege "is not applicable where the litigation 'involves a question concerning the intent of the governmental decisionmakers or the decisionmaking process itself'" and instead applying the five factor balancing test); *Vietnam Veterans of Am. v. C.I.A.*, 2011 WL 4635139, at *10 (N.D. Cal. Oct. 5, 2011) (declining to adopt a categorical rule that the deliberative process privilege is inapplicable when plaintiffs challenge intent, and explaining that the issue of "intent is properly considered as a factor in the substantial need analysis"); *First Heights Bank, FSB v. United States*, 46 Fed. Cl. 312, 321–22 (2000) ("declin[ing] to follow the reasoning of *In re Subpoena* to the extent that it supports an automatic bar

on assertions of deliberative process privilege in any case where the Government's intent is potentially relevant," and applying the balancing test weighing "a showing of evidentiary need" against "the harm that may result from disclosure").

Plaintiffs rely on another D.C. Circuit case, *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997), for the proposition that "the deliberative process privilege disappears altogether when there is any reason to believe government misconduct occurred." Pls.' Mot. 13. But, as another court has recognized, *In re Sealed Case* "provides little or no guidance" for evaluating a deliberative process privilege claim because "this standard is stated in the case in order to contrast it with the higher standard for overcoming the Presidential privilege, which is the actual subject matter of the case." *City of Colton v. Am. Promotional Events, Inc.*, No. CV 05-01479 JFW (EX), 2011 WL 13223955, at *3 (C.D. Cal. Nov. 14, 2011). Notably, Plaintiffs cite to no Fourth Circuit case finding that the deliberative process is inapplicable even when a plaintiff alleges governmental misconduct. *See* Pls.' Mot. 13–14.

The other cases cited by Plaintiffs actually support the Government's view: in two of the cases Plaintiffs cite for the proposition that the privilege is "does not apply at all" when intent is at issue, Pls.' Mot. 10–11, the courts declined to apply the deliberative process privilege to "routine personnel decisions," such as the decision to terminate an employee, but observed that the deliberative process privilege is intended to protect deliberations behind broad policy decisions—precisely the kind of information at issue here. *See United States v. Lake Cty. Bd. of Comm'rs*, 233 F.R.D. 523, 526 (N.D. Ind. 2005); *Jones v. City of Coll. Park*, 237 F.R.D. 517, 521 (N.D. Ga. 2006). Further, in *Jones*, the court applied the balancing test despite finding that "government intent is at the heart of the issue in this case"—contrary to Plaintiffs' own position. 237 F.R.D. at 521.[13] Moreover, despite advocating for a

[13] Plaintiffs also cite *McPeek v. Ashcroft*, 202 F.R.D. 332, 335 (D.D.C. 2001). But in that case, the court held that "Plaintiff is simply wrong in asserting that the deliberative process privilege should yield in this case because of his claim of governmental misconduct," and the court's discussion of when the privilege may yield due to a challenge to the Government's subjective intent is dicta.

per se rule, Plaintiffs cite a case where the court applied the balancing test. *See* Pls.' Mot. 18 (citing *Holmes v. Hernandez*, 221 F. Supp. 1011, 1021 (N.D. Ill. 2016)).

Additionally, Plaintiffs' argument that the deliberative process privilege does not apply as a matter of law rests ultimately on the assumption that intent is at issue in this case, Pls.' Mot. 11, which the Court has not yet decided, *see supra* Section I. The Court should not reach that issue at this stage in connection with this discovery motion, but if it does, it should find that Plaintiffs' arguments are meritless. As Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment, explains, the Department's new policy, on its face, triggers rational-basis review in connection with Plaintiffs' equal protection challenge. Defs.' Mot. 23–24, Dkt. 158. The new policy, like the Carter policy before it, draws lines on the basis of a medical condition (gender dysphoria) and its treatment (gender transition)—eminently reasonable considerations in setting standards for military service—and not transgender status. *Compare* Report 3–5, *with* AR323–24 (DTM 16-005 at Attachment 1–2); *see also* Op. 8 n.9, Dkt. 85 (recognizing the difference between transgender status and the medical condition of gender dysphoria). Such classifications receive only rational-basis review. *See, e.g., Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365–68 (2001); *Geduldig v. Aiello*, 417 U.S. 484, 494–97 & n.20 (1974). Given that courts should be "reluctant to establish new suspect classes"—a presumption that "has even more force when the intense judicial scrutiny would be applied to the 'specialized society' of the military"—there is no basis for departing from rational-basis review here. *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc).[14]

Under rational-basis review, it is "'constitutionally irrelevant [what] reasoning in fact underlay

[14] This Court should not follow a recent decision by a court in a related case to subject the new policy to strict scrutiny. *See Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, *11 (W.D. Wash. Apr. 13, 2018), *appeal filed*, No. 18-35347 (9th Cir.). That court did not cite a single example of another decision concluding that a policy that classified on the basis of transgender status was subject to strict scrutiny, let alone a military policy turning on gender dysphoria adopted after a substantial review process. *See id.*

the [policy] decision.'" *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)); *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) ("[T]he Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification."). Intent is thus irrelevant to this case; the Government's "choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (citing *Vance v. Bradley*, 440 U.S. 93 111 (1979); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981)). But the "Court's review does require that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Nordlinger*, 505 U.S. at 15 (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528–29 (1959)).

Plaintiffs rely on *Romer v. Evans*, 517 U.S. 620, 634 (1996), to support their argument that intent is at issue, even when rational-basis review applies.[15] *See* Pls.' Mot. 11–12. However, this reliance is misplaced. In *Romer*, the Supreme Court held that an amendment to the Colorado Constitution violated the Fourteenth Amendment's Equal Protection Clause because it was not "directed to *any* identifiable legitimate purpose or discrete objective." 517 U.S. at 635. The Court explained that the amendment's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects," causing the law to "lack[ ] a rational relationship to legitimate state interests." *Id.* at 632. In contrast, in the case at hand, the Department of Defense has offered a "conceivable," "legitimate purpose" for the new policy, *see*

[15] Plaintiffs also rely on *United States v. Windsor*, 570 U.S. 744, 770 (2013). Pls.' Mot. 11. But, as the dissent noted in *Windsor*, it is unclear which standard of review the Supreme Court applied in that case. 570 U.S. at 793 (Scalia, J., dissenting) (stating that the majority "opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality").

Nordlinger, 505 U.S. at 17, *Romer*, 517 U.S. at 635, that is not "so discontinuous" from the policy: as the Department has explained, allowing service by individuals with a history or diagnosis of gender dysphoria, or who require or have already undertaken a course to change their gender, would create unacceptable risks to military readiness, undermine good order and discipline as well as unit cohesion, and impose disproportionate costs. Mattis Mem. 2, Dkt. 120-1; *see* Defs.' Mot. 28–41, Dkt. 158. Thus, unlike the amendment in *Romer*, the new policy is not "inexplicable by anything but animus," nor based on "a bare . . . desire to harm a politically unpopular group." 517 U.S. at 632, 634 (internal citation and quotation marks omitted) (alteration in original). In contrast here, the new DoD policy is supported by a 44-page report, which provides a detailed explanation as to why, in the professional judgment of officials of the Department of Defense, this policy is necessary to further military interests, and thus is not "divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests." *Id.* at 635.

Additionally, to support their argument, Plaintiffs rely on the Court's Order granting Plaintiffs' motion for a preliminary injunction, *see* Pls.' Mot. 11–12, 14 (citing Op. 43–44, Dkt. 85), which held that heightened scrutiny applies and that the directives set forth in the 2017 Presidential Memorandum likely would not survive constitutional scrutiny. But the bases for that Order—the 2017 Presidential Memorandum and the President's preceding statements on Twitter—have been expressly revoked. *See* Dkt. 119-1; *see also* Op. 43 (stating that "President Trump's tweets did not emerge from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest"). Indeed, Plaintiffs' reliance on the Court's Order granting Plaintiffs' motion for a preliminary injunction serves to highlight Plaintiffs' refusal to acknowledge the changed circumstances in this case and the internal inconsistencies in Plaintiffs' positions. Plaintiffs seek information related to the President's intent, arguing that "deliberative materials generated by Defendants in the months

leading up to the July 2017 Tweets and August 2017 Memorandum should help reveal exactly what [the President's] true motivations were." Pls.' Mot. 12. However, in filing a Second Amended Complaint challenging the new policy, Dkt. 148, Plaintiffs acknowledge that the circumstances of this case have changed, under which the 2017 Presidential Memorandum has been expressly revoked, and the Department has issued a new policy. Plaintiffs mischaracterize the new DoD policy as a mere "implementation" of the President's 2017 Memorandum and preceding statements on Twitter. *See, e.g.*, Pls.' Mot. 8. But that plainly is not the case—the new DoD policy differs markedly and materially from the August 2017 Memorandum. *Compare* AR 327–28 (2017 Memorandum), *with* Mattis Mem., Dkt. 120-1; *see also supra* pp. 5, 7–8. In any event, Plaintiffs cannot rely on the alleged intent behind now revoked actions to negate application of the deliberative process privilege as a matter of law with respect to every document put at issue in discovery, including deliberations as to DoD's subsequent policy.

Finally, Plaintiffs generally argue that each of the three categories of deliberative materials they seek are "likely to contain evidence reflecting Defendants' intent" or would reflect governmental misconduct. Pls.' Mot. 12, 14. But Plaintiffs make no effort to show how *each and every* document and discovery request related to the "July 2017 Tweets and August 2017 Memorandum," the "Panel of Experts and its working groups," and the so-called "Implementation Plan and the President's acceptance of the Plan," would shed light on the Government's intent or on alleged misconduct.[16]

[16] Plaintiffs' bare allegation that the "Ban was driven not by legitimate military considerations, but by political and discriminatory animus" because the "illegitimate motivation animating the July 2017 Tweets and the August 2017 Memorandum . . . inevitably flows down" to the study by the Panel of Experts, Secretary Mattis's February 2018 Memorandum, and the 2018 Presidential Memorandum, Pls.' Mot. 14, is far from a "clear showing of misconduct," *Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991), and is contradicted by record evidence. For example, Secretary Mattis stated that he created the Panel of Experts to "develop policy proposals based on data, as well as their own professional military judgment" and that he directed the Panel to "provide its best military advice . . . without regard to any external factors." Dkt. 120-1. Using his "professional military judgment," Secretary Mattis agreed with the Panel's recommended policy. *Id.* Plaintiffs have provided no basis for any allegation of misconduct by Secretary Mattis, the Panel of Experts, or anyone else at the

Accordingly, even if the deliberative process privilege did not apply when intent is at issue, or when there is reason to suspect governmental misconduct, Plaintiffs' bare allegations still would be insufficient to overcome the privilege as a categorical matter with respect to every document for which the privilege is claimed. *See Am. Petroleum Tankers Parent*, 952 F. Supp. 2d at 268 (requiring plaintiffs to provide "an adequate factual basis for believing that the requested discovery would shed light upon governmental misconduct"); *Murray Energy Corp.*, 2016 WL 6902359, at *4 ("[T]he deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process." (quoting *Coastal States Gas*, 617 F.2d at 867); *ICM Registry, LLC v. Dep't of Commerce*, 538 F. Supp. 2d 130, 133 (D.D.C. 2008) ("If every hint of marginal misconduct sufficed to erase the [deliberative process] privilege, the exception would swallow the rule.").

C. The Balancing Test Weighs in Favor of Upholding Defendants' Privilege Claims.

Plaintiffs have failed to demonstrate that the deliberative process privilege cannot apply as a matter of law in this case, and they expressly decided not to seek to compel any specific documents being withheld on the basis of privilege at this time. *See* Exh. 4 (email from Mitchell Kamin to Chambers of Judge Garbis, May 2, 2018). Their motion should be denied on those bases alone. That is, under the relevant balancing test, Plaintiffs bear a heavy burden of showing an "overriding" and "particularized" need for any documents and information they seek. *Heyer*, 2014 WL 4545946, at *3 (citing *Redland Soccer Club*, 55 F.3d at 853); *Farley*, 11 F.3d at 1389. But they cannot meet that burden over documents or information not specifically identified or addressed in their motion to compel. *See*

Department of Defense or the military Services. *See* Pls.' Mot. 14. Plaintiffs cite internet news articles in an attempt to show that the White House may have intervened in the Department's process, *see* Pls.' Mot. 8, 17 n.6, but such unsubstantiated hearsay should be entirely disregarded, *see In re Neustar Sec.*, 83 F. Supp. 3d 671, 686 (E.D. Va. 2015) (refusing to rely on anonymously sourced news article because the court had "no way to assess the credibility of anonymous sources quoted in the article, whether the sources have personal knowledge of the events described, and whether the sources were in a position to learn of such events personally").

Brown, 2014 WL 4701170, at *3; *Spell*, 591 F. Supp. at 1116; *Murray Energy Corp.*, 2016 WL 6902359, at *4. Although Plaintiffs purport to seek three categories of deliberative materials "regarding" "the President's original July 2017 Tweets and August 2017 Memorandum," the "Panel of Experts and its working groups," and the so-called "Implementation Plan and the President's acceptance of the Plan," Pls.' Mot. 2, these enumerated categories are much too broad for the Court to be able to properly apply the balancing test, which requires a balancing of an articulated need for specific deliberative documents or information being sought against the Government's interests in non-disclosure. *See Farley*, 11 F.3d at 1389; *Vietnam Veterans of Am.*, 2011 WL 4635139, at *10. Thus, even if the Court were to consider Plaintiffs' generic arguments, any balancing of the *Cipollone* factors would not justify the disclosure of each and every document subject to a claim of the deliberative process privilege in this case.

Relevance of the evidence: Plaintiffs argue that "the government's decision-making processes are critical to determining whether the Ban and the implementation policies stemming from it violate the Plaintiffs' equal protection and substantive due process rights." Pls.' Mot. 18. But this generalized assertion of need is far from the "strong showing of relevance" and "particularized need" required to overcome the privilege for *each and every* document withheld relating to the President's 2017 actions, the Panel of Experts' study, or the 2018 policy. *VVA*, 2011 WL 4635139, at *10; *Farley*, 11 F.3d at 1389. Plaintiffs have not identified any particular document for which they have a compelling need, let alone provided any specific information regarding why their need for such a document outweighs Defendants' interest in non-disclosure. *See Cipollone*, 812 F.2d at 1400 (affirming the district court's decision to override the privilege after finding that the corporation "demonstrated a compelling need for the materials"); *Marriott Int'l Resorts*, 437 F.3d at 1307 (stating that a plaintiff must show a "compelling need" to overcome the privilege); *Farley*, 11 F.3d at 1390 (holding that a party could not establish "need" as a matter of law where it could not establish relevance).

Even accepting Plaintiffs' view that the Department's policy merely "implements" the August 2017 Presidential Memorandum, Plaintiffs still have not set forth any particularized need for the deliberative materials that went into the 2018 policy, particularly where their focus remains on the intent reflected in deliberations that preceded the 2017 Memorandum. And while Plaintiffs argue that the intent behind the 2017 Presidential Memorandum is at issue, they have not demonstrated a particularized need for any deliberative materials which preceded that decision, given that the 2017 Memorandum and any preceding directives have been expressly revoked.

Although Plaintiffs provide a "handful of examples" of documents they contend were improperly withheld, they do not actually seek to compel them or to provide anything but a generalized assertion that those documents may contain evidence of "Defendants' intent and rationale." Pls.' Mot. 22–25. For example, Plaintiffs cite to a dissenting opinion by a member of the Panel, Acting Under Secretary of the Navy Thomas Dee, which expressed his view of the Panel's recommended policy. But one Panel member's view of the recommended policy, which plainly is deliberative, has no bearing on whether the policy passes constitutional muster. *Cf. Sears*, 421 U.S. at 152 (recognizing in the FOIA context that "[t]he public is only marginally concerned with reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground"); *see also Coastal States Gas Corp. v. Dep't of Energy*, No. CIV. 76-1173, 1979 WL 6202, at *10 (D.D.C. Aug. 22, 1979), *aff'd*, 617 F.2d 854 (D.C. Cir. 1980) (stating that "to the extent that policy and regulatory options presented in these memoranda were rejected by the decisionmakers, the public has little legitimate interest in them").

Finally, by filing a motion for summary judgment arguing that there is no genuine dispute of material fact and that they are entitled to judgment in their favor, Plaintiffs effectively conceded that the deliberative material they seek is irrelevant or unnecessary to prove their claims.

Availability of other evidence: Aside from failing to show a particularized need for any

document or information, Plaintiffs have available to them ample discovery and other information (including over 30,000 non-privileged documents and upcoming responses to Plaintiffs' second set of discovery requests). Plaintiffs have also had the opportunity to take depositions and attend depositions taken in the related *Doe* case, but they have failed to do so.

In addition, the reasoning and evidence behind the Department's new policy is set forth in the Department's Report, and Defendants have produced an administrative record to Plaintiffs that comprises over 3,000 pages of supporting documentation for that policy.[17] *See Utah Med. Prods.*, 2004 WL 988877 at *5 (finding that even though the requested document was relevant to plaintiff's claims, the production of a "fifteen-volume administrative record" and other documents "all provided [the plaintiff with] a clear explanation" as to why the agency took an enforcement action). Taken together, the availability of other evidence strongly undercuts Plaintiffs' demand to negate the deliberative process privilege as a matter of law in this case.

The extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions: This factor strongly weighs against wholesale waiver of the deliberative process privilege or the disclosure of any information, especially given Plaintiffs' lack of any effort to compel, or show any need for, particular documents. Plaintiffs first argue that because "[t]he decision to ban transgender persons from the military has already been made, . . . disclosure will not chill that deliberative process." Pls.' Mot. 19. But that is not the relevant inquiry, and in any event is simply wrong. The question is not just whether disclosure will chill discussions on the same policy, but whether disclosure will chill discussions on a *future* policy. *Warner*, 742 F.2d at 1162; *Heyer*, 2014 WL 4545946, at *5. Indeed, the Supreme Court has held that documents "shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since

[17] The next factor in the *Cipollone* balancing test is the role of the Government in the litigation. 812 F.2d at 1400 (citing *Warner*, 742 F.2d. at 1161). As there is no dispute that the Government's policy is at issue in this case, this brief does not address that factor.

disclosure at any time could inhibit the free flow of advice[.]" *Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979).

Plaintiffs also argue that "[p]rospectively, the specific circumstances of these deliberations are so unique that disclosure should not chill future legitimate policy discussions." Pls.' Mot. 19. But Plaintiffs ignore that the Department of Defense and the military Services routinely make decisions related to personnel, composition of the fighting force, and national security. *See, e.g.*, AR2 (discussing studies undertaken by the Air Force and a contractor regarding "the viability of allowing individuals with disabilities to join the military in certain occupations"); AR32–33 (setting forth the Department's retention policy for non-deployable service members that was made "[b]ased on the recommendations of the Military Personnel Policy Working Group"); AR210–61 (setting forth a change made in 2011 to the medical standards for appointment, enlistment, or induction into the Services). Disclosure of deliberative material, whether on the wholesale basis sought here or even as to particular material, from the Department of Defense and the military Services plainly risks chilling future policy discussions on sensitive personnel and security matters that require free and frank communication within the highest ranks of the Department and the military. In particular, disclosure of deliberative material related to Secretary Mattis's decisions could diminish his subordinates' willingness to present their candid views to the Secretary in the future. If subordinates are chilled from providing their candid views on future policy matters to the Secretary of Defense and military leaders, the overall quality of the decision-making process will be affected, potentially leading to a direct negative impact to national security. Such harm to the core Government responsibility to protect its citizens should carry overwhelming weight. *Cf. Heyer*, 2014 WL 4545946, at *5 (in a case involving due process claims from inmates, finding that "the unique security and other concerns presented by the correctional setting enhance the need for correctional facility decision makers to be able to freely and openly consider among themselves appropriate accommodations for inmates").

D. Defendants Have Not Waived the Deliberative Process Privilege.

Lastly, the Court should reject Plaintiffs' arguments that Defendants have somehow "waived" the deliberative process privilege on a blanket basis as to all of the documents related to the Panel of Expert's findings by "selectively disclosing those findings publicly" in the Department's Report. Pls.' Mot. 15. Specifically, Plaintiffs argue that Defendants have waived the deliberative process privilege as to deliberative materials generated by the Panel of Experts by "publicly rel[ying]on those materials to support" the new policy. *Id.* at 16. This argument is wrong factually and fundamentally misconstrues the concept of waiver.

Defendants' issuance of a new policy through a presidential memorandum, a memorandum by the Secretary of Defense, and an accompanying report cannot serve to negate the deliberative process privilege as a matter of law as to the deliberations concerning the new policy. Plaintiffs' contention that once a final policy is made public, the deliberative process by which that policy was determined is *per se* discoverable, would stand the deliberative process privilege on its head. As should be apparent, innumerable government policies are the result of a deliberative process. If publicly announcing a final policy and referencing the preceding deliberations required disclosure of those internal deliberations, including candid assessments and opinions by military officials, the very notion of the deliberative process privilege would be eliminated, in disregard of its vital role in protecting the quality of government decisionmaking. *See Judicial Watch, Inc. v. Dep't of Def.*, No. 14-1935, 2016 WL 410993, *3 (D.D.C. Feb. 2, 2016), *aff'd*, 847 F.3d 735 (D.C. Cir. 2017) ("[T]he cases plaintiff cites do not go so far as to call for the abrogation of the deliberative process privilege merely because the decisionmaker ultimately acted in accordance with the recommendation in a deliberative document."); *see also City of Va. Beach*, 995 F.2d at 1252–53.

At the core of Plaintiffs' flawed argument is an attempt to erroneously conflate reliance on the final new policy and the Department's accompanying report that *resulted* from the policy process with

reliance on the "deliberations" that led to the policy outcome. The fact that the Panel of Experts' deliberations led to a final policy and report that were made public does not negate protection of those internal deliberations. *See Utah Med. Prods.*, 2004 WL 988877 at *6 (finding that the plaintiff's argument that the release of a completed report "justifies disclosure of [the] redacted supporting information" was "in error" because the "release of the [report] does not warrant disclosure of the subjective information and opinions that went into the creation of the [report]"); *Am. Soc. of Pension Actuaries v. IRS*, 746 F. Supp. 188, 191 (D.D.C. 1990) ("[P]ermitting FOIA to reach all documents expressing the bottom-line conclusion eventually espoused by the government would intrude severely into the deliberative process exemption."). Plaintiffs' contention that Defendants are using the deliberative process privilege as a "shield and a sword," Pls.' Mot. 15, is thus plainly wrong. The "sword/shield" concept applies only where a party seeks to *use* privileged information to support its claims. But in disclosing the new policy and the Report, Defendants are not relying on deliberative process information and are not waiving privilege over that information. Rather, Defendants are relying on the *outcome* of the deliberative process: the Department's new policy and the accompanying 44-page Report, which provides a detailed explanation for why, in the professional judgment of Department officials, this policy is necessary to further military interests. Indeed, it is Plaintiffs who seek to turn reliance on a final policy into a sword that would eliminate deliberative process protections *per se* for a broad category of documents. There is no support in the law for this sweeping proposition.[18]

Similarly, Plaintiffs' argument that the deliberative process privilege cannot apply to *any* deliberative materials of the Panel of Experts because these materials were "adopted as an official

[18] Plaintiffs cite *HSH Nordbank AG N.Y. Branch v. Swerdlow*, 259 F.R.D. 64, 74 (S.D.N.Y. 2009) to support their argument that Defendants are impermissibly using the deliberative process privilege as a "shield and a sword." But that case is about the attorney-client privilege, and the court concluded that there was "no basis for concluding that [the plaintiff] ha[d] used the attorney-client privilege as a shield and a sword." Similarly, Plaintiffs cite *U.S. ex rel. Mayman v. Maritn Marietta Corp.*, 886 F. Supp. 1243, 1252 (D. Md. 1995) in support of its argument that Defendants waived the deliberative process privilege by "selective disclosure." However, that case concerns waiver of the attorney-client privilege.

position" or "incorporate[d] by reference," *see* Pls.' Mot. 15, holds no weight. The concept of obviating the deliberative process privilege by adoption or incorporation by reference applies to "documents that *are themselves* later adopted as documents that express a policy or decision, and not all documents *leading to* a policy or decision that is subsequently adopted." *Freeman v. Dep't of Justice*, 723 F. Supp. 1115, 1121 (D. Md. 1988). Thus, adoption can only be applied to specific documents, not to broad categories of deliberative materials. *See N.Y. Times Co. v. Dep't of Justice*, 915 F. Supp. 2d 508, 547 (S.D.N.Y. 2013), *aff'd in part, rev'd in part on other grounds*, 752 F.3d 123 (2d Cir. 2014*), and aff'd in part, rev'd in part on other grounds and remanded*, 756 F.3d 100 (2d Cir. 2014) ("The first thing to note about adoption is that it refers to the adoption of a 'memorandum'—i.e., adoption of a particular document."). Plaintiffs' contention that Secretary Mattis and the Department of Defense have "adopted as an official position" *all* of the deliberative materials generated by the Panel of Experts is thus quite meritless. *Cf. Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 357 (2d Cir. 2005) (concluding that "*the Memorandum*" was incorporated by reference into the new policy (emphasis added)); *Judicial Watch, Inc.*, 2016 WL 410993, at *2 ("The Court has been provided with no indication that the Secretary of Defense ever 'expressly adopted' *the Lumpkin Memorandum*, or that *the document* was incorporated by reference in a memorandum that followed the decision." (emphasis added)). Rather, deliberative materials of the Panel of Experts were "used to arrive at a decision," but the deliberative documents themselves were not "adopted as documents that express a policy or decision." *Freeman*, 723 F. Supp. at 1121 (rejecting plaintiff's argument that because the information in deliberative documents was used to arrive at a decision, the documents were "adopted as the [agency's] decision"); *Judicial Watch*, 2016 WL 410993, at *3 (rejecting plaintiff's argument that a memo was expressly adopted the record showed "at most, that [the memo] may have been used as part of the larger decision-making process"). For these reasons, the Court should reject Plaintiffs' argument that

Defendants have waived the deliberative process privilege.[19]

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Compel should be denied.

[19] It also bears noting that there is no general subject matter waiver for the deliberative process privilege. *See Mobil Oil Corp. v. EPA*, 879 F.2d 698, 701 (9th Cir. 1989) ("[Plaintiff] cites no case and we have found none in which the release of certain documents waived the exemption as to other documents."). Thus, Plaintiffs' demand that the deliberative process privilege be set aside *en masse* finds no support in the law of the privilege itself. Plaintiffs cite *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982), and *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 46 (D. Md. 1974), *see* Pls.' Mot. 17, but those cases involve the waiver of the attorney-client privilege. Unlike with the attorney-client privilege, "there is no authority for applying the waiver rule to the deliberative process privilege," *Murray Energy Corp.*, 2016 WL 6902359, at *5 (quoting *Gen. Elec. Co. v. Johnson*, 2006 WL 2616187, at *17 (D.D.C. Sept. 12, 2006)); *see also Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 66 (1st Cir. 2007) ("Courts have held in the context of executive privilege that 'release of a document only waives these privileges for the document or information specifically released, and not for related materials.'" (quoting *In re Sealed Case*, 121 F.3d at 741)); *Ford Motor Co. v. United States*, 94 Fed. Cl. 211, 218 (2010) (stating that "[t]here is no subject-matter waiver associated with the deliberative process privilege"); *Marisol v. Giuliani*, No. 95 Civ. 10533, 1998 WL 132810, *8 (S.D.N.Y Mar. 23, 1998) ("[R]elease of the document only waives [the deliberative process] privilege for the documents specifically released and not for related materials."). "This limited approach to waiver serves important interests in open government by 'ensur[ing] that agencies do not forego voluntarily disclosing some privileged material out of the fear that by doing so they are exposing other, more sensitive documents.'" *Commonwealth of Puerto Rico*, 490 F.3d at 66 (quoting *In re Sealed Case*, 121 F.3d at 741); *see also Murray Energy Corp.*, 2016 WL 6902359, at *5. "Thus, the Government's release of a document waives the privilege only for the document specifically released, not for related materials." *Murray Energy Corp.*, 2016 WL 6902359, at *5 (citing *In re Sealed Case*, 121 F.3d at 741).

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2018, I served the foregoing Defendants' Response in Opposition to Plaintiffs' Motion to Compel Supplemental Interrogatory Answers and Productions via electronic mail on Plaintiffs' counsel, Marianne Kies, at mkies@cov.com, and Mitchell Kamin, at mkamin@cov.com.

Dated: May 29, 2018

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