

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’ OPPOSITION TO
DEFENDANTS’ MOTION FOR A
PROTECTIVE ORDER**

NOTED FOR CONSIDERATION:
June 13, 2018

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

1. I am counsel of record for Plaintiffs in this action, am over the age of 18, and am competent to be a witness. I make this declaration in support of Plaintiffs’ Opposition to Defendants’ Motion for a Protective Order based on facts within my personal knowledge.

2. On February 9, 2018, Defendants served their Objections to Plaintiffs’ First Set of Interrogatories to Defendant, Donald J. Trump, a true and correct copy of which is attached hereto as Exhibit 1.

3. On February 9, 2018, Defendants served their Objections to Plaintiffs’ First Requests for Production to Defendant, Donald J. Trump, a true and correct copy of which is

1 attached hereto as Exhibit 2.

2 4. On February 26, 2018, Defendants served their Objections to Plaintiffs’ First Set
3 of Requests for Admission to Defendant, Donald J. Trump, a true and correct copy of which is
4 attached hereto as Exhibit 3.

5 5. On April 23, 2018, my colleague Jordan Heinz sent a letter to Defendants’
6 counsel regarding deficiencies in their responses to Plaintiffs’ interrogatories, requests for
7 production and requests for admission. A true and correct copy of that letter is attached hereto as
8 Exhibit 4.

9 6. On May 29, 2018, Defendants served their Objections to Plaintiffs’ Second Set of
10 Interrogatories to Defendant, Donald J. Trump, a true and correct copy of which is attached
11 hereto as Exhibit 5.

12 7. On May 29, 2018, Defendants served their Objections to Plaintiffs’ Second Set of
13 Requests for Production to Defendant, Donald J. Trump, a true and correct copy of which is
14 attached hereto as Exhibit 6.

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

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18 DATED: June 6, 2018

19 s/Daniel Siegfried
20 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 June 6, 2018.



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Exhibit 1

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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/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
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U.S. Department of Justice

Exhibit 2

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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Civil Division

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Deputy Assistant Attorney General

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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 3

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

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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Exhibit 4

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

Dear Ryan:

I write regarding deficiencies in Defendants' written discovery responses to Plaintiffs' interrogatories, requests for production ("RFPs"), and requests for admission ("RFAs"), as well as depositions in other related actions.

1. Defendants' Outstanding Interrogatory and RFP Deficiencies

Defendants never responded to my February 23, 2018 letter regarding Defendants' interrogatory and RFP responses. As I previously explained, Defendants have failed to show that they are entitled to rely on Rule 33(d) to respond to Plaintiffs' interrogatories. Even if they were, they have not adequately identified the specific documents that are responsive to Plaintiffs' interrogatories. It is not enough to say the answer "may be derived from a review of certain documents." Defendants must provide sufficient detail of the specific documents that are responsive. *See* Fed. R. Civ. P. 33(d) (records must be specified "in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could"). And, as my previously letter stated, it is improper to rely on Rule 33(d) to answer contention interrogatories such as Plaintiffs' Interrogatory Nos. 1-3:

- 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).

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Mr. Ryan B. Parker

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- 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.
- 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.

Please supplement and/or amend Defendants' interrogatory responses to comport with Rule 33 by no later than April 27, 2018.

My February 23 letter also asked Defendants to comply with the directive in Rule 34 to indicate whether any documents are being withheld based on any non-privileged-based objections in Defendants' RFP responses. Because you have not responded, we understand that Defendants are not withholding any documents on any basis other than privilege. If that is incorrect, please let me know immediately.

Finally, Defendants' objection to the scope of Plaintiffs' Interrogatory No. 4¹ is without merit. Plaintiffs' interrogatory is appropriately limited in time and subject matter, rendering the request proper and answerable by both the Department of Defense and the President.² Please provide a response by no later than April 27, 2018.

2. The President's Refusal to Respond to Any Discovery Requests

Defendants have failed to provide substantive discovery responses for all written discovery propounded on the President. Contrary to Defendants' assertions, the President is not immune

¹ "Identify all individuals with whom President Trump has discussed or corresponded with regarding the United States' past, present, or potential future government policies on transgender military service or related healthcare, and the dates of each discussion, from November 9, 2016 to the present."

² Defendants' scope objection cannot justify their complete failure to respond. *See* Fed. R. Civ. P. 33(b)(3) ("Each interrogatory must, to the extent it is not objected to, be answered separately and fully . . ."); Fed. R. Civ. P. 33 advisory comm. notes ("If, for example, an interrogatory seeking information about numerous facilities or products is deemed objectionable, but an interrogatory seeking information about a lesser number of facilities or products would not have been objectionable, the interrogatory should be answered with respect to the latter even though an objection is raised as to the balance of the facilities or products."); *In re Rivera*, 2017 WL 5163695, at *6 (C.D. Cal. Apr. 14, 2017) ("If a dispute remains as to the proper scope of a discovery request, a party should still respond to the extent possible to the non-objectionable portion").

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Mr. Ryan B. Parker
April 23, 2018
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from responding to civil discovery based on separation-of-powers principles or matters of executive privilege. Defendants' supporting authority does not stand for such a sweeping proposition. For example, *Mississippi v. Johnson*, 71 U.S. 475, 601 (1866), and its progeny speak only to the ability of courts to enjoin the President. By the same token, *Cheney v. U.S. District Court for District of Columbia*, 542 U.S. 367, 385 (2004), merely indicated that separation of powers should "inform the conduct of the entire proceeding, including the timing and scope of discovery." *Id.* at 385 (emphasis added) (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). It did not eviscerate a party's right to conduct discovery into the Executive. Rather, the Court remanded the case so that the district court could consider the separation-of-powers objections. *Id.* at 391-92. Had the Court intended to immunize the President from civil discovery entirely, it would have so held. It did not.

Plaintiffs have served on the President proper discovery that is narrowly tailored to obtain information that is highly relevant to the issues in this case. The Court has rejected Defendants' contention that the President is not a proper party in this action, finding that he may be subjected to declaratory relief. (4/13/2018 Op. and Order, Docket No. 233, at 29.) And the Court likewise concluded that "the Ban was devised by the President, and the President alone," (*id.*) making this discovery of the utmost relevance. Please supplement all of the President's discovery responses no later than April 27, 2018.

3. Defendants' Deficient Responses to Requests for Admission

First, in response to Plaintiffs' RFA Nos. 2, 3, 5, 11, 13, and 16,³ Secretary Mattis and the Department of Defense assert that they have made a reasonable inquiry but lack information sufficient to admit or deny these requests. In order for Plaintiffs to evaluate these claims,

³ RFA 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[.]'"); RFA 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."); RFA 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."); RFA 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."); RFA 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.'"); RFA 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.").

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Mr. Ryan B. Parker

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Defendants must explain the inquiry they undertook. *See Carolina Cas. Ins. Co. v. Oahu Air Conditioning Serv., Inc.*, 2014 WL 4661979, at *6 (E.D. Cal. Sept. 17, 2014) (ordering party to “respond by either admitting or denying [a request for admission] or stating in detail the nature of the ‘reasonable inquiry’ it made”); *A. Farber & Partners, Inc. v. Garber*, 237 F.R.D. 250, 257 (C.D. Cal. 2006) (“Rule 36 requires the responding party to make a reasonable inquiry, a reasonable effort, to secure information that is readily obtainable from persons and documents within the responding party's relative control and to *state fully those efforts.*” (emphasis added) (quoting *Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73, 78 (N.D.N.Y. 2003))). Please supplement these responses with this information by April 27, 2018.

Second, Defendants object to RFA No. 2⁴ on the basis that the term “decided” is purportedly “vague and ambiguous, as well as undefined.” As an initial matter, Defendants should interpret Plaintiffs’ requests using the plain dictionary meaning of each term. *See In re Plascencia*, 2012 WL 2161412, at *5 (C.D. Cal. Bankr. June 12, 2012) (noting that terms in discovery can be interpreted by “[r]eference to a dictionary and use of common sense”); *U.S. ex rel. Englund v. Los Angeles Cty.*, 235 F.R.D. 675, 685 (E.D. Cal. 2006) (“[I]t is not ground for objection that the request is ‘ambiguous’ unless so ambiguous that the responding party cannot, in good faith, frame an intelligent reply.”). But Defendants’ objection is especially meritless given that they have already represented to courts that the President’s tweets constituted a “decision.” *Doe v. Trump*, 1:17-cv-01597-CKK, ECF No. 89-9, Hr’g Tr. at 33:10. Please withdraw Defendants’ objection and answer RFA No. 2 by April 27, 2018.

Third, Secretary Mattis and the DoD object to RFA No. 10 as unduly burdensome by requiring it to perform discovery into individuals beyond the Joint Chiefs, specifically “more than 950 general and flag officers.” But Rule 36 imposes an obligation on a party to perform reasonable inquiries into individuals within its control that “in realistic terms, may have information which may lead to or furnish the necessary and appropriate response.” *Herrera v. Scully*, 143 F.R.D. 545, 548 (S.D.N.Y. 1992) (holding “reasonable inquiry” includes “investigation and inquiry of any of defendant’s officers, administrators, agents, employees, servants, enlisted or other personnel”); *accord Florer v. Johnson-Bales*, 2010 WL 597167, at *1 (W.D. Wash. Feb. 17, 2010). Defendants, therefore, have an obligation to conduct at least a reasonable inquiry and admit or deny Plaintiffs’ request as appropriate. If a request cannot be admitted or denied outright, Rule 36 expressly requires a party to qualify its answer as to why the request cannot be admitted or denied. Fed. R. Civ. P. 36(a)(4) (“If a matter is not admitted, the answer *must* specifically deny it or *state in detail why the answering party cannot truthfully admit or deny it.*” (emphasis added)). Please confirm that (1) Defendants have performed a reasonable inquiry, (2) explain the scope of that inquiry, and (3) based on that inquiry admit, deny, or qualify Defendants’ response as appropriate

⁴ See *supra* note 1.

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Mr. Ryan B. Parker
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by identifying those individuals within the identified ranks that did advise the President to adopt a policy excluding transgender individuals from serving in any capacity in the U.S. military. Please correct each of the above RFA deficiencies no later than April 27, 2018.

4. Depositions in Other Actions

Finally, as discovery moves forward in this case and other related cases, it is important that Plaintiffs are given reasonable notice of depositions in other actions, particularly if Defendants intend to argue that Plaintiffs cannot take depositions of those witnesses at a later date. Please provide at least ten (10) business days of notice in advance of any deposition in another action.

* * *

Given the Court's April 13, 2018 order and opinion, and the parties' May 4 deadline for submitting an updated joint status report, it is critical that the parties move forward with discovery in this case and resolve these disputes as soon as possible. Please identify your availability to meet and confer regarding the above issues this week. We need to understand Defendants' positions regarding the issues identified above in order to assess the extent to which Plaintiffs need to involve the Court in resolving the parties' disputes. Should we not receive a timely response to this letter or to the invitation to meet and confer, plaintiffs reserve the right to seek appropriate relief with the Court.

Sincerely,



Jordan M. Heinz

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.

No. 2:17-Cv-1297-MJP

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' SECOND
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' Second Set of Interrogatories to Defendant Donald J. Trump, served April 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 in response to the requests as they are directed to Defendant President Trump and as they are intended to apply to the Vice President or the Office of the Vice President. Defendants will produce, or already have produced, separate objections for other Defendants.

Objections to Definitions and Instructions

1. Defendants object to Definition 1 of “You,” “your,” and “yours” as substantially overbroad, ambiguous, and disproportionate to the needs of the case.

2. Defendants object to Definition 2 of “President Trump” and the “President” as substantially overbroad, ambiguous, and disproportionate to the needs of the case because “indirectly by” or “under the control of Donald J. Trump” is overbroad, ambiguous, and disproportionate to the needs of the case because these terms would encompass all employees of every Executive Branch Department and agency. In these objections, Defendants will construe the terms “President Trump” and the “President” to refer only to the President and his immediate advisors in the White House and their staff, as well as officials and employees of the Executive Office of the President and EOP components.

3. Defendants object to Definition 3 of “Vice President Pence” and the “Vice President” as overbroad, unduly burdensome and disproportionate to the needs of the case to the extent that it includes “persons engaged . . . indirectly by” and “under the control of Michael R. Pence.” In these objections, Defendants will construe the terms “Vice President Pence” and the “Vice President” to refer only to employees of the Office of the Vice President.

4. Defendants object to Plaintiffs’ Definition 8 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. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

5. Defendants object to Plaintiffs' Definition 9 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. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

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. *See* Defendants' Motion for Protective Order, ECF No. 268.

First, Plaintiffs should not be permitted to request the President to respond to discovery because doing so would intrude on established separation of powers principles. Indeed, this Court has already concluded that Plaintiffs may not seek injunctive relief against the President based on the *Mississippi v. Johnson*, 71 U.S. at 501, line of cases. *See* ECF No. 233 at 30; ECF No. 194 at 22–24. An order directing the President to respond to discovery raises the same core separation-of-powers concerns as the Court identified in *Mississippi v. Johnson*. *See* 71 U.S. at 499 (reasoning that when presidential action requires "the exercise of judgment," "general principles . . . forbid judicial interference with the exercise of Executive discretion."); *see also Franklin v. Massachusetts*, 505 U.S. 788, 827–28 (1992) (Scalia, J., concurring in part and concurring in the judgment) (the principle that the President "may not be ordered to perform particular executive . . . acts at the behest of the Judiciary" is "implicit in the separation of powers"). Forcing the President to respond to discovery where he is sued in his official capacity,

even where declaratory relief is at issue or otherwise, would “not only distract him from his constitutional responsibility to ‘take Care that the Laws be faithfully executed,’” but “would produce needless head-on confrontations between district judges and the chief executive.” *Id.* at 828; *see Swan v. Clinton*, 100 F.3d 973, 977 n.1 (D.C. Cir. 1996) (“[S]imilar considerations regarding a court’s power to issue [injunctive] relief against the President himself apply to [a] request for a declaratory judgment.”). In light of these concerns, the Court should order that Plaintiffs may not seek discovery from the sitting President or any discovery of information concerning presidential communications and deliberations.

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 the 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, Plaintiffs are required, at a minimum, to exhaust alternative sources of discovery before seeking discovery of the President and discovery from other sources that seeks information concerning presidential communications and deliberations. *See Cheney*, 542 U.S. at 391.

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. The foregoing objection also applies to discovery of any information, documents or materials from the Vice President of the United States and the Office of the Vice President.

Specific Objections to Interrogatories

Interrogatory No. 16: Identify the principal author(s) and each person who reviewed, revised, or commented on any drafts, including but not limited to the final draft, of Secretary James Mattis's February 22, 2018, Memorandum for the President with Subject: Military Service by Transgender Individuals.

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 that this interrogatory calls for information that is not within his custody or control.

Interrogatory No. 17: Identify the principal author(s) and each person who reviewed, revised, or commented on any drafts, including but not limited to the final draft, of the February

2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons.

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 that this interrogatory calls for information that is not within his custody or control.

Interrogatory No. 18: Identify each person who attended any meeting of the Panel of Experts and/or provided the Panel of Experts or its members any information, statement, advice, opinion, or other input of any nature or kind, including without limitation the Transgender Service Policy Working Group, any other group or committee within the Department of Defense that reviewed or considered transgender issues, members of agencies other than the Department of Defense, military medical professionals, civilian medical professionals, transgender service members, the commanders of transgender service members, elected officials, third parties, lobbyists, experts, and/or consultants, and describe in detail the information, statement, advice, opinion, or other input such person provided.

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 that this interrogatory calls for information that is not within his custody or control.

Interrogatory No. 19: Identify each member of the Transgender Service Policy Working Group and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues, and each person who attended any meeting of such group and/or

provided such group or its members any information, statement, advice, opinion, or other input of any nature or kind, including without limitation military medical professionals, civilian medical professionals, transgender service members, the commanders of transgender service members, members of agencies other than the Department of Defense, elected officials, third parties, lobbyists, experts, and/or consultants, and describe in detail the information, statement, advice, opinion, or other input such person provided.

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 that this interrogatory calls for information that is not within his custody or control.

Interrogatory No. 20: Identify the principal author(s) and each person who reviewed, revised, or commented on any drafts, including but not limited to the final draft, of President Trump's March 23, 2018, Memorandum for the Secretary of Defense and the Secretary of Homeland Security with Subject: Military Service by Transgender Individuals.

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 "each

person” purports to require the President to identify every single person who (1) reviewed, (2) revised, or (3) commented on any drafts of his March 23, 2018, Memorandum for the Secretary of Defense and the Secretary of Homeland Security with Subject: Military Service by Transgender Individuals.

Interrogatory No. 21: Identify all Communications, on or after January 20, 2017 to the present, between the President, the Executive Office of the President, the Vice President, and/or the Office of the Vice President, on the one hand, and Secretary Mattis and/or the Department of the Defense, on the other hand, relating or referring to military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general, including but not limited to oral communications.

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.

Dated: May 29, 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 May 29, 2018, a copy of the document above was served by email on the following:

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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.

No. 2:17-Cv-1297-MJP

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' SECOND SET
OF REQUESTS FOR PRODUCTION TO DEFENDANT DONALD J. TRUMP**

Pursuant to Federal Rules of Civil Procedure 26 and 34, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs' Second Set of Requests for Production of Documents to Defendant Donald J. Trump, served April 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 in response to the requests as they are directed to Defendant President Trump and as they are intended to apply to the Vice President or the Office of the Vice President. Defendants will produce, or already have produced, separate objections for other Defendants.

Objections to Definitions and Instructions

1. Defendants object to Definition 1 of “You,” “your,” and “yours” as substantially overbroad, ambiguous, and disproportionate to the needs of the case.

2. Defendants object to Definition 2 of “President Trump” and the “President” as substantially overbroad, ambiguous, and disproportionate to the needs of the case because “indirectly by” or “under the control of Donald J. Trump” is overbroad, ambiguous, and disproportionate to the needs of the case because these terms would encompass all employees of every Executive Branch Department and agency. In these objections, Defendants will construe the terms “President Trump” and the “President” to refer only to the President and his immediate advisors in the White House and their staff, as well as officials and employees of the Executive Office of the President and EOP components.

3. Defendants object to Definition 3 of “Vice President Pence” and the “Vice President” as overbroad, unduly burdensome and disproportionate to the needs of the case to the extent that it includes “persons engaged . . . indirectly by” and “under the control of Michael R. Pence.” In these objections, Defendants will construe the terms “Vice President Pence” and the “Vice President” to refer only to the Vice President and to employees of the Office of the Vice President.

4. Defendants object to Plaintiffs’ Definition 9 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. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

5. Defendants object to Plaintiffs' Definition 10 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. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

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. *See* Defendants' Motion for Protective Order, ECF No. 268.

First, Plaintiffs should not be permitted to request the President to respond to discovery because doing so would intrude on established separation of powers principles. Indeed, this Court has already concluded that Plaintiffs may not seek injunctive relief against the President based on the *Mississippi v. Johnson*, 71 U.S. at 501, line of cases. *See* ECF No. 233 at 30; ECF No. 194 at 22–24. An order directing the President to respond to discovery raises the same core separation-of-powers concerns as the Court identified in *Mississippi v. Johnson*. *See* 71 U.S. at 499 (reasoning that when presidential action requires "the exercise of judgment," "general principles . . . forbid judicial interference with the exercise of Executive discretion."); *see also Franklin v. Massachusetts*, 505 U.S. 788, 827–28 (1992) (Scalia, J., concurring in part and concurring in the judgment) (the principle that the President "may not be ordered to perform particular executive . . . acts at the behest of the Judiciary" is "implicit in the separation of powers"). Forcing the President to respond to discovery where he is sued in his official capacity,

even where declaratory relief is at issue or otherwise, would “not only distract him from his constitutional responsibility to ‘take Care that the Laws be faithfully executed,’” but “would produce needless head-on confrontations between district judges and the chief executive.” *Id.* at 828; *see Swan v. Clinton*, 100 F.3d 973, 977 n.1 (D.C. Cir. 1996) (“[S]imilar considerations regarding a court’s power to issue [injunctive] relief against the President himself apply to [a] request for a declaratory judgment.”). In light of these concerns, the Court should order that Plaintiffs may not seek discovery from the sitting President or any discovery of information concerning presidential communications and deliberations.

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 the 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, Plaintiffs are required, at a minimum, to exhaust alternative sources of discovery before seeking discovery of the President and discovery from other sources that seeks information concerning presidential communications and deliberations. *See Cheney*, 542 U.S. at 391.

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. The foregoing objection also applies to discovery of any information, documents or materials from the Vice President of the United States and the Office of the Vice President.

Specific Objections to Requests for Production

RFP No. 26: Documents sufficient to show the total annual amount spent and average, actual, or estimated annual per-person cost of hormone therapy provided to service members for each of fiscal years 2015, 2016, and 2017, and for the year to date of fiscal year 2018, including without limitation hormone therapy for the treatment of hypogonadism, hypothyroidism, hyperthyroidism, prostate cancer, breast cancer, growth hormone deficiency, menopause, osteoporosis, and transgender hormone therapy.

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. The President further objects to this RFP to the extent that it seeks documents that are not within his custody or control.

Response:

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

RFP No. 27: All Documents or Communications relating or referring to Secretary James Mattis's February 22, 2018, Memorandum for the President with Subject: Military Service by Transgender Individuals (the "February 22, 2018, Memorandum"), including without limitation: (a) all documents reviewed, considered, or relied upon in preparing the February 22, 2018, Memorandum; and (b) all drafts of the February 22, 2018, Memorandum.

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. The President further objects to this RFP to the extent that it seeks documents that are not within his custody or control.

Response:

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

RFP No. 28: All Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the final draft of the February 22, 2018, Memorandum.

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. The President further objects to this RFP to the extent that it seeks documents that are not within his custody or control.

Response:

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

RFP No. 29: All Documents or Communications relating or referring to the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons (the “Report and Recommendations”), including without limitation: (a) all documents received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (b) all Communications to, from, or copying the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (c) all Documents reflecting, containing, or setting forth any

information or data received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (d) all Documents relating, reflecting, or referring to matters discussed at any meeting of the Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (e) all drafts of the Report and Recommendations.

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. The President further objects to this RFP to the extent that it seeks documents that are not within his custody or control.

Response:

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

RFP No. 30: All Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the Report and Recommendations.

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. The President further objects to this RFP to the extent that it seeks documents that are not within his custody or control.

Response:

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

RFP No. 31: All Documents and Communications relating or referring to any person or group providing analysis, advice, or recommendations to Secretary Mattis, the Department of Defense, and/or the Panel of Experts concerning the Report and Recommendations, military service by transgender people or any restrictions on such service, including the Transgender Service Policy Working Group and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues.

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. The President further objects to this RFP to the extent that it seeks documents that are not within his custody or control.

Response:

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

RFP No. 32: All Documents or Communications relating or referring to President Trump's March 23, 2018, Memorandum for the Secretary of Defense and the Secretary of Homeland Security with Subject: Military Service by Transgender Individuals (the "March 23, 2018, Memorandum"), including without limitation: (a) all documents reviewed, considered, or relied upon in preparing the March 23, 2018, Memorandum; and (b) all drafts of the March 23, 2018, Memorandum.

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.

Response:

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

RFP No. 33: All Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the March 23, 2018, Memorandum.

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.

Response:

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

RFP No. 34: All Communications, on or after January 20, 2017 to the present, between the President, the Executive Office of the President, the Vice President, and/or the Office of the Vice President, on the one hand, and Secretary Mattis and/or the Department of the Defense, on the other hand, relating or referring to military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general.

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.

Response:

The President will not produce any documents responsive to this RFP. To the extent this request is directed at documents, information, or materials in the custody of the Vice President and the Office of the Vice President—who are not defendants in this action—any responsive Vice Presidential materials will also not be produced based on the general objection above. *See Cheney v. U.S. District Court for the District of Columbia.*

RFP No. 35: All Communications, on or after January 20, 2017 to the present, between the President, the Executive Office of the President, the Vice President, the Office of the Vice President, Secretary Mattis, the Department of Defense, and/or the Panel of Experts, on the one hand, and non-government third parties, including but not limited to the Heritage Foundation, Heritage Action for America, the Family Research Council, the Center for Military Readiness, the Liberty Council, lobbyists, think tanks, nonprofit organizations, religious organizations, and individuals, on the other hand, concerning military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general.

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.

Response:

The President will not produce any documents responsive to this RFP. To the extent this request is directed at documents, information, or materials in the custody of the Vice President and the Office of the Vice President—who are not defendants in this action—any responsive Vice Presidential materials will also not be produced based on the general objection above. *See Cheney v. U.S. District Court for the District of Columbia.*

Dated: May 29, 2018

Respectfully submitted,

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