IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, Defendants.	Case 1:17-cv-02459-GLR Hon. George L. Russell, III

DEFENDANTS' SUPPLEMENTAL BRIEF CONCERNING THE IMPACT OF *TRUMP V. HAWAII* ON PLAINTIFFS' MOTION TO COMPEL SUPPLEMENTAL INTERROGATORY ANSWERS AND PRODUCTION

Defendants respectfully provide this supplemental brief in support of Defendants' Opposition to Plaintiffs' Motion to Compel Supplemental Interrogatory Answers and Production ("Defendants' Opposition to Plaintiffs' Motion to Compel"), Dkt. 184. The Supreme Court's recent decision in *Trump v. Hawaii*, No. 138 S. Ct. 2392 (June 26, 2018), impacts the Court's consideration of Plaintiffs' Motion to Compel Supplemental Interrogatory Answers and Production ("Plaintiffs' Motion to Compel"), Dkt. 177-3.

By way of background, in *Hawaii*, the President initially signed Executive Order No. 13769 (EO-1), which directed the Secretary of Homeland Security to conduct a review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States. That executive order suspended for 90 days the entry of foreign nationals from seven counties. Plaintiffs alleged that the executive order violated, among other things, the Equal Protection, Due Process, and the Establishment Clauses, and the district court entered a temporary restraining order. In response, the President revoked EO-1, replacing it with Executive Order No. 13780 (EO-2), which also directed a worldwide review, and temporarily restricted entry of foreign

nationals from six of the countries covered by EO-1 during the pendency of that review. This executive order was immediately challenged in court and was preliminarily enjoined. The Supreme Court stayed the injunctions, and the temporary restrictions in EO-2 expired before the Supreme Court could address the merits. After completion of the worldwide review, the President issued Proclamation No. 9645 (EO-3), which sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present public safety threats. Accordingly, EO-3 placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.

In their Motion to Compel, Plaintiffs argue that the deliberative process privilege does not apply in this case as a matter of law because "intent" or "animus" is at issue. *See* Pls.' Mot. 10–12. But *Hawaii* strongly supports Defendants' position in this case that the President's purported intent in issuing a prior policy that he has expressly revoked is not at issue, and that the Court should instead analyze the official objectives of the current policy. *See* 138 S. Ct. 2420–23. In *Hawaii*, the Supreme Court assessed the challenged policy on its own terms and rejected the theory that prior statements forever "contaminated" the proclamation with "impermissible discriminatory animus." *Compare id.* at 2420–21, *with id.* at 2440 (Sotomayor, J., dissenting). While recognizing that it "may consider plaintiffs' extrinsic evidence," the Court stated that it would "uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.* at 2420 (majority op.). In analyzing whether such a justification existed, the Court focused on the proclamation itself and the "multi-agency review" that supported it. *See id.* at 2417, 2421. That targeted inquiry was not influenced by the other executive orders preceding the proclamation, which the President had revoked, or past statements by the President about Muslims and terrorism. *See id.* at 2417–23.

In this case, Plaintiffs' theory is similar to the one adopted by Justice Sotomayor's dissent, arguing that the military's 2018 policy continues an alleged "ban" announced by the President on Twitter last year and is the product of animus. *See* Pls.' Mot. 1, 5–6. To bolster their theory, Plaintiffs seek, among other things, deliberative materials concerning the "the President's original July 2017 Tweets and August 2017 Memorandum," *id.* at 2, which the President expressly revoked in his March 2018 Memorandum, 83 Fed. Reg. 13,367 (Mar. 23, 2018). But *Hawaii* instructs that the Court must assess the 2018 policy on its own terms, not on the purported intent behind the policy as evidenced by prior statements, including as to an expressly revoked policy. Thus, Plaintiffs' demand for all deliberative process materials related to the challenged Department of Defense policy, and assertion that the deliberative process privilege does not apply to these materials, cannot be sustained based on alleged animus behind prior, revoked presidential statements and policy. Such alleged animus is not pertinent to judicial review of the military's new policy, and thus cannot serve as a basis to negate the deliberative process privilege in this litigation.

Hawaii also supports Defendants' position the Court should apply a deferential standard of review to the Department of Defense's 2018 policy. As a preliminary matter, as explained in Defendants' Opposition to Plaintiffs' Cross-Motion for Summary Judgment ("Defendants' Opposition"), the Department of Defense's 2018 policy triggers rational-basis review because it—like the policy announced by former Secretary of Defense Ashton Carter during the prior administration—draws lines on the basis of gender dysphoria (a medical condition) and gender transition (a medical treatment), rather than transgender status. Defs.' Opp. 30, Dkt. 176. But even if an analogous civilian policy would trigger heightened scrutiny, military-deference principles require an approach akin to rational-basis review here. *Id.* at 30–31. The Supreme Court recently confirmed this point in *Hawaii*, when it rejected the invitation to import "the *de novo* 'reasonable observer' inquiry" into "the national security and foreign affairs context," including cases that involve review

of "military actions." 138 S. Ct. at 2420 n.5. Instead, based on deference principles, the Court applied "rational basis review" and stressed that judicial "inquiry into matters of . . . national security is highly constrained." *Id.* at 2420 (citing *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976)). In conducting its review of a policy affecting national security, the Supreme Court stressed that a court "cannot substitute [its] own assessment for the Executive's predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.'" *Id.* at 2421 (quoting *Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948)). The Supreme Court further explained that this deferential review may apply "across different contexts and constitutional claims," even when evaluating a "'categorical'" classification "on the basis of sex." *Id.* at 2419 (citing *Fiallo v. Bell*, 430 U.S. 787, 795, 799 (1977)). Therefore, *Hawaii* underscores that deferential review applies to "military actions," *id.* at 2420 n.5—regardless of whether a similar action would trigger heightened scrutiny in the civilian context—and that such deference is triggered by the subject matter of the decision; here, manning and personnel decisions concerning the armed forces. Because the Court should apply a deferential standard of review and "uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds," *id.* at 2420, the Court should examine the Department of Defense's stated justifications for the policy, as set forth in the Secretary of Defense's February 2018 memorandum and its accompanying 44-page report. For these reasons as well, discovery into the Department's deliberative process is neither necessary nor appropriate in this case, and Plaintiffs' contention that the deliberative process privilege is inapplicable as a matter of law lacks merit.

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Respectfully submitted,

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