

No. 18-_____

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In re DONALD J. TRUMP, *et al.*,
Petitioners.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES OF AMERICA; JAMES N. MATTIS, in his official capacity as Secretary of Defense; U.S. DEPARTMENT OF DEFENSE; U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN, Secretary of Homeland Security,
Petitioners-Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON,
Respondent,

RYAN KARNOSKI; CATHRINE SCHMID; D.L.; LAURA GARZA; HUMAN RIGHTS
CAMPAIGN; GENDER JUSTICE LEAGUE; LINDSEY MULLER; TERECE LEWIS; PHILLIP
STEPHENS; MEGAN WINTERS; JANE DOE; CONNER CALLAHAN; AMERICAN
MILITARY PARTNER ASSOCIATION;
Real Parties in Interest-Plaintiffs,

STATE OF WASHINGTON,
Real Party in Interest-Intervenor Plaintiff.

**PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON AND EMERGENCY
MOTION FOR STAY PENDING CONSIDERATION OF THE PETITION**

CHAD A. READLER
Acting Assistant Attorney General

HASHIM M. MOOPAN
Deputy Assistant Attorney General

BRINTON LUCAS
Counsel to the Assistant Attorney General

MARK R. FREEMAN
MARK B. STERN
MARLEIGH D. DOVER
TARA S. MORRISSEY
BRAD HINSHELWOOD
*Attorneys, Appellate Staff
Civil Division*

*U.S. Department of Justice, Room 7261
950 Pennsylvania Ave., NW
Washington, DC 20530*

CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

(1) Telephone numbers and addresses of the attorneys for the parties

Counsel for Petitioners Donald Trump, et al.:

Chad A. Readler (Chad.A.Readler@usdoj.gov)
Hashim M. Mooppan (Hashim.Mooppan@usdoj.gov)
Brinton Lucas (Brinton.Lucas@usdoj.gov)

Mark R. Freeman (Mark.Freeman2@usdoj.gov)
Mark B. Stern (Mark.Stern@usdoj.gov)
Marleigh D. Dover (Marleigh.Dover@usdoj.gov)
Tara S. Morrissey (Tara.Morrissey@usdoj.gov)
Brad Hinshelwood (Bradley.A.Hinshelwood@usdoj.gov)
Attorneys, Appellate Staff
Civil Division, Room 7261
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
(202) 353-9018

Counsel for Real Party in Interest-Intervenor Plaintiff

La Rond Baker (larondb@atg.wa.gov)
Colleen M. Melody (colleenm1@atg.wa.gov)
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206-464-7744

Counsel for Real Party in Interest- Plaintiffs

Vanessa Barsanti (vanessa.barsanti@kirkland.com)
Jordan M. Heinz (jheinz@kirkland.com)
James F. Hurst (james.hurst@kirkland.com)
Scott Lerner (scott.lerner@kirkland.com)
Daniel I. Siegfried (Daniel.siegfried@kirkland.com)
Joseph B. Tyson (Ben.Tyson@kirkland.com)
Stephen R. Patton (Stephen.patton@kirkland.com)
Kirkland & Ellis
300 North LaSalle
Chicago, IL 60654
312-862-2205

Tara Borelli (tborelli@lambdalegal.org)
Jon W. Davidson (j davidson@lambdalegal.org)
Natalie Nardecchia (nnardecchia@lambdalegal.org)
Peter C. Renn (prens@lambdalegal.org)
Lambda Legal Defense & Education Fund, Inc.
3325 Wilshire Blvd, Suite 1300
Los Angeles, CA 90010
213-382-7600

Sasha J. Buchert (sbuchert@lambdalegal.org)
Carl Charles (ccharles@lambdalegal.org)
Lambda Legal Defense & Education Fund, Inc.
1875 I Street, NW, 5th Floor
Washington, DC 20006
202-999-8083

Kara N. Ingelhart (kingelhart@lambdalegal.org)
Camilla B. Taylor (ctaylor@lambdalegal.org)
105 W. Adams St., Suite 2600
Chicago, IL 60603-6208
312-663-4413

Paul D Castillo (Pcastillo@lambdalegal.Org)
Lambda Legal Defense & Education Fund, Inc.
3500 Oak Lawn Avenue, Ste 500
Dallas, TX 75219
214-302-2216

Samantha Everett (samantha@newmanlaw.com)
Derek Alan Newman (Derek@newmanlaw.com)
Jason Sykes (jason@newmanlaw.com)
Newman & Du Wors LLP
2101 Fourth Avenue, Suite 1500
Seattle, WA 98121
206-274-2800

Peter E. Perkowski (peterp@outserve.org)
Outserve-SLDN, Inc.
c/o Perkowski Legal
445 S. Figueroa St., Suite 3100
Los Angeles, CA 90071
213-426-2137

(2) Facts showing the existence and nature of the emergency

As set forth more fully in the petition, the district court on Friday, July 27, 2018, ordered the President to comply with an extraordinarily burdensome discovery order within ten days—*i.e.*, by Monday, August 6, 2018. The court ordered the President to comb through presidential communications and deliberations encompassing approximately 9,000 documents to produce a privilege log “on a document-by-document basis,” without even requiring plaintiffs to show that relevant information is unavailable through other avenues, to limit the scope of their discovery, or to make a focused demonstration of need. Additionally, it ordered all government defendants to produce every document they withheld solely under the deliberative process privilege—well over 19,000 documents—thus revealing the military’s internal deliberations regarding its policy on military service by transgender

individuals. In so doing, the district court has created extremely serious separation-of-powers concerns, imposed an extraordinary burden on the President and the military, and intruded on the government's decision-making process regarding military policies. And it has done all of this even though the government has already produced over 30,000 documents in discovery, including a complete administrative record, and has a fully briefed preliminary-injunction appeal on the merits pending in this Court, which, if successful, would eliminate the justification for much if not all of the requested discovery.

This Court's immediate correction is required. This Court should grant a stay pending consideration of the petition for a writ of mandamus as expeditiously as possible, as well as an administrative stay. We request that the Court act on the administrative stay request by August 2, so that the Solicitor General will have sufficient time to seek Supreme Court review if necessary.

(3) When and how counsel notified

Government counsel notified plaintiffs' counsel by e-mail of the government's intent to file this petition and stay motion. Service will be effected by electronic service through the CM/ECF system and e-mail. Plaintiffs' counsel Jordan M. Heinz (for the individual and organizational plaintiffs) and La Rond Baker (for the State of Washington) indicated that plaintiffs oppose the stay motion.

(4) Submissions to the district court

The government requested a protective order to stay discovery, Doc.225, which the district court denied, Add.13-15. The government requested a protective order to preclude discovery directed at the President and discovery of information concerning presidential communications and deliberations, Doc.268, which the district court denied, Add.1-12. The district court also granted plaintiffs' motion to compel discovery of documents withheld under the deliberative process privilege, which the government opposed. *Id.* The district court ordered the government to turn over all documents withheld solely under the deliberative process privilege within ten days and to produce revised, "document-by-document" privilege logs within ten days, including for "documents, communications, and other materials" withheld under the presidential communications privilege. Add.11. On July 31, 2018, the government moved for a stay in district court. Doc.300. That motion remains pending.

Counsel for Defendants

CHAD A. READLER

Acting Assistant Attorney General

HASHIM M. MOOPAN

Deputy Assistant Attorney General

BRINTON LUCAS

Counsel to the Assistant Attorney General

MARK R. FREEMAN

MARK B. STERN

MARLEIGH D. DOVER

TARA S. MORRISSEY

BRAD HINSHELWOOD

Attorneys, Appellate Staff

Civil Division

U.S. Department of Justice, Room 7261

950 Pennsylvania Ave., NW

Washington, DC 20530

INTRODUCTION AND SUMMARY

Pursuant to the All Writs Act, 28 U.S.C. § 1651, and Rule 21 of the Federal Rules of Appellate Procedure, the federal government respectfully asks this Court to issue a writ of mandamus directing the district court to vacate its order of July 27, 2018, grant the government's motion for a protective order (Doc.268), and deny plaintiffs' motion to compel (Doc.245)—or, at a minimum, to stay the discovery at issue in the July 27 order until the government's pending appeal in *Karnoski v. Trump*, No. 18-35347 (9th Cir.), is resolved.

The July 27 order requires the government within ten days—*i.e.*, by August 6—to make particularized, document-by-document objections of executive privilege for a sweeping array of White House documents and communications and to produce to plaintiffs every single document—over 19,000 documents—it has withheld solely under the deliberative process privilege. Because that order would impose extraordinary burdens on the government while this mandamus petition is pending—especially given the impractical ten-day deadline, which plaintiffs did not even request—we also respectfully ask that the Court grant, as expeditiously as possible, a stay of the district court's order pending its consideration of this petition, as well as an administrative stay pending its consideration of this stay request. Because the district court's order threatens such an extraordinary disruption of the operations of the Executive Branch, we request that the Court act on the administrative stay request by

August 2, so that the Solicitor General will have sufficient time to seek Supreme Court review if necessary.¹

The district court's July 27 order plainly warrants an exercise of this Court's mandamus jurisdiction. By any measure, the order is extraordinary: (1) it requires the President, on a ten-day deadline, to produce a "document-by-document" privilege log making particularized objections to thousands of documents—including draft presidential memoranda, emails among presidential advisers, communications between the President and military leadership, and more—that have been withheld under the presidential communications privilege, and to do so in a manner that may require disclosure of privileged information; and (2) it orders the Department of Defense, on the same arbitrary timeline, to disclose every single document withheld solely under the deliberative process privilege, totaling over 19,000 documents—including sensitive communications to Secretary of Defense James Mattis and his personal notes on those communications—without any particularized showing of need.

The district court's order is all the more extraordinary because this Court is already poised to review the legal premises of the court's ruling, thereby potentially obviating the need for much, if not all, of the discovery at issue. As justification for

¹ The government has asked the district court for a stay pending this Court's review (Doc.301), and we will promptly inform the Court of any action on that motion.

the discovery required by the July 27 order, the district court cited the reasoning in its earlier April 13 order, which preliminarily enjoined a new military policy regarding service by transgender individuals and declared that the policy would be subject to strict scrutiny. The government's expedited appeal from that April 13 order is fully briefed and is scheduled to be argued to this Court on October 10 (if not sooner, as the government has a pending motion to further expedite the argument). *See Karnoski v. Trump*, No. 18-35347. That appeal presents for this Court's review several issues central to the district court's discovery ruling, and the Court's disposition of the appeal may demonstrate that the discovery is improper in whole or in part.

The district court offered no reason for imposing this massive burden (let alone on an impossible schedule) while its April 13 order is under review. Among other things, this Court's resolution of the government's appeal will clarify what policy is actually at issue in this litigation. Although plaintiffs' amended complaint challenges a policy allegedly announced by the President in a 2017 memorandum, the President revoked that memorandum in light of a new policy proposed by Secretary Mattis in March 2018. Despite that revocation, the district court refused to dissolve the preliminary injunction it entered against the President's 2017 memorandum and enjoined the military's new 2018 policy. The district court's discovery order is predicated on its facially erroneous assertion that the 2018 policy is not a "new policy" but "rather a plan to implement" the 2017 memorandum, Add.14, which the court claimed had not been "substantively rescind[ed] or revoke[d]," Add.27. But in March

2018, the President expressly “revoke[d] [his 2017] memorandum” and “any other directive” to allow Secretary Mattis to implement the military’s proposed policy, Add.70, which was based on the military’s professional, independent judgment, Add. 70, 72-74. The substantive terms of the 2018 policy, moreover, expressly draw classifications based on the medical diagnosis of gender dysphoria, not based on transgender status, Add.73-74, as the district court wrongly asserted, Add.4-5.

The government’s pending appeal further explains the errors in the key premises underlying the district court’s July 27 discovery order. If this Court agrees that the district court has erroneously focused its analysis on a now-revoked presidential memorandum, much of the justification for the discovery order will disappear, as there will be no need to obtain discovery from the President regarding his now-revoked memorandum. Moreover, because the 2018 policy draws classifications based on gender dysphoria, rather than transgender status, the policy is subject to rational-basis review—not strict scrutiny, as the district court concluded. Add.7-8, 39. Indeed, the Supreme Court has never applied strict scrutiny in similar circumstances, and instead has stressed that deference is owed to the military’s judgment. Again, if this Court agrees, an essential premise of the court’s extraordinary discovery order will fall away. *See* Add.7-8. Under rational-basis review, there is no basis to probe internal Presidential and military deliberations. *See Hawaii v. Trump*, 138 S. Ct. 2392, 2420 (2018). And because the district court has enjoined both

the rescinded 2017 memorandum and the current policy announced in March 2018, plaintiffs will suffer no injury by awaiting this Court's guidance on these questions.

The Supreme Court's decision in *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004), leaves no doubt that the district court wrongly ordered intrusive and burdensome discovery from the White House under these circumstances. *Cheney* explains that mandamus is appropriate "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities," particularly when a court fails to "explore other avenues." *Id.* at 382, 390. Nevertheless, the district court inexplicably declared that there was "no support" for the government's argument that the court should explore alternatives before requiring the President to assert executive privilege or respond to burdensome discovery requests. *Id.* Yet *Cheney* makes clear that there is, to the contrary, "no support" for the district court's approach of requiring the Executive Branch to "bear the burden" of "making particularized objections" to broad discovery requests—especially without even attempting to consider "other avenues." 542 U.S. at 388, 390.

The court's blanket order to the military to produce every single document withheld solely under the deliberative process—over 19,000 documents concerning military deliberations—is equally unsound. The court purported to analyze the relative interests in confidentiality and disclosure in a page and a half. Rather than explain why plaintiffs had demonstrated a need for any category or subcategory of documents, the court broadly declared that evidence concerning the military's

deliberations is “central to the litigation” because of “the searching judicial inquiry that strict scrutiny requires.” Add.7. As explained, that critical assumption as to the appropriate standard of review is erroneous and currently on appeal. Moreover, 30,000 documents (totaling roughly 150,000 pages), including a complete administrative record, have already been produced.

Furthermore, the district court abdicated its duties in cursorily dispatching the military’s interest in confidential deliberations. It rejected as “mere speculation” the military’s concerns regarding the chilling effect on deliberations over “sensitive personnel and security matters” and the “direct negative impact to national security” from disclosure. Add.8. This reasoning is facially flawed given the sensitivity of the communications at issue, including those at the highest levels of the Department of Defense. The court could reach this incorrect conclusion only by issuing a sweeping categorical ruling, rather than performing a more particularized balancing inquiry.

In sum, the district court’s order hinges on erroneous legal rulings that are already being reviewed by this Court and also threatens extraordinary intrusions that should not be permitted pending resolution of these issues. Independently, the court’s disregard for the significant concerns raised by discovery requests to the President, and for the military’s interest in confidential deliberations, warrants the exercise of mandamus authority. Because this order would impose enormous burdens on the government while this petition is pending—especially given the imminent (and impossible) ten-day deadline—we respectfully ask this Court to grant a stay of the

court's July 27 order pending the Court's disposition of this mandamus petition and an immediate administrative stay pending consideration of the stay motion.

STATEMENT

The factual and legal background of this litigation is set out in detail in the government's briefs in *Karnoski v. Trump*, No. 18-35347 (9th Cir.), which is currently set for oral argument on October 10. We summarize that background below as it relates to the district court's July 27 discovery order.

A. Background

1. In June 2016, then-Secretary of Defense Ashton Carter ordered the armed forces to revise their standards for accession into the military by transgender individuals, setting an implementation date of July 1, 2017. Doc.48-3. Longstanding military standards had presumptively barred transgender individuals from entering the military on the basis of transgender status. Doc.197, ex. 5, at 27, 48. The Carter policy altered these standards to turn on the medical diagnosis of "gender dysphoria," which involves a "clinically significant distress or impairment in social, occupational, or other important areas of functioning." Doc.224-2, at 12-13, 20. Under the Carter policy, a "history of gender dysphoria" was disqualifying unless a medical provider certified that the applicant had been stable for 18 months. Doc.48-3, attach., at 1. Similarly, a "history of medical treatment associated with gender transition" to address gender dysphoria—*e.g.*, hormone therapy, sex-reassignment surgery—was disqualifying absent 18 months of stability following the completion of treatment. *Id.*

While those who had transitioned could serve in their preferred gender, transgender individuals without a history of gender dysphoria could serve on the same terms as all others—*i.e.*, subject to the terms and conditions applicable to their biological sex. *Id.* at 1-2; Doc.224-2, at 4.

2. On June 30, 2017, the day before the Carter accession standards took effect, Secretary Mattis deferred their implementation until January 1, 2018, pending a five-month review of the issue. Doc.197, ex. 3.

On July 26, 2017, the President stated on Twitter that “[a]fter consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow . . . Transgender individuals to serve in any capacity.” Add.77.

The President issued a memorandum in August 2017 calling for further study on this issue and directing the military to “return to the longstanding policy” on service by transgender individuals “until such time as a sufficient basis exists upon which to conclude that terminating [it] would not have . . . negative effects” on the military. Add.75. The President stressed, however, that the Secretary of Defense, in consultation with the Secretary of Homeland Security, could provide “a recommendation to the contrary that I find convincing” and “may advise me at any time, in writing, that a change to this policy is warranted.” *Id.*

3. In February 2018, following an extensive review by a panel of experts, Secretary Mattis proposed a new policy that differed from both the Carter policy and

the longstanding policy addressed in the 2017 memorandum. Add.72-74. The Secretary recommended that the President “revoke” his 2017 memorandum, “thus allowing” the military to adopt the new policy. Add.74. In response, the President issued a memorandum on March 23, 2018, stating “I hereby revoke my [2017] memorandum . . . and any other directive I may have made with respect to military service by transgender individuals.” Add.70.

The military’s 2018 policy, like the Carter policy, does not operate on the basis of transgender status. *Both* policies allow transgender individuals without a history of gender dysphoria to serve, if they meet the standards associated with their biological sex. Add.74. And *both* policies restrict the ability of transgender individuals with a history of gender dysphoria to serve, though they differ as to the scope of the restrictions. Under the 2018 policy, individuals with a history of gender dysphoria may join the military if they can show 36 months of stability (as opposed to the Carter policy’s 18 months) before applying and neither need nor have undergone gender transition. Add.73. Current servicemembers diagnosed with gender dysphoria may continue serving either in their preferred gender (if, under a reliance exemption, they received that diagnosis from a military medical provider while the Carter policy was in effect) or in their biological sex. *Id.*

B. Prior Proceedings

1. In August 2017, several individuals and organizations brought this constitutional challenge against the July 2017 Twitter announcement and the 2017

presidential memorandum, and they moved for a preliminary injunction. Docs.1, 30. The State of Washington intervened as a plaintiff. Doc.101.

In December 2017, the district court entered a preliminary injunction, enjoining the government “from taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump’s July 26, 2017 announcement” on Twitter. Add.68. The parties filed cross-motions for summary judgment. Docs.129, 150, 194.

2. In March 2018, the government informed the district court that, at Secretary Mattis’s request, the President had revoked the earlier 2017 presidential memorandum to allow the Secretary to implement his proposed new policy based on the advice of a panel of military experts, and accordingly moved to dissolve the preliminary injunction. Docs.213, 223. The motion explained that plaintiffs’ challenge to the 2017 presidential memorandum was moot, that plaintiffs lacked standing to challenge the new policy, and they could not, in any event, demonstrate a likelihood of success on the merits of a challenge to the new policy. Doc.223.

Neither plaintiffs nor Washington amended their complaints to assert claims against the 2018 policy, but they nevertheless continued to urge the district court to grant summary judgment. Docs.227, 228. On April 13, 2018, the district court refused to dissolve the December 2017 injunction and instead extended it to enjoin the 2018 policy as well. Add.16-46.

The court held that plaintiffs' claims were not moot because the 2018 policy did not "substantively rescind or revoke" the 2017 presidential memorandum, but merely "implemented" its directives. Add.27. It held that strict scrutiny applies and directed the parties to "prepare for trial" on the questions of "whether, and to what extent, deference is owed" to the military and whether the challenged policy is constitutional. Add.45, 46. Although the court accepted the government's argument that the President cannot be subject to injunctive relief here, it held that the President could be subject to declaratory relief. Add.43-45.

3. The government appealed the district court's April 13 order. Briefing has been completed, and argument is currently scheduled for October 10, 2018 (and the government's motion to further expedite the argument is pending). *See Karnoski v. Trump*, No. 18-35347 (9th Cir.). Resolution of that appeal may effectively terminate the litigation or, at a minimum, sharply circumscribe its scope. The government's brief explains that the district court fundamentally erred in enjoining the 2018 policy on the basis of its earlier ruling with respect to the rescinded 2017 memorandum—the 2018 policy is manifestly not the same as the policy set forth in the 2017 memorandum. Gov't Br. 40-45. On the merits, plaintiffs cannot show that they are likely to succeed in a challenge to the 2018 policy, particularly in light of the deference afforded to professional military judgments. *Id.* at 19-40. Additionally, plaintiffs have failed to demonstrate irreparable harm resulting from that policy or standing to challenge it. *Id.* at 49-53.

C. Discovery

1. Notwithstanding the issuance of the 2018 policy and the pendency of the government's appeal in this Court, the district court has declared that discovery shall proceed. In light of the 2018 policy, the government moved to stay discovery pending resolution of its motion to dissolve the December 2017 preliminary injunction and any appeal. Doc.225. The court denied that motion and allowed discovery to proceed—discovery premised on the court's view that the March 2018 policy is simply an extension of the now-revoked 2017 policy, that strict scrutiny applies, and that principles of military deference depend on factual questions about the nature of the military's deliberative process. Add.13-15, 16-46. The court declared that “discovery related to President Trump is not ‘irrelevant’” because the 2018 policy is not a “new policy” but “rather a plan to implement, with few exceptions, the directives of the 2017 Memorandum.” Add.14. The court further stated that if the government “intend[s] to claim Executive privilege,” it must “expressly make the claim” and “provide a privilege log” describing the privileged documents or communications without revealing information that is itself privileged. Add.15 (citing Fed. R. Civ. P. 26(b)(5)(i), (ii)).

2. Plaintiffs have served broad discovery requests on the government defendants, including the President. These requests include detailed interrogatories, requests for production of documents, and requests for admission directed to the defendants. Docs.246-1, 246-2, 246-3, 269-1, 269-2. To date, the government has

produced over 30,000 documents (corresponding to roughly 150,000 pages), including a complete administrative record, over the course of 16 document productions. In addition, plaintiffs are in a cross-use agreement with the plaintiffs in other cases, *see* Doc.183, and those other plaintiffs have deposed various military officials.

The discovery requests directed to defendants—including the President—purport to require cataloguing and disclosing the totality of the President’s deliberations concerning his announcements in 2017 and 2018—including who was involved, when and how they were involved, and what advice was communicated to the President. For example, plaintiffs request:

- “All [d]ocuments and [c]ommunications” relating to “President Trump’s consultation” with the military regarding “transgender military service.” Doc.246-2, at 2 (Req. 7).
- “All [d]ocuments and [c]ommunications relating to” the 2017 presidential memorandum and the President’s March 23, 2018 memorandum, including “all drafts.” Doc.246-2, at 2 (Req. 6); Doc.269-2, at 3 (Req. 32).
- “[A]ll documents reviewed, considered, or relied upon in preparing” the President’s March 23, 2018 memorandum. Doc.269-2, at 3 (Req. 32).
- “All [c]ommunications” between the President or the Executive Office of the President and the Department of Defense regarding “military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general.” Doc.269-2, at 3 (Req. 34).
- Identification of “all individuals” with whom President Trump discussed “past, present, or potential future governmental policies on transgender military service.” Doc.246-1, at 1-2 (Interrog. 4).

- An explanation of the “process [President Trump] used to formulate the Tweets [and] the Presidential Memorandum” and identification of “all sources of fact or opinion” that he “consulted [or] considered.” Doc.246-1, at 2 (Interrog. 7).

The President did not provide substantive responses to plaintiffs’ requests, and objected to plaintiffs’ requests on several grounds, including the presidential communications privilege. *See* Docs.246-6, 246-7, 246-10, 279-1, 279-2, 279-3, 279-5, 279-6.

Plaintiffs also seek “[a]ll [d]ocuments and [c]ommunications” regarding the military’s deliberative process. Secretary Mattis and the Department of Defense have substantively responded to Plaintiffs’ requests, subject to privilege. *E.g.*, Docs.246-4, 246-5, 246-9. The Office of the Secretary of Defense withheld 19,770 documents solely on the basis of the deliberative process privilege. Add.101.

3. Following a dispute among the parties over issues of discovery directed to the President, the government moved for a protective order to preclude plaintiffs’ discovery requests to the President. Doc.268. The government explained that plaintiffs’ requests implicate the presidential communications privilege because they seek to “probe sensitive communications and deliberations related to [the President] and his advisors’ formation of policy.” *Id.* at 2-3. Relying on separation-of-powers principles, the government argued that discovery should not be directed to the President and that, in any event, the court should not force the President to formally invoke the presidential communications privilege at this juncture. *Id.* at 4-5, 9-12.

The government explained that plaintiffs must first exhaust other sources of non-privileged discovery and establish “a heightened, particularized need for the specific information or documents” by “at a minimum substantially narrow[ing] any requests directed at presidential deliberations.” *Id.* at 1. The government provided plaintiffs with a privilege log for the President, *see* Doc.282; Add.80-81, 85-89, while explaining that under *Cheney*, it need not provide a log nor formally assert the privilege at this stage, Doc.268 at 8 n.3. The government later produced a supplemental privilege log, which covered a total of 9,000 documents grouped into 66 categories and which described the documents in a manner that avoided revealing privileged information. Add.81, 91-97. Each privilege log took at least ten White House staff members, including many attorneys, “hundreds of hours to complete.” Add.81, 82.

4. Plaintiffs filed a separate motion to compel discovery withheld under the deliberative process privilege, noting that they had rejected the government’s prior attempts “to resolve disputes about the deliberative process privilege on a document-by-document basis or based on a representative sample of documents.” Doc.245, at 4. Instead, they argued that “the privilege has no application in this case.” *Id.*

5. On July 27, 2018, the district court denied the government’s motion for a protective order and granted plaintiffs’ motion to compel. Add.1-12. The court briefly acknowledged that discovery against the President “involves ‘special considerations,’” but nonetheless concluded that such discovery is permitted “where, as in this case, he is a party or has information relevant to the issues in dispute.”

Add.9. It further ruled that the President has “failed to demonstrate that he need not invoke the presidential communications privilege” at this stage. Add.11. And it found “no support” for the government’s argument that plaintiffs must exhaust other sources of non-privileged discovery, demonstrate a particularized need for the information, and narrow any discovery requests before the President must formally assert the privilege. Add.10.

The district court then ordered the government to “produce a privilege log identifying the documents, communications, and other materials they have withheld under the presidential communications privilege within 10 days.” Add.11. And it made clear it deemed insufficient the privilege log previously submitted by the President, ordering the government to “produce revised privilege logs within 10 days” that “identify individual author(s) and recipient(s)” and “include *specific, non-boilerplate* privilege descriptions *on a document-by-document basis.*” *Id.* “Only then,” the court explained, “can the Court evaluate whether the privilege applies and if so, whether Plaintiffs have established a showing of need sufficient to overcome it.” Add.10.

The court also ordered the government to produce, within ten days, all “documents that have been withheld solely under the deliberative process privilege.” Add.11. Consistent with plaintiffs’ refusal to consider the application of the privilege to documents or classes of documents, the court did not evaluate the applicability of the privilege with respect to any individual document or category of documents. Instead, after discussing the interests in disclosure and confidentiality in a page and a

half, the court ordered wholesale disclosure, declaring that evidence concerning the military's deliberations is "central to the litigation" because of "the searching judicial inquiry that strict scrutiny requires." Add.7. It dismissed out of hand the military's interest in confidentiality, declaring that concerns about the impact of blanket disclosure were "mere speculation." Add.8. And it gave no explanation for requiring compliance within ten days—a deadline that plaintiffs did not even request. Add.11.

ARGUMENT

I. This Court Should Exercise Its Mandamus Authority To Correct An Order That Disregards Established Separation-Of-Powers Principles, Imposes Intolerable Burdens On The Executive Branch, And Requires Disclosure Of Military Deliberations.

A. Mandamus Review Is Appropriate.

The Supreme Court in *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004), made clear that mandamus is appropriate "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Id.* at 382. Yet the district court here ordered a substantial intrusion on the Executive Branch without even asking whether "other avenues" are available. *Id.* at 390. Moreover, compliance with the order would impose an enormous burden on the Executive Branch. *See id.* at 382. The requirement to disclose over 19,000 documents withheld under the deliberative process privilege similarly intrudes on the internal deliberations of the military and imposes an extraordinary burden. Add.101-07.

The factors that typically inform this Court’s exercise of its mandamus jurisdiction—whether the petitioner has “no other adequate means” of relief or will suffer harm that is not correctable on appeal, and whether the order is “clearly erroneous as a matter of law,” reflects a frequent error or “persistent disregard of the federal rules,” or raises “new and important problems”—confirm that mandamus is warranted. *Bauman v. United States Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977). These factors “serve as guidelines,” and “[n]ot every factor need be present at once” or even “point in the same direction.” *Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010). Here, the government has “no other adequate means” to obtain relief from the district court’s discovery demands. *Bauman*, 557 F.2d at 654. And the extraordinary burdens that these demands would impose on the President and the military—and the intrusion into their deliberations and consultations that would result—cannot be undone. *Id.* The district court’s order is based on serious legal errors and cannot be reconciled with *Cheney*’s admonition that courts should be “mindful of the burdens imposed on the Executive Branch.” 542 U.S. at 391; *see also Bauman*, 557 F.2d at 654-55.

B. The Discovery Order Is Premised On Issues That This Court Will Decide In The Government’s Pending Appeal.

The premises of the July 27 order are set out in the district court’s opinion and order of April 13. The government’s appeal of that order is fully briefed and is currently scheduled for argument on October 10 (absent further expedition). *Karnoski*

v. Trump, No. 18-35347 (9th Cir.). The resolution of that appeal may eliminate the purported basis for the discovery and, at a minimum, will clarify the issues presented and the standard of review. The district court could not properly impose intrusive discovery obligations on the White House while this Court is reviewing the predicate of the discovery order, and the significant consequences of the court's error call for this Court's immediate exercise of its mandamus authority. See *In re United States*, 138 S. Ct. 443, 445 (2017) (per curiam) (vacating denial of mandamus and recognizing that "the Government's threshold arguments . . . , if accepted, likely would eliminate the need for the District Court to examine" the requested materials).

Among other things, the disposition of the appeal will clarify which policy is properly the subject of the court's review. The government's briefs explain that the governing policy is that established by Secretary Mattis in 2018, and that the policy should be reviewed on its own terms, without regard to any rescinded presidential directives. See Gov't Br. 40-49; Reply Br. 2-10; see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (upholding presidential proclamation based solely on its text and the "review process" that supported it, without regard to previous executive orders or past statements by the President, or any discovery into that deliberative process).

By contrast, the district court's decision to allow "discovery related to President Trump" is premised on the mistaken assumption that the 2018 policy announced by Secretary Mattis is "not a 'new policy,' but rather a plan to implement . . . the directives of the 2017 Memorandum." Add.14. That is incorrect, and much of the

requested discovery has nothing to do with the new policy. The district court’s theory rests on its view that the President did not “substantively rescind or revoke” his 2017 memorandum and statements, Add.27—a conclusion that inexplicably disregards the President’s unambiguous action “revok[ing]” the 2017 memorandum and “any other directive . . . with respect to military service by transgender individuals.” Add.70. It also overlooks the substantive terms of the 2018 policy, which draws classifications based on the medical condition of gender dysphoria, rather than on transgender status. *Compare* Add.73-74, *with* Add.4-5.

The pending appeal will address these and other errors infecting the court’s conclusion that strict scrutiny applies. That view has shaped the district court’s discovery orders, and it is the linchpin of the court’s ruling requiring the wholesale production of documents subject to the deliberative process privilege. The government’s briefs explain that this standard is inapplicable and that “great deference” is owed to “the professional judgment of military authorities,” *Winter v. NRDC*, 555 U.S. 7, 24 (2008). *See* Gov’t Br. 19-40; *see also Hawaii*, 138 S. Ct. at 2421 (emphasizing that courts “cannot substitute [their] own assessment for the Executive’s predictive judgments” on matters of “national security”).

In affording deference to military decisions, courts do not reexamine *de novo* the “timing and thoroughness” of military studies and deliberations. Add.41; *cf. Hawaii*, 138 S. Ct. at 2421 (rejecting attempt to discredit “the thoroughness of [a] multi-agency review” on the ground that the final government “report ‘was a mere 17 pages’”).

Rather, it is sufficient that such questions have been “decided by the appropriate military officials” in “their considered professional judgment.” *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986); *see also Hawaii*, 138 S. Ct. at 2419-20 (observing that judicial “inquiry into matters of . . . national security is highly constrained,” even when evaluating “a ‘categorical’ . . . classification that discriminate[s] on the basis of sex”) (discussing *Fiallo v. Bell*, 430 U.S. 787 (1977)); *Rostker v. Goldberg*, 453 U.S. 57, 71-72 (1981) (recognizing the “deference due” to the political branches’ “choices among alternatives” in military affairs, even when those choices involved facial “gender-based” classifications).

The district court offered no reason for authorizing intrusive discovery while this Court considers the basis of the discovery orders. Still less did it justify its ten-day time frame. Mandamus is clearly warranted.

C. Mandamus Would Be Warranted Even Absent The Pending Appeal.

1. The order imposing discovery obligations on the President is squarely foreclosed by *Cheney*.

Plaintiffs have imposed sweeping discovery obligations regarding the President’s conduct and deliberations as Commander-in-Chief, implicating material that is plainly subject to executive privilege. They seek, for example, all documents and communications relating to the President’s consultation with the military regarding “transgender military service”; all communications between the President and the Department of Defense on broad topics such as “public policy regarding

transgender people” and “transgender people in general”; “all drafts” of the President’s memoranda; and all documents “reviewed, considered, or relied upon in preparing” the 2018 memorandum. Doc.246-2, at 2 (Req. for Prod. 6, 7); Doc.269-2, at 3 (Req. for Prod. 32, 34).

Without regard to the serious separation-of-powers concerns raised by these demands, the district court commanded the President to produce a detailed privilege log that requires the White House to identify and individually address each of the 9,000 documents encompassed by the expansive discovery requests. Add.11; Add.80, 82. The court declared that the privilege log previously submitted by the White House, which identified 66 categories of documents grouped in a manner intended to avoid revealing privileged information, was insufficient. Without even considering whether “other avenues” are available, *Cheney*, 542 U.S. at 390, the court instead demanded that the government identify presidential communications and deliberations “on a document-by-document basis”—and that it do so within ten days. Add.11. Such an order is plainly improper.

a. The district court made no attempt to reconcile its order with *Cheney* and the separation-of-powers principles underlying that decision. Unlike other civil litigants, the President comes to court with unique “constitutional responsibilities and status.” *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982). The “high respect” owed to the President “should inform the conduct of the entire proceeding, including the timing and scope of discovery.” *Cheney*, 542 U.S. at 385 (quoting *Clinton v. Jones*, 520 U.S.

681, 707 (1997)). Litigation against the president does not proceed as it would “against an ordinary individual.” *Id.* at 381-82 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (CC Va. 1807) (Marshall, C.J.)). Even assuming *arguendo* that some circumscribed discovery of the President could properly be permitted in extraordinary circumstances, the Court stressed, a court could countenance such intrusions only after assuring itself of the necessity of doing so. *See id.* at 389-90.

Cheney precludes the district court’s license of wholesale—and unnecessary—discovery into the President’s deliberations. Indeed, the Court reversed an order of the D.C. Circuit far less intrusive than the district court’s order here. In *Cheney*, plaintiffs sought discovery from the Office of the Vice President as to the identities of participants in a presidential advisory group, in an effort to prove that the group included non-federal participants and was therefore subject to open-meeting and disclosure laws. 542 U.S. at 374. The district court rejected the government’s efforts to narrow discovery, insisting that the Vice President must “winnow the discovery orders by asserting specific claims of privilege and making more particular objections.” *Id.* at 389. The D.C. Circuit declined to address the merits of that ruling on mandamus review, even though “the scope of [the] requests [was] overly broad,” and instructed that the Vice President “shall bear the burden of invoking executive privilege and filing objections to the discovery orders with detailed precision.” *Id.* at 376-77.

The Supreme Court vacated the judgment of the court of appeals, declining to “require the Executive Branch to bear the onus of critiquing . . . unacceptable discovery requests line by line.” *Cheney*, 542 U.S. at 388. Underscoring the separation-of-powers concerns at issue, the Court made clear that a court of appeals may invoke its mandamus authority “to prevent a lower court from interfering with a coequal branch’s ability to discharge its constitutional responsibilities.” *Id.* at 382. The Court explained that discovery directed to the Office of the Vice President raised “special considerations” regarding “the Executive Branch’s interests in maintaining the autonomy of its office,” the “energetic performance” of the Commander-in-Chief’s “constitutional responsibilities,” and “[t]he high respect that is owed to the office of the Chief Executive.” *Id.* at 382, 385 (alteration in original).

The Court explained that there is “no support for the proposition that the Executive Branch ‘shall bear the burden’ of invoking executive privilege with sufficient specificity and of making particularized objections” to broad discovery requests. *Cheney*, 542 U.S. at 388. “Executive privilege is an extraordinary assertion of power ‘not to be lightly invoked,’” the Court continued, and once it is asserted, “coequal branches of the Government are set on a collision course” through adjudications of the privilege. *Id.* at 389. The Court explained that this “constitutional confrontation between the two branches’ should be avoided whenever possible,” and it encouraged district courts to “explore other avenues” and consider “the choices available.” *Id.* at 389-90.

A plaintiff, moreover, must “satisf[y] his burden of showing the propriety of the requests.” *Cheney*, 542 U.S. at 388. The Court noted that even in a criminal case, a court must find a specific “need” for information that implicates presidential deliberations before it undertakes to balance the competing needs of the Executive Branch. *Id.* (discussing *Nixon v. United States*, 418 U.S. 683, 713 (1984)). When privileged material is sought in a civil case, the burden to overcome the privilege is even greater, as “the right to production of relevant evidence in civil proceedings does not have the same ‘constitutional dimensions’” or “share the urgency or significance” of evidence in criminal prosecutions. *Id.* at 384.

b. Plaintiffs’ requests are far more intrusive than those in *Cheney*, and they target not the Vice President, but the President himself. Nevertheless, the district court required the President to object to these requests “line-by-line,” without even attempting to explore “other avenues.” *Cheney*, 542 U.S. at 388, 390. This course is particularly improper where, as here, the government’s pending appeal will clarify the issues presented and the governing standard of review, and may eliminate the purported basis for the discovery altogether. *See id.* at 390.

At the very least, the district court should have made some effort to narrow plaintiffs’ broad discovery requests, consider the non-privileged discovery that is available, and ask whether plaintiffs have demonstrated a particularized need. *See Cheney*, 542 U.S. at 388-90. Instead, the court inexplicably declared that there was “no support” for the government’s argument that such steps are required. Add.10. But

the Supreme Court in *Cheney* could not have been more clear: It is the district court's approach that has "no support." 542 U.S. at 388.

Moreover, the district court's order reflects no regard for "the burdens imposed on the Executive Branch." *Cheney*, 542 U.S. at 391. The burden of producing a highly specific, "document-by-document" privilege log in response to these broad requests would be extraordinary. Approximately 9,000 documents are at issue, and the White House has already provided a detailed privilege log for these documents that spans 66 categories of documents and describes the nature of the documents "without revealing information [that is] itself privileged." Fed. R. Civ. P. 26(b)(5)(A)(ii); see Add.80, 82. It took White House staffers and attorneys "hundreds of hours to complete" both the initial version of the privilege log and the supplemental log. Add.81, 82. The district court's order would require creation of a new, highly specific privilege log on a document-by-document basis—that is, a log with approximately 9,000 individual entries. Add.11, 80, 82. *Cheney* forecloses this "line-by-line" critique of privileged information and documents, which would plainly "interfer[e] with a coequal branch's ability to discharge its constitutional responsibilities." 542 U.S. at 388.

Quite apart from this wholly unwarranted burden, there is a significant risk that the court's order, which requires a highly specific privilege log, will itself require disclosure of privileged material. See Add.83 (noting that prior privilege log was designed to describe materials without disclosing privileged information). For

example, the district court specified that the log “must . . . identify individual author(s) and recipients,” together with the date of each document or communication. Add.11. The presidential communications privilege, however, protects the President from being compelled to disclose the identities of the particular advisors from whom he sought advice on particular subjects, or the timing or sequence of those deliberations. The privilege is broad, protecting the “confidentiality of Presidential communications in performance of the President’s responsibilities.” *Nixon*, 418 U.S. at 711. It protects facts and “sources of information,” as well as “documents or other materials that reflect presidential decisionmaking and deliberations.” *In re Sealed Case*, 121 F.3d 729, 744, 750 (D.C. Cir. 1997). Disclosing the authors and recipients of communications and deliberations in formulating military policy would reveal the President’s deliberative process in a field in which concerns about the “confidentiality of Presidential communications in performance of the President’s responsibilities,” *Nixon*, 418 U.S. at 711, are at their zenith. *See* Add.83.

c. The district court’s order is erroneous for the additional reason that, because the ultimate injunctive and declaratory relief requested is not available against the President, he is not properly named as a party defendant for purposes of discovery. *See* Add.9 (noting that the President “is a party”). The Supreme Court has long 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); *see also Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (plurality op.) (explaining that “injunctive relief

against the President himself is extraordinary”). Thus, even the district court recognized that injunctive relief against the President in this case is foreclosed. Add.43-45. The court erred, however, by failing to recognize (Add.43-45) that this principle likewise precludes claims for declaratory relief against the President. *See, e.g., Franklin*, 505 U.S. at 827 (Scalia, J., concurring) (“[W]e cannot issue a declaratory judgment against the President.”); *Swan v. Clinton*, 100 F.3d 973, 976 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.”); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (“[C]ourts . . . have never submitted the President to declaratory relief.”).

2. The district court impermissibly required wholesale disclosure of military deliberations.

Even apart from the pendency of the government’s appeal, the Court would properly exercise mandamus review to correct the district court’s ruling on the deliberative process privilege. In cursory fashion, that ruling compels disclosure of *all* documents that the government declined to produce solely on grounds of deliberative process privilege—over 19,000 documents from the Office of the Secretary of Defense alone—thereby ordering the blanket disclosure of military deliberations without discussing a single document or category of documents.

The deliberative process privilege is a subset of executive privilege and protects from disclosure documents “reflecting advisory opinions, recommendations and

deliberations comprising part of a process by which governmental decisions and policies are formulated.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).

“[I]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny.” *National Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988) (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)).

The privilege is qualified and may be overcome if a litigant’s “need for the materials and the need for accurate fact-finding override the government’s interest in non-disclosure.” *FTC v. Warner Communc’ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (per curiam). In assessing a claim under the privilege, a court considers “1) the relevance of the evidence; 2) the availability of other evidence; 3) the government’s role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.” *Id.*

The district court purported to apply these factors to tens of thousands of documents in a page and a half, declaring that these considerations required disclosure of *all* documents withheld under the deliberative process privilege alone. Add.7-8. This approach was improper. Just as application of “the deliberative process privilege is . . . dependent upon the individual document and the role it plays in the administrative process,” *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980), so too is the analysis undertaken in determining whether the privilege is overcome. The *Warner* factors reflect the need for granular consideration

of documents, as the precise balancing of those factors varies from document to document depending on their degree of relevance to plaintiffs' claims, the availability of other sources of evidence, and the chilling effect of disclosure on government deliberations. The district court's decision to conduct the *Warner* balancing en masse, rather than assessing specific documents or categories of documents, requires this Court's intervention.

The district court further erred both in its general negation of the government's interest in confidentiality and its all-inclusive assumption of plaintiffs' demonstrated need. Despite never questioning the deliberative nature of any of the documents, the court dismissed concerns regarding the impact of disclosure as "mere speculation." Add.8. It then declared that the government must identify "specific, credible risks which cannot be mitigated by the existing protective order in this case." *Id.* But it is unclear why the court disparaged the government's concerns as speculative, or what "specific" risks it believed would satisfy its standard. As the Supreme Court has explained, the deliberative process privilege exists because disclosure of deliberative documents chills the willingness of government officials to engage in "open, frank discussion between subordinate and chief concerning administrative action." *Mink*, 410 U.S. at 87. Those risks are heightened where, as here, the challenged action relates to military readiness and national security as well as implicates sensitive and controversial issues. And they are further exacerbated by the district court's sweeping order, which would indiscriminately expose every document remotely connected to

the deliberative process here. It is far from “speculative” to say that laying bare the entirety of a lengthy process of formulating multiple policies by military officials will have a substantial chilling effect on future internal deliberations, and the court’s two-sentence dismissal of these consequences only illustrates its failure to grapple with the core concerns of the privilege.

The district court’s reference to the protective order illustrates its fundamental misunderstanding of the importance of the privilege to government deliberations. It has never been thought that privileges, including the deliberative process privilege, are adequately protected by limiting disclosure to adversaries in litigation. A protective order neither eliminates the chilling effect created by disclosures of deliberative materials, nor justifies disregarding the government’s interest in maintaining the documents’ confidentiality. *Cf. Perry v. Schwarzenegger*, 591 F.3d 1147, 1163-64 (9th Cir. 2009) (granting defendants’ mandamus petition and overruling a district court’s order compelling the defendants to produce documents whose disclosure threatened to “inhibit[] internal campaign communications that are essential to effective association and expression,” while emphasizing that “[a] protective order limiting dissemination of this information will ameliorate but cannot eliminate these threatened harms”).

The district court’s radical discounting of the government’s interest in confidentiality was compounded by its cursory consideration of plaintiffs’ need. In considering a massive disclosure of military deliberations, the court was required to give serious consideration to plaintiffs’ demonstrated need for the documents, judged

by reference to the voluminous information already in their possession. A general declaration that all documents relating to the military deliberations must be “relevant” is plainly inadequate. Add.7. Even a cursory review of the privilege logs should have given the court pause. Many of the documents involve high-level discussions within the Department of Defense, or even the Secretary’s own handwritten notes—documents where the government’s interest in confidentiality and the risk of chilling future deliberations are at their highest. *See* Add. 101-02 (noting examples of documents, including a draft memorandum to the President containing the Secretary’s handwritten notes and a memorandum from the Undersecretary for Personnel and Readiness to the Deputy Secretary of Defense and Vice-Chairman of the Joint Chiefs of Staff). Moreover, although plaintiffs here challenge neither decision, some of the documents record deliberations preceding the Secretary’s decision to defer implementation of the Carter policy, while others predate the formulation of the Carter policy in the first instance. *See id.* (noting as examples a June 28, 2017 memorandum from the Deputy Secretary to the Secretary and cover letter with the Secretary’s handwritten notes, as well as pre-decisional documents prepared under Secretary Carter). The district court never explained the relevance of any of these documents, much less how the plaintiffs have made out the showing of need required to overcome the privilege.

The court’s assumption that plaintiffs had demonstrated a need sufficient to outweigh the important interests in confidentiality is particularly striking because it

never asked plaintiffs to show why the discovery they have already obtained is inadequate. The government has produced over 30,000 documents totaling roughly 150,000 pages, including a complete administrative record, over the course of 16 document productions, and has responded to written interrogatories. In addition, plaintiffs in related litigation have deposed numerous military officials, and plaintiffs here may rely on those depositions. *See* Doc.183. Before contemplating an order of this kind, it was incumbent on the district court to ascertain that the discovery that plaintiffs have already received did not diminish or eliminate the need for one or more categories of the privileged documents.

II. This Court Should Grant A Stay Pending Review Of The Petition And An Immediate Administrative Stay.

This Court should also stay the district court's order pending its consideration of this petition and grant an administrative stay pending its consideration of the stay motion. This Court commonly grants stays pending disposition of a writ of mandamus, including in cases involving challenges to discovery orders. *See, e.g.,* Order, *In re United States of America*, No. 17-72917 (Oct. 24, 2017) (staying discovery and record supplementation); *Barton v. U.S. Dist. Court for Cent. Dist. of Cal.*, 410 F.3d 1104, 1106 (9th Cir. 2005); *Calderon v. U.S. Dist. Court for the N. Dist. of Cal.*, 98 F.3d 1102, 1104 (9th Cir. 1996). A stay is equally appropriate here.

A stay is required to prevent the violation of established separation-of-powers principles that will occur if the President is required to respond to plaintiffs' discovery

requests with a privilege log on a “document-by-document basis” that may require disclosure of privileged information, and to prevent disclosure of over 19,000 privileged communications regarding the military’s deliberative process. Add.11. The burdens of attempting to comply with the district court’s order are extraordinary. *See* Add.82-83, 102-04. The government accordingly asks that the Court issue, as expeditiously as possible, a stay of the district court’s order pending its consideration of the mandamus petition, as well as an administrative stay pending its consideration of the stay motion. We respectfully ask that the Court rule on the administrative stay request by August 2, to allow the Solicitor General sufficient time to seek Supreme Court review if necessary.

No countervailing harm will result from granting a stay while this Court considers the government’s petition. Plaintiffs already have obtained a preliminary injunction, and thus face no harm in the interim. Moreover, the district court has already ruled on the parties’ cross-motions for summary judgment, and trial is not scheduled to begin until April 2019.

Finally, a stay is particularly appropriate given that the legal premises of the discovery ruling are currently on appeal to this Court, where argument is currently scheduled for October 10 (and may be expedited further).

CONCLUSION

For the foregoing reasons, this Court should grant an immediate administrative stay and grant a stay pending resolution of the petition for mandamus. Additionally,

this Court should grant the petition for writ of mandamus; vacate the order of July 27, 2018; and order the district court to grant the government's motion for a protective order (Doc.268) and deny plaintiffs' motion to compel (Doc.245)—or, at a minimum, to stay all such discovery until the government's pending appeal is resolved.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

HASHIM M. MOOPAN
Deputy Assistant Attorney General

BRINTON LUCAS
Counsel to the Assistant Attorney General

MARK R. FREEMAN

MARK B. STERN

MARLEIGH D. DOVER

s/ Tara S. Morrissey

TARA S. MORRISSEY

BRAD HINSHELWOOD

*Attorneys, Appellate Staff
Civil Division*

U.S. Department of Justice, Room 7261

950 Pennsylvania Ave., NW

Washington, DC 20530

202-353-9018

AUGUST 2018

STATEMENT OF RELATED CASES

Petitioners are aware of one related appeal in this same matter, *Karnoski v. Trump*, No. 18-35347 (9th Cir), which raises issues closely related to those raised in this petition.

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the limit of Ninth Circuit Rule 21-2(c) and 32-3(2) because it totals 8,358 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this petition complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 14-point Garamond font.

s/ Tara S. Morrissey

TARA S. MORRISSEY

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service has been accomplished via e-mail to the following counsel:

Counsel for Real Party in Interest-Intervenor Plaintiff:

La Rond Baker (larondb@atg.wa.gov)
Colleen M. Melody (colleenm1@atg.wa.gov)

Counsel for Real Party in Interest- Plaintiffs:

Vanessa Barsanti (vanessa.barsanti@kirkland.com)
Jordan M. Heinz (jheinz@kirkland.com)
James F. Hurst (james.hurst@kirkland.com)
Scott Lerner (scott.lerner@kirkland.com)
Daniel I. Siegfried (Daniel.siegfried@kirkland.com)
Joseph B. Tyson (Ben.Tyson@kirkland.com)
Stephen R. Patton (Stephen.patton@kirkland.com)
Tara Borelli (tborelli@lambdalegal.org)
Jon W. Davidson (j davidson@lambdalegal.org)
Natalie Nardecchia (nnardecchia@lambdalegal.org)
Peter C. Renn (prens@lambdalegal.org)
Sasha J. Buchert (sbuchert@lambdalegal.org)
Carl Charles (ccharles@lambdalegal.org)
Kara N. Ingelhart (kingelhart@lambdalegal.org)
Camilla B. Taylor (ctaylor@lambdalegal.org)
Paul D. Castillo (pcastillo@lambdalegal.org)
Samantha Everett (samantha@newman.com)
Derek Alan Newman (Derek@newmanlaw.com)
Jason Sykes (jason@newmanlaw.com)
Peter E. Perkowski (peterp@outserve.org)

The district court has been provided with a copy of this petition for writ of mandamus.

s/ Tara S. Morrissey

TARA S. MORRISSEY

No. 18-_____

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In re DONALD J. TRUMP, *et al.*,
Petitioners.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES OF AMERICA; JAMES N. MATTIS, in his official capacity as Secretary of Defense; U.S. DEPARTMENT OF DEFENSE; U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN, Secretary of Homeland Security,
Petitioners-Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,

Respondent,

RYAN KARNOSKI; CATHRINE SCHMID; D.L.; LAURA GARZA; HUMAN RIGHTS CAMPAIGN; GENDER JUSTICE LEAGUE; LINDSEY MULLER; TERECE LEWIS; PHILLIP STEPHENS; MEGAN WINTERS; JANE DOE; CONNER CALLAHAN; AMERICAN MILITARY PARTNER ASSOCIATION;

Real Parties in Interest-Plaintiffs,

STATE OF WASHINGTON,

Real Party in Interest-Intervenor Plaintiff.

**ADDENDUM TO PETITION FOR A WRIT OF MANDAMUS
AND EMERGENCY STAY MOTION**

CHAD A. READLER

Acting Assistant Attorney General

HASHIM M. MOOPAN

Deputy Assistant Attorney General

BRINTON LUCAS

Counsel to the Assistant Attorney General

MARK R. FREEMAN

MARK B. STERN

MARLEIGH D. DOVER

TARA S. MORRISSEY

BRAD HINSHELWOOD

Attorneys, Appellate Staff

Civil Division

U.S. Department of Justice, Room 7261

950 Pennsylvania Ave., NW

Washington, DC 20530

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

CASE NO. C17-1297-MJP

ORDER GRANTING MOTION TO
COMPEL; DENYING MOTION
FOR PROTECTIVE ORDER

THIS MATTER comes before the Court on Plaintiffs’ Motion to Compel Defendants’
Discovery Withheld Under the Deliberative Process Privilege (Dkt. No. 245) and Defendants’
Motion for Protective Order (Dkt. No. 268). Having reviewed the Motions, the Responses
(Dkt. Nos. 266, 278), the Replies (Dkt. Nos. 273, 281), the Supplemental Briefs
(Dkt. Nos. 289, 292, 293) and the related record, and having considered the submissions of the
parties at oral argument, the Court GRANTS Plaintiffs’ Motion to Compel and DENIES
Defendants’ Motion for Protective Order.

Background

I. Procedural History

On July 26, 2017, President Donald J. Trump announced a ban on military service by openly transgender people (the “Ban”). On March 23, 2018, following the Court’s entry of a preliminary injunction, the President issued a Presidential Memorandum (the “2018 Memorandum”) directing the Department of Defense (“DoD”) to implement the Ban. (Dkt. No. 224, Ex. 3.) That same day, Defendants moved to dissolve the preliminary injunction. (Dkt. No. 215.) On March 29, 2018, Defendants requested to preclude discovery pending resolution of their motion to dissolve the preliminary injunction. (Dkt. No. 225.) The Court denied that request and ordered discovery in the case to proceed. (Dkt. No. 235.) The Court explained:

To the extent that Defendants intend to claim executive privilege, they must “expressly make the claim” and provide a privilege log “describ[ing] the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.”

(Id. at 3 (quoting Fed. R. Civ. P. 26(b)(5)(i)-(ii).))

On April 13, 2018, the Court ordered the preliminary injunction to remain in effect and granted partial summary judgment against the Ban. (See Dkt. No. 233.) The Court held that the Ban would be subject to strict scrutiny, but declined to rule on its constitutional adequacy. (Id.) The Court observed that “[w]hether Defendants have satisfied their burden of showing that the Ban is constitutionally adequate (i.e., that it was sincerely motivated by compelling state interests, rather than by prejudice or stereotype) necessarily turns on facts related to Defendants’ deliberative process.” (Id. at 28.) Because those facts were not yet before it, the Court directed the parties “to proceed with discovery and prepare for trial on the issues of whether, and to what

1 extent, deference is owed to the Ban and whether the Ban violates equal protection, substantive
 2 due process, and the First Amendment.” (*Id.* at 31.) Defendants filed a notice of appeal and
 3 requested that the Ninth Circuit stay the preliminary injunction pending its review. (Dkt. No.
 4 236); see also *Karnoski v. Trump*, No. 18-35347, Dkt. No. 3 (9th Cir. May 4, 2018). On July 18,
 5 2018, the Ninth Circuit denied the request, holding that “a stay of the preliminary injunction
 6 would upend, rather than preserve, the status quo.” (Dkt. No. 295.) The appeal is set to be heard
 7 in October 2018. (Dkt. No. 296.)

8 **II. The Requested Discovery**

9 Throughout this litigation, Plaintiffs have sought discovery regarding:

- 10 • The identity of the individuals with whom President Trump discussed or
 11 corresponded regarding policies on military service by transgender people;
- 12 • The date on which President Trump decided that transgender people should be
 13 banned from military service;
- 14 • The process by which President Trump formulated the Ban, including identification
 15 of “all sources of fact or opinion” he “consulted, considered, or otherwise referred to”
 16 in formulating the Ban;
- 17 • Documents and communications related to President Trump’s consultation with
 18 employees, agents, contractors, or consultants of the United States Armed Forces
 19 regarding military service by transgender people;
- 20 • Documents and communications relating to, and including all drafts of, the 2017
 21 Memorandum;
- 22 • Communications between President Trump and Congress concerning military service
 23 by transgender people prior to August 26, 2017; and
- 24 • Documents relating to visits and communications between President Trump and his
 Evangelical Advisory Board.

(Dkt. No. 278 at 3-4; Dkt. No. 268 at 4-5.)

21 To date, Defendants have objected to each of these requests and have withheld or
 22 redacted tens of thousands of documents based on the deliberative process privilege. President
 23

1 Trump has refused to substantively respond at all based on the presidential communications
2 privilege. (Dkt. No. 245 at 8-9; Dkt. No. 246, Ex. 28; Dkt. No. 278 at 4-5.)

3 On May 10, 2018, Plaintiffs moved to compel responses withheld under the deliberative
4 process privilege. (Dkt. No. 245.) On May 21, 2018, Defendants moved to preclude discovery
5 directed at President Trump. (Dkt. No. 268.) These motions are now before the Court.

6 Discussion

7 I. Trump v. Hawaii

8 Before turning to the merits of the pending discovery motions, the Court addresses the
9 impact of the Supreme Court’s recent ruling in Trump v. Hawaii, 138 S.Ct. 2392 (2018). In
10 Hawaii, the Supreme Court held that President Trump’s policy restricting the entry of certain
11 foreign nationals did not violate the Immigration and Nationality Act or the Establishment
12 Clause. The majority found the policy to be “facially neutral toward religion” and plausibly
13 related to the government’s stated national security objectives. Id. at 2418-24. While
14 Defendants claim that the same reasoning precludes discovery directed to President Trump in
15 this case, the Court disagrees for the following reasons:

16 First, Hawaii involved an entirely different standard of scrutiny. The Court already ruled
17 that the Ban is subject to strict scrutiny (Dkt. No. 233 at 20-24) and rejects Defendants’
18 suggestion that it “turns on a medical condition—gender dysphoria—and its treatment, not on
19 any protected status.” (Dkt. No. 289 at 5.) Unlike the policy in Hawaii, the Court need not “look
20 behind the face” of the Ban, as the Ban is facially discriminatory. 138 S.Ct. at 2420. President
21 Trump’s announcement explains that “the United States Government will not accept or allow . . .
22 Transgender individuals to serve in any capacity in the U.S. Military” (Dkt. No. 149, Ex. 1); the
23 2017 Memorandum, 2018 Memorandum, and Implementation Plan are titled “Military Service
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1 by Transgender Individuals.” (Dkt. No. 149, Ex. 2; Dkt. No. 224, Exs. 1, 3.) That the Ban turns
 2 on transgender identity—and not on any medical condition—could not be clearer.¹

3 Second, the majority in Hawaii repeatedly emphasized that the exclusion policy was
 4 formulated following a “worldwide, multi-agency review.” See, e.g., 138 S.Ct. at 2404-06,
 5 2408, 2421. This review considered risks “identified by Congress or prior administrations” and
 6 involved the Department of Homeland Security (DHS), the State Department, “several
 7 intelligence agencies,” and “multiple Cabinet members and other officials.” Id. at 2403-05. The
 8 majority considered this process “persuasive evidence” that the policy had “a legitimate
 9 grounding in national security concerns, quite apart from any religious hostility.” Id. at 2421. In
 10 contrast, Defendants in this case have provided no information whatsoever concerning the
 11 process by which the Ban was formulated.

12 Finally, Hawaii does not purport to address the scope of discovery or the application of
 13 any privilege. For these reasons, the Court finds that Hawaii does not impact its consideration of
 14 either of the pending motions.

15 **II. Plaintiffs’ Motion to Compel**

16 Plaintiffs move to compel documents withheld under the deliberative process privilege.
 17 (Dkt. No. 245.)

18 The deliberative process privilege protects documents and materials which would reveal
 19 “advisory opinions, recommendations and deliberations comprising part of a process by which
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21 ¹ The Implementation Plan prohibits transgender people who have *never* been diagnosed
 22 with gender dysphoria from serving unless they are “willing and able to adhere to all standards
 23 associated with their biological sex.” (Dkt. No. 224, Ex. 1 at 4, Ex. 2 at 7.) As the Court
 24 previously noted, “[r]equiring transgender people to serve in their ‘biological sex’ . . . would
 force [them] to suppress the very characteristic that defines them as transgender in the first
 place.” (Dkt. No. 233 at 13.)

1 governmental decisions and policies are formulated.” N.L.R.B. v. Sears, Roebuck & Co., 421
 2 U.S. 132, 150 (1975). For the privilege to apply, a document must be (1) “predecisional,”
 3 meaning that it was “generated before the adoption of an agency’s policy or decision,” and (2)
 4 “deliberative,” meaning that it contains “opinions, recommendations, or advice about agency
 5 policies.”² FTC v. Warner Commc’ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984). “Purely factual
 6 material that does not reflect deliberative processes is not protected.” Id.

7 The deliberative process privilege is not absolute. Several courts have recognized that
 8 the privilege does not apply in cases involving claims of governmental misconduct or where the
 9 government’s intent is at issue. See, e.g., In re Sealed Case, 121 F.3d 729, 738, 746 (D.C. Cir.
 10 1997); In re Subpoena Duces Tecum, 145 F.3d 1422, 1424-25 (D.C. Cir. 1998). However,
 11 “[t]his appears to be an open question in the Ninth Circuit,” Vietnam Veterans of Am. v. CIA,
 12 2011 WL 4635139, at *10 (N.D. Cal. Oct. 5, 2011), and even where there are claims of
 13 governmental misconduct, courts in this district and circuit have applied a balancing test. See,
 14 e.g., Wagafe v. Trump, No. 17-094RAJ, Dkt. No. 189 (W.D. Wash. May 21, 2018); All. for the
 15 Wild Rockies v. Pena, No. 16-294RMP, 2017 WL 8778579, at *6-8 (E.D. Wash. Dec. 12, 2017);
 16 Thomas v. Cate, 715 F. Supp. 2d 1012, 1021 (E.D. Cal. 2010). For purposes of this motion, the
 17 Court assumes, without deciding, that applying the balancing test set forth in Warner, 742 F.2d at
 18 1161, is appropriate.

19 In Warner, the Ninth Circuit instructed courts to consider whether “[Plaintiffs’] need for
 20 the materials and the need for accurate fact-finding override the government’s interest in

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 22 ² Plaintiffs contend that Defendants have improperly asserted the deliberative process
 23 privilege over categories of documents that are facially outside its scope (*i.e.*, post-decisional
 24 documents generated after President Trump’s July 26, 2017 announcement and non-deliberative
 documents containing purely factual information). (Dkt. No. 245 at 15-17.) Because the Court
 finds that the deliberative process privilege does not apply at all, it need not address its scope.

1 nondisclosure.” Id. In making this determination, relevant factors include: “(1) the relevance of
 2 the evidence; (2) the availability of other evidence; (3) the government’s role in the litigation;
 3 and (4) the extent to which disclosure would hinder frank and independent discussion regarding
 4 contemplated policies and decisions.” Id.

5 As with all evidentiary privileges, “the deliberative process privilege is narrowly
 6 construed” and Defendants bear the burden of establishing its applicability. Greenpeace v. Nat’l
 7 Marine Fisheries Serv., 198 F.R.D. 540, 543 (W.D. Wash. 2000) (citations omitted). In addition
 8 to showing that withheld documents are privileged, Defendants must comply with formal
 9 procedures necessary to invoke the privilege. Id. “Blanket assertions of the privilege are
 10 insufficient. Rather [Defendants] must provide ‘precise and certain’ reasons for preserving the
 11 confidentiality of designated material.” Id.

12 **A. Relevance of the Evidence**

13 The evidence Plaintiffs seek is undoubtedly relevant. The Court has already found that
 14 the Ban’s constitutionality “necessarily turns on facts related to Defendants’ deliberative
 15 process.” (Dkt. No. 233 at 28.) Defendants may not simultaneously claim that deference is
 16 owed to the Ban because it is the product of “considered reason [and] deliberation,” “exhaustive
 17 study,” and “comprehensive review” by the military (Dkt. No. 194 at 17; Dkt. No. 226 at 9)
 18 while also withholding access to information concerning these deliberations, including whether
 19 the military was even involved.³ This information is central to the litigation and should not be
 20 withheld from the searching judicial inquiry that strict scrutiny requires. See In re Subpoena,
 21 145 F.3d at 1424; see also Johnson v. California, 543 U.S. 499, 506 (2005) (observing that strict
 22 scrutiny is intended to assure that the government “is pursuing a goal important enough to

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 24 ³ The Court notes that Defendants have steadfastly refused to identify even one general or
 military official President Trump consulted before announcing the Ban.

1 warrant use of a highly suspect tool.”); Arizona Dream Act Coalition v. Brewer, 2014 WL
2 171923, at *3 (D. Ariz. Jan. 15, 2014) (holding that withheld communications were “highly
3 relevant” because the “Court must consider the actual intent behind Arizona’s driver’s license
4 policy when it considers the merits of this case.”). This factor weighs in favor of disclosure.

5 **B. Availability of Other Evidence**

6 Defendants possess all of the evidence concerning their deliberations over the Ban, and
7 there is no suggestion that this evidence can be obtained from other sources. Defendants’
8 production of non-privileged documents and an administrative record do not obviate Plaintiffs’
9 need for responsive documents concerning the deliberative process. (See Dkt. No. 235 at 2.)
10 This factor weighs in favor of disclosure.

11 **C. Government’s Role in the Litigation**

12 There is no dispute that the government is a party to this litigation. This factor weighs in
13 favor of disclosure.

14 **D. Extent to Which Disclosure Would Hinder Independent Discussion**

15 While Defendants claim that disclosure “risks chilling future policy discussions on
16 sensitive personnel and security matters” and could “potentially lead[] to a direct negative impact
17 to national security” (Dkt. No. 266 at 12-13), they cannot avoid disclosure based on mere
18 speculation. Instead, Defendants must identify specific, credible risks which cannot be mitigated
19 by the existing protective order in this case (Dkt. No. 183), and must explain why these risks
20 outweigh the Court’s need to perform the “searching judicial inquiry” that strict scrutiny
21 requires. Johnson, 543 U.S. at 506. Because they have failed to do so, this factor weighs in
22 favor of disclosure.

1 Having found that the deliberative process privilege does not apply in this case, the Court
2 GRANTS Plaintiffs' Motion to Compel.

3 **III. Defendants' Motion for Protective Order**

4 Defendants move for a protective order precluding discovery directed at President
5 Trump. (Dkt. No. 268.) Defendants concede that the President has not provided substantive
6 responses or produced a privilege log, but contend that because the requested discovery raises
7 "separation-of-powers concerns," Plaintiffs must exhaust discovery "from sources other than the
8 President and his immediate White House advisors and staff" before he is required to do
9 formally invoke the privilege. (*Id.* at 8, 10-11.)

10 The Supreme Court has recognized that discovery directed at the President involves
11 "special considerations," and that his "constitutional responsibilities and status are factors
12 counseling judicial deference and restraint in the conduct of litigation" against him. *Cheney v.*
13 *U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 385, 387 (2004) (citation omitted).

14 Nevertheless, the President is not immune from civil discovery. Courts have permitted discovery
15 directed at the President where, as in this case, he is a party or has information relevant to the
16 issues in dispute. *See, e.g., United States v. Nixon*, 418 U.S. 683, 706 (1974) (rejecting "an
17 absolute, unqualified Presidential privilege of immunity from judicial process under all
18 circumstances"); *Clinton v. Jones*, 520 U.S. 681, 704 (1997) (noting that "[s]itting Presidents
19 have responded to court orders to provide testimony and other information with sufficient
20 frequency that such interactions between the Judicial and Executive Branches can scarcely be
21 thought a novelty.").

22 The President may invoke the privilege "when asked to produce documents or other
23 materials that reflect presidential decisionmaking and deliberations that [he] believes should
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1 remain confidential.” In re Sealed Case, 121 F.3d at 744. Once he does so, those documents and
2 materials are presumed to be privileged. Id. However, “the privilege is qualified, not absolute,
3 and can be overcome by an adequate showing of need.” Id. at 745. If the Court finds that an
4 adequate showing has been demonstrated (i.e., that the materials contain evidence “directly
5 relevant to issues that are expected to be central to the trial” and “not available with due
6 diligence elsewhere”), it may then proceed to review the documents in camera to excise
7 non-relevant material. Id. at 754, 759.

8 To date, President Trump and his advisors have failed to invoke the presidential
9 communications privilege, to respond to a single discovery request, or to produce a privilege log
10 identifying the documents, communications, and other materials they have withheld. While
11 Defendants claim they need not do so until Plaintiffs “exhaust other sources of non-privileged
12 discovery, meet a heavy, initial burden of establishing a heightened, particularized need for the
13 specific information or documents sought, and at a minimum substantially narrow any requests
14 directed at presidential deliberations” (Dkt. No. 268 at 3), the Court finds no support for this
15 claim. To the extent the President intends to invoke the privilege, the Court already ordered that
16 he “‘expressly make the claim’ and provide a privilege log ‘describ[ing] the nature of the
17 documents, communications, or tangible things not produced or disclosed—and do so in a
18 manner that, without revealing information itself privileged or protected, will enable other parties
19 to assess the claim.’” (Dkt. No. 235 at 3 (quoting Fed. R. Civ. P. 25(b)(5)(i)-(ii).) Only then can
20 the Court evaluate whether the privilege applies and if so, whether Plaintiffs have established a
21 showing of need sufficient to overcome it.

1 Having found that President Trump has failed to demonstrate that he need not invoke the
2 presidential communications privilege, the Court DENIES Defendants' Motion for a Protective
3 Order.

4 **Conclusion**

5 The Court ORDERS as follows:

- 6 1. The Court GRANTS Plaintiffs' Motion to Compel and ORDERS Defendants to turn over
7 those documents that have been withheld solely under the deliberative process privilege
8 within 10 days of the date of this Order;
- 9 2. The Court DENIES Defendants' Motion for a Protective Order and ORDERS Defendants
10 to produce a privilege log identifying the documents, communications, and other
11 materials they have withheld under the presidential communications privilege within 10
12 days of the date of this Order;
- 13 3. The Court notes that the government privilege logs it has reviewed to date are deficient
14 and do not comply with Federal Rule of Civil Procedure 26(b)(5)(A)(i)-(ii). (See Dkt.
15 No. 246, Exs. 11-27.) Privilege logs must provide sufficient information to assess the
16 claimed privilege and to this end must (a) identify individual author(s) and recipient(s);
17 and (b) include *specific, non-boilerplate* privilege descriptions *on a document-by-*
18 *document basis*. To the extent they have not already done so, the Court ORDERS
19 Defendants to produce revised privilege logs within 10 days of the date of this Order;
- 20 4. Should any discovery disputes remain following Defendants' compliance with the above
21 directives, the parties shall bring them before the Court jointly using the procedure set
22 forth in LCR 37.
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The clerk is ordered to provide copies of this order to all counsel.

Dated July 27, 2018.



Marsha J. Pechman
United States District Judge

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

CASE NO. C17-1297-MJP

ORDER DENYING
DEFENDANTS’ MOTION FOR A
PROTECTIVE ORDER

THIS MATTER comes before the Court on Defendants’ Motion for a Protective Order. (Dkt. No. 225.) Having reviewed the Motion, the Responses (Dkt. Nos. 230, 231), and the Reply (Dkt. No. 232), the Court DENIES the Motion in its entirety.

Defendants seek to preclude discovery pending the resolution of their motion to dissolve the preliminary injunction, including through any interlocutory appeal. (Dkt. No. 222.) Defendants claim (1) that Plaintiffs’ and Washington’s current challenge is moot because the “new policy” (i.e., the policy set forth in President Trump’s 2018 Memorandum) is the “operative policy” governing military service by transgender persons; (2) that any challenge to the “new policy” is subject to the Administrative Procedures Act (“APA”), including the

1 requirement that review be confined to the administrative record; and (3) that it is in the interest
2 of judicial economy to preclude discovery until their motion to dissolve the preliminary
3 injunction has been resolved. (Dkt. No. 225 at 2, 5-7.)

4 In light of the Court’s recent order—which directed the parties to proceed with discovery
5 and prepare for trial and which struck Defendants’ motion to dissolve the preliminary injunction
6 in its entirety—the Court finds that entry of a protective order is not warranted. (See Dkt. No.
7 233.)

8 First, as explained in further detail in that Order, Plaintiffs’ and Washington’s challenge
9 is not “moot,” and discovery related to President Trump is not “irrelevant.” (Id. at 11-14.) The
10 2018 Memorandum and Implementation Plan are not a “new policy,” but rather a plan to
11 implement, with few exceptions, the directives of the 2017 Memorandum. (Id. at 11-14.)

12 Second, there is no reason for discovery to be confined to the administrative record.
13 Plaintiffs and Washington do not challenge the policy under the APA, but instead raise direct
14 constitutional claims. (Dkt. No. 230 at 5-6; Dkt. No. 231 at 10-12); see also Bolton v. Pritzker,
15 Case No. 15-cv-1607MJP, 2016 WL 4555467, at *4 (W.D. Wash. Sept. 1, 2016) (noting that “a
16 direct constitutional challenge is reviewed independent of the APA and as such the court is
17 entitled to look beyond the administrative record in regard to such a claim”) (internal quotation
18 marks and citation omitted). Further, Defendants have not demonstrated that the policy
19 excluding openly transgender people from military service constitutes an “agency action” that
20 “resulted from an administrative process by the Department of Defense.” (Dkt. No. 223 at 6.)
21 Indeed, the policy was announced by President Trump, and whether the DoD was even consulted
22 prior to its announcement is disputed. (See Dkt. No. 233 at 28-29.)
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1 Finally, Defendants have not demonstrated that precluding discovery will serve the
2 interests of judicial economy in any way.

3 Accordingly, the Court DENIES Defendants' motion and ORDERS that discovery in this
4 case proceed. Such discovery shall not be confined to the administrative record. To the extent
5 that Defendants intend to claim Executive privilege, they must "expressly make the claim" and
6 provide a privilege log "describ[ing] the nature of the documents, communications, or tangible
7 things not produced or disclosed—and do so in a manner that, without revealing information
8 itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P.
9 26(b)(5)(i)-(ii).

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11 The clerk is ordered to provide copies of this order to all counsel.

12 Dated April 19, 2018.

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15 Marsha J. Pechman
16 United States District Judge
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

CASE NO. C17-1297-MJP

ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFFS' AND
WASHINGTON'S MOTIONS FOR
SUMMARY JUDGMENT;

GRANTING IN PART AND
DENYING IN PART
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT

THIS MATTER comes before the Court on Plaintiffs' Motion for Summary Judgment (Dkt. No. 129); the State of Washington's Motion for Summary Judgment (Dkt. No. 150); and Defendants' Cross-Motion for Partial Summary Judgment (Dkt. No. 194.) Having reviewed the Motions, the Responses (Dkt. Nos. 194, 207, 209), the Replies (Dkt. Nos. 201, 202, 212) and all related papers, and having considered arguments made in proceedings before the Court, the Court rules as follows: The Court GRANTS IN PART and DENIES IN PART Plaintiffs' and

1 Washington’s Motions and GRANTS IN PART and DENIES IN PART Defendants’ Cross-
2 Motion.

3 **ORDER SUMMARY**

4 In July 2017, President Donald J. Trump announced on Twitter a ban on military service
5 by openly transgender people (the “Ban”). Plaintiffs and the State of Washington
6 (“Washington”) challenged the constitutionality of the Ban, and moved for a preliminary
7 injunction to prevent it from being carried out.

8 In December 2017, the Court—along with three other federal judges—entered a
9 nationwide preliminary injunction preventing the military from implementing the Ban. The
10 effect of the order was to maintain the status quo, allowing transgender people to join and serve
11 in the military and receive transition-related medical care. For the past few months, they have
12 done just that.

13 In March 2018, President Trump announced a plan to implement the Ban. With few
14 exceptions, the plan excludes from military service people “with a history or diagnosis of gender
15 dysphoria” and people who “require or have undergone gender transition.” The plan provides
16 that transgender people may serve in the military only if they serve in their “biological sex.”
17 Defendants claim that this plan resolves the constitutional issues raised by Plaintiffs and
18 Washington.

19 In the following order, the Court concludes otherwise, and rules that the preliminary
20 injunction will remain in effect. Each of the claims raised by Plaintiffs and Washington remains
21 viable. The Court also rules that, because transgender people have long been subjected to
22 systemic oppression and forced to live in silence, they are a protected class. Therefore, any
23 attempt to exclude them from military service will be looked at with the highest level of care,
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1 and will be subject to the Court’s “strict scrutiny.” This means that before Defendants can
 2 implement the Ban, they must show that it was sincerely motivated by compelling interests,
 3 rather than by prejudice or stereotype, and that it is narrowly tailored to achieve those interests.

4 The case continues forward on the issue of whether the Ban is well-supported by
 5 evidence and entitled to deference, or whether it fails as an impermissible violation of
 6 constitutional rights. The Court declines to dismiss President Trump from the case and allows
 7 Plaintiffs’ and Washington’s claims for declaratory relief to go forward against him.

8 BACKGROUND

9 I. The Ban on Military Service by Openly Transgender People¹

10 *President Trump’s Announcement on Twitter:* On July 26, 2017, President Donald J.
 11 Trump (@realDonaldTrump) announced over Twitter that the United States would no longer
 12 “accept or allow” transgender people “to serve in any capacity in the U.S. military” (the “Twitter
 13 Announcement”):



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 20 (Dkt. No. 149, Ex. 1.)

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 23 ¹ As used throughout this Order, and as explained in greater detail in this section, the
 24 “Ban” refers to Defendants’ policy generally prohibiting military service by openly transgender people, as announced in President Trump’s Twitter Announcement and 2017 Memorandum and as further detailed in the Implementation Plan and 2018 Memorandum.

1 ***The 2017 Memorandum:*** On August 25, 2017, President Trump issued a Presidential
2 Memorandum (the “2017 Memorandum”) formalizing his Twitter Announcement, and directing
3 the Secretaries of Defense and Homeland Security to “return” to an earlier policy excluding
4 transgender service members. (Dkt. No. 149, Ex. 2.) The 2017 Memorandum authorized the
5 discharge of openly transgender service members (the “Retention Directive”); prohibited the
6 accession of openly transgender service members (the “Accession Directive”); and prohibited the
7 use of Department of Defense (“DoD”) and Department of Homeland Security (“DHS”)
8 resources to fund “sex reassignment” surgical procedures (the “Medical Care Directive”). (Id. at
9 §§ 1-3.) The Accession Directive was to take effect on January 1, 2018; the Retention and
10 Medical Care Directives on March 23, 2018. (Id. at § 3.) The 2017 Memorandum also ordered
11 the Secretary of Defense to “submit to [President Trump] a plan for implementing both [its]
12 general policy . . . and [its] specific directives . . .” no later than February 21, 2018. (Id.)

13 ***Secretary Mattis’ Press Release and Interim Guidance:*** On August 29, 2017, Secretary
14 of Defense James N. Mattis issued a press release confirming that the DoD had received the
15 2017 Memorandum and, as directed, would “carry out” its policy direction. (Dkt. No. 197, Ex.
16 2.) The press release explained that Secretary Mattis would “develop a study and
17 implementation plan” and “establish a panel of experts . . . to provide advice and
18 recommendation on the implementation of the [P]resident’s direction.” (Id.)

19 On September 14, 2017, Secretary Mattis issued interim guidance regarding President
20 Trump’s Twitter Announcement and 2017 Memorandum to the military (the “Interim
21 Guidance”). (Dkt. No. 149, Ex. 3.) The Interim Guidance again identified the DoD’s intent to
22 “carry out the President’s policy and directives” and “present the President with a plan to
23 implement the policy and directives in the [2017] Memorandum.” (Id. at 2.) The Interim
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1 Guidance provided (1) that transgender people would be prohibited from accession effective
 2 immediately; (2) that service members diagnosed with gender dysphoria would be provided
 3 “treatment,” however, “no new sex reassignment surgical procedures for military personnel
 4 [would] be permitted after March 22, 2018”; and (3) that no action would be taken “to
 5 involuntarily separate or discharge an otherwise qualified Service member solely on the basis of
 6 a gender dysphoria diagnosis or transgender status.” (*Id.* at 3.)

7 ***The Implementation Plan:*** On February 22, 2018, as directed, Secretary Mattis
 8 delivered to President Trump a plan for carrying out the policies set forth in his Twitter
 9 Announcement and 2017 Memorandum (Dkt. No. 224, Ex. 1) along with a “Report and
 10 Recommendations on Military Service by Transgender Persons” (Dkt. No. 224, Ex. 2)
 11 (collectively, the “Implementation Plan”). The Implementation Plan recommended the following
 12 policies:

- 13 • Transgender persons with a history or diagnosis of gender dysphoria are
 14 disqualified from military service, except under the following limited
 15 circumstances: (1) if they have been stable for 36 consecutive months in their
 16 biological sex prior to accession; (2) Service members diagnosed with gender
 17 dysphoria after entering into service may be retained if they do not require a
 18 change of gender and remain deployable within applicable retention
 standards; and (3) currently serving Service members who have been
 diagnosed with gender dysphoria since the previous administration’s policy
 took effect and prior to the effective date of this new policy, may continue to
 serve in their preferred gender and receive medically necessary treatment for
 gender dysphoria.
- 19 • Transgender persons who require or have undergone gender transition are
 20 disqualified from military service.
- 21 • Transgender persons without a history or diagnosis of gender dysphoria, who
 22 are otherwise qualified for service, may serve, like all other Service members,
 23 in their biological sex.

24 (Dkt. No. 224, Ex. 1 at 3-4.)

1 **The 2018 Memorandum:** On March 23, 2018, President Trump issued another
2 Presidential Memorandum (the “2018 Memorandum”). (Dkt. No. 224, Ex. 3.) The 2018
3 Memorandum confirms his receipt of the Implementation Plan, purports to “revoke” the 2017
4 Memorandum and “any other directive [he] may have made with respect to military service by
5 transgender individuals,” and directs the Secretaries of Defense and Homeland Security to
6 “exercise their authority to implement any appropriate policies concerning military service by
7 transgender individuals.” (Id. at 2-3.)

8 **II. The Carter Policy**

9 In 2010, Congress repealed the “Don’t Ask, Don’t Tell” policy that had previously
10 prevented gay, lesbian, and bisexual people from serving openly in the military. (Dkt. No. 145 at
11 ¶ 10.) The repeal of “Don’t Ask, Don’t Tell” raised questions about the military’s policy on
12 transgender service members, as commanders became increasingly aware that there were capable
13 and experienced transgender service members in every branch of the military. (Id. at ¶ 11; Dkt.
14 No. 146 at ¶ 7.) In August 2014, the DoD eliminated its categorical ban on retention of
15 transgender service members, enabling each branch of military service to reassess its own
16 policies. (Dkt. No. 145 at ¶ 12; Dkt. No. 146 at ¶ 8.) In July 2015, then-Secretary of Defense
17 Ashton Carter convened a group to evaluate policy options regarding openly transgender service
18 members (the “Working Group”). (Dkt. No. 142 at ¶ 8.) The Working Group included senior
19 uniformed officials from each branch, a senior civilian official, and various staff members. (Id.
20 at ¶ 9.) It sought to “identify and address all relevant issues relating to service by openly
21 transgender persons.” (Id. at ¶ 22.) To do so, it consulted with medical experts, personnel
22 experts, readiness experts, and commanders whose units included transgender service members,
23 and commissioned an independent study by the RAND Corporation to assess the implications of
24

1 allowing transgender people to serve openly (the “RAND Study”). (Id. at ¶¶ 10-11, 22-27.) In
2 particular, the RAND Study focused on: (1) the health care needs of transgender service
3 members and the likely costs of providing coverage for transition-related care; (2) the readiness
4 implications of allowing transgender service members to serve openly; and (3) the experiences of
5 foreign militaries that allow for open service. (Dkt. No. 144, Ex. B at 4.) The RAND Study
6 found “no evidence” that allowing transgender people to serve openly would adversely impact
7 military effectiveness, readiness, or unit cohesion. (Dkt. No. 144 at ¶ 14.) Instead, the RAND
8 Study found that discharging transgender service members would reduce productivity and result
9 in “significant costs” associated with replacing skilled and qualified personnel. (Dkt. No. 142 at
10 ¶ 21.) The results of the RAND Study were published in a 113-page report titled “Assessing the
11 Implications of Allowing Transgender Personnel to Serve Openly.” (See Dkt. No. 144, Ex. B.)

12 After reviewing the results of the RAND Study and other evidence, the Working Group
13 unanimously agreed that (1) transgender people should be allowed to serve openly and (2)
14 excluding them from service based on a characteristic unrelated to their fitness to serve would
15 undermine military efficacy. (Dkt. No. 142 at ¶¶ 26-27.) On June 30, 2016, Secretary Carter
16 accepted the recommendations of the Working Group and issued Directive-type Memorandum
17 16-005 (the “Carter Policy”), which affirmed that “service in the United States military should be
18 open to all who can meet the rigorous standards for military service and readiness.” (Dkt. No.
19 144, Ex. C.) The Carter Policy provided that “[e]ffective immediately, no otherwise qualified
20 service member may be involuntarily separated, discharged or denied reenlistment or
21 continuation of service, solely on the basis of their gender identity,” and further provided that
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1 transgender people would be allowed to accede into the military not later than July 1, 2017.² (Id.
 2 at 5.) Consistent with the Carter Policy, each branch of military service issued detailed
 3 instructions, policies, and regulations regarding separation and retention, accession, in-service
 4 transition, and medical care. (Dkt. No. 144 at ¶¶ 24-36, Exs. D, E, F; Dkt. No. 145 at ¶¶ 41-50,
 5 Exs. A, B; Dkt. No. 146 at ¶¶ 27-34, Ex. A.)

6 In reliance upon the Carter Policy and the DoD’s assurances that it would not discharge
 7 them for being transgender, many service members came out to the military and had been
 8 serving openly for more than a year when President Trump issued his Twitter Announcement
 9 and 2017 Memorandum. (Dkt. No. 144, ¶ 37; Dkt. No. 145 at ¶ 51; Dkt. No. 146 at ¶ 35.)

10 **III. Procedural History**

11 On August 28, 2017, Plaintiffs filed this lawsuit challenging the constitutionality of the
 12 Ban, as set forth in the Twitter Announcement and the 2017 Memorandum. (See Dkt. No. 1.)
 13 Plaintiffs include nine transgender individuals (the “Individual Plaintiffs”) and three
 14 organizations (the “Organizational Plaintiffs”). (Dkt. No. 30 at ¶¶ 7-18.) Individual Plaintiffs
 15 Ryan Karnoski, D.L., and Connor Callahan aspire to enlist in the military; Staff Sergeant
 16 Cathrine Schmid, Chief Warrant Officer Lindsey Muller, Petty Officer First Class Terece Lewis,
 17 Petty Officer Second Class Phillip Stephens, and Petty Officer Second Class Megan Winters
 18 currently serve openly in the military. (Id. at ¶¶ 7-13.) Individual Plaintiff Jane Doe currently
 19 serves in the military, but does not serve openly. (Id. at ¶ 14.) Organizational Plaintiffs include
 20 the Human Rights Campaign (“HRC”), the Gender Justice League (“GJL”), and the American
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23 ² On June 30, 2017, Secretary Mattis extended the effective date for accepting
 24 transgender recruits to January 1, 2018. (Dkt. No. 197, Ex. 3.)

1 On March 23, 2018, as these motions were pending and only days before the Court was
2 set to hear oral argument, President Trump issued the 2018 Memorandum. (Dkt. No. 214, Ex.
3 1.) On March 27, the Court ordered the parties to present supplemental briefing on the effect of
4 the 2018 Memorandum and the Implementation Plan. (Dkt. No. 221.) That briefing has now
5 been completed and this matter is ready for ruling. (See Dkt. Nos. 226, 227, 228.)

6 DISCUSSION

7 I. Legal Standard

8 Summary judgment is proper if “the movant shows that there is no genuine dispute as to
9 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
10 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue
11 of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To defeat a motion for
12 summary judgment, the non-movant must point to facts supported by the record which
13 demonstrate a genuine issue of material fact. Lujan v. National Wildlife Federation, 497 U.S.
14 871, 888 (1990). Conclusory, non-specific statements are not sufficient. Id. Similarly, “a party
15 cannot manufacture a genuine issue of material fact merely by making assertions in its legal
16 memoranda.” S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc., 690
17 F.2d 1235, 1238 (9th Cir. 1982).

18 II. Plaintiffs’ and Washington’s Motions for Summary Judgment

19 Plaintiffs and Washington contend that summary judgment is proper because the Ban is
20 unsupported by any constitutionally adequate government interest as a matter of law, and
21 therefore violates equal protection, substantive due process, and the First Amendment. (Dkt. No.
22 129 at 15-28; Dkt. No. 150 at 13-23.) Defendants respond that disputes of material fact preclude
23 summary judgment, including disputes as to (1) whether Plaintiffs’ and Washington’s challenges
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1 are moot as a result of the 2018 Memorandum; (2) whether Plaintiffs and Washington have
2 standing; and (3) whether the Ban satisfies the applicable level of scrutiny. (Dkt. No. 194 at
3 5-24; Dkt. No. 226 at 3-11.) The Court addresses each of these issues in turn:

4 **A. Mootness**

5 Defendants claim that Plaintiffs' and Washington's challenges are now moot, as the
6 policy set forth in the 2017 Memorandum has been "revoked" and replaced by that in the 2018
7 Memorandum. (Dkt. No. 226 at 3-7.) Defendants claim the "new policy" has "changed
8 substantially," such that it presents a "substantially different controversy." (*Id.* at 6 (citations
9 omitted.)) Plaintiffs and Washington respond that there is no "new policy" at all, as the 2018
10 Memorandum and the Implementation Plan merely implement the directives of the 2017
11 Memorandum. (Dkt. No. 227 at 2; Dkt. No. 228 at 7-8.)

12 "The burden of demonstrating mootness 'is a heavy one.'" Los Angeles County v. Davis,
13 440 U.S. 625, 631 (1979) (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632-33
14 (1953)). The Ninth Circuit has explained that a case is not moot unless "subsequent events make
15 it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to
16 recur," McCormack v. Herzog, 788 F.3d 1017, 1024 (9th Cir. 2015) (quoting Friends of the
17 Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)), such that "the
18 litigant no longer ha[s] any need of the judicial protection that is sought." Jacobus v. Alaska,
19 338 F.3d 1095, 1102-03 (9th Cir. 2003) (quoting Adarand Constructors, Inc. v. Slater, 528 U.S.
20 216, 224 (2000)). Accordingly, courts find cases moot only where the challenged policy has
21 been completely revoked or rescinded, not merely voluntarily ceased. *See Davis*, 440 U.S. at
22 631 (holding that a case is moot only where "there can be no reasonable expectation" that the
23 alleged violation will recur and "interim relief or events have completely and irrevocably
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1 eradicated the effects of the alleged violation”); City of Mesquite v. Aladdin’s Castle, Inc., 455
2 U.S. 283, 289 (1982) (holding that “a defendant’s voluntary cessation of a challenged practice
3 does not deprive a federal court of its power to determine the legality of the practice”); see also
4 McCormack, 788 F.3d at 1025 (noting that a case is not moot where the government never
5 “repudiated . . . as unconstitutional” the challenged policy).

6 The Court finds that the 2018 Memorandum and the Implementation Plan do not
7 substantively rescind or revoke the Ban, but instead threaten the very same violations that caused
8 it and other courts to enjoin the Ban in the first place. The 2017 Memorandum prohibited the
9 accession and authorized the discharge of openly transgender service members (the Accession
10 and Retention Directives); prohibited the use of DoD and DHS resources to fund transition-
11 related surgical procedures (the Medical Care Directive); and directed Secretary Mattis to submit
12 “a plan for implementing” both its “general policy” and its “specific directives” no later than
13 February 21, 2018. (Dkt. No. 149, Ex. 2 at §§ 1-3.) The 2017 Memorandum did not direct
14 Secretary Mattis to determine *whether* or not the directives should be implemented, but instead
15 ordered the directives to be implemented by specific dates and requested a plan for *how* to do so.

16 The Implementation Plan adheres to the policy and directives set forth in the 2017
17 Memorandum with few exceptions: With regard to the Accession and Retention Directives, the
18 Implementation Plan excludes from military service and authorizes the discharge of transgender
19 people who “require or have undergone gender transition” and those “with a history or diagnosis
20 of gender dysphoria” unless they have been “stable for 36 consecutive months in their biological
21 sex prior to accession.” (Dkt. No. 224, Ex. 1 at 3-4.) With regard to the Medical Care Directive,
22 the Implementation Plan provides that the military will, with few exceptions, no longer provide
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1 transition-related surgical care (as people who “require . . . gender transition” will no longer be
2 permitted to serve and those who are currently serving will be subject to discharge). (Id.)

3 Defendants claim that the 2018 Memorandum and the Implementation Plan differ from
4 the 2017 Memorandum in that they do not mandate a “categorical” prohibition on service by
5 openly transgender people and “contain[] several exceptions allowing some transgender
6 individuals to serve.” (Dkt. No. 226 at 6-7). The Court is not persuaded. The Implementation
7 Plan prohibits transgender people—including those who have neither transitioned nor been
8 diagnosed with gender dysphoria—from serving, unless they are “willing and able to adhere to
9 all standards associated with their biological sex.” (Dkt. No. 224, Ex. 1 at 4, Ex. 2 at 7.)
10 Requiring transgender people to serve in their “biological sex”⁵ does not constitute “open”
11 service in any meaningful way, and cannot reasonably be considered an “exception” to the Ban.
12 Rather, it would force transgender service members to suppress the very characteristic that
13 defines them as transgender in the first place.⁶ (See Dkt. No. 143 at ¶ 19 (“The term
14 ‘transgender’ is used to describe someone who experiences any significant degree of
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16 ⁵ The Court notes that the Implementation Plan uses the term “biological sex,” apparently
17 to refer to the sex one is assigned at birth. This is somewhat misleading, as the record indicates
18 that gender identity—“a person’s internalized, inherent sense of who they are as a particular
19 gender (i.e., male or female)”—is also widely understood to have a “biological component.”
(See Dkt. No. 143 at ¶¶ 20-21.)

20 ⁶ While the Implementation Plan contains an exception that allows current service
21 members to serve openly and in their preferred gender and receive “medically necessary”
22 treatment for gender dysphoria, the exception is narrow, and applies only to those service
23 members who “were diagnosed with gender dysphoria by a military medical provider after the
24 effective date of the Carter [P]olicy” (i.e., June 30, 2016) but “before the effective date” of the
policy set forth in the Implementation Plan. (Dkt. No. 224, Ex. 2 at 7-8.) Further, this exception
is severable from the remainder of the Implementation Plan. (Id. at 7 (“[S]hould [the DoD]’s
decision to exempt these Service members be used by a court as a basis for invalidating the
entire policy, this exemption is and should be deemed severable from the rest of the policy.”).)

1 misalignment between their gender identity and their assigned sex at birth.”); Dkt. No. 224, Ex. 2
2 at 9 n.10 (“[T]ransgender” is “an umbrella term used for individuals who have sexual identity or
3 gender expression that differs from their assigned sex at birth.”)

4 Therefore, the Court concludes that the 2018 Memorandum and the Implementation Plan
5 do not moot Plaintiffs’ and Washington’s existing challenges.

6 **B. Standing**

7 Defendants claim that Plaintiffs and Washington lack standing to challenge the Ban, and
8 that the 2018 Memorandum and Implementation Plan “have significantly changed the analysis.”
9 (Dkt. No. 194 at 6-12; Dkt. No. 226 at 7.)

10 Standing requires (1) an “injury in fact”; (2) a “causal connection between the injury and
11 the conduct complained of”; and (3) a likelihood “that the injury will be redressed by a favorable
12 decision.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal quotation
13 marks and citations omitted). An “injury in fact” exists where there is an invasion of a legally
14 protected interest that is both “concrete and particularized” and “actual or imminent, not
15 conjectural or hypothetical.” Id. at 560 (internal quotation marks and citations omitted).

16 While the Court previously concluded that both Plaintiffs and Washington established
17 standing at the preliminary injunction stage (Dkt. No. 103 at 7-12), their burden for doing so on
18 summary judgment is more exacting and requires them to set forth “by affidavit or other
19 evidence ‘specific facts’” such that a “fair-minded jury” could find they have standing. Id. at
20 561; see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

21 The Court considers standing for the Individual Plaintiffs, the Organizational Plaintiffs,
22 and Washington in turn:

1 **1. Individual Plaintiffs**

2 Each of the Individual Plaintiffs has submitted an affidavit detailing the ways in which
3 they have already been harmed by the Ban, and would be further harmed were it to be
4 implemented. (See Dkt. Nos. 130-138.) While Defendants claim that “Plaintiffs are obviously
5 not suffering any harm from the revoked 2017 Memorandum,” and “would neither sustain an
6 actual injury nor face an imminent threat of future injury” as a result of the 2018 Memorandum,
7 the Court disagrees and concludes that each of the Individual Plaintiffs has standing to challenge
8 the Ban.

9 Karnoski, D.L, and Callahan have “taken clinically appropriate steps to transition” and
10 would be excluded from acceding under the Implementation Plan. (Dkt. No. 130 at ¶ 10; Dkt.
11 No. 132 at ¶ 8; Dkt. No. 137 at ¶ 8.) Whether they could have acceded under the Carter Policy
12 and whether they might be able to obtain “waivers,” as Defendants suggest, are irrelevant. (See
13 Dkt. No. 226 at 8.) As the Court previously found, their injury “lies in the denial of an equal
14 *opportunity* to compete, not the denial of the job itself,” and the Court need not “inquire into the
15 plaintiff’s qualifications (or lack thereof) when assessing standing.” (Dkt. No. 103 at 10 n.3
16 (citing *Shea v. Kerry*, 796 F.3d 42, 50 (D.C. Cir. 2015)) (emphasis in original).)

17 Doe does not currently serve openly, but was intending to come out and to transition
18 surgically before President Trump’s Twitter Announcement. (Dkt. No. 138 at ¶¶ 8-11.) The Ban
19 unambiguously subjects her to discharge should she seek to do either. (See Dkt. No. 224, Ex. 1.)
20 Schmid, Muller, Lewis, Stephens, and Winters have been diagnosed with gender dysphoria, and
21 likewise would be subject to discharge under the Ban.⁷ (Dkt. No. 131 at ¶ 9; Dkt. No. 133 at
22

23 ⁷ Defendants claim that the currently serving Plaintiffs were “diagnosed with gender
24 dysphoria within the relevant time period” and “therefore would be able to continue serving in
their preferred gender, change their gender marker, and receive all medically necessary

¶ 15; Dkt. No. 134 at ¶ 10; Dkt. No. 135 at ¶ 10; Dkt. No. 136 at ¶ 10.) The threat of discharge facing Doe, Schmid, Muller, Lewis, Stephens, and Winters is “actual or imminent, not conjectural or hypothetical,” and clearly gives rise to standing. See Lujan, 504 U.S. at 560 (internal quotation marks and citation omitted).

Importantly, even if each of the Individual Plaintiffs were granted waivers or otherwise not excluded, discharged, or denied medical care, there can be no dispute that they would nevertheless have standing to challenge the Ban. This is because the Ban already has denied them the opportunity to serve in the military on the same terms as others; has deprived them of dignity; and has subjected them to stigmatization. (See Dkt. No. 103 at 8.) Policies that “stigmatiz[e] members of [a] disfavored group as ‘innately inferior’ . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.” Heckler v. Mathews, 465 U.S. 728, 737-740 (1984) (citation omitted). Such stigmatic injury, when identified in specific terms, is “one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing.” Allen v. Wright, 468 U.S. 737, 755 (1984), abrogated on other grounds, 134 S. Ct. 1377 (2014).

treatment” under the Implementation Plan’s narrow exception. (Dkt. No. 226 at 8.) The record does not support this claim. As noted previously, the exception applies only to current service members who “were diagnosed with gender dysphoria by a military medical provider *after* the effective date of the Carter [P]olicy” (*i.e.*, June 30, 2016) but “before the effective date” of the policy set forth in the Implementation Plan. (See supra, n.6; Dkt. No. 224, Ex. 2 at 7-8 (emphasis added).) The record suggests that many, if not all, of the currently serving Plaintiffs were diagnosed *before* June 30, 2016. For example, Schmid was diagnosed “approximately four years ago.” (Dkt. No. 131 at ¶ 9.) Muller was diagnosed “approximately six years ago.” (Dkt. No. 133 at ¶ 15.) Lewis, Stephens, and Winters were diagnosed “approximately three years ago,” “approximately two and a half years ago,” and “approximately two years ago” respectively. (Dkt. No. 134 at ¶ 10; Dkt. No. 135 at ¶ 10; Dkt. No. 136 at ¶ 10.) There is also no indication that any of the currently serving Plaintiffs received their diagnosis from a “military medical provider.”

1 Each of the Individual Plaintiffs has detailed the stigmatic injuries they have suffered
2 through affidavits. For example, Karnoski has explained that the Ban has caused him “great
3 distress, discomfort, and pain.” (Dkt. No. 130 at ¶ 21.) Schmid has explained that the Ban’s
4 “abrupt change in policy and implicit commentary on [her] value to the military and competency
5 to serve has caused [her] to feel tremendous anguish,” and that since it was announced, she has
6 lost sleep and suffered “an immense amount of anxiety.” (Dkt. No. 131 at ¶¶ 23-24, 26.) Muller
7 has explained that the Ban was “devastating” and “wounded [her] more than any combat injury
8 could.” (Dkt. No. 133 at ¶¶ 30-31.) Doe has explained that the Ban precludes her from
9 expressing her authentic gender identity, and that as a result, she has not come out. (Dkt. No.
10 138 at ¶¶ 10-11.) Doe’s self-censorship alone is a “constitutionally sufficient injury,” as it is
11 based on her “actual and well-founded fear” of discharge. See Cal. Pro-Life Council, Inc. v.
12 Getman, 328 F.3d 1088, 1095 (9th Cir. 2003) (holding that a person’s “actual and well-founded
13 fear that [a] law will be enforced against him or her” may give rise to standing to bring
14 pre-enforcement claims under the First Amendment and that “self-censorship is ‘a harm that can
15 be realized even without an actual prosecution’”) (quoting Virginia v. Am. Booksellers Ass’n,
16 484 U.S. 383, 393 (1988)).

17 Therefore, the Court concludes that each of the Individual Plaintiffs has standing.

18 2. Organizational Plaintiffs

19 As each of the Individual Plaintiffs has standing, so too do the organizations they
20 represent. An organization has standing where “(a) its members would otherwise have standing
21 to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s
22 purpose; and (c) neither the claim asserted nor the relief requested requires the participation of
23 individual members in the lawsuit.” Hunt v. Wash. State Apple Advert. Comm’n, 432 U.S. 333,
24

1 343 (1977). Each of the Organizational Plaintiffs satisfies these requirements. Karnoski and
2 Schmid are members of HRC, GJL, and AMPA, and Muller, Stephens, and Winters are also
3 members of AMPA. (Dkt. No. 130 at ¶ 3; Dkt. No. 131 at ¶ 5; Dkt. No. 133 at ¶ 5; Dkt. No. 135
4 at ¶ 4; Dkt. No. 136 at ¶ 4; Dkt. No. 140 at ¶ 3.) The interests each Organizational Plaintiff seeks
5 to protect are germane to their organizational purposes, which include ending discrimination
6 against lesbian, gay, bisexual, transgender and queer (“LGBTQ”) individuals (HRC and GJL)
7 and supporting families and allies of LGBT service members and veterans (AMPA). (Dkt. No.
8 139 at ¶ 2; Dkt. No. 140 at ¶ 2; Dkt. No. 141 at ¶ 2.)

9 Therefore, the Court concludes that each of the Organizational Plaintiffs has standing.

10 3. Washington

11 Defendants claim that “Washington has not even attempted to satisfy its burden to
12 demonstrate standing,” and that “in granting Washington’s motion to intervene, the Court
13 expressly declined to decide whether Washington possessed standing to sue.” (Dkt. No. 194 at
14 12.) To the contrary, the Court explicitly found that Washington had standing in its own right,
15 and not merely as an intervenor. (Dkt. No. 103 at 11-12.)

16 A state has standing to sue the federal government to vindicate its sovereign and quasi-
17 sovereign interests. See Massachusetts v. E.P.A., 549 U.S. 497, 518-520 (2007). Sovereign
18 interests include a state’s interest in protecting the natural resources within its boundaries. Id. at
19 518-19. Quasi-sovereign interests include its interest in “the health and well-being—both
20 physical and economic—of its residents,” and in “securing residents from the harmful effects of
21 discrimination.” Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 607,
22 609 (1982).

1 Washington contends that the Ban will impede its ability to protect its residents and
2 natural resources and will undermine the efficacy of its National Guard. (Dkt. No. 150 at 9-10.)
3 Washington is home to approximately 60,000 active, reserve, and National Guard members, and
4 the military is the second largest public employer in the state. (Id. at 9.) Washington is also
5 home to approximately 32,850 transgender adults, and its laws protect these residents against
6 discrimination on the basis of sex, gender, and gender identity. (Id. at 9-10); RCW §§ 49.60.030;
7 49.60.040(25)-(26).

8 Washington relies on the National Guard to assist with emergency preparedness and
9 disaster recovery planning, and to protect the state’s residents and natural resources from
10 wildfires, landslides, flooding, and earthquakes. (Dkt. No. 150 at 9.) When the Governor
11 deploys the National Guard for state active duty, Washington pays its members’ wages and
12 provides disability and life insurance benefits for injuries they may sustain while serving the
13 state. (Id.); RCW § 38.24.050. The state also oversees recruitment efforts and exercises
14 day-to-day command over Guard members in training and most forms of active duty. (Dkt. No.
15 170, Ex. A at 20.) Further, the Governor must ensure that the Guard conforms to both federal
16 and state laws and regulations, including the state’s anti-discrimination laws and, were the Ban to
17 be implemented, conflicting DoD policies regarding accession and retention. (Dkt. No. 150 at
18 9-10; Dkt. No. 170, Ex. A at 21-22.) Thus, in addition to diminishing the number of eligible
19 members for the National Guard, the Ban threatens Washington’s ability to (1) protect its
20 residents and natural resources in times of emergency and (2) “assur[e] its residents that it will
21 act” to protect them from “the political, social, and moral damage of discrimination.” See
22 Snapp, 458 U.S. at 609. Defendants have not offered any contrary evidence with respect to
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1 Washington's sovereign and quasi-sovereign interests. Therefore, the Court concludes that
2 Washington has standing.

3 C. Constitutional Violations

4 Plaintiffs contend that the Ban violates equal protection, substantive due process, and the
5 First Amendment. (Dkt. No. 129 at 15-28.) Washington contends that the Ban violates equal
6 protection and substantive due process. (Dkt. No. 150 at 13-23.) Before it can reach the merits
7 of these constitutional claims, the Court must determine (1) the applicable level of scrutiny and
8 (2) the applicable level of deference owed to the Ban, if any. The Court addresses each of these
9 issues in turn:

10 1. Level of Scrutiny

11 At the preliminary injunction stage, the Court found that transgender people were, at
12 minimum, a quasi-suspect class. (Dkt. No. 103 at 15-16.) In light of additional evidence before
13 it at this stage, the Court today concludes that they are a suspect class, such that the Ban must
14 satisfy the most exacting level of scrutiny if it is to survive.

15 In determining whether a classification is suspect or quasi-suspect, the Supreme Court
16 has observed that relevant factors include: (1) whether the class has been “[a]s a historical
17 matter . . . subjected to discrimination,” Bowen v. Gilliard, 483 U.S. 587, 602 (1987); (2)
18 whether the class has a defining characteristic that “frequently bears [a] relation to ability to
19 perform or contribute to society,” City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432,
20 440-41 (1985); (3) whether the class exhibits “obvious, immutable, or distinguishing
21 characteristics that define [it] as a discrete group,” Bowen, 483 U.S. at 602; and (4) whether the
22 class is “a minority or politically powerless.” Id.; see also Windsor v. U.S., 699 F.3d 169, 181
23 (2d Cir. 2012), aff’d on other grounds, 570 U.S. 744 (2013). While “[t]he presence of any of the
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1 factors is a signal that the particular classification is ‘more likely than others to reflect
2 deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,’”
3 the first two factors alone may be dispositive. Golinski v. U.S. Office of Pers. Mgmt., 824 F.
4 Supp. 2d 968, 983 (N.D. Cal. 2012) (quoting Pyler v. Doe, 457 U.S. 202, 216 n.14 (1982)).

5 The Court considers each of these factors in turn:

6 **i. History of Discrimination**

7 The history of discrimination and systemic oppression of transgender people in this
8 country is long and well-recognized. Transgender people have suffered and continue to suffer
9 endemic levels of physical and sexual violence, harassment, and discrimination in employment,
10 education, housing, criminal justice, and access to health care. (See Dkt. No. 169, Ex. A at
11 9-12.) According to a nationwide survey conducted by the National Center for Transgender
12 Equality in 2015, 48 percent of transgender respondents reported being “denied equal treatment,
13 verbally harassed, and/or physically attacked in the past year because of being transgender” and
14 47 percent reported being “sexually assaulted at some point in their lifetime.” (Id. at 10.)
15 Seventy-seven (77) percent report being “verbally harassed, prohibited from dressing according
16 to their gender identity, or physically or sexually assaulted” in grades K-12. (Id. at 10-11.)
17 Thirty (30) percent reported being “fired, denied a promotion, or experiencing some other form
18 of mistreatment in the workplace related to their gender identity or expression, such as being
19 harassed or attacked.” (Id. at 11.) Finally, “it is generally estimated that transgender women
20 face *4.3 times the risk* of becoming homicide victims than the general population.” (Id. at 10
21 (emphasis in original).)

1 **ii. Contributions to Society**

2 Discrimination against transgender people clearly is unrelated to their ability to perform
3 and contribute to society. See Doe 1, 275 F. Supp. 3d at 209 (noting the absence of any
4 “argument or evidence suggesting that being transgender in any way limits one’s ability to
5 contribute to society”); Adkins v. City of New York, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015)
6 (noting the absence of “any data or argument suggesting that a transgender person, simply by
7 virtue of transgender status, is any less productive than any other member of society”). Indeed,
8 the Individual Plaintiffs in this case contribute not only to society as a whole, but to the military
9 specifically. For years, they have risked their lives serving in combat and non-combat roles,
10 fighting terrorism around the world, and working to secure the safety and security of our forces
11 overseas. (See, e.g., Dkt. No. 133 at ¶¶ 7-9; Dkt. No. 134 at ¶¶ 5-6; Dkt. No. 135 at ¶¶ 6-7; Dkt.
12 No. 136 at ¶¶ 6-7.) Their exemplary service has been recognized by the military itself, with
13 many having received awards and distinctions. (See Dkt. No. 131 at ¶ 15; Dkt. No. 133 at ¶ 12;
14 Dkt. No. 134 at ¶ 7.)

15 **iii. Immutability**

16 Transgender people clearly have “immutable” and “distinguishing characteristics that
17 define them as a discrete group.” Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of
18 Educ., 208 F. Supp. 3d 850, 874 (S.D Ohio 2016) (quoting Lyng v. Castillo, 477 U.S. 635, 638
19 (1986)). Experts agree that gender identity has a “biological component,” and there is a
20 “medical consensus that gender identity is deep-seated, set early in life, and *impervious to*
21 *external influences.*” (Dkt. No. 143 at ¶¶ 21-22 (emphasis added).) In other contexts, the Ninth
22 Circuit has held that “[s]exual orientation and sexual identity” are “immutable” and are “so
23 fundamental to one’s identity that a person should not be required to abandon them.”

1 Hernandez-Montiel v. I.N.S., 225 F.3d 1087, 1093 (9th Cir. 2000), overruled on other grounds,
 2 409 F.3d 1177 (9th Cir. 2005).

3 **iv. Political Power**

4 Despite increased visibility in recent years, transgender people as a group lack the
 5 relative political power to protect themselves from wrongful discrimination. While the exact
 6 number is unknown, transgender people make up less than 1 percent of the nation’s adult
 7 population. (Dkt. No. 143, Ex. B at 3 (estimating 0.3 percent)); see also Doe 1, 275 F. Supp. 3d
 8 at 209 (estimating 0.6 percent). Fewer than half of the states have laws that explicitly prohibit
 9 discrimination against transgender people. (Dkt. No. 169, Ex. A at 12.) Further, recent actions
 10 by President Trump’s administration have removed many of the limited protections afforded by
 11 federal law. (Id. at 12-13.) Finally, openly transgender people are vastly underrepresented in
 12 and have been “systematically excluded from the most important institutions of
 13 self-governance.” SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 484 (9th Cir.
 14 2014). There are no openly transgender members of the United States Congress or the federal
 15 judiciary, and only one out of more than 7,000 state legislators is openly transgender. (Dkt. No.
 16 169, Ex. A at 14); see also Adkins, 143 F. Supp. 3d at 140.

17 Recognizing these factors, courts have consistently found that transgender people
 18 constitute, at minimum, a quasi-suspect class.⁸ See, e.g., Doe 1, 275 F. Supp. 3d at 208-10;

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 20
 21 ⁸ The Ninth Circuit applies heightened scrutiny to equal protection claims involving
 22 discrimination based on sexual orientation. SmithKline, 740 F.3d at 484; Latta v. Otter, 771
 23 F.3d 456, 468 (9th Cir. 2014). This reasoning further supports the Court’s conclusion as to the
 24 applicable level of scrutiny, as discrimination based on transgender status burdens a group that
 has in many ways “experienced even greater levels of societal discrimination and
 marginalization.” Norsworthy, 87 F. Supp. 3d at 1119 n.8; see also Adkins, 143 F. Supp. 3d at
 140 (“Particularly in comparison to gay people . . . transgender people lack the political strength
 to protect themselves. . . . [A]lthough there are and were gay members of the United States

1 Stone, 280 F. Supp. 3d at 768; Adkins, 143 F. Supp. 3d at 139-40; Highland, 208 F. Supp. 3d at
 2 873-74; Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015). Today, the Court
 3 concludes that transgender people constitute a suspect class. Transgender people have long been
 4 forced to live in silence, or to come out and face the threat of overwhelming discrimination.

5 Therefore, the Court GRANTS summary judgment in Plaintiffs’ and Washington’s favor
 6 as to the applicable level of scrutiny. The Ban specifically targets one of the most vulnerable
 7 groups in our society, and must satisfy strict scrutiny if it is to survive.

8 **2. Level of Deference**

9 Defendants claim that “considerable deference is owed to the President and the DoD in
 10 making military personnel decisions,” and that for this reason, Plaintiffs’ and Washington’s
 11 constitutional claims necessarily fail. (Dkt. No. 194 at 16.)

12 The Court previously found that the Ban—as set forth in President Trump’s Twitter
 13 Announcement and 2017 Memorandum—was not owed deference, as it was not supported by
 14 “any evidence of considered reason or deliberation.” (Dkt. No. 103 at 17-18.) Indeed, at the
 15 time he announced the Ban, “all of the reasons proffered by the President for excluding
 16 transgender individuals from the military were not merely unsupported, but were actually
 17 *contradicted* by the studies, conclusions, and judgment of the military itself.” Doe 1, 275 F.
 18 Supp. 3d at 212 (emphasis in original); see also Rostker v. Goldberg, 453 U.S. 57, 67-72 (1981)
 19 (concluding that deference is owed to well-reasoned policies that are not adopted “unthinkingly”
 20 or “reflexively and not for any considered reason”); Goldman v. Weinberger, 475 U.S. 503,
 21 507-08 (1986) (concluding that deference is owed where a policy results from the “professional
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23 _____
 24 Congress . . . as well as gay federal judges, there is no indication that there have ever been any
 transgender members of the United States Congress or federal judiciary.”)

1 judgment of military authorities concerning the relative importance of a particular military
2 interest”); compare Owens v. Brown, 455 F. Supp. 291, 305 (D.D.C. 1978) (concluding that
3 deference is not owed where a policy is adopted “casually, over the military’s objections and
4 without significant deliberation”).

5 Now that the specifics of the Ban have been further defined in the 2018 Memorandum
6 and the Implementation Plan, whether the Court owes deference to the Ban presents a more
7 complicated question. Any justification for the Ban must be “genuine, not hypothesized or
8 invented post hoc in response to litigation.” United States v. Virginia, 518 U.S. 515, 533 (1996).
9 However, the Court is mindful that “complex[,] subtle, and professional decisions as to the
10 composition . . . and control of a military force are essentially professional military judgments,”
11 reserved for the Legislative and Executive Branches. Gilligan v. Morgan, 413 U.S. 1, 10 (1973).
12 The Court’s entry of a preliminary injunction was not intended to prevent the military from
13 continuing to review the implications of open service by transgender people, nor to preclude it
14 from *ever* modifying the Carter Policy.

15 Defendants claim that the military has done just that, and that the Ban—as set forth in the
16 2018 Memorandum and the Implementation Plan—is now the product of a deliberative review.
17 In particular, Defendants claim the Ban has been subjected to “an exhaustive study” and is
18 consistent with the recommendations of a “Panel of Experts” convened by Secretary Mattis to
19 study “military service by transgender individuals, focusing on military readiness, lethality, and
20 unit cohesion,” and tasked with “conduct[ing] an independent multi-disciplinary review and
21 study of relevant data and information pertaining to transgender Service members.” (See Dkt.
22 No. 226 at 9-10; Dkt. No. 224, Ex. 2 at 19.) Defendants claim that the Panel was comprised of
23 senior military leaders who received “support from medical and personnel experts from across
24

1 the [DoD] and [DHS],” and considered “input from transgender Service members, commanders
2 of transgender Service members, military medical professionals, and civilian medical
3 professionals with experience in the care and treatment of individuals with gender dysphoria.”
4 (Dkt. No. 224, Ex. 2 at 20.) “Unlike previous reviews on military service by transgender
5 individuals,” Defendants claim that the Panel’s analysis was “informed by the [DoD]’s own data
6 obtained since the new policy began to take effect last year.” (Dkt. No. 224, Ex. 1 at 3.) The
7 Panel’s findings are set forth in a 44-page “Report and Recommendations on Military Service by
8 Transgender Persons,” which concludes that “the realities associated with service by transgender
9 individuals are far more complicated than the prior administration or RAND had assumed,” and
10 that because gender transition “would impede readiness, limit deployability, and burden the
11 military with additional costs . . . the risks associated with maintaining the Carter [P]olicy . . .
12 counsel in favor of” the Ban. (Dkt. No. 224, Ex. 2 at 46.)

13 Having carefully considered the Implementation Plan—including the content of the
14 DoD’s “Report and Recommendations on Military Service by Transgender Persons”—the Court
15 concludes that whether the Ban is entitled to deference raises an unresolved question of fact.
16 The Implementation Plan was not disclosed until March 29, 2018. (See Dkt. No. 224, Exs. 1, 2.)
17 As Defendants’ claims and evidence regarding their justifications for the Ban were presented to
18 the Court only recently, Plaintiffs and Washington have not yet had an opportunity to test or
19 respond to these claims. On the present record, the Court cannot determine whether the DoD’s
20 deliberative process—including the timing and thoroughness of its study and the soundness of
21 the medical and other evidence it relied upon—is of the type to which Courts typically should
22 defer. See Fed. R. Civ. P. 56(e)(1).

1 Accordingly, the Court DENIES summary judgment as to the level of deference due.
2 The Court notes that, even in the event it were to conclude that deference is owed, it would not
3 be rendered powerless to address Plaintiffs’ and Washington’s constitutional claims, as
4 Defendants seem to suggest. “‘The military has not been exempted from constitutional
5 provisions that protect the rights of individuals’ and, indeed, ‘[i]t is precisely the role of the
6 courts to determine whether those rights have been violated.’” Doe 1, 275 F. Supp. 3d at 210
7 (quoting Emory v. Sec’y of Navy, 819 F.2d 291, 294 (D.C. Cir. 1987)); Chappell v. Wallace,
8 462 U.S. 296, 304 (1983) (“This Court has never held, nor do we now hold, that military
9 personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the
10 course of military service.”); Rostker, 453 U.S. at 70 (“[D]eference does not mean abdication.”).
11 Indeed, the Court notes that Defendants’ claimed justifications for the Ban—to promote
12 “military lethality and readiness” and avoid “disrupt[ing] unit cohesion, or tax[ing] military
13 resources”— are strikingly similar to justifications offered in the past to support the military’s
14 exclusion and segregation of African American service members, its “Don’t Ask, Don’t Tell”
15 policy, and its policy preventing women from serving in combat roles. (Dkt. No. 224, Ex. 1 at
16 2-4; see also Dkt. No. 163, Ex. 1 at 8-16.)

17 **3. Equal Protection, Due Process, and First Amendment Claims**

18 A policy will survive strict scrutiny only where it is motivated by a “compelling state
19 interest” and “the means chosen ‘fit’ the compelling goal so closely that there is little or no
20 possibility that the motive for the classification was illegitimate . . . prejudice or stereotype.”
21 Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (citation omitted). In making this determination,
22 the Court must carefully evaluate “the importance and the sincerity of the reasons advanced” by
23 the government for the use of a particular classification in a particular context. Id. at 327.
24

1 Whether Defendants have satisfied their burden of showing that the Ban is constitutionally
2 adequate (i.e., that it was sincerely motivated by compelling state interests, rather than by
3 prejudice or stereotype) necessarily turns on facts related to Defendants’ deliberative process.
4 As discussed previously, these facts are not yet before the Court. (See supra, § II.C.2.) Further,
5 Defendants’ responsive briefing addresses only the constitutionality of the Interim Guidance, a
6 document that has never been, and is not now, the applicable policy before the Court. (See Dkt.
7 No. 194 at 19-24.)

8 For the same reasons it cannot grant summary judgment as to the level of deference due
9 at this stage, the Court cannot reach the merits of the alleged constitutional violations.
10 Accordingly, the Court DENIES summary judgment as to Plaintiffs’ and Washington’s equal
11 protection, due process, and First Amendment claims.

12 **IV. Defendants’ Motion for Partial Summary Judgment**

13 Defendants contend that the Court is without jurisdiction to impose injunctive or
14 declaratory relief against President Trump in his official capacity, and move for partial summary
15 judgment on all claims against him individually. (Dkt. No. 194 at 25-27.) Plaintiffs and
16 Washington do not oppose summary judgment as to injunctive relief, but respond that
17 declaratory relief against President Trump is proper. (Dkt. No. 207 at 8-10; Dkt. No. 209 at 6-8.)

18 The Court is aware of no case holding that the President is immune from declaratory
19 relief—Rather, the Supreme Court has explicitly affirmed the entry of such relief. See Clinton v.
20 City of New York, 524 U.S. 417, 425 n.9 (1998) (affirming entry of declaratory judgment
21 against President Clinton stating that Line Item Veto Act was unconstitutional); NTEU v. Nixon,
22 492 F.2d 587, 609 (1974) (“[N]o immunity established under any case known to this Court bars
23 every suit against the president for injunctive, declaratory or mandamus relief.”); see also Hawaii
24

1 v. Trump, 859 F.3d 741, 788 (9th Cir. 2017) (vacating injunctive relief against President Trump,
2 but not dismissing him in suit for declaratory relief), vacated as moot, 874 F.3d 1112 (9th Cir.
3 2017).

4 The Court concludes that, not only does it have jurisdiction to issue declaratory relief
5 against the President, but that this case presents a “most appropriate instance” for such relief.
6 See NTEU, 492 F.2d at 616. The Ban was announced by President Trump (@realDonaldTrump)
7 on Twitter, and was memorialized in the 2017 and 2018 Presidential Memorandums, which were
8 each signed by President Trump. (Dkt. No. 149, Exs. 1, 2; Dkt. No. 224, Ex. 3.) While
9 President Trump’s Twitter Announcement suggests he authorized the Ban “[a]fter consultation
10 with [his] Generals and military experts” (Dkt. No. 149, Ex. 1), Defendants to date have failed to
11 identify even one General or military expert he consulted, despite having been ordered to do so
12 repeatedly. (See Dkt. Nos. 204, 210, 211.) Indeed, the *only* evidence concerning the lead-up to
13 his Twitter Announcement reveals that military officials were entirely unaware of the Ban, and
14 that the abrupt change in policy was “unexpected.” (See Dkt. No. 208, Ex. 1 at 9 (General
15 Joseph F. Dunford, Chairman of the Joint Chiefs of Staff stating on July 27, 2017 “Chiefs, I
16 know yesterday’s announcement was unexpected . . .”); Dkt. No. 152, Ex. A at 11-12 (“The Joint
17 Chiefs of Staff were not consulted at all on the decision . . . The decision was announced so
18 abruptly that White House and Pentagon officials were unable to explain the most basic of
19 details about how it would be carried out.”).) Even Secretary Mattis was given only one day’s
20 notice before President Trump’s Twitter Announcement. (Id.; Dkt. No. 163, Ex. 1 at 26.) As no
21 other persons have ever been identified by Defendants—despite repeated Court orders to do so—
22 the Court is led to conclude that the Ban was devised by the President, and the President alone.
23
24

1 Therefore, the Court GRANTS Defendants’ motion for partial summary judgment with
2 regard to injunctive relief and DENIES the motion with regard to declaratory relief.

3 **CONCLUSION**

4 The Court concludes that all Plaintiffs and Washington have standing; that the 2018
5 Memorandum and Implementation Plan do not moot their claims; and that transgender people
6 constitute a suspect class necessitating a strict scrutiny standard of review. The Court concludes
7 that questions of fact remain as to whether, and to what extent, deference is owed to the Ban, and
8 whether the Ban, when held to strict scrutiny, survives constitutional review.

9 Accordingly, the Court rules as follows:

10 1. The Court GRANTS Plaintiffs’ and Washington’s motions for summary judgment
11 with respect to the applicable level of scrutiny, which is strict scrutiny;

12 2. The Court DENIES Plaintiffs’ and Washington’s motions for summary judgment
13 with respect to the applicable level of deference;

14 3. The Court DENIES Plaintiffs’ and Washington’s motions for summary judgment
15 with respect to violations of equal protection, due process, and the First Amendment;

16 4. The Court GRANTS Defendants’ cross-motion for summary judgment with
17 respect to injunctive relief against President Trump and DENIES the cross-motion with respect
18 to declarative relief against President Trump.

19 5. The preliminary injunction previously entered otherwise remains in full force and
20 effect. Defendants (with the exception of President Trump), their officers, agents, servants,
21 employees, and attorneys, and any other person or entity subject to their control or acting directly
22 or indirectly in concert or participation with Defendants are enjoined from taking any action
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1 relative to transgender people that is inconsistent with the status quo that existed prior to
2 President Trump's July 26, 2017 announcement.

3 6. The Court's ruling today eliminates the need for Plaintiffs and Washington to
4 respond to Defendants' Motion to Dissolve the Preliminary Injunction (Dkt. No. 223), which is
5 hereby STRICKEN.

6 7. The parties are directed to proceed with discovery and prepare for trial on the
7 issues of whether, and to what extent, deference is owed to the Ban and whether the Ban violates
8 equal protection, substantive due process, and the First Amendment.

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10 The clerk is ordered to provide copies of this order to all counsel.

11 Dated April 13, 2018.

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14 Marsha J. Pechman
15 United States District Judge
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.

Plaintiffs,

v.

DONALD J. TRUMP, et al.

Defendants.

CASE NO. C17-1297-MJP

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS’ MOTION TO
DISMISS

ORDER GRANTING
PLAINTIFFS’ MOTION FOR
PRELIMINARY INJUNCTION

INTRODUCTION

THIS MATTER comes before the Court on Plaintiffs Ryan Karnoski, et al.’s Motion for Preliminary Injunction (Dkt. No. 32) and Defendants Donald J. Trump, et al.’s Motion to Dismiss (Dkt. No. 69). Plaintiffs challenge the constitutionality of Defendant President Donald J. Trump’s Presidential Memorandum excluding transgender individuals from the military. Defendants respond that Plaintiffs lack standing, that their claims are neither properly plead nor ripe for review, and that they are not entitled to injunctive relief. Having reviewed the Motions (Dkt. Nos. 32, 69), the Responses (Dkt. Nos. 69, 84), the Replies (Dkt. Nos. 84, 90), and all related papers, and having considered the arguments made in proceedings before the Court, the

1 Court GRANTS in part and DENIES in part Defendants’ Motion to Dismiss and GRANTS
2 Plaintiffs’ Motion for Preliminary Injunction.

3 **ORDER SUMMARY**

4 On July 26, 2017, President Donald J. Trump announced on Twitter that “the United
5 States Government will not accept or allow transgender individuals to serve in any capacity in
6 the U.S. Military.” A Presidential Memorandum followed, directing the Secretaries of Defense
7 and Homeland Security to “return” to the military’s policy authorizing the discharge of openly
8 transgender service members (the “Retention Directive”); to prohibit the accession (bringing into
9 service) of openly transgender individuals (the “Accession Directive”); and to prohibit the
10 funding of certain surgical procedures for transgender service members (the “Medical Care
11 Directive”). Plaintiffs filed this action challenging the constitutionality of the policy prohibiting
12 military service by openly transgender individuals. Plaintiffs contend the policy violates their
13 equal protection and due process rights and their rights under the First Amendment. Plaintiffs
14 include transgender individuals currently serving in the military and seeking to join the military;
15 the Human Rights Campaign, the Gender Justice League, and the American Military Partner
16 Association; and the State of Washington. Plaintiffs have moved for a preliminary injunction to
17 prevent implementation of the policy set forth in the Presidential Memorandum, and Defendants
18 have moved to dismiss.

19 The Court finds that Plaintiffs have standing to bring this action, and that their claims for
20 violation of equal protection, substantive due process, and the First Amendment are properly
21 plead and ripe for resolution. The Court finds that Plaintiffs’ claim for violation of procedural
22 due process is defective. The Court finds that the policy prohibiting openly transgender
23 individuals from serving in the military is likely unconstitutional. Accordingly, the Court
24

1 GRANTS in part and DENIES in part Defendants’ Motion to Dismiss and GRANTS Plaintiffs’
2 Motion for Preliminary Injunction.

3 BACKGROUND

4 I. Presidential Memorandum and Interim Guidance

5 On July 26, 2017, President Donald J. Trump announced on Twitter that the United
6 States government will no longer allow transgender individuals to serve in any capacity in the
7 military. (Dkt. No. 34, Ex. 6.) President Trump’s announcement read as follows:



16 Thereafter, President Trump issued a memorandum (the “Presidential Memorandum”)
17 directing the Secretaries of Defense and Homeland Security to “return” to the military’s policy
18 authorizing the discharge of openly transgender service members (the “Retention Directive”);
19 to prohibit the accession (bringing into service) of openly transgender individuals (the
20 “Accession Directive”); and to prohibit the funding of certain surgical procedures for
21 transgender service members (the “Medical Care Directive”). (*Id.* at §§ 1-3.) The Accession
22 Directive takes effect on January 1, 2018; the Retention and Medical Care Directives take
23 effect on March 23, 2018. (*Id.* at § 3.)

1 On September 14, 2017, Secretary of Defense James N. Mattis issued a memorandum
2 providing interim guidance to the military (the “Interim Guidance”). (Dkt. No. 69, Ex. 1.) The
3 Interim Guidance identified the intent of the Department of Defense (“DoD”) to “carry out the
4 President’s policy and directives” and to identify “a plan to implement the policy and directives
5 in the Presidential Memorandum.” (Id. at 2.) The Interim Guidance explained that transgender
6 individuals would be prohibited from accession effective immediately. (Id. at 3.)

7 **II. Policy on Transgender Service Members Prior to July 26, 2017**

8 Prior to President Trump’s announcement, the military concluded that transgender
9 individuals should be permitted to serve openly and was in the process of implementing a policy
10 to this effect (the “June 2016 Policy”). (Dkt. Nos. 32 at 9-10; 46 at ¶¶ 8-27; 48 at ¶¶ 8-36, Ex.
11 C.) The June 2016 Policy was preceded by extensive research, including an independent study
12 to evaluate the implications of military service by transgender individuals. (Dkt. Nos. 30 at
13 ¶¶ 159-162; 32 at 9-10; 46 at ¶ 11.) This study concluded that allowing transgender individuals
14 to serve would not negatively impact military effectiveness, readiness, or unit cohesion, and that
15 the costs of providing transgender service members with transition-related healthcare would be
16 “exceedingly small” compared with DoD’s overall healthcare expenditures. (Dkt. No. 32 at 30;
17 46 at ¶¶ 15-20.) After consulting with medical experts, personnel experts, readiness experts,
18 commanders whose units included transgender service members, and others, the working group
19 concluded that transgender individuals should be allowed to serve openly. (Dkt. Nos. 30 at
20 ¶ 161; 46 at ¶ 10.) The Secretary of Defense issued a directive-type memorandum on June 30,
21 2016 affirming that “service in the United States military should be open to all who can meet the
22 rigorous standards for military service and readiness,” including transgender individuals. (Dkt.
23 No. 48, Ex. C.) The memorandum established procedures for accession, retention, in-service
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1 transition, and medical coverage, and provided that “[e]ffective immediately, no otherwise
 2 qualified Service member may be involuntarily separated, discharged or denied reenlistment or
 3 continuation of service, solely on the basis of their gender identity.” (*Id.*) Relying upon the June
 4 2016 Policy, transgender service members disclosed their transgender status to the military and
 5 were serving openly at the time of President Trump’s announcement. (*See* Dkt. Nos. 30 at ¶¶
 6 101-102, 112-114; 48 at ¶ 37.)

7 **III. Plaintiffs Challenge to the Presidential Memorandum**

8 Plaintiffs challenge the constitutionality of the policy prohibiting military service by
 9 openly transgender individuals and seek declaratory and injunctive relief.¹ (Dkt. No. 30 at 39.)
 10 Plaintiffs contend the policy violates their equal protection and due process rights, and their
 11 rights under the First Amendment. (*Id.* at ¶¶ 214-238.)

12 Plaintiffs include nine individuals (the “Individual Plaintiffs”), three organizations (the
 13 “Organizational Plaintiffs”), and Washington State. (*See id.* at ¶¶ 7-18; Dkt. No. 101.)
 14 Plaintiffs Ryan Karnoski, D.L., and Connor Callahan seek to pursue a military career, and
 15 contend that the policy set forth in the Presidential Memorandum forecloses this opportunity.
 16 (Dkt. No. 30 at ¶¶ 38-49, 64-73, 130-139.) Plaintiffs Staff Sergeant Cathrine Schmid, Chief
 17 Warrant Officer Lindsey Muller, Petty Officer First Class Terece Lewis, Petty Officer Second
 18 Class Phillip Stephens, and Petty Officer Second Class Megan Winters currently serve openly
 19 in the military. (*Id.* at ¶¶ 50-63, 74-120.) Plaintiff Jane Doe currently serves in the military, but

21 ¹ Plaintiffs’ suit is one of four lawsuits filed in response to President Trump’s policy prohibiting
 22 transgender individuals from serving openly. *See Doe 1 v. Trump*, No. 17-1597 (CKK) (D.D.C.
 23 filed Aug. 9, 2017); *Stone v. Trump*, No. MJG-17-2459 (D. Md. filed Aug. 8, 2017); *Stockman*
 24 *v. Trump*, No. 17-cv-1799-JGB-KK (C.D. Cal. filed Sept. 5, 2017). The District Courts for the
 Districts of Columbia and Maryland have issued preliminary injunctions suspending enforcement
 of the policy. *See Doe 1*, 2017 WL 4873042 (D.D.C. Oct. 30, 2017); *Stone*, 2017 WL 5589122
 (D. Md. Nov. 21, 2017).

1 does not serve openly. (Id. at ¶¶ 121-129.) The Human Rights Campaign (“HRC”), the Gender
2 Justice League (“GJL”), and the American Military Partner Association (“AMPA”) join as
3 Organizational Plaintiffs. (Id. at ¶¶ 140-145.) After the Individual and Organization Plaintiffs
4 filed this action, Washington State moved to intervene to protect its sovereign and quasi-
5 sovereign interests, which it alleged were harmed by the policy set forth in the Presidential
6 Memorandum. (Dkt. No. 55; see also Dkt. No. 97.) On November 27, 2017, the Court granted
7 Washington State’s motion. (Dkt. No. 101.) Washington State now joins in Plaintiffs’ Motion
8 for Preliminary Injunction based upon its interests in protecting “the health, and physical and
9 economic well-being of its residents” and “securing residents from the harmful effects of
10 discrimination.” (Id. at 4.) Defendants include President Donald J. Trump, Secretary James N.
11 Mattis, the United States, and the DoD. (Dkt. No. 30 at ¶¶ 19-22.)

12 DISCUSSION

13 I. Motion to Dismiss

14 Defendants move to dismiss Plaintiffs’ Amended Complaint under Federal Rules of Civil
15 Procedure 12(b)(1) and 12(b)(6). (See Dkt. No. 69 at 16-22.) The Court finds that Plaintiffs
16 have standing to challenge the Presidential Memorandum and have stated valid claims upon
17 which relief may be granted. However, Plaintiffs have failed to state a valid claim for violation
18 of procedural due process. The Court therefore DENIES Defendants’ Motion to Dismiss as to
19 Plaintiffs’ equal protection, substantive due process, and First Amendment claims; and GRANTS
20 Defendants’ Motion to Dismiss as to Plaintiffs’ procedural due process claim.

21 A. Rule 12(b)(1)

22 Defendants move to dismiss for lack of subject matter jurisdiction under Federal Rule of
23 Civil Procedure 12(b)(1). Defendants contend the Court lacks subject matter jurisdiction for two
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1 reasons: First, they contend Plaintiffs lack standing because they have not suffered injuries in
 2 fact. (Id. at 18-20.) Second, they contend Plaintiffs’ claims are not ripe for resolution. (Id. at
 3 20-22.) Plaintiffs respond that the Presidential Memorandum gives rise to current harm and
 4 credible threats of impending harm sufficient for both standing and ripeness. (See Dkt. No. 84 at
 5 11-27.)

6 **i. Individual Plaintiffs**

7 The Court finds that the Individual Plaintiffs have standing to challenge the Presidential
 8 Memorandum. To establish standing, Individual Plaintiffs must demonstrate: (1) an “injury in
 9 fact”; (2) a causal connection between the injury and the conduct complained of; and (3) that it
 10 is likely their injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife,
 11 504 U.S. 555, 560-61 (1992). “At the preliminary injunction stage, a plaintiff must make a
 12 ‘clear showing’ of his injury in fact.” Lopez v. Candaele, 630 F.3d 775, 785 (9th Cir. 2010)
 13 (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008)). An “injury in fact”
 14 exists where there is an invasion of a legally protected interest that is both “concrete and
 15 particularized” and “actual or imminent, not conjectural or hypothetical.” Lujan, 504 U.S. at
 16 560 (internal quotation marks and citations omitted).

17 Each of the Individual Plaintiffs satisfies these requirements: As a result of the
 18 Retention Directive, Plaintiffs Schmid, Muller, Lewis, Stephens, Winters, and Doe face a
 19 credible threat of discharge. (See Dkt. No. 84 at 14-15.) As a result of the Accession
 20 Directive, Plaintiff Schmid has been refused consideration for appointment as a warrant officer
 21 and faces a credible threat of being denied opportunities for career advancement. (See Dkt.
 22 Nos. 36 at ¶¶ 28-30; 70 at ¶ 3.) Plaintiffs Karnoski, D.L., and Callahan also face a credible
 23 threat of being denied opportunities to compete for accession on equal footing with non-
 24

1 transgender individuals. (See Dkt. Nos. 35 at ¶¶ 16-22; 37 at ¶¶ 3-16; 42 at ¶¶ 3-5, 10-21; see
 2 also Doe 1, 2017 WL 4873042, at *18-19 (finding the Accession and Retention Directives
 3 impose competitive barriers on transgender individuals who intend to accede). As a result of
 4 the Medical Care Directive, Plaintiff Stephens faces a credible threat of being denied surgical
 5 treatment, as he is currently ineligible for surgery until after March 23, 2018, the date upon
 6 which DoD is to cease funding of transition-related surgical procedures.² (Dkt. Nos. 30 at ¶
 7 102; 34, Ex. 7 at § 3; 40 at ¶ 14.)

8 In addition to these threatened harms, the Individual Plaintiffs face current harms in the
 9 form of stigmatization and impairment of free expression. The policy set forth in the Presidential
 10 Memorandum currently denies Individual Plaintiffs the opportunity to serve in the military on
 11 the same terms as other service members, deprives them of dignity, and subjects them to
 12 stigmatization. (Dkt. No. 30 at ¶¶ 217, 222, 238.) Policies that “stigmatiz[e] members of the
 13 disfavored group as ‘innately inferior’ . . . can cause serious non-economic injuries to those
 14 persons who are personally denied equal treatment solely because of their membership in a
 15 disfavored group.” Heckler v. Mathews, 465 U.S. 728, 737-740 (1984). The Presidential
 16 Memorandum currently impairs Plaintiff Jane Doe’s rights to express her authentic gender
 17 identity, as she fears discharge from the military as a result. (Dkt. No. 33 at ¶¶ 3-15.) Plaintiff
 18 Doe’s self-censorship is a “constitutionally sufficient injury,” as it is based on her “actual and
 19 well-founded fear” that the Retention Directive will take effect. See Cal. Pro-Life Council, Inc.
 20 v. Getman, 328 F.3d 1088, 1093 (9th Cir. 2003) (“an actual and well-founded fear that [a] law

21
 22 ² While the Medical Care Directive includes an exception where necessary “to protect the health
 23 of an individual who has already begun a course of treatment to reassign his or her sex” (Dkt.
 24 No. 34, Ex. 7 at § 2), the exception does not apply to Plaintiff Stephens and does not diminish
 the threat of harm he faces. (Dkt. No. 40 at ¶ 14.)

1 will be enforced against [him or her]” may create standing to bring pre-enforcement claims based
2 on the First Amendment) (quoting Virginia v. Am. Booksellers Ass’n, 484 U.S. 383, 393
3 (1988)).

4 Each of Defendants’ arguments to the contrary is unavailing. First, Defendants claim the
5 harms facing Plaintiffs are not certain, as the Presidential Memorandum directs “further study
6 before the military changes its longstanding policies regarding service by transgender
7 individuals.” (See Dkt. No. 69 at 18.) However, the Accession Directive is already in place, and
8 the restrictions set forth in the Medical Care Directive are final and will be implemented on
9 March 23, 2018. (See Dkt. No. 34, Ex. 7 at § 3.) The Court finds that “[t]he directives of the
10 Presidential Memorandum, to the extent they are definitive, are the operative policy toward
11 military service by transgender service members.” Doe 1, 2017 WL 4873042, at *17. Similarly,
12 the Court reads the Interim Guidance “as implementing the directives of the Presidential
13 Memorandum,” and concludes that “any protections afforded by the Interim Guidance are
14 necessarily limited to the extent they conflict with the express directives of the memorandum.”
15 Id.

16 Second, Defendants claim Plaintiffs Karnoski, D.L., and Callahan have not suffered
17 injury in fact as they have yet to enlist in the military. (Dkt. No. 69 at 19.) However, as a result
18 of the Accession Directive, Plaintiffs Karnoski, D.L., and Callahan cannot compete for accession
19 on equal footing with non-transgender individuals. Denial of this opportunity constitutes injury
20 in fact. See Int’l Brotherhood of Teamsters v. United States, 431 U.S. 324, 365-66 (1977)
21 (“When a person’s desire for a job is not translated into a formal application solely because of his
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23
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1 unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who
 2 goes through the motions of submitting an application.”).³

3 Third, Defendants rely on Allen v. Wright, 468 U.S. 737 (1984) to claim that Plaintiffs
 4 have not suffered stigmatic injury. (Dkt. No. 69 at 18.) But unlike the claimants in Allen, who
 5 raised abstract instances of stigmatic injury only, the Individual Plaintiffs have identified
 6 concrete interests in accession, career advancement, and medical treatment, and have
 7 demonstrated that they are “‘personally denied equal treatment’ by the challenged discriminatory
 8 conduct.” Allen, 468 U.S. at 755 (quoting Heckler, 465 U.S. at 739-40). Such stigmatic injury
 9 is “one of the most serious consequences of discriminatory government action and is sufficient in
 10 some circumstances to support standing.” Id.⁴

11 **ii. Organizational Plaintiffs**

12 The Court finds that Organizational Plaintiffs HRC, GJL, and AMPA have standing to
 13 challenge the Presidential Memorandum. An organization has standing where “(a) its members
 14 would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are
 15 germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested
 16 requires the participation of individual members in the lawsuit.” Hunt v. Wash. State Apple
 17 Adver. Comm’n, 432 U.S. 333, 343 (1977). Each of the Organizational Plaintiffs satisfies these
 18 requirements. Individual Plaintiffs Karnoski and Schmid are members of HRC, GJL, and

19
 20 ³ Defendants’ claim that Plaintiffs Karnoski and D.L. would not be able to accede under the June
 21 2016 Policy because they have recently taken steps to transition does not compel a different
 22 finding. Plaintiffs’ injury “lies in the denial of an equal *opportunity* to compete, not the denial of
 the job itself,” and thus the Court does not “inquire into the plaintiffs’ qualifications (or lack
 thereof) when assessing standing.” Shea v. Kerry, 796 F.3d 42, 50 (D.C. Cir. 2015) (citing
Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 280-81 & n.14 (1978) (emphasis in original)).

23 ⁴ Allen addressed racial discrimination specifically. However, the Supreme Court has also
 24 acknowledged stigmatic injury arising from gender-based discrimination. See Heckler, 465 U.S.
 at 737-40.

1 AMPA, and Individual Plaintiffs Muller, Stephens, and Winters are also members of AMPA.
2 (See Dkt. No. 30 at ¶¶ 141-145.) The interests each Organizational Plaintiff seeks to protect are
3 germane to their organizational purposes, which include ending discrimination against LGBTQ
4 individuals (HRC and GJL) and supporting families and allies of LGBT service members and
5 veterans (AMPA). (Id. at ¶¶ 16-18.) As Plaintiffs seek injunctive and declaratory relief,
6 participation by the organizations' individual members is not required. See Associated Gen.
7 Contractors of Cal., Inc. v. Coal. for Econ. Equity, 950 F.2d 1401, 1408 (9th Cir. 1991)
8 (participation of individual members not required where "the claims proffered and relief
9 requested [by an organization] do not demand individualized proof on the part of its members").

10 **iii. Washington State**

11 The Court finds that Washington State has standing to challenge the Presidential
12 Memorandum. A state has standing to sue the federal government to vindicate its sovereign and
13 quasi-sovereign interests. See Massachusetts v. E.P.A., 549 U.S. 497, 518-520 (2007).
14 Sovereign interests include a state's interest in protecting the natural resources within its
15 boundaries. Id. at 518-519. Quasi-sovereign interests include a state's interest in the health and
16 physical and economic well-being of its residents, and in "securing residents from the harmful
17 effects of discrimination." Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S.
18 592, 607, 609 (1982). Washington State is home to approximately 45,000 active duty service
19 members and approximately 32,850 transgender adults. (Dkt. No. 97 at 6.) The Washington
20 National Guard is comprised of service members who assist with emergency preparedness and
21 disaster recovery planning, including protecting Washington State's natural resources from
22 wildfires, landslides, flooding, and earthquakes. (Id. at 8.) Washington State contends that
23 prohibiting transgender individuals from serving openly adversely impacts its ability to recruit
24

1 and retain members of the Washington National Guard, and thereby impairs its ability to protect
2 its territory and natural resources. (Id.) Additionally, Washington State contends that the
3 prohibition implicates its interest in maintaining and enforcing its anti-discrimination laws,
4 protecting its residents from discrimination, and ensuring that employment and advancement
5 opportunities are not unlawfully restricted based on transgender status. (Id. at 8-9.) The Court
6 agrees.

7 The injuries to the Individual Plaintiffs, the Organizational Plaintiffs, and to Washington
8 State are indisputably traceable to the policy set forth in the Presidential Memorandum, and may
9 be redressed by a favorable ruling from this Court. Therefore, the Court DENIES Defendants'
10 Motion to Dismiss for lack of standing.

11 **iv. Ripeness**

12 The Court finds that Plaintiffs' claims are ripe for review. Ripeness "ensure[s] that
13 courts adjudicate live cases or controversies" and do not "issue advisory opinions [or] declare
14 rights in hypothetical cases." Bishop Paiute Tribe v. Inyo Cnty., 863 F.3d 1144, 1153 (9th Cir.
15 2017) (citation omitted). "A proper ripeness inquiry contains a constitutional and a prudential
16 component." Id. (citation omitted). Because Plaintiffs have standing to challenge the
17 Presidential Memorandum, their claims satisfy the requirement for constitutional ripeness. See
18 id. (constitutional ripeness "is often treated under the rubric of standing"). Because they raise
19 purely legal issues (i.e., whether the Presidential Memorandum violates their constitutional
20 rights), and because withholding consideration of these issues will subject Plaintiffs to hardships
21 (i.e., denial of career opportunities and transition-related medical care, stigmatic injury, and
22 impairment of self-expression), they also satisfy the requirement for prudential ripeness. See id.
23 at 1154 (prudential ripeness is "guided by two overarching considerations: the fitness of the
24

1 issues for judicial decision and the hardship to the parties of withholding court consideration.”)
2 (citation and internal quotation marks omitted).

3 Defendants claim this case is not ripe for resolution because the policy on military service
4 by transgender individuals is “still being studied, developed, and implemented.” (Dkt. No. 69 at
5 20.) However, President Trump’s announcement on Twitter and his Presidential Memorandum
6 did not order a study, but instead unilaterally proclaimed a prohibition on transgender service
7 members. See Stone, 2017 WL 5589122, at *10 (“The Court cannot interpret the plain text of
8 the President’s Memorandum as being a request for a study to determine whether or not the
9 directives should be implemented. Rather, it orders the directives to be implemented by
10 specified dates.”). Defendants’ contention that Plaintiffs must first exhaust administrative
11 remedies before the Court can consider their claims is also unavailing, as the Ninth Circuit has
12 explained that “[r]esolving a claim founded solely upon a constitutional right is singularly suited
13 to a judicial forum and clearly inappropriate to an administrative board.” Downen v. Warner,
14 481 F.2d 642, 643 (9th Cir. 1973).

15 Therefore, the Court DENIES Defendants’ Motion to Dismiss for lack of subject matter
16 jurisdiction.

17 **B. Rule 12(b)(6)**

18 To survive a motion to dismiss for failure to state a claim upon which relief can be
19 granted, a complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to
20 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell
21 Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). This requirement is met where the
22 complaint “pleads factual content that allows the court to draw the reasonable inference that the
23 defendant is liable for the misconduct alleged.” Id. The complaint need not include detailed
24

1 allegations, but it must have “more than labels and conclusions, and a formulaic recitation of the
 2 elements of a cause of action will not do.” Twombly, 550 U.S. at 555. In evaluating a motion
 3 under Rule 12(b)(6), the Court accepts all facts alleged in the complaint as true, and makes all
 4 inferences in the light most favorable to the non-movant. Barker v. Riverside Cnty. Office of
 5 Educ., 584 F.3d 821, 824 (9th Cir. 2009) (internal citations omitted).

6 The Court finds that Plaintiffs’ Amended Complaint states valid claims for violation of
 7 equal protection, substantive due process, and the First Amendment. Plaintiffs have established
 8 a likelihood of success on the merits with regard to each of these claims (see discussion of
 9 Plaintiffs’ Motion for Preliminary Injunction, infra), and for the same reasons, these claims
 10 survive under Rule 12(b)(6). However, the Court finds that Plaintiffs’ Amended Complaint fails
 11 to state a valid claim for violation of procedural due process. Plaintiffs’ Amended Complaint
 12 alleges neither a “protectible liberty or property interest” nor a “denial of adequate procedural
 13 protections” as required for a procedural due process claim. (See Dkt. No. 30 at ¶¶ 225-230;
 14 Sanchez v. City of Fresno, 914 F. Supp. 2d 1079, 1103 (9th Cir. 2012).)⁵

15 Therefore, the Court DENIES Defendants’ Motion to Dismiss with respect to Plaintiffs’
 16 equal protection, substantive due process and First Amendment claims, and GRANTS
 17 Defendants’ Motion to Dismiss with respect to Plaintiffs’ procedural due process claim.

18 **II. Motion for Preliminary Injunction**

19 The Court finds that Plaintiffs are entitled to a preliminary injunction to preserve the
 20 status quo that existed prior to the change in policy announced by President Trump on Twitter
 21 and in his Presidential Memorandum. The Court considers four factors in evaluating Plaintiffs’
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23 ⁵ The Court notes that the procedural due process claim is elaborated upon in detail in Plaintiffs’
 24 Motion for Preliminary Injunction and Reply. (See Dkt. Nos. 32 at 22-23; 84 at 39-40.)

1 request for a preliminary injunction: (1) the likelihood of success on the merits; (2) the likelihood
 2 of irreparable harm in the absence of an injunction; (3) the balance of equities; and (4) the public
 3 interest. Winter, 555 U.S. at 20. “When the government is a party, these last two factors
 4 merge.” Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing Nken v.
 5 Holder, 556 U.S. 418, 435 (2009)).

6 **A. Likelihood of Success on the Merits**

7 The Court finds that Plaintiffs have established a likelihood of success on the merits of
 8 their equal protection, substantive due process, and First Amendment claims.

9 **i. Equal Protection**

10 Plaintiffs have established a likelihood of success on the merits of their equal protection
 11 challenge. The Equal Protection Clause prohibits government action “denying to any person
 12 the equal protection of the laws.” United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

13 Plaintiffs contend the policy set forth in the Presidential Memorandum denies them equal
 14 protection in that it impermissibly classifies individuals based on transgender status and gender
 15 identity and is not substantially related to an important government interest. (Dkt. No. 30 at
 16 ¶¶ 217-224.)

17 The Court must first determine whether the policy burdens “a ‘suspect’ or ‘quasi-
 18 suspect’ class.” See Ball v. Massanari, 254 F.3d 817, 823 (9th Cir. 2001). The Court
 19 concludes that the policy distinguishes on the basis of transgender status, a quasi-suspect
 20 classification, and is therefore subject to intermediate scrutiny. See id. (noting that gender is a
 21 quasi-suspect classification); Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000)
 22 (noting that discrimination based on a person’s failure “to conform to socially-constructed
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1 gender expectations” is a form of gender discrimination) (citing Price Waterhouse v. Hopkins,
2 490 U.S. 228, 240 (1989)).⁶

3 Next, the Court must determine whether the policy satisfies intermediate scrutiny. Id.
4 A policy subject to intermediate scrutiny must be supported by an “exceedingly persuasive
5 justification.” United States v. Virginia, 518 U.S. 515, 531 (1996). The policy must serve
6 important governmental objectives, and the government must show “that the discriminatory
7 means employed are substantially related to the achievement of those objectives.” Id. at 533
8 (citation omitted). While Defendants identify important governmental interests including
9 military effectiveness, unit cohesion, and preservation of military resources, they fail to show
10 that the policy prohibiting transgender individuals from serving openly is related to the
11 achievement of those interests. (See Dkt. No. 69 at 33-35.) Indeed, “all of the reasons
12 proffered by the President for excluding transgender individuals from the military [are] not
13 merely unsupported, but [are] actually *contradicted* by the studies, conclusions, and judgment
14 of the military itself.” Doe 1, 2017 WL 4873042, at *30 (emphasis in original). Not only did
15 the DoD previously conclude that allowing transgender individuals to serve openly would not
16 impact military effectiveness and readiness, the working group tasked to evaluate the issue also
17 concluded that *prohibiting* open service would have negative impacts including loss of
18 qualified personnel, erosion of unit cohesion, and erosion of trust in command. (See Dkt. Nos.
19 46 at ¶¶ 25-26; 48 at ¶¶ 45-47.)

20 Defendants’ arguments to the contrary are unavailing. While Defendants raise concerns
21 about transition-related medical conditions and costs, their concerns “appear to be hypothetical
22

23 ⁶ The June 2016 Policy also stated it was DoD’s position “consistent with the U.S. Attorney
24 General’s opinion, that discrimination based on gender identity is a form of sex
discrimination.” (See Dkt. No. 48, Ex. C at 6.)

1 and extremely overbroad.” Doe 1, 2017 WL 4873042, at *29. For instance, Defendants claim
2 that “at least some transgender individuals suffer from medical conditions that could impede
3 the performance of their duties,” including gender dysphoria, and complications from hormone
4 therapy and sex reassignment surgery. (See Dkt. No. 69 at 33-34.) But *all* service members
5 might suffer from medical conditions that could impede performance, and indeed the working
6 group found that it is common for service members to be non-deployable for periods of time
7 due to an array of such conditions. (Dkt. No. 46 at ¶ 22.) Defendants claim that
8 accommodating transgender service members would “impose costs on the military.” (Dkt. No.
9 69 at 34.) But the study preceding the June 2016 Policy indicates that these costs are
10 exceedingly minimal. (Dkt. Nos. 48, Ex. B at 57 (“[E]ven in the most extreme scenario . . . we
11 expect only a 0.13-percent (\$8.4 million out of \$6.2 billion) increase in [active component]
12 health care spending.”); 48 at ¶ 41 (“[T]he maximum financial impact . . . is an amount so small
13 it was considered to be ‘budget dust,’ hardly even a rounding error, by military leadership.”).)
14 Indeed, the cost to discharge transgender service members is estimated to be *more than 100*
15 *times greater* than the cost to provide transition-related healthcare. (See Dkt. Nos. 32 at 20; 46
16 at ¶ 32; 48 at ¶ 18.)

17 Defendants’ claim that the policy prohibiting transgender individuals from serving
18 openly is entitled to substantial deference is also unavailing. (See Dkt. No. 69 at 29.)
19 Defendants rely on Rostker v. Goldberg, 453 U.S. 57 (1981). In Rostker the Supreme Court
20 considered whether the Military Selective Service Act (“MSSA”), which compelled draft
21 registration for men only, was unconstitutional. Id. at 59. Finding that the MSSA was enacted
22 after extensive review of legislative testimony, floor debates, and committee reports, the
23 Supreme Court held that Congress was entitled to deference when, in “exercising the
24

1 congressional authority to raise and support armies and make rules for their governance,” it
 2 does not act “unthinkingly” or “reflexively and not for any considered reason.” See id. at 71-
 3 72. In contrast, the prohibition on military service by transgender individuals was announced
 4 by President Trump on Twitter, abruptly and without any evidence of considered reason or
 5 deliberation. (See Dkt. No. 30 at ¶¶ 172-184.) The policy is therefore not entitled to Rostker
 6 deference.⁷

7 Because Defendants have failed to demonstrate that the policy prohibiting transgender
 8 individuals from serving openly is substantially related to important government interests, it does
 9 not survive intermediate scrutiny.⁸ Plaintiffs are therefore likely to succeed on the merits of their
 10 equal protection claim.

11 **ii. Substantive Due Process**⁹

12 The Court finds that Plaintiffs have established a likelihood of success on the merits of
 13 their substantive due process challenge. Substantive due process protects fundamental liberty
 14 interests in individual dignity, autonomy, and privacy from unwarranted government intrusion.
 15 See U.S. Const., amend. V. These fundamental interests include the right to make decisions
 16 concerning bodily integrity and self-definition central to an individual’s identity. See Obergefell
 17 v. Hodges, 135 S. Ct. 2584, 2584 (2015) (“The Constitution promises liberty to all within its
 18 reach, a liberty that includes certain specific rights that allow persons . . . to define and express
 19

20 ⁷ Defendants’ reliance on Goldman v. Weinberger, 475 U.S. 503 (1986), is also misplaced. See
 21 Doe 1, 2017 WL 4873042, at *30 n.11 (distinguishing the policy at issue in Weinberger as
 22 having been “based on the ‘considered professional judgment’” of the military).

23 ⁸ For the same reasons, the policy is also unlikely to survive rational basis review.

24 ⁹ Having granted Defendants’ Motion to Dismiss with regard to Plaintiffs’ procedural due
 process challenge, the Court does not reach the merits of that claim at this time.

1 their identity.”); see also Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984) (due process
 2 “safeguards the ability independently to define one’s identity that is central to any concept of
 3 liberty”). To succeed on their substantive due process challenge, Plaintiffs must establish a
 4 governmental intrusion upon a fundamental liberty interest. The Court concludes that the policy
 5 set forth in the Presidential Memorandum constitutes such an intrusion. The policy directly
 6 interferes with Plaintiffs’ ability to define and express their gender identity, and penalizes
 7 Plaintiffs for exercising their fundamental right to do so openly by depriving them of
 8 employment and career opportunities. As discussed in the context of Plaintiffs’ equal protection
 9 challenge, supra, Defendants have not demonstrated that this intrusion is necessary to further an
 10 important government interest. Plaintiffs are therefore likely to succeed on the merits of their
 11 substantive due process challenge.

12 **iii. First Amendment**

13 The Court finds that Plaintiffs have established a likelihood of success on the merits of
 14 their First Amendment challenge. In general, laws that regulate speech based on its content (i.e.,
 15 because of “the topic discussed or the idea or message expressed”) are presumptively
 16 unconstitutional and subject to strict scrutiny. Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218,
 17 2226-27 (2015). Military regulations on speech are permitted so long as they “restrict speech no
 18 more than is reasonably necessary to protect the substantial governmental interest.” Brown v.
 19 Glines, 444 U.S. 348, 355 (1980).

20 Plaintiffs contend the policy set forth in the Presidential Memorandum impermissibly
 21 burdens “speech or conduct that ‘openly’ discloses a transgender individual’s identity or
 22 transgender status” by subjecting openly transgender individuals to discharge and other adverse
 23 actions. (See Dkt. No. 30 at ¶¶ 196-197, 234-236.) The Court agrees. The policy penalizes
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1 transgender service members—but not others—for disclosing their gender identity, and is
2 therefore a content-based restriction. Even giving the government the benefit of a more
3 deferential standard of review under Brown, 444 U.S. at 355, the policy does not survive. As
4 discussed in the context of Plaintiffs’ equal protection challenge, supra, Defendants have not
5 demonstrated that the intrusion upon protected expression furthers an important government
6 interest.

7 **B. Irreparable Harm**

8 The Court finds that Plaintiffs are likely to suffer irreparable harm if an injunction does
9 not issue. The Individual and Organizational Plaintiffs have demonstrated a likelihood of
10 irreparable harm in the form of current and threatened injuries in fact, including denial of career
11 opportunities and transition-related medical care, stigmatic injury, and impairment of self-
12 expression. While Defendants claim these harms can be remedied with money damages (Dkt.
13 No. 69 at 23-24), they are incorrect. Unlike the plaintiffs in Anderson v. United States, 612
14 F.2d 1112 (9th Cir. 1979) and Hartikka v. United States, 754 F.2d 1516 (9th Cir. 1985), who
15 alleged harms "common to most discharged employees" (e.g., loss of income, loss of
16 retirement, loss of relocation pay, and damage to reputation) and not “attributable to any
17 unusual actions relating to the discharge itself,” Hartikka, 754 F.2d at 1518, the harms facing
18 the Individual Plaintiffs are directly attributable to the policy set forth in the Presidential
19 Memorandum. Back pay and other monetary damages proposed by Defendants will not
20 remedy the stigmatic injury caused by the policy, reverse the disruption of trust between
21 service members, nor cure the medical harms caused by the denial of timely health care. (See
22 Dkt. No. 84 at 28.) Moreover, to the extent Plaintiffs are likely to succeed on the merits of
23 their constitutional claims, these violations are yet another form of irreparable harm. See
24

1 Associated Gen. Contractors, 950 F.2d at 1412 (“alleged constitutional infringement will often
2 alone constitute irreparable harm.”) (citation omitted); see also Klein v. City of San Clemente,
3 584 F.3d 1196, 1207-08 (9th Cir. 2009) (“loss of First Amendment freedoms, for even minimal
4 periods of time, unquestionably constitutes irreparable injury”) (quoting Elrod v. Burns, 427
5 U.S. 347, 373 (1976)).

6 Plaintiff Washington State has demonstrated a likelihood of irreparable harm to its
7 sovereign and quasi-sovereign interests if it is “forced to continue to expend its scarce
8 resources to support a discriminatory policy when it provides funding or deploys its National
9 Guard.” (See Dkt. No. 97 at 8-9.) Washington State has also demonstrated that its ability to
10 recruit and retain service personnel for the Washington National Guard may be irreparably
11 harmed. See Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d
12 597, 603 (9th Cir. 1991) (“intangible injuries, such as damage to ongoing recruitment efforts
13 and goodwill, qualify as irreparable harm.”).

14 **C. Balance of Equities and Public Interest**

15 The Court finds that the balance of equities and the public interest are in Plaintiffs’
16 favor. If a preliminary injunction does not issue, Plaintiffs will continue to suffer injuries as a
17 result of the Presidential Memorandum, including deprivation of their constitutional rights. On
18 the other hand, Defendants will face no serious injustice in maintaining the June 2016 Policy
19 pending resolution of this action on the merits. Defendants claim they are in the process of
20 “gathering a panel of experts” to study the military’s policy on transgender service members
21 and assert, without explanation, that an injunction will “directly interfere with the panel’s work
22 and the military’s ability to thoroughly study a complex and important issue regarding the
23 composition of the armed forces.” (Dkt. No. 69 at 40.) The Court is not convinced that
24

1 reverting to the June 2016 Policy, which was voluntarily adopted by DoD after extensive study
 2 and review, and which has been in place for over a year without documented negative effects,
 3 will harm Defendants. See Doe 1, 2017 WL 4873042, at *33 (recognizing “considerable
 4 evidence that it is the *discharge* and *banning* of [transgender] individuals that would have such
 5 [negative] effects”) (emphasis in original).

6 Injunctive relief furthers the public interest as it “is always in the public interest to
 7 prevent the violation of a party’s constitutional rights.” Melendres v. Arpaio, 695 F.3d 990,
 8 1002 (9th Cir. 2012) (citations omitted). Defendants’ contention that the public has a strong
 9 interest in national defense does not change this analysis, as “[a] bare invocation of ‘national
 10 defense’ simply cannot defeat every motion for preliminary injunction that touches on the
 11 military.” Doe 1, 2017 WL 4873042, at *33; Stone, 2017 WL 5589122, at *16.

12 CONCLUSION

13 Plaintiffs have standing to bring this lawsuit challenging Defendants’ policy of
 14 prohibiting transgender individuals from serving openly in the military. Plaintiffs’ claims for
 15 violations of equal protection, substantive due process, and the First Amendment are properly
 16 plead and ripe for resolution, and Plaintiffs are entitled to a preliminary injunction to protect the
 17 status quo with regard to each of these claims. Plaintiffs have not properly plead a claim for
 18 violation of procedural due process. Therefore, the Court rules as follows:

19 1. The Court GRANTS Defendants’ Motion to Dismiss with respect to Plaintiffs’
 20 procedural due process claim;

21 2. The Court DENIES Defendants’ Motion to Dismiss with respect to Plaintiffs’
 22 equal protection, substantive due process, and First Amendment claims;

THE WHITE HOUSE

WASHINGTON

March 23, 2018

MEMORANDUM FOR THE SECRETARY OF DEFENSE
THE SECRETARY OF HOMELAND SECURITY

SUBJECT: Military Service by Transgender Individuals

Pursuant to my memorandum of August 25, 2017, "Military Service by Transgender Individuals," the Secretary of Defense, in consultation with the Secretary of Homeland Security, submitted to me a memorandum and report concerning military service by transgender individuals.

These documents set forth the policies on this issue that the Secretary of Defense, in the exercise of his independent judgment, has concluded should be adopted by the Department of Defense. The Secretary of Homeland Security concurs with these policies with respect to the U.S. Coast Guard.

Among other things, the policies set forth by the Secretary of Defense state that transgender persons with a history or diagnosis of gender dysphoria -- individuals who the policies state may require substantial medical treatment, including medications and surgery -- are disqualified from military service except under certain limited circumstances.

By the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby order as follows:

Section 1. I hereby revoke my memorandum of August 25, 2017, "Military Service by Transgender Individuals," and any other directive I may have made with respect to military service by transgender individuals.

Sec. 2. The Secretary of Defense, and the Secretary of Homeland Security, with respect to the U.S. Coast Guard, may exercise their authority to implement any appropriate policies concerning military service by transgender individuals.

Sec. 3. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

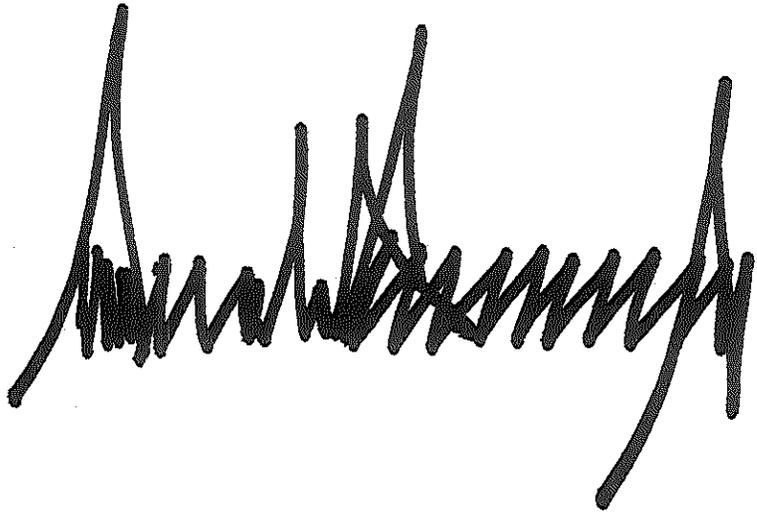
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of Defense is authorized and directed to publish this memorandum in the *Federal Register*.

A large, stylized handwritten signature in black ink, appearing to be the signature of the Secretary of Defense, is positioned in the lower right quadrant of the page.

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SECRETARY OF DEFENSE
 1000 DEFENSE PENTAGON
 WASHINGTON, DC 20301-1000

FEB 22 2018

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Military Service by Transgender Individuals

“Transgender” is a term describing those persons whose gender identity differs from their biological sex. A subset of transgender persons diagnosed with gender dysphoria experience discomfort with their biological sex, resulting in significant distress or difficulty functioning. Persons diagnosed with gender dysphoria often seek to transition their gender through prescribed medical treatments intended to relieve the distress and impaired functioning associated with their diagnosis.

Prior to your election, the previous administration adopted a policy that allowed for the accession and retention in the Armed Forces of transgender persons who had a history or diagnosis of gender dysphoria. The policy also created a procedure by which such Service members could change their gender. This policy was a departure from decades-long military personnel policy. On June 30, 2017, before the new accession standards were set to take effect, I approved the recommendation of the Services to delay for an additional six months the implementation of these standards to evaluate more carefully their impact on readiness and lethality. To that end, I established a study group that included the representatives of the Service Secretaries and senior military officers, many with combat experience, to conduct the review.

While this review was ongoing, on August 25, 2017, you sent me and the Secretary of Homeland Security a memorandum expressing your concern that the previous administration’s new policy “failed to identify a sufficient basis” for changing longstanding policy and that “further study is needed to ensure that continued implementation of last year’s policy change would not have ... negative effects.” You then directed the Department of Defense and the Department of Homeland Security to reinstate the preexisting policy concerning accession of transgender individuals “until such time as a sufficient basis exists upon which to conclude that terminating that policy” would not “hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources.” You made clear that we could advise you “at any time, in writing, that a change to this policy is warranted.”

I created a Panel of Experts comprised of senior uniformed and civilian Defense Department and U.S. Coast Guard leaders and directed them to consider this issue and develop policy proposals based on data, as well as their professional military judgment, that would enhance the readiness, lethality, and effectiveness of our military. This Panel included combat veterans to ensure that our military purpose remained the foremost consideration. I charged the Panel to provide its best military advice, based on increasing the lethality and readiness of America’s armed forces, without regard to any external factors.

The Panel met with and received input from transgender Service members, commanders of transgender Service members, military medical professionals, and civilian medical

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professionals with experience in the care and treatment of individuals with gender dysphoria. The Panel also reviewed available information on gender dysphoria, the treatment of gender dysphoria, and the effects of currently serving individuals with gender dysphoria on military effectiveness, unit cohesion, and resources. Unlike previous reviews on military service by transgender individuals, the Panel's analysis was informed by the Department's own data obtained since the new policy began to take effect last year.

Based on the work of the Panel and the Department's best military judgment, the Department of Defense concludes that there are substantial risks associated with allowing the accession and retention of individuals with a history or diagnosis of gender dysphoria and require, or have already undertaken, a course of treatment to change their gender. Furthermore, the Department also finds that exempting such persons from well-established mental health, physical health, and sex-based standards, which apply to all Service members, including transgender Service members without gender dysphoria, could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.

The prior administration largely based its policy on a study prepared by the RAND National Defense Research Institute; however, that study contained significant shortcomings. It referred to limited and heavily caveated data to support its conclusions, glossed over the impacts of healthcare costs, readiness, and unit cohesion, and erroneously relied on the selective experiences of foreign militaries with different operational requirements than our own. In short, this policy issue has proven more complex than the prior administration or RAND assumed.

I firmly believe that compelling behavioral health reasons require the Department to proceed with caution before compounding the significant challenges inherent in treating gender dysphoria with the unique, highly stressful circumstances of military training and combat operations. Preservation of unit cohesion, absolutely essential to military effectiveness and lethality, also reaffirms this conclusion.

Therefore, in light of the Panel's professional military judgment and my own professional judgment, the Department should adopt the following policies:

- Transgender persons with a history or diagnosis of gender dysphoria are disqualified from military service, except under the following limited circumstances: (1) if they have been stable for 36 consecutive months in their biological sex prior to accession; (2) Service members diagnosed with gender dysphoria after entering into service may be retained if they do not require a change of gender and remain deployable within applicable retention standards; and (3) currently serving Service members who have been diagnosed with gender dysphoria since the previous administration's policy took effect and prior to the effective date of this new policy, may continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria.
- Transgender persons who require or have undergone gender transition are disqualified from military service.

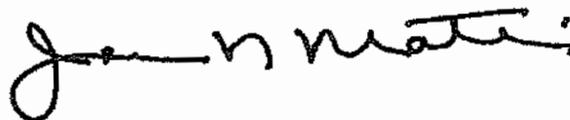
- Transgender persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other Service members, in their biological sex.

I have consulted with the Secretary of Homeland Security, and she agrees with these proposed policies.

By its very nature, military service requires sacrifice. The men and women who serve voluntarily accept limitations on their personal liberties – freedom of speech, political activity, freedom of movement - in order to provide the military lethality and readiness necessary to ensure American citizens enjoy their personal freedoms to the fullest extent. Further, personal characteristics, including age, mental acuity, and physical fitness – among others – matter to field a lethal and ready force.

In my professional judgment, these policies will place the Department of Defense in the strongest position to protect the American people, to fight and win America's wars, and to ensure the survival and success of our Service members around the world. The attached report provided by the Under Secretary of Defense for Personnel and Readiness includes a detailed analysis of the factors and considerations forming the basis of the Department's policy proposals.

I therefore respectfully recommend you revoke your memorandum of August 25, 2017, regarding Military Service by Transgender Individuals, thus allowing me and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to implement appropriate policies concerning military service by transgender persons.



Attachment:
As stated

cc:
Secretary of Homeland Security

Presidential Documents

Memorandum of August 25, 2017

Military Service by Transgender Individuals

Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security

Section 1. Policy. (a) Until June 2016, the Department of Defense (DoD) and the Department of Homeland Security (DHS) (collectively, the Departments) generally prohibited openly transgender individuals from accession into the United States military and authorized the discharge of such individuals. Shortly before President Obama left office, however, his Administration dismantled the Departments' established framework by permitting transgender individuals to serve openly in the military, authorizing the use of the Departments' resources to fund sex-reassignment surgical procedures, and permitting accession of such individuals after July 1, 2017. The Secretary of Defense and the Secretary of Homeland Security have since extended the deadline to alter the currently effective accession policy to January 1, 2018, while the Departments continue to study the issue.

In my judgment, the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources, and there remain meaningful concerns that further study is needed to ensure that continued implementation of last year's policy change would not have those negative effects.

(b) Accordingly, by the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States under the Constitution and the laws of the United States of America, including Article II of the Constitution, I am directing the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have the negative effects discussed above. The Secretary of Defense, after consulting with the Secretary of Homeland Security, may advise me at any time, in writing, that a change to this policy is warranted.

Sec. 2. Directives. The Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, shall:

(a) maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary that I find convincing; and

(b) halt all use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex.

Sec. 3. Effective Dates and Implementation. Section 2(a) of this memorandum shall take effect on January 1, 2018. Sections 1(b) and 2(b) of this memorandum shall take effect on March 23, 2018. By February 21, 2018, the Secretary of Defense, in consultation with the Secretary of Homeland Security, shall submit to me a plan for implementing both the general policy set forth in section 1(b) of this memorandum and the specific directives

set forth in section 2 of this memorandum. The implementation plan shall adhere to the determinations of the Secretary of Defense, made in consultation with the Secretary of Homeland Security, as to what steps are appropriate and consistent with military effectiveness and lethality, budgetary constraints, and applicable law. As part of the implementation plan, the Secretary of Defense, in consultation with the Secretary of Homeland Security, shall determine how to address transgender individuals currently serving in the United States military. Until the Secretary has made that determination, no action may be taken against such individuals under the policy set forth in section 1(b) of this memorandum.

Sec. 4. Severability. If any provision of this memorandum, or the application of any provision of this memorandum, is held to be invalid, the remainder of this memorandum and other dissimilar applications of the provision shall not be affected.

Sec. 5. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

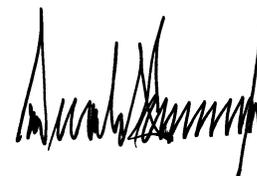
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of Defense is authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, August 25, 2017

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Donald J. Trump  @realDonaldTrump · 4h ▼

....victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you

 39K  25K  73K 
- 

Donald J. Trump  @realDonaldTrump · 4h ▼

....Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming.....

 24K  27K  71K 
- 

Donald J. Trump  @realDonaldTrump · 4h ▼

After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow.....

 14K  26K  66K 

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

**DECLARATION OF GINEEN
BRESSO IN SUPPORT OF
DEFENDANTS' MOTION TO STAY
COMPLIANCE WITH THE COURT'S
ORDER PENDING RESOLUTION OF
PETITION FOR WRIT OF
MANDAMUS**

I, Gineen Bresso, do hereby state and declare as follows:

1. I currently hold the position of General Counsel of the Office of Administration. I have held this position since July 10, 2017. As General Counsel of the Office of Administration, my responsibilities include advising and assisting the Office of Administration on a wide variety of matters, including on records management, litigation, and management of discovery for the Executive Office of President.
2. I submit this declaration in response to the Court's July 27, 2018 Order Granting Motion to Compel and Denying Motion for a Protective Order, Dkt. 299. I base this declaration on my personal knowledge, information made available to me in the

performance of my official duties, and my knowledge of the issues being litigated in the above-captioned case.

3. On December 29, 2017, Plaintiffs in the above-captioned litigation served their first set of requests for production on the President. In this first set of requests, Plaintiffs directed 25 separate requests for documents to the Executive Office of the President. Many of these requests specifically targeted information subject to the presidential communications privilege. For example, request 6 sought “[a]ll 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.’” Request 7 sought “[a]ll 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.” And request 10 sought “[f]or 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.”
4. In response to these requests and separate requests for production in the related cases of *Doe v. Trump*, No. 17-cv-1597 (D.D.C.), and *Stone v. Trump*, No. 1:17-cv-02459 (D. Md.), White House staff took the following steps: (i) notified all White House staff of the need to preserve information and data relevant to the litigation, including information beyond what White House staff are required to preserve under the Presidential Records Act; (ii) identified 41 custodians who might have information responsive to these requests; (iii) identified for each custodian what information may be responsive to the requests; (iv) collected approximately 114,000 documents that were potentially responsive to Plaintiffs’ requests from these custodians; (v) loaded these potentially responsive documents into a litigation database; (vi) reviewed the potentially

responsive documents to determine which ones were actually responsive to Plaintiffs' requests; and (vii) reviewed the documents that were responsive to Plaintiffs' requests for privileged information. In total, this collection and review process took 17 White House staff members (including 12 attorneys) hundreds of hours over more than six weeks to complete.

5. In conjunction with this collection and review process, White House staff created a privilege log to record the documents being withheld and the justifications for their withholding. *See* Exh. A. This privilege log recorded approximately 3,600 documents that were being withheld for various privileges, including the presidential communications privilege. The creation of this log required an attorney to review each document, ascertain if privileges applied, and identify those privileges that did apply. To describe the nature of the documents without revealing any privileged information, as permitted under Federal Rule of Civil Procedure 26(b)(5)(A)(ii), the documents were grouped into 52 separate categories, and the attorneys creating the privilege log included a description of each category of documents, instead of a more specific description of each individual document. For example, one category of documents is described on the privilege log as containing "Discussions between senior White House policy aides and other members of the Executive Office of the President as to the formulation or implementation of the President's policies regarding military lethality and readiness and the service of transgender individuals in the military leading up to a policy recommendation to the President, which predate a final policy decision on transgender individuals' service in the military" from January 20, 2017 through July 25, 2017. *See* Exh. A at 3. The attorneys creating the privilege log also included descriptions of the authors and recipients and their titles, instead of specific identities. For example, some categories of documents were sent to "Senior members of the National Security Council or their staffers or other EOP or DOD Staffers" from "Senior members of the National Security Council or their staffers or other EOP or DOD Staffers." *See* Exh. A at 3-4. This categorical privilege log was provided to the

Plaintiffs in the above-captioned case as well as the plaintiffs in the related litigation. In total, the creation of this privilege log took 13 White House staff members (including 11 attorneys) hundreds of hours to complete.

6. On April 26, 2018, Plaintiffs served their second set of requests for production on the President. In this second set of requests, Plaintiffs made an additional 10 requests for documents from the Executive Office of the President. For example, request 32 sought “[a]ll 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.” Request 33 sought “[a]ll 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.” And request 34 sought “[a]ll 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.”
7. In response to this second set of requests from Plaintiffs, and further requests for production in one of the related cases, *Stone v. Trump*, No. 1:17-cv-02459 (D. Md.), White House staff repeated the efforts described in paragraph 4 above. In total, this second collection and review process took 10 White House staff members (including six attorneys) hundreds of hours to complete.
8. In conjunction with this second collection and review process, the Office of the President supplemented its prior privilege log. *See* Exh. B. This supplemental privilege

log recorded approximately 5,500 additional documents that were being withheld for various privileges, including the presidential communications privilege. The creation of this log once again required attorneys to review each document, ascertain if privileges applied, and identify those privileges that did apply. And again, to describe the nature of the documents without revealing any privileged information as permitted under Federal Rule of Civil Procedure 26(b)(5)(A)(ii), the documents were grouped into separate categories (66 in the supplemental privilege log) and the attorneys creating the privilege log included a description of each category of documents, instead of a more specific description of each individual document. For example, one category of documents contains “Discussions between senior members or staffers of the National Security Council and other members of the Executive Office of the President or Department of Defense as part of the development of a recommendation to the President regarding the implementation of his policy concerning the service of transgender individuals in the military” from August 26, 2017 through February 12, 2018. *See* Exh. B at 5. The attorneys creating the privilege log also included descriptions of the authors and recipients and their titles, instead of specific identities. For example, some categories of documents were sent to “Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)” from “Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys).” *See* Exh. B at 4–5. This supplemental privilege log was then provided to the Plaintiffs. In total, the creation of this supplemental privilege log took 10 White House staff members (including six attorneys) hundreds of hours to complete.

9. The Court’s July 27, 2018 Order requires the Office of the President to revise its supplemental privilege log and to “(a) identify individual author(s) and recipient(s); and (b) include *specific, non-boilerplate* privilege descriptions *on a document-by-document basis*...within 10 days of that date of [the] Order.” This Order would require the creation of a new privilege log that records the required information for approximately 9,000 individual entries instead of 66 categorical ones. This task is expected to require

at least twice as much time as the creation of the first two logs combined and would require the White House to reallocate staff away from other pressing responsibilities. Given the limited resources available within the Executive Office of the President, it would be virtually impossible to create a document-by-document privilege log in the short time period required by the Court's Order.

10. As explained in paragraphs 5 and 8 above, the Office of the President has created privilege logs to comply with Federal Rule of Civil Procedure 26(b)(5)(A)(ii), which requires a party to describe the nature of the requested discovery without revealing any information that is itself privileged or protected. The Court's order requires the Office of the President to "(a) identify individual author(s) and recipient(s); and (b) include specific, non-boilerplate privilege descriptions on a document-by-document basis." Revealing information that is itself subject to the presidential communications privilege would reveal the inner workings of the President's deliberative process and would be disruptive of the President's decision making and performance of his constitutional responsibilities.

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

Executed this 31st day of July 2018, Washington, D.C.



GINEEN BRESSO
General Counsel
Office of Administration

Exhibit A to Gineen Bresso Declaration

Privilege Log, served June 4, 2018

# of Documents*	Description**	Date Range	To	From	Primary Privilege Asserted	Privilege Description
97	Internal emails and documents drafted by attorneys in the White House Counsel's Office to deliberate with other attorneys in the White House Counsel's office regarding the policies governing transgender individuals' service in the military and regarding anticipated litigation	1/20/2017-7/25/2017	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys in anticipation of litigation during the period when the President and his advisors were deliberating regarding whether to implement the 2016 Secretary of Defense Memorandum; deliberations occurred in anticipation of litigation and included assessments of litigation risk; emails and documents to and from attorneys in the White House Counsel's Office seeking and providing confidential legal advice concerning transgender individuals' service in the military and the 2016 Secretary of Defense Memorandum; emails and documents reflecting White House Counsel's Office legal deliberations concerning issues surrounding transgender individuals' service in the military, which predate a policy decision on transgender individuals' service in the military
153	Internal emails and documents drafted by attorneys in the White House Counsel's Office to deliberate with other attorneys in the White House Counsel's office regarding the formulation of the 8/25 Presidential Memorandum and regarding anticipated litigation, including drafts of the 8/25/2017 Presidential Memorandum	7/26/2017-8/8/2017	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys in anticipation of litigation regarding the drafting, form, and legality of the 8/25/2017 Presidential Memorandum; emails and documents to and from attorneys in the White House Counsel's Office seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and anticipated litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum
85	Internal emails and documents drafted by attorneys in the White House Counsel's Office to deliberate with other attorneys in the White House Counsel's office regarding policies governing the formulation of the 8/25 Presidential Memorandum and regarding pending litigation, including drafts of the 8/25/2017 Presidential Memorandum	8/9/2017-8/25/2017	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys after litigation had commenced (the Doe Complaint was filed 8/9/2017) regarding the drafting, form, and legality of the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents to and from attorneys in the White House Counsel's Office providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum
343	Internal emails and documents drafted by attorneys in the White House Counsel's Office regarding the implementation of the 8/25 Presidential Memorandum and regarding pending litigation	8/26/2017-1/9/2018	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys after litigation had commenced regarding pending litigation and regarding the implementation of the 8/25/2017 Memorandum; emails and documents to and from attorneys in the White House Counsel's Office providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum and legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
161	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Office of Legal Counsel to deliberate regarding the formulation, form and legality, and implementation of the 8/25/2017 Presidential Memorandum, including drafts of the 8/25/2017 Presidential Memorandum	6/30/2017-12/4/2017	WHCO and OLC Attorneys	WHCO and OLC Attorneys (in some cases, attorneys from DOD or from other DOJ components are also recipients or cc ed)	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys in anticipation of litigation, or after litigation had commenced, assessing the form and legality of the 8/25/2017 Presidential Memorandum and implementation thereof; emails and documents to and from attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Office of Legal Counsel seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum; emails and documents reflecting White House Counsel's Office deliberations concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
188	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Civil Division regarding pending litigation	8/9/2017-1/11/2018	WHCO and DOJ-Civil Division Attorneys (and, occasionally, attorneys from other DOJ components or from DOD)	WHCO and DOJ-Civil Division Attorneys (and, occasionally, attorneys from other DOJ components or from DOD)	Work Product (in many cases, also covered by Attorney Client Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents drafted by attorneys during pending litigation regarding litigation strategy, updates, and filings; emails and documents drafted by attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Civil Division seeking and providing confidential legal advice concerning pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
31	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD regarding the policies governing transgender individuals' service in the military and regarding anticipated litigation	1/20/2017-7/25/2017	WHCO Attorneys and DOD Attorneys	WHCO Attorneys and DOD Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys in anticipation of litigation during the period when the President and his advisors were deliberating regarding whether to implement the 2016 Secretary of Defense Memorandum; deliberations occurred in anticipation of litigation; emails and documents to and from attorneys in the White House Counsel's Office and attorneys from DOD seeking and providing confidential legal advice concerning policies governing transgender individuals' service in the military and anticipated litigation; emails and documents reflecting White House Counsel's Office deliberations concerning legal issues surrounding policies governing transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
44	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD regarding the formulation of the 8/25 Presidential Memorandum and regarding anticipated litigation, including drafts of the 8/25/2017 Presidential Memorandum	7/26/2017-8/8/2017	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted in anticipation of litigation, regarding the drafting, form, and legality of the 8/25/2017 Presidential Memorandum; emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and anticipated litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum
19	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD regarding the formulation of the 8/25 Presidential Memorandum and regarding pending litigation, including drafts of the 8/25/2017 Presidential Memorandum	8/9/2017-8/25/2017	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted after litigation had commenced (the Doe Complaint was filed 8/9/2017) regarding the drafting, form, and legality of the 8/25/2017 Presidential Memorandum and regarding pending litigation; emails and documents to and from attorneys in the White House Counsel's Office and attorneys from DOD seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum
50	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD regarding the implementation of the 8/25/Presidential Memorandum and pending litigation	8/26/2017-12/27/2017	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	Work Product (in many cases, also covered by Attorney Client Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents drafted by attorneys after litigation had commenced regarding implementation of the 8/25/2017 Presidential Memorandum and regarding pending litigation; emails and documents to and from attorneys in the White House Counsel's Office and attorneys from DOD seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military

104	(Generally pre-decisional) emails and documents drafted by senior members of the National Security Council in order to advise the President regarding the formulation and implementation of his policy concerning the service of transgender individuals in the military and to deliberate re same	7/26/2017-8/25/2017	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior members or staffers of the National Security Council and other members of the Executive Office of the President or Department of Defense as part of the development of a recommendation to the President regarding the impact of the service of transgender individuals on military lethality and readiness, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
6	(Generally pre-decisional) emails and documents drafted by senior members of the National Security Council in order to advise the President regarding the implementation of his policy concerning the service of transgender individuals in the military and to deliberate re same	8/26/2017-1/4/2018	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior members or staffers of the National Security Council and other members of the Executive Office of the President or Department of Defense as part of the development of a recommendation to the President regarding the implementation of his policy concerning the service of transgender individuals in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
8	Emails and documents drafted by attorneys within the White House Counsel's Office, the Executive Office of the President's Office of Administration, and the Department of Justice regarding discovery in the four pending cases challenging the 8/25/2017 Presidential Memorandum	11/3/2017-1/8/2018	Attorneys from WHCO, OA, or DOJ	Attorneys from WHCO, OA, or DOJ	Work Product (in many cases, also covered by Attorney Client Privilege or Deliberative Process Privilege)	Emails and documents drafted in anticipation of litigation or for pending litigation, as the attorneys within the White House Counsel's Office, the Executive Office of the President's Office of Administration, or the Department of Justice discussed how to meet their discovery obligations in the four pending suits challenging the 8/25/2017 Presidential Memorandum; emails and documents from Attorneys from WHCO, OA, or DOJ providing or seeking confidential legal advice concerning the four pending suits; emails and documents reflecting WHCO deliberations concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
113	Pre-decisional emails and documents in which members of the President's White House Legislative Affairs team deliberate with one another regarding how to advance the President's goals regarding military readiness and lethality (and, by extension, the service of transgender individuals in the military) before Congress	1/20/2017-7/25/2017	Members of the President's Legislative Affairs team	Members of the President's Legislative Affairs team	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members of the President's Legislative Affairs team deliberate with their colleagues regarding the President's policy regarding military readiness (and, thus, the military service of transgender individuals) as it relates to legislative affairs
109	Pre-decisional emails and documents in which members of the President's White House Legislative Affairs team deliberate with one another regarding how to advance the President's goals regarding military readiness and lethality (and, by extension, the service of transgender individuals in the military) before Congress	7/26/2017-8/25/2018	Members of the President's Legislative Affairs team	Members of the President's Legislative Affairs team	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members of the President's Legislative Affairs team deliberate with their colleagues regarding the President's policy regarding military readiness (and, thus, the military service of transgender individuals) as it relates to legislative affairs
185	Pre-decisional emails and documents in which members of the President's White House Legislative Affairs team deliberate with one another regarding how to advance the President's goals regarding military readiness and lethality (and, by extension, the service of transgender individuals in the military) before Congress	8/26/2017-1/10/2018	Members of the President's Legislative Affairs team	Members of the President's Legislative Affairs team	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members of the President's Legislative Affairs team deliberate with their colleagues regarding the President's policy regarding military readiness (and, thus, the military service of transgender individuals) as it relates to legislative affairs
15	Pre-decisional emails and documents in which members of the President's Legislative Affairs team deliberate with DOD staff regarding interactions with Congress (and members of Congress) and advancing the President's goals with respect to military readiness and lethality and the service of transgender individuals in the military before Congress	7/11/2017-9/12/2017	Members of the President's Legislative Affairs team and/or DOD staff	Members of the President's Legislative Affairs team and/or DOD staff	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members of the President's Legislative Affairs team deliberate with DOD regarding legislative efforts impacting the service of transgender individuals in the military
26	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate with DOD staff regarding the President's goals with respect to military readiness and lethality and the service of transgender individuals in the military	1/25/2017-7/25/2017	Members and staff of the National Security Council or DOD staff	Members and staff of the National Security Council or DOD staff	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate with DOD regarding the service of transgender individuals in the military (in some cases, leading up to giving advice to the President)
35	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate with DOD staff regarding the President's goals with respect to military readiness and lethality and the service of transgender individuals in the military	7/26/2017-1/3/2018	Members and staff of the National Security Council or DOD staff	Members and staff of the National Security Council or DOD staff	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate with DOD regarding the service of transgender individuals in the military (in some cases, leading up to giving advice to the President)
26	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and lethality and the service of transgender individuals in the military	1/20/2017-7/25/2017	Members and staff of the National Security Council	Members and staff of the National Security Council	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege, and in some cases also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and the service of transgender individuals in the military; emails and documents reflecting confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
27	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and lethality and the service of transgender individuals in the military	7/26/2017-8/25/2017	Members and staff of the National Security Council	Members and staff of the National Security Council	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege, and in some cases also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and the service of transgender individuals in the military; emails and documents reflecting confidential legal advice concerning anticipated litigation or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
65	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and lethality, the service of transgender individuals in the military, and implementation of the 8/25/2017 Presidential Memorandum	8/26/2017-1/9/2018	Members and staff of the National Security Council	Members and staff of the National Security Council	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege, and in some cases also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and the service of transgender individuals in the military; emails and documents reflecting confidential legal advice concerning pending litigation; emails and documents prepared for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
67	Emails and documents touching on military service by transgender individuals drafted by members of the White House Staff, National Security Council Staff, and agency staff as part of the Staff Secretary or National Security Council Executive Secretary process in order to advise the President or to produce a document for Presidential signing or review	6/16/2017-9/19/2017	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	Presidential Communications Privilege (in most cases, also covered by Deliberative Process Privilege; in some cases, also covered by Attorney Client Privilege, or Work Product Privilege)	Emails and documents in which White House, National Security Council, and agency staff review and comment on draft documents intended for the President's review, to be signed by the President, or to be used to advise the President, which predate a final policy decision on transgender individuals' service in the military; emails and documents reflecting confidential legal advice concerning anticipated litigation or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military

34	Pre-decisional emails and documents drafted by members of the White House Staff and other staffers within the Executive Office of the President as part of the Staff Secretary or NSC Executive Secretary process -- in which draft documents are reviewed in order to produce advice for the President or documents for presidential signing or review -- that touch on the service of transgender individuals in the military, including materials that were ultimately reviewed by the President and records of his briefings	1/20/2017-7/25/2017	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	Deliberative Process Privilege (in almost all cases, also covered by Presidential Communications Privilege, and in many cases, also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which White House, National Security Council, and agency staff review and comment on draft documents intended for the President's review, to be signed by the President, or to be used to advise the President; emails and documents reflecting confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
37	Pre-decisional emails and documents drafted by members of the White House Staff and other staffers within the Executive Office of the President as part of the Staff Secretary or NSC Executive Secretary process -- in which draft documents are reviewed in order to produce advice for the President or documents for presidential signing or review -- that touch on the service of transgender individuals in the military, including drafts of the 8/25/2017 Presidential Memorandum, including materials that were ultimately reviewed by the President and records of his briefings	7/26/2017-8/25/2017	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	Deliberative Process Privilege (in almost all cases, also covered by Presidential Communications Privilege, and in many cases, also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which White House, National Security Council, and agency staff review and comment on draft documents intended for the President's review, to be signed by the President, or to be used to advise the President; emails and documents reflecting confidential legal advice concerning anticipated litigation or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
14	Pre-decisional emails and documents drafted by members of the White House Staff and other staffers within the Executive Office of the President as part of the Staff Secretary or NSC Executive Secretary process -- in which draft documents are reviewed in order to produce advice for the President or documents for presidential signing or review -- that touch on the service of transgender individuals in the military, including materials that were ultimately reviewed by the President and records of his briefings.	8/26/2017-10/6/2017	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	Deliberative Process Privilege (in almost all cases, also covered by Presidential Communications Privilege, and in many cases, also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which White House, National Security Council, and agency staff review and comment on draft documents intended for the President's review, to be signed by the President, or to be used to advise the President; emails and documents reflecting confidential legal advice concerning pending litigation; emails and documents prepared for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
50	Pre-decisional emails and documents drafted by White House Legislative Affairs Staff and outside parties from whom they solicited information for use in advising the President	1/20/2017-7/25/2017	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Deliberative Process Privilege (and, in some cases, Presidential Communications Privilege)	Pre-decisional emails and documents drafted by White House Legislative Affairs staffers to solicit information from third parties as part of a deliberative process and responses to those emails from third parties seeking to assist White House deliberations; in some cases, these communications would lead up to advice to the President
251	Pre-decisional emails and documents drafted by White House Legislative Affairs Staff and outside parties from whom they solicited information for use in advising the President	7/26/2017-8/25/2017	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Deliberative Process Privilege (and, in some cases, Presidential Communications Privilege)	Pre-decisional emails and documents drafted by White House Legislative Affairs staffers to solicit information from third parties as part of a deliberative process and responses to those emails from third parties seeking to assist White House deliberations; in some cases, these communications would lead up to advice to the President
29	Pre-decisional emails and documents drafted by White House Legislative Affairs Staff and outside parties from whom they solicited information for use in advising the President	8/26/2017-1/11/2018	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Deliberative Process Privilege (and, in some cases, Presidential Communications Privilege)	Pre-decisional emails and documents drafted by White House Legislative Affairs staffers to solicit information from third parties as part of a deliberative process and responses to those emails from third parties seeking to assist White House deliberations; in some cases, these communications would lead up to advice to the President
19	Pre-decisional emails and documents drafted by White House Policy Staff and outside parties from whom they solicited information for use in advising the President	1/20/2017-8/25/2017	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties	Deliberative Process Privilege (and, in some cases, Presidential Communications Privilege)	Pre-decisional emails and documents drafted by White House Policy staffers to solicit information from third parties as part of a deliberative process and responses to those emails from third parties seeking to assist White House deliberations; in some cases, these communications would lead up to advice to the President
2	Pre-decisional emails and documents drafted by White House Policy Staff and outside parties from whom they solicited information for use in advising the President	8/26/2017-1/11/2018	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties	Deliberative Process Privilege (and, in some cases, Presidential Communications Privilege)	Pre-decisional emails and documents drafted by White House Policy staffers to solicit information from third parties as part of a deliberative process and responses to those emails from third parties seeking to assist White House deliberations in some cases, these communications would lead up to advice to the President

* Document tallies do not include attachments ** Although some documents fall into multiple categories, each document is tallied as only belonging in one category to more accurately reflect volume of documents at issue.

Exhibit B to Gineen Bresso Declaration

Privilege Log, served July 16, 2018

# of Documents*	Description**	Date Range	To	From	Primary Privilege Asserted	Privilege Description
239	Internal emails and documents drafted by attorneys in the White House Counsel's Office to deliberate with other attorneys in the White House Counsel's office regarding the policies governing transgender individuals' service in the military and regarding anticipated litigation	1/20/2017-7/25/2017	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys in anticipation of litigation during the period when the President and his advisors were deliberating regarding whether to implement the 2016 Secretary of Defense Memorandum; deliberations occurred in anticipation of litigation and included assessments of litigation risk; emails and documents to and from attorneys in the White House Counsel's Office seeking and providing confidential legal advice concerning transgender individuals' service in the military and the 2016 Secretary of Defense Memorandum; emails and documents reflecting White House Counsel's Office legal deliberations concerning issues surrounding transgender individuals' service in the military, which predate a policy decision on transgender individuals' service in the military
218	Internal emails and documents drafted by attorneys in the White House Counsel's Office to deliberate with other attorneys in the White House Counsel's office regarding the formulation of the 8/25 Presidential Memorandum and regarding anticipated litigation, including drafts of the 8/25/2017 Presidential Memorandum	7/26/2017-8/8/2017	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys in anticipation of litigation regarding the drafting, form, and legality of the 8/25/2017 Presidential Memorandum; emails and documents to and from attorneys in the White House Counsel's Office seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and anticipated litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum
124	Internal emails and documents drafted by attorneys in the White House Counsel's Office to deliberate with other attorneys in the White House Counsel's office regarding policies governing the formulation of the 8/25 Presidential Memorandum and regarding pending litigation, including drafts of the 8/25/2017 Presidential Memorandum	8/9/2017-8/25/2017	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys after litigation had commenced (the Doe Complaint was filed 8/9/2017) regarding the drafting, form, and legality of the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents to and from attorneys in the White House Counsel's Office providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum
836	Internal emails and documents drafted by attorneys in the White House Counsel's Office to deliberate with other attorneys in the White House Counsel's office regarding the implementation of the 8/25 Presidential Memorandum and regarding pending litigation	8/26/2017-1/9/2018	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys after litigation had commenced regarding pending litigation and regarding the implementation of the 8/25/2017 Memorandum; emails and documents to and from attorneys in the White House Counsel's Office providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum and legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
433	Internal emails and documents drafted by attorneys in the White House Counsel's Office to deliberate with other attorneys in the White House Counsel's office regarding the implementation of the 8/25 Presidential Memorandum, the formulation of the 3/23 Presidential Memorandum, and regarding pending litigation	1/10/2018 - 2/9/2018	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys after litigation had commenced regarding pending litigation and regarding the implementation of the 8/25/2017 Memorandum and formulation of the 3/23/2018 Memorandum; emails and documents to and from attorneys in the White House Counsel's Office providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum and legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military.
388	Internal emails and documents drafted by attorneys in the White House Counsel's Office to deliberate with other attorneys in the White House Counsel's office regarding the formulation of the 3/23 Presidential Memorandum and regarding pending litigation	2/10/2018 - 3/23/2018	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys after litigation had commenced regarding pending litigation and regarding the formulation of the 3/23/2018 Memorandum; emails and documents to and from attorneys in the White House Counsel's Office providing confidential legal advice concerning the 3/23/2018 Presidential Memorandum and pending litigation.
241	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Office of Legal Counsel to deliberate regarding the formulation, form and legality, and implementation of the 8/25/2017 Presidential Memorandum, including drafts of the 8/25/2017 Presidential Memorandum	6/30/2017 - 8/25/2017	WHCO and OLC Attorneys	WHCO and OLC Attorneys (in some cases, attorneys from DOD or from other DOJ components are also recipients or cc ed)	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys in anticipation of litigation, or after litigation had commenced, assessing the form and legality of the 8/25/2017 Presidential Memorandum and implementation thereof; emails and documents to and from attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Office of Legal Counsel seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum; emails and documents reflecting White House Counsel's Office deliberations concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
85	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Office of Legal Counsel to deliberate regarding the formulation, form and legality, and implementation of the 3/23/2018 Presidential Memorandum, including drafts of the 3/23/2018 Presidential Memorandum	8/26/2017 - 3/23/2018	WHCO and OLC Attorneys	WHCO and OLC Attorneys (in some cases, attorneys from DOD or from other DOJ components are also recipients or cc ed)	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys after litigation had commenced assessing the implementation of the 8/25/2017 Presidential Memorandum and the form and legality of the 3/23/2018 Presidential Memorandum and implementation thereof; emails and documents to and from attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Office of Legal Counsel seeking and providing confidential legal advice concerning the 3/23/2018 Presidential Memorandum; emails and documents reflecting White House Counsel's Office deliberations concerning the 3/23/2018 Presidential Memorandum, which predate the issuance of the 3/23/2018 Presidential Memorandum; emails and documents reflecting White House Counsel's Office deliberations concerning legal issues surrounding transgender individuals' service in the military.
458	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Civil Division regarding pending litigation	8/9/2017-1/11/2018	WHCO and DOJ-Civil Division Attorneys (and, occasionally, attorneys from other DOJ components or from DOD)	WHCO and DOJ-Civil Division Attorneys (and, occasionally, attorneys from other DOJ components or from DOD)	Work Product (in many cases, also covered by Attorney Client Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents drafted by attorneys during pending litigation regarding litigation strategy, updates, and filings; emails and documents drafted by attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Civil Division seeking and providing confidential legal advice concerning pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
372	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Civil Division regarding pending litigation	1/12/2018 - 3/23/2018	WHCO and DOJ-Civil Division Attorneys (and, occasionally, attorneys from other DOJ components or from DOD)	WHCO and DOJ-Civil Division Attorneys (and, occasionally, attorneys from other DOJ components or from DOD)	Work Product (in many cases, also covered by Attorney Client Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents drafted by attorneys during pending litigation regarding litigation strategy, updates, and filings; emails and documents drafted by attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Civil Division seeking and providing confidential legal advice concerning pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning legal issues surrounding transgender individuals' service in the military, many of which predate a final policy decision on transgender individuals' service in the military

16	(Generally pre-decisional) emails and documents drafted by senior members of the President's Domestic Policy Council to deliberate with other EOP staffers regarding the formulation and implementation of the President's policy concerning the service of transgender individuals in the military and in order to advise the President re same	8/26/2017 - 1/28/2018	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior White House policy aides and other members of the Executive Office of the President as to the implementation of the President's policies regarding military lethality and readiness and the service of transgender individuals in the military leading up to policy recommendations to the President, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
44	(Generally pre-decisional) emails and documents drafted by senior members of the President's Domestic Policy Council to deliberate with other EOP staffers regarding the formulation and implementation of the President's policy concerning the service of transgender individuals in the military and in order to advise the President re same	1/29/2018 - 2/25/2018	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior White House policy aides and other members of the Executive Office of the President as to the implementation of the President's policies regarding military lethality and readiness and the service of transgender individuals in the military leading up to policy recommendations to the President, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
78	(Generally pre-decisional) emails and documents drafted by senior members and staff of the National Security Council in order to advise the President regarding the formulation and implementation of his policy concerning the service of transgender individuals in the military and to deliberate re same	1/20/2017- 7/25/2017	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior members or staffers of the National Security Council and other members of the Executive Office of the President or Department of Defense as part of the development of a recommendation to the President regarding the impact of the service of transgender individuals on military lethality and readiness, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
136	(Generally pre-decisional) emails and documents drafted by senior members of the National Security Council in order to advise the President regarding the formulation and implementation of his policy concerning the service of transgender individuals in the military and to deliberate re same	7/26/2017- 8/25/2017	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior members or staffers of the National Security Council and other members of the Executive Office of the President or Department of Defense as part of the development of a recommendation to the President regarding the impact of the service of transgender individuals on military lethality and readiness, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
10	(Generally pre-decisional) emails and documents drafted by senior members of the National Security Council in order to advise the President regarding the implementation of his policy concerning the service of transgender individuals in the military and to deliberate re same	8/26/2017- 2/12/2018	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior members or staffers of the National Security Council and other members of the Executive Office of the President or Department of Defense as part of the development of a recommendation to the President regarding the implementation of his policy concerning the service of transgender individuals in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
122	Emails and documents drafted by attorneys within the White House Counsel's Office, the Executive Office of the President's Office of Administration, and the Department of Justice regarding discovery in the four pending cases challenging the 8/25/2017 Presidential Memorandum	11/3/2017- 2/6/2018	Attorneys from WHCO, OA, or DOJ	Attorneys from WHCO, OA, or DOJ	Work Product (in many cases, also covered by Attorney Client Privilege or Deliberative Process Privilege)	Emails and documents drafted in anticipation of litigation or for pending litigation, as the attorneys within the White House Counsel's Office, the Executive Office of the President's Office of Administration, or the Department of Justice discussed how to meet their discovery obligations in the four pending suits challenging the 8/25/2017 Presidential Memorandum; emails and documents from Attorneys from WHCO, OA, or DOJ providing or seeking confidential legal advice concerning the four pending suits; emails and documents reflecting WHCO deliberations concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
142	Pre-decisional emails and documents in which members of the President's White House Legislative Affairs team deliberate with one another regarding how to advance the President's goals regarding military readiness and lethality (and, by extension, the service of transgender individuals in the military) before Congress	1/20/2017- 7/25/2017	Members of the President's Legislative Affairs team	Members of the President's Legislative Affairs team	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members of the President's Legislative Affairs team deliberate with their colleagues regarding the President's policy regarding military readiness (and, thus, the military service of transgender individuals) as it relates to legislative affairs
144	Pre-decisional emails and documents in which members of the President's White House Legislative Affairs team deliberate with one another regarding how to advance the President's goals regarding military readiness and lethality (and, by extension, the service of transgender individuals in the military) before Congress	7/26/2017- 8/25/2017	Members of the President's Legislative Affairs team	Members of the President's Legislative Affairs team	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members of the President's Legislative Affairs team deliberate with their colleagues regarding the President's policy regarding military readiness (and, thus, the military service of transgender individuals) as it relates to legislative affairs
248	Pre-decisional emails and documents in which members of the President's White House Legislative Affairs team deliberate with one another regarding how to advance the President's goals regarding military readiness and lethality (and, by extension, the service of transgender individuals in the military) before Congress	8/26/2017- 1/16/2018	Members of the President's Legislative Affairs team	Members of the President's Legislative Affairs team	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members of the President's Legislative Affairs team deliberate with their colleagues regarding the President's policy regarding military readiness (and, thus, the military service of transgender individuals) as it relates to legislative affairs
24	Pre-decisional emails and documents in which members of the President's White House Legislative Affairs team deliberate with one another regarding how to advance the President's goals regarding military readiness and lethality (and, by extension, the service of transgender individuals in the military) before Congress	1/17/2018 - 3/22/2018	Members of the President's Legislative Affairs team	Members of the President's Legislative Affairs team	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members of the President's Legislative Affairs team deliberate with their colleagues regarding the President's policy regarding military readiness (and, thus, the military service of transgender individuals) as it relates to legislative affairs
59	Pre-decisional emails and documents in which members of the President's Legislative Affairs team deliberate with DOD staff regarding interactions with Congress (and members of Congress) and advancing the President's goals with respect to military readiness and lethality and the service of transgender individuals in the military before Congress	7/11/2017- 3/23/2018	Members of the President's Legislative Affairs team and/or DOD staff	Members of the President's Legislative Affairs team and/or DOD staff	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members of the President's Legislative Affairs team deliberate with DOD regarding legislative efforts impacting the service of transgender individuals in the military
45	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate with DOD staff regarding the President's goals with respect to military readiness and lethality and the service of transgender individuals in the military	1/25/2017- 7/25/2017	Members and staff of the National Security Council or DOD staff	Members and staff of the National Security Council or DOD staff	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate with DOD regarding the service of transgender individuals in the military (in some cases, leading up to giving advice to the President)
43	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate with DOD staff regarding the President's goals with respect to military readiness and lethality and the service of transgender individuals in the military	7/26/2017- 1/3/2018	Members and staff of the National Security Council or DOD staff	Members and staff of the National Security Council or DOD staff	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate with DOD regarding the service of transgender individuals in the military (in some cases, leading up to giving advice to the President)

57	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate with DOD staff regarding the President's goals with respect to military readiness and lethality and the service of transgender individuals in the military, including regarding the formulation of the 3/23/2018 Presidential Memorandum	1/4/2018 - 3/23/2018	Members and staff of the National Security Council or DOD staff	Members and staff of the National Security Council or DOD staff	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege)	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate with DOD regarding the service of transgender individuals in the military (in some cases, leading up to giving advice to the President), including the formulation of the 3/23/2018 Presidential Memorandum.
28	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and lethality and the service of transgender individuals in the military	1/20/2017-7/25/2017	Members and staff of the National Security Council	Members and staff of the National Security Council	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege, and in some cases also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and the service of transgender individuals in the military; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
30	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and lethality and the service of transgender individuals in the military	7/26/2017-8/25/2017	Members and staff of the National Security Council	Members and staff of the National Security Council	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege, and in some cases also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and the service of transgender individuals in the military; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
91	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and lethality, the service of transgender individuals in the military, and implementation of the 8/25/2017 Presidential Memorandum	8/26/2017-1/9/2018	Members and staff of the National Security Council	Members and staff of the National Security Council	Deliberative Process Privilege (in many cases, also covered by Presidential Communications Privilege, and in some cases also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which members and staff of the National Security Council deliberate regarding military readiness and the service of transgender individuals in the military; emails and documents prepared for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
104	Emails and documents touching on military service by transgender individuals drafted by members of the White House Staff, National Security Council Staff, and agency staff as part of the Staff Secretary or National Security Council Executive Secretary process in order to advise the President or to produce a document for Presidential signing or review	6/16/2017-9/19/2017	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	Presidential Communications Privilege (in most cases, also covered by Deliberative Process Privilege; in some cases, also covered by Attorney Client Privilege, or Work Product Privilege)	Emails and documents in which White House, National Security Council, and agency staff review and comment on draft documents intended for the President's review, to be signed by the President, or to be used to advise the President, which predate a final policy decision on transgender individuals' service in the military; emails and documents reflecting confidential legal advice concerning anticipated litigation or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
41	Emails and documents touching on military service by transgender individuals drafted by members of the White House Staff, National Security Council Staff, and agency staff as part of the Staff Secretary or National Security Council Executive Secretary process in order to advise the President or to produce a document for Presidential signing or review	9/20/2017 - 3/23/2018	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	Presidential Communications Privilege (in most cases, also covered by Deliberative Process Privilege; in some cases, also covered by Attorney Client Privilege, or Work Product Privilege)	Emails and documents in which White House, National Security Council, and agency staff review and comment on draft documents intended for the President's review, to be signed by the President, or to be used to advise the President, which predate a final policy decision on transgender individuals' service in the military; emails and documents reflecting confidential legal advice concerning anticipated litigation or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
39	Pre-decisional emails and documents drafted by members of the White House Staff and other staffers within the Executive Office of the President as part of the Staff Secretary or NSC Executive Secretary process -- in which draft documents are reviewed in order to produce advice for the President or documents for presidential signing or review -- that touch on the service of transgender individuals in the military, including materials that were ultimately reviewed by the President and records of his briefings	1/20/2017-7/25/2017	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	Deliberative Process Privilege (in almost all cases, also covered by Presidential Communications Privilege, and in many cases, also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which White House, National Security Council, and agency staff review and comment on draft documents intended for the President's review, to be signed by the President, or to be used to advise the President; emails and documents reflecting confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
48	Pre-decisional emails and documents drafted by members of the White House Staff and other staffers within the Executive Office of the President as part of the Staff Secretary or NSC Executive Secretary process -- in which draft documents are reviewed in order to produce advice for the President or documents for presidential signing or review -- that touch on the service of transgender individuals in the military, including drafts of the 8/25/2017 Presidential Memorandum, including materials that were ultimately reviewed by the President and records of his briefings	7/26/2017-8/25/2017	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	Deliberative Process Privilege (in almost all cases, also covered by Presidential Communications Privilege, and in many cases, also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which White House, National Security Council, and agency staff review and comment on draft documents intended for the President's review, to be signed by the President, or to be used to advise the President; emails and documents reflecting confidential legal advice concerning anticipated litigation or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
28	Pre-decisional emails and documents drafted by members of the White House Staff and other staffers within the Executive Office of the President as part of the Staff Secretary or NSC Executive Secretary process -- in which draft documents are reviewed in order to produce advice for the President or documents for presidential signing or review -- that touch on the service of transgender individuals in the military, including materials that were ultimately reviewed by the President and records of his briefings.	8/26/2017-10/6/2017	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	WH, NSC, and agency staffers; each conversation also includes at least one representative from the WH Staff Secretary's Office or the NSC Executive Secretary's Office	Deliberative Process Privilege (in almost all cases, also covered by Presidential Communications Privilege, and in many cases, also covered by Attorney Client Privilege or Work Product Privilege)	Pre-decisional emails and documents in which White House, National Security Council, and agency staff review and comment on draft documents intended for the President's review, to be signed by the President, or to be used to advise the President; emails and documents reflecting confidential legal advice concerning pending litigation; emails and documents prepared for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
61	Pre-decisional emails and documents drafted by White House Legislative Affairs Staff and outside parties from whom they solicited information for use in advising the President	1/20/2017-7/25/2017	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Deliberative Process Privilege (and, in some cases, Presidential Communications Privilege)	Pre-decisional emails and documents drafted by White House Legislative Affairs staffers to solicit information from third parties as part of a deliberative process and responses to those emails from third parties seeking to assist White House deliberations; in some cases, these communications would lead up to advice to the President
408	Pre-decisional emails and documents drafted by White House Legislative Affairs Staff and outside parties from whom they solicited information for use in advising the President	7/26/2017-8/25/2017	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Deliberative Process Privilege (and, in some cases, Presidential Communications Privilege)	Pre-decisional emails and documents drafted by White House Legislative Affairs staffers to solicit information from third parties as part of a deliberative process and responses to those emails from third parties seeking to assist White House deliberations. In some cases, these communications would lead up to advice to the President
64	Pre-decisional emails and documents drafted by White House Legislative Affairs Staff and outside parties from whom they solicited information for use in advising the President	8/26/2017-1/11/2018	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties (including Members of Congress and their staffs)	Deliberative Process Privilege (and, in some cases, Presidential Communications Privilege)	Pre-decisional emails and documents drafted by White House Legislative Affairs staffers to solicit information from third parties as part of a deliberative process and responses to those emails from third parties seeking to assist White House deliberations; in some cases, these communications would lead up to advice to the President

25	Pre-decisional emails and documents drafted by White House Policy Staff and outside parties from whom they solicited information for use in advising the President	1/20/2017-8/25/2017	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties	Deliberative Process Privilege (and, in some cases, Presidential Communications Privilege)	Pre-decisional emails and documents drafted by White House Policy staffers to solicit information from third parties as part of a deliberative process and responses to those emails from third parties seeking to assist White House deliberations in some cases, these communications would lead up to advice to the President
34	Pre-decisional emails and documents drafted by White House Policy Staff and outside parties from whom they solicited information for use in advising the President	8/26/2017-1/11/2018	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties	Members of the President's Legislative Affairs, Policy, Communications, and NSC Teams, as well as outside third parties	Deliberative Process Privilege (and, in some cases, Presidential Communications Privilege)	Pre-decisional emails and documents drafted by White House Policy staffers to solicit information from third parties as part of a deliberative process and responses to those emails from third parties seeking to assist White House deliberations; in some cases, these communications would lead up to advice to the President

* Document tallies do not include attachments ** Although some documents fall into multiple categories, each document is tallied as only belonging in one category to more accurately reflect volume of documents at issue.

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

**DECLARATION OF ROBERT E.
EASTON IN SUPPORT OF
DEFENDANTS' MOTION TO
STAY COMPLIANCE WITH THE
COURT'S ORDER PENDING
RESOLUTION OF PETITION
FOR WRIT OF MANDAMUS**

DECLARATION OF ROBERT E. EASTON

I, Robert E. Easton, do hereby declare as follows:

1. I currently serve as the Director, Office of Litigation Counsel, within the Department of Defense ("DoD") Office of General Counsel. I have held this position since 2006. In this capacity, I supervise the conduct and oversight of litigation of Departmental significance, including matters involving senior Department of Defense (DoD) leaders, and to coordinate litigation among the Military Departments, Defense Agencies, and Field Activities.

2. In the exercise of my official duties, I have been made aware of this lawsuit and the three other cases involving the DoD policy on service by transgender individuals.

3. I submit this declaration in response to the Court's July 27, 2018 Order Granting Plaintiffs' Motion to Compel and Denying Defendants' Motion for Protective Order, Dkt. 299 ("Order"). I base this declaration on my personal knowledge and on information made available to me in the performance of my official duties.

Background

4. On December 29, 2017, Plaintiffs served their first set of requests for production on DoD. Plaintiffs sought 25 separate categories of documents. Many of these requests specifically targeted information subject to the deliberative process privilege. For example, Request 15 sought "[a]ll 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." Request 23 sought "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."

5. On April 26, 2018, Plaintiffs served a second set of requests for production. This set sought an additional 10 categories of documents from DoD. Like the first set, many of these requests specifically targeted information subject to the deliberative process privilege. For example, Request 27 sought all "[d]ocuments 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."

Request 28 sought “[a]ll 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.” Request 30 sought “[a]ll 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.”

Purpose of this Declaration

6. This declaration is submitted in support of Defendants’ motion to stay the Court’s July 27, 2018 Order. That Order requires that Defendants “turn over those documents that have been withheld solely under the deliberative process privilege within 10 days.” It also requires that Defendants produce revised privilege logs that “(a) identify individual author(s) and recipient(s); and (b) include *specific, non-boilerplate* privilege descriptions *on a document-by-document basis*,” also within 10 days.

Information Subject to the Deliberative Process Privilege

7. The discovery sought by Plaintiffs in this case has been extremely broad. The current DoD policy on military service by transgender individuals has been under development since the Obama administration, and internal deliberative discussions regarding the policy began in earnest as far back as 2015. Several of Plaintiff’s Requests for Production span nearly three years of policy development and reach multiple components of DoD, including each of the Military Services, the Office of the Secretary of Defense (OSD), and the Defense Health Agency (DHA). For example, in Request 14, Plaintiffs sought “[a]ll Documents and Communications relating to the RAND Report.” In Request #23, Plaintiff’s sought “[a]ll 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.”

8. In response to these and Plaintiffs’ other broad Requests, OSD alone has identified 33,395 responsive documents. In addition, the uniformed Services performed their own searches for responsive materials. They identified and collected hundreds of thousands of responsive documents in this case. From the outset, discovery in this case has consumed vast amounts of resources and manpower to meet the timelines established by the Court.

9. Of the 33,395 responsive documents maintained by OSD alone, 28,704 documents have been identified as protected by the deliberative process privilege. A subset of these documents (8,934) are attorney work product or are also protected by other privileges including the attorney-client privilege. That leaves 19,770 responsive documents that are protected only by the deliberative process privilege and thus must be produced under the Court’s Order.

10. The Order requires disclosure of highly sensitive deliberative material reflecting the pre-decisional thought processes of very senior DoD officials. For example, one document consists of a lengthy memo from the Deputy Secretary of Defense, dated June 28, 2017, in which he provides candid advice to the Secretary on DoD’s transgender policy (DOD00096903/USDOE00219987) and the cover letter (DOD00004685/USDOE000083257) on which there are handwritten notes by the Secretary. Another, consisting of a draft letter to the President, reflects the Secretary’s thoughts on the developing transgender policy (DOD00084379/USDOE00304412). A third example is an email from a senior DoD official to the Under Secretary of Defense for Personnel and Readiness advising him on several courses of action and providing a book of policy options to consider before the formulation of the original DoD transgender policy in 2016 (DoD00003993/USDOE00075584). A fourth example is a read

ahead that the Secretary received prior to his briefing from the Under Secretary of Defense for Personnel and Readiness and the Deputy Secretary of Defense on the recommendations from the Panel of Experts (DoD0088408/USDOE00208679). A fifth and final example is a memorandum from the Secretary of the Air Force to the Deputy Secretary of Defense dated May 31, 2017 describing the Air Force's experience under the DoD transgender policy at the time (AF_0008131). Each of these examples reflects deliberations at the most senior levels of the Department concerning the history and future of the Department's approach to service by transgender individuals. Such sensitive information should not be disclosed without a careful document-by-document review that assesses both the heightened burden for such release and the effect of disclosure on senior leaders' decision-making process.

11. Before any privileged documents can be produced, however, they must be reviewed again so that deliberative and pre-decisional information that is not relevant to this case can be redacted. Many deliberative and pre-decisional documents that contain responsive information also contain information that is not material to this case, but until these documents are reviewed, we cannot know exactly how many such documents there are. The information collected in this case dates back nearly three years and therefore includes deliberative information not relevant to this litigation that is closely comingled with relevant and responsive, privileged information. Documents withheld pursuant to the deliberative process privilege may contain, among other things, information that relates to disciplinary activities, other activities by DoD offices, and other legal materials. For example, a document listed on DoD privilege log 14 includes information on a DoD policy for recruiting and retention of individuals with critical skills who are non-U.S. citizens (DoD00037586/USDOE00198236). Another document on DoD privilege log 14 includes non-relevant information for a press briefing that also includes

information on the DoD transgender policy (DoD00084191/USDOE00202679). And on DoD privilege log 5, a document consisting of a May 2016 communication about service members who gave consent to share their personal information with a state service organization also includes relevant deliberative information concerning the DoD transgender policy (/DoD00011181/USDOE00089089). Each of these examples reflects types of non-responsive information that is prevalent and comingled with responsive transgender material.

12. In addition, due to global operations with varying degrees of classification within DoD, some non-responsive information contained in responsive documents is considered Controlled Unclassified Information (“CUI”).¹ CUI may include draft briefings to senior DoD leaders on various initiatives, draft policy, pre-decisional commentary on various DoD policies, or commentary on foreign government activities. CUI can be comingled with other information relevant to the DoD transgender policy and responsive to Plaintiffs’ Requests. Both the CUI and the information regarding the DoD transgender policy can be deliberative and pre-decisional. For example, a document listed on privilege log 14 is considered CUI because it concerns high-level deliberations and the DoD’s strategic response to protests in Iran (DoD00082773/USDOE00201495). Another document on privilege log 14 is considered CUI because it contains information regarding deliberation on activities in Afghanistan and deliberations regarding North Korea (DoD00083928/USDOE00202327). For these reasons, documents containing CUI that have been withheld pursuant to the deliberative process privilege must be reviewed again and redacted before they can be produced under the Order.

13. In addition to concerns about CUI, some responsive documents identified as deliberative and pre-decisional contain classified information. There are approximately 974

¹ See generally *DoD Information Security Program: Controlled Unclassified Information (CUI)*, DoDM 5200.01, Volume 4, February 24, 2012.

documents that contain information responsive to Plaintiffs' requests but were withheld solely pursuant to the deliberative process privilege and that are currently and properly classified SECRET or SECRET//NOFORN.² The presence of this information was disclosed to Plaintiffs in a privilege log served on June 22, 2018. These documents contain classified information that is closely comingled with transgender policy material. Declassification of these records, review and segregation of non-responsive material, and production to Plaintiffs cannot under any circumstance occur within the Order's prescribed 10-day timeline.

14. The Court's Order also presents practical obstacles. The Office of Litigation Counsel (OLC), which handles discovery-related matters for OSD, has only six attorneys and two paralegals. In addition to the transgender litigation, these attorneys and paralegals are responsible for many other ongoing cases of importance to DoD. In extraordinary circumstances, OLC can obtain the assistance of up to four additional attorneys and staff in the Office of General Counsel who work on litigation involving the Freedom of Information Act (FOIA), but to do so would impair DoD's ability to timely satisfy its obligations in ongoing FOIA litigation. Typically, OLC obtains litigation support when needed from the Military Services, but in this case, the Military Services require all of their assigned personnel to comply with the Service's own obligations in litigation related to the military's transgender policy. In light of these personnel limitations, the review and segregation of all non-responsive material, including CUI and classified information, from the 19,770 responsive documents are not feasible within the ten-day timeline ordered by the Court.

15. In addition to the above logistical, production, and personnel concerns, and perhaps most importantly, release of DoD information protected by the deliberative process

² See generally Exec. Order No. 12,356 (Apr. 2, 1982).

privilege would have a substantial and immediate chilling effect on policy deliberation and development within DoD. The DoD decision-making apparatus is reliant on open and candid conversations between leadership, advisors, and policy analysts to advise and inform DoD policy makers across the military services on various courses of action for any decision. Due to the geographically dispersed nature of DoD activities and the high operational tempo with which many of the Department's activities are conducted, deliberative and pre-decisional conversations frequently occur over email. The forced release of such communications would directly and immediately impair the open and candid discussions occurring at both the operational and strategic level if participants knew that their thoughts, impressions, and opinions on various topics, both related to DoD transgender policy and other non-transgender policies, would be open to scrutiny, regardless of any judicial protective order.

16. Indicative of the DoD decision making process, to address issues surrounding military service by transgender individuals, the Secretary established a Panel of Experts comprised of the Under Secretaries of the Military Departments (or officials performing their duties), the Armed Services Vice Chiefs (including the Vice Commandant of the U.S. Coast Guard), and the Armed Services Senior Enlisted Advisors and chaired by the Under Secretary of Defense for Personnel and Readiness (or an official performing those duties). The Panel received input from transgender service members, commanders of transgender service members, military medical professionals, and civilian medical professionals with experience in the care and treatment of individuals with gender dysphoria. Participants in this panel were encouraged to speak candidly and openly about their experiences and opinions. This input was understood to be confidential. The input from service members included perspectives from enlisted personnel and junior officers and from across the uniformed services.

17. The Panel also received input from various working groups to more fully inform its opinions. The Transgender Service Policy Working Group, which was comprised of medical and personnel experts from across DoD, developed policy recommendations and various implementation plans for the Panel's consideration. The Medical and Personnel Executive Steering Committee, a standing group of the Surgeons General and Service Personnel Chiefs, provided the Panel with an analysis of accession standards, a multi-disciplinary review of relevant data, and information about medical treatment for gender dysphoria and gender transition-related medical care. The groups reported regularly to the Panel and responded to numerous queries for information and analysis to support the Panel's review and deliberations. In so doing, these groups were asked to provide candid and honest analysis.

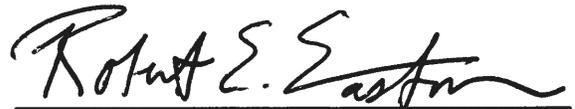
18. The disclosure of deliberative, pre-decisional input, analysis, and opinions from these individuals would breach DoD's commitment to maintain the confidentiality of their honest deliberations regarding the sensitive topic of transgender service and would irreparably harm DoD's ability to obtain candid and honest input on any subject in the future, not just the subject of transgender service.

19. Without assurance that their opinions on aspects of transgender policy would be protected from disclosure, individuals will be much more likely to withhold their participation and honest views in the future. This is especially true given the high-profile and controversial nature of this issue, as well as the allegations of irrational discriminatory treatment made by Plaintiffs against DoD. Subject matter experts, including those with battlefield experience, will decline to lend their unique expertise for fear that they would be subject to unfair accusations and opprobrium. As a result, DoD's decision-making process would suffer because it would not

benefit from the practical first-hand experiences of those most qualified to opine on unique aspects of military experience.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 31st day of July 2018, Arlington, VA.

A handwritten signature in black ink that reads "Robert E. Easton". The signature is written in a cursive style and is positioned above a solid horizontal line.

ROBERT E. EASTON
Director, Office of Litigation Counsel

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2018, I filed the foregoing addendum with the Clerk of the Court by using the appellate CM/ECF system. Service has been accomplished via e-mail to the following counsel:

Counsel for Real Party in Interest-Intervenor Plaintiff:

La Rond Baker (larondb@atg.wa.gov)
Colleen M. Melody (colleenm1@atg.wa.gov)

Counsel for Real Party in Interest- Plaintiffs:

Vanessa Barsanti (vanessa.barsanti@kirkland.com)
Jordan M. Heinz (jheinz@kirkland.com)
James F. Hurst (james.hurst@kirkland.com)
Scott Lerner (scott.lerner@kirkland.com)
Daniel I. Siegfried (Daniel.siegfried@kirkland.com)
Joseph B. Tyson (Ben.Tyson@kirkland.com)
Stephen R. Patton (Stephen.patton@kirkland.com)
Tara Borelli (tborelli@lambdalegal.org)
Jon W. Davidson (j davidson@lambdalegal.org)
Natalie Nardecchia (nnardecchia@lambdalegal.org)
Peter C. Renn (prens@lambdalegal.org)
Sasha J. Buchert (sbuchert@lambdalegal.org)
Carl Charles (ccharles@lambdalegal.org)
Kara N. Ingelhart (kingelhart@lambdalegal.org)
Camilla B. Taylor (ctaylor@lambdalegal.org)
Paul D. Castillo (pcastillo@lambdalegal.org)
Samantha Everett (samantha@newman.com)
Derek Alan Newman (Derek@newmanlaw.com)
Jason Sykes (jason@newmanlaw.com)
Peter E. Perkowski (peterp@outserve.org)

The district court has been provided with a copy of this addendum.

s/ Tara S. Morrissey
TARA S. MORRISSEY



Office of the Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, California 94119-3939
415-355-8000

Molly C. Dwyer
Clerk of Court

August 01, 2018

No.: 18-72159
D.C. No.: 2:17-cv-01297-MJP
Short Title: Donald Trump, et al v. USDC-WAWSE

Dear Petitioners/Counsel

A petition for writ of mandamus and/or prohibition has been received in the Clerk's Office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. Always indicate this docket number when corresponding with this office about your case.

If the U.S. Court of Appeals docket fee has not yet been paid, please make immediate arrangements to do so. If you wish to apply for in forma pauperis status, you must file a motion for permission to proceed in forma pauperis with this court.

Pursuant to FRAP Rule 21(b), no answer to a petition for writ of mandamus and/or prohibition may be filed unless ordered by the Court. If such an order is issued, the answer shall be filed by the respondents within the time fixed by the Court.

Pursuant to Circuit Rule 21-2, an application for writ of mandamus and/or prohibition shall not bear the name of the district court judge concerned. Rather, the appropriate district court shall be named as respondent.