

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, et al.,  
Plaintiffs,

vs.

DONALD J. TRUMP, et al.,  
Defendants.

Case No. 1:17-cv-02459-GLR

Hon. George L. Russell, III

**PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO THE  
MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER**

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## I. INTRODUCTION

From the outset of discovery, Defendants have wielded the deliberative process privilege as a shield against discovery concerning the central issue in this constitutional challenge.

Defendants insist that President Trump's ban on military service by transgender persons ("the Ban") and the plan developed to implement the Ban (the "Implementation Plan") are not based on impermissible animus but rather are supported by an independent deliberative study. Yet for over seven months they have withheld the very materials Plaintiffs need to test Defendants' position. As a result of Defendants' overbroad and obstructive objections, discovery in this case has ground to a halt.

On August 14, 2018, Magistrate Judge A. David Copperthite granted Plaintiffs' Motion to Compel Supplemental Interrogatory Answers and Production ("Motion to Compel"), ordering Defendants to produce three discrete categories of documents they are withholding on privilege grounds and that are highly relevant to the intent underlying the Ban and Implementation Plan and to Plaintiffs' opposition to Defendants' pending motion for summary judgment. Two district court judges in other litigation challenging the Ban have cited the Magistrate Judge's order with approval. *See Doe v. Mattis*, --- F. Supp. 3d ---, 2018 WL 4053380, at \*3 (D.D.C. Aug. 24, 2018) ("In related cases throughout the country, Defendants' assertions of privilege have not fared well." (citing Magistrate Judge's order)); *Karnoski v. Trump*, No. 17-cv-1297-MJP, ECF 311 at 7 (W.D. Wash. Aug. 20, 2018) (same, denying motion to stay order granting motion to compel).

Defendants now assert that the Magistrate Judge's well-reasoned order was clearly erroneous and contrary to law. But they fall far short of meeting these high standards. The Magistrate Judge made careful findings that were supported by the evidence to reach the conclusion that Defendants' intent was "at the very heart of this litigation," and, therefore, that

the deliberative process privilege should not protect interrogatory answers and documents that go to that intent. ECF 204 at 5–6. Defendants suggest that this order is too “sweeping,” but that is a problem of their own making: Defendants invoked the deliberative process privilege in response to every interrogatory and request for production and asserted the privilege for over 40,000 documents.

Defendants cannot withhold immense numbers of deliberative process documents while asking the Court to blindly accept their assertions that the deliberative process was independent and untainted. As the U.S. District Court for the District of Columbia recently concluded in rejecting Defendants’ motion for summary judgment in parallel litigation:

[D]espite the fact that one of Defendants’ *main defenses* in this action is that their decisions regarding transgender military service are owed great deference because they are the product of reasoned deliberation, study and review by the military, Defendants have withheld nearly all information concerning this alleged deliberation. This is not how civil litigation works.

*Doe*, 2018 WL 4053380, at \*7; *accord Karnoski*, 2018 WL 3608401, at \*4 (W.D. Wash. July 27, 2018) (“Defendants may not simultaneously claim that deference is owed to the Ban because it is the product of ‘considered reason [and] deliberation,’ ‘exhaustive study,’ and ‘comprehensive review’ by the military . . . while also withholding access to information concerning these deliberations, including whether the military was even involved.”).

The Court should reject Defendants’ latest effort to stifle discovery in this case. Because the Magistrate Judge’s opinion and order are based on reasonable conclusions and are consistent with the weight of authority, Defendants’ objections should be overruled.

## **II. PROCEDURAL BACKGROUND**

In July 2017, President Trump announced on Twitter that he had decided to ban transgender individuals from serving in the military “in any capacity,” purportedly based on

concerns about military effectiveness. ECF 40-22. The District Court determined, however, that the President's abrupt action was apparently based on no evidence at all, much less "genuine concerns regarding military efficacy." ECF 85 at 43 (internal quotation marks omitted).

President Trump ordered Defendants to "implement the Directives" in the Ban, *id.* at 50, which Defendants have now done, *see* ECF 120-1, -2, -3 (the Implementation Plan).

Discovery began in January 2018. It soon stalled, because Defendants objected to every single document request and interrogatory on the basis of, *inter alia*, the deliberative process privilege. *See, e.g.*, ECF 177-8. After considerable delay, Defendants produced approximately 30 logs listing thousands of withheld documents; most of the logs stated largely uninformative boilerplate justifications for Defendants' privilege claims. *See, e.g.*, ECF 177-9 (DoD).

Although fact discovery was originally scheduled to close on April 24, 2018, ECF 100, this deadline was later extended through May 31, 2018, ECF 145, to permit the parties to meet and confer on a later deadline. The Court then ordered that discovery be extended through August 31, 2018, and denied Defendants' request to stay discovery in light of the pendency of various motions: "[t]he Court does not consider the fact that motions are currently pending to be sufficient justification to warrant a stay of discovery. Nor is the Court persuaded that a stay will serve the interests of judicial economy." ECF 170. Defendants' ongoing failure to timely produce significant volumes of key documents and interrogatory answers has now necessitated a suspension of the fact discovery deadline. *See* ECF 210, 213.

Plaintiffs repeatedly attempted to confer concerning Defendants' extensive assertions of privilege, without success. *See, e.g.*, ECF 177-12 (February 21, 2018 deficiency letter); ECF 177-14 (March 16, 2018 deficiency letter); ECF 177-15 (April 9, 2018 deficiency letter). Plaintiffs concluded that they had no choice but to seek an order compelling production of

deliberative materials that concern three discrete topics: (1) the issuance of the Ban; (2) the work of the “panel of experts” tasked with developing a proposal to implement the Ban; and (3) the March 23, 2018 Implementation Plan and the President’s acceptance of that plan. *See generally* ECF 177, 177-3 at 7. Plaintiffs also filed a motion challenging Defendants’ attempted clawback of several documents on the basis of the deliberative process privilege, under the Court’s Rule 502(d) order, ECF 110. ECF 178 (the “502(d) Motion”). Defendants responded that the Court should defer any decision on Plaintiffs’ Motion to Compel and on the 502(d) Motion until the resolution of other pending motions, including the parties’ cross-motions for summary judgment. ECF 184 at 4; ECF 186 at 5–6 (filed under seal).

Soon after briefing on Plaintiffs’ Motion to Compel was complete, Defendants moved for a protective order to preclude discovery directed at the President of the United States, and discovery that seeks information concerning presidential communications and deliberations from sources other than President Trump. ECF 179.<sup>1</sup> Defendants represented that this preemptive action was necessary because Plaintiffs’ Motion to Compel “asked the Court for a declaration that the deliberative process privilege does not apply to large swaths of material, including material in the possession of the White House and material reflecting presidential communications.” *Id.* That assertion was incorrect; Plaintiffs’ proposed order accompanying the Motion to Compel did not require Defendants to produce materials withheld on grounds other than deliberative process privilege, including the presidential communications privilege. ECF 177-2; *see also* ECF 177-1 at 1–2. Nevertheless, in a further effort to allay Defendants’ concerns, Plaintiffs expressly stipulated that their Motion to Compel

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<sup>1</sup> Prior to that filing, Defendants had categorically refused even to confer about their assertions of the presidential communications privilege. *See* ECF 177-4 (Kies Aff.) ¶ 32. As of the date of this filing, Defendants have not produced a document-by-document privilege log for Defendant Trump.

does not seek production of (a) any information and documents in the custody, possession or control of the President or the Executive Office of the President or (b) any information and documents (or portions thereof) that Defendants contend are subject to the presidential communications privilege, including any information and documents in the custody, possession, or control of the defendants other than the President that constitute or would disclose any information concerning presidential communications and deliberations, including communications to or from the President or Executive Office of the President.

ECF 185-2 at 2. The Magistrate Judge entered the parties' proposed stipulation. ECF 187.

On August 14, 2018, the Magistrate Judge granted Plaintiffs' Motion to Compel (ECF 177) and dismissed as moot Plaintiffs' Rule 502(d) Motion (ECF 178) challenging Defendants' effort to claw back one document.<sup>2</sup> ECF 204, 205. As a threshold matter, the Magistrate Judge found that "there are no justifiable reasons to stay decisions on the discovery disputes pending the outcome of the dispositive motions or for any other proffered reasons." ECF 204 at 4. The Magistrate Judge further found that "each of the categories of compelled documents is likely to contain evidence reflecting Defendants' intent," which "is at the very heart of this litigation." *Id.* at 5–6. The Magistrate Judge granted in part and denied in part Defendants' motion for a protective order, ruling that no discovery should be directed to President Trump for the time being, but permitting discovery from other sources to proceed. *Id.* at 10.

On August 17, 2018, Defendants sought a stay of the Magistrate Judge's order pending the District Court's resolution of Defendants' forthcoming Objections. ECF 208. Plaintiffs oppose a stay of the Magistrate Judge's ruling on deliberative process privilege, but do not oppose a temporary stay of the Magistrate Judge's partial denial of Defendants' motion for a

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<sup>2</sup> Defendants initially sought to claw back five documents. Prior to Plaintiffs' filing of the 502(d) Motion, Defendants withdrew their claims of deliberative process privilege for three of these documents. After Plaintiffs filed the 502(d) Motion, Defendants withdrew their privilege claim for an additional document, leaving only one document at issue. *See* ECF 186 at 1 (filed under seal).

protective order (i.e., the portion of the decision referring to “discovery of information or documents in the custody, possession, or control of Defendants other than the President that would disclose information concerning presidential communications and deliberations”). ECF 208 at 1; ECF 211 at 5.

Plaintiffs responded to the stay motion on August 31, 2018. ECF 211. That motion is currently pending before the Court. On August 28, 2018, Defendants filed objections to the Magistrate Judge’s memorandum opinion and order. ECF 209.

### III. ARGUMENT

Defendants’ objections to the Magistrate Judge’s opinion and order should be rejected. Under Federal Rule of Civil Procedure 72(a), objections to a magistrate judge’s nondispositive discovery order must overcome a high standard, as “‘it is extremely difficult to justify alteration of the magistrate judge’s nondispositive actions by the district judge.’” *Bost v. Wexford Health Sources, Inc.*, 2017 WL 3503673, at \*4 (D. Md. Aug. 16, 2017) (quoting 12 Charles A. Wright, Arthur R. Miller, et al., *Federal Practice and Procedure Civil* § 3069 (2d ed.)). “[T]he district court should only overrule the magistrate judge if the contested order is ‘clearly erroneous or is contrary to law.’” *Id.* (quoting Fed. R. Civ. P. 72(a)). “This standard vests ‘broad discretion’ in the magistrate judge with regard to the resolution of discovery disputes.” *Baird v. CCDC/CCSCC*, 2008 WL 4999252, at \*2 (S.D.W. Va. Nov. 20, 2008). “In light of the broad discretion given to a magistrate judge in the resolution of nondispositive discovery disputes, the court should only overrule a magistrate judge’s determination if this discretion is abused.” *Patrick v. PHH Mortg. Corp.*, 298 F.R.D. 333, 336 (N.D.W. Va. 2014) (internal quotation marks omitted). “[I]t is not the function of objections to discovery rulings to allow wholesale relitigation of issues resolved by the magistrate judge.” *Buchanan v. Consol. Stores Corp.*, 206 F.R.D. 123, 124 (D. Md. 2002). Although the “contrary to law” standard ordinarily suggests a

plenary review of legal determinations, the decisions of a magistrate judge concerning discovery disputes and scheduling should be afforded “great deference.” *Malibu Media, LLC v. John Does 1-23*, 878 F. Supp. 2d 628, 629 (E.D. Va. 2012).

Defendants have not shown that any aspect of the Magistrate Judge’s order was in error, much less “clearly erroneous” or “contrary to law.” Because Defendants do not meet the high standards required to overturn a magistrate judge’s nondispositive discovery order, their objections should be overruled.

**A. The Parties Have Stipulated that Plaintiffs Are Not Presently Seeking Production of Materials Subject to Claims of Presidential Communications Privilege, So There Is No Live Dispute Regarding the Magistrate Judge’s Partial Denial of Defendants’ Motion for a Protective Order.**

There is no live dispute regarding the presidential communications privilege. Plaintiffs have not moved to compel production of any materials withheld pursuant to that privilege. To the contrary, the parties have expressly stipulated that—at this time—Defendants need not produce *any* documents they claim are protected by the presidential communications privilege, even where such documents are in the custody of defendants other than the President. *See* ECF 185; ECF 187.

Discovery that Plaintiffs have sought to compel—such as review of the materials previously improperly withheld pursuant to the deliberative process privilege, and depositions of government officials—may adequately establish that the President “tweeted his transgender ban *sua sponte* as alleged,” for discriminatory reasons. ECF 204 at 10. Because of that possibility, Plaintiffs have been willing to exhaust this category of discovery before determining whether it is necessary to challenge Defendants’ assertion of the presidential communications privilege. If, on the other hand, the discovery compelled by the Magistrate Judge’s order ultimately does not prove sufficient on the relevant question of the President’s intent, it may prove appropriate for

the Court to compel further production notwithstanding Defendants’ claims of presidential communications privilege.<sup>3</sup> However, because Plaintiffs are not pursuing such documents and information at this time—and the parties have stipulated that Defendants’ preemptive Motion for a Protective Order should be held in abeyance for now—there is no reason for a hypothetical and premature ruling on the presidential communications privilege.

The existing record is thus abundantly clear that Defendants are under no current obligation to produce materials subject to a good-faith assertion of presidential communications privilege. Should Plaintiffs later choose to pursue documents or information over which Defendants assert the presidential communications privilege, any disputes regarding that privilege may be presented and litigated at that time. Nevertheless, to address Defendants’ apparent confusion on this point, Plaintiffs would not oppose a modification of the Magistrate Judge’s order to clarify that Defendants are not required to produce materials subject to a claim of presidential communications privilege, without prejudice to Plaintiffs’ ability to challenge those privilege claims, if necessary, at an appropriate future time.

**B. The Magistrate Judge Did Not Rule “Prematurely.”**

Defendants argue “[a]s an initial matter” that the Magistrate Judge “prematurely” decided Plaintiffs’ Motion to Compel and 502(d) Motion, in light of the pending dispositive motions. ECF 209 at 8–10. However, the Magistrate Judge correctly noted that he had the discretion to rule on discovery motions while cross-motions for summary judgment are pending. ECF 204 at 4 (citing *Tilley v. United States*, 270 F. Supp. 2d 731, 734 n.1 (M.D.N.C. 2003)). Indeed, both the District Court and the Federal Rules *required* the Magistrate Judge to timely resolve the pending discovery disputes. *See* ECF 152 (referring this case to the Magistrate Judge to resolve

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<sup>3</sup> *See generally, e.g., In re Sealed Case*, 121 F.3d 729, 754 (D.C. Cir. 1997).

all discovery disputes); Fed. R. Civ. P. 72(a) (providing that, when a nondispositive pretrial matter is referred to a magistrate judge, the “magistrate judge *must promptly* conduct the required proceedings” (emphasis added)); *see also Robinson v. Quicken Loans Inc.*, 2013 WL 1704839, at \*6 (S.D.W. Va. Apr. 19, 2013) (“[T]he magistrate judge has wide discretion when resolving discovery disputes.”). The Magistrate Judge explained that he had found “no justifiable reasons to stay decisions on the discovery disputes,” and that a prompt ruling was appropriate in light of his perception that the parties are “very litigious” and that “more objections and motions” are likely. ECF 204 at 4. That determination should not be disturbed solely because Defendants prefer delay. ECF 209 at 9 (arguing that the Magistrate Judge “should” have waited until after resolution of the motions for summary judgment).

In support of their claim that the Magistrate Judge “should” have abstained from ruling on the pending motions, Defendants cite nonbinding caselaw for the proposition that “discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending.” ECF 209 at 9–10. However, the District Court previously rejected Defendants’ efforts to stay discovery in this case, and Defendants should not be permitted to seek reconsideration of that determination via the instant discovery dispute. *See* ECF 170 at 2 (“The Court does not consider the fact that motions are currently pending to be sufficient justification to warrant a stay of discovery.”). Moreover, the cases Defendants cite support the District Court’s discretion with regard to timing of discovery. *See, e.g., Cleveland Const., Inc. v. Schenkel & Schultz Architects, P.A.*, 2009 WL 903564, at \*2 (W.D.N.C. Mar. 31, 2009) (“Trial courts . . . are given wide discretion to control th[e] discovery process.”). And although the district court in *Doe* initially postponed consideration of the plaintiffs’ motion to compel until after ruling on the motions for summary judgment, the *Doe* court recently

concluded that it was *unable* to resolve the summary judgment motions *because* “[t]he parties disagree about the fundamental nature of the process leading up to the issuance of the Mattis Implementation Plan,” and “[t]his is a genuine factual dispute,” *Doe*, 2018 WL 4053380, at \*7, demonstrating that it is not practical or possible to delay resolution of these discovery disputes while the motions for summary judgment are pending.

Defendants also complain that the Magistrate Judge “decided critical issues.” ECF 209, at 10–11. But Defendants offer no support for the suggestion that “critical” issues are off-limits to magistrate judges. *Contra* 28 U.S.C. § 636(b)(1)(A) (“[A] judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court.”). To the contrary: When, as here, a party has contested assertions of privilege over materials sought in discovery requests, it is inevitable and entirely proper that the court resolving the privilege dispute will consider the relevance of the evidence. *See, e.g., Patrick*, 298 F.R.D. at 339 (reviewing for clear error the magistrate judge’s finding that sought-after documents were relevant). Defendants *themselves* put forward various legal arguments in resisting Plaintiffs’ discovery, and the issues they raised were fully briefed in connection with the discovery motions. Pursuant to the referral of all discovery matters to him, ECF 152, the Magistrate Judge appropriately addressed issues raised by the parties to the extent necessary to decide the motions that had been assigned to him for his prompt resolution. Defendants may not now invoke the existence of these issues to forestall discovery, particularly when it is unclear how soon the dispositive motions can be decided.

Finally, Defendants complain that the Magistrate Judge’s decision requires them to produce “thousands” of documents. *See, e.g.,* ECF 209 at 6. Again, it is Defendants who bear responsibility for the breadth of the order. Plaintiffs repeatedly attempted to narrow the issue

through meet and confers, but to no avail. *See, e.g.*, ECF 177-12 (February 21, 2018 deficiency letter); ECF 177-14 (March 16, 2018 deficiency letter); ECF 177-15 (April 9, 2018 deficiency letter). Defendants asserted deliberative process privilege over tens of thousands of documents.<sup>4</sup> A determination regarding these sweeping privilege claims naturally requires a broad ruling.

**C. The Magistrate Judge’s Decision to Grant Plaintiffs’ Motion to Compel Was Not Contrary to Law.**

The Magistrate Judge’s decision to grant Plaintiffs’ Motion to Compel is consistent with the weight of authority and did not ignore any conflicting dispositive law. Because the Magistrate Judge’s decision is not “contrary to law,” this Court should dismiss the objections.

*1. The Magistrate Judge did not “overlook[]” Supreme Court precedent.*

Contrary to Defendants’ suggestion, the decision in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), does not undercut the Magistrate Judge’s ruling. *See* ECF 208 at 11–12. The deference the Court discussed in *Trump v. Hawaii* applies only to policies that are “neutral on [their] face.” 138 S. Ct. at 2418; *id.* at 2423 (“[T]he only question is evaluating the actions of this particular President in promulgating *an otherwise valid Proclamation.*” (emphasis added)). Here, by contrast, Defendants seek to implement a policy that is facially discriminatory. ECF 85 at 43–44; *accord Karnoski*, 2018 WL 3608401, at \*2 (“Unlike the policy in Hawaii, the Court need not ‘look behind the face’ of the Ban, as the Ban is facially discriminatory.”). Indeed, President Trump granted the Secretary of Defense and the Secretary of Homeland Security the authority to “implement any appropriate policies concerning military service *by transgender individuals.*”

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<sup>4</sup> For example, in one single DoD privilege log (for Production No. 5), Defendants assert deliberative process privilege over nearly 4,500 documents. Defendants almost certainly swept too broadly in asserting this privilege, a supposition borne out by the experience of their initial effort to claw back inadvertently produced documents. Defendants initially sought to retrieve five documents based on a claim of deliberative process privilege. By the time they responded to the 502(d) Motion, Defendants had withdrawn their privilege claims for four of the five documents. *See supra* n.2.

ECF 120-3 at 1 (emphasis added). Evidence relating to the motive underlying the establishment and implementation of the Ban is relevant to whether Defendants' asserted justifications for the Implementation Plan are pretextual. This is exactly the inquiry that the Constitution requires when a policy discriminates on its face. *See United States v. Virginia*, 518 U.S. 515, 533 (1996).

Defendants insist that the Implementation Plan merely discriminates based on the medical condition of gender dysphoria and not transgender status. As explained in Plaintiffs' Reply In Support of Cross-Motion for Summary Judgment, ECF 190 at 17, that is simply not true. Under the Implementation Plan, eligibility for service is determined not by a diagnosis of gender dysphoria, but rather by whether the person has transitioned. *See id.* Specifically, a person whose gender dysphoria has been completely cured as a result of gender transition is barred from enlisting, whereas a person with a history of gender dysphoria is permitted to enlist after 36 months so long as they serve in their sex assigned at birth. ECF 120-1 at 2–3. A policy that bans transgender people from transitioning and serving consistently with their gender identity facially discriminates based on transgender status. *See Karnoski*, 2018 WL 3608401, at \*2 (“That the Ban turns on transgender identity—and not on any medical condition—could not be clearer.”); *Karnoski*, 2018 WL 1784464, at \*6 (W.D. Wash. Apr. 13, 2018) (a person’s medical need to transition is the “very characteristic that defines them as transgender in the first place”); *see also EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018) (rejecting distinction between transgender status and gender transition because “transitioning status constitutes an inherently gender non-conforming trait”); *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) (same). Because the Ban and Implementation Plan are not facially neutral, the deference the Court applied in *Hawaii* does not apply here.

Moreover, assuming deference were appropriate in connection with the policies at issue here, it would not thwart the discovery Plaintiffs seek. Even in the case of the facially neutral policy at issue in *Trump v. Hawaii*, the Court considered the President’s statements, as well as the authority of the Presidency. 138 S. Ct. at 2418. The Court weighed the “significance of those statements” in reviewing the policy and “inform[ed] [its] standard of review” in part considering “the sincerity of the stated justifications for the policy by reference to extrinsic statements.” *Id.* Ultimately, the Court concluded that it could “consider plaintiffs’ extrinsic evidence” of discriminatory intent, *id.* at 2420, the type of evidence Plaintiffs seek here. Thus, even if *Trump v. Hawaii* did suggest deference is owed to the policy at issue here—which it does not—the exercise of deference would not preclude the discovery Plaintiffs seek.<sup>5</sup>

2. *The Magistrate Judge did not “overlook[]” binding Fourth Circuit precedent regarding applicability of the deliberative process privilege.*

The Magistrate Judge did not act “contrary to law” in holding that the deliberative process privilege is inapplicable when, as here, a plaintiff’s cause of action turns on the government’s intent. ECF 209 at 15–22. In fact, the Magistrate Judge’s decision to compel production of the three categories of materials sought in Plaintiffs’ Motion to Compel reflects the “dominant view” of courts that have considered the applicability of deliberative process privilege in analogous circumstances. *United States v. Lake Cty. Bd. of Comm’rs*, 233 F.R.D. 523, 527 (N.D. Ind. 2005); *see* ECF 177-33 (Reply In Support of Motion to Compel) at 10. These courts have widely concluded that, “[i]f the plaintiff’s cause of action is directed at the government’s

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<sup>5</sup> Defendants assert that in *Trump v. Hawaii* the Supreme Court rejected limited discovery as inappropriate under the rational basis standard the Court applied in that case. ECF 209 at 14 n.5. But this Court has already concluded that President Trump’s Ban is subject to heightened scrutiny—not rational basis review. ECF 85 at 43–44. Moreover, even if rational basis review were the standard, the footnote Defendants cite does not even mention discovery, and it does not imply that discovery on the factual matters Justice Breyer referenced would have been inappropriate. *See* 138 S. Ct. at 2423 n.7.

intent, . . . it makes no sense to permit the government to use the privilege as a shield.” *In re Subpoena Duces Tecum Served on the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998); *see also Dunnet Bay Constr. Co. v. Hannig*, 2012 WL 1599893, at \*3 (C.D. Ill. May 7, 2012) (“The deliberative process privilege . . . does not apply when the lawsuit puts at issue the intent of the officials making the governmental policy decision.”); *Children First Found., Inc. v. Martinez*, 2007 WL 4344915, at \*7 (N.D.N.Y. Dec. 10, 2007) (“[I]f the party’s cause of action is directed at the government’s intent in rendering its policy decision and closely tied to the underlying litigation then the deliberative process privilege ‘evaporates.’”); *Jones v. City of Coll. Park*, 237 F.R.D. 517, 521 (N.D. Ga. 2006) (“[T]he privilege is simply inapplicable, because government intent is at the heart of the issue in this case.”); *Lake Cty. Bd. of Comm’rs*, 233 F.R.D. at 527 (“the deliberative process privilege does not apply when the government’s intent is at issue”).

No case from this circuit, much less a binding case, suggests otherwise. Defendants’ objections rely primarily on an unpublished table decision, *Cipollone v. Liggett Group*, 812 F.2d 1400 (Table), 1987 WL 36515 (4th Cir. Feb. 13, 1987). ECF 209 at 15. The *Cipollone* court did not consider this question, however, because the government’s intent was not at issue in that case. 1987 WL 36515, at \*1 (noting that the party sought governmental documents through a Rule 45 motion for an underlying lawsuit that did not involve a governmental entity). The three district court opinions from this circuit that Defendants include in a “*see also*” cite also do not support Defendants’ argument. *See* ECF 209 at 16. In *Brown v. Meehan*, 2014 WL 4701170, at \*3 (E.D. Va. Sept. 22, 2014), and *Murray Energy Corp. v. McCarthy*, 2016 WL 6902359, at \*4 (N.D.W. Va. July 20, 2016), as in *Cipollone*, the plaintiffs did not allege that the government’s intent was at issue, so the court did not consider the question. And the decision in *Spell v.*

*McDaniel*, 591 F. Supp. 1090, 1117 (E.D.N.C. 1984), actually supports *Plaintiffs'* argument. In *Spell*, the plaintiffs did not argue that the key role of the government's intent in that case should render the privilege inapplicable, yet the court—without analyzing individual documents—still ordered disclosure of the documents, citing allegations that the government was “deliberately indifferent” to allegations of misconduct. *Id.* at 1117–18. The court there concluded that “[i]n order for plaintiff to prove these allegations, he must have an opportunity to discover and review internal investigative files and reports.” *Id.* at 1118. And, contrary to Defendants' speculation about potential misuse of this principle (ECF 209 at 22), Plaintiffs in this case have not simply recast their claims in order to put Defendants' intent at issue. The Court itself recognized that intent is central to this case when it granted the preliminary injunction. ECF 85 at 42–44.

Even were the Court to apply the four-prong balancing test Defendants demand<sup>6</sup>—which it is not obligated to do—the result would be the same. Several courts Defendants describe as skeptical of the categorical approach in fact conclude that when government intent is of central importance to the case, the plaintiff's need for the privileged documents is dispositive in the balancing test. *See, e.g., In re Delphi Corp.*, 276 F.R.D. 81, 85 (S.D.N.Y. 2011) (explaining that decisions which have held that the deliberative process privilege is inapplicable when the plaintiff's cause of action goes to the government's intent “simply involve logical applications of the balancing test”; namely, “[w]here the deliberative or decisionmaking process is the ‘central issue’ in the case, the need for the deliberative documents will outweigh the possibility that disclosure will inhibit future candid debate among agency decision-makers.”); *First Heights*

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<sup>6</sup> The balancing test discussed in *Cipollone* considers: “(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government's role (if any) in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.” 1987 WL 36515, at \*2 (internal quotation marks omitted).

*Bank, FSB v. United States*, 46 Fed. Cl. 312, 322 (2000) (finding that the balance weighed in favor of disclosure because the documents provided the “only way to obtain information critical to responding to the various defenses raised by the Government”); *see also Jones*, 237 F.R.D. at 521 (“Whether this court applies a balancing test or finds that the privilege simply does not apply, the undersigned reaches the same result.”); *Holmes v. Hernandez*, 221 F. Supp. 3d 1011, 1021 (N.D. Ill. 2016) (“Where a plaintiff directly challenges a government agency’s deliberative process, courts routinely find that there is a particularized need for disclosure”—particularly where the issue “is the deliberative process.” (internal quotation marks omitted)); *Scott v. Bd. of Educ. of City of E. Orange*, 219 F.R.D. 333, 337–38 (D.N.J. 2004) (citing the balancing test and concluding that the intent factor is dispositive). Thus, under the four-factor balancing test, application of factor 1 (relevance) would require production, given the centrality of governmental intent to Plaintiffs’ claims.

The remaining *Cipollone* factors also weigh in favor of disclosure, both for the categories of documents and information at issue in Plaintiffs’ Motion to Compel and for the single claw-back document at issue in the 502(d) Motion. Defendants do not contest that the government has a central role in this litigation. *See* ECF 184 at 28–31. And the internal evidence of the government’s deliberations regarding the Ban and its implementation is unavailable from sources other than Defendants. Defendants insist that a production of 30,000 pages and a so-called “administrative record” ought to be ample evidence to satisfy Plaintiffs’ need for evidence (ECF 209 at 18), but Defendants have asserted deliberative process privilege for over 40,000 documents, and the “administrative record” itself is riddled with deliberative process privilege redactions. *See* ECF 177-34 at 2. This missing material is likely to contain the information most relevant to Plaintiffs’ claims regarding Defendants’ intent and decision-making process. As for

the fourth factor, Defendants offer only “conclusory allegations” that disclosure of the deliberative materials Plaintiffs seek here would chill future policy discussions.<sup>7</sup> *See Cipollone*, 1987 WL 36515, at \*1. *Karnoski*, 2018 WL 3608401, at \*4 (assuming, without deciding, that the balancing test applies and ruling that “the deliberative process privilege does not apply in this case”).

The argument presented under seal in Plaintiffs’ 502(d) Motion includes application of the four-factor balancing test to a specific document. ECF 191 at 7–11. That argument shows, *inter alia*, Plaintiffs’ need for the information in the document and their inability to obtain the information elsewhere, confirming the correctness of the Magistrate Judge’s ruling on the Motion to Compel. *Cf. Cipollone*, 1987 WL 36515, at \*2 (affirming the district court’s order to disclose documents allegedly shielded by the deliberative process privilege because the party “demonstrated a compelling need for the materials in its litigation with [the opposing party], and one that could not be satisfied in other ways”).

3. *The Magistrate Judge was not required to adjudicate Plaintiffs’ Motion to Compel on a document-by-document basis.*

Defendants insist that the Magistrate Judge’s order was contrary to law because Plaintiffs must show a “compelling” or “particularized need” for “specific documents.” ECF 209 at 17. But Plaintiffs have done so: as established in the Motion to Compel, Defendants’ intent and decision-making process are central to this case, and documents and information involving the deliberative process surrounding the Ban and the Implementation Plan go to the government’s intent and decision-making process. ECF 177-3 at 10–13. As discussed above, such evidence is

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<sup>7</sup> Defendants provide no specifics regarding the chilling effect they claim the Magistrate Judge should have considered, other than speculation that disclosure of a hypothetical communication from the Deputy Secretary of Defense to the Secretary might chill further provision of advice. In any event, courts have concluded that any chilling effect is outweighed in the balancing test

not available from other sources. Moreover, as set forth in their extensive 56(d) affidavit (ECF 177-4), Plaintiffs need this information to oppose Defendants' pending motion for summary judgment. Contrary to Defendants' claim (ECF 208 at 5, 9–10), the fact that Plaintiffs themselves have moved for summary judgment does not defeat their need for the discovery at issue here. *See Zook v. Brown*, 748 F.2d 1161, 1166 (7th Cir. 1984) (“The contention of one party that there are no issues of material fact sufficient to prevent the entry of judgment in its favor does not bar that party from asserting that there are issues of material fact sufficient to prevent the entry of judgment as a matter of law against it.” (internal quotation marks omitted)).

Defendants purport to cite authority that a document-by-document review must be performed before a party can show a “particularized need.” *See* ECF 209 at 17–18. The cases they cite do not support that proposition. For example, Defendants rely on *United States v. Farley*, 11 F.3d 1385 (7th Cir. 1993), for the proposition that a plaintiff must show a “particularized need” to overcome the deliberative process privilege. ECF 209 at 17. However, a later decision from a court within the Seventh Circuit applied *Farley*'s particularized-need test and determined, without reviewing individual documents, that plaintiffs had a particularized need for the documents because their case turned on the government's decision-making process. *Ferrell v. U.S. Dep't of Hous. & Urban Dev.*, 177 F.R.D. 425, 429–31 (N.D. Ill. 1998) (ordering disclosure of all 457 documents defendants had withheld pursuant to the deliberative process privilege because “the government's decisionmaking process in this matter . . . [was] ‘the case’ and [was] directly relevant and crucial” to the plaintiffs' motion). The Magistrate Judge correctly ruled that the privilege does not apply *at all* to the categories of documents identified in Plaintiffs' Motion to Compel—a document-by-document review is not required. *See Karnoski*,

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when intent of the government is the central issue in a case. *See, e.g., In re Delphi Corp.*, 276 F.R.D. at 85; *Jones*, 237 F.R.D. at 521–22.

ECF 311 at 7 (finding “no support” for Defendants’ claim that deliberative process privilege must be determined “on a document-by-document basis,” and reiterating that the deliberative process privilege “does not apply *at all* in cases involving claims of governmental misconduct or where the government’s intent is at issue” (emphasis in original)).

A document-by-document review is particularly inappropriate in this case. Defendants have withheld thousands of documents based on the deliberative process privilege, in many cases with only boilerplate recitation of the privilege in their privilege logs. In these circumstances, the Court should not have to devote its resources to adjudicating one document at time, particularly where the categories of materials covered by Plaintiffs’ Motion to Compel go to the central issue of the government’s intent. *See Karnoski*, ECF 311 at 7 (“The Court also notes that, given the deficiencies in Defendants’ privilege logs, it would not have been possible to evaluate the privilege on a document-by-document basis.”).

**D. The Magistrate Judge’s Factual Findings Were Not Erroneous, Let Alone “Clearly Erroneous.”**

The District Court may overturn a magistrate judge’s factual findings only if the findings are “clearly erroneous.” Fed. R. Civ. P. 72(a). This standard is “deferential,” and a magistrate’s findings of fact should be affirmed unless “the reviewing court’s view of the entire record leaves the Court with the definite and firm conviction that a mistake has been committed.” *FEC v. Christian Coal.*, 178 F.R.D. 456, 460 (E.D. Va. 1998) (citing *Harman v. Levin*, 772 F.2d 1150, 1153 (4th Cir. 1985)). The reviewing court may not “substitute its own conclusions for that of the magistrate judge. Rather, the court is only required to determine whether the magistrate judge’s findings are reasonable and supported by the evidence.” *Bost*, 2017 WL 3503673, at \*4.

Defendants cite three “examples” of purportedly erroneous findings by the Magistrate Judge. All three findings are eminently reasonable and supported by evidence; certainly, they are not clearly erroneous.

First, the Magistrate Judge did not clearly err in finding that the Panel of Experts would not have existed but for President Trump’s Twitter statements and the August 2017 Ban. Defendants assert that Secretary Mattis’s June 30, 2017 order regarding the starting date for transgender accessions was the true impetus for the formation of the Panel of Experts. ECF 209 at 24–25. As explained in Plaintiffs’ Reply In Support of Cross Motion for Summary Judgment, this is revisionist history, at odds with the actual record. ECF 190 at 12. DoD did initiate a review in the middle of 2017. ECF 40-11. However, that review involved assessment of the military’s readiness to implement the accessions element of the Open Service Directive by July 1, 2017, not whether to implement the Open Service Directive at all. *See* ECF 190-2 (USDOE00003258 at 3263). Indeed, DoD expressly informed each military department that it “d[id] not intend to reconsider prior decisions unless they cause readiness problems that could lessen our ability to fight, survive and win on the battlefield.” *Id.* Consistent with that guidance, some of the branches recommended delays of the date by which accessions of transgender persons were to begin, to permit further study of various issues.<sup>8</sup>

In July 2017, President Trump abruptly interrupted and preempted DoD’s review—in his words, doing the military a “great favor” by resolving this “confusing issue” himself and ordering the military to reinstate the historical ban on service by transgender persons. ECF 40-

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<sup>8</sup> Tellingly, no branch recommended reinstating the historical ban on transgender service. *Id.* at 3258 (Air Force: recommending 12- to 36-month delay to starting accessions), 3260 (Army: recommending 24-month delay to starting accessions), 3262–64 (Navy: finding “no impediments” to the July 1, 2017 start date for accessions, but requesting consideration of one year delay), 3265 (Marine Corps: recommending 12-month delay to starting accessions).

12. Nothing in the record supports the proposition that the Panel of Experts would have studied and recommended a broad ban in the absence of President Trump’s directives. It was not “clearly erroneous” for the Magistrate Judge to reject Defendants’ unsupported proposition. In fact, Defendants’ own talking points acknowledge that DoD issued an “implementation plan to meet the President’s intent.” ECF 163-9.

Second, Defendants attack the Magistrate Judge’s skepticism regarding the findings of the Panel of Experts in light of the conclusion of an earlier DoD panel that there was no justifiable reason to exclude transgender persons from military service. *See* ECF 209 at 26–27. This does not amount to a “clearly erroneous” finding. The Magistrate Judge regarded the findings of the previous panel as relevant because that panel was formed and completed its work before DoD reached a final policy decision and because that process incorporated both the military leadership and transgender representatives. *See* ECF 204 at 6 (citing findings from the transgender working group established in 2015 by then-Secretary of Defense Ashton Carter). The Magistrate Judge’s explanation is sensible on its face and shows that his findings were “reasonable and supported by the evidence.” *Bost*, 2017 WL 3503673, at \*4.

Third, Defendants repeat their argument that the Implementation Plan does not actually ban transgender persons from military service and assert that the Magistrate Judge’s statement that the Implementation Plan resulted in “transgender persons [being] banned from military service” was clearly erroneous. ECF 209 at 27 (quoting ECF 204 at 9). As a preliminary matter, the Magistrate Judge did not rest his grant of Plaintiffs’ Motion to Compel on this statement; the statement appears in the section discussing Defendants’ Motion for Protective Order. *See* ECF 204 at 9. Moreover, the Magistrate Judge’s finding is not wrong, much less “clearly erroneous.” As explained in Plaintiffs’ Reply In Support of Cross-Motion for Summary Judgment, ECF 190

at 17, under the Implementation Plan, eligibility for service hinges on whether the person has transitioned gender. *See id.* Specifically, a person whose gender dysphoria has been completely cured as a result of gender transition is barred from enlisting, whereas a person with a history of gender dysphoria is permitted to enlist after 36 months of stability living in their sex assigned at birth, so long as they continue to serve in that sex. ECF 120-1 at 2–3. The suggestion that this is not discrimination based on transgender status is ludicrous. *See Karnoski*, 2018 WL 3608401, at \*2 (“That the Ban turns on transgender identity—and not on any medical condition—could not be clearer.”); *supra* page 12.

The weakness of these three examples simply reinforces the conclusion that the Magistrate Judge’s decision was “reasonable and supported by evidence.” *Bost*, 2017 WL 3503673, at \*4.

**E. The Magistrate Judge’s Dismissal of Plaintiffs’ 502(d) Motion as Moot Was Neither Clearly Erroneous Nor Contrary to Law.**

The Magistrate Judge’s decision to dismiss Plaintiffs’ 502(d) Motion as moot was not clearly erroneous or contrary to law. The single document Defendants clawed back and for which they then chose to defend their assertion of the deliberative process privilege plainly falls within the scope of Plaintiffs’ Motion to Compel. Defendants claim only the deliberative process privilege for this document (which presents a good illustration of why the Magistrate Judge’s ruling on the Motion to Compel was correct). Defendants do not contest that the document falls within one of the categories covered by the Motion to Compel: “deliberative material[] relating to the activities of the DoD’s so-called ‘panel of experts’ and its working groups tasked with developing a plan to study and implement that decision.” *See* ECF 177-2; ECF 205. Grant of the Motion to Compel therefore dictates that the clawed back document is not protected by the privilege, and the 502(d) Motion is therefore moot.

**CONCLUSION**

For the foregoing reasons, Defendants' Objections to the Magistrate Judge's Memorandum Opinion and Order should be overruled, and the Magistrate Judge's Order should be affirmed.

Dated: September 14, 2018

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**CERTIFICATE OF SERVICE**

I hereby certify that, on September 14, 2018, a copy of the foregoing and its exhibits were served on Defendants via CM/ECF. In addition, a courtesy copy was mailed to the Chambers of Judge Russell.

/s/ Marianne F. Kies  
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