No. 18-72159

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

DONALD J. TRUMP, President of the United States, *et al.*,
Petitioners-Defendants,

v.

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

RYAN KARNOSKI, *et al.*,
Real Parties in Interest-Plaintiffs,

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

REAL PARTIES IN INTEREST-PLAINTIFFS' ANSWER TO PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

Peter C. Renn
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
4221 Wilshire Blvd., Ste. 280
Los Angeles, CA 90010
(213) 382-7600

Tara L. Borelli
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
730 Peachtree St., NE, Ste. 640
Atlanta, GA 30308
(404) 897-1880

James F. Hurst, P.C.
Stephen R. Patton, P.C.
Jordan M. Heinz
Scott Lerner
Vanessa Barsanti
Daniel Siegfried
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000

Counsel for Real Parties in Interest-Plaintiffs

Additional Counsel

Diana Flynn
Sasha Buchert
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
1875 I St., NW 5th Fl.
Washington, DC 20006
(202) 740-0914

Camilla B. Taylor
Kara Ingelhart
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
105 W. Adams, 26th Fl.
Chicago, IL 60603
(312) 663-4413

Paul D. Castillo
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
3500 Oak Lawn Ave., Ste. 500
Dallas, TX 75219
(214) 219-8585

Peter E. Perkowski
OUTSERVE-SLDN, INC.
445 S. Figueroa St., Ste. 3100
Los Angeles, CA 90071
(213) 426-2137

Derek A. Newman
Jason B. Sykes
NEWMAN DU WORS LLP
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, Real Party in Interest-Plaintiff Human Rights Campaign hereby files its corporate disclosure statement and certifies that Human Rights Campaign does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1, Real Party in Interest-Plaintiff Gender Justice League hereby files its corporate disclosure statement and certifies that Gender Justice League does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock. Gender Justice League further certifies that Gay City Health Project serves as the fiscal sponsor for Gender Justice League.

Pursuant to Federal Rule of Appellate Procedure 26.1, Real Party in Interest-Plaintiff American Military Partner Association hereby files its corporate disclosure statement and certifies that American Military Partner Association does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

RULES

INTRODUCTION AND SUMMARY OF ARGUMENT

Neither of the privilege issues raised in Defendants' petition warrants mandamus. First, as to executive privilege, Defendants dress their petition in the trappings of a showdown between the judiciary and the executive, claiming that mandamus is necessary "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities" and a "substantial intrusion on the Executive Branch." Pet. 17. But, at this point, all the district court has ordered is for Defendants' *counsel* to provide the privilege log-type information required by Federal Rule of Civil Procedure 26(b)(5) and its previous orders. The order at issue did not "substantially intrude" on the Executive Branch or "interfere" with the President's "ability to discharge [his] constitutional responsibilities." It simply reflected the court's exercise of discretion to resolve a discovery-related dispute over a privilege log. This is not even remotely the type of case warranting this Court's extraordinary intervention by way of mandamus.

Nor did the district court err—much less clearly err, as required for mandamus—in requiring Defendants to supplement their privilege log. There is no legal basis for Defendants' argument that Plaintiffs must first bear some initial, heightened burden under the circumstances here. And, even if such a burden existed, Plaintiffs amply satisfy it: the log information at issue is necessary to ascertain whether executive privilege applies; the required supplementation is

tailored to that need; and there is no other source from which that log information can be obtained. There also is no support for Defendants' remarkable contention that this routine log information is itself privileged, which would effectively immunize assertions of executive privilege from judicial review.

Second, as to the deliberative process privilege, the district court likewise did not clearly err in applying the relevant balancing test to the facts here and finding that Plaintiffs' need for the documents outweighed Defendants' interest in withholding them. Defendants' decision-making process and deliberations that led to the Ban sit at the heart of multiple issues in the case. Discovery concerning that process and those deliberations is necessary to test: the actual motivations for the Ban at the time it was adopted, which is critical for heightened scrutiny; Defendants' assertions that the Ban resulted from "the professional judgment of military authorities," Pet. 20 (quoting *Winter v. NRDC*, 555 U.S. 7, 24 (2008)), which is a factual prerequisite for the deference they urge; and Defendants' claim that Secretary Mattis's February 22, 2018 Memorandum represented "a new policy" that was initiated by the military independent of the White House, Pet. 3. As the district court found, this evidence cannot be obtained from other sources.

The district court also carefully considered Defendants' asserted interest in frank policy deliberation, but it found that Defendants' claimed chill was based on speculation, lacked specificity, and, in any event, could not outweigh Plaintiffs'

need for the discovery sought. As many other courts have recognized, the deliberative process privilege cannot justify withholding information where, as here, the government's decision-making process and deliberations are precisely what is at issue in the litigation. No clear error lies in the district court's finding that the scales tipped in favor of requiring production of the documents withheld.

RELEVANT BACKGROUND[1]

In 2016, the United States Department of Defense ("DoD") concluded a comprehensive review of its policy towards military service by transgender individuals, including consultation with military and medical experts. DoD's unanimous conclusion, announced on June 30, 2016, was that there was no legitimate reason to exclude transgender individuals from military service.

But just 13 months later, President Trump abruptly decreed via Twitter that, after purportedly consulting "Generals and military experts," he would "not accept or allow" transgender individuals to serve in the military. Add.77. In fact, these tweets caught the Joint Chiefs by surprise. As the Chairman admitted to the Service Chiefs, the announcement was "unexpected" and he "was not consulted." *See* SER.136. President Trump then directed Secretary of Defense James Mattis to

[1] Because the mandamus petition has been assigned to the same panel deciding the related preliminary injunction appeal (No. 18-35347), this brief presumes familiarity with briefing in that appeal. References to "ER" and "SER" refer to the Excerpts of Record and Supplemental Excerpts of Record in the related appeal. References to "SA" refer to the Supplemental Addendum submitted herewith.

develop a plan to implement the Ban.[2] Plaintiffs filed suit challenging the Ban's constitutionality and obtained a preliminary injunction to maintain the status quo that existed before the Ban. Add.47-69.

I. Defendants' Motion to Dissolve the Preliminary Injunction

On February 22, 2018, Secretary Mattis delivered the Implementation Plan President Trump had ordered. On March 23, 2018, Defendants publicly released that plan. ER.158. Defendants then filed a motion to dissolve the preliminary injunction. On April 13, 2018, the district court denied that motion after finding that the Implementation Plan did not "substantively rescind or revoke the Ban, but instead threaten[ed] the very same violations that caused it and other courts to enjoin the Ban in the first place." Add.27, 46.

II. Defendants' Motion to Stay Discovery

At the same time Defendants moved to dissolve the preliminary injunction, they also asked the district court to stay all discovery, citing separation-of-powers concerns allegedly raised by Plaintiffs' requests for discovery that Defendants claimed was subject to executive privilege. Dkt. 217. In opposition, Plaintiffs noted that the President had not yet even invoked the privilege or provided the log-type information required by Federal Rule of Civil Procedure 26(b)(5). Dkt. 230 at

[2] The "Ban" refers to Defendants' policy generally prohibiting military service by openly transgender people, as announced and ordered by President Trump and detailed in Secretary Mattis's implementation plan (the "Implementation Plan").

5-7. On April 19, 2018, the district court denied the motion to stay, and ordered that "to the extent that Defendants intend to claim Executive privilege, they must 'expressly make the claim' and provide a privilege log" that complied with Rule 26(b)(5). Add.15. Defendants did not appeal that ruling. Defendants have thus been aware of their obligation to submit an adequate privilege log for several months. Although responsive documents have been collected and reviewed, the only log provided to date groups large numbers of documents by category, omitting any information concerning the individual documents withheld. Add.90-97.

III. The District Court's Summary Judgment Opinion

On April 13, 2018, the district court denied the government's partial motion for summary judgment on all claims against the President, finding that "not only does it have jurisdiction to issue declaratory relief against the President, but that this case presents a 'most appropriate instance' for such relief." Add.44 (quote omitted). The court also granted in part and denied in part Plaintiffs' motion for summary judgment, ruling that the Ban is subject to strict scrutiny because discrimination against transgender people constitutes a suspect classification. Add.35-39. But the court denied complete relief, holding that it needed factual information concerning the "deliberative process" and actual reasons for the Ban, and the military's involvement in that process, in order to evaluate Defendants'

claim that the Ban is entitled to military deference and to analyze the Ban under heightened scrutiny. Add.41-43, 46.

IV. The Parties' Discovery Disputes

In December 2017 and January 2018, Plaintiffs served discovery requests targeting these and other key issues at the core of their constitutional claims, such as the purported government interests supporting the Ban and the "deliberative process" preceding its announcement, including who the President consulted before ordering the Ban. SA.38-62. The government's responses broadly invoked the presidential communications privilege (hereafter, "executive privilege") and the deliberative process privilege, culminating in the two discovery motions that were the subject of the challenged district court order.

A. Plaintiffs' Motion to Compel Documents Withheld Under the Deliberative Process Privilege

In their discovery responses, the government objected to any discovery concerning "communications or information protected by the deliberative process privilege." SA.64-165. In total, Defendants have withheld or redacted approximately 44,000 documents based on deliberative process privilege, or approximately 58% of all documents they have identified as responsive. Dkt. 310 at 24. After attempts to resolve these claims failed, and in light of the Court's summary judgment opinion highlighting the importance of deliberative materials, Plaintiffs moved to compel on May 10, 2018. Dkt. 245.

B. Defendants' Motion for a Protective Order

The government took an even more extreme position as to discovery from the President, refusing to provide any substantive responses whatsoever to written discovery or to produce a single document. Instead, the President provided only a "general objection" that he was immune from civil discovery and that "virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege." SA.15-32, 112-165. The government thereafter moved for a protective order to prevent any substantive discovery from the President and to preclude any discovery from sources touching on presidential communications and deliberations. Dkt. 268 at 1.

C. The District Court's July 27, 2018 Discovery Order

The district court heard argument on both motions, and on July 27, 2018 issued a decision granting Plaintiffs' motion to compel and denying Defendants' motion for a protective order. First, the court found that Plaintiffs had overcome the deliberative process privilege under the relevant balancing test. Add.6-7. Second, the court rejected the notion that the President is immune from civil discovery and found "no support" for the government's claim that Plaintiffs must first exhaust all non-privileged discovery, meet a heavy burden of need, and substantially narrow all discovery requests before the President must invoke the privilege and provide an adequate privilege log. Add.10. Third, the court found

that the government's privilege logs failed to comply with Rule 26(b)(5) because they omitted document-specific information, such as authors, recipients, and adequate privilege descriptions. Add.11. The court ordered the government to produce the documents withheld solely under the deliberative process privilege within ten days and, noting that it had already ordered the President to produce an adequate privilege log in its April 19, 2018 order denying a stay, again ordered him to produce an adequate log, this time within ten days. Add.10-11.

On August 20, 2018, the district court denied Defendants' motion to stay the discovery order, but extended the deadline for compliance until a ruling on their mandamus petition. SA.1-2. The district court directed Defendants to certify by October 10, 2018 that they had prepared legally sufficient privilege logs and taken steps to prepare to produce materials withheld under the deliberative process privilege. SA.10. However, the court held that Defendants need not provide these logs and materials to Plaintiffs until further order of the court. *Id.*

STANDARD OF REVIEW

"The writ of mandamus is an 'extraordinary' remedy limited to 'extraordinary' causes." *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court*, 408 F.3d 1142, 1146 (9th Cir. 2005). "[O]nly exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify the invocation of" mandamus. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542

U.S. 367, 380 (2004) (internal quotes and citations omitted). Limits on mandamus are especially "salient" in the discovery context because "the courts of appeals cannot afford to become involved with the daily details of discovery." *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) (internal quotes omitted).

This Court examines multiple factors in evaluating a mandamus petition, but consideration of only one factor—whether the district court's order is clearly erroneous as a matter of law—requires denial of the petition here. *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977). Its absence "is dispositive." *Online Speakers*, 661 F.3d at 1177. Mandamus will not issue for mere legal error; clear error is required. *Will v. United States*, 389 U.S. 90, 104 (1967) ("Mandamus, it must be remembered, does not 'run the gauntlet of reversible errors.'"). And, "'[c]lear error' is a highly deferential standard of review" requiring "a definite and firm conviction that the district court's interpretation . . . was incorrect." *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011) (internal quotes omitted).

ARGUMENT

I. The Required Supplementation of Defendants' Privilege Log Does Not Warrant the Extraordinary Remedy of Mandamus.

A. The District Court Did Not Clearly Err in Declining to Impose an Initial, Heightened Burden on Plaintiffs.

There is no general requirement that Plaintiffs must satisfy some initial heightened burden before Defendants are required to invoke executive privilege and provide a legally adequate privilege log. That is particularly true under the circumstances here, where Defendants have already collected, reviewed, and even logged responsive documents, and the challenged order simply required that they supplement the existing log to comply with Rule 26(b)(5). Defendants' arguments conflate the legal analysis for determining whether the privilege has been overcome by Plaintiffs—an issue not yet decided in this litigation—with their threshold obligation to invoke the privilege and provide an adequate log.

The controlling case on executive privilege is *United States v. Nixon*, 418 U.S. 683 (1974). In upholding a subpoena for discovery from President Nixon for use in a criminal prosecution, the Supreme Court held that executive privilege is qualified rather than absolute. While recognizing the need for an appropriate level of protection for presidential communications, *Nixon* held that executive privilege must be narrowly construed, because it is "in derogation of the search for truth" and can "cut deeply into the guarantee of due process of law and gravely impair the

basic function of the courts." *Id.* at 710, 712. Of particular relevance here, the Supreme Court approved the approach adopted by the district court there: the President must first properly invoke the privilege, which may then be overcome by an adequate showing of need for the discovery sought. *Id.* at 713.

Defendants misread *Cheney*, 542 U.S. at 367, as purportedly overruling that approach and assigning the initial burden on the party seeking discovery. But *Cheney* was a narrow, fact-bound decision that did not establish a general rule for all cases where discovery is sought from the President. There, the district court had ordered the government to produce the discovery sought, even though the requests were overbroad. Indeed, because the relief requested there was simply to obtain information about an advisory group, the discovery sought would provide the plaintiffs with everything they had hoped to gain if they succeeded on the merits "and much more besides." *Id.* at 388.

The Supreme Court recognized that *Nixon* requires that the President must "first assert privilege to resist disclosure," *id.* at 384, but concluded that in the unique circumstances presented by *Cheney*, the government was not required to "bear the onus of critiquing the unacceptable discovery requests line by line," *id.* at 388. *Accord* SA.4-5. Unlike in *Nixon*, withholding the information sought did not implicate any issue of "constitutional dimension[]," nor did it interfere with a "court's ability to fulfill its constitutional responsibility to resolve cases and

controversies." *Cheney*, 542 U.S. at 384, 385; *accord* SA.4.

As with *Nixon*, this case is "vastly different" in every relevant respect. SA.5. First, there is no conceivable argument of overbreadth as to the only information required at this juncture: privilege-log information. *Cf. Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 532 F.3d 860, 867 (D.C. Cir. 2008) (finding *Cheney*'s concern about overbroad discovery requests inapplicable to basic information on a visitor log). Indeed, even the deficient log produced to date confirms that this information is directly relevant, contrary to Defendants' assertions of overbreadth. For example, the log identifies fourteen categories of responsive documents withheld primarily based on executive privilege—and all of the documents relate to policymaking concerning military service by transgender people, which perfectly mirrors the scope of what is at issue in this case. Add.94-96.

Second, as the district court explained, "this case involves a concern of 'constitutional dimension,' and indeed, one of the most critical that a court can be called upon to resolve—state-sponsored discrimination against a suspect class." SA.5. Third, as in *Nixon*, Defendants' refusal to provide the requested information interferes with the court's ability to perform its constitutional duties under Article III, including determining whether the privilege properly applies and has been overcome. SA.5. At a minimum, the district court did not commit "clear error" in

declining to interpret *Cheney* as purporting to require the universal rule that Defendants claim.

B. Even If a Heightened Showing Was Required for Production of an Adequate Log, Plaintiffs Have Satisfied It.

Even if Plaintiffs were required to make a heightened showing before Defendants were obligated to provide an adequate log, that requirement has been amply satisfied here. There is a particularized need for an adequate privilege log; requiring log supplementation is not overbroad; and the omitted information is unavailable through other sources. Any burden in complying with the district court's order is also reduced here, given that Defendants have already collected and logged the documents at issue, and must merely supplement that log with further detail.

Particularized Need. First, there is a particularized need for an adequate privilege log because it is necessary to adjudicating Defendants' executive privilege claims. The district court found that the existing log was deficient because it failed to provide sufficient information to assess the claimed privilege, including "*specific, non-boilerplate* privilege descriptions *on a document-by-document basis*." Add.11. The current log groups together documents under general descriptions that prevent analysis of whether the privilege has been properly claimed, in violation of Federal Rule of Civil Procedure 26(b)(5) . *See Wiener v. FBI*, 943 F.2d 972, 979 (9th Cir. 1991) (boilerplate language without

"tailor[ing] the explanation to the specific document withheld" is insufficient); *Burlington N.*, 408 F.3d at 1149. The district court was within its right to insist on a log that complied with these settled legal requirements.

Because the district court did not order production of the underlying documents, there is no basis for challenging whether there is a particularized need for the documents themselves (as opposed to an adequate privilege log) at this stage. But even if such an analysis were required, the underlying documents are essential to multiple issues at the core of this constitutional challenge. For example, they bear on Defendants' claims regarding President Trump's decision-making process for the Ban—including the claim that it was adopted after consultation with "Generals and military experts." Add.7. Negating those claims would not merely vitiate any basis for deference; it would also undermine the government's credibility across-the-board. The documents are also essential to determining the actual reasons and motivations for the Ban, including whether impermissible political considerations, or "prejudice or stereotype," were at play.[3] Add.18. And they bear on Defendants' assertion that the Implementation Plan was a "new" policy, formulated independent of the White House. *See, e.g.*, Add.95 (logging communications with unidentified "DOD Staffers").

Moreover, an adequate privilege log is both necessary and legally required

[3] *Compare* Add.94 (logging documents relating to interactions with Congress) *with* SA.172-77 (describing political motivations for Ban).

regardless of whether President Trump is subject to declaratory relief or properly a party (which he is), even if that issue were before this Court (which it is not). Even as a non-party, President Trump would be subject to third-party discovery, s*ee Doe 2 v. Trump*, -- F. Supp. 3d --, 2018 WL 3736435, at *3 (D.D.C. Aug. 6, 2018), and assessing his claims of privilege would still require an adequate log.

Scope of Information Sought. Second, the district court tailored the required supplementation of the log to the specific need here: assessing whether Defendants have appropriately claimed executive privilege. Defendants assert that Plaintiffs' underlying discovery requests are overbroad but, as explained above, the only disclosure at issue in the challenged order concerns legally required log information. In any event, the district court also found that the underlying discovery is "narrowly focused and indispensable to resolving this case on the merits," SA.5, and Defendants do not even purport to show otherwise.

Nor did the district court clearly err in requiring a log that complied with Rule 26(b)(5). Adequate detail about the documents withheld is essential to determine whether the privilege even applies. *See, e.g., Nixon*, 418 U.S. at 701, 706 (holding that the privilege is limited to "high-level" communications, such as those between the President and his "close" advisors). This is precisely the type of day-to-day discovery question that is committed to the district court's discretion. Conversely, it is plainly inappropriate for a writ of mandamus, "one of the most

potent weapons in the judicial arsenal." *Cheney*, 542 U.S. at 380 (internal quotes omitted).

Alternate Sources. Third, there are no alternate sources from which an adequate privilege log can be obtained. The log concerns *presidential* communications, which are within Defendants' sole possession. And even if such information *were* available from other sources, Defendants' position is that the privilege would apply to those sources as well. Dkt. 268 at 1.

Defendants also argue that Plaintiffs must first exhaust other sources of non-privileged discovery, but there are no other sources from which information on the issues identified above—Defendants' process and deliberations in creating and implementing the Ban—can be obtained. For instance, information unrelated to President Trump's communications will not establish whether President Trump actually consulted with anyone in the military before announcing the Ban.

Burden of Compliance. Finally, any purported burden associated with supplementing Defendants' existing privilege log cannot justify withholding the information at issue. Defendants have already identified, reviewed, and even logged (albeit inadequately) the responsive documents that they claim are privileged. Accordingly, the burden of providing additional log information for this known universe of already collected and reviewed documents is greatly reduced and not remotely the type of "harm" warranting mandamus. And even if

Defendants had not already taken these steps, they would be required in any event, both because they are part and parcel of any privilege invocation, and because of they are a function of Defendants' expansive invocation of executive privilege here. The purported burden of compliance does not excuse Defendants from their discovery obligations. Even where, unlike here, "a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive," that "is not sufficient to establish a violation of the Constitution" and separation of powers. *Clinton v. Jones*, 520 U.S. 681, 703 (1997).

Defendants also cannot claim that *Cheney*'s concern about "insubstantial legal claims" advanced in "vexatious litigation that might distract [the Executive Branch] from the energetic performance of its constitutional duties" applies here. 542 U.S. at 382, 386. Plaintiffs' defense of their constitutional rights is hardly "vexatious." Indeed, like every other federal court to consider a challenge to the Ban, the district court found that Plaintiffs are likely to succeed on the merits.

C. The Information Required for an Adequate Privilege Log Is Not Itself Protected by Executive Privilege.

Defendants' remarkable contention that supplementation of their existing log would itself disclose information covered by executive privilege is wrong and unsupported. *See* SA.6 n.2 ("Defendants do not cite any authority—and the Court is aware of none—that supports [this] claim"). The basic, non-substantive

information required to evaluate whether a party has appropriately claimed privilege is not itself privileged. Defendants' position would prevent meaningful judicial review of such privilege claims and convert the qualified executive privilege into an absolute one, contrary to the Supreme Court's holding in *Nixon.*

Executive privilege applies to the *substance* of communications—not to basic information such as who was involved in a communication or when it occurred. *See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 592 F. Supp. 2d 127, 132 (D.D.C. 2009) ("[T]he presidential communications privilege protects only *communications*; the bits of information contained in the sought records—names of visitors, dates of visits, and in some case who was visited—do not rise to the level of protection"). Indeed, the government routinely provides such information when claiming executive privilege. *See, e.g.*, *In re Sealed Case*, 121 F.3d 729, 735 (D.C. Cir. 1997) ("[T]he White House produced a privilege log identifying the date, author, and recipient of each document withheld as well as a general statement of the nature of each document and the basis for the privilege on which the document was withheld.").

None of what is required on a traditional privilege log, such as author and recipient information, discloses the substance of any presidential advice. The same is true for the date of a communication, which Defendants' current privilege log obscures through wide date ranges spanning several months.

For that reason, Defendants' objection to supplementation of the privilege log also cannot be justified by the purpose of the privilege, which is to facilitate candid advice. *Nixon*, 418 U.S. at 708. Mere disclosure of the participants to a communication, or its date, does not disclose what was advised and thereby chill the willingness of advisors to provide candid advice.

In any event, even if supplementation of the privilege log did implicate executive privilege (which it does not), the privilege is "overcome by an adequate showing of need." *In re Sealed Case*, 121 F.3d at 745. For the reasons discussed above, both the district court and Plaintiffs have a clear need for this information to assess whether the privilege properly applies.

II. The District Court Did Not Commit Clear Legal Error in Ordering Production of Documents Withheld Under the Deliberative Process Privilege.

Defendants likewise fail to show any clear legal error in the district court's decision to compel documents withheld solely on grounds of the deliberative process privilege. As Defendants had urged, the court analyzed Defendants' privilege claims by applying the balancing test in *FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984), which requires a discretionary weighing of four factors designed to test the relative need for and alternative availability of the information sought. A court's discretionary performance of that balancing test is subject to highly deferential review even on direct appeal. *See, e.g., Texaco P.R.,*

Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 885 (1st Cir. 1995) (explaining "the deliberative process privilege is 'a discretionary one'" and therefore refusing "to tinker with the [district] court's determination that the [plaintiff's] interest in due process and fairness outweighed [the government's] interest in shielding its deliberations from public view"). Defendants have not satisfied their even heavier burden here of showing that the district court's application of the correct legal test to the facts of this case gives rise to the exceptional circumstances and clear error required for mandamus.

In fact, other courts considering challenges to the Ban have similarly rejected Defendants' claims regarding the deliberative process privilege and ordered production of the exact same documents on the exact same grounds. *See Stone v. Trump*, No. GLR-17-2459, 2018 WL 3866676, at *3 (D. Md. Aug. 14, 2018); *Doe 2 v. Mattis*, -- F. Supp. 3d --, 2018 WL 4053380, at *7 (D.D.C. Aug. 24, 2018) ("[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.")

Defendants concede, as they must, that "the privilege is qualified" and may be overcome if a party's "need for the materials and the need for accurate fact-

finding override the government's interest in non-disclosure." Pet. 29 (quoting *Warner*, 742 F.2d at 1161). Here, the district court found exactly that, and did so after conscientiously examining the *Warner* factors, including (1) the relevance of the evidence sought; (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 of contemplated policies. *Warner*, 742 F.2d at 1161. As explained below, Defendants cannot demonstrate clear error in the court's analysis of any factor, let alone in its discretionary balancing of all of them.

A. The District Court Committed No Error, Let Alone Clear Error, in Applying the *Warner* Balancing Test to the Facts Here.

1. Relevance of the Evidence Sought.

Defendants dismiss the district court's conclusion that Plaintiffs seek relevant information as "cursory" and premised on an "all-inclusive assumption" of Plaintiffs' need for the information. Pet. 30-31. But this characterization is unfair and inaccurate, as the court explained the relevance of this information at length, over a series of orders. Defendants' deliberations and the actual reasons for the Ban lie at the core of this case for at least two reasons: (1) under settled law, they are not only highly relevant but potentially dispositive in determining whether the Ban survives heightened scrutiny; and (2) Defendants themselves placed the deliberative process at issue by insisting—against all current evidence—that the Ban is entitled to military deference because it was independently "decided by the

appropriate military officials" in "their considered professional judgment." Pet. 21 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)).

Constitutional scrutiny requires examination of Defendants' actual motivations for enacting the Ban. In accordance with settled law, the district court has ruled that heightened scrutiny applies to Plaintiffs' constitutional claims. Add.39, 61-62. Heightened scrutiny requires that Defendants' purported justifications are "genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). In its partial summary judgment ruling, the court found that, in order to apply heightened scrutiny, it needed additional information as to whether "the Ban was sincerely motivated by compelling state interests, rather than by prejudice or stereotype," which "necessarily turns on facts related to Defendants' deliberative process." Add.43. Accordingly, the withheld documents are "highly relevant" so that the court can "consider the actual intent behind" the Ban "when it considers the merits." *See Ariz. Dream Act Coalition v. Brewer*, No. CV-12-02546, 2014 WL 171923, at *3 (D. Ariz. Jan. 15, 2014).

Defendants have put their deliberative process at issue by urging military deference. The district court also directed the parties to "proceed with discovery" on the defense that Defendants have placed squarely at the center of this case: "whether, and to what extent, deference is owed to the Ban," Add.45-46, because it

reflects "the Department [of Defense]'s best military judgment." Add.73.[4]. As multiple courts have found, deference is not warranted to the extent that the Ban is not the product of an independent, military-driven process. *See, e.g.*, *Stone*, 2018 WL 3866676, at *3 (record indicates "that the decision [about the Ban] was made and the panel was formed to justify and enforce that decision" afterward); *Doe 2 v. Trump*, -- F. Supp. 3d --, 2018 WL 3717071, at *13 (D.D.C. Aug. 6, 2018) (plan to implement the Ban was crafted "clearly with assistance from lawyers and an eye to pending litigation").

For that reason, the district court found that "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." Add.7. Where deliberative materials may shed light on government discrimination or other misconduct, "the privilege is routinely denied." *Texaco P.R.*, 60 F.3d at 885. This is because, where there is "any reason" to believe such material "may shed light on" on such matters, "public policy (as embodied by the law) demands that the

[4] Defendants claimed below that deference is required simply because the Ban involves the military. But no limiting principle would exist if mere subject matter alone warranted deference, and it is unthinkable that the courts would be required to defer to an exclusion of African-American service members, for example. Even Defendants' authorities indicate that deference is appropriate only when the policy at issue actually reflects the "professional judgment of military authorities." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

misconduct not be shielded merely because it happens to be predecisional and deliberative." *Alexander v. FBI*, 186 F.R.D. 170, 177-78 (D.D.C. 1999). In such cases, "the decisionmaking process is not 'swept up into' the case, it *is* the case." *United States v. Bd. of Educ. of City of Chicago*, 610 F. Supp. 695, 700 (N.D. Ill. 1985); *accord In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998), *on reh'g in part*, 156 F.3d 1279 (D.C. Cir. 1998) ("If the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the privilege as a shield.").[5]

Accordingly, there is no clear error in the district court's finding that the relevance of the withheld documents weighed in favor of disclosure. Such documents are not only relevant but indispensable to test Defendants' claims that the Ban represents an appropriate exercise of military judgment, rather than a repackaging of the reflexive desire to discriminate reflected in President Trump's tweets. *See Stone*, 2018 WL 3866676, at *3 ("It also could not be more clear that the Defendants' intent—whether it was for military purposes or whether it was

[5] Defendants half-heartedly argue that documents regarding the Carter policy are irrelevant because that policy pre-dated the Ban. Pet. 32. But demonstrating that the same issues Defendants now cite to support the Ban were previously rejected by military leaders is directly relevant to Plaintiffs' rebuttal. Defendants also complain that they must produce "every document remotely connected to the deliberative process." Pet. 30-31. But "Defendants themselves identified these documents as responsive," and each is relevant to "deliberations concerning military service by transgender people." SA.7. Defendants cannot now complain about their own decision to make sweeping assertions of privilege.

purely for political and discriminatory purposes—is at the very heart of this litigation."; finding that the withheld documents are likely to contain evidence of Defendants' intent).

2. Availability of Other Evidence.

Defendants claim that the district court erred because it "never asked [P]laintiffs to show why the discovery they have already obtained is inadequate." Pet. 33. But it matters not how many zeros one adds to the number of pages produced if they are not responsive to Plaintiffs' need and the central issues in dispute; and apart from citing the size of Defendants' document production, Defendants do not explain how those documents allow Plaintiffs the rigorous testing of the deliberative process and rationales for the Ban that the Constitution requires.

Warner illustrates the proper analysis of this factor, and the district court followed that reasoning faithfully. The parties in *Warner* sought memoranda containing "material regarding various aspects of market structure and the merger's effect on competition." 742 F.2d at 1161. *Warner* noted that information about market structure and competitive effects was available to the parties through other sources, which would allow the parties to "obtain and introduce evidence on these issues" without the privileged memoranda. *Id.* at 1161-62. This case could not be more different. Here, Plaintiffs cannot divine Defendants' process

and motivations through any source other than Defendants themselves.

Additionally, the suggestion that the need for discovery is somehow obviated because other plaintiffs in different litigation have deposed "numerous military officials" is, at best, disingenuous. Pet. 33. In fact, only a handful of depositions have been taken of officials with peripheral roles, precisely because Defendants refuse to produce the documents necessary to allow meaningful discovery to proceed. *Doe 2*, 2018 WL 3717071, at *3 ("Defendants [have] strenuously resisted engaging in discovery" which "remains unfinished" because Defendants have asserted privilege for "a substantial portion of the documents and information sought by Plaintiffs"). And in the depositions that have occurred, Defendants have repeatedly invoked the deliberative process privilege to block testimony as to any deliberations concerning the Ban. *See*, *e.g.*, SA.185-197 (deliberative process privilege objection asserted 11 times during the deposition of Martie Soper).

As the district court found, "Defendants possess all of the evidence concerning their deliberations over the Ban, and there is no suggestion that this evidence can be obtained from other sources." Add.8. Nor can any such suggestion be found in Defendants' petition. Instead, Defendants speak generically about information produced in response to other requests on other topics. But "Defendants' production of non-privileged documents and an

administrative record do not obviate Plaintiffs' need for responsive documents concerning the deliberative process." *Id.* Accordingly, the district court did not clearly err in finding that "[t]his factor weighs in favor of disclosure." Add.8.

3. The Government's Role in the Litigation.

As the district court noted, "[t]here is no dispute that the government is a party to this litigation." Add.8. Additionally, where allegations of government "misconduct" are at issue, *Warner*, 742 F.2d at 1162—specifically, Plaintiffs' allegations of unlawful discrimination against transgender individuals—this factor particularly "weighs in favor of disclosure." Add.8.

4. The Extent to Which Disclosure Would Hinder Frank Discussion.

Although Defendants characterize the district court's analysis of the fourth *Warner* factor—the extent to which disclosure would hinder frank and independent discussions—as a "radical discounting of the government's interest in confidentiality," Pet. 31, the district court closely examined the government's arguments but found that they relied upon generalized speculation. SA.8. Disclosure of Defendants' decision-making process here is unlikely to have a chilling effect on frank and independent discussion, because the government has already unveiled its conclusions and does not seek to study them further, but rather only to implement them as quickly as it can. In any event, to the extent disclosure discourages government officials from recommending or adopting unconstitutional

policies, that would be a constructive result. *See Newport Pac., Inc. v. Cty. of San Diego*, 200 F.R.D. 628, 640 (S.D. Cal. 2001) ("[I]f because of this case, members of government agencies acting on behalf of the public at large are reminded that they are subject to scrutiny, a useful purpose will have been served.").

The district court also observed that the protective order it had previously entered would mitigate concerns with respect to disclosure. Add.8. Far from reflecting a "misunderstanding of the importance of the privilege," Pet. 31, this is precisely how other courts have addressed this factor. *See, e.g.*, *Del Socorro Quintero Perez v. United States*, No. 13CV1417-WQH-BGS, 2016 WL 499025, at *7 (S.D. Cal. Feb. 9, 2016) ("concerns regarding the frankness of agency discussion . . . can be mitigated through the use of the protective order"); *Price v. Cty. of San Diego*, 165 F.R.D. 614, 620 (S.D. Cal. 1996) (finding that infringement on frank discussion "can be alleviated through the use of a strict protective order"). Defendants do not cite any contrary authority, and *Perry v. Schwarzenegger*, 591 F.3d 1147, 1164 (9th Cir. 2010)—which did not even involve the deliberative process privilege—recognized that, while a protective order may not entirely eliminate concerns about disclosing confidential information, it "will ameliorate" such concerns.

In sum, Defendants cannot point to any error in the district court's balancing of this factor, let alone clear error. Disclosure will not chill any deliberative

process with respect to the decision to ban transgender persons from the military, which has already been made. Nor will disclosure of such deliberations chill any future, lawful policy deliberations. And if Defendants' hypothetical and generic arguments about chilling future discussion were sufficient, the deliberative process privilege could never be overcome in any case.

B. The District Court Correctly Declined to Require the Privilege to Be Tested Individually for the Thousands of Documents at Issue.

Finally, Defendants complain about the district court's application of the *Warner* balancing test to the documents collectively, as opposed to individually for each of the thousands of documents withheld—or at a minimum, category-by-category. Pet. 29-30. But no authority establishes that the district court committed any error—let alone *clear* error—by declining to allow Defendants to impose that unnecessary burden on the court.

Defendants claim that the "*Warner* factors reflect the need for granular consideration" and application of the balancing test "from document to document" or by "categories of documents." Pet. 29-30. *Warner*, however, held no such thing, and courts routinely apply the balancing analysis on a categorical basis. *See, e.g.*, *Ariz. Dream Act Coal.*, 2014 WL 171923, at *3 (granting motion to compel on all documents withheld solely under deliberative process privilege); *Ferrell v. U.S. Dep't of Hous. & Urban Dev.*, 177 F.R.D. 425, 430-31 (N.D. Ill. 1998) (ordering disclosure of all documents 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). In contrast to executive privilege—where document-by-document log details can expose situations where the privilege has been improperly invoked—the district court assumed that Defendants *had* properly invoked the deliberative process privilege for all the documents at issue, but nonetheless found that the privilege had been overcome for reasons applicable and common to all of them.

The district court in *Stone*, ruling on a motion to compel the same documents at issue here, took the same approach as the district court here. *Compare Stone*, 2018 WL 3866676, at *2-3 (describing three categories of Plaintiffs' requests for documents; ordering production of all documents withheld) *with* Add.3 (describing seven categories of Plaintiffs' requests; ordering production of all documents withheld).[6] And other courts have recognized that the privilege does not apply at all in cases where government intent or misconduct is at issue.

[6] Defendants also relied below on *New York v. Dep't of Commerce*, No. 18-cv-2921 (S.D.N.Y. Aug. 14, 2018), but the court there simply found that the balancing test applied and denied plaintiffs' motion to compel without prejudice to renewal "as to specific documents *or categories of documents*" (emphasis added) after the parties had briefed the issue "using the balancing approach." Contrary to Defendants' suggestion, it did *not* hold that the balancing approach must be applied on a document-by-document basis.

Indeed, the same court previously recognized that "whether the privilege is categorically inapplicable or dependent on a balancing of factors is more stylistic than substantive" when "the deliberative or decisionmaking process is the 'central issue' in the case." *In re Delphi Corp.*, 276 F.R.D. 81, 85 (S.D.N.Y. 2011) (observing that, under those circumstances, "the need for the deliberative documents *will outweigh* the possibility that disclosure could inhibit future candid debate among agency decision-makers") (emphasis added).

Add.6, SA.7 (collecting cases).

Finally, Defendants' reliance on *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980), does not help them. Pet. 29. Defendants point to *Coastal*'s observation that the deliberative process privilege is "dependent upon the individual document and the role it plays in the administrative process." 617 F.2d at 867. But the court made this observation in weighing whether the privilege applied at all to a type of government memo it had not previously considered. *Id.* The court observed that "[t]he cases in this area are of limited help" in deciding whether the privilege applies at all because it is context-specific—not that courts must apply the balancing test document-by-document when considering whether the privilege has been *overcome* by the plaintiff's need, as Defendants suggest. *Id.* In fact, that same court subsequently held that the deliberative process privilege is *categorically* inapplicable when, as here, the plaintiff's claim turns on the government's intent. *In re Subpoena Duces Tecum*, 145 F.3d at 1424 ("[I]t seems rather obvious to us that the privilege has no place . . . in a constitutional claim for discrimination.").

CONCLUSION

For all these reasons, the Court should deny Defendants' petition in full.

Dated: August 27, 2018

Respectfully submitted,

By: s/ Stephen R. Patton

James F. Hurst, P.C.
Stephen R. Patton, P.C.
Jordan M. Heinz
Scott Lerner
Vanessa Barsanti
Daniel Siegfried
KIRKLAND & ELLIS LLP

Diana Flynn
Camilla B. Taylor
Peter C. Renn
Tara L. Borelli
Paul D. Castillo
Sasha Buchert
Kara Ingelhart
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

Peter E. Perkowski
OUTSERVE-SLDN, INC.

Derek A. Newman
Jason B. Sykes
NEWMAN DU WORS LLP

Attorneys for Real Parties in Interest-Plaintiffs

STATEMENT OF RELATED CASES

Plaintiffs are aware of one related appeal, *Karnoski v. Trump*, No. 18-35347 (9th Cir.), which arises from the same underlying district court action.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rules 21-2(c) and 32-3(2), because it totals 7,234 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Stephen R. Patton
Stephen R. Patton

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 27, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen R. Patton
Stephen R. Patton

No. 18-72159

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

DONALD J. TRUMP, President of the United States, et al.,
Petitioners-Defendants,

v.

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

RYAN KARNOSKI, et al.,
Real Parties in Interest-Plaintiffs,

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

REAL PARTIES IN INTEREST-PLAINTIFFS' SUPPLEMENTAL ADDENDUM

Peter C. Renn
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
4221 Wilshire Blvd., Ste. 280
Los Angeles, CA 90010
(213) 382-7600

Tara L. Borelli
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
730 Peachtree St., NE, Ste. 640
Atlanta, GA 30308
(404) 897-1880

James F. Hurst, P.C.
Stephen R. Patton, P.C.
Jordan M. Heinz
Scott Lerner
Vanessa Barsanti
Daniel Siegfried
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000

Counsel for Real Parties in Interest-Plaintiffs

Additional Counsel

Diana Flynn
Sasha Buchert
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
1875 I St., NW 5th Fl.
Washington, DC 20006
(202) 740-0914

Camilla B. Taylor
Kara Ingelhart
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
105 W. Adams, 26th Fl.
Chicago, IL 60603
(312) 663-4413

Paul D. Castillo
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
3500 Oak Lawn Ave., Ste. 500
Dallas, TX 75219
(214) 219-8585

Peter E. Perkowski
OUTSERVE-SLDN, INC.
445 S. Figueroa St., Ste. 3100
Los Angeles, CA 90071
(213) 426-2137

Derek A. Newman
Jason B. Sykes
NEWMAN DU WORS LLP
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

TABLE OF CONTENTS

Page

DISTRICT COURT ORDER AND TESTIMONY

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 MOTION TO STAY

THIS MATTER comes before the Court on Defendants' Motion to Stay Compliance with the Court's Discovery Order. (Dkt. No. 300.) Having reviewed the Motion, the Response (Dkt. No. 306), the Reply (Dkt. No. 307), the Notices of Supplemental Authority (Dkt. Nos. 308, 309), and the related record, the Court DENIES the Motion. While the Court declines to stay its Order Granting Plaintiffs' Motion to Compel and Denying Defendants' Motion for a Protective Order ("Discovery Order") (Dkt. No. 299), it hereby ORDERS that the deadline for compliance be extended until the Ninth Circuit has ruled on Defendants' Emergency Petition for Writ of Mandamus ("Mandamus Petition"), on which oral argument is expected to be heard on October

10, 2018. See In re Donald Trump, No. 18-72159, Dkt. No. 1 (9th Cir. Aug. 1, 2018); Dkt. No. 4 (9th Cir. Aug. 2, 2018). In the meantime, Defendants are directed to prepare legally sufficient privilege logs for documents withheld under the presidential communications and deliberative process privileges and prepare to turn over materials withheld solely under the deliberative process privilege. Defendants shall certify to the Court by no later than October 10, 2018 that they have taken these steps and are prepared to comply with its Discovery Order, but need not turn over their revised privilege logs or other withheld materials until further order.

Background

On July 27, 2018, the Court issued its Discovery Order granting Plaintiffs' motion to compel discovery withheld under the deliberative process privilege and denying Defendants' motion to preclude discovery directed at President Trump.[1] (Dkt. No. 299.) The Court ordered Defendants to (1) turn over documents withheld solely under the deliberative process privilege; (2) produce a privilege log identifying documents, communications, and other materials withheld under the presidential communications privilege; and (3) produce revised privilege logs that comply with Federal Rule of Civil Procedure 26(b)(5). (Id. at 11.) The Court ordered Defendants to comply within ten days. (Id.)

On July 31, 2018, Defendants filed this Motion to stay compliance with the Discovery Order pending resolution of their Mandamus Petition, which they filed with the Ninth Circuit on the following day. (Dkt. No. 300); see also In re Donald Trump, Dkt. No. 1. On August 2, the Ninth Circuit referred the Mandamus Petition to the panel assigned to hear Defendants' appeal regarding the preliminary injunction. In re Donald Trump, Dkt. No. 4. The panel granted a

[1] Many of the facts relevant to this Motion are set forth in the Discovery Order and the Court does not repeat them here. (See Dkt. No. 299 at 2-4.)

temporary stay of the Court's Discovery Order pending this Court's ruling on the instant Motion, which will remain in effect for seven days following the entry of this Order. (Id.)

Discussion

I. Motion to Stay

A stay pending appeal "is an intrusion into the ordinary processes of administration and judicial review." Nken v. Holder, 556 U.S. 418, 427 (2009) (internal quotation marks and citation omitted). As such, it is "not a matter of right, even if irreparable injury might otherwise result." Id. at 433 (citation omitted). "It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." Id. (internal quotation marks and citation omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." Id. at 433-34.

In determining whether to grant a stay, the Court considers: (1) whether Defendants have made a strong showing that they are likely to succeed on the merits of their Mandamus Petition; (2) whether Defendants will be irreparably injured absent a stay; (3) whether a stay will substantially injure Plaintiffs; and (4) whether the public interest supports a stay. Id. at 434.

A. Likelihood of Success on the Merits

The Court finds that Defendants have not made a strong showing that they are likely to prevail on merits of their Mandamus Petition. A writ of mandamus is "a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" In re Van Dusen, 654 F.3d 838, 840 (9th Cir. 2011) (quoting Ex parte Fahey, 332 U.S. 258, 259-60 (1947)). The critical factor in determining whether to grant the writ is "whether the district court's order is clearly erroneous as a matter of law," and "only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this . . . remedy."

Id. at 840-41 (quoting Cheney v. U.S. Dist. Ct. for the Dist. of Columbia, 542 U.S. 367, 380 (2004)). While recognizing that precedent concerning the presidential communications and deliberative process privileges is limited in the Ninth Circuit, the Court stands by its Discovery Order.

(1) Presidential Communications Privilege

Defendants contend that discovery directed at President Trump is foreclosed by Cheney, such that Plaintiffs must "exhaust other sources of non-privileged discovery and establish a heightened, particularized need for the specific information or documents" before the President is required to assert the privilege or provide a privilege log. (Mandamus Pet. at 22, 28-35.) Defendants contend that "[t]he district court made no attempt to reconcile its order with Cheney and the separation-of-powers principles underlying that decision." (Id. at 29.)

The Court does not read Cheney to stand for the proposition claimed by Defendants, and concludes that they are unlikely to succeed on the merits of their petition as to the presidential communications privilege. In Cheney, the Supreme Court explained that discovery directed at the President implicates separation of powers concerns, such that courts should not "require the Executive Branch to bear the onus of critiquing . . . unacceptable discovery requests line by line." 542 U.S. at 388. But Cheney does not purport to preclude all civil discovery directed at the President, nor to impose any of the threshold requirements suggested by Defendants. The Supreme Court explained that the discovery requests at issue were "unacceptable" because they were "overly broad," "ask[ed] for everything under the sky," and sought "all the disclosure to which [plaintiffs] would be entitled in the event they prevail on the merits, and much more besides." Id. at 386, 388. The Court explained that the withheld information did not relate to a constitutional right or otherwise implicate a "constitutional dimension," nor would its

withholding interfere with the court's "ability to fulfill its constitutional responsibility to resolve cases and controversies within its jurisdiction" or "hamper [its] ability to perform its 'essential functions.'" Id. at 384 (quoting United States v. Nixon, 418 U.S. 683, 707 (1974)). For these reasons, and "*in these circumstances*," the Court found that the otherwise well-settled requirement that the President "first assert privilege to resist disclosure" did not apply. Id. at 384, 388 (emphasis added); see also Nixon, 418 U.S. at 709, 710.

The situation here is vastly different. The discovery that Plaintiffs seek from President Trump is not "unacceptable" or "overly broad" but is instead narrowly focused and indispensable to resolving this case on the merits. Plaintiffs challenge a Ban that was ordered by President Trump, announced by President Trump, and which appears to have been "devised by the President and the President alone." (Dkt. No. 233 at 29); see also Stone, et al. v. Trump, et al., 2018 WL 3866676, at *4 (D. Md. Aug. 14, 2018) ("The Presidential tweets put the President front and center as the potential discriminating official."). As in Nixon, this case involves a concern of "constitutional dimension," and indeed, one of the most critical that a court may be called upon to resolve—state-sponsored discrimination against a suspect class. (See Dkt. No. 233 at 20-24.) Also as in Nixon, President Trump's refusal to comply with the judicial process threatens to "upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Article III." Nixon, 418 U.S. at 707. Repeatedly, this Court has ordered Defendants to identify the "Generals and military experts" with whom President Trump consulted. (See, e.g., Dkt. Nos. 204, 210, 233.) Repeatedly, Defendants have refused to do so. To date, it remains the case that "the *only* evidence concerning the lead-up to [President Trump's] Twitter Announcement reveals that military officials were entirely unaware of the Ban, and that the abrupt change in policy was 'unexpected.'" (Dkt. No. 233 at 29 (citations omitted).)

The government's lack of candor in this regard is disconcerting, and provides all the more reason why the presidential communications privilege cannot be used in the manner claimed by Defendants.

Accordingly, the Court stands by its previous ruling that Nixon and In re Sealed Case—not Cheney—provide the applicable standard in this constitutional case. President Trump must expressly assert the presidential communications privilege and must provide a privilege log that complies with Rule 26(b)(5).[2]

(2) Deliberative Process Privilege

Defendants' contend that the Court erred in its evaluation of the deliberative process privilege by failing to apply the balancing test from FTC v. Warner Commc'ns Inc., 742 F.2d 1156 (9th Cir. 1984) on a document-by-document basis. (Dkt. No. 300 at 6-7; see also Mandamus Pet. at 35-40.) In particular, Defendants contend that the Court's ruling will result in the disclosure of "deliberative documents related to the policy announced by former Secretary of Defense Ashton Carter during the prior administration, which are plainly not relevant to Plaintiffs' challenge to the President's 2017 Memorandum." (Dkt. No. 300 at 7.) Further, Defendants contend that "release of DoD information protected by the deliberative process

[2] Defendants claim there is a "significant risk that the Court's Order, which requires a highly specific privilege log, will itself require disclosure of privileged material." (Dkt. No. 307 at 3.) Rule 26(b)(5) specifically states that the log be produced "*without revealing information itself privileged or protected . . .*" Fed. R. Civ. P. 26(b)(5)(A)(ii) (emphasis added). Defendants do not cite any authority—and the Court is aware of none—that supports their claim that the presidential communications privilege "protects the President from being compelled to disclose the identities of the particular advisors from whom he sought advice on particular subjects" or, in particular, the identities of the "Generals and military experts" with whom he publicly proclaimed to have consulted. (Dkt. No. 307 at 3-4.) In any event, Defendants need not produce their revised privilege logs until the Ninth Circuit has ruled on the Mandamus Petition.

privilege would have a substantial and immediate chilling effect on policy deliberation and development within DoD." (Dkt. No. 307 at 7.)

The Court finds no support for Defendants' claim that the Warner factors must be applied on a document-by-document basis.[3] To the contrary, the deliberative process privilege is qualified, and as the Court noted in its Discovery Order, other courts have recognized that the privilege does not apply *at all* in cases involving claims of governmental misconduct or where the government's intent is at issue. (Dkt. No. 299 at 6 (citing In re Sealed Case, 121 F.3d 729, 738 (D.C. Cir. 1997); In re Subpoena Duces Tecum, 145 F.3d 1422, 1424-25 (D.C. Cir. 1998)); see also Stone, 2018 WL 3866676, at *3 (explaining that the deliberative process privilege does not protect documents "likely to contain evidence reflecting Defendants' intent" regarding the Ban and that "[i]t also could not be more clear that the Defendants' intent—whether it was for military purposes or whether it was purely for political and discriminatory purposes—is at the very heart of this litigation.").

The Court also finds no support for Defendants' claim that the withheld documents are "plainly not relevant" to Plaintiffs' claims. (Dkt. No. 300 at 7.) Defendants themselves identified these documents as responsive to Plaintiffs' discovery requests, and each pertains to deliberations concerning military service by transgender people. The Court has already found

[3] 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. The privilege logs reviewed by the Court categorize documents broadly and provide generic, non-specific descriptions as to their content and the reason for their withholding. (See, e.g., Dkt. No. 246, Ex. 11 (describing documents as "Slides for policymaking meeting"); Ex. 13 (describing document as "E-mail re: Slides (with attachments)" and describing reason for withholding as "Predecisional and deliberative internal agency document created as part of the agency's process of developing courses of action for implementing DoD's policy on the service and accessions of military personnel and the continuous process of assessing the policy's impact on military readiness.").)

that the Ban's constitutionality (i.e., whether it was sincerely motivated by compelling state interests, rather than by prejudice or stereotype) "necessarily turns on facts related to Defendants' deliberative process," including its review of the Carter Policy and the deliberations that preceded it. (Dkt. No. 233 at 28.)

Finally, for the same reasons identified in its Discovery Order, the Court rejects Defendants' claim that requiring them to turn over documents withheld solely under the deliberative process privilege would have a "substantial and immediate chilling effect on policy deliberation and development." (Dkt. No. 307 at 7.) It is Defendants' burden to show that the privilege applies, yet they have made no effort to explain *with specificity* why the disclosure of relevant, responsive documents—many of which appear to be factual and non-deliberative—would have a greater chilling effect in this case than in any other. Were the government permitted to withhold relevant documents and information based upon the abstract risk of a chilling effect, it is difficult to imagine a case in which the deliberative process privilege would not preclude disclosure.

Accordingly, the Court stands by its previous ruling that the deliberative process privilege does not apply in this case.

B. Likelihood of Irreparable Harm

In light of the Court's decision to extend the deadline for compliance with its Discovery Order pending the Ninth Circuit ruling on Defendants' Mandamus Petition, the Court finds that Defendants have not shown that they will suffer irreparable harm absent a stay. While Defendants contend that reviewing documents and revising their privilege logs will impose upon them a "staggering burden" requiring hundreds of hours of work and dozens of lawyers (Dkt. No. 300 at 4; Dkt. No. 307 at 2-3), they cite no authority for the proposition that requiring them

to comply with their *existing* obligations under Rule 26 can somehow constitute "irreparable harm." Further, any burden imposed by the Discovery Order is entirely of Defendants' own making. Over the past five months, the Court has repeatedly directed Defendants to turn over relevant documents and information and provide privilege logs that comply with Rule 26(b)(5). (See, e.g., Dkt. Nos. 204, 210, 233, 235.) Despite each of these orders, Defendants have maintained their overbroad and unsupported claims of privilege. Finally, while Defendants repeatedly point to the number of documents they will be required to review, they have failed to identify any reason why good faith compliance with the discovery process in this case would impose a greater burden or involve a greater allocation of resources than in any other. The Court is confident that the federal government has the resources to comply with its order between now and October 10, 2018.

C. Injury to Plaintiffs and Impact on the Public Interest

The Court finds that the stay requested by Defendants would harm Plaintiffs and the public interest. This case is currently set to proceed to trial in April 2019. (See Dkt. No. 242.) Were the Court to permit Defendants to further delay compliance with its prior orders and their discovery obligations, there can be no doubt that Plaintiffs' ability to litigate the case and prepare for trial—and the Court's ability to enforce the rule of law and thereby perform its essential role in our system of government—would be harmed. See Nixon, 418 U.S. at 708 ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."); see also United States v. Sumitomo Marine & Fire Ins. Co., Ltd., 617 F.2d 1365, 1370 (9th Cir. 1980) ("The public interest requires not only that Court orders be obeyed but further that Governmental agencies

which are charged with the enforcement of laws should set the example of compliance with Court orders.").

Conclusion

The Court ORDERS as follows:

(1) The Court DENIES Defendants' Motion for a Stay;

(2) The Court ORDERS Defendants to comply with its Discovery Order;

(3) The Court ORDERS that the deadline for compliance with its Discovery Order be extended until the Ninth Circuit has ruled on Defendants' Mandamus Petition; and

(4) The Court ORDERS Defendants to:

(a) prepare legally sufficient privilege logs for documents withheld under the presidential communications and deliberative process privileges;

(b) prepare to turn over materials withheld solely under the deliberative process privilege; and

(c) certify to the Court by no later than October 10, 2018 that they have taken these steps and are prepared to comply with its Discovery Order.

(5) However, Defendants need not turn over their revised privilege logs or other withheld materials until further order of this Court.

The clerk is ordered to provide copies of this order to all counsel and to the Clerk of Court for the Ninth Circuit.

Dated August 20, 2018.

Marsha J. Pechman
United States District Judge

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, *et al.*,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*,

Defendants.

Case No. 2:17-cv-01297-MJP

DECLARATION OF DANIEL SIEGFRIED IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

NOTED FOR CONSIDERATION: June 13, 2018

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

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

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

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

attached hereto as Exhibit 2.

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

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

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

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

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

DATED: June 6, 2018

s/Daniel Siegfried
Daniel Siegfried

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on June 6, 2018.

Jason B. Sykes, WSBA #47533
jason@newmanlaw.com
Newman Du Wors LLP
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

Exhibit 3

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Case No. 2:17-cv-01297-MJP

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSION TO DEFENDANT DONALD J. TRUMP

Pursuant to Federal Rules of Civil Procedure 26 and 36 and the Local Rules of the U.S. District Court for the Western District of Washington, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs' First Set of Requests for Admission to Defendant Donald J. Trump, in his official capacity as President of the United States, served January 26, 2018.[1] In presenting these objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

[1] These objections are limited to President Trump. Defendants will produce, or already have produced, separate objections and responses for other Defendants.

General Objection to All Requests for Admission

Defendants object to any discovery directed to the President of the United States in this case, on several grounds, including that such discovery should be foreclosed in this case based on separation of powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege.

First, such discovery requests are inappropriate where, as here, they are premised on claims for declaratory and injunctive relief brought directly against the President of the United States, who is not a proper defendant on such claims. The Supreme Court has held that it has "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866); *id.* at 500 ("The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department."). A plurality of the Court later reiterated this principle in *Franklin v. Massachusetts*, 505 U.S. 788, 802–803 (1992). The plurality in *Franklin* found it "extraordinary" that the district court in that case had issued an injunction against the President and two other government officials. *Id.* at 802, 806. "At the threshold," it said, "the District Court should have evaluated whether injunctive relief against the President was available, and if not, whether appellees' injuries were nonetheless redressable." *Id.* at 803. Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827–28 (noting that such principle is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history"). He reasoned that just as the President is absolutely immune from official capacity damages suits, so is he immune from efforts to enjoin him in his official capacity. *Id.* at 827

("Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President's performance of executive functions"). The lower courts have often applied this settled principle. *See e.g.*, *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) ("similar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [the] request for a declaratory judgment"); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.") (citations omitted). Under that principle, the President should not be subject to discovery in this case.

Second, the Supreme Court has made clear that discovery directed to the President in civil litigation raises significant separation of powers concerns and should be strictly circumscribed. In *Cheney v. U.S. District Court for District of Columbia*, the Supreme Court explained that where the discovery requests were directed to the Vice President and other senior officials of the Executive Branch who gave advice and made recommendations to the President, it was "not a routine discovery dispute." 542 U.S. 367, 385 (2004). The Court emphasized that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Id.* at 385. The Supreme Court "has held, on more than one occasion, that '[t]he highest respect that is owed to the office of the Chief Executive … is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.'" *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Further, the Court has held that the Executive's "constitutional responsibilities and status [are] factors counseling judicial deference and

restraint" in the conduct of the litigation against it. *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

In *Cheney*, the district court permitted broad discovery directed to the Vice President and other senior officials, and the D.C. Circuit dismissed the government's mandamus petition to vacate the district court's discovery orders, holding that the government officials, "to guard against intrusion into the President's prerogatives, must first assert privilege." 542 U.S. at 375–76. In vacating the D.C. Circuit's decision, the Supreme Court described as "anything but appropriate" the "overly broad discovery requests" directed to the Vice President and other senior officials, which were "unbounded in scope," and asked for "everything under the sky." *Id.* at 387–88 ("The Government [ ] did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored."). Noting the separation of powers concerns, the Supreme Court instructed the D.C. Circuit to analyze, on remand, whether the district court's actions in permitting discovery against the Vice President and other senior officials constituted "an unwarranted impairment of another branch in the performance of its constitutional duties." *Id.* at 390. It rejected the D.C. Circuit's "mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections." *Id.* at 391. *Cf. United States v. Poindexter*, 727 F. Supp. 1501, 1503–04 (D.D.C. 1989) (agreeing with the President that "it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents" and deciding to narrow, on its own, the scope of the discovery directed to the President). These separation of powers concerns were also recognized in *American Historical Association v. National Archives & Records Administration*. 402 F. Supp. 2d 171, 181 (D.D.C. 2005) (Kollar-Kotelly, J.). The Court there found the reasoning in *Cheney*

instructive, reiterating the *Cheney* Court's view that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Id.* at 181 (quoting *Cheney*, 542 U.S. at 385) (internal quotation marks omitted).

In light of these compelling separation of powers concerns, the Court should, at a minimum, require Plaintiffs to exhaust alternative sources of discovery before subjecting the President to discovery. Indeed, the Secretary of Defense has submitted an implementation plan to the President, which the President is now reviewing. Implementation of that plan could narrow, if not completely eliminate, any purported reason for such broad discovery directed to the President. Any discovery into the basis for the military policy concerning transgender individuals contained in that plan, if permitted at all, should be directed at DoD in the first instance at that time. This timeline alone weighs heavily in favor of not subjecting the sitting President to discovery.

Finally, virtually all of the discovery directed to the President in this case is subject to the presidential communications privilege. The "presumptive privilege" that attaches to presidential communications is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974); *see In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (describing the privilege's "constitutional origins"). The privilege is broad, protecting the "confidentiality of Presidential communications in performance of the President's responsibilities." *United States v. Nixon*, 418 U.S. at 711. *See also In re Sealed Case*, 121 F.3d at 744 ("The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and

deliberations."). Documents subject to the presidential communications privilege are shielded in their entirety, and the privilege "covers final and post-decisional material as well as pre-deliberative ones." *In re Sealed Case*, 121 F.3d at 745.

Although the presidential communications privilege is not absolute, the bar to overcoming the privilege is high; it is "more difficult to surmount" than the deliberative process privilege. *In re Sealed Case*, 121 F.3d at 746. A party seeking otherwise privileged presidential material must demonstrate a "focused demonstration of need." *Id.*; *See also Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). Courts will balance "the public interests served by protecting the President's confidentiality in a particular context with those furthered by requiring disclosure." *In re Sealed Case*, 121 F.3d at 753. To meet this heavy burden of "specific need" in a criminal matter, the party seeking the privileged material must first demonstrate "that each discrete group of the subpoenaed materials likely contains important evidence"—that is, evidence "directly relevant to issues that are expected to be central to the trial," and not evidence that is "only tangentially relevant or would relate to side issues." *Id.* at 753–55. The party seeking the discovery must also show "that this evidence is not available with due diligence elsewhere"—that is, notwithstanding other sources of information, the privileged documents are "still needed." *Id.* (explaining that this standard reflects the Supreme Court's "insistence that privileged presidential communications should not be treated as just another source of information").

Where privileged material is sought for use in a civil case, the burden to overcome the presidential communications privilege is even greater. The greater scrutiny is appropriate because "the right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions'" as a request for information in a criminal case. *Cheney*, 542 U.S. at

384 (quoting *United States v. Nixon*, 418 U.S. at 713); *see also Am. Historical Ass'n*, 402 F. Supp. 2d at 181 (explaining that the *Cheney* Court noted that "while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch's essential functions, the same could not be said of document requests in the civil context"); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) ("[T]he sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee's functions.") (emphasis added).

In this case—a civil matter seeking discovery directly from the President, in his capacity as Commander-in-Chief, related to his decisionmaking process on a topic involving national security and military concerns—Plaintiffs face a significant burden in order to negate a valid assertion of the presidential communications privilege. Plaintiffs cannot meet this burden, especially where the requested discovery seeks information that, on its face, is privileged (including information about presidential communications, attorney-client and work product materials, and drafts of presidential documents) and would plainly intrude on core presidential deliberations, or where the requested discovery seeks information that could be sought from the Department of Defense or other sources, including publicly available ones.

Accordingly, Defendants object to any discovery requests directed to the President of the United States in this case based on these compelling separation of powers concerns, and in particular object to the discovery sought that is subject to the presidential communications privilege.

Finally, Plaintiffs and Intervenor have both moved for summary judgment under Federal Rule of Civil Procedure 56, arguing that there is "no genuine dispute as to any material fact" and

that they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Accordingly, since Plaintiffs and Intervenor claim that there are no issues of fact, discovery is inappropriate.

Specific Objections to Requests for Admission

Request for Admission No 1:

Admit that on July 26, 2017, President Trump stated via Twitter that: "[a]fter consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow [t]ransgender individuals to serve in any capacity in the U.S. military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.]"

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection. Defendants respectfully refer the Court to the July 26, 2017 tweets for a complete statement of their contents.

Request for Admission No. 2:

Admit that on or before July 26, 2017, President Trump decided that "the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. military[.]"

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President objects to this RFA to the extent that it seeks (a) communications or

information protected by the attorney-client privilege; (b) communications or information protected by the deliberative process privilege; or (c) communications or information protected by the presidential communications privilege.

The President also objects that "decided" is vague and ambiguous, as well as undefined by Plaintiffs.

Request for Admission No. 3:

Admit that prior to President Trump's July 26, 2017 statements on Twitter, President Trump did not inform General Joseph F. Dunford, Jr. or any other member of the Joint Chiefs of Staff that the United States Government would not accept or allow transgender individuals to serve in any capacity in the U.S. military.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFA to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 4:

Admit that on or about June 19, 2017, General Joseph F. Dunford, Jr. stated: "[t]ransgender personnel are serving right now, and there is no review ongoing that would affect the ability of those currently serving to continue serving, provided they can meet the physical

and mental qualifications of service, be worldwide deployable, and the same standards that every other soldier, sailor, airmen, and Marine meets."

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

Request for Admission No. 5:

Admit that between July 26, 2017 and September 26, 2017, General Joseph F. Dunford, Jr. communicated to President Trump that transgender service members who otherwise meet the physical and mental standards for military service and are worldwide deployable should be able to continue serving.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFA to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 6:

Admit that between January 20, 2017 and July 26, 2017, Secretary Mattis did not recommend that President Trump adopt a policy that the United States Government not accept or allow transgender individuals to serve in any capacity in the U.S. military.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFA to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 7:

Admit that before July 26, 2017, Secretary Mattis advised President Trump against adopting a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFA to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 8:

Admit that when President Trump issued the Tweets, Secretary Mattis had not communicated to President Trump a reversal of his previous advice that President Trump not

adopt a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFA to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 9:

Admit that before President Trump issued the Tweets, no individual within the Department of Defense holding, at the time of providing any such advice, the title of Secretary, Deputy Secretary, or Under Secretary, advised President Trump to adopt a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFA to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 10:

Admit that before President Trump issued the Tweets, no individual serving in the U.S. Military holding at least, at the time of providing any such advice, the rank of Brigadier General, Major General, Lieutenant General, Chief of Staff, or General (for any individual serving in the U.S. Army, Air Force, or Marine Corps) or Rear Admiral Lower Half, Rear Admiral, Vice Admiral, Chief of Naval Operations, or Admiral (for any individual serving in the U.S. Navy or Coast Guard), advised President Trump to adopt a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFA to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 11:

Admit that between January 20, 2017 and July 26, 2017, Lieutenant General H.R. McMaster did not recommend that President Trump adopt a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFA to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 12:

Admit that on or about January 12, 2017, at a Senate confirmation hearing, a Senator asked Secretary Mattis: "Is there something innate in being a woman or LGBT that would cause you to believe that they could not be part of a lethal force?" And Secretary Mattis responded: "No."[2]

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

Request for Admission No. 13:

Admit that prior to July 26, 2017, President Trump never spoke to any person he believed to be or knew to be transgender regarding his decision "that the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. military."

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

[2] *See* https://www.armed-services.senate.gov/imo/media/doc/17-03_01-12-17.pdf.

The President further objects to this RFA to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 14:

Admit that as of July 25, 2017, Secretary Mattis had not expressed any intention to further extend, past January 1, 2018, the date on which a policy permitting transgender people to access into the U.S. military under the conditions set forth in Directive-Type Memorandum 16-005 would go into effect.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFA to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Request for Admission No. 15:

Admit that had President Trump not issued the Tweets or the August 25 Memorandum, You would have been prepared no later than January 1, 2018 to implement a policy permitting transgender people to access into the U.S. military under the conditions set forth in Directive-Type Memorandum 16-005.

Specific Objections:

The President objects on the grounds that this RFA is not properly directed to him.

To the extent that this RFA is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President also objects on the grounds that this RFA calls for speculation about a hypothetical situation.

Request for Admission No. 16:

Admit that You have never granted a medical waiver allowing a transgender individual to access into the U.S. military when otherwise applicable medical requirements would disqualify that individual from accession solely on account of the individual's transgender status, gender transition, or gender dysphoria.

Specific Objections:

The President objects on the grounds that this RFA is not properly directed to him.

To the extent that this RFA is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects on the basis that this RFA is vague, as it is not confined to any particular time period.

Date: February 26, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Ryan B. Parker
RYAN B. PARKER
ANDREW E. CARMICHAEL
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on February 26, 2018, a copy of the document above was served by email on the following:

Vanessa Barsanti
KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 2205
F +1 312 862 2200
vanessa.barsanti@kirkland.com

Jordan M. Heinz
KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 7027
F +1 312 862 2200
jordan.heinz@kirkland.com

Peter Renn
Senior Attorney
Lambda Legal
Western Regional Office
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010-3512
Tel 213-382-7600 ext. 228
Fax 213-351-6050
prenn@lambdalegal.org
www.lambdalegal.org

La Rond Baker
Assistant Attorney General
Wing Luke Civil Rights Unit
Office of the Washington Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206.516.2999
206.464.6451 (fax)
LaRondB@ATG.WA.GOV

/s/ *Ryan Parker*
RYAN B. PARKER
Senior Trial Counsel
U.S. Department of Justice

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*,

Defendants.

CASE No. 2:17-cv-01297-MJP

DECLARATION OF DANIEL SIEGFRIED IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL DEFENDANTS' DISCOVERY WITHHELD UNDER THE DELIBERATIVE PROCESS PRIVILEGE

NOTE ON MOTION CALENDAR:
May 25, 2017

ORAL ARGUMENT REQUESTED

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

1. I am counsel of record for Plaintiffs in this action, am over the age of 18, and am competent to be a witness. I make this declaration in support of Plaintiffs' Motion to Compel Defendants' Discovery Responses Withheld Under the Deliberative Process Privilege based on facts within my personal knowledge.

2. On December 29, 2017, Plaintiffs served their First Set of Interrogatories and First Set of Requests for Production on Defendants, true and correct copies of which are attached hereto as Exhibits 1 and 2. On January 26, 2018, Plaintiffs served their First Set of Requests for Admission on Defendants, a true and correct copy of which is attached hereto as Exhibit 3.

3. Defendants served responses to Plaintiffs' First Set of Interrogatories and First Set of Requests for Production on February 9, 2018. Defendants issued responses on behalf of Secretary James Mattis and the Department of Defense. A true and correct copy of those responses are attached hereto as Exhibits 4 and 5. Defendants also issued separate responses on behalf of President Donald Trump. A true and correct copy of those responses are attached hereto as Exhibits 6 and 7.

4. On February 23, 2018, my colleague Jordan Heinz sent a letter to Defendants' counsel regarding deficiencies in their responses to Plaintiffs' interrogatories and requests for production. A true and correct copy of that letter is attached hereto as Exhibit 8. Among other things, Plaintiffs' February 23, 2018 letter asked Defendants to withdraw their assertions of the deliberative process privilege and also to provide privilege logs identifying any documents withheld pursuant to the privilege. Defendants did not respond to this letter, supplement or amend their discovery responses, or accept any request to meet and confer.

5. On February 26, 2018, Defendants served responses to Plaintiffs' First Set of Requests for Admission, again serving one set of responses for Secretary Mattis and the Department of the Defense and another set for President Trump. True and correct copies of those responses are attached hereto as Exhibits 9 and 10.

6. On March 20, 2018, Defendants served 17 privilege logs on behalf of 6 entities: the Department of Defense, the Defense Health Agency, the Navy, the Army, the Air Force, and the

Chairman of the Joint Chiefs of Staff. Native versions of Defendants' privilege logs are submitted as Exhibits 11 through 27.

7. On April 26, 2018, I sent a letter to Defendants' counsel regarding their privilege logs, a copy of which is attached hereto as Exhibit 28. My letter reiterated Plaintiffs' request that Defendants withdraw their assertions of the deliberative process privilege entirely, and requested a meet and confer if Defendants were unwilling to do so.

8. On May 2, 2018, counsel for Plaintiffs and counsel for Defendants held a telephonic conference in compliance with Federal Rule of Civil Procedure 37 and Local Civil Rule 37(a)(1) to make a good faith effort to resolve the parties' dispute regarding the deliberative process privilege. The parties were unable to resolve their dispute regarding Plaintiffs' positions that (1) the deliberative process privilege does not apply in this case, and (2) the privilege, even if applicable, would not shield information and documents that are post-deliberative (*i.e.* after the President's July 26, 2017 tweets), non-deliberative (*i.e.* discussing how to implement the Ban following the President's decision), or factual.

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

DATED: May 10, 2018

/s/Daniel Siegfried
Daniel Siegfried

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on May 10, 2018.

Jason B. Sykes, WSBA No. 44369
jason@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

Exhibit 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Case No. 2:17-cv-01297-MJP **PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANTS** Honorable Marsha J. Pechman

Pursuant to Federal Rules of Civil Procedure 26 and 33, Plaintiffs propound the following interrogatories to Defendants and hereby request that Defendants serve a written response within thirty (30) days of the date of service hereof, at the law offices of Kirkland & Ellis LLP, 300 N. LaSalle, Chicago, IL 60654.

INTERROGATORIES

1. Identify and describe each of the governmental purposes or interests that you contend will be advanced by the Policy (including, but not limited to, any purported interest in military readiness, lethality, unit cohesion, and military resources).

2. For each governmental purpose or interest identified in Your answers to Interrogatory 1 above, describe in detail all facts that You contend establish the need or justification to further each purpose or interest, including all Documents that You contend might establish the existence of such facts.

3. For each governmental purpose or interest identified in Your answers to Interrogatory 1 above, describe in detail all facts that You contend demonstrate that the Policy furthers that purpose or interest, including all Documents that You contend might establish the existence of such facts.

4. Identify all individuals with whom President Trump has discussed or corresponded with regarding the United States' past, present, or potential future governmental policies on

transgender military service or related healthcare, and the dates of each discussion, from November 9, 2016 to the present.

5. State the Date on which President Trump decided that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military."

6. Identify all individuals with whom President Trump communicated or consulted in deciding that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military," including each of the "Generals and military experts" referenced in President Trump's July 26, 2017 tweet.

7. Explain the process You used to formulate the Tweets, the Presidential Memorandum, the Interim Guidance, and the Implementation Plan, and identify all sources of fact or opinion You consulted, considered, or otherwise referred to and the dates on which You first consulted, considered, or otherwise referred to such sources of information or opinion.

8. Explain President Trump's purported concerns regarding the RAND Report or any other study or review that the Department of Defense relied upon when adopting Secretary Ash Carter's policy allowing transgender people to serve openly in the military.

9. Identify all members of the "panel of experts serving within the Departments of Defense and Homeland Security to provide advice and recommendations on the implementation of the president's direction." Statement of Secretary Jim Mattis, Release No: NR-312-17.

10. Identify all Department of Defense and Department of Homeland Security employees who worked with, provided information to, or communicated with employees of the RAND National Defense Research Institute concerning the studies and/or fact gathering that resulted in the RAND Report.

11. Identify all persons with authority to approve medical waivers requested by transgender service members or transgender individuals seeking to join the U.S. military during the period from January 1, 2010 to the present.

12. Identify all persons with authority, during the period from January 1, 2010 to the present, to involuntarily discharge or separate service members on account of transgender status (including those individuals with authority to initiate any necessary proceedings for involuntary discharge or separation, even if final adjudicatory authority resides elsewhere).

13. Describe in detail the circumstances leading to Secretary James Mattis's June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff with Subject: Accession of Transgender Individuals in the Military Services, including all reasons for the decision set forth in the memo (whether or not such reasons were publicly stated or acknowledged).

14. Identify all persons with knowledge or information concerning the facts set forth in your response to Interrogatory No. 13, including all persons who requested, advised, or consulted on the result set forth in the June 30, 2017 memorandum.

15. Identify all communications between a member of Congress, on the one hand, and President Trump or any officer or employee of the Executive Office of the President, on the other, from January 20, 2017 to July 26, 2017, concerning military service by transgender people.

DEFINITIONS AND INSTRUCTIONS

1. "You," "your," and "yours," whether or not capitalized, shall mean the Defendants, individually and/or collectively, including Defendants' current and former employees, agents, affiliates, contractors, consultants, representatives, and other persons engaged directly or indirectly by or under the control of Defendants.

2. "The Policy" shall mean any of President Trump's July 26, 2017 tweets (the "Tweets") regarding transgender military service or related healthcare together with the

August 25, 2017 Presidential Memorandum regarding the same (the "Presidential Memorandum"), and all changes in United States government policies regarding transgender military service or related healthcare undertaken or contemplated as a direct or indirect result of Tweets and/or the Presidential Memorandum, including but not limited to, "The Implementation Plan" (defined *infra*) and the "Interim Guidance" (defined *infra*).

3. "The Implementation Plan" shall mean the implementation plan referenced in Secretary of Defense Jim Mattis' August 28, 2017 Release (No: NR-312-17).

4. The "Interim Guidance" shall mean the memorandum titled "Military Service by Transgender Individuals - Interim Guidance" and dated September 14, 2017.

5. "Communication" shall mean any transmission of information by one or more persons to one or more persons by any means including, without limitation, telephone conversations, letters, telegrams, teletypes, telexes, telecopies, e-mail, text messages, computer linkups, written memoranda, and face-to-face conversations; "communication" includes all documents and electronically stored information ("ESI") containing, summarizing, or memorializing any communication.

6. "Document" or "documents" shall have the full meaning ascribed to it by Federal Rule of Civil Procedure 34(a) including ESI, and includes the original and any identical or nonidentical copy, regardless of origin or location, of any writing or record of any type or description, including but not limited to, all writings; records; contracts; agreements; communications (intra or inter-company); correspondence; memoranda; letters; facsimiles; electronic mail (e-mail); text messages; minutes, recordings, transcripts, and summaries of meetings, or recordings of meetings, speeches, presentations, conversations, or telephone calls (whether recorded in writing, mechanically, or electronically); handwritten and typewritten notes of any kind; statements; reports; voice recordings; desk calendars; diaries; logs; drafts; studies; analyses; schedules; forecasts; surveys; invoices; receipts; computer data; computer printouts;

financial statements; balance sheets; statements of operations; audit reports; financial summaries; statements of lists of assets; work papers; pictures; photographs; drawings; computer cards; tapes; discs; printouts and records of all types; instruction manuals; policy manuals and statements; books; pamphlets; and every other device or medium by which information or intelligence of any type is transmitted, recorded, or preserved, or from which intelligence or information can be perceived.

7. “Identify,” whether or not capitalized, when used with respect to: (a) an individual, shall mean to provide the individual’s full name, job title, and employer during the period referred to, and current or last-known address and telephone number and business address and telephone number; (b) any entity other than an individual, shall mean to provide the entity’s full name and current or last-known address (designating which); and (c) a document, shall mean to provide the date, title, subject matter, author(s), recipient(s), and Bates number(s).

8. “Including” or “includes,” whether or not capitalized, shall mean “including but not limited to” or “including without limitation.”

9. “Member of Congress,” whether or not capitalized, shall mean any Senator, Representative, committee, sub-committee, or group (formal or informal) of the United States Congress (or individual or staff member acting on behalf of any such Senator, Representative, committee, sub-committee, or group (formal or informal)).

10. The “RAND Report” means the study performed by the RAND Corporation regarding the impact of transgender military service or healthcare for current or prospective transgender service members (such report appears on the docket in this case at Dkt. 34-10).

11. “Relating to” or “related to,” whether or not capitalized, when referring to any given subject matter, shall mean any document that constitutes, comprises, involves, contains, embodies, reflects, identifies, states, mentions, alludes to, refers directly or indirectly to, or is in any way relevant to the particular subject matter identified.

12. Each paragraph is to be construed independently and not by or with reference to any other paragraph for purposes of limiting the scope of any particular request.

13. Pursuant to the Federal Rules of Civil Procedure, these requests are continuing and you must revise or supplement your responses and production whenever new or additional responsive information becomes known.

Dated: December 29, 2017

/s/ Jordan M. Heinz

NEWMAN DU WORS LLP Derek A. Newman, WSBA #26967
dn@newmanlaw.com
Samantha Everett, WSBA #47533
samantha@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

LAMDBA LEGAL DEFENSE AND EDUCATION FUND, INC.
Tara Borelli, WSBA #36759
tborelli@lambdalegal.org
Jon W. Davidson (admitted pro hac vice)
Camilla B. Taylor (admitted pro hac vice)
Peter C. Renn (admitted pro hac vice pending)
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Sasha Buchert (admitted pro hac vice)
Kara Ingelhart (admitted pro hac vice)
Carl Charles (admitted pro hac vice)
730 Peachtree Street NE, Ste. 640
Atlanta, GA 30308

OUTSERVE-SLDN, INC.
Peter Perkowski (admitted pro hac vice)

KIRKLAND & ELLIS LLP
James F. Hurst, P.C. (admitted pro hac vice)
Jordan M. Heinz (admitted pro hac vice)
Scott Lerner (admitted pro hac vice)
Vanessa Barsanti (admitted pro hac vice)
Daniel I. Siegfried (admitted pro hac vice)
300 North LaSalle
Chicago, IL 60654

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on December 29, 2017, I caused a true and correct copy of the foregoing document to be served by email on the following counsel of record for Defendants:

Ryan B. Parker
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
ryan.parker@usdoj.gov

s/ Jordan M. Heinz

Exhibit 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Case No. 2:17-cv-01297-MJP **PLAINTIFFS' FIRST REQUESTS FOR PRODUCTION TO DEFENDANTS** Honorable Marsha J. Pechman

Pursuant to Federal Rules of Civil Procedure 26 and 34, Plaintiffs propound the following requests for production of documents to Defendants to be responded to within 30 days of service. Plaintiffs request that all documents and electronically stored information responsive to the following discovery requests be produced electronically, or alternatively, at the offices of Kirkland & Ellis LLP, 300 North LaSalle Street, Chicago, Illinois 60654.

REQUESTS FOR PRODUCTION

1. All Documents and Communications related to the Policy.

2. All Documents supporting, refuting, or relating to Your contention that transgender service members hinder military readiness and lethality.

3. All Documents supporting, refuting, or relating to Your contention that transgender service members disrupt unit cohesion.

4. All Documents supporting, refuting, or relating to Your contention that transgender service members tax military resources.

5. All documents relating to any justification considered by Defendants for the Policy other than those identified in Requests for Production Nos. 1-4.

6. All Documents and Communications relating to, including all drafts of, the August 25, 2017, memorandum entitled "Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security."

7. All Documents and Communications related to President Trump's consultation with employees, agents, contractors, or consultants of the United States Armed Forces regarding transgender military service or related healthcare.

8. All studies, reports, instructions, directives, or other Documents relating to the "panel of experts serving within the Departments of Defense and Homeland Security to provide advice and recommendations on the implementation of the president's direction." Statement of Secretary Jim Mattis, Release No: NR-312-17.

9. All Documents and Communications between January 20, 2017 and July 28, 2017 related to military spending on gender confirmation surgeries.

10. For the period starting January 20, 2017 up to and including July 28, 2017, all Communications between any member of Congress and President Trump or any individual within the Executive Office of the President concerning military service by transgender people or healthcare for current or prospective transgender service members, and any Documents constituting, summarizing, reflecting, or evidencing such Communications.

11. All Documents reflecting visits to the White House on July 10, 2017 by President Trump's Evangelical Advisory Board members or his campaign's Evangelical Advisors, including but not limited to, visitor logs.

12. All Documents related to, and Communications with, President Trump's Evangelical Advisory Board members or his campaign's Evangelical Advisors related to transgender military service or healthcare for current or prospective transgender service members.

13. All currently operative military policies, directives, or procedures that pertain exclusively to transgender service members.

14. All Documents and Communications relating to the RAND Report.

15. All documents or communications relating to Secretary of Defense Ash Carter's Directive Type Memo 16-005, issued on June 30, 2016, regarding transgender military service and related healthcare.

16. All Documents or Communications relating to any application (including any action taken on such application) by a transgender person for a waiver sought for the purpose of accessing into the U.S. military.

17. With respect to waivers sought by transgender people for the purpose of accessing into the U.S. military, Documents sufficient to show the number of such waivers requested, the number of such waivers granted, and the number of such waivers denied.

18. With respect to waivers sought by transgender people for the purpose of accessing into the U.S. military, all Documents or Communications relating to the purpose or bases for the denial of such waivers.

19. All Documents or Communications, between June 30, 2017 and the present, relating to discharge proceedings against any transgender service member serving in the U.S. military.

20. All Documents or Communications, between June 30, 2017 and the present, relating to any transgender person who has applied to join the U.S. military.

21. All Documents and Communications produced by You to any party in any of the following lawsuits: *Doe v. Trump*, No. 17-cv-1597 (D.D.C.); *Stone v. Trump*, No. 1:17-cv-02459 (D. Md.); *Stockman v. Trump*, No. 17-cv-1799 (C.D. Cal.), and any cases consolidated therewith.

22. All Documents and Communications relating to the subject matter set forth in a June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff from Secretary James Mattis with Subject: Accession of Transgender Individuals in the Military Services.

23. All Documents or Communications relating to the reasons, grounds, or bases for the decision set forth in a June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff from Secretary James Mattis with Subject: Accession of Transgender Individuals in the Military Services.

24. All Documents or Communications relating to the cost of implementing the policy set forth in the August 25, 2017, memorandum entitled "Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security."

25. All estimates or calculations, and related Documents and Communications, relating to the cost of separating currently serving transgender people from the military.

DEFINITIONS AND INSTRUCTIONS

1. "You," "your," and "yours," whether or not capitalized, shall mean the Defendants, individually and/or collectively, including Defendants' current and former employees, agents, affiliates, contractors, consultants, representatives, and other persons engaged directly or indirectly by or under the control of Defendants.

2. "The Policy" shall mean any of President Trump's July 26, 2017 tweets (the "Tweets") regarding transgender military service and related healthcare together with the August 25, 2017 Presidential Memorandum regarding the same (the "Presidential Memorandum"), and all changes in United States government policies regarding transgender military service undertaken or related healthcare or contemplated as a direct or indirect result of Tweets and/or the Presidential Memorandum, including but not limited to, "The Implementation Plan" (defined *infra*) and the "Interim Guidance" (defined *infra*).

3. "The Implementation Plan" shall mean the implementation plan referenced in Secretary of Defense Jim Mattis' August 28, 2017 Release (No: NR-312-17).

4. The "Interim Guidance" shall mean the memorandum titled "Military Service by Transgender Individuals - Interim Guidance" and dated September 14, 2017.

5. "Communication" shall mean any transmission of information by one or more persons to one or more persons by any means including, without limitation, telephone conversations, letters, telegrams, teletypes, telexes, telecopies, e-mail, text messages, computer linkups, written memoranda, and face-to-face conversations; "communication" includes all documents and electronically stored information ("ESI") containing, summarizing, or memorializing any communication.

6. "Document" or "documents" shall have the full meaning ascribed to it by Federal Rule of Civil Procedure 34(a) including ESI, and includes the original and any identical or nonidentical copy, regardless of origin or location, of any writing or record of any type or description, including but not limited to, all writings; records; contracts; agreements; communications (intra or inter-company); correspondence; memoranda; letters; facsimiles; electronic mail (e-mail); text messages; minutes, recordings, transcripts, and summaries of meetings, or recordings of meetings, speeches, presentations, conversations, or telephone calls (whether recorded in writing, mechanically, or electronically); handwritten and typewritten notes of any kind; statements; reports; voice recordings; desk calendars; diaries; logs; drafts; studies; analyses; schedules; forecasts; surveys; invoices; receipts; computer data; computer printouts; financial statements; balance sheets; statements of operations; audit reports; financial summaries; statements of lists of assets; work papers; pictures; photographs; drawings; computer cards; tapes; discs; printouts and records of all types; instruction manuals; policy manuals and statements; books; pamphlets; and every other device or medium by which information or intelligence of any type is transmitted, recorded, or preserved, or from which intelligence or information can be perceived.

7. "Identify," whether or not capitalized, when used with respect to: (a) an individual, shall mean to provide the individual's full name, job title, and employer during the period referred to, and current or last-known address and telephone number and business address and telephone

number; (b) any entity other than an individual, shall mean to provide the entity's full name and current or last-known address (designating which); and (c) a document, shall mean to provide the date, title, subject matter, author(s), recipient(s), and Bates number(s).

8. "Including" or "includes," whether or not capitalized, shall mean "including but not limited to" or "including without limitation."

9. "Member of Congress," whether or not capitalized, shall mean any Senator, Representative, committee, sub-committee, or group (formal or informal) of the United States Congress (or individual or staff member acting on behalf of any such Senator, Representative, committee, sub-committee, or group (formal or informal)).

10. The "RAND Report" means the study performed by the RAND Corporation regarding the impact of transgender military service or healthcare for current or prospective transgender service members (such report appears on the docket in this case at Dkt. 34-10).

11. "Relating to" or "related to," whether or not capitalized, when referring to any given subject matter, shall mean any document that constitutes, comprises, involves, contains, embodies, reflects, identifies, states, mentions, alludes to, refers directly or indirectly to, or is in any way relevant to the particular subject matter identified.

12. Produce all documents in the order in which they appear in your files. Documents that, in their original condition, are stapled, clipped, or otherwise fastened together shall be produced in this same condition.

13. Produce all documents within your possession, custody, or control including all documents in the possession, custody, or control of any United States government employee, agent, representative, consultant, attorney, accountant, advisors, or other persons directly or indirectly connected with you or subject to your control, any government department, agency or any other government subdivision.

14. If any responsive document has been lost, destroyed, removed from, or is no longer in your possession, custody, or control for any reason, please identify the document, its last known location, and the circumstances surrounding its loss, destruction, or removal.

15. If you contend that any responsive document is protected from disclosure pursuant to any privilege or work-product doctrine, please specifically set forth the privilege being asserted and any factual or legal basis for its assertion. Also set forth the date and title of the document, its subject matter generally, its author(s) and recipient(s), and its Bates number(s).

16. Each paragraph is to be construed independently and not by or with reference to any other paragraph for purposes of limiting the scope of any particular request.

17. If no documents responsive to a particular request exist, or if such documents exist but are not in your possession, custody, or control, then your response to that request shall so state.

18. Pursuant to the Federal Rules of Civil Procedure, these requests are continuing and you must revise or supplement your responses and production whenever new or additional responsive information becomes known.

Dated: December 29, 2017

/s/ Jordan M. Heinz

NEWMAN DU WORS LLP Derek A. Newman, WSBA #26967
dn@newmanlaw.com
Samantha Everett, WSBA #47533
samantha@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

LAMDBA LEGAL DEFENSE AND EDUCATION FUND, INC.
Tara Borelli, WSBA #36759
tborelli@lambdalegal.org
Jon W. Davidson (admitted pro hac vice)
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Vanessa Barsanti (admitted pro hac vice)
Daniel I. Siegfried (admitted pro hac vice)
300 North LaSalle
Chicago, IL 60654

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on December 29, 2017, I caused a true and correct copy of the foregoing document to be served by email on the following counsel of record for Defendants:

Ryan B. Parker
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
ryan.parker@usdoj.gov

s/ Jordan M. Heinz

Exhibit 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Case No. 2:17-cv-01297-MJP **PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSION TO DEFENDANTS** Honorable Marsha J. Pechman

Pursuant to Federal Rules of Civil Procedure 26 and 36, Plaintiffs hereby request that Defendants answer the following requests for admission ("Requests") within 30 days from the date of service hereof, in accordance with Rule 36, the Local Rules of this Court, and the Definitions and Instructions set forth below.

Requests

1. Admit that on July 26, 2017, President Trump stated via Twitter that: "[a]fter consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow [t]ransgender individuals to serve in any capacity in the U.S. military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you[.]"

2. Admit that on or before July 26, 2017, President Trump decided that "the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. military[.]"

3. Admit that prior to President Trump's July 26, 2017 statements on Twitter, President Trump did not inform General Joseph F. Dunford, Jr. or any other member of the Joint Chiefs of Staff that the United States Government would not accept or allow transgender individuals to serve in any capacity in the U.S. military.

4. Admit that on or about June 19, 2017, General Joseph F. Dunford, Jr. stated: "[t]ransgender personnel are serving right now, and there is no review ongoing that would affect the ability of those currently serving to continue serving, provided they can meet the physical and mental qualifications of service, be worldwide deployable, and the same standards that every other soldier, sailor, airmen, and Marine meets."

5. Admit that between July 26, 2017 and September 26, 2017, General Joseph F. Dunford, Jr. communicated to President Trump that transgender service members who otherwise meet the physical and mental standards for military service and are worldwide deployable should be able to continue serving.

6. Admit that between January 20, 2017 and July 26, 2017, Secretary Mattis did not recommend that President Trump adopt a policy that the United States Government not accept or allow transgender individuals to serve in any capacity in the U.S. military.

7. Admit that before July 26, 2017, Secretary Mattis advised President Trump against adopting a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

8. Admit that when President Trump issued the Tweets, Secretary Mattis had not communicated to President Trump a reversal of his previous advice that President Trump not adopt a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

9. Admit that before President Trump issued the Tweets, no individual within the Department of Defense holding, at the time of providing any such advice, the title of Secretary, Deputy Secretary, or Under Secretary, advised President Trump to adopt a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

10. Admit that before President Trump issued the Tweets, no individual serving in the U.S. Military holding at least, at the time of providing any such advice, the rank of Brigadier General, Major General, Lieutenant General, Chief of Staff, or General (for any individual serving

in the U.S. Army, Air Force, or Marine Corps) or Rear Admiral Lower Half, Rear Admiral, Vice Admiral, Chief of Naval Operations, or Admiral (for any individual serving in the U.S. Navy or Coast Guard), advised President Trump to adopt a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

11. Admit that between January 20, 2017 and July 26, 2017, Lieutenant General H.R. McMaster did not recommend that President Trump adopt a policy of excluding transgender individuals from serving in any capacity in the U.S. military.

12. Admit that on or about January 12, 2017, at a Senate confirmation hearing, a Senator asked Secretary Mattis: "Is there something innate in being a woman or LGBT that would cause you to believe that they could not be part of a lethal force?" And Secretary Mattis responded: "No."[1]

13. Admit that prior to July 26, 2017, President Trump never spoke to any person he believed to be or knew to be transgender regarding his decision "that the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. military."

14. Admit that as of July 25, 2017, Secretary Mattis had not expressed any intention to further extend, past January 1, 2018, the date on which a policy permitting transgender people to access into the U.S. military under the conditions set forth in Directive-Type Memorandum 16-005 would go into effect.

15. Admit that had President Trump not issued the Tweets or the August 25 Memorandum, You would have been prepared no later than January 1, 2018 to implement a policy permitting transgender people to access into the U.S. military under the conditions set forth in Directive-Type Memorandum 16-005.

[1] *See* https://www.armed-services.senate.gov/imo/media/doc/17-03_01-12-17.pdf.

16. Admit that You have never granted a medical waiver allowing a transgender individual to access into the U.S. military when otherwise applicable medical requirements would disqualify that individual from accession solely on account of the individual's transgender status, gender transition, or gender dysphoria.

Definitions and Instructions

1. "You," "your," and "yours," whether or not capitalized, shall mean the Defendants, individually and/or collectively, including Defendants' current and former employees, agents, affiliates, contractors, consultants, representatives, and other persons engaged directly or indirectly by or under the control of Defendants.

2. The "Tweets" shall mean any of President Trump's July 26, 2017 tweets regarding transgender military service or related healthcare.

3. The "August 25 Memorandum" shall mean the memorandum issued by President Trump on August 25, 2017 titled "Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security."

4. If You contend that any Request is objectionable in whole or in part, please state with particularity each objection, the basis for it, and the categories of information to which the objection applies, and respond to the Request insofar as it is deemed not objectionable.

5. If You find the meaning of any term in these Requests unclear, You shall assume a reasonable meaning, state what the assumed meaning is, and respond to the Request according to the assumed meaning.

6. If You intend to refuse to answer any Request by reason of the attorney-client privilege, work-product doctrine, or other privilege, doctrine, or immunity, please identify all bases, factual and legal, upon which such protection from discovery rests.

7. Each paragraph is to be construed independently and not by or with reference to any other paragraph for purposes of limiting the scope of any particular Request.

8. Pursuant to the Federal Rules of Civil Procedure, these requests are continuing and you must revise or supplement your responses and production whenever new or additional responsive information becomes known.

Dated: January 26, 2018

/s/ Jordan M. Heinz
NEWMAN DU WORS LLP Derek A. Newman, WSBA #26967
dn@newmanlaw.com
Samantha Everett, WSBA #47533
samantha@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

LAMDBA LEGAL DEFENSE AND EDUCATION FUND, INC.
Tara Borelli, WSBA #36759
tborelli@lambdalegal.org
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Scott Lerner (admitted pro hac vice)
Vanessa Barsanti (admitted pro hac vice)
Daniel I. Siegfried (admitted pro hac vice)
300 North LaSalle
Chicago, IL 60654

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on January 26, 2018 I caused a true and correct copy of the foregoing document to be served by email on the following counsel of record for Defendants:

Ryan B. Parker
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
ryan.parker@usdoj.gov

/s/ Jordan M. Heinz

Exhibit 4

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Case No. 2:17-cv-01297-MJP

DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO SECRETARY MATTIS AND THE UNITED STATES DEPARTMENT OF DEFENSE

Pursuant to Federal Rules of Civil Procedure 26 and 34 and the Local Rules of the U.S. District Court for the Western District of Washington, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' First Set of Requests for Production of Documents to Defendant James N. Mattis, in his official capacity as Secretary of Defense, and the United States Department of Defense, served December 29, 2017.[1] In presenting these objections and responses, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance,

[1] These objections and responses are limited to Secretary Mattis and the Department of Defense. Defendants will produce, or already have produced, separate objections for other Defendants.

materiality, privilege, competency, or any other appropriate ground. ESI will be produced in TIF format.

Objection to Definitions

Defendants object to Plaintiffs' Definition 6 of "Document" as encompassing "every other device or medium by which information or intelligence of any type is transmitted, recorded, or preserved, or from which intelligence or information can be perceived," insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

Specific Objections and Responses to Requests for Production

RFP No. 1:

All Documents and Communications related to the Policy.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All

Documents and Communications" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 2:

All Documents supporting, refuting, or relating to Your contention that transgender service members hinder military readiness and lethality.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents" purports to require Defendants to search for and produce documents in any and all

locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 3:

All Documents supporting, refuting, or relating to Your contention that transgender service members disrupt unit cohesion.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 4:

All Documents supporting, refuting, or relating to Your contention that transgender service members tax military resources.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 5:

All documents relating to any justification considered by Defendants for the Policy other than those identified in Requests for Production Nos. 1-4.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

RFP No. 6:

All Documents and Communications relating to, including all drafts of, the August 25, 2017, memorandum entitled "Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security."

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents and Communications" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 7:

All Documents and Communications related to President Trump's consultation with employees, agents, contractors, or consultants of the United States Armed Forces regarding transgender military service or related healthcare.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents and Communications" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, Defendants object to the extent that "consultation" is vague and undefined.

RFP No. 8:

All studies, reports, instructions, directives, or other Documents relating to the "panel of experts serving within the Departments of Defense and Homeland Security to provide advice and

recommendations on the implementation of the president's direction." Statement of Secretary Jim Mattis, Release No: NR-312-17.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All studies, reports, instructions, directives, or other Documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 9:

All Documents and Communications between January 20, 2017 and July 28, 2017 related to military spending on gender confirmation surgeries.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 10:

For the period starting January 20, 2017 up to and including July 28, 2017, all Communications between any member of Congress and President Trump or any individual within the Executive Office of the President concerning military service by transgender people or healthcare for current or prospective transgender service members, and any Documents constituting, summarizing, reflecting, or evidencing such Communications.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The foregoing objections do not foreclose the possibility that, to the extent any responsive documents exist, a Member of Congress may seek to oppose the production of information in this case based on the Speech or Debate Clause.

<u>Response:</u>

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

<u>RFP No. 11</u>:

All Documents reflecting visits to the White House on July 10, 2017 by President Trump's Evangelical Advisory Board members or his campaign's Evangelical Advisors, including but not limited to, visitor logs.

<u>Specific Objections</u>:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which

would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object to the extent that "reflecting" is vague and undefined.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 12:

All Documents related to, and Communications with, President Trump's Evangelical Advisory Board members or his campaign's Evangelical Advisors related to transgender military service or healthcare for current or prospective transgender service members.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents related to, and Communications with" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 13:

All currently operative military policies, directives, or procedures that pertain exclusively to transgender service members.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 14:

All Documents and Communications relating to the RAND Report.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents and Communications" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

RFP No. 15:

All documents or communications relating to Secretary of Defense Ash Carter's Directive Type Memo 16-005, issued on June 30, 2016, regarding transgender military service and related healthcare.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents or Communications" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 16:

All Documents or Communications relating to any application (including any action taken on such application) by a transgender person for a waiver sought for the purpose of accessing into the U.S. military.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 17:

With respect to waivers sought by transgender people for the purpose of accessing into the U.S. military, Documents sufficient to show the number of such waivers requested, the number of such waivers granted, and the number of such waivers denied.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or

information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object to the extent that "sufficient to show" is vague and undefined.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 18:

With respect to waivers sought by transgender people for the purpose of accessing into the U.S. military, all Documents or Communications relating to the purpose or bases for the denial of such waivers.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which

describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 19:

All Documents or Communications, between June 30, 2017 and the present, relating to discharge proceedings against any transgender service member serving in the U.S. military.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 20:

All Documents or Communications, between June 30, 2017 and the present, relating to any transgender person who has applied to join the U.S. military.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 21:

All Documents and Communications produced by You to any party in any of the following lawsuits: *Doe v. Trump*, No. 17-cv-1597 (D.D.C.); *Stone v. Trump*, No. 1:17-cv-02459 (D. Md.); *Stockman v. Trump*, No. 17-cv-1799 (C.D. Cal.), and any cases consolidated therewith.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which

would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 22:

All Documents and Communications relating to the subject matter set forth in a June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff from Secretary James Mattis with Subject: Accession of Transgender Individuals in the Military Services.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents and Communications" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, Defendants object to the extent that "subject matter set forth in" is vague and undefined.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 23:

All Documents or Communications relating to the reasons, grounds, or bases for the decision set forth in a June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff from Secretary James Mattis with Subject: Accession of Transgender Individuals in the Military Services.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents or Communications" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, Defendants object to the extent that "reasons, grounds, or bases" is vague and undefined.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 24:

All Documents or Communications relating to the cost of implementing the policy set forth in the August 25, 2017, memorandum entitled "Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security."

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which

would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 25:

All estimates or calculations, and related Documents and Communications, relating to the cost of separating currently serving transgender people from the military.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

Date: February 9, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ *Ryan Parker*
RYAN B. PARKER
ANDREW E. CARMICHAEL
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

Vanessa Barsanti
KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 2205
F +1 312 862 2200
vanessa.barsanti@kirkland.com

Jordan M. Heinz
KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 7027
F +1 312 862 2200
jordan.heinz@kirkland.com

Peter Renn
Senior Attorney
Lambda Legal
Western Regional Office
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010-3512
Tel 213-382-7600 ext. 228
Fax 213-351-6050
prenn@lambdalegal.org
www.lambdalegal.org

La Rond Baker
Assistant Attorney General
Wing Luke Civil Rights Unit
Office of the Washington Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206.516.2999
206.464.6451 (fax)
LaRondB@ATG.WA.GOV

/s/ *Ryan Parker*
RYAN B. PARKER
Senior Trial Counsel
U.S. Department of Justice

Exhibit 5

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Case No. 2:17-cv-01297-MJP

DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES TO SECRETARY MATTIS AND THE UNITED STATES DEPARTMENT OF DEFENSE

Pursuant to Federal Rules of Civil Procedure 26 and 33, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' First Set of Interrogatories to James N. Mattis, in his official capacity as Secretary of Defense, and the United States Department of Defense (collectively, "Department of Defense"), served December 29, 2017.[1] In presenting these objections and responses, Defendants do not waive any further

[1] These objections and responses are limited to Secretary Mattis and the Department of Defense. Defendants will produce, or already have produced, separate objections and responses for other Defendants.

objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Objections to Definitions and Instructions

1. The Department of Defense objects to Definition 1 of "You," "your," and "yours" as substantially overbroad and problematic because the Department of Defense has more than three million current personnel, and millions more former personnel.

2. The Department of Defense objects to Plaintiffs' Definition 5 of "Communication" as encompassing "electronically stored information (ESI) containing, summarizing, or memorializing any communication," insofar as electronic information collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

2. The Department of Defense objects to Plaintiffs' Definition 6 of "Document" and "documents" as encompassing "ESI," and "computer data," insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

Specific Objections to Interrogatories

Interrogatory No 1:

Identify and describe each of the governmental purposes or interests that you contend will be advanced by the Policy (including, but not limited to, any purported interest in military readiness, lethality, unit cohesion, and military resources).

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client

privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in an upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 2:

For each governmental purpose or interest identified in Your answers to Interrogatory 1 above, describe in detail all facts that You contend establish the need or justification to further each purpose or interest, including all Documents that You contend might establish the existence of such facts.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Department of Defense also objects to this interrogatory to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 2 includes at least two discrete subparts: (1) a detailed description of the facts that establish a government interest, and (2) all documents that establish

the existence of those facts. See *Paananen v. Cellco P'ship*, No. C08-1042 RSM, 2009 WL 3327227, at *3 (W.D. Wash. Oct. 8, 2009) (concluding that an interrogatory had two discrete subparts where it asked both for "a defendant to summarize and state all the facts that support an affirmative defense," and for "a defendant to identify the evidence (documents and witnesses) that support that affirmative defense"); *Smith v. Cafe Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009) (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories").

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in an upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 3:

For each governmental purpose or interest identified in Your answers to Interrogatory 1 above, describe in detail all facts that You contend demonstrate that the Policy furthers that purpose or interest, including all Documents that You contend might establish the existence of such facts.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Department of Defense also objects to this interrogatory to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 3 includes at least two discrete subparts: (1) a detailed description of the facts that demonstrate that the policy furthers a particular government interest, and (2) all documents that establish the existence of those facts. *See Paananen*, No. C08-1042 RSM, 2009 WL 3327227, at *3 (concluding that an interrogatory had two discrete subparts where it asked both for "a defendant to summarize and state all the facts that support an affirmative defense," and for "a defendant to identify the evidence (documents and witnesses) that support that affirmative defense"); *Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories").

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in an upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 4:

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

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Department of Defense also objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "all individuals" purports to require the Department of Defense to identify every single person President Trump has communicated with regarding transgender policies, regardless of the (a) type, (b) location, (c) amount, or (d) context of the communication.

Interrogatory No. 5:

State the Date on which President Trump decided that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military."

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 6:

Identify all individuals with whom President Trump communicated or consulted in deciding that "the United States Government will not accept or allow Transgender individuals to

serve in any capacity in the U.S. military," including each of the "Generals and military experts" referenced in President Trump's July 26, 2017 tweet.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 7:

Explain the process You used to formulate the Tweets, the Presidential Memorandum, the Interim Guidance, and the Implementation Plan, and identify all sources of fact or opinion You consulted, considered, or otherwise referred to and the dates on which You first consulted, considered, or otherwise referred to such sources of information or opinion.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Department of Defense also objects to this interrogatory to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 7 includes at least two discrete subparts: (1) an explanation of the process used to develop various policies, (2) all sources of fact or opinion

consulted in developing those policies, and the dates of such consultation. *See Paananen*, No. C08-1042 RSM, 2009 WL 3327227, at *3 (concluding that an interrogatory had two discrete subparts where it asked both for "a defendant to summarize and state all the facts that support an affirmative defense," and for "a defendant to identify the evidence (documents and witnesses) that support that affirmative defense"); *Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories").

<u>Response:</u>

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in an upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

<u>Interrogatory No. 8</u>:

Explain President Trump's purported concerns regarding the RAND Report or any other study or review that the Department of Defense relied upon when adopting Secretary Ash Carter's policy allowing transgender people to serve openly in the military.

<u>Specific Objections</u>:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 9:

Identify all members of the "panel of experts serving within the Departments of Defense and Homeland Security to provide advice and recommendations on the implementation of the president's direction." Statement of Secretary Jim Mattis, Release No: NR-312-17.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

The panel of experts is composed of the following individuals who held or hold the following positions:

Chair

- Anthony M. Kurta – Performing the Duties of Under Secretary of Defense (Personnel & Readiness)
- Robert Wilkie – Under Secretary of Defense for Personnel and Readiness

Members

- Thomas Kelly III – Performing the Duties of the Under Secretary of the Army
- Thomas Dee – Performing the Duties of the Under Secretary of the Navy
- Matthew Donovan – Under Secretary of the Air Force
- Charles D. Michel – Vice Commandant of the Coast Guard
- James McConville – Vice Chief of Staff of the Army
- William Moran – Vice Chief of Naval Operations
- Stephen Wilson – Vice Chief of Staff of the Air Force

- Glenn Walters – Assistant Commandant of the Marine Corps
- Daniel Hokanson – Vice Chief of Staff National Guard Bureau
- John Wayne Troxell – Senior Enlisted Advisor to the Vice Chairman of the Joint Chiefs of Staff
- Daniel Daily – Sergeant Major of the Army
- Steven S. Giordano – Master Chief Petty Officer of the Navy
- Kaleth O. Wright – Chief Master Sergeant of the Air Force
- Ronald L. Green – Sergeant Major of the Marine Corps
- Steven W. Cantrell – Master Chief Petty Officer of the Coast Guard
- Christopher Kepner – Senior Enlisted Advisor National Guard Bureau

Interrogatory No. 10:

Identify all Department of Defense and Department of Homeland Security employees who worked with, provided information to, or communicated with employees of the RAND National Defense Research Institute concerning the studies and/or fact gathering that resulted in the RAND Report.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in an

upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 11:

Identify all persons with authority to approve medical waivers requested by transgender service members or transgender individuals seeking to join the U.S. military during the period from January 1, 2010 to the present.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; (b) communications or information protected by the presidential communications privilege; or (c) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

The Department of Defense further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, due to Plaintiffs' definition of "Identify," the reference to "Identify all persons" purports to require the Department of Defense to provide the full name, job title, employer from January 1, 2010 to present, current or last known address and telephone number, and business address and telephone number, of likely hundreds of individuals who had medical waiver authority during the designated time period.

Response:

Department of Defense Instruction 6130.03, which is publicly available at http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003p.pdf, directs the

Secretaries of the Military Departments and the Commandant of the Coast Guard to "[a]uthorize the waiver of the [medical] standards [for appointment, enlistment, or induction in the military services] in individual cases for applicable reasons and ensure uniform waiver determinations." DoDI 6130.03, Enclosure 2, paragraph 3b. The Services have implemented this direction and authority in different ways.

Army. In the Army, for example, the Army's medical waiver authorities are identified in Army Regulation 40-501, paragraph 1-6. The current version of this regulation is available at: https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN3801_AR40-501_Web_FINAL.pdf. The appropriate waiver authority varies depending on the applicable accession program. For example, the Commanding General, United States Army Recruiting Command (USAREC) is the waiver authority for original enlistments, s*ee* AR 40-501, paragraph 1-6d, while the waiver authority for commissioning United States Military Academy (USMA) cadets is the Superintendent, USMA, following consultation with the USMA Surgeon. *Id.* at paragraph 1-6c(2). By previously produced memorandum, *see* Bates ARMY_00000582, the Secretary of the Army on April 20, 2017, withdrew and re-delegated medical waiver authority for transgender applicants to the Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA)(M&RA).

Navy. In the Navy, assignment of authority to grant a medical waiver is by position/title and outlined in the Manual of the Medical Department (MANMED), specifically section 15-31, which provides:

15-31 Waivers of the Physical Standards

(1) For some applicants, their current level of functioning and/or state of health in spite of the presence of a disqualifying medical condition warrants a waiver of the standards.

(2) Waivers of the standards do not make an applicant "physically qualified" but rather provide the applicant the opportunity to enlist or commission despite the fact that a disqualifying condition exists.

(3) The authority to grant a waiver lies with the commander charged with enlisting or commissioning the applicant and the specific program desired (e.g., Commander, Marine Corps Recruiting Command is the authority for applicants desiring enlistment in the Marine Corps). The medical authority to recommend a waiver of the standards to these various commands resides with the Chief, Bureau of Medicine and Surgery. By direction authority to carry out this function has been granted to:

(a) The Director, BUMED Qualifications and Standards. Provides waiver recommendations to: Commander, Marine Corps Recruiting Command; Commander, Naval Services Training Command (NROTC entry, commission of NROTC enrollees, commission of MMR, USNR enrollees); Commander, Naval Medical Education and Training Command; Commander, Officer Candidate School; Superintendent, U.S. Naval Academy; Superintendent, United States Merchant Marine Academy (USMMA entry); Commander, Navy Recruiting Command (Health Professions Scholarship Program, Nurse Commissioning Program). Additionally, the Director, Bureau of Medicine and Surgery, Qualifications and Standards provides guidance to the Navy and Marine Corps Reserve commands regarding physical qualification for retention of service members in the reserves and to the recruit training commands regarding retention of recruits found to have disqualifying medical conditions.

(b) The Senior Medical Officer, Naval Recruiting Command. Provides waiver recommendations to: Commander, Naval Recruiting Command (including Reserve Recruiting Command, excepting the programs listed in article 15-31 (3)(a) above).

(c) The Navy Brigade Surgeon, Uniformed Services University of Healtth Sciences. Provides waiver recommendations to: Assistant Secretary of Defense for Health Affairs (enrollment and graduation commissions).

(4) The processes for requesting a waiver vary based on the program the applicant is seeking. Review the pertinent guidance issued by the enlisting or commissioning authority above. However, regardless of the specific procedures involved, most delays in waiver recommendations result from inadequate information provided with the waiver request. When assembling a waiver request package ensure, at a minimum, the following information is included: most recent complete physical examination, all pertinent past medical records, documentation regarding past and current limitations of activity associated with the condition, and the results of any laboratory testing or specialty evaluation initiated by the examiner.

(5) Results of waiver requests (approved or denied) should be recorded in block 76 or 77 of the DD 2808.

(6) Waiver processes for special duty examinations and assignments are contained in Section IV within the description of the standards for each specific program.

(7) The Navy Medicine Operational Training Center Detachment, Naval Aerospace Medical Institute, (NAMI Code 342) is designated as the Program Manager for assessment and determination of the qualification of applicants, both enlisted and commissioned, for duties involving aviation. In this capacity, NAMI is authorized to issue correspondence recommending

waivers of physical standards to the commander charged with enlisting or commissioning and the specific program desired. Such correspondence shall include letters recommending commissioning by the appropriate authority.

Air Force. The Air Force medical waiver authority is discussed in Air Force Instruction 48-123, Section 6 B, but particularly paragraph 6.4 and Attachment 2. This instruction is publicly available at http://static.e-publishing.af.mil/production/1/af_sg/publication/afi48-123/afi48-123.pdf.

Additional information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in an upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 12:

Identify all persons with authority, during the period from January 1, 2010 to the present, to involuntarily discharge or separate service members on account of transgender status (including those individuals with authority to initiate any necessary proceedings for involuntary discharge or separation, even if final adjudicatory authority resides elsewhere).

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; (b) communications or information protected by the presidential communications privilege; or (c)

material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in an upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 13:

Describe in detail the circumstances leading to Secretary James Mattis's June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff with Subject: Accession of Transgender Individuals in the Military Services, including all reasons for the decision set forth in the memo (whether or not such reasons were publicly stated or acknowledged).

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Response:

Considering the responses from the Secretaries of the Military Departments and Chiefs of the Military Services to the Deputy Secretary of Defense's May 8, 2017 directive to assess their readiness to begin accessing transgender applicants into military service on July 1, 2017, and

after consulting with the Service Chiefs and Secretaries, Secretary Mattis concluded it was necessary to defer the July 1, 2017 accessions date for six months in order to evaluate more carefully the impact of transgender accessions on readiness and lethality and to ensure that he personally had the benefit of the views of the military leadership and senior civilian officials who were then arriving in the Department of Defense.

Interrogatory No. 14:

Identify all persons with knowledge or information concerning the facts set forth in your response to Interrogatory No. 13, including all persons who requested, advised, or consulted on the result set forth in the June 30, 2017 memorandum.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) communications or information protected by the presidential communications privilege; or (e) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Response:

Individuals with relevant knowledge and information include:

- Former Acting Secretary of the Navy, Sean J. Stackley
- Chief of Naval Operations, Admiral John M. Richardson
- Former Director of the Navy Staff, Admiral James G. Foggo
- Commandant of the Marine Corps, General Robert B. Neller

- Secretary of the Air Force, Heather Wilson
- Air Force Chief of Staff, General David L. Goldfein
- Former Acting Secretary of the Army, Robert M. Speer
- Chief of Staff of the Army, General Mark A. Milley.

Interrogatory No. 15:

Identify all communications between a member of Congress, on the one hand, and President Trump or any officer or employee of the Executive Office of the President, on the other, from January 20, 2017 to July 26, 2017, concerning military service by transgender people.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) communications or information protected by the presidential communications privilege; or (e) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

As to the responses to the interrogatories, see Attachment A.

As to the objections:

Date: February 9, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ *Ryan Parker*
RYAN B. PARKER
ANDREW E. CARMICHAEL
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants

ATTACHMENT A

VERIFICATION

Based on information that I obtained in the course of my official duties, I declare under penalty of perjury that the substance of the responses to these interrogatories are true and correct to the best of my knowledge and belief.

Date: Feb. 9, 2018

Signature: Stephanie P. Miller

STEPHANIE P. MILLER

CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

Vanessa Barsanti
KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 2205
F +1 312 862 2200
vanessa.barsanti@kirkland.com

Jordan M. Heinz
KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 7027
F +1 312 862 2200
jordan.heinz@kirkland.com

Peter Renn
Senior Attorney
Lambda Legal
Western Regional Office
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010-3512
Tel 213-382-7600 ext. 228
Fax 213-351-6050
prenn@lambdalegal.org
www.lambdalegal.org

La Rond Baker
Assistant Attorney General
Wing Luke Civil Rights Unit
Office of the Washington Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206.516.2999
206.464.6451 (fax)
LaRondB@ATG.WA.GOV

/s/ *Ryan Parker*
RYAN B. PARKER
Senior Trial Counsel
U.S. Department of Justice

Exhibit 6

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Case No. 2:17-cv-01297-MJP

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' FIRST REQUESTS FOR PRODUCTION TO DEFENDANT DONALD J. TRUMP

Pursuant to Federal Rules of Civil Procedure 26 and 34 and the Local Rules of the U.S. District Court for the District of Columbia, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs' First Set of Requests for Production of Documents to Defendant Donald J. Trump, served December 29, 2017.[1] In presenting these objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

[1] These objections are limited to President Trump. Defendants will produce, or already have produced, separate objections for other Defendants.

Objection to Definitions

Defendants object to Plaintiffs' Definition 6 of "Document" as encompassing "every other device or medium by which information or intelligence of any type is transmitted, recorded, or preserved, or from which intelligence or information can be perceived," insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

General Objection to All Requests for Production

Defendants object to any discovery directed to the President of the United States in this case, on several grounds, including that such discovery should be foreclosed in this case based on separation of powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege.

First, such discovery requests are inappropriate where, as here, they are premised on claims for declaratory and injunctive relief brought directly against the President of the United States, who is not a proper defendant on such claims. The Supreme Court has held that it has "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866); *id.* at 500 ("The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department."). A plurality of the Court later reiterated this principle in *Franklin v. Massachusetts*, 505 U.S. 788, 802–803 (1992). The plurality in *Franklin* found it "extraordinary" that the district court in that case had issued an injunction against the President and two other government officials. *Id.* at 802, 806. "At the threshold," it said, "the

District Court should have evaluated whether injunctive relief against the President was available, and if not, whether appellees' injuries were nonetheless redressable." *Id.* at 803. Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827–28 (noting that such principle is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history"). He reasoned that just as the President is absolutely immune from official capacity damages suits, so is he immune from efforts to enjoin him in his official capacity. *Id.* at 827 ("Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President's performance of executive functions"). The lower courts have often applied this settled principle. *See e.g.*, *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) ("similar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [the] request for a declaratory judgment"); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.") (citations omitted). Under that principle, the President should not be subject to discovery in this case.

Second, the Supreme Court has made clear that discovery directed to the President in civil litigation raises significant separation of powers concerns and should be strictly circumscribed. In *Cheney v. U.S. District Court for District of Columbia*, the Supreme Court explained that where the discovery requests were directed to the Vice President and other senior officials of the Executive Branch who gave advice and made recommendations to the President,

it was "not a routine discovery dispute." 542 U.S. 367, 385 (2004). The Court emphasized that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Id.* at 385. The Supreme Court "has held, on more than one occasion, that '[t]he highest respect that is owed to the office of the Chief Executive … is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.'" *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Further, the Court has held that the Executive's "constitutional responsibilities and status [are] factors counseling judicial deference and restraint" in the conduct of the litigation against it. *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

In *Cheney*, the district court permitted broad discovery directed to the Vice President and other senior officials, and the D.C. Circuit dismissed the government's mandamus petition to vacate the district court's discovery orders, holding that the government officials, "to guard against intrusion into the President's prerogatives, must first assert privilege." 542 U.S. at 375–76. In vacating the D.C. Circuit's decision, the Supreme Court described as "anything but appropriate" the "overly broad discovery requests" directed to the Vice President and other senior officials, which were "unbounded in scope," and asked for "everything under the sky." *Id.* at 387–88 ("The Government [ ] did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored."). Noting the separation of powers concerns, the Supreme Court instructed the D.C. Circuit to analyze, on remand, whether the district court's actions in permitting discovery against the Vice President and other senior officials constituted "an unwarranted impairment of another branch in the performance of its constitutional duties." *Id.* at 390. It rejected the D.C. Circuit's "mistaken assumption that the

assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections." *Id.* at 391. *Cf. United States v. Poindexter*, 727 F. Supp. 1501, 1503–04 (D.D.C. 1989) (agreeing with the President that "it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents" and deciding to narrow, on its own, the scope of the discovery directed to the President). These separation of powers concerns were also recognized in *American Historical Association v. National Archives & Records Administration*. 402 F. Supp. 2d 171, 181 (D.D.C. 2005) (Kollar-Kotelly, J.). The Court there found the reasoning in *Cheney* instructive, reiterating the *Cheney* Court's view that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Id.* at 181 (quoting *Cheney*, 542 U.S. at 385) (internal quotation marks omitted).

In light of these compelling separation of powers concerns, the Court should, at a minimum, require Plaintiffs to exhaust alternative sources of discovery before subjecting the President to discovery. Indeed, on February 21, 2018—a mere two weeks from now—the Secretary of Defense is expected to submit an implementation plan to the President, which could narrow, if not completely eliminate, any purported reason for such broad discovery directed to the President. Military policy concerning transgender persons will be set forth in that plan, and any discovery, if permitted at all, into the basis for that policy should be directed at DoD in the first instance at that time. This timeline alone weighs heavily in favor of not subjecting the sitting President to discovery.

Finally, virtually all of the discovery directed to the President in this case is subject to the presidential communications privilege. The "presumptive privilege" that attaches to presidential

communications is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974); *see In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (describing the privilege's "constitutional origins"). The privilege is broad, protecting the "confidentiality of Presidential communications in performance of the President's responsibilities." *United States v. Nixon*, 418 U.S. at 711. *See also In re Sealed Case*, 121 F.3d at 744 ("The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations."). Documents subject to the presidential communications privilege are shielded in their entirety, and the privilege "covers final and post-decisional material as well as pre-deliberative ones." *In re Sealed Case*, 121 F.3d at 745.

Although the presidential communications privilege is not absolute, the bar to overcoming the privilege is high; it is "more difficult to surmount" than the deliberative process privilege. *In re Sealed Case*, 121 F.3d at 746. A party seeking otherwise privileged presidential material must demonstrate a "focused demonstration of need." *Id.*; *See also Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). Courts will balance "the public interests served by protecting the President's confidentiality in a particular context with those furthered by requiring disclosure." *In re Sealed Case*, 121 F.3d at 753. To meet this heavy burden of "specific need" in a criminal matter, the party seeking the privileged material must first demonstrate "that each discrete group of the subpoenaed materials likely contains important evidence"—that is, evidence "directly relevant to issues that are expected to be central to the trial," and not evidence that is "only tangentially relevant or would relate to side issues." *Id.* at 753–55. The party seeking the discovery must also show "that this evidence is not available with

due diligence elsewhere"—that is, notwithstanding other sources of information, the privileged documents are "still needed." *Id.* (explaining that this standard reflects the Supreme Court's "insistence that privileged presidential communications should not be treated as just another source of information").

Where privileged material is sought for use in a civil case, the burden to overcome the presidential communications privilege is even greater. The greater scrutiny is appropriate because "the right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions'" as a request for information in a criminal case. *Cheney*, 542 U.S. at 384 (quoting *United States v. Nixon*, 418 U.S. at 713); *see also Am. Historical Ass'n*, 402 F. Supp. 2d at 181 (explaining that the *Cheney* Court noted that "while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch's essential functions, the same could not be said of document requests in the civil context"); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) ("[T]he sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee's functions.") (emphasis added).

In this case—a civil matter seeking discovery directly from the President, in his capacity as Commander-in-Chief, related to his decisionmaking process on a topic involving national security and military concerns—Plaintiffs face a significant burden in order to negate a valid assertion of the presidential communications privilege. Plaintiffs cannot meet this burden, especially where the requested discovery seeks information that, on its face, is privileged (including information about presidential communications, attorney-client and work product materials, and drafts of presidential documents) and would plainly intrude on core presidential

deliberations, or where the requested discovery seeks information that could be sought from the Department of Defense or other sources, including publicly available ones.

Accordingly, Defendants object to any discovery requests directed to the President of the United States in this case based on these compelling separation of powers concerns, and in particular object to the discovery sought that is subject to the presidential communications privilege. Based on the foregoing objections, the President will not produce privileged or non-privileged documents and information that have been identified as potentially responsive.

Specific Objections to Requests for Production

RFP No. 1: All Documents and Communications related to the Policy.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President also objects to the scope of this RFP on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the

reference to "[a]ll Documents and Communications" purports to require the President to search for and produce documents and communications in any and all locations, regardless of whether the documents and communications would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

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

RFP No. 2: All Documents supporting, refuting, or relating to Your contention that transgender service members hinder military readiness and lethality.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents" purports to require the President to search for and produce documents in any and all

locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

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

RFP No. 3: All Documents supporting, refuting, or relating to Your contention that transgender service members disrupt unit cohesion.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents" purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

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

RFP No. 4: All Documents supporting, refuting, or relating to Your contention that transgender service members tax military resources.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents" purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

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

RFP No. 5: All documents relating to any justification considered by Defendants for the Policy other than those identified in Requests for Production Nos. 1-4.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents" purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

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

RFP No. 6: All Documents and Communications relating to, including all drafts of, the August 25, 2017, memorandum entitled "Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security."

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents and Communications" purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

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

RFP No. 7: All Documents and Communications related to President Trump's consultation with employees, agents, contractors, or consultants of the United States Armed Forces regarding transgender military service or related healthcare.

<u>Specific Objections</u>:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents and Communications" purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, the President objects to the extent that "consultation" is vague and undefined.

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

<u>RFP No. 8</u>: All studies, reports, instructions, directives, or other Documents relating to the "panel of experts serving within the Departments of Defense and Homeland Security to

provide advice and recommendations on the implementation of the president's direction." Statement of Secretary Jim Mattis, Release No: NR-312-17.

<u>Specific Objections</u>:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All studies, reports, instructions, directives, or other Documents" purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents

would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

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

RFP No. 9: All Documents and Communications between January 20, 2017 and July 28, 2017 related to military spending on gender confirmation surgeries.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

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

RFP No. 10: For the period starting January 20, 2017 up to and including July 28, 2017, all Communications between any member of Congress and President Trump or any individual within the Executive Office of the President concerning military service by transgender people or

healthcare for current or prospective transgender service members, and any Documents constituting, summarizing, reflecting, or evidencing such Communications.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

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

The foregoing objections do not foreclose the possibility that, to the extent any responsive documents exist, a Member of Congress may seek to oppose the production of information in this case based on the Speech or Debate Clause.

RFP No. 11: All Documents reflecting visits to the White House on July 10, 2017 by President Trump's Evangelical Advisory Board members or his campaign's Evangelical Advisors, including but not limited to, visitor logs.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects to the extent that "reflecting" is vague and undefined.

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

RFP No. 12: All Documents related to, and Communications with, President Trump's Evangelical Advisory Board members or his campaign's Evangelical Advisors related to transgender military service or healthcare for current or prospective transgender service members.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents related to, and Communications with" purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

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

RFP No. 13: All currently operative military policies, directives, or procedures that pertain exclusively to transgender service members.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The

President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

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

RFP No. 14: All Documents and Communications relating to the RAND Report.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log

will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents and Communications" purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

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

RFP No. 15: All documents or communications relating to Secretary of Defense Ash Carter's Directive Type Memo 16-005, issued on June 30, 2016, regarding transgender military service and related healthcare.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log

will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents or Communications" purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

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

RFP No. 16: All Documents or Communications relating to any application (including any action taken on such application) by a transgender person for a waiver sought for the purpose of accessing into the U.S. military.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

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

RFP No. 17: With respect to waivers sought by transgender people for the purpose of accessing into the U.S. military, Documents sufficient to show the number of such waivers requested, the number of such waivers granted, and the number of such waivers denied.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not

party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects to the extent that "sufficient to show" is vague and undefined.

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

RFP No. 18: With respect to waivers sought by transgender people for the purpose of accessing into the U.S. military, all Documents or Communications relating to the purpose or bases for the denial of such waivers.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not

party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

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

RFP No. 19: All Documents or Communications, between June 30, 2017 and the present, relating to discharge proceedings against any transgender service member serving in the U.S. military.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log

will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

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

RFP No. 20: All Documents or Communications, between June 30, 2017 and the present, relating to any transgender person who has applied to join the U.S. military.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

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

RFP No. 21: All Documents and Communications produced by You to any party in any of the following lawsuits: *Doe v. Trump*, No. 17-cv-1597 (D.D.C.); *Stone v. Trump*, No. 1:17-cv-02459 (D. Md.); *Stockman v. Trump*, No. 17-cv-1799 (C.D. Cal.), and any cases consolidated therewith.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

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

RFP No. 22: All Documents and Communications relating to the subject matter set forth in a June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff from Secretary James Mattis with Subject: Accession of Transgender Individuals in the Military Services.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President furthers objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents and Communications" purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, the President objects to the extent that "subject matter set forth in" is vague and undefined.

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

RFP No. 23: All Documents or Communications relating to the reasons, grounds, or bases for the decision set forth in a June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff from Secretary James Mattis with Subject: Accession of Transgender Individuals in the Military Services.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log

will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents or Communications" purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, the President objects to the extent that "reasons, grounds, or bases" is vague and undefined.

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

RFP No. 24: All Documents or Communications relating to the cost of implementing the policy set forth in the August 25, 2017, memorandum entitled "Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security."

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential

communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

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

RFP No. 25: All estimates or calculations, and related Documents and Communications, relating to the cost of separating currently serving transgender people from the military.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

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

Date: February 9, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Ryan B. Parker
RYAN B. PARKER
ANDREW E. CARMICHAEL
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

Vanessa Barsanti
KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 2205
F +1 312 862 2200
vanessa.barsanti@kirkland.com

Jordan M. Heinz
KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 7027
F +1 312 862 2200
jordan.heinz@kirkland.com

Peter Renn
Senior Attorney
Lambda Legal
Western Regional Office
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010-3512
Tel 213-382-7600 ext. 228
Fax 213-351-6050
prenn@lambdalegal.org
www.lambdalegal.org

La Rond Baker
Assistant Attorney General
Wing Luke Civil Rights Unit
Office of the Washington Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206.516.2999
206.464.6451 (fax)
LaRondB@ATG.WA.GOV

/s/ *Ryan Parker*
RYAN B. PARKER
Senior Trial Counsel
U.S. Department of Justice

Exhibit 7

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Case No. 2:17-cv-01297-MJP

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANT DONALD J. TRUMP

Pursuant to Federal Rules of Civil Procedure 26 and 33, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs' First Set of Interrogatories to Defendant Donald J. Trump, served December 29, 2017.[1] In presenting these objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

[1] These objections are limited to President Trump. Defendants will produce, or already have produced, separate objections for other Defendants.

<u>Objections to Definitions and Instructions</u>

1. Defendants object to Plaintiffs' Definition 5 of "Communication" as encompassing "electronically stored information (ESI) containing, summarizing, or memorializing any communication," insofar as electronic information collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

2. Defendants object to Plaintiffs' Definition 6 of "Document" and "documents" as encompassing "ESI," and "computer data," insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

<u>General Objection to All Interrogatories</u>

Defendants object to any discovery directed to the President of the United States in this case, on several grounds, including that such discovery should be foreclosed in this case based on separation of powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege.

First, such discovery requests are inappropriate where, as here, they are premised on claims for declaratory and injunctive relief brought directly against the President of the United States, who is not a proper defendant on such claims. The Supreme Court has held that it has "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866); *id.* at 500 ("The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department."). A plurality of the Court later reiterated this principle in *Franklin v. Massachusetts*, 505 U.S. 788, 802–803 (1992). The plurality in *Franklin*

found it "extraordinary" that the district court in that case had issued an injunction against the President and two other government officials. *Id.* at 802, 806. "At the threshold," it said, "the District Court should have evaluated whether injunctive relief against the President was available, and if not, whether appellees' injuries were nonetheless redressable." *Id.* at 803. Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827-28 (noting that such principle is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history"). He reasoned that just as the President is absolutely immune from official capacity damages suits, so is he immune from efforts to enjoin him in his official capacity. *Id.* at 827 ("Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President's performance of executive functions"). The lower courts have often applied this settled principle. *See e.g.*, *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) ("similar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [the] request for a declaratory judgment"); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.") (citations omitted). Under that principle, the President should not be subject to discovery in this case.

Second, the Supreme Court has made clear that discovery directed to the President in civil litigation raises significant separation of powers concerns and should be strictly circumscribed. In *Cheney v. U.S. District Court for District of Columbia*, the Supreme Court

explained that where the discovery requests were directed to the Vice President and other senior officials of the Executive Branch who gave advice and made recommendations to the President, it was "not a routine discovery dispute." 542 U.S. 367, 385 (2004). The Court emphasized that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Id.* at 385. The Supreme Court "has held, on more than one occasion, that '[t]he highest respect that is owed to the office of the Chief Executive … is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.'" *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Further, the Court has held that the Executive's "constitutional responsibilities and status [are] factors counseling judicial deference and restraint" in the conduct of the litigation against it. *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

In *Cheney*, the district court permitted broad discovery directed to the Vice President and other senior officials, and the D.C. Circuit dismissed the government's mandamus petition to vacate the district court's discovery orders, holding that the government officials, "to guard against intrusion into the President's prerogatives, must first assert privilege." 542 U.S. at 375-76. In vacating the D.C. Circuit's decision, the Supreme Court described as "anything but appropriate" the "overly broad discovery requests" directed to the Vice President and other senior officials, which were "unbounded in scope," and asked for "everything under the sky." *Id.* at 387-88 ("The Government [ ] did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored."). Noting the separation of powers concerns, the Supreme Court instructed the D.C. Circuit to analyze, on remand, whether the district court's actions in permitting discovery against the Vice President and other senior

officials constituted "an unwarranted impairment of another branch in the performance of its constitutional duties." *Id.* at 390. It rejected the D.C. Circuit's "mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections." *Id.* at 391. *Cf. United States v. Poindexter*, 727 F. Supp. 1501, 1503–04 (D.D.C. 1989) (agreeing with the President that "it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents" and deciding to narrow, on its own, the scope of the discovery directed to the President). These separation of powers concerns were also recognized in *American Historical Association v. National Archives & Records Administration*. 402 F. Supp. 2d 171, 181 (D.D.C. 2005) (Kollar-Kotelly, J.). The Court there found the reasoning in *Cheney* instructive, reiterating the *Cheney* Court's view that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Id.* at 181 (quoting *Cheney*, 542 U.S. at 385) (internal quotation marks omitted).

In light of these compelling separation of powers concerns, the Court should, at a minimum, require Plaintiffs to exhaust alternative sources of discovery before subjecting the President to discovery. Indeed, on February 21, 2018—a mere two weeks from now—the Secretary of Defense is expected to submit an implementation plan to the President, which could narrow, if not completely eliminate, any purported reason for such broad discovery directed to the President. Military policy concerning transgender persons will be set forth in that plan, and any discovery, if permitted at all, into the basis for that policy should be directed at DoD in the first instance at that time. This timeline alone weighs heavily in favor of not subjecting the sitting President to discovery.

Finally, virtually all of the discovery directed to the President in this case is subject to the presidential communications privilege. The "presumptive privilege" that attaches to presidential communications is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974); *see In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (describing the privilege's "constitutional origins"). The privilege is broad, protecting the "confidentiality of Presidential communications in performance of the President's responsibilities." *United States v. Nixon*, 418 U.S. at 711. *See also In re Sealed Case*, 121 F.3d at 744 ("The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations."). Documents subject to the presidential communications privilege are shielded in their entirety, and the privilege "covers final and post-decisional material as well as pre-deliberative ones." *In re Sealed Case*, 121 F.3d at 745.

Although the presidential communications privilege is not absolute, the bar to overcoming the privilege is high; it is "more difficult to surmount" than the deliberative process privilege. *In re Sealed Case*, 121 F.3d at 746. A party seeking otherwise privileged presidential material must demonstrate a "focused demonstration of need." *Id.*; *See also Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). Courts will balance "the public interests served by protecting the President's confidentiality in a particular context with those furthered by requiring disclosure." *In re Sealed Case*, 121 F.3d at 753. To meet this heavy burden of "specific need" in a criminal matter, the party seeking the privileged material must first demonstrate "that each discrete group of the subpoenaed materials likely contains important evidence"—that is, evidence "directly relevant to issues that are expected to be central to the

trial," and not evidence that is "only tangentially relevant or would relate to side issues." *Id.* at 753–55. The party seeking the discovery must also show "that this evidence is not available with due diligence elsewhere"—that is, notwithstanding other sources of information, the privileged documents are "still needed." *Id.* (explaining that this standard reflects the Supreme Court's "insistence that privileged presidential communications should not be treated as just another source of information").

Where privileged material is sought for use in a civil case, the burden to overcome the presidential communications privilege is even greater. The greater scrutiny is appropriate because "the right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions'" as a request for information in a criminal case. *Cheney*, 542 U.S. at 384 (quoting *United States v. Nixon*, 418 U.S. at 713); *see also Am. Historical Ass'n*, 402 F. Supp. 2d at 181 (explaining that the *Cheney* Court noted that "while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch's essential functions, the same could not be said of document requests in the civil context"); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) ("[T]he sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee's functions.") (emphasis added).

In this case—a civil matter seeking discovery directly from the President, in his capacity as Commander-in-Chief, related to his decisionmaking process on a topic involving national security and military concerns—Plaintiffs face a significant burden in order to negate a valid assertion of the presidential communications privilege. Plaintiffs cannot meet this burden, especially where the requested discovery seeks information that, on its face, is privileged

(including information about presidential communications, attorney-client and work product materials, and drafts of presidential documents) and would plainly intrude on core presidential deliberations, or where the requested discovery seeks information that could be sought from the Department of Defense or other sources, including publicly available ones.

Accordingly, Defendants object to any discovery requests directed to the President of the United States in this case based on these compelling separation of powers concerns, and in particular object to the discovery sought that is subject to the presidential communications privilege.

Specific Objections to Interrogatories

Interrogatory No 1: Identify and describe each of the governmental purposes or interests that you contend will be advanced by the Policy (including, but not limited to, any purported interest in military readiness, lethality, unit cohesion, and military resources).

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 2: For each governmental purpose or interest identified in Your answers to Interrogatory 1 above, describe in detail all facts that You contend establish the need

or justification to further each purpose or interest, including all Documents that You contend might establish the existence of such facts.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to this interrogatory to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 2 includes at least two discrete subparts: (1) a detailed description of the facts that establish a government interest, and (2) all documents that establish the existence of those facts. *See Paananen v. Cellco P'ship*, No. C08-1042 RSM, 2009 WL 3327227, at *3 (W.D. Wash. Oct. 8, 2009) (concluding that an interrogatory had two discrete subparts where it asked both for "a defendant to summarize and state all the facts that support an affirmative defense," and for "a defendant to identify the evidence (documents and witnesses) that support that affirmative defense"); *Smith v. Cafe Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009) (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories").

Interrogatory No. 3: For each governmental purpose or interest identified in Your answers to Interrogatory 1 above, describe in detail all facts that You contend demonstrate that the Policy furthers that purpose or interest, including all Documents that You contend might establish the existence of such facts.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to this interrogatory to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 3 includes at least two discrete subparts: (1) a detailed description of the facts that demonstrate that the policy furthers a particular government interest, and (2) all documents that establish the existence of those facts. *See Paananen*, No. C08-1042 RSM, 2009 WL 3327227, at *3 (concluding that an interrogatory had two discrete subparts where it asked both for "a defendant to summarize and state all the facts that support an affirmative defense," and for "a defendant to identify the evidence (documents and witnesses) that support that affirmative defense"); *Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories").

Interrogatory No. 4: Identify all individuals with whom President Trump has discussed or corresponded with regarding the United States' past, present, or potential future governmental policies on transgender military service or related healthcare, and the dates of each discussion, from November 9, 2016 to the present.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "all individuals" purports to require Defendants to identify every single person President Trump has communicated with regarding transgender policies, regardless of the (a) type, (b) location, (c) amount, or (d) context of the communication.

Interrogatory No. 5: State the Date on which President Trump decided that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military."

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege, or (b) communications or information protected by the presidential communications privilege.

The President objects to this interrogatory to the extent that "decided" is vague and ambiguous, as well as undefined by Plaintiffs.

Interrogatory No. 6: Identify all individuals with whom President Trump communicated or consulted in deciding that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military," including each of the "Generals and military experts" referenced in President Trump's July 26, 2017 tweet.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 7: Explain the process You used to formulate the Tweets, the Presidential Memorandum, the Interim Guidance, and the Implementation Plan, and identify all sources of fact or opinion You consulted, considered, or otherwise referred to and the dates on which You first consulted, considered, or otherwise referred to such sources of information or opinion.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to this interrogatory to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 7 includes at least two discrete subparts: (1) an explanation of the process used to develop various policies, (2) all sources of fact or opinion consulted in developing those policies, and the dates of such consultation. *See Paananen*, No. C08-1042 RSM, 2009 WL 3327227, at *3 (concluding that an interrogatory had two discrete subparts where it asked both for "a defendant to summarize and state all the facts that support an affirmative defense," and for "a defendant to identify the evidence (documents and witnesses) that support that affirmative defense"); *Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories").

Interrogatory No. 8: Explain President Trump's purported concerns regarding the RAND Report or any other study or review that the Department of Defense relied upon when adopting Secretary Ash Carter's policy allowing transgender people to serve openly in the military.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 9: Identify all members of the "panel of experts serving within the Departments of Defense and Homeland Security to provide advice and recommendations on the implementation of the president's direction." Statement of Secretary Jim Mattis, Release No: NR-312-17.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Interrogatory No. 10: Identify all Department of Defense and Department of Homeland Security employees who worked with, provided information to, or communicated with employees of the RAND National Defense Research Institute concerning the studies and/or fact gathering that resulted in the RAND Report.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD and DHS.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Interrogatory No. 11: Identify all persons with authority to approve medical waivers requested by transgender service members or transgender individuals seeking to join the U.S. military during the period from January 1, 2010 to the present.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; (b) communications or information protected by the presidential communications privilege; or (c) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation

Interrogatory No. 12: Identify all persons with authority, during the period from January 1, 2010 to the present, to involuntarily discharge or separate service members on account of transgender status (including those individuals with authority to initiate any necessary proceedings for involuntary discharge or separation, even if final adjudicatory authority resides elsewhere).

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege; or (c) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Interrogatory No.13: Describe in detail the circumstances leading to Secretary James Mattis's June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff with Subject: Accession of Transgender Individuals in the Military Services, including all reasons for the decision set forth in the memo (whether or not such reasons were publicly stated or acknowledged).

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 14: Identify all persons with knowledge or information concerning the facts set forth in your response to Interrogatory No. 13, including all persons who requested, advised, or consulted on the result set forth in the June 30, 2017 memorandum.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the

President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) communications or information protected by the presidential communications privilege; or (e) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Interrogatory No. 15: Identify all communications between a member of Congress, on the one hand, and President Trump or any officer or employee of the Executive Office of the President, on the other, from January 20, 2017 to July 26, 2017, concerning military service by transgender people.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

The foregoing objections do not foreclose the possibility that, to the extent any responsive documents exist, a Member of Congress may seek to oppose the production of information in this case based on the Speech or Debate Clause.

Date: February 9, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Ryan Parker
RYAN B. PARKER
ANDREW E. CARMICHAEL
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-4336
Email: ryan.parker@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

Vanessa Barsanti
KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 2205
F +1 312 862 2200
vanessa.barsanti@kirkland.com

Jordan M. Heinz
KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 7027
F +1 312 862 2200
jordan.heinz@kirkland.com

Peter Renn
Senior Attorney
Lambda Legal
Western Regional Office
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010-3512
Tel 213-382-7600 ext. 228
Fax 213-351-6050
prenn@lambdalegal.org
www.lambdalegal.org

La Rond Baker
Assistant Attorney General
Wing Luke Civil Rights Unit
Office of the Washington Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206.516.2999
206.464.6451 (fax)
LaRondB@ATG.WA.GOV

/s/ *Ryan Parker*
RYAN B. PARKER
Senior Trial Counsel
U.S. Department of Justice

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

DECLARATION OF SAMANTHA EVERETT IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

NOTE ON MOTION CALENDAR: October 6, 2017

ORAL ARGUMENT REQUESTED

I, Samantha Everett, swear under penalty of perjury under the laws of the United States to the following:

1. I am counsel of record for Plaintiffs in this action, am over age 18, and competent to be a witness. I am making this Declaration based on facts within my own personal knowledge. I provide this Declaration in support of Plaintiffs' Motion for Preliminary Injunction.

2. Attached hereto as **Exhibit 1** is a true and correct copy of Department of Defense Press Briefing by Secretary Carter on Transgender Service Policies, dated June 30, 2016, available at https://www.defense.gov/News/Transcripts/Transcript-View/Article/822347/department-of-defense-press-briefing-by-secretary-carter-on-transgender-service/.

3. Attached hereto as **Exhibit 2** is a true and correct copy of a Statement by Secretary Carter on DOD Transgender Policy, dated July 13, 2015, available at

https://www.defense.gov/News/News-Releases/News-Release-View/Article/612778.

4. Attached hereto as **Exhibit 3** is a true and correct copy of a Statement by Chief Pentagon Spokesperson Dana W. White on Transgender Accessions, dated June 30, 2017, available at: https://www.defense.gov/News/News-Releases/News-Release-View/Article/1236145/statement-by-chief-pentagon-spokesperson-dana-w-white-on-transgender-accessions.

5. Attached hereto as **Exhibit 4** is a true and correct copy of a Politico article entitled "Inside Trump's snap decision to ban transgender troops," dated July 26, 2017, available at: http://www.politico.com/story/2017/07/26/trump-transgender-military-ban-behind-the-scenes-240990.

6. Attached hereto as **Exhibit 5** is a true and correct copy of a New Civil Rights Article entitled "Trump announced his transgender military ban just days after Tony Perkins asked him for it," dated September 11, 2017, available at: http://www.thenewcivilrightsmovement.com/trump_announced_his_transgender_military_ban_just_days_after_tony_perkins_asked_him_for_it.

7. Attached hereto as **Exhibit 6** are true and correct copies of tweets posted on July 26, 2017, from the Twitter feed of President Trump, available at https://twitter.com/realDonaldTrump.

8. Attached hereto as **Exhibit 7** is a true and correct copy of the President's August 25, 2017 Memorandum for the Secretary of Defense and the Secretary of Homeland Security regarding "Military Service by Transgender Individuals," available at https://www.whitehouse.gov/the-press-office/2017/08/25/presidential-memorandum-secretary-defense-and-secretary-homeland.

9. Attached hereto as **Exhibit 8** are true and correct copies of excerpts from the 2011 "A Report of the National Transgender Discrimination Survey," available at http://www.transequality.org/issues/resources/national-transgender-discrimination-survey-executive-summary (highlighting provided).

10. Attached hereto as **Exhibit 9** is a true and correct copy of New England Journal of Medicine Article entitled "Caring for Our Transgender Troops – The Negligible Cost of Transition-Related Care," dated September 17, 2015 (highlighting provided).

11. Attached hereto as **Exhibit 10** is a true and correct copy of a RAND Corporation Article entitled "Transgender Troops: Fit to Serve," dated August 18, 2016, available at http://www.nejm.org/doi/pdf/10.1056/NEJMp1509230 (highlighting provided).

12. Attached hereto as **Exhibit 11** is a true and correct copy of an August 2017 Palm Center Publication entitled "Discharging Transgender Troops Would Cost 960 Million," available at http://www.palmcenter.org/wp-content/uploads/2017/08/cost-of-firing-trans-troops.pdf (highlighting provided).

13. Attached hereto as **Exhibit 12** is a true and correct copy of a March 2015 Palm Center Publication entitled "Open Service by Transgender Members of Israel Defense Forces," available at http://www.palmcenter.org/wp-content/uploads/2015/05/Israel-Defense-Forces.pdf (highlighting provided).

14. Attached hereto as **Exhibit 13** are true and correct copies of excerpts from a March 2014 Palm Center Publication entitled "Report of the Transgender Military Service Commission," available at http://archive.palmcenter.org/files/Transgender%20Military%20Service%20Report.pdf (highlighting provided).

15. Attached hereto as **Exhibit 14** is a true and correct copy of a Statement by Fifty-Six Retired Generals and Admirals, dated August 1, 2017, available at http://www.palmcenter.org/wp-content/uploads/2017/08/56-GOFO-statement-2.pdf.

16. Attached hereto as **Exhibit 15** is a true and correct copy of the Declaration of Margaret C. Wilmoth filed in *Doe v. Trump*, No. 1:17-cv-01597, Dkt. No. 13-13 (D.D.C.), on August 31, 2017. Because Dr. Wilmoth has been ill this week, she has been unable to sign an identical copy of this declaration for use in this litigation.

17. Attached hereto as **Exhibit 16** is a true and correct copy of a USA Today Article entitled "Accept transgender troops, allow them medical treatment, Adm. Mike Mullen tells Congress," dated July 25, 2017, available at https://www.usatoday.com/story/news/politics/

2017/07/25/accept-treat-transgender-troops-admmike-mullen-tells-congress/508852001.

18. Attached hereto as **Exhibit 17** is a true and correct copy of an Article from The Hill entitled "Ex-Joint Chiefs chairman tells Congress to allow medical care for transgender troops," dated July 25, 2017, available at http://thehill.com/policy/defense/343658-former-joint-chiefs-chairman-to-congress-dont-ban-medical-care-for-transgender.

19. Attached hereto as **Exhibit 18** is a true and correct copy of the biography webpage for Admiral Michael Mullen on the Joint Chiefs of Staff website, obtained from the website http://www.jcs.mil/About/The-Joint-Staff/Chairman/Admiral-Michael-Glenn-Mullen/ on September 13, 2017 (highlighting provided).

DATED this 14th day of September, 2017 at Seattle, Washington

Samantha Everett

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that on September 14, 2017, I caused true and correct copies of the foregoing documents to be served by the method(s) listed below on the following interested parties:

By Hand Delivery:

US Attorney's Office
700 Stewart St., Suite 5220
Seattle, WA 98101-1271

By Registered or Certified Mail:

Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Department of Defense
1400 Defense Pentagon
Washington, DC 20301-1400

Secretary of Defense James N. Mattis
1000 Defense Pentagon
Washington, DC 20301-1000

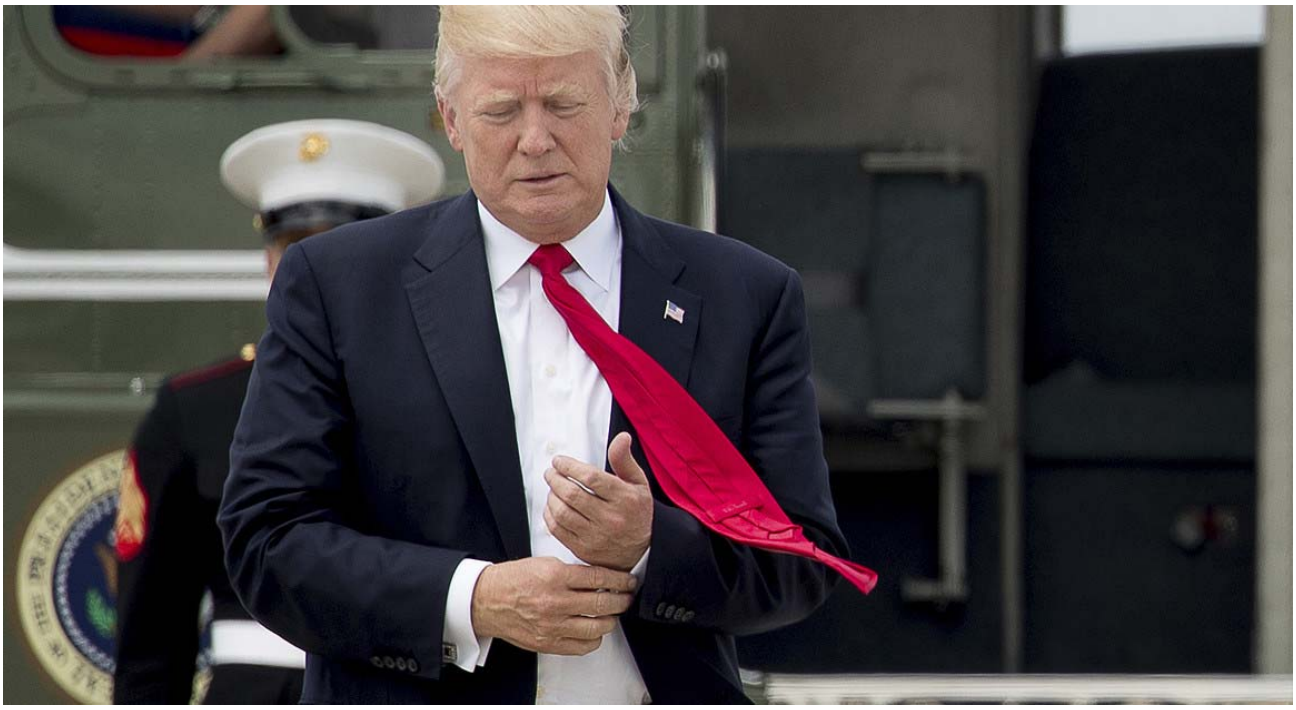
President Donald J. Trump
1600 Pennsylvania Ave. NW
Washington, DC 20500

I hereby certify under the penalty of perjury that the foregoing is true and correct. Executed on September 14, 2017 at Seattle, Washington.

s/Rachel Horvitz
Rachel Horvitz, *Paralegal*

Exhibit 4

POLITICO



President Donald Trump's sudden decision was, in part, a last-ditch attempt to save a House proposal full of his campaign promises that was on the verge of defeat, numerous congressional and White House sources said. | Andrew Harnik/AP Photo

DEFENSE

Inside Trump's snap decision to ban transgender troops

A congressional fight over sex reassignment surgery threatened funding for his border wall.

By **RACHAEL BADE** and **JOSH DAWSEY** | 07/26/2017 02:07 PM EDT | Updated 07/26/2017 09:49 PM EDT

After a week sparring with his attorney general and steaming over the Russia investigation consuming his agenda, President Donald Trump was closing in on an important win.

House Republicans were planning to pass a spending bill stacked with his campaign promises, including money to build his border wall with Mexico.

But an internal House Republican fight over transgender troops was threatening to blow up the bill. And House GOP insiders feared they might not have the votes to pass the legislation because defense hawks wanted a ban on Pentagon-funded sex reassignment operations — something GOP leaders wouldn't give them.

They turned to Trump, who didn't hesitate. In the flash of a tweet, he announced that transgender troops would be banned altogether.

Trump's sudden decision was, in part, a last-ditch attempt to save a House proposal full of his campaign promises that was on the verge of defeat, numerous congressional and White House sources said.

The president had always planned to scale back policies put in place during the administration of President Barack Obama welcoming such individuals in combat and greenlighting the military to pay for their medical treatment plans. But a behind-the-scenes GOP brawl threatening to tank a Pentagon funding increase and wall construction hastened Trump's decision.

Numerous House conservatives and defense hawks this week had threatened to derail their own legislation if it did not include a prohibition on Pentagon funding for gender reassignment surgeries, which they deem a waste of taxpayer money. But GOP leaders were caught in a pinch between those demands and those of moderate Republicans who considered the proposal blatantly discriminatory.

"There are several members of the conference who feel this really needs to be addressed," senior House Appropriations Committee member Robert Aderholt (R-Ala.) said Tuesday. "This isn't about the transgender issue; it's about the taxpayer dollars going to pay for the surgery out of the defense budget."

That's why House lawmakers took the matter to the Trump administration. And when Defense Secretary James Mattis refused to immediately upend the policy, they went straight to the White House. Trump — never one for political correctness — was all too happy to oblige.

"[P]lease be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military," Trump tweeted Wednesday morning. "Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail."

The president's directive, of course, took the House issue a step beyond paying for gender reassignment surgery and other medical treatment. House Republicans were never debating expelling all transgender troops from the military.

"This is like someone told the White House to light a candle on the table and the WH set the whole table on fire," a senior House Republican aide said in an email. The source said that although GOP leaders asked the White House for help on the taxpayer matter specifically, they weren't expecting — and got no heads up on — Trump's far-reaching directive.

While Democrats and centrist Republicans are already blasting the move, one White House official said the decision would be "seen as common-sense" by millions — though likely vociferously protested by others. White House officials also noted that conservatives had pushed for the ban, including in a May letter that was signed by dozens of right-leaning

groups.

"It's not the worst thing in the world to have this fight," the administration official said.

The announcement, multiple sources said, did not sit well with Mattis, who appeared to be trying to avoid the matter in recent weeks. An extensive Defense Department review of the policy was already underway, but a decision wasn't expected for months.

Insiders said Mattis felt there was no need to rush upending the policy, arguing the Pentagon needed time to study the issue. Its decision would affect at least 2,450 transgender active-military personnel, according to a Rand report — though military LGBT activist groups say as many as 15,000 soldiers fall into that category.

That timeline, however, wasn't good enough for House Republicans. Rep. Vicky Hartzler (R-Mo.), the original author of the House's transgender proposal, attempted to reach Mattis by phone numerous times in recent weeks to discuss the transgender issue.

What to know about Trump's transgender military ban
By **JACQUELINE KLIMAS**, **MATTHEW NUSSBAUM** and **CONNOR O'BRIEN**

Mattis only got back to her the day she forced the matter on the House floor in mid-July. And, according to Rep. Tom MacArthur (R-N.J.), who opposed the Hartzler proposal, Mattis asked Hartzler to withdraw her amendment and give him space to maneuver.

Lawmakers, including Hartzler, went around Mattis to engage the White House. Mattis knew the ban was being considered and was consulted before the announcement, according to several White House officials. But the decision ultimately came down from Trump and was "White House-driven," Trump aides said.

The president was also annoyed by the Pentagon delay, one person said. A different official said the White House had gotten positive reaction from conservatives, an important factor amid their displeasure with Trump's recent bashing of Attorney General Jeff Sessions.

The transgender fight first surfaced in the House a few weeks ago. With the backing of almost the entire GOP Conference, Hartzler offered an amendment to a defense authorization bill that would ban funding for gender reassignment surgeries and treatments for transgender active-duty personnel.

Republican supporters were shocked when a group of 24 mostly moderate Republicans teamed up with 190 Democrats to kill the effort in a 209-214 vote.

Republicans spent much of a closed-door GOP Conference meeting the next morning steaming about what happened.

"It's not so much the transgender surgery issue as much as we continue to let the defense bill be the mule for all of these social experiments that the left wants to try to [foist] on government," Rep. Trent Franks (R-Ariz.), a conservative supporter of the Hartzler proposal, said last week.

He added: "It seems to me, and all due respect to everyone, that if someone wants to come to the military, potentially risk their life to save the country, that they should probably decide whether they're a man or woman before they do that."

Ernst opposes Trump's ban on transgender troops
By **BURGESS EVERETT**

Supporters of Hartzler's proposal were determined to try again. Last week, they began pushing GOP leadership to use a procedural trick to automatically include the controversial proposal in a Pentagon spending package set for a floor vote this week. The idea was to tuck the provision into a rules package governing the legislation, sidestepping a second potentially unsuccessful amendment vote and adding it to the bill without a floor fight.

Under intense pressure from moderates in the Tuesday Group to reject the idea, Speaker Paul Ryan (R-Wis.) and his team shied away from the strategy, worried that it would make them look hypocritical for circumventing regular order.

"Leadership should respect the will of the House — and that's already been expressed," said Rep. Carlos Curbelo (R-Fla.), a centrist who opposed the amendment. "These transgender service-people are serving our country and have signed up and agreed to risk their lives for this country, so we want to honor that commitment as well."

That's when lawmakers turned to the White House for help. They figured the administration could speed up a decision and settle the dispute once and for all.

"Conservatives were telling [the] White House they didn't want money in a spending bill to go to transgender health services," said one senior administration official, noting that it accelerated Trump's decision.

Their argument fell on sympathetic ears, White House sources said. Chief strategist Steve Bannon encouraged Trump to deal with the matter now.

Now, some Republicans are having buyer's remorse. They didn't realize Trump was going to ban transgender people from serving in the military altogether.

Franks, the Hartzler amendment supporter, told POLITICO that his push was more narrowly tailored to the medical procedures issue — not an all-out ban on transgender people. He wasn't sure what he thought about the broader prohibition, saying he needed to look into it further.

Still, some, like Hartzler, were elated.

"This was the right call by our commander in chief, to make sure every defense dollar goes toward meeting the threats that we are facing in the world," she said in an interview. "The entire [Obama-era transgender] policy... is a detriment to our readiness."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Brock Stone, et al., Plaintiffs, v. Donald J. Trump, et al., Defendants.	Case No. 1:17-cv-02459-MJG

DECLARATION OF MARIANNE F. KIES IN SUPPORT OF MOTION TO COMPEL SUPPLEMENTAL INTERROGATORY ANSWERS AND PRODUCTION

I, MARIANNE F. KIES, depose and say as follows:

1. I make this declaration in support of the remedies and relief sought by Plaintiffs in this case. The following facts are based on my own personal knowledge, except those stated upon information and belief, and as to all such facts stated upon information and belief, I am informed and believe that the same are true.

2. I am an attorney with Covington & Burling LLP, and I represent Plaintiffs in this action.

3. Attached hereto as "Exhibit 1" is a true and correct copy of Plaintiffs' First Set of Interrogatories to Defendants, served on January 3, 2018.

4. Attached hereto as "Exhibit 2" is a true and correct copy of Plaintiffs' First Set of Requests for Production of Documents, served on January 3, 2018.

5. Attached hereto as "Exhibit 3" is a true and correct copy of Defendants' Objections and Responses to Plaintiffs' First Set of Interrogatories to Secretary Mattis, served on February 9, 2018.

6. Attached hereto as "Exhibit 4" is a true and correct copy of Defendants' Objections and Responses to Plaintiffs' First Set of Requests for Production of Documents to Secretary Mattis, served on February 9, 2018.

7. Attached hereto as "Exhibit 5" is a true and correct copy of an initial, partial privilege log listing Department of Defense documents, served by Defendants on February 13, 2018.

8. Attached hereto as "Exhibit 6" is a true and correct copy of Defendants' Objections and Responses to Plaintiffs' First Set of Interrogatories to Defendant Donald J. Trump, served by Defendants on February 9, 2018.

9. Attached hereto as "Exhibit 7" is a true and correct copy of Defendants' Objections and Responses to Plaintiffs' First Set of Requests for Production of Documents to Defendant Donald J. Trump, served by Defendants on February 9, 2018.

10. During an in-person meeting on March 13, 2018, Defendants' counsel agreed to supplement Defendants' responses to Plaintiffs' interrogatories to, at minimum, direct Plaintiffs to specific Bates numbers of responsive documents. Defendants did not specify a date certain by which this supplementation would be provided, and to date Defendants have not made any such supplementation.

11. Defendants made an initial production in this matter on February 9, 2018, containing approximately 17,000 documents. This production was identical to their initial

production in *Doe, et al. v. Trump, et al.*, No. 17-1597 (D.D.C.), minus information pertinent to the individual *Doe* plaintiffs.

12. Defendants made a supplemental production of a similar number of documents on March 9, 2018. Defendants still have not completed their document production and have advised they are not likely to until sometime in May.

13. On February 13, 2018, Defendants produced twelve privilege logs to Plaintiffs from the President, the Department of Defense, each of the military services, the Chairman of the Joint Chiefs of Staff, and the Defense Health Agency.

14. On March 20, 2018, Defendants produced six additional privilege logs to Plaintiffs.

15. Attached hereto as "Exhibit 8" is a true and correct copy of a letter from my colleague and co-counsel Augustus Golden sent to Defendants' counsel Ryan Parker on February 21, 2018, outlining numerous deficiencies in Defendants' discovery objections and privilege logs, including their claims of deliberative process privilege.

16. Defendants did not substantively respond to this letter. Instead, during a March 1, 2018 conference, Defendants requested that Plaintiffs identify particular privilege log entries for re-consideration. Plaintiffs advised that this proposal was likely not feasible given the inadequacy of the information provided in Defendants' privilege logs.

17. On March 9, 2018, I sent an email to Mr. Parker confirming Plaintiffs' view that it was not possible to provide a line-by-line identification of deficient entries, and requesting a further meet and confer session to discuss the ongoing deficiencies in Defendants' discovery responses. Attached hereto as "Exhibit 9" is a true and correct copy of that correspondence.

18. On March 13, 2018, counsel for Plaintiffs and Defendants met and conferred in person at Defendants' counsel's offices. In attendance for Plaintiffs were my colleagues and co-counsel Mark Lynch, Mark Neuman-Lee, and myself. In attendance for Defendants were Mr. Parker and other Department of Justice attorneys. This meet and confer session did not resolve the parties' dispute regarding Defendants' assertion of the deliberative process privilege.

19. Attached hereto as "Exhibit 10" is a true and correct copy of a letter I sent to Mr. Parker on March 16, 2018, further describing the deficiencies in Defendants' document productions and interrogatory responses. Defendants have not, to date, provided any substantive response to this letter.

20. Attached hereto as "Exhibit 11" is a true and correct copy of a letter I sent to Mr. Parker on April 9, 2018, requesting a response to my letter of March 16 and further explaining why Defendants' assertions of the deliberative process privilege were deficient. Defendants have not, to date, provided any substantive response to this letter.

21. Attached hereto as "Exhibit 12" is a true and correct copy of a document produced by Defendants in the parallel *Doe* case bearing the Bates range USDOE00081113-16. This document was produced by Defendants with extensive redactions, and it is identified as a "Memorandum for the Record" on the Subject of "Dissenting Opinion from the Majority Recommendations of the 'Military Service by Transgender Individuals - Panel of Experts.'" It appears to have been written by Deputy Assistant Secretary of the Navy Thomas P. Dee.

22. Attached hereto as "Exhibit 13" is a true and correct excerpt of a privilege log produced by Defendants on February 13, 2018 listing Army documents.

23. Attached hereto as "Exhibit 14" is a true and correct excerpt of a privilege log produced by Defendants on February 13, 2018 listing Joint Chiefs of Staff documents.

24. Attached hereto as "Exhibit 15" is a true and correct excerpt of a privilege log produced by Defendants on February 13, 2018 listing Air Force documents.

25. Attached hereto as "Exhibit 16" is a true and correct excerpt of a privilege log produced by Defendants on February 13, 2018 listing Navy documents.

26. Attached hereto as "Exhibit 17" is a true and correct excerpt of a privilege log produced by Defendants on February 13, 2018 listing Defense Health Agency documents.

27. Attached hereto as "Exhibit 18" is a true and correct excerpt of a redaction log produced by Defendants on March 20, 2018 listing Navy documents.

28. Attached hereto as "Exhibit 19" is a true and correct copy of correspondence I received from Defendants' counsel Ryan Parker on April 19, 2018, regarding the inadvertent production of certain documents which Defendants claim are privileged.

29. Attached hereto as "Exhibit 20" is a true and correct copy of a document produced by Defendants in the parallel *Doe* case bearing the Bates range USDOE00000442-43. This document appears to be a Memorandum prepared by the Secretary of Defense on the Subject of "Terms of Reference - Implementation of President Memorandum on Military Service by Transgender Individuals." It is signed by Secretary of Defense James Mattis and has a handwritten date of September 14, 2017.

30. Attached hereto as "Exhibit 21" is a true and correct, highlighted excerpt of the transcript from the deposition of Martie Soper taken in the parallel *Doe* case.

31. Attached hereto as "Exhibit 22" is a true and correct copy of an initial, partial privilege log listing categories of documents withheld by the President of the United States, served by Defendants on February 13, 2018.

32. During the parties' meeting of counsel on March 13, 2018, Plaintiffs' counsel also sought to engage Defendants' counsel in a discussion regarding Defendants' various assertions of the presidential communications privilege. Defendants' counsel categorically refused to meet and confer on that topic at that time, and advised they would not do so until after the Court had ruled on Defendants' partial motion for judgment on the pleadings addressing claims against the President.

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

Executed this 23rd day of April, 2018.

Marianne F. Kies (Bar No. 18606)

Exhibit 21

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, JANE DOE 2, JANE DOE 3, JANE DOE 4, JANE DOE 5, JOHN DOE 1, REGAN V. KIBBY, and DYLAN KOHERE,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; et al.,

Defendants.

) Civil Action
) No. 17-cv-1597 (CKK)

Complete caption on Page 2.

- - -

Thursday, February 1, 2018

- - -

Deposition of MARTIE SOPER, taken at the offices of Foley Hoag LLP, 1717 K Street NW, Washington, D.C., beginning at 9:13 a.m., before Nancy J. Martin, a Registered Merit Reporter, Certified Shorthand Reporter.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Case No. 17-cv-1597 (CKK)

JANE DOE 1, JANE DOE 2, JANE DOE 3, JANE DOE 4, JANE DOE 5, JOHN DOE 1, REGAN V. KIBBY, and DYLAN KOHERE,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; JAMES N. MATTIS, in his official capacity as Secretary of Defense; JOSEPH F. DUNFORD, JR., in his official capacity as Chairman of the Joint Chiefs of Staff; the UNITED STATES DEPARTMENT OF THE ARMY; RYAN D. MCCARTHY, in his official capacity as Secretary of the Army; the UNITED STATES DEPARTMENT OF THE NAVY; RICHARD V. SPENCER, in his official capacity as Secretary of the Navy; the UNITED STATES DEPARTMENT OF THE AIR FORCE; HEATHER A. WILSON, in her official capacity as Secretary of the Air Force; the UNITED STATES COAST GUARD; ELAINE C. DUKE, in her official capacity as Secretary of Homeland Security; the DEFENSE HEALTH AGENCY; RAQUEL C. BONO, in her official capacity as Director of the Defense Health Agency; and the UNITED STATES OF AMERICA,

Defendants.

A P P E A R A N C E S :

FOLEY HOAG LLP
BY: CLAIRE LAPORTE, ATTORNEY AT LAW
LAUREN GODLES MILGROOM, ATTORNEY AT LAW
TRACY ROOSEVELT, ATTORNEY AT LAW
1717 K Street NW
Washington, D.C. 20006
(202) 223-1200
claporte@foleyhoag.com
lmilgroom@foleyhoag.com
troosevelt@foleyhoag.com
Representing Plaintiffs

NATIONAL CENTER FOR LESBIAN RIGHTS
BY: ALEXANDER L. CHEN, ESQ.
SHANNON MINTER, ESQ.
870 Market Street
Suite 370
San Francisco, California 94102
(415) 365-1335
achen@nclrights.org
sminter@nclrights.org
Representing Plaintiffs

LATHAM & WATKINS LLP
BY: HARRISON WHITE, ESQ.
355 South Grand Avenue
Los Angeles, California 90071
(213) 485-1234
harrison.white@lw.com
Representing Plaintiffs

WILMER CUTLER PICKERING HALE AND DORR LLP
BY: KEVIN M. LAMB, ESQ.
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 663-6249
kevin.lamb@wilmerhale.com
Representing the Plaintiffs

A P P E A R A N C E S :

COVINGTON & BURLING LLP
BY: PETER KOMOROWSKI III, ESQ.
One City Center
850 Tenth Street N.W.
Washington, D.C. 20001
(202) 662-5780
pkomorowski@cov.com
Representing the Plaintiffs

U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION
BY: RYAN BRADLEY PARKER, ESQ.
ANDREW E. CARMICHAEL, ESQ.
MATTHEW SKURNIK, ESQ.
20 Massachusetts Avenue N.W.
Washington, D.C. 20001
(202) 514-4336
ryan.parker@usdoj.gov
andrew.e.carmichael@usdoj.gov
matthew.skurnik@usdoj.gov

ALSO PRESENT:

COLONEL LAURA BARCHICK, USAF JAG
LT. COLONEL FELIX SUTANTO, USAF JAG
LT. COLONEL CHARLES GARTLAND, USAF JAG

WASHINGTON, D.C., THURSDAY, FEBRUARY 1, 2018;
9:31 A.M.
- - -
MARTIE SOPER,
having been first duly sworn,
was examined and testified as follows:

EXAMINATION

BY MS. LAPORTE:

Q. All right, Ms. Soper. Good morning.

A. Good morning.

Q. And thank you for making yourself available today.

Have you ever had your deposition taken before?

A. No, ma'am.

Q. Okay. Well, let me explain a little bit about how it's going to go because it's quite different from an ordinary conversation.

During the deposition I'll be asking you questions, and you, hopefully, will be answering them, and our stenographer will be recording everything that either one of us says.

And what that means is that it's important that we not talk over each other. So if you could

So this is a directive-type memorandum stating to the services, "Go forth and do and develop your additional policies." So this is not the product of our working group.

Q. Okay. Was any -- do you know what the process was by which the product of your working group affected, for example, the timing of this announcement?

MR. PARKER: I'm going to object to the extent it calls for deliberative material that's protected by the deliberative process privilege.

MS. LAPORTE: Okay. Are you instructing her not to answer that question?

MR. PARKER: I'm instructing her not to answer to the extent you are asking about recommendations that came to the group from the deliberative process that was undertaken by the panel in making recommendations regarding both the DTM and the DoDI that have been discussed in the deposition.

BY MS. LAPORTE:

Q. So for the moment all I'm trying to understand is how procedurally the work of the working group fed into this announcement that is Exhibit 5. In other words, I'm not trying to understand all the details of what you recommended. I'm just trying to

understand whether Exhibit 5 reflects the Secretary of Defense taking into account recommendations of the working group or whether these were not -- whether your recommendations were not feeding into the development of this announcement.

MR. PARKER: Objection. To the extent you're asking the witness whether this reflects the work product or the recommendations of the working group, the answer to that question would be protected by the deliberative process privilege.

MS. LAPORTE: And that's not what I'm asking. I'm just trying to understand the work flow here.

Q. So can you explain that in terms of how the work that the working group did fed into Exhibit 5 without getting into the detail of the policies that you recommended?

A. I don't know the work flow, ma'am. I don't know the part that we submitted and how it got approved by the Secretary of Defense.

Q. Were you aware that Secretary Carter was going to make that announcement on June 30 before it happened?

A. No, ma'am.

Q. Okay. What -- so you mentioned that you were involved in a working group relating to accessions. I

think you referred to it specifically as an accessions group within the working group. Do you recall that?

A. It's the accessions medical standards working group, yes, ma'am.

Q. Yes. Okay. And did that actually relate to the specifics of the accessions policy?

MR. PARKER: I'm going to object. The term "relate to" is a little vague. Can you specify so that I can decide whether there's a privilege objection? What do you mean by "relate to"?

BY MS. LAPORTE:

Q. When you were on the accessions medical standards working group, were you working on the standards or procedures that would be required in order for transgender people to accede to the military? And you can answer that "yes" or "no."

A. Yes.

Q. What process did you follow to determine what kind of standards and practices would be needed to permit transgender applicants to accede to the military?

MR. PARKER: I'm going to object to the extent this calls for information related to the types of discussions or the substantive recommendations that would come out of the panel or the subcommittee that

you participated on, on deliberative process grounds.

MS. LAPORTE: All right. Let me move on to another topic then.

Q. I have heard that you were involved in a hotline relating to issues of transgender service in the military. Is that accurate, or is that an informal way of referring to some of the responsibilities that you've had that have more fancy titles?

A. I would ask you to clarify what you mean by "hotline."

Q. Okay. So it sounds like "hotline" is not a term that you use?

A. No, ma'am.

Q. Okay.

A. Sounds like the red phone, and I don't do that.

Q. And you don't work on the red phone?

A. No, ma'am.

MS. LAPORTE: Well, in that case, let me...

(Deposition Exhibit 6 was marked for identification.)

BY MS. LAPORTE:

Q. Okay. So Exhibit 6 should be labeled USDOE0018301 and -302. Is that what you have before

study group of 691, and then the mental health control group of 3,500, 3,400. So what was confusing is the picture they were trying to paint with the information here. It wasn't very clear on where we were going.

Q. Were there any other aspects of it that you found confusing?

A. Some of the information in the time lines that were presented.

Q. When you're talking about the time lines, you're referring to the deployment statistics?

A. Well, on Page 11, this top number says "Service members were a primary diagnosis of gender dysphoria," and it has the number 994.

And then underneath it says, "Deployed in support of OEF/OIF" and "OND." Gender dysphoria didn't exist during those time lines. So we're not really sure what they're trying to say here at this time.

Q. Okay. Did you have any discussion with the people who were in attendance when Dr. Adirim presented this material? Did you have any discussion with them after the fact?

A. No, ma'am.

Q. Are you aware of the panel of experts having reached any decisions about accessions?

MR. PARKER: I'm going to just object to the extent this is more than a "yes" or "no" question.

BY MS. LAPORTE:

Q. You can answer that "yes" or "no."

A. Yes.

Q. So you're aware that they have reached some decisions about accessions?

A. I am aware that they have provided recommendations.

Q. Okay. And did they vote on the recommendations that they were going to be making?

A. I have no idea.

Q. Okay. Is it true that they recommended in favor of accessing only transgender people who will not seek transition to the preferred gender?

MR. PARKER: Objection. The answer to that question calls for deliberative material.

MS. LAPORTE: Well, I think that once they're done deliberating and they've voted on it, it's not really deliberative anymore.

MR. PARKER: You're asking for the recommendation of a panel for a decision process that's ongoing. There hasn't been a final decision. So it's both predecisional and deliberative.

BY MS. LAPORTE:

Q. Well, once they've voted, I don't think that it's deliberative at all. It just reflects the final decision that they've arrived at.

MR. PARKER: The witness testified that the panel has made a recommendation and an ongoing decision process. A recommendation would be a deliberative statement or a recommendation, and it would be predecisional because a final decision hasn't been made on a new policy.

BY MS. LAPORTE:

Q. Are you aware -- this is just "yes" or "no" -- of what the recommendations are that the panel of experts has made to the Secretary of Defense?

A. No.

Q. Are you aware of what their recommendations about accessions have been, "yes" or "no"?

A. No.

Q. What about the handling of people who are already in service and who identify as transgender? Have you heard, yes or no, what their decisions have been with respect to those people?

A. No.

MS. LAPORTE: All right. Why don't we take a brief break.

(A recess was taken from 4:15 p.m.

C E R T I F I C A T E

I do hereby certify that the aforesaid testimony was taken before me, pursuant to notice, at the time and place indicated; that said deponent was by me duly sworn to tell the truth, the whole truth, and nothing but the truth; that the testimony of said deponent was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the deposition is a true and correct record of the testimony given by the witness; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

Nancy J. Martin, RMR, CSR

Dated: February 5, 2018

(The foregoing certification of this transcript does not apply to any reproduction of the same by any means, unless under the direct control and/or supervision of the certifying shorthand reporter.)

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 27, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen R. Patton
Stephen R. Patton