The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

DEFENDANTS' NOTICE OF FILING STAY APPLICATION

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
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Washington, DC 20530
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Defendants respectfully provide notice that on September 14, 2018, Defendants filed in the Supreme Court an application for a stay of the orders issued by this Court on July 27 and August 20, 2018. *See* Dkt. Nos. 299, 311. Defendants' stay application in the Supreme Court and the corresponding appendix are attached.

Dated: September 14, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, I electronically filed the foregoing Defendant's Notice of Filing Stay Application using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: September 14, 2018

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Counsel for Defendants

No. 18A-_____

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
APPLICANTS

v.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, ET AL.

APPLICATION FOR A STAY PENDING DISPOSITION BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT OF A PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AND ANY FURTHER PROCEEDINGS IN THIS COURT AND REQUEST FOR AN ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING

Applicants (defendants in the district court, and mandamus petitioners in the court of appeals) are Donald J. Trump, in his official capacity as President of the United States; the United States of America; James Mattis, in his official capacity as Secretary of Defense; and the United States Department of Defense. Applicants also include the United States Department of Homeland Security and Kirstjen Nielsen, in her official capacity as Secretary of Homeland Security (intervenor-defendants in the district court, and mandamus petitioners in the court of appeals).

Respondent in this Court is the United States District Court for the Western District of Washington (respondent in the court of appeals). Respondents in this Court also include Ryan Karnoski; Cathrine Schmid, Staff Sergeant; D.L., by his next friend and mother, FKA K.G.; Laura Garza; Human Rights Campaign Fund; Gender Justice League; Lindsey Muller, Chief Warrant Officer; Terece Lewis, Petty Officer First Class; Phillip Stephens, Petty Officer Second Class; Megan Winters, Petty Officer Second Class; Jane Doe; Conner Callahan; and American Military Partner Association (plaintiffs in the district court, and real parties in interest in the court of appeals). Respondents in this Court additionally include the State of Washington (intervenor-plaintiff in the district court, and real party in interest in the court of appeals).

IN THE SUPREME COURT OF THE UNITED STATES

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No. 18A-_____

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
APPLICANTS

v.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, ET AL.

_____

APPLICATION FOR A STAY PENDING DISPOSITION BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT OF A PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AND ANY FURTHER PROCEEDINGS IN THIS COURT AND REQUEST FOR AN ADMINISTRATIVE STAY

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Pursuant to Rule 23 of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of applicants Donald J. Trump, et al., respectfully applies for a stay of the orders issued by the United States District Court for the Western District of Washington on July 27 (App., infra, 1a-10a) and August 20 (App., infra, 13a-24a), pending the disposition of the government's petition for a writ of mandamus filed on August 1 in the United States Court of Appeals for the Ninth Circuit and any further proceedings in this Court. Alternatively, the government respectfully requests that the Court construe this application as

a petition for a writ of mandamus to the district court, and that it (1) vacate the orders and direct the district court to grant the government's motion for a protective order and deny respondents' motion to compel or (2) at a minimum, stay the district court's orders pending the court of appeals' disposition of the government's appeal of the district court's preliminary injunction. Should the Court decline to do any of the above, the government respectfully requests that this Court construe this application as a petition for a writ of certiorari before judgment has been rendered by the court of appeals in the mandamus proceedings, in the preliminary-injunction appeal, or in both the mandamus proceedings and the preliminary-injunction appeal, and that it stay the district court's orders pending disposition of the petition and any further proceedings in this Court. The government also requests that this Court enter an administrative stay pending its consideration of this stay application.

This case involves a constitutional challenge to a policy that the U.S. military adopted earlier this year after an extensive review of military service by transgender individuals. The new 2018 policy does not turn on the basis of transgender status. Like the policy adopted by the previous Administration in 2016, the 2018 policy distinguishes between individuals with a history of a medical condition called gender dysphoria and individuals without such a history. Under the 2018 policy, individuals with a history

of gender dysphoria would be presumptively disqualified from military service, subject to various exceptions.

Earlier this year, the district court preliminarily enjoined the military from implementing the 2018 policy nationwide. The court characterized that policy as "a plan to implement" a "ban on military service by openly transgender people." App., infra, 29a. The court reasoned that "[t]he Ban * * * must satisfy strict scrutiny if it is to survive" because "transgender people" are "a suspect class." Id. at 51a. And the court directed the parties "to proceed with discovery and prepare for trial" on the nature of the deliberative process that resulted in the 2018 policy. Id. at 58a; see id. at 53a, 55a. In the court's view, "facts" related to that process, id. at 55a -- such as "the timing and thoroughness" of the government's consideration of the new policy, id. at 53a -- would answer two questions central to the case: (1) whether "the Ban" "was sincerely motivated by compelling state interests, rather than by prejudice or stereotype," id. at 55a; and (2) whether "the Ban" is entitled to the "deference" "typically" afforded military judgments, id. at 53a.

The government appealed the preliminary injunction, challenging each of those aspects of the district court's reasoning. The parties continued to proceed with discovery, and on July 27, 2018, the court issued one of the orders at issue here. App., infra, 13a-24a. That order requires the Executive Branch, including the President himself, to produce a detailed privilege

log of thousands of documents withheld under the presidential communications privilege -- and to do so in a manner that reveals information that is itself privileged. The July 27 order also directs the government to disclose all documents -- totaling in the thousands -- withheld solely under the deliberative process privilege. The court gave the government ten days to comply.

On August 1, the government petitioned the court of appeals for mandamus relief, requesting vacatur of the July 27 order or, at a minimum, a stay of that order pending the disposition of the government's preliminary-injunction appeal. In accordance with this Court's Rule 23.3, the government also moved in the district court and the court of appeals for a stay of the July 27 order pending disposition of the government's mandamus petition. The court of appeals granted a temporary stay of the July 27 order that would remain in effect for seven days following the district court's ruling on the stay motion filed in the district court. The court of appeals stated that the government could renew its stay motion in the court of appeals within three days after the district court's ruling.

On August 20, the district court denied the government's request for a stay. App., infra, 1a-10a. It also "extended" the "deadline for compliance" with its July 27 order until the court of appeals rules on the government's mandamus petition. Id. at 1a. But the court ordered the government to undertake all of the "steps" necessary to comply -- i.e., to prepare the detailed log

of thousands of documents protected by the presidential communications privilege and to prepare to turn over thousands of other documents protected by the deliberative process privilege -- by October 10, the date on which the court of appeals is scheduled to hear oral argument on the mandamus petition and the preliminary-injunction appeal. Id. at 2a. Within days of that order, the government filed a renewed stay motion in the court of appeals, seeking a stay of both the July 27 and the August 20 orders pending consideration of its mandamus petition. As of the time of this filing, the court has not ruled on that motion.

This Court should grant a stay of the July 27 and August 20 orders, including the command that the government certify by October 10 that it has completed the steps necessary to comply with the July 27 order. The standard for granting a stay is readily met here. This Court's decision in Cheney v. United States District Court for the District of Columbia, 542 U.S. 367 (2004), squarely forecloses the burdensome and intrusive discovery obligations imposed by the district court on a coequal branch of government. Indeed, the court's orders, which are directed at the Commander-in-Chief himself, raise even greater separation-of-powers concerns than the discovery orders in Cheney. Moreover, the court's determination that respondents had a need for discovery into presidential communications and deliberative materials was premised on the correctness of its earlier legal rulings in issuing a preliminary injunction. Those rulings are currently under review

in the court of appeals, and there was no justification for the district court to invite a "constitutional confrontation" over the scope of executive privilege before that appeal is resolved. Id. at 389 (citation omitted).

Nor does the district court's August 20 order ameliorate those separation-of-powers concerns. By requiring the government to create a new privilege log and be ready to turn over the deliberative materials by October 10, the court's August 20 order forces the government to bear the very burdens that it sought to avoid by petitioning for mandamus. To meet the court's arbitrary deadline, the Executive Branch must still divert resources away from its constitutional responsibilities, expend many hundreds of hours reviewing (and sometimes redacting) privileged materials, and make particularized objections of executive privilege on a document-by-document basis -- all before the court of appeals has even heard argument on the government's mandamus petition.

Finally, the balance of equities strongly supports a stay. A stay of discovery deadlines would not harm respondents at all, because they already have the benefit of a preliminary injunction keeping in place their preferred military policy. By contrast, the absence of a stay would irreparably harm the government. Indeed, if the district court's October 10 deadline remains in place, the government will be forced to undertake all steps, short of disclosure, necessary for complying with the court's July 27 order. The government therefore needs immediate relief from this Court,

absent a ruling from the court of appeals on the government's renewed stay motion. Should the court of appeals rule while this Court is considering this application, the government will promptly notify this Court.

STATEMENT

1. a. Given the unique stresses inherent in military life, the U.S. military has traditionally set demanding mental-health standards for service. C.A. E.R. 173.[1] In general, the military has aligned the conditions it has deemed disqualifying with those listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association (APA). Ibid. Consistent with the inclusion of "transsexualism" in the third edition of the DSM, military standards for decades presumptively disqualified individuals with a history of "transsexualism" from service. Id. at 170, 173-174.

In 2013, the APA published a new edition of the DSM, which replaced the term "gender identity disorder" (itself a replacement for "transsexualism") with "gender dysphoria." C.A. E.R. 173, 175. The APA explained that it no longer considered identification with a gender different from one's biological sex (i.e., transgender status) to be a disorder. Id. at 175. It stated, however, that a subset of transgender people suffer from a medical condition called gender dysphoria, a "marked incongruence between

[1] References to the "C.A. E.R." are to the Excerpts of Record filed in the court of appeals in No. 18-35347, the government's appeal of the preliminary injunction.

one's experienced/expressed gender and assigned gender, of at least 6 months' duration," that is "'associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.'" Id. at 175-176, 182 (citation omitted). Individuals diagnosed with gender dysphoria sometimes transition genders through cross-sex hormone therapy, sex-reassignment surgery, or living and working in their preferred gender. Id. at 185, 345-346, 360.

b. In June 2016, then-Secretary of Defense Ashton Carter ordered the military to adopt a new policy on service by transgender individuals. C.A. E.R. 177, 314-319. Under the Carter policy, an individual could not be disqualified from military service on the basis of transgender status. Id. at 317-318. The Carter policy instead distinguished between individuals with a history of gender dysphoria and those without such a history. Ibid.

Under the Carter policy, transgender individuals without a history of gender dysphoria would be permitted to join and remain in the military, but would be required to serve in their biological sex. C.A. E.R. 167; see id. at 317-318. By contrast, a "history of gender dysphoria" would disqualify an applicant from joining unless an applicant provided a certificate from a licensed medical provider that the applicant had been "stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months." Id. at 317. A "history of medical treatment associated with gender transition"

would likewise be disqualifying absent certification that the applicant had completed all transition-related medical treatment and had been "stable in the preferred gender for 18 months." Ibid. If an applicant satisfied these standards for accession into the military, the applicant would be permitted to serve in the applicant's preferred gender. Secretary Carter ordered that these accession standards be implemented by July 1, 2017. Ibid.

As for current servicemembers with a history of gender dysphoria, the Carter policy allowed them to serve in their preferred gender upon undergoing gender transition. C.A. E.R. 167, 317-318. The Carter policy provided that servicemembers could transition genders at government expense if they received a diagnosis of gender dysphoria from a military medical provider. Id. at 177-178; see id. at 219-236, 309-313, 318.

c. The day before the Carter accession standards were set to take effect, Secretary Mattis determined that it was "necessary to defer" those standards until January 1, 2018, so that the military could "evaluate more carefully" their potential effect "on readiness and lethality." C.A. E.R. 217; see id. at 167, 218. While that study was ongoing, the President stated in a series of tweets on July 26, 2017: "After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow . . . Transgender individuals to serve in any capacity in the U.S. Military." App., infra, 89a. The President issued a memorandum in August 2017 noting the ongoing

study and directing the military to "return" to the pre-Carter policy on service by transgender individuals "until such time as a sufficient basis exists upon which to conclude that terminating [it] would not have * * * negative effects" on the military. Id. at 87a. The President emphasized that the Secretary of Defense, in consultation with the Secretary of Homeland Security, could provide "a recommendation to the contrary that I find convincing" and "may advise me at any time, in writing, that a change to this policy is warranted." Ibid.

d. Secretary Mattis established a panel of experts to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." C.A. E.R. 211. The panel consisted of "senior uniformed and civilian Defense Department and U.S. Coast Guard leaders." App., infra, 84a. After "extensive review and deliberation," the panel "exercised its professional military judgment" and presented its recommendations to the Secretary. C.A. E.R. 181.

In February 2018, Secretary Mattis sent the President a memorandum proposing a new policy consistent with the panel's conclusions. App., infra, 84a-86a; see C.A. E.R. 163-207. In response, the President "revoke[d]" his 2017 memorandum "and any other directive [he] may have made with respect to military service by transgender individuals," thereby allowing Secretary Mattis and the Secretary of Homeland Security to "exercise their authority to implement" the proposed new policy. App., infra, 82a.

Like the Carter policy, the military's 2018 policy does not turn on the basis of transgender status, but instead distinguishes between individuals with a history of gender dysphoria and those without such a history. Under the 2018 policy -- as under the Carter policy -- transgender individuals without a history of gender dysphoria would be permitted to serve in their biological sex, whereas those with a history of gender dysphoria would be presumptively disqualified from service. App., infra, 85a-86a. The two policies differ, however, in the nature of the exceptions to that disqualification. Under the 2018 policy, individuals with a history of gender dysphoria would be permitted to join the military if they neither need nor have undergone gender transition and could show 36 months of stability (i.e., absence of gender dysphoria) before joining. Id. at 85a. If they satisfied those conditions, they would be permitted to serve in their biological sex. Current servicemembers diagnosed with gender dysphoria would likewise be permitted to serve in their biological sex if they could meet the deployability standards that apply to all servicemembers. Ibid. If, under a reliance exemption, they received that diagnosis from a military medical provider while the Carter policy was in effect, they would be permitted to continue serving in their preferred gender. Ibid.

2. Shortly after the President issued his 2017 memorandum, respondents -- current and aspiring servicemembers, various organizations, and the State of Washington as an intervenor --

brought suit against the President and other government defendants, challenging on equal protection and other grounds what they described as the ban on military service by transgender individuals reflected in the President's 2017 tweets and memorandum. C.A. E.R. 108-156. In December 2017, the district court entered a nationwide preliminary injunction, enjoining the government "from taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement" on Twitter. App., infra, 81a.

In March 2018, the government informed the district court that the President had revoked his 2017 memorandum to allow the Secretary to adopt the new policy. D. Ct. Doc. 213 (Mar. 23, 2018). In light of the new policy, the government moved to dissolve the December 2017 injunction. D. Ct. Doc. 223 (Mar. 29, 2018).

In April 2018, the district court declined to dissolve the injunction and instead extended it to enjoin the 2018 policy. App., infra, 28a-58a. The court characterized the 2018 policy as a mere "plan to implement" the "ban on military service by openly transgender people" that the President had supposedly "announced on Twitter." Id. at 29a; see id. at 39a-40a. The court also determined that "transgender people" are "a suspect class," id. at 47a, such that "[t]he Ban * * * must satisfy strict scrutiny if it is to survive," id. at 51a. The court declined, however, to "reach the merits of the alleged constitutional violations,"

reasoning that "[w]hether Defendants have satisfied their burden of showing that the Ban is constitutionally adequate (i.e., that it was sincerely motivated by compelling state interests, rather than by prejudice or stereotype) necessarily turns on facts related to Defendants' deliberative process," which were "not yet before the Court." Id. at 55a.

The district court also identified "an unresolved question of fact" regarding whether the "justifications for the Ban" found in the 2018 policy were entitled to "deference." App., infra, 53a. The court stated that it could not determine, "[o]n the present record," "whether the [Defense Department's] deliberative process -- including the timing and thoroughness of its study and the soundness of the medical and other evidence it relied upon -- is of the type to which Courts typically should defer." Ibid. The court therefore directed the parties "to proceed with discovery and prepare for trial on the issues of whether, and to what extent, deference is owed to the Ban and whether the Ban violates equal protection, substantive due process, and the First Amendment." Id. at 58a.

The government promptly appealed the preliminary injunction and sought a stay. In its briefing on appeal, the government challenges the court's determinations that the 2018 policy implements a "Ban" on military service by transgender individuals supposedly announced by the President in 2017, Gov't C.A. Br. 41 (citation omitted); see id. at 40-41; that the 2018 policy is

subject to strict scrutiny, id. at 20-23; and that a trial is necessary to determine whether the military's judgments are entitled to deference, id. at 21-24, 45-47. The court of appeals denied the government's stay motion, 18-35347 C.A. Doc. 90, at 1-2 (July 18, 2018), and its request to expedite oral argument, 18-35347 C.A. Doc. 102, at 1 (Aug. 6, 2018), which is scheduled for October 10, 2018, 18-35347 Docket entry No. 95 (July 30, 2018).

3. The district court denied the government's request to stay discovery "pending the resolution of [its] motion to dissolve the preliminary injunction, including through any interlocutory appeal." App., infra, 25a. The court reiterated that the 2018 policy was "not a 'new policy,' but rather a plan to implement, with few exceptions, the directives of the [President's] 2017 Memorandum." Id. at 26a (citation omitted). The court thus found "discovery related to President Trump" "not 'irrelevant.'" Ibid. (citation omitted). The court further stated that if the government "intend[s] to claim Executive privilege," it must "'expressly make the claim'" and "provide a privilege log" describing the nature of the documents or communications not disclosed. Id. at 27a (citation omitted).

Respondents have served broad discovery requests on the government, including the President himself. See D. Ct. Docs. 246-1, 246-2, 246-3 (May 10, 2018); D. Ct. Docs. 269-1, 269-2 (May 21, 2018). Those requests ask the President and his advisors to catalog and disclose the totality of his deliberations concerning

his announcements in 2017 and 2018, including who was involved, when and how they were involved, and what advice was communicated. For example, respondents request: "[a]ll [d]ocuments and [c]ommunications" relating to "President Trump's consultation" with the military regarding "transgender military service," D. Ct. Doc. 246-2, at 3 (Req. 7); "[a]ll [d]ocuments and [c]ommunications relating to" the President's 2017 and 2018 memoranda, including "all drafts," ibid. (Req. 6); D. Ct. Doc. 269-2, at 4 (Req. 32); "all documents reviewed, considered, or relied upon in preparing" the President's 2018 memorandum, D. Ct. Doc. 269-2, at 4 (Req. 32); and "[a]ll [c]ommunications" between the President or the Executive Office of the President and the Department of Defense regarding "military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general," ibid. (Req. 34). The President objected to respondents' requests on several grounds, including the presidential communications privilege. See D. Ct. Docs. 246-6, 246-7, 246-10 (May 10, 2018); D. Ct. Docs. 279-1, 279-2, 279-3, 279-5, 279-6 (June 6, 2018).

Respondents also seek "[a]ll [d]ocuments and [c]ommunications" regarding the military's deliberative process. E.g., D. Ct. Doc. 246-4, at 3 (May 10, 2018). Secretary Mattis and the Department of Defense have substantively responded to respondents' requests, subject to privilege. E.g., D. Ct. Docs. 246-4, 246-5, 246-9 (May 10, 2018). The Office of the Secretary

of Defense, a single component of the Department of Defense, has alone withheld 19,770 documents solely on the basis of the deliberative process privilege. App., infra, 113a.

4. The government moved for a protective order to preclude discovery directed to the President and presidential communications. D. Ct. Doc. 268, at 1-16 (May 21, 2018). The government explained that such discovery would impose a heavy burden on the White House and raise serious separation-of-powers concerns. Id. at 7-11. The government also argued that Cheney v. United States District Court for the District of Columbia, 542 U.S. 367 (2004), foreclosed requiring the White House to assert executive privilege and make particularized objections to respondents' broad discovery requests. D. Ct. Doc. 268, at 7-14. The government argued that Cheney makes clear that the Executive Branch need not bear those burdens until after respondents have exhausted "sources of non-privileged discovery," demonstrated "a heightened, particularized need for the specific information or documents sought," and "substantially narrow[ed] any requests directed at presidential deliberations." Id. at 3.

While noting that it was not yet required to assert executive privilege or produce a privilege log, the government further noted that it had already produced "a privilege log of broad categories of information concerning presidential communications and deliberations." D. Ct. Doc. 268, at 10 n.3; see App., infra, 92a-93a, 97a-101a. That log recorded about 3600 documents without

revealing privileged information. App., infra, 92a. The government later supplemented that log, recording about 5500 additional documents, again without revealing privileged information. Id. at 93a-94a; see id. at 103a-109a. Each privilege log took at least ten White House staff members, including many attorneys, "hundreds of hours to complete." Id. at 93a-94a.

Meanwhile, respondents moved to compel discovery withheld under the deliberative process privilege. D. Ct. Doc. 245, at 1-18 (May 10, 2018). Respondents argued that such discovery would bear on the unresolved factual issues that the district court had identified in its prior ruling. Id. at 6. Respondents acknowledged that the government had offered "to resolve disputes about the deliberative process privilege on a document-by-document basis or based on a representative sample of documents," but that they had rejected that offer on the view "that the privilege has no application in this case." Id. at 9.

5. On July 27, 2018, the district court denied the government's motion for a protective order and granted respondents' motion to compel. App., infra, 13a-24a.

In denying the government's motion, the district court rejected the government's contention that the White House "need not invoke the presidential communications privilege" at this juncture. App., infra, 23a. In addition, the court ordered the government to produce, "within 10 days," a more detailed privilege log "identifying the documents, communications, and other materials

* * * withheld under the presidential communications privilege." Ibid. The court ordered that the new log "(a) identify individual author(s) and recipient(s)" and "(b) include specific, non-boilerplate privilege descriptions on a document-by-document basis." Ibid. "Only then," the court reasoned, could it "evaluate whether the privilege applies and if so, whether [respondents] have established a showing of need sufficient to overcome it." Id. at 22a.

The district court also ordered the government to produce, "within 10 days," all "documents that have been withheld solely under the deliberative process privilege." App., infra, 23a. Applying a balancing test, the court asked whether respondents' "need for the materials and the need for accurate fact-finding override the government's interest in nondisclosure." Id. at 18a-19a (quoting FTC v. Warner Commc'ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984) (per curiam)). In assessing respondents' need, the court emphasized that it had "already found that the Ban's constitutionality 'necessarily turns on facts related to Defendants' deliberative process.'" Id. at 19a (quoting id. at 55a). As for the government's interest in nondisclosure, the court dismissed as "mere speculation" the concern that disclosure would "'risk[] chilling future policy discussions on sensitive personnel and security matters' and could 'potentially lead to a direct negative impact to national security.'" Id. at 20a (brackets and citation omitted). Significantly, the court did not evaluate the

applicability of the privilege with respect to any particular document or category of documents, but rather ordered wholesale disclosure of every one of the many thousands of documents withheld solely under the deliberative process privilege. Id. at 23a.

6. The government swiftly filed a petition for a writ of mandamus in the court of appeals, seeking vacatur of the July 27 order or, at a minimum, a stay of that order pending the disposition of the government's preliminary-injunction appeal. 18-72159 C.A. Doc. 1 (Aug. 1, 2018). The government also filed motions in both the district court and the court of appeals seeking a stay pending consideration of its mandamus petition. D. Ct. Doc. 300 (July 31, 2018); 18-72159 Docket entry No. 2 (Aug. 1, 2018).

The court of appeals called for a response to the mandamus petition, App., infra, 11a, and scheduled oral argument for October 10, the same date set for oral argument in the government's preliminary-injunction appeal. 18-72159 Docket entry No. 5 (Aug. 2, 2018). The court also granted a temporary stay of the July 27 order pending the district court's consideration of the stay motion filed in the district court. App., infra, 12a. The court of appeals stated that the temporary stay would remain in effect for seven days following the district court's ruling on the stay motion, and that the government could renew its stay motion in the court of appeals within three days after the district court's ruling. Ibid.

On August 20, the district court denied the stay motion. App., infra, 1a-10a. The court extended the deadline for complying with its July 27 discovery order until the court of appeals rules on the government's mandamus petition. Id. at 1a. But the district court ordered the government, "[i]n the meantime," 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." Id. at 2a. The court further ordered the government to "certify" by "no later than October 10, 2018, that [it] ha[s] taken these steps and [is] prepared to comply with [the court's] Discovery Order." Ibid.

Following that denial of a stay, the government filed a renewed motion in the court of appeals, seeking a stay of the district court's July 27 and August 20 orders pending consideration of the government's mandamus petition. 18-72159 C.A. Doc. 20, at 1-16 (Aug. 23, 2018). That motion remains pending.

ARGUMENT

The court of appeals has not yet ruled on the government's renewed motion for a stay of the district court's July 27 and August 20 orders. Absent a stay, the government must undertake the steps necessary to comply with the July 27 order by October 10 and thus bear the very burdens it sought to avoid by seeking mandamus relief. Accordingly, the government respectfully requests that this Court grant a stay of the July 27 and August 20

orders pending the court of appeals' disposition of the government's mandamus petition and any further proceedings in this Court. The government also respectfully requests an administrative stay pending this Court's ruling on this application for a stay.

Under this Court's Rule 23 and the All Writs Act, 28 U.S.C. 1651, a single Justice or the Court has authority to enter a stay pending proceedings in a court of appeals.[2] In considering an application for such a stay, the Court or Circuit Justice considers whether four Justices are likely to vote to grant a writ of certiorari if the court of appeals ultimately rules against the applicant; whether five Justices would then likely conclude that the case was erroneously decided below; and whether, on balancing the equities, the injury asserted by the applicant outweighs the harm to the other parties or the public. See San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); Hilton v. Braunskill, 481 U.S. 770, 776 (1987) (traditional stay factors). All of those factors support a stay here.

I. THIS COURT IS LIKELY TO GRANT REVIEW IF THE COURT OF APPEALS DENIES THE GOVERNMENT'S PETITION FOR A WRIT OF MANDAMUS

If the court of appeals denies the government's petition for a writ of mandamus, this Court is likely to grant review. "This is not a routine discovery dispute." Cheney v. United States Dist.

[2] See, e.g., Trump v. International Refugee Assistance Project, 138 S. Ct. 542 (2017); West Virginia v. EPA, 136 S. Ct. 1000 (2016); Stephen M. Shapiro et al., Supreme Court Practice § 17.6, at 881-884 (10th ed. 2013).

Court for the Dist. of Columbia, 542 U.S. 367, 385 (2004). The district court's orders are directed to the President himself. They compel discovery relating to sensitive deliberations involving the President on matters of U.S. military policy, a subject of core Article II concern. The orders in this case therefore raise substantial separation-of-powers concerns -- striking directly at the President's role as Commander-in-Chief, his ability to consult with senior military advisors on questions of military readiness, and "the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications." Ibid.; see id. at 381-382.

This Court has previously granted review to address "the circumstances under which a court of appeals may exercise its power to issue a writ of mandamus" when enforcement of overbroad discovery orders "might interfere with [executive-branch] officials in the discharge of their duties and impinge upon the President's constitutional prerogatives." Cheney, 542 U.S. at 372-373. Given that the district court's orders in this case raise even greater separation-of-powers concerns than in Cheney, see pp. 26-32, infra, this Court would likely grant review, just as it did in Cheney, if the court of appeals were to deny mandamus relief.

II. THERE IS AT LEAST A FAIR PROSPECT THAT, IF THE COURT OF APPEALS DENIES MANDAMUS RELIEF, THIS COURT WILL REVERSE OR ISSUE A WRIT OF MANDAMUS DIRECTLY TO THE DISTRICT COURT

If the court of appeals denies mandamus relief, there is at least "a fair prospect" that a majority of this Court will reverse or issue a writ of mandamus directly to the district court. Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). As this Court has observed, the traditional use of mandamus has been "to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction." Cheney, 542 U.S. at 380 (brackets and citation omitted). Mandamus may also be justified by errors "amounting to a judicial 'usurpation of power'" or a "'clear abuse of discretion.'" Ibid. (citations omitted). A court may issue a writ of mandamus when the petitioner establishes that (1) the petitioner's "right to issuance of the writ is 'clear and indisputable'"; (2) "no other adequate means [exists] to attain the relief he desires"; and (3) "the writ is appropriate under the circumstances." Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam) (quoting Cheney, 542 U.S. at 380-381) (brackets in original). Each of those prerequisites is satisfied here.

A. The Government's Right To Issuance Of The Writ Is Clear And Indisputable

The district court clearly and indisputably erred in ordering the government to (1) compile a privilege log that makes particularized objections of executive privilege on a document-

by-document basis and (2) produce many thousands of documents withheld solely under the deliberative process privilege. App., infra, 23a. The court further clearly and indisputably erred in directing the government to create the new log and prepare to turn over the deliberative materials by October 10. Id. at 2a. The court's orders are particularly misguided because the legal rulings underlying those orders are currently under review in the government's preliminary-injunction appeal. If those legal rulings are set aside -- either by the court of appeals or by this Court -- there would be no "need" for such discovery at all. In re United States, 138 S. Ct. 443, 445 (2017) (per curiam).

1. The district court's command that the Executive produce a more detailed, document-by-document privilege log containing information that is itself privileged is directly contrary to this Court's decision in Cheney.

a. The presidential communications privilege "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). "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." Ibid. By protecting such communications from disclosure, the privilege advances "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking." Ibid.

In Cheney, this Court addressed the principles that should govern discovery implicating presidential communications. The district court in that case had "entered discovery orders directing the Vice President and other senior officials in the Executive Branch to produce information about a task force established to give advice and make policy recommendations [on energy policy] to the President." 542 U.S. at 372. "While acknowledging that discovery itself might raise serious constitutional questions," id. at 375, the district court had declined to narrow the scope of discovery and had instead placed the burden on the Vice President himself to "winnow the discovery orders by asserting specific claims of privilege and making more particular objections," id. at 389. The D.C. Circuit declined to issue a writ of mandamus, id. at 376, agreeing with the district court that the Vice President "shall bear the burden of invoking executive privilege and filing objections to the discovery orders with detailed precision," id. at 377 (citation and internal quotation marks omitted).

This Court vacated the judgment of the court of appeals. Cheney, 542 U.S. at 392. The Court explained that "a coequal branch of government" should "'afford Presidential confidentiality the greatest protection consistent with the fair administration of justice.'" Id. at 382 (citation omitted). And the Court recognized that the Judiciary should be mindful of both "[a] party's need for information" and "the burden imposed by [discovery]" 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 Court made clear, moreover, that such separation-of-powers concerns could not be addressed simply by "inviting the Executive Branch to invoke executive privilege." Cheney, 542 U.S. at 389. On the contrary, the Court explained, "[e]xecutive privilege is an extraordinary assertion of power 'not to be lightly invoked.'" Ibid. (citation omitted). "Once executive privilege is asserted, coequal branches of the Government are set on a collision course," and "[t]he Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive's Article II prerogatives." Ibid. The Court thus admonished that such "'occasions for constitutional confrontation between the two branches' should be avoided whenever possible." Id. at 389-390 (brackets and citation omitted). It encouraged courts to "explore other avenues, short of forcing the Executive to invoke privilege, when they are asked to enforce against the Executive Branch unnecessarily broad [discovery requests]." Id. at 390. And it determined that the lower courts had erred in requiring the Executive Branch to "'bear the burden' of invoking executive privilege with sufficient specificity and of making particularized objections." Id. at 388 (citation omitted).

b. The discovery sought here raises even greater separation-of-powers concerns than in Cheney. Whereas the discovery requests in Cheney were directed to the Vice President,

the discovery requests here are directed to the President. And whereas the information sought in Cheney pertained to the development of energy policy, the information sought here pertains to the development of military policy -- an exercise of core Article II powers. Respondents have served sweeping discovery requests regarding the President's conduct as Commander-in-Chief, implicating material that is plainly subject to the presidential communications privilege. See p. 15, supra.

The district court in this case failed to reconcile its orders with Cheney or the separation-of-powers principles underlying that decision. Without "explor[ing] other avenues, short of forcing the Executive to invoke privilege," Cheney, 542 U.S. at 390, the court declared that "President Trump must expressly assert the presidential communications privilege," App., infra, 6a; see id. at 23a. Instead of placing the "burden" on respondents to "show[] the propriety of the[ir] requests," Cheney, 542 U.S. at 388, the court placed the burden on the Executive to make "specific" objections of privilege "on a document-by-document basis," App., infra, 23a. And rather than seek to avoid the "awkward position of evaluating the Executive's claims of confidentiality and autonomy," Cheney, 542 U.S. at 389, the court ordered the Executive to create a more particularized privilege log for the purpose of allowing the court to "evaluate whether the privilege applies," App., infra, 22a. In setting the branches on precisely the "collision course" that Cheney admonished the Judiciary to avoid

"whenever possible," 542 U.S. at 389-390, the court ignored respondents' lack of "need for [the] information" and "the burden imposed" on the Executive, id. at 385.

i. With respect to respondents' need for the information, the district court failed to consider that the outcome of the government's pending preliminary-injunction appeal may eliminate such need altogether. See In re United States, 138 S. Ct. at 445. For example, in justifying "discovery related to President Trump," the court reasoned that the 2018 policy was "not a 'new policy,' but rather a plan to implement, with few exceptions, the directives of the [President's] 2017 Memorandum." App., infra, 26a (citation omitted); see id. at 5a. A central issue in the preliminary-injunction appeal is the accuracy of that characterization, given that the President expressly "revoke[d]" his 2017 memorandum, id. at 82a, and the substance of the 2018 policy differs so markedly from that of the 2017 memorandum, compare id. at 85a-86a, with id. at 87a-88a. See Gov't C.A. Br. 40-49. If the government prevails on that issue, the 2018 policy will have to be evaluated on its own terms, and much of the requested discovery pertaining to presidential communications will be irrelevant.

The district court's orders also suggest that discovery of presidential communications is relevant to whether the government has "'satisfied [its] burden of showing that the Ban is constitutionally adequate'" under "strict scrutiny" -- "'i.e., that it was sincerely motivated by compelling state interests,

rather than by prejudice or stereotype.'" App., infra, 14a (quoting id. at 55a). The appropriate level of scrutiny, however, is also at issue in the pending preliminary-injunction appeal. And if the government is correct that a deferential form of review applies, see Gov't C.A. Br. 20-24, there will be no need for a "searching judicial inquiry," App., infra, 20a (citation omitted), into the subjective motivations of the President or his advisors.

The district court's orders rest on the additional premise that whether the military is entitled to deference is a "question of fact" that cannot be resolved without inquiring into the "timing and thoroughness" of the military's studies and deliberations. App., infra, 53a. The government also has challenged that premise in its preliminary-injunction appeal, arguing that the court's approach "turns principles of military deference on their head." Gov't C.A. Br. 46. If the government is correct that military deference does not depend on a factual inquiry into the military's deliberations, App., infra, 53a, there will be even less basis to require the Executive to disclose the communications at issue. See Goldman v. Weinberger, 475 U.S. 503, 509 (1986) (deferring to the military on an issue "decided by the appropriate military officials" in "their considered professional judgment"); Rostker v. Goldberg, 453 U.S. 57, 71-72 (1981) (recognizing the "deference due" to the political branches' "choices among alternatives" in military affairs).

Each of the justifications for discovery of presidential communications is thus currently the subject of a pending appeal, with oral argument scheduled for October 10. The district court offered no reason for authorizing intrusive and burdensome discovery before that appeal is resolved.

ii. The district court's orders likewise reflect no regard for "the burdens imposed on the Executive Branch." Cheney, 542 U.S. at 391. The orders directly undermine the "confidentiality of [the Executive Branch's] communications," id. at 385, by requiring the disclosure of information that is itself privileged. The court has demanded that the new privilege log "identify individual author(s) and recipients," together with the date of each communication. App., infra, 23a. The court has made clear that it expects the Commander-in-Chief to disclose, for example, the identities of the generals and military experts with whom he discussed military policy. Id. at 6a n.2. The presidential communications privilege, however, protects the identities of the particular advisors the President consulted on particular subjects, as well as the timing and sequence of those deliberations. See In re Sealed Case, 121 F.3d 729, 744, 750 (D.C. Cir. 1997) (explaining that the privilege protects "sources of information" as well as "documents or other materials that reflect presidential decisionmaking and deliberations"). And the confidentiality of such information is particularly important in the context of the

President's performance of his constitutional responsibilities as Commander-in-Chief. See App., infra, 95a.

The district court's orders also force the Executive Branch to "'bear the burden' of invoking executive privilege with sufficient specificity and of making particularized objections." Cheney, 542 U.S. at 388 (citation omitted). The burden of doing so would be extraordinary. At issue are approximately 9000 documents, which the court has ordered catalogued "on a document-by-document basis," with "specific, non-boilerplate privilege descriptions." App., infra, 23a; see id. at 94a. The White House has already produced a detailed privilege log for those documents that groups them into 66 separate categories and describes them "without revealing information [that is] itself privileged." Fed. R. Civ. P. 26(b)(5)(A)(ii); see App., infra, 92a, 94a. White House attorneys and staff members spent "hundreds of hours" completing the initial version of that log and "hundreds" of additional hours supplementing it. App., infra, 93a, 94a. Creating a new, highly specific privilege log with 9000 individual entries would not only "require at least twice as much time," id. at 94a-95a, but also "require the Executive Branch to bear the onus of critiquing the unacceptable discovery requests line by line," Cheney, 542 U.S. at 388 -- thereby "distract[ing] [the Executive Branch] from the energetic performance of its constitutional duties," id. at 382.

The burden imposed by the district court's orders is all the more unwarranted given that the President himself, a subject of

the orders, is not even a proper defendant. Respondents seek injunctive and declaratory relief -- neither of which is available against the President. Although the district court recognized that the President could not be subject to injunctive relief, see App., infra, 55a-57a; Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1867), the same separation-of-powers principles foreclose the issuance of a declaratory judgment against him. See, e.g., Franklin v. Massachusetts, 505 U.S. 788, 827 (1992) (Scalia, J., concurring in part and concurring in the judgment) ("[W]e cannot issue a declaratory judgment against the President."); Swan v. Clinton, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) ("[S]imilar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [a] request for a declaratory judgment."); Doe 2 v. Trump, No. 17-cv-1597, 2018 WL 3736435, at *2-*4 (D.D.C. Aug. 6, 2018) (dismissing the President as a defendant in a similar suit).

2. The district court's order directing the government to "turn over those documents withheld solely under the deliberative process privilege," App., infra, 23a, is likewise misguided.[3] The deliberative process privilege is a form of executive privilege that protects from disclosure documents "reflecting advisory opinions, recommendations and deliberations comprising part of a

[3] The district court's directive that the government produce documents withheld solely under the deliberative process privilege appears to apply to the President as well. For reasons already discussed, see pp. 24-32, supra, such discovery directed to the President is improper.

process by which governmental decisions and policies are formulated." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975) (citation omitted). The court determined that respondents' need for the materials outweighed the government's interest in nondisclosure. App., infra, 19a-20a. But the court's finding of need was premised entirely on its prior ruling that "the Ban's constitutionality 'necessarily turns on facts related to Defendants' deliberative process,'" id. at 19a (quoting id. at 55a) -- a ruling that, as explained above, is currently under review in the court of appeals. If that ruling is overturned on appeal, the basis for the court's order will be eliminated.

In any event, the district court clearly and indisputably erred in ordering wholesale disclosure of many thousands of documents in a page and a half of analysis. App., infra, 19a-20a; see id. at 113a. The court analyzed the documents en masse, rather than consider any particular document or subset of documents. Id. at 19a-20a. But just as application of "the deliberative process privilege is * * * dependent upon the individual document and the role it plays in the administrative process," Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 867 (D.C. Cir. 1980), so too is the inquiry into whether the privilege has been overcome. The court failed to recognize that respondents' need for the materials and the government's interest in nondisclosure will vary according to the type of document at issue.

Moreover, in assessing respondents' need for the deliberative materials, the district court failed to acknowledge the voluminous discovery already in respondents' possession. The government has already responded to written interrogatories and produced over 30,000 documents totaling roughly 150,000 pages, including a complete administrative record. Respondents may also rely on depositions of numerous military officials taken in related litigation. See D. Ct. Doc. 183 (Feb. 14, 2018). Before ordering the production of many thousands of additional documents -- including White House documents not covered by the presidential communications privilege -- the court should have considered whether discovery of certain categories of privileged documents was still necessary.

The district court also erred in dismissing concerns about the effects of disclosure as "mere speculation." App., infra, 20a. "The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." Department of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001). As one Defense Department official has averred, "release of [Defense Department] information protected by the deliberative process privilege would have a substantial and immediate chilling effect on policy deliberation and development within [the Department]." App., infra, 116a-117a. That is particularly so because the Department

made a "commitment" to those involved in "deliberations regarding the sensitive topic of transgender service" that it would keep their opinions "confidential[]." Id. at 118a. If the Department were forced to "breach" that commitment, it "would irreparably harm [the Department's] ability to obtain candid and honest input on any subject in the future." Ibid.

A few examples illustrate the highly sensitive nature of the documents at issue. One document consists of "a lengthy memo from the Deputy Secretary of Defense" containing "candid advice" on "transgender policy," accompanied by a "cover letter" on which the Secretary of Defense made "handwritten notes." App., infra, 113a. Another document is "a draft letter to the President, reflect[ing] the Secretary's thoughts on the developing transgender policy." Ibid. And a third is an email from one senior Defense Department official to another, providing "a book of policy options" before the formulation of the Carter policy. Ibid. Despite the highly sensitive nature of these and similar documents, the district court considered them together with the many thousands of other documents at issue and ordered them all disclosed without the more focused analysis that the deliberative process privilege requires.

3. The district court also clearly and indisputably erred in ordering the government to create the new privilege log and be ready to produce the deliberative materials by October 10. App., infra, 2a. That arbitrary deadline requires the government to take the steps necessary to comply with the court's discovery

orders now -- before the court of appeals has even heard oral argument on the government's mandamus petition.

Absent a stay, the government will therefore be forced to bear the very burdens it sought to avoid by seeking mandamus relief in the first place. To create the new privilege log and prepare the deliberative materials for disclosure by October 10, the Executive Branch will be forced to expend many hundreds of hours reviewing privileged and confidential material and redacting sensitive information unrelated to this litigation. App., infra, 94a-95a, 114a-116a. And it will be forced to "bear the onus of critiquing the unacceptable discovery requests line by line" with "particularized objections" of executive privilege. Cheney, 542 U.S. at 388. Such burdens "interfer[e] with a coequal branch's ability to discharge its constitutional responsibilities," raising the very separation-of-powers concerns identified in Cheney. Id. at 382. There is no valid reason to make the government endure such burdens between now and October 10, before the court of appeals (or this Court) has ruled on the government's mandamus petition.

B. The Government Has No Other Adequate Means To Attain Relief

Absent mandamus relief, the district court's orders will be effectively unreviewable on appeal from final judgment. If the government is forced to comply with those orders, there will be no going back. The Executive Branch will have devoted immense

resources to reviewing many thousands of privileged documents and communications, App., infra, 94a-95a, 113a-116a, and "critiquing the unacceptable discovery requests line by line," Cheney, 542 U.S. at 388. The Executive will have also disclosed large amounts of privileged and confidential information, including in the new privilege log itself. App., infra, 6a n.2, 23a. The disclosure of those materials will have created "a substantial and immediate chilling effect on policy deliberation and development," id. at 117a, and will have "irreparably harm[ed] [the Defense Department's] ability to obtain candid and honest input on any subject in the future," id. at 118a. And the district court will have proceeded to "evaluate whether the [presidential communications] privilege applies" to thousands of White House communications, id. at 22a, producing precisely the sort of "constitutional confrontation" that Cheney admonished courts to avoid, 542 U.S. at 389 (citation omitted). Those circumstances "remove this case from the category of ordinary discovery orders," id. at 381, and render a writ of mandamus the only adequate means to obtain relief.

C. Mandamus Relief Is Appropriate Under The Circumstances

Although a writ of mandamus is extraordinary relief, this Court has explained that it is appropriately used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction," Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943); "to prevent a lower court from interfering with a coequal branch's ability to

discharge its constitutional responsibilities," Cheney, 542 U.S. at 382; and to correct "particularly injurious or novel privilege ruling[s]," Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 110 (2009). The district court's decision to intrude into the "confidentiality and autonomy" of the highest levels of the Executive Branch, Cheney, 542 U.S. at 389 -- even as a pending appeal may eliminate the basis for such an intrusion entirely -- satisfies each of those justifications for mandamus.

III. THE BALANCE OF EQUITIES STRONGLY SUPPORTS A STAY

A stay of the district court's orders pending consideration of the government's mandamus petition would cause no harm to respondents. Respondents have already obtained a preliminary injunction requiring the government to keep in place the military policy that respondents prefer. App., infra, 57a-58a. Because that injunction fully protects respondents' interests, a stay of discovery deadlines while the court of appeals (or this Court) considers the government's mandamus petition would not injure respondents at all.

The district court speculated that a stay could harm respondents by impairing their ability to prepare for a trial scheduled to start in April 2019. App., infra, 9a. But the need for a trial itself rests on the merits of the issues currently pending in the government's preliminary-injunction appeal. If the court of appeals (or this Court) does not agree that respondents' claims "turn[] on facts related to [the government's] deliberative

process," id. at 55a; see id. at 53a, a trial would be unnecessary. In any event, there is nothing special about the current trial date. If a stay caused respondents to need a few more months to prepare for trial, the district court could simply delay trial to give them additional time to prepare.

By contrast, the absence of a stay would irreparably harm the government. See pp. 36-37, supra. As this Court has explained, "the public interest requires that a coequal branch of Government 'afford Presidential confidentiality the greatest protection consistent with the fair administration of justice,' and give recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." Cheney, 542 U.S. at 382 (citation omitted).

That the district court has "extended" the "deadline for compliance," App., infra, 1a, does not eliminate the need for a stay. The government must still undertake all of the necessary "steps" to "comply" -- short of disclosure -- by October 10. Id. at 2a. Absent a stay, the Executive Branch will therefore be forced to endure the very burdens that it sought to avoid by seeking mandamus relief in the first place. See pp. 35-36, supra. There is no justification for imposing such burdens on the Executive, particularly where, as here, a stay would cause no harm to respondents and the legal rulings underlying the court's discovery orders are the subject of a pending appeal.

CONCLUSION

This Court should stay the district court's July 27 and August 20 orders pending the court of appeals' disposition of the government's petition for a writ of mandamus and any further proceedings in this Court. Alternatively, the Court should construe this application as a petition for a writ of mandamus to the district court, and it should (1) vacate the orders and direct that court to grant the government's motion for a protective order and deny respondents' motion to compel or (2) at a minimum, stay the orders pending the court of appeals' disposition of the government's appeal of the district court's preliminary injunction. Should the Court decline to do any of the above, the government respectfully requests that this Court construe this application as a petition for a writ of certiorari before judgment has been rendered by the court of appeals in the mandamus proceedings, in the preliminary-injunction appeal, or in both the mandamus proceedings and the preliminary-injunction appeal, and that it stay the district court's orders pending disposition of the petition and any further proceedings in this Court. The government also requests that this Court enter an administrative stay pending its consideration of this stay application.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

SEPTEMBER 2018

APPENDIX

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 2 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

In re: DONALD J. TRUMP, in his official capacity as President of the United States; et al.

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

Petitioners,

v.

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

Respondent,

RYAN KARNOSKI; et al.,

Real Parties in Interest.

No. 18-72159

D.C. No. 2:17-cv-01297-MJP
Western District of Washington, Seattle

ORDER

This petition is referred to the panel assigned to hear *Karnoski v. Trump*, No. 18-35347.

At the direction of the panel, the court issues the following order:

This petition for a writ of mandamus raises issues that warrant an answer. *See* Fed. R. App. P. 21(b). Accordingly, within 21 days after the date of this order, the real parties in interest shall file an answer.

The district court, within 21 days after the date of this order, may address the petition if it so desires. The district court may elect to file an answer with this court or to issue an order and serve a copy on this court. Petitioners may file a reply within 5 days after service of the answer(s).

The Clerk shall serve this order on the district court and District Judge Pechman.

The court grants a temporary stay of the district court's July 27, 2018 discovery order pending the district court's decision on petitioners' July 31, 2018 motion to stay the July 27, 2018 order. If the district court denies the July 31, 2018 motion, the temporary stay will remain in effect for 7 days following the entry of the district court's decision.

Petitioners' motion for a stay pending review of this petition (Docket Entry No. 2) is denied without prejudice to renewal within 3 days after the district court's decision on the pending July 31, 2018 motion.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	CASE NO. C17-1297-MJP ORDER GRANTING MOTION TO COMPEL; DENYING MOTION FOR PROTECTIVE ORDER

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

Background

I. Procedural History

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

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

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

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

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

II. The Requested Discovery

Throughout this litigation, Plaintiffs have sought discovery regarding:

- The identity of the individuals with whom President Trump discussed or corresponded regarding policies on military service by transgender people;
- The date on which President Trump decided that transgender people should be banned from military service;
- The process by which President Trump formulated the Ban, including identification of "all sources of fact or opinion" he "consulted, considered, or otherwise referred to" in formulating the Ban;
- Documents and communications related to President Trump's consultation with employees, agents, contractors, or consultants of the United States Armed Forces regarding military service by transgender people;
- Documents and communications relating to, and including all drafts of, the 2017 Memorandum;
- Communications between President Trump and Congress concerning military service by transgender people prior to August 26, 2017; and
- Documents relating to visits and communications between President Trump and his Evangelical Advisory Board.

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

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

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

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

Discussion

I. Trump v. Hawaii

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

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

by Transgender Individuals." (Dkt. No. 149, Ex. 2; Dkt. No. 224, Exs. 1, 3.) That the Ban turns on transgender identity—and not on any medical condition—could not be clearer.[1]

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

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

II. Plaintiffs' Motion to Compel

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

The deliberative process privilege protects documents and materials which would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which

[1] The Implementation Plan prohibits transgender people who have *never* been diagnosed with gender dysphoria from serving unless they are "willing and able to adhere to all standards associated with their biological sex." (Dkt. No. 224, Ex. 1 at 4, Ex. 2 at 7.) As the Court previously noted, "[r]equiring transgender people to serve in their 'biological sex' . . . would force [them] to suppress the very characteristic that defines them as transgender in the first place." (Dkt. No. 233 at 13.)

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

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

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

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

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

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

A. Relevance of the Evidence

The evidence Plaintiffs seek is undoubtedly relevant. The Court has already found that the Ban's constitutionality "necessarily turns on facts related to Defendants' deliberative process." (Dkt. No. 233 at 28.) 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 (Dkt. No. 194 at 17; Dkt. No. 226 at 9) while also withholding access to information concerning these deliberations, including whether the military was even involved.[3] This information is central to the litigation and should not be withheld from the searching judicial inquiry that strict scrutiny requires. See In re Subpoena, 145 F.3d at 1424; see also Johnson v. California, 543 U.S. 499, 506 (2005) (observing that strict scrutiny is intended to assure that the government "is pursuing a goal important enough to

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

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

B. Availability of Other Evidence

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. Defendants' production of non-privileged documents and an administrative record do not obviate Plaintiffs' need for responsive documents concerning the deliberative process. (See Dkt. No. 235 at 2.) This factor weighs in favor of disclosure.

C. Government's Role in the Litigation

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

D. Extent to Which Disclosure Would Hinder Independent Discussion

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

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

III. Defendants' Motion for Protective Order

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

The Supreme Court has recognized that discovery directed at the President involves "special considerations," and that his "constitutional responsibilities and status are factors counseling judicial deference and restraint in the conduct of litigation" against him. Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 385, 387 (2004) (citation omitted). Nevertheless, the President is not immune from civil discovery. Courts have permitted discovery directed at the President where, as in this case, he is a party or has information relevant to the issues in dispute. See, e.g., United States v. Nixon, 418 U.S. 683, 706 (1974) (rejecting "an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances"); Clinton v. Jones, 520 U.S. 681, 704 (1997) (noting that "[s]itting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty.").

The President may invoke the privilege "when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations that [he] believes should

remain confidential." In re Sealed Case, 121 F.3d at 744. Once he does so, those documents and materials are presumed to be privileged. Id. However, "the privilege is qualified, not absolute, and can be overcome by an adequate showing of need." Id. at 745. If the Court finds that an adequate showing has been demonstrated (i.e., that the materials contain evidence "directly relevant to issues that are expected to be central to the trial" and "not available with due diligence elsewhere"), it may then proceed to review the documents in camera to excise non-relevant material. Id. at 754, 759.

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

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

Conclusion

The Court ORDERS as follows:

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

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

Dated July 27, 2018.

Marsha J. Pechman
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	CASE NO. C17-1297-MJP ORDER DENYING DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

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

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

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

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

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

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

Finally, Defendants have not demonstrated that precluding discovery will serve the interests of judicial economy in any way.

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

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

Dated April 19, 2018.

Marsha J. Pechman
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	CASE NO. C17-1297-MJP ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' AND WASHINGTON'S MOTIONS FOR SUMMARY JUDGMENT; GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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

Washington's Motions and GRANTS IN PART and DENIES IN PART Defendants' Cross-Motion.

ORDER SUMMARY

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

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

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

In the following order, the Court concludes otherwise, and rules that the preliminary injunction will remain in effect. Each of the claims raised by Plaintiffs and Washington remains viable. The Court also rules that, because transgender people have long been subjected to systemic oppression and forced to live in silence, they are a protected class. Therefore, any attempt to exclude them from military service will be looked at with the highest level of care,

and will be subject to the Court's "strict scrutiny." This means that before Defendants can implement the Ban, they must show that it was sincerely motivated by compelling interests, rather than by prejudice or stereotype, and that it is narrowly tailored to achieve those interests.

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

BACKGROUND

I. The Ban on Military Service by Openly Transgender People[1]

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

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

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

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

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

On September 14, 2017, Secretary Mattis issued interim guidance regarding President Trump's Twitter Announcement and 2017 Memorandum to the military (the "Interim Guidance"). (Dkt. No. 149, Ex. 3.) The Interim Guidance again identified the DoD's intent to "carry out the President's policy and directives" and "present the President with a plan to implement the policy and directives in the [2017] Memorandum." (Id. at 2.) The Interim

Guidance provided (1) that transgender people would be prohibited from accession effective immediately; (2) that service members diagnosed with gender dysphoria would be provided "treatment," however, "no new sex reassignment surgical procedures for military personnel [would] be permitted after March 22, 2018"; and (3) that no action would be taken "to involuntarily separate or discharge an otherwise qualified Service member solely on the basis of a gender dysphoria diagnosis or transgender status." (Id. at 3.)

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

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

- Transgender persons who require or have undergone gender transition are disqualified from military service.

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

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

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

II. The Carter Policy

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

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

After reviewing the results of the RAND Study and other evidence, the Working Group unanimously agreed that (1) transgender people should be allowed to serve openly and (2) excluding them from service based on a characteristic unrelated to their fitness to serve would undermine military efficacy. (Dkt. No. 142 at ¶¶ 26-27.) On June 30, 2016, Secretary Carter accepted the recommendations of the Working Group and issued Directive-type Memorandum 16-005 (the "Carter Policy"), which affirmed that "service in the United States military should be open to all who can meet the rigorous standards for military service and readiness." (Dkt. No. 144, Ex. C.) The Carter Policy provided that "[e]ffective immediately, no otherwise qualified service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity," and further provided that

transgender people would be allowed to accede into the military not later than July 1, 2017.[2] (Id. at 5.) Consistent with the Carter Policy, each branch of military service issued detailed instructions, policies, and regulations regarding separation and retention, accession, in-service transition, and medical care. (Dkt. No. 144 at ¶¶ 24-36, Exs. D, E, F; Dkt. No. 145 at ¶¶ 41-50, Exs. A, B; Dkt. No. 146 at ¶¶ 27-34, Ex. A.)

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

III. Procedural History

On August 28, 2017, Plaintiffs filed this lawsuit challenging the constitutionality of the Ban, as set forth in the Twitter Announcement and the 2017 Memorandum. (See Dkt. No. 1.) Plaintiffs include nine transgender individuals (the "Individual Plaintiffs") and three organizations (the "Organizational Plaintiffs"). (Dkt. No. 30 at ¶¶ 7-18.) Individual Plaintiffs Ryan Karnoski, D.L., and Connor Callahan aspire to enlist in the military; Staff Sergeant Cathrine Schmid, Chief Warrant Officer Lindsey Muller, Petty Officer First Class Terece Lewis, Petty Officer Second Class Phillip Stephens, and Petty Officer Second Class Megan Winters currently serve openly in the military. (Id. at ¶¶ 7-13.) Individual Plaintiff Jane Doe currently serves in the military, but does not serve openly. (Id. at ¶ 14.) Organizational Plaintiffs include the Human Rights Campaign ("HRC"), the Gender Justice League ("GJL"), and the American

[2] On June 30, 2017, Secretary Mattis extended the effective date for accepting transgender recruits to January 1, 2018. (Dkt. No. 197, Ex. 3.)

Military Partner Association ("AMPA"). (Id. at ¶¶ 16-18.) Defendants include President Trump, Secretary Mattis, the United States, and the DoD. (Id. at ¶¶ 19-22.)

On November 27, 2017, the Court granted intervention to Washington, which joined to protect its sovereign and quasi-sovereign interests in its natural resources and in the health and physical and economic well-being of its residents. (See Dkt. No. 101.)

On December 11, 2017, the Court issued a nationwide preliminary injunction barring Defendants from "taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement."[3] (Dkt. No. 103 at 23.) The Court found that Plaintiffs and Washington had standing to challenge the Ban and were likely to succeed on the merits of their claims for violation of equal protection, substantive due process, and the First Amendment. (Id. at 6-12, 15-20.)

On January 25, 2018, Plaintiffs and Washington filed separate motions for summary judgment.[4] (Dkt. Nos. 129, 150.) Both seek an order declaring the Ban unconstitutional and permanently enjoining its implementation. (Dkt. No. 129 at 28-29; Dkt. No. 150-1.)

On February 28, 2018, Defendants filed an opposition and cross-motion for partial summary judgment seeking dismissal of all claims brought against President Trump. (Dkt. No. 194.)

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[3] Three other district courts also entered preliminary injunctions against the Ban. See Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017); Stone v. Trump, 280 F. Supp. 3d 747 (D. Md. 2017); Stockman v. Trump, No. 17-cv-1799-JGB-KK, Dkt. No. 79 (C.D. Cal. Dec. 22, 2017).

[4] Plaintiffs are joined by amici the Constitutional Accountability Center (Dkt. No. 163, Ex. 1); Legal Voice (Dkt. No. 169); Retired Military Officers and Former National Security Officials (Dkt. No. 152, Ex. A); and the Commonwealths of Massachusetts and Pennsylvania, the States of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and the District of Columbia (Dkt. No. 170, Ex. A.)

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

DISCUSSION

I. Legal Standard

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

II. Plaintiffs' and Washington's Motions for Summary Judgment

Plaintiffs and Washington contend that summary judgment is proper because the Ban is unsupported by any constitutionally adequate government interest as a matter of law, and therefore violates equal protection, substantive due process, and the First Amendment. (Dkt. No. 129 at 15-28; Dkt. No. 150 at 13-23.) Defendants respond that disputes of material fact preclude summary judgment, including disputes as to (1) whether Plaintiffs' and Washington's challenges

are moot as a result of the 2018 Memorandum; (2) whether Plaintiffs and Washington have standing; and (3) whether the Ban satisfies the applicable level of scrutiny. (Dkt. No. 194 at 5-24; Dkt. No. 226 at 3-11.) The Court addresses each of these issues in turn:

A. Mootness

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

"The burden of demonstrating mootness 'is a heavy one.'" Los Angeles County v. Davis, 440 U.S. 625, 631 (1979) (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953)). The Ninth Circuit has explained that a case is not moot unless "subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," McCormack v. Herzog, 788 F.3d 1017, 1024 (9th Cir. 2015) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)), such that "the litigant no longer ha[s] any need of the judicial protection that is sought." Jacobus v. Alaska, 338 F.3d 1095, 1102-03 (9th Cir. 2003) (quoting Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 224 (2000)). Accordingly, courts find cases moot only where the challenged policy has been completely revoked or rescinded, not merely voluntarily ceased. See Davis, 440 U.S. at 631 (holding that a case is moot only where "there can be no reasonable expectation" that the alleged violation will recur and "interim relief or events have completely and irrevocably

eradicated the effects of the alleged violation"); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982) (holding that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice"); see also McCormack, 788 F.3d at 1025 (noting that a case is not moot where the government never "repudiated . . . as unconstitutional" the challenged policy).

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

The Implementation Plan adheres to the policy and directives set forth in the 2017 Memorandum with few exceptions: With regard to the Accession and Retention Directives, the Implementation Plan excludes from military service and authorizes the discharge of transgender people who "require or have undergone gender transition" and those "with a history or diagnosis of gender dysphoria" unless they have been "stable for 36 consecutive months in their biological sex prior to accession." (Dkt. No. 224, Ex. 1 at 3-4.) With regard to the Medical Care Directive, the Implementation Plan provides that the military will, with few exceptions, no longer provide

transition-related surgical care (as people who "require . . . gender transition" will no longer be permitted to serve and those who are currently serving will be subject to discharge). (Id.)

Defendants claim that the 2018 Memorandum and the Implementation Plan differ from the 2017 Memorandum in that they do not mandate a "categorical" prohibition on service by openly transgender people and "contain[] several exceptions allowing some transgender individuals to serve." (Dkt. No. 226 at 6-7). The Court is not persuaded. The Implementation Plan prohibits transgender people—including those who have neither transitioned nor been diagnosed with gender dysphoria—from serving, unless they are "willing and able to adhere to all standards associated with their biological sex." (Dkt. No. 224, Ex. 1 at 4, Ex. 2 at 7.) Requiring transgender people to serve in their "biological sex" [5] does not constitute "open" service in any meaningful way, and cannot reasonably be considered an "exception" to the Ban. Rather, it would force transgender service members to suppress the very characteristic that defines them as transgender in the first place.[6] (See Dkt. No. 143 at ¶ 19 ("The term 'transgender' is used to describe someone who experiences any significant degree of

[5] The Court notes that the Implementation Plan uses the term "biological sex," apparently to refer to the sex one is assigned at birth. This is somewhat misleading, as the record indicates that gender identity—"a person's internalized, inherent sense of who they are as a particular gender (i.e., male or female)"—is also widely understood to have a "biological component." (See Dkt. No. 143 at ¶¶ 20-21.)

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

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

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

B. Standing

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

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

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

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

1. Individual Plaintiffs

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

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

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

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

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

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

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

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

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

2. Organizational Plaintiffs

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

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

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

3. Washington

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

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

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

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

Washington's sovereign and quasi-sovereign interests. Therefore, the Court concludes that Washington has standing.

C. Constitutional Violations

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

1. Level of Scrutiny

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

In determining whether a classification is suspect or quasi-suspect, the Supreme Court has observed that relevant factors include: (1) whether the class has been "[a]s a historical matter . . . subjected to discrimination," Bowen v. Gilliard, 483 U.S. 587, 602 (1987); (2) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society," City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985); (3) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define [it] as a discrete group," Bowen, 483 U.S. at 602; and (4) whether the class is "a minority or politically powerless." Id.; see also Windsor v. U.S., 699 F.3d 169, 181 (2d Cir. 2012), aff'd on other grounds, 570 U.S. 744 (2013). While "[t]he presence of any of the

factors is a signal that the particular classification is 'more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,'" the first two factors alone may be dispositive. Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012) (quoting Pyler v. Doe, 457 U.S. 202, 216 n.14 (1982)).

The Court considers each of these factors in turn:

i. History of Discrimination

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

ii. Contributions to Society

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

iii. Immutability

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

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

iv. Political Power

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

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

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

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

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

2. Level of Deference

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

The Court previously found that the Ban—as set forth in President Trump's Twitter Announcement and 2017 Memorandum—was not owed deference, as it was not supported by "any evidence of considered reason or deliberation." (Dkt. No. 103 at 17-18.) Indeed, at the time he announced the Ban, "all of the reasons proffered by the President for excluding transgender individuals from the military were not merely unsupported, but were actually *contradicted* by the studies, conclusions, and judgment of the military itself." Doe 1, 275 F. Supp. 3d at 212 (emphasis in original); see also Rostker v. Goldberg, 453 U.S. 57, 67-72 (1981) (concluding that deference is owed to well-reasoned policies that are not adopted "unthinkingly" or "reflexively and not for any considered reason"); Goldman v. Weinberger, 475 U.S. 503, 507-08 (1986) (concluding that deference is owed where a policy results from the "professional

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Congress . . . as well as gay federal judges, there is no indication that there have ever been any transgender members of the United States Congress or federal judiciary.")

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

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

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

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

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

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

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

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

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

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

IV. Defendants' Motion for Partial Summary Judgment

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

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

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

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

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

CONCLUSION

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

Accordingly, the Court rules as follows:

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

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

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

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

5. The preliminary injunction previously entered otherwise remains in full force and effect. Defendants (with the exception of President Trump), their officers, agents, servants, employees, and attorneys, and any other person or entity subject to their control or acting directly or indirectly in concert or participation with Defendants are enjoined from taking any action

relative to transgender people that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement.

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

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

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

Dated April 13, 2018.

Marsha J. Pechman
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al. Plaintiffs, v. DONALD J. TRUMP, et al. Defendants.	CASE NO. C17-1297-MJP ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

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

Court GRANTS in part and DENIES in part Defendants' Motion to Dismiss and GRANTS Plaintiffs' Motion for Preliminary Injunction.

ORDER SUMMARY

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

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

GRANTS in part and DENIES in part Defendants' Motion to Dismiss and GRANTS Plaintiffs' Motion for Preliminary Injunction.

BACKGROUND

I. Presidential Memorandum and Interim Guidance

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

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

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

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

Prior to President Trump's announcement, the military concluded that transgender individuals should be permitted to serve openly and was in the process of implementing a policy to this effect (the "June 2016 Policy"). (Dkt. Nos. 32 at 9-10; 46 at ¶¶ 8-27; 48 at ¶¶ 8-36, Ex. C.) The June 2016 Policy was preceded by extensive research, including an independent study to evaluate the implications of military service by transgender individuals. (Dkt. Nos. 30 at ¶¶ 159-162; 32 at 9-10; 46 at ¶ 11.) This study concluded that allowing transgender individuals to serve would not negatively impact military effectiveness, readiness, or unit cohesion, and that the costs of providing transgender service members with transition-related healthcare would be "exceedingly small" compared with DoD's overall healthcare expenditures. (Dkt. No. 32 at 30; 46 at ¶¶ 15-20.) After consulting with medical experts, personnel experts, readiness experts, commanders whose units included transgender service members, and others, the working group concluded that transgender individuals should be allowed to serve openly. (Dkt. Nos. 30 at ¶ 161; 46 at ¶ 10.) The Secretary of Defense issued a directive-type memorandum on June 30, 2016 affirming that "service in the United States military should be open to all who can meet the rigorous standards for military service and readiness," including transgender individuals. (Dkt. No. 48, Ex. C.) The memorandum established procedures for accession, retention, in-service

transition, and medical coverage, and provided that "[e]ffective immediately, no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity." (Id.) Relying upon the June 2016 Policy, transgender service members disclosed their transgender status to the military and were serving openly at the time of President Trump's announcement. (See Dkt. Nos. 30 at ¶¶ 101-102, 112-114; 48 at ¶ 37.)

III. Plaintiffs Challenge to the Presidential Memorandum

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

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

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

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

DISCUSSION

I. Motion to Dismiss

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

A. Rule 12(b)(1)

Defendants move to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Defendants contend the Court lacks subject matter jurisdiction for two

reasons: First, they contend Plaintiffs lack standing because they have not suffered injuries in fact. (Id. at 18-20.) Second, they contend Plaintiffs' claims are not ripe for resolution. (Id. at 20-22.) Plaintiffs respond that the Presidential Memorandum gives rise to current harm and credible threats of impending harm sufficient for both standing and ripeness. (See Dkt. No. 84 at 11-27.)

i. *Individual Plaintiffs*

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

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

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

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

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

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

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

Second, Defendants claim Plaintiffs Karnoski, D.L., and Callahan have not suffered injury in fact as they have yet to enlist in the military. (Dkt. No. 69 at 19.) However, as a result of the Accession Directive, Plaintiffs Karnoski, D.L., and Callahan cannot compete for accession on equal footing with non-transgender individuals. Denial of this opportunity constitutes injury in fact. See Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 365-66 (1977) ("When a person's desire for a job is not translated into a formal application solely because of his

unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.").[3]

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

ii. *Organizational Plaintiffs*

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

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

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

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

iii. *Washington State*

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

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

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

iv. *Ripeness*

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

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

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

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

B. Rule 12(b)(6)

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

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

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

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

II. Motion for Preliminary Injunction

The Court finds that Plaintiffs are entitled to a preliminary injunction to preserve the status quo that existed prior to the change in policy announced by President Trump on Twitter and in his Presidential Memorandum. The Court considers four factors in evaluating Plaintiffs'

[5] The Court notes that the procedural due process claim is elaborated upon in detail in Plaintiffs' Motion for Preliminary Injunction and Reply. (See Dkt. Nos. 32 at 22-23; 84 at 39-40.)

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

A. Likelihood of Success on the Merits

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

i. *Equal Protection*

Plaintiffs have established a likelihood of success on the merits of their equal protection challenge. The Equal Protection Clause prohibits government action "denying to any person the equal protection of the laws." United States v. Windsor, 133 S. Ct. 2675, 2695 (2013). Plaintiffs contend the policy set forth in the Presidential Memorandum denies them equal protection in that it impermissibly classifies individuals based on transgender status and gender identity and is not substantially related to an important government interest. (Dkt. No. 30 at ¶¶ 217-224.)

The Court must first determine whether the policy burdens "a 'suspect' or 'quasi-suspect' class." See Ball v. Massanari, 254 F.3d 817, 823 (9th Cir. 2001). The Court concludes that the policy distinguishes on the basis of transgender status, a quasi-suspect classification, and is therefore subject to intermediate scrutiny. See id. (noting that gender is a quasi-suspect classification); Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (noting that discrimination based on a person's failure "to conform to socially-constructed

gender expectations" is a form of gender discrimination) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989)).[6]

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

Defendants' arguments to the contrary are unavailing. While Defendants raise concerns about transition-related medical conditions and costs, their concerns "appear to be hypothetical

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

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

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

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

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

ii. *Substantive Due Process*[9]

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

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

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

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

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

iii. *First Amendment*

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

Plaintiffs contend the policy set forth in the Presidential Memorandum impermissibly burdens "speech or conduct that 'openly' discloses a transgender individual's identity or transgender status" by subjecting openly transgender individuals to discharge and other adverse actions. (See Dkt. No. 30 at ¶¶ 196-197, 234-236.) The Court agrees. The policy penalizes

transgender service members—but not others—for disclosing their gender identity, and is therefore a content-based restriction. Even giving the government the benefit of a more deferential standard of review under Brown, 444 U.S. at 355, the policy does not survive. As discussed in the context of Plaintiffs' equal protection challenge, supra, Defendants have not demonstrated that the intrusion upon protected expression furthers an important government interest.

B. Irreparable Harm

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

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

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

C. Balance of Equities and Public Interest

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

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

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

CONCLUSION

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

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

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

3. The Court GRANTS Plaintiffs' Motion for a Preliminary Injunction, and hereby enjoins Defendants and their officers, agents, servants, employees, and attorneys, and any other person or entity subject to their control or acting directly or indirectly in concert or participation with Defendants from taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement. This Preliminary Injunction shall take effect immediately and shall remain in effect pending resolution of this action on the merits or further order of this Court.

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

Dated December 11, 2017.

Marsha J. Pechman
United States District Judge

THE WHITE HOUSE

WASHINGTON

March 23, 2018

MEMORANDUM FOR THE SECRETARY OF DEFENSE
THE SECRETARY OF HOMELAND SECURITY

SUBJECT: Military Service by Transgender Individuals

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

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

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

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

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

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

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

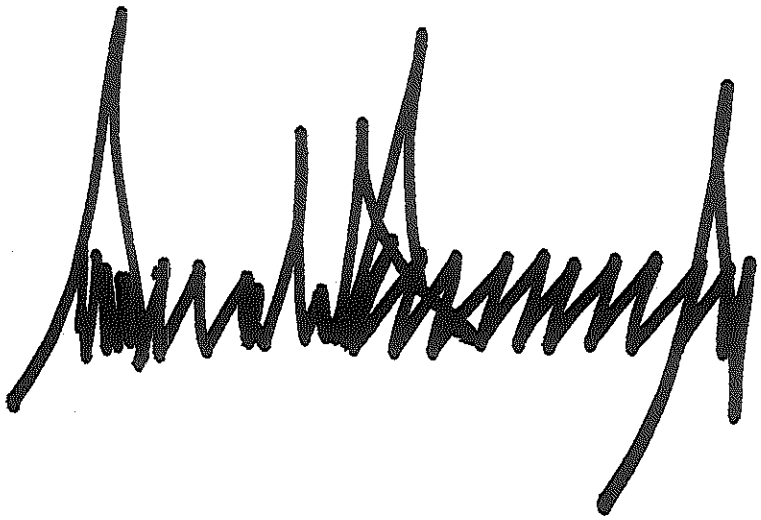
(i) the authority granted by law to an executive department or agency, or the head thereof; or

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

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

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

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



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

FEB 22 2018

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Military Service by Transgender Individuals

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

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

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

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

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

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

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

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

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

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

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

- Transgender persons who require or have undergone gender transition are disqualified from military service.

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

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

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

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

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

Attachment:
As stated

cc:
Secretary of Homeland Security

Presidential Documents

Memorandum of August 25, 2017

Military Service by Transgender Individuals

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

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

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

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

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

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

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

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

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

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

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

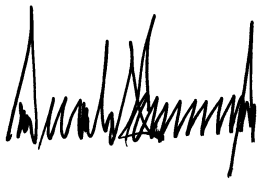
(i) the authority granted by law to an executive department or agency, or the head thereof; or

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

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

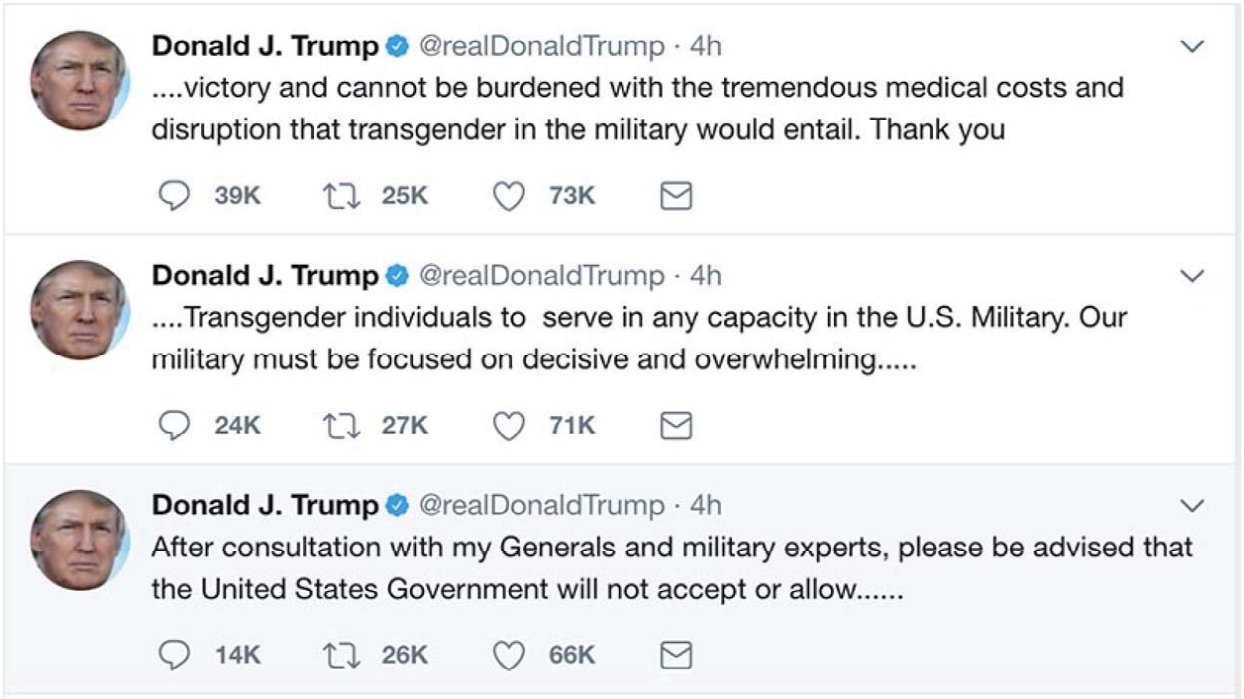
(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

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



THE WHITE HOUSE,
Washington, August 25, 2017

[FR Doc. 2017–18544
Filed 8–29–17; 11:15 am]
Billing code 5001–06–P



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

39K 25K 73K

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

24K 27K 71K

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

14K 26K 66K

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

NO. 2:17-CV-1297-MJP

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

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

1. I currently hold the position of General Counsel of the Office of Administration. I have held this position since July 10, 2017. As General Counsel of the Office of Administration, my responsibilities include advising and assisting the Office of Administration on a wide variety of matters, including on records management, litigation, and management of discovery for the Executive Office of President.

2. I submit this declaration in response to the Court's July 27, 2018 Order Granting Motion to Compel and Denying Motion for a Protective Order, Dkt. 299. I base this declaration on my personal knowledge, information made available to me in the

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

3. On December 29, 2017, Plaintiffs in the above-captioned litigation served their first set of requests for production on the President. In this first set of requests, Plaintiffs directed 25 separate requests for documents to the Executive Office of the President. Many of these requests specifically targeted information subject to the presidential communications privilege. For example, request 6 sought "[a]ll Documents and Communications relating to, including all drafts of, the August 25, 2017, memorandum entitled 'Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security.'" Request 7 sought "[a]ll Documents and Communications related to President Trump's consultation with employees, agents, contractors, or consultants of the United States Armed Forces regarding transgender military service or related healthcare." And request 10 sought "[f]or the period starting January 20, 2017 up to and including July 28, 2017, all Communications between any member of Congress and President Trump or any individual within the Executive Office of the President concerning military service by transgender people or healthcare for current or prospective transgender service members, and any Documents constituting, summarizing, reflecting, or evidencing such Communications."

4. In response to these requests and separate requests for production in the related cases of *Doe v. Trump*, No. 17-cv-1597 (D.D.C.), and *Stone v. Trump*, No. 1:17-cv-02459 (D. Md.), White House staff took the following steps: (i) notified all White House staff of the need to preserve information and data relevant to the litigation, including information beyond what White House staff are required to preserve under the Presidential Records Act; (ii) identified 41 custodians who might have information responsive to these requests; (iii) identified for each custodian what information may be responsive to the requests; (iv) collected approximately 114,000 documents that were potentially responsive to Plaintiffs' requests from these custodians; (v) loaded these potentially responsive documents into a litigation database; (vi) reviewed the potentially

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

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

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

6. On April 26, 2018, Plaintiffs served their second set of requests for production on the President. In this second set of requests, Plaintiffs made an additional 10 requests for documents from the Executive Office of the President. For example, request 32 sought "[a]ll Documents or Communications relating or referring to President Trump's March 23, 2018, Memorandum for the Secretary of Defense and the Secretary of Homeland Security with Subject: Military Service by Transgender Individuals (the 'March 23, 2018, Memorandum'), including without limitation: (a) all documents reviewed, considered, or relied upon in preparing the March 23, 2018, Memorandum; and (b) all drafts of the March 23, 2018, Memorandum." Request 33 sought "[a]ll Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the March 23, 2018, Memorandum." And request 34 sought "[a]ll Communications, on or after January 20, 2017 to the present, between the President, the Executive Office of the President, the Vice President, and/or the Office of the Vice President, on the one hand, and Secretary Mattis and/or the Department of the Defense, on the other hand, relating or referring to military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general."

7. In response to this second set of requests from Plaintiffs, and further requests for production in one of the related cases, *Stone v. Trump*, No. 1:17-cv-02459 (D. Md.), White House staff repeated the efforts described in paragraph 4 above. In total, this second collection and review process took 10 White House staff members (including six attorneys) hundreds of hours to complete.

8. In conjunction with this second collection and review process, the Office of the President supplemented its prior privilege log. *See* Exh. B. This supplemental privilege

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

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

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

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

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

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

GINEEN BRESSO
General Counsel
Office of Administration

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Exhibit A to Gineen Bresso Declaration

Privilege Log, served June 4, 2018

# of Documents*	Description**	Date Range	To	From	Primary Privilege Asserted	Privilege Description
97	Internal emails and documents drafted by attorneys in the White House Counsel's Office to deliberate with other attorneys in the White House Counsel's office regarding the policies governing transgender individuals' service in the military and regarding anticipated litigation	1/20/2017-7/25/2017	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys in anticipation of litigation during the period when the President and his advisors were deliberating regarding whether to implement the 2016 Secretary of Defense Memorandum; deliberations occurred in anticipation of litigation and included assessments of litigation risk; emails and documents to and from attorneys in the White House Counsel's Office seeking and providing confidential legal advice concerning transgender individuals' service in the military and the 2016 Secretary of Defense Memorandum; emails and documents reflecting White House Counsel's Office legal deliberations concerning issues surrounding transgender individuals' service in the military, which predate a policy decision on transgender individuals' service in the military
153	Internal emails and documents drafted by attorneys in the White House Counsel's Office to deliberate with other attorneys in the White House Counsel's office regarding the formulation of the 8/25 Presidential Memorandum and regarding anticipated litigation, including drafts of the 8/25/2017 Presidential Memorandum	7/26/2017-8/8/2017	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys in anticipation of litigation regarding the drafting, form, and legality of the 8/25/2017 Presidential Memorandum; emails and documents to and from attorneys in the White House Counsel's Office seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and anticipated litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum
85	Internal emails and documents drafted by attorneys in the White House Counsel's Office to deliberate with other attorneys in the White House Counsel's office regarding policies governing the formulation of the 8/25 Presidential Memorandum and regarding pending litigation, including drafts of the 8/25/2017 Presidential Memorandum	8/9/2017-8/25/2017	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys after litigation had commenced (the *Doe* Complaint was filed 8/9/2017) regarding the drafting, form, and legality of the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents to and from attorneys in the White House Counsel's Office providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum
343	Internal emails and documents drafted by attorneys in the White House Counsel's Office to deliberate with other attorneys in the White House Counsel's office regarding the implementation of the 8/25 Presidential Memorandum and regarding pending litigation	8/26/2017-1/9/2018	WHCO Attorneys	WHCO Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys after litigation had commenced regarding pending litigation and regarding the implementation of the 8/25/2017 Memorandum; emails and documents to and from attorneys in the White House Counsel's Office providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum and legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
161	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Office of Legal Counsel to deliberate regarding the formulation, form and legality, and implementation of the 8/25/2017 Presidential Memorandum, including drafts of the 8/25/2017 Presidential Memorandum	6/30/2017-12/4/2017	WHCO and OLC Attorneys	WHCO and OLC Attorneys (in some cases, attorneys from DOD or from other DOJ components are also recipients or cc ed)	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys in anticipation of litigation, or after litigation had commenced, assessing the form and legality of the 8/25/2017 Presidential Memorandum and implementation thereof; emails and documents to and from attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Office of Legal Counsel seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum; emails and documents reflecting White House Counsel's Office deliberations concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
188	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Civil Division regarding pending litigation	8/9/2017-1/11/2018	WHCO and DOJ-Civil Division Attorneys (and, occasionally, attorneys from other DOJ components or from DOD)	WHCO and DOJ-Civil Division Attorneys (and, occasionally, attorneys from other DOJ components or from DOD)	Work Product (in many cases, also covered by Attorney Client Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents drafted by attorneys during pending litigation regarding litigation strategy, updates, and filings; emails and documents drafted by attorneys in the White House Counsel's Office and attorneys in the Department of Justice's Civil Division seeking and providing confidential legal advice concerning pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
31	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD regarding the policies governing transgender individuals' service in the military and regarding anticipated litigation	1/20/2017-7/25/2017	WHCO Attorneys and DOD Attorneys	WHCO Attorneys and DOD Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys in anticipation of litigation during the period when the President and his advisors were deliberating regarding whether to implement the 2016 Secretary of Defense Memorandum; deliberations occurred in anticipation of litigation; emails and documents to and from attorneys in the White House Counsel's Office and attorneys from DOD seeking and providing confidential legal advice concerning policies governing transgender individuals' service in the military and anticipated litigation; emails and documents reflecting White House Counsel's Office deliberations concerning legal issues surrounding policies governing transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
44	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD regarding the formulation of the 8/25 Presidential Memorandum and regarding anticipated litigation, including drafts of the 8/25/2017 Presidential Memorandum	7/26/2017-8/8/2017	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted in anticipation of litigation, regarding the drafting, form, and legality of the 8/25/2017 Presidential Memorandum; emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and anticipated litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum
19	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD regarding the formulation of the 8/25 Presidential Memorandum and regarding pending litigation, including drafts of the Presidential Memorandum	8/9/2017-8/25/2017	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted after litigation had commenced (the *Doe* Complaint was filed 8/9/2017) regarding the drafting, form, and legality of the 8/25/2017 Presidential Memorandum and regarding pending litigation; emails and documents to and from attorneys in the White House Counsel's Office and attorneys from DOD seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum
50	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD regarding the implementation of the 8/25/Presidential Memorandum and pending litigation	8/26/2017-12/27/2017	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	Work Product (in many cases, also covered by Attorney Client Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents drafted by attorneys after litigation had commenced regarding implementation of the 8/25/207 Memorandum and regarding pending litigation; emails and documents to and from attorneys in the White House Counsel's Office and attorneys from DOD seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military

39	Emails and documents in which attorneys in the White House Counsel's Office provide legal advice to other White House staffers with regard to the formulation and implementation of the President's policies regarding transgender individuals' military service	1/20/2017-7/25/2017	WHCO Attorneys and Other White House Employees	WHCO Attorneys and Other White House Employees (including, in some cases, other EOP employees from, e.g., the NSC)	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys and emails and documents drafted by WHCO Attorneys providing confidential legal advice to other White House employees regarding legal aspects of the formulation of the President's policy regarding service by transgender individuals in the military; emails and documents prepared by WHCO Attorneys in anticipation of litigation, concerning legal issues surrounding transgender individuals' service in the military; emails and documents reflecting deliberations by and between WHCO Attorneys and other White House employees concerning transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
59	Emails and documents in which attorneys in the White House Counsel's Office provide legal advice to other White House staffers with regard to the formulation and implementation of the President's policies regarding transgender individuals' military service	7/26/2017-8/8/2017	WHCO Attorneys and Other White House Employees	WHCO Attorneys and Other White House Employees (including, in some cases, other EOP employees from, e.g., the NSC)	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys and emails and documents drafted by WHCO attorneys providing confidential legal advice to other White House employees regarding legal aspects of the formulation and implementation of the President's policy regarding service by transgender individuals in the military; emails and documents prepared by WHCO Attorneys in anticipation of litigation, concerning legal issues surrounding transgender individuals' service in the military; emails and documents reflecting deliberations by and between WHCO Attorneys and other White House employees concerning transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
108	Emails and documents in which attorneys in the White House Counsel's Office provide legal advice to other White House staffers with regard to the formulation and implementation of the President's policies regarding transgender individuals' military service and regarding pending litigation	8/9/2017-8/25/2017	WHCO Attorneys and Other White House Employees	WHCO Attorneys and Other White House Employees (including, in some cases, other EOP employees from, e.g., the NSC)	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys and emails and documents drafted by WHCO Attorneys providing confidential legal advice to other White House employees regarding legal aspects of the formulation and implementation of the President's policy regarding military service by transgender individuals and regarding pending litigation; emails and documents prepared by WHCO Attorneys for pending litigation; emails and documents reflecting deliberations by and between WHCO Attorneys and other White House employees concerning transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
80	Emails and documents in which attorneys in the White House Counsel's Office provide legal advice to other White House staffers with regard to the implementation of the President's policies regarding transgender individuals' military service and regarding pending litigation	8/26/2017-1/9/2018	WHCO Attorneys and Other White House Employees	WHCO Attorneys and Other White House Employees (including, in some cases, other EOP employees from, e.g., the NSC)	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys and emails and documents from WHCO Attorneys providing confidential legal advice to other White House employees regarding legal aspects of the implementation of the President's policy regarding service by transgender individuals and regarding pending litigation; emails and documents prepared by WHCO Attorneys for pending litigation; emails and documents reflecting deliberations by and between WHCO Attorneys and other White House employees concerning transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
21	Emails or documents in which attorneys in the White House Counsel's Office or the Legal Division of the National Security Council provide legal advice to National Security Council principals or staffers with regard to the formulation and implementation of the President's policies regarding transgender individuals' military service and regarding anticipated litigation	1/20/2017-7/25/2017	WHCO/NSC Legal Attorneys and NSC Employees	WHCO/NSC Legal Attorneys and NSC Employees	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys/NSC Legal Attorneys and emails from WHCO Attorneys/NSC Legal Attorneys providing confidential legal advice to NSC employees regarding legal aspects of the formulation of the President's policy regarding service by transgender individuals in the military; emails and documents prepared by WHCO Attorneys and NSC Legal Attorneys in anticipation of litigation; emails and documents reflecting deliberations by WHCO Attorneys and NSC Legal Attorneys concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
41	Emails or documents in which attorneys in the White House Counsel's Office or the Legal Division of the National Security Council provide legal advice to National Security Council principals and staffers with regard to the formulation and implementation of the President's policies regarding transgender individuals' military service and regarding anticipated litigation	7/26/2017-8/8/2017	WHCO/NSC Legal Attorneys and NSC Employees	WHCO/NSC Legal Attorneys and NSC Employees	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys/NSC Legal Attorneys and emails and documents drafted by WHCO Attorneys/NSC Legal Attorneys providing confidential legal advice to NSC employees regarding legal aspects of the formulation and implementation of the President's policy regarding military service by transgender individuals; emails and documents prepared by WHCO Attorneys and NSC Legal Attorneys in anticipation of litigation; emails and documents reflecting deliberations by WHCO Attorneys and NSC Legal Attorneys concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
25	Emails or documents in which attorneys in the White House Counsel's Office or the Legal Division of the National Security Council provide legal advice to National Security Council principals and staffers with regard to the formulation and implementation of the President's policies regarding transgender individuals' military service and regarding pending litigation	8/9/2017-8/25/2017	WHCO/NSC Legal Attorneys and NSC Employees	WHCO/NSC Legal Attorneys and NSC Employees	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys/NSC Legal Attorneys and emails and documents drafted by WHCO Attorneys/NSC Legal Attorneys providing confidential legal advice to NSC employees regarding legal aspects of the formulation and implementation of the President's policy regarding service by transgender individuals and regarding pending litigation; emails and documents prepared by WHCO Attorneys and NSC Legal Attorneys for pending litigation; emails and documents reflecting deliberations by WHCO Attorneys and NSC Legal Attorneys concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
84	Emails or documents in which attorneys in the White House Counsel's Office or the Legal Division of the National Security Council provide legal advice to National Security Council principals and staffers with regard to the formulation and implementation of the President's policies regarding transgender individuals' military service and regarding pending litigation	8/26/2017-1/12/2018	WHCO/NSC Legal Attorneys and NSC Employees	WHCO/NSC Legal Attorneys and NSC Employees	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys/NSC Legal Attorneys and emails and documents from WHCO Attorneys/NSC Legal Attorneys providing confidential legal advice to NSC employees regarding legal aspects of the implementation of the President's policy regarding military service by transgender individuals and regarding pending litigation; emails and documents prepared by WHCO Attorneys and NSC Legal Attorneys for pending litigation; emails and documents reflecting deliberations by WHCO Attorneys and NSC Legal Attorneys concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
8	Emails and documents in which members of the President's Communications staff and other staffers within the Executive Office of the President deliberate regarding the President's communications strategy regarding the service of transgender individuals in the military	1/20/2017-7/25/2017	WH Communications Staffers or other EOP Staffers (including some attorneys)	WH Communications Staffers or other EOP Staffers (including some attorneys)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's Communications staff to deliberate with other members of the EOP staff regarding the President's policies with respect to the service of transgender individuals in the military; emails and documents discussing confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
98	Emails and documents in which members of the President's Communications staff and other staffers within the Executive Office of the President deliberate regarding the President's communications strategy regarding the service of transgender individuals in the military and his 7/26/2017 Tweet	7/26/2017-8/25/2017	WH Communications Staffers or other EOP Staffers, including some attorneys	WH Communications Staffers or other EOP Staffers, including some attorneys (and, occasionally, a DOD staffer)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's Communications staff to deliberate with other members of the EOP staff regarding the President's policies, as presented in his 7/26/2017 Tweet, regarding the service of transgender individuals in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation, or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military

70	Emails and documents in which members of the President's Communications staff and other staffers within the Executive Office of the President deliberate regarding the President's communications strategy regarding the service of transgender individuals in the military, his 7/26/2017 Tweet, and his 8/25/2017 Presidential Memorandum	8/26/2017-12/29/2017	WH Communications Staffers or other EOP Staffers, including some attorneys	WH Communications Staffers or other EOP Staffers, including some attorneys (and, occasionally, a DOD staffer)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's Communications staff to deliberate with other members of the EOP staff regarding the President's policies with respect to the service of transgender individuals in the military, his 7/26/2017 Tweet, and his 8/25/2017 Presidential Memorandum; emails and documents discussing confidential legal advice concerning pending litigation; emails and documents prepared for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
13	Emails and documents in which members of the President's National Security Council Communications staff and other staffers within the Executive Office of the President and the Department of Defense deliberate regarding the President's communications strategy with respect to the service of transgender individuals in the military	1/20/2017-7/25/2017	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's National Security Council Communications staff to deliberate with other members of the EOP staff regarding the President's policies with respect to the service of transgender individuals in the military; emails and documents discussing confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
117	Emails and documents in which members of the President's National Security Council Communications staff and other staffers within the Executive Office of the President or the Department of Defense deliberate regarding the President's communications strategy with respect to the service of transgender individuals in the military and his 7/26/2017 Tweet	7/26/2017-8/25/2017	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's National Security Council Communications staff to deliberate with other members of the EOP staff regarding the President's policies, as presented in his 7/26/2017 Tweet, with respect to the service of transgender individuals in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
163	Emails and documents in which members of the National Security Council's Communications staff and other staffers within the Executive Office of the President deliberate regarding the President's communications strategy with respect to the service of transgender individuals in the military, his 7/26/2017 Tweet, and his 8/25/2017 Presidential Memorandum	8/26/2017-1/8/2018	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's National Security Council Communications staff to deliberate with other members of the EOP staff regarding the President's policies regarding the service of transgender individuals in the military, his 7/26/2017 Tweet, and his 8/25/2015 Presidential Memorandum; emails and documents discussing confidential legal advice concerning pending litigation; emails and documents prepared for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
93	(Generally pre-decisional) emails and documents in which senior members of the President's Legislative Affairs staff deliberate regarding the Administration's interactions with Congress (and Members of Congress) and how best to advance the President's legislative goals regarding military readiness and the service of transgender individuals in the military before Congress, in order to advise the President re same	1/20/2017-7/25/2017	WH Legislative Affairs Staffers and other EOP Staffers	WH Legislative Affairs Staffers and other EOP Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Emails and documents drafted by members of the President's Legislative Affairs team to deliberate with other members of the President's staff regarding military readiness and the service of transgender individuals in the military, in order to advise the President re aspects of same with implications for legislative efforts, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
70	(Generally pre-decisional) emails and documents in which senior members of the President's Legislative Affairs staff deliberate regarding the Administration's interactions with Congress (and Members of Congress) and how best to advance the President's legislative goals regarding military readiness and the service of transgender individuals in the military before Congress, in order to advise the President re same	7/26/2017-8/25/2017	WH Legislative Affairs Staffers and other EOP Staffers	WH Legislative Affairs Staffers and other EOP Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Emails and documents in which members of the President's Legislative Affairs team deliberate with other members of the President's staff regarding military readiness and the service of transgender individuals in the military, in order to advise the President re aspects of same with implications for legislative efforts, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
29	(Generally pre-decisional) emails and documents in which senior members of the President's Legislative Affairs staff deliberate regarding the Administration's interactions with Congress (and Members of Congress) and how best to advance the President's legislative goals regarding the service of transgender individuals in the military before Congress, in order to advise the President re same	8/26/2017-1/18/2018	WH Legislative Affairs Staffers and other EOP Staffers	WH Legislative Affairs Staffers and other EOP Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Emails and documents in which members of the President's Legislative Affairs team deliberate with other members of the President's staff regarding military readiness and the service of transgender individuals in the military, in order to advise the President re aspects of same with implications for legislative efforts, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
32	(Generally pre-decisional) emails and documents drafted by senior members of the President's Domestic Policy Council to deliberate with other EOP staffers regarding the formulation and implementation of the President's policy concerning the service of transgender individuals in the military and in order to advise the President re same	1/20/2017-7/25/2017	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior White House policy aides and other members of the Executive Office of the President as to the formulation or implementation of the President's policies regarding military lethality and readiness and the service of transgender individuals in the military leading up to a policy recommendation to the President, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
56	(Generally pre-decisional) emails and documents drafted by senior members of the President's Domestic Policy Council to deliberate with other EOP staffers regarding the formulation and implementation of the President's policy concerning the service of transgender individuals in the military and in order to advise the President re same	7/26/2017-8/25/2017	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior White House policy aides and other members of the Executive Office of the President as to the formulation or implementation of the President's policies regarding military lethality and readiness and the service of transgender individuals in the military leading up to policy recommendations to the President, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
11	(Generally pre-decisional) emails and documents drafted by senior members of the President's Domestic Policy Council to deliberate with other EOP staffers regarding the formulation and implementation of the President's policy concerning the service of transgender individuals in the military and in order to advise the President re same	8/26/2017-1/4/2018	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior White House policy aides and other members of the Executive Office of the President as to the implementation of the President's policies regarding military lethality and readiness and the service of transgender individuals in the military leading up to policy recommendations to the President, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
62	(Generally pre-decisional) emails and documents drafted by senior members and staff of the National Security Council in order to advise the President regarding the formulation and implementation of his policy concerning the service of transgender individuals in the military and to deliberate re same	1/20/2017-7/25/2017	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Senior members of the National Security Council or their staffers or other EOP or DOD Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior members or staffers of the National Security Council and other members of the Executive Office of the President or Department of Defense as part of the development of a recommendation to the President regarding the impact of the service of transgender individuals on military lethality and readiness, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military

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

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

* Document tallies do not include attachments

** Although some documents fall into multiple categories, each document is tallied as only belonging in one category to more accurately reflect volume of documents at issue.

Exhibit B to Gineen Bresso Declaration

Privilege Log, served July 16, 2018

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

58	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD regarding the policies governing transgender individuals' service in the military and regarding anticipated litigation	1/20/2017-7/25/2017	WHCO Attorneys and DOD Attorneys	WHCO Attorneys and DOD Attorneys	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted by attorneys in anticipation of litigation during the period when the President and his advisors were deliberating regarding whether to implement the 2016 Secretary of Defense Memorandum; deliberations occurred in anticipation of litigation; emails and documents to and from attorneys in the White House Counsel's Office and attorneys from DOD seeking and providing confidential legal advice concerning policies governing transgender individuals' service in the military and anticipated litigation; emails and documents reflecting White House Counsel's Office deliberations concerning legal issues surrounding policies governing transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
77	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD regarding the formulation of the 8/25 Presidential Memorandum and regarding anticipated litigation, including drafts of the 8/25/2017 Presidential Memorandum	7/26/2017-8/8/2017	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted in anticipation of litigation, regarding the drafting, form, and legality of the 8/25/2017 Presidential Memorandum; emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and anticipated litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum
26	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD regarding the formulation of the 8/25/2017 Presidential Memorandum and regarding pending litigation, including drafts of the Presidential Memorandum	8/9/2017-8/25/2017	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	Work Product (in many cases, also covered by Presidential Communications Privilege, Deliberative Process Privilege, and Attorney Client Privilege)	Emails and documents drafted after litigation had commenced (the *Doe* Complaint was filed 8/9/2017) regarding the drafting, form, and legality of the 8/25/2017 Presidential Memorandum and regarding pending litigation; emails and documents to and from attorneys in the White House Counsel's Office and attorneys from DOD seeking and providing confidential legal advice concerning the 8/25/2017 Presidential Memorandum and pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning the 8/25/2017 Presidential Memorandum, which predate the issuance of the 8/25/2017 Presidential Memorandum
138	Emails and documents drafted by attorneys in the White House Counsel's Office and attorneys from DOD regarding the implementation of the 8/25/2017 Presidential Memorandum, the formulation of the 3/23/2018 Presidential Memorandum, including drafts of the Memorandum, and pending litigation.	8/26/2017-3/23/2018	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	WHCO Attorneys and DOD Attorneys (and, occasionally, DOJ attorneys)	Work Product (in many cases, also covered by Attorney Client Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents drafted by attorneys after litigation had commenced regarding implementation of the 8/25/207 Memorandum and the formulation of the 3/23/2018 Presidential Memorandum and regarding pending litigation; emails and documents to and from attorneys in the White House Counsel's Office and attorneys from DOD seeking and providing confidential legal advice concerning the 8/25/2017 and 3/23/2018 Presidential Memorandums and pending litigation; emails and documents reflecting White House Counsel's Office deliberations concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
55	Emails and documents in which attorneys in the White House Counsel's Office provide legal advice to other White House staffers with regard to the formulation and implementation of the President's policies regarding transgender individuals' military service	1/20/2017-7/25/2017	WHCO Attorneys and Other White House Employees	WHCO Attorneys and Other White House Employees (including, in some cases, other EOP employees from, e.g., the NSC)	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys and emails and documents drafted by WHCO Attorneys providing confidential legal advice to other White House employees regarding legal aspects of the formulation of the President's policy regarding service by transgender individuals in the military; emails and documents prepared by WHCO Attorneys in anticipation of litigation, concerning legal issues surrounding transgender individuals' service in the military; emails and documents reflecting deliberations by and between WHCO Attorneys and other White House employees concerning transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
88	Emails and documents in which attorneys in the White House Counsel's Office provide legal advice to other White House staffers with regard to the formulation and implementation of the President's policies regarding transgender individuals' military service	7/26/2017-8/8/2017	WHCO Attorneys and Other White House Employees	WHCO Attorneys and Other White House Employees (including, in some cases, other EOP employees from, e.g., the NSC)	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys and emails and documents drafted by WHCO attorneys providing confidential legal advice to other White House employees regarding legal aspects of the formulation and implementation of the President's policy regarding service by transgender individuals in the military; emails and documents prepared by WHCO Attorneys in anticipation of litigation, concerning legal issues surrounding transgender individuals' service in the military; emails and documents reflecting deliberations by and between WHCO Attorneys and other White House employees concerning transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
139	Emails and documents in which attorneys in the White House Counsel's Office provide legal advice to other White House staffers with regard to the formulation and implementation of the President's policies regarding transgender individuals' military service and regarding pending litigation	8/9/2017-8/25/2017	WHCO Attorneys and Other White House Employees	WHCO Attorneys and Other White House Employees (including, in some cases, other EOP employees from, e.g., the NSC)	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys and emails and documents drafted by WHCO Attorneys providing confidential legal advice to other White House employees regarding legal aspects of the formulation and implementation of the President's policy regarding military service by transgender individuals and regarding pending litigation; emails and documents prepared by WHCO Attorneys for pending litigation; emails and documents reflecting deliberations by and between WHCO Attorneys and other White House employees concerning transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
186	Emails and documents in which attorneys in the White House Counsel's Office provide legal advice to other White House staffers with regard to the implementation of the President's policies regarding transgender individuals' military service and regarding pending litigation	8/26/2017-12/29/2017	WHCO Attorneys and Other White House Employees	WHCO Attorneys and Other White House Employees (including, in some cases, other EOP employees from, e.g., the NSC)	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys and emails and documents from WHCO Attorneys providing confidential legal advice to other White House employees regarding legal aspects of the implementation of the President's policy regarding service by transgender individuals and regarding pending litigation; emails and documents prepared by WHCO Attorneys for pending litigation; emails and documents reflecting deliberations by and between WHCO Attorneys and other White House employees concerning transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
395	Emails and documents in which attorneys in the White House Counsel's Office provide legal advice to other White House staffers with regard to the implementation of the President's policies regarding transgender individuals' military service and regarding pending litigation	12/30/2017 – 2/15/2018	WHCO Attorneys and Other White House Employees	WHCO Attorneys and Other White House Employees (including, in some cases, other EOP employees from, e.g., the NSC)	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys and emails and documents from WHCO Attorneys providing confidential legal advice to other White House employees regarding legal aspects of the implementation of the President's policy regarding service by transgender individuals and regarding pending litigation; emails and documents prepared by WHCO Attorneys for pending litigation; emails and documents reflecting deliberations by and between WHCO Attorneys and other White House employees concerning transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
258	Emails and documents in which attorneys in the White House Counsel's Office provide legal advice to other White House staffers with regard to the implementation of the President's policies regarding transgender individuals' military service and regarding pending litigation	2/16/2018 - 3/23/2018	WHCO Attorneys and Other White House Employees	WHCO Attorneys and Other White House Employees (including, in some cases, other EOP employees from, e.g., the NSC)	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys and emails and documents from WHCO Attorneys providing confidential legal advice to other White House employees regarding legal aspects of the implementation of the President's policy regarding service by transgender individuals and regarding pending litigation; emails and documents prepared by WHCO Attorneys for pending litigation; emails and documents reflecting deliberations by and between WHCO Attorneys and other White House employees concerning transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military

47	Emails or documents in which attorneys in the White House Counsel's Office or the Legal Division of the National Security Council provide legal advice to National Security Council principals or staffers with regard to the formulation and implementation of the President's policies regarding transgender individuals' military service and regarding anticipated litigation	1/20/2017-7/25/2017	WHCO/NSC Legal Attorneys and NSC Employees	WHCO/NSC Legal Attorneys and NSC Employees	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys/NSC Legal Attorneys and emails from WHCO Attorneys/NSC Legal Attorneys providing confidential legal advice to NSC employees regarding legal aspects of the formulation of the President's policy regarding service by transgender individuals in the military; emails and documents prepared by WHCO Attorneys and NSC Legal Attorneys in anticipation of litigation; emails and documents reflecting deliberations by WHCO Attorneys and NSC Legal Attorneys concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
56	Emails or documents in which attorneys in the White House Counsel's Office or the Legal Division of the National Security Council provide legal advice to National Security Council principals and staffers with regard to the formulation and implementation of the President's policies regarding transgender individuals' military service and regarding anticipated litigation	7/26/2017-8/8/2017	WHCO/NSC Legal Attorneys and NSC Employees	WHCO/NSC Legal Attorneys and NSC Employees	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys/NSC Legal Attorneys and emails and documents drafted by WHCO Attorneys/NSC Legal Attorneys providing confidential legal advice to NSC employees regarding legal aspects of the formulation and implementation of the President's policy regarding military service by transgender individuals; emails and documents prepared by WHCO Attorneys and NSC Legal Attorneys in anticipation of litigation; emails and documents reflecting deliberations by WHCO Attorneys and NSC Legal Attorneys concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
36	Emails or documents in which attorneys in the White House Counsel's Office or the Legal Division of the National Security Council provide legal advice to National Security Council principals and staffers with regard to the formulation and implementation of the President's policies regarding transgender individuals' military service and regarding pending litigation	8/9/2017-8/25/2017	WHCO/NSC Legal Attorneys and NSC Employees	WHCO/NSC Legal Attorneys and NSC Employees	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys/NSC Legal Attorneys and emails and documents drafted by WHCO Attorneys/NSC Legal Attorneys providing confidential legal advice to NSC employees regarding legal aspects of the formulation and implementation of the President's policy regarding service by transgender individuals and regarding pending litigation; emails and documents prepared by WHCO Attorneys and NSC Legal Attorneys for pending litigation; emails and documents reflecting deliberations by WHCO Attorneys and NSC Legal Attorneys concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
100	Emails or documents in which attorneys in the White House Counsel's Office or the Legal Division of the National Security Council provide legal advice to National Security Council principals and staffers with regard to the formulation and implementation of the President's policies regarding transgender individuals' military service and regarding pending litigation	8/26/2017 - 11/2/2017	WHCO/NSC Legal Attorneys and NSC Employees	WHCO/NSC Legal Attorneys and NSC Employees	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys/NSC Legal Attorneys and emails and documents from WHCO Attorneys/NSC Legal Attorneys providing confidential legal advice to NSC employees regarding legal aspects of the implementation of the President's policy regarding military service by transgender individuals and regarding pending litigation; emails and documents prepared by WHCO Attorneys and NSC Legal Attorneys for pending litigation; emails and documents reflecting deliberations by WHCO Attorneys and NSC Legal Attorneys concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
95	Emails or documents in which attorneys in the White House Counsel's Office or the Legal Division of the National Security Council provide legal advice to National Security Council principals and staffers with regard to the formulation and implementation of the President's policies regarding transgender individuals' military service and regarding pending litigation	11/3/2017 - 2/14/2018	WHCO/NSC Legal Attorneys and NSC Employees	WHCO/NSC Legal Attorneys and NSC Employees	Attorney Client Privilege (in many cases, also covered by Work Product Privilege, Deliberative Process Privilege, and Presidential Communications Privilege)	Emails and documents seeking confidential legal advice from WHCO Attorneys/NSC Legal Attorneys and emails and documents from WHCO Attorneys/NSC Legal Attorneys providing confidential legal advice to NSC employees regarding legal aspects of the implementation of the President's policy regarding military service by transgender individuals and regarding pending litigation; emails and documents prepared by WHCO Attorneys and NSC Legal Attorneys for pending litigation; emails and documents reflecting deliberations by WHCO Attorneys and NSC Legal Attorneys concerning legal issues surrounding transgender individuals' service in the military, which predate a final policy decision on transgender individuals' service in the military
8	Emails and documents in which members of the President's Communications staff and other staffers within the Executive Office of the President deliberate regarding the President's communications strategy regarding the service of transgender individuals in the military	1/20/2017-7/25/2017	WH Communications Staffers or other EOP Staffers (including some attorneys)	WH Communications Staffers or other EOP Staffers (including some attorneys)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's Communications staff to deliberate with other members of the EOP staff regarding the President's policies with respect to the service of transgender individuals in the military; emails and documents discussing confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
137	Emails and documents in which members of the President's Communications staff and other staffers within the Executive Office of the President deliberate regarding the President's communications strategy regarding the service of transgender individuals in the military and his 7/26/2017 Tweet	7/26/2017-8/25/2017	WH Communications Staffers or other EOP Staffers, including some attorneys	WH Communications Staffers or other EOP Staffers, including some attorneys (and, occasionally, a DOD staffer)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's Communications staff to deliberate with other members of the EOP staff regarding the President's policies, as presented in his 7/26/2017 Tweet, regarding the service of transgender individuals in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation, or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
124	Emails and documents in which members of the President's Communications staff and other staffers within the Executive Office of the President deliberate regarding the President's communications strategy regarding the service of transgender individuals in the military, his 7/26/2017 Tweet, and his 8/25/2017 Presidential Memorandum	8/26/2017-12/29/2017	WH Communications Staffers or other EOP Staffers, including some attorneys	WH Communications Staffers or other EOP Staffers, including some attorneys (and, occasionally, a DOD staffer)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's Communications staff to deliberate with other members of the EOP staff regarding the President's policies with respect to the service of transgender individuals in the military, his 7/26/2017 Tweet, and his 8/25/2017 Presidential Memorandum; emails and documents discussing confidential legal advice concerning pending litigation; emails and documents prepared for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
331	Emails and documents in which members of the President's Communications staff and other staffers within the Executive Office of the President deliberate regarding the President's communications strategy regarding the service of transgender individuals in the military, his 7/26/2017 Tweet, his 8/25/2017 Presidential Memorandum, and his 3/23/2018 Presidential Memorandum.	12/30/2017 – 3/23/2018	WH Communications Staffers or other EOP Staffers, including some attorneys	WH Communications Staffers or other EOP Staffers, including some attorneys (and, occasionally, a DOD staffer)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's Communications staff to deliberate with other members of the EOP staff regarding the President's policies with respect to the service of transgender individuals in the military, his 7/26/2017 Tweet, his 8/25/2017 Presidential Memorandum, and his 3/23/2018 Presidential Memorandum; emails and documents discussing confidential legal advice concerning pending litigation; emails and documents prepared for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
13	Emails and documents in which members of the President's National Security Council Communications staff and other staffers within the Executive Office of the President and the Department of Defense deliberate regarding the President's communications strategy with respect to the service of transgender individuals in the military	1/20/2017-7/25/2017	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's National Security Council Communications staff to deliberate with other members of the EOP staff regarding the President's policies with respect to the service of transgender individuals in the military; emails and documents discussing confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
170	Emails and documents in which members of the President's National Security Council Communications staff and other staffers within the Executive Office of the President or the Department of Defense deliberate regarding the President's communications strategy with respect to the service of transgender individuals in the military and his 7/26/2017 Tweet	7/26/2017-8/25/2017	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's National Security Council Communications staff to deliberate with other members of the EOP staff regarding the President's policies, as presented in his 7/26/2017 Tweet, with respect to the service of transgender individuals in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military

342	Emails and documents in which members of the National Security Council's Communications staff and other staffers within the Executive Office of the President deliberate regarding the President's communications strategy with respect to the service of transgender individuals in the military, his 7/26/2017 Tweet, and his 8/25/2017 Presidential Memorandum	8/26/2017-2/19/2018	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's National Security Council Communications staff to deliberate with other members of the EOP staff regarding the President's policies regarding the service of transgender individuals in the military, his 7/26/2017 Tweet, and his 8/25/2015 Presidential Memorandum; emails and documents discussing confidential legal advice concerning pending litigation; emails and documents prepared for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
102	Emails and documents in which members of the National Security Council's Communications staff and other staffers within the Executive Office of the President deliberate regarding the President's communications strategy with respect to the service of transgender individuals in the military, his 8/25/2017 Presidential Memorandum, and his 3/23/2018 Presidential Memorandum	2/20/2018-3/18/2018	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's National Security Council Communications staff to deliberate with other members of the EOP staff regarding the President's policies regarding the service of transgender individuals in the military, his 7/26/2017 Tweet, his 8/25/2017 Presidential Memorandum, and his 3/23/2018 Presidential Memorandum; emails and documents discussing confidential legal advice concerning pending litigation; emails and documents prepared for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
18	Emails and documents in which members of the National Security Council's Communications staff and other staffers within the Executive Office of the President deliberate regarding the President's communications strategy with respect to the service of transgender individuals in the military, his 8/25/2017 Presidential Memorandum, and his 3/23/2018 Presidential Memorandum	3/19/2018 - 3/23/2018	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	NSC Communications Staffers and other EOP and DOD Staffers (including some attorneys)	Deliberative Process Privilege (in many cases, also covered by Attorney Client Privilege, Presidential Communications Privilege, or Work Product Privilege)	Pre-decisional emails and documents drafted by members of the President's National Security Council Communications staff to deliberate with other members of the EOP staff regarding the President's policies regarding the service of transgender individuals in the military and his 3/23/2018 Presidential Memorandum; emails and documents discussing confidential legal advice concerning pending litigation; emails and documents prepared for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
118	(Generally pre-decisional) emails and documents in which senior members of the President's Legislative Affairs staff deliberate regarding the Administration's interactions with Congress (and Members of Congress) and how best to advance the President's legislative goals regarding military readiness and the service of transgender individuals in the military before Congress, in order to advise the President re same	1/20/2017-7/25/2017	WH Legislative Affairs Staffers and other EOP Staffers	WH Legislative Affairs Staffers and other EOP Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Emails and documents drafted by members of the President's Legislative Affairs team to deliberate with other members of the President's staff regarding military readiness and the service of transgender individuals in the military, in order to advise the President re aspects of same with implications for legislative efforts, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
94	(Generally pre-decisional) emails and documents in which senior members of the President's Legislative Affairs staff deliberate regarding the Administration's interactions with Congress (and Members of Congress) and how best to advance the President's legislative goals regarding military readiness and the service of transgender individuals in the military before Congress, in order to advise the President re same	7/26/2017-8/25/2017	WH Legislative Affairs Staffers and other EOP Staffers	WH Legislative Affairs Staffers and other EOP Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Emails and documents in which members of the President's Legislative Affairs team deliberate with other members of the President's staff regarding military readiness and the service of transgender individuals in the military, in order to advise the President re aspects of same with implications for legislative efforts, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
53	(Generally pre-decisional) emails and documents in which senior members of the President's Legislative Affairs staff deliberate regarding the Administration's interactions with Congress (and Members of Congress) and how best to advance the President's legislative goals regarding the service of transgender individuals in the military before Congress, in order to advise the President re same	8/26/2017-1/16/2018	WH Legislative Affairs Staffers and other EOP Staffers	WH Legislative Affairs Staffers and other EOP Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Emails and documents in which members of the President's Legislative Affairs team deliberate with other members of the President's staff regarding military readiness and the service of transgender individuals in the military, in order to advise the President re aspects of same with implications for legislative efforts, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
68	(Generally pre-decisional) emails and documents in which senior members of the President's Legislative Affairs staff deliberate regarding the Administration's interactions with Congress (and Members of Congress) and how best to advance the President's legislative goals regarding the service of transgender individuals in the military before Congress, in order to advise the President re same	1/17/2018 – 3/18/2018	WH Legislative Affairs Staffers and other EOP Staffers	WH Legislative Affairs Staffers and other EOP Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Emails and documents in which members of the President's Legislative Affairs team deliberate with other members of the President's staff regarding military readiness and the service of transgender individuals in the military, in order to advise the President re aspects of same with implications for legislative efforts, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
35	(Generally pre-decisional) emails and documents in which senior members of the President's Legislative Affairs staff deliberate regarding the Administration's interactions with Congress (and Members of Congress) and how best to advance the President's legislative goals regarding the service of transgender individuals in the military before Congress, in order to advise the President re same	3/19/2018 - 3/23/2018	WH Legislative Affairs Staffers and other EOP Staffers	WH Legislative Affairs Staffers and other EOP Staffers	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Emails and documents in which members of the President's Legislative Affairs team deliberate with other members of the President's staff regarding military readiness and the service of transgender individuals in the military, in order to advise the President re aspects of same with implications for legislative efforts, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military
35	(Generally pre-decisional) emails and documents drafted by senior members of the President's Domestic Policy Council to deliberate with other EOP staffers regarding the formulation and implementation of the President's policy concerning the service of transgender individuals in the military and in order to advise the President re same	1/20/2017-7/25/2017	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior White House policy aides and other members of the Executive Office of the President as to the formulation or implementation of the President's policies regarding military lethality and readiness and the service of transgender individuals in the military leading up to a policy recommendation to the President, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated litigation; emails and documents prepared in anticipation of litigation, at the direction of counsel, concerning the service of transgender individuals in the military
79	(Generally pre-decisional) emails and documents drafted by senior members of the President's Domestic Policy Council to deliberate with other EOP staffers regarding the formulation and implementation of the President's policy concerning the service of transgender individuals in the military and in order to advise the President re same	7/26/2017-8/25/2017	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Senior member of the WH Domestic Policy Council or other EOP Staffer (including some attorneys)	Presidential Communications Privilege (in many cases, also covered by Deliberative Process Privilege, Attorney Client Privilege, or Work Product Privilege)	Discussions between senior White House policy aides and other members of the Executive Office of the President as to the formulation or implementation of the President's policies regarding military lethality and readiness and the service of transgender individuals in the military leading up to policy recommendations to the President, which predate a final policy decision on transgender individuals' service in the military; emails and documents discussing confidential legal advice concerning anticipated or pending litigation; emails and documents prepared in anticipation of litigation or for pending litigation, at the direction of counsel, concerning the service of transgender individuals in the military

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

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

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

* Document tallies do not include attachments

** Although some documents fall into multiple categories, each document is tallied as only belonging in one category to more accurately reflect volume of documents at issue.

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

No. 2:17-cv-1297-MJP

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

DECLARATION OF ROBERT E. EASTON

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

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

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

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

Background

4. On December 29, 2017, Plaintiffs served their first set of requests for production on DoD. Plaintiffs sought 25 separate categories of documents. Many of these requests specifically targeted information subject to the deliberative process privilege. For example, Request 15 sought "[a]ll documents or communications relating to Secretary of Defense Ash Carter's Directive Type Memo 16-005, issued on June 30, 2016, regarding transgender military service and related healthcare." Request 23 sought "All Documents or Communications relating to the reasons, grounds, or bases for the decision set forth in a June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff from Secretary James Mattis with Subject: Accession of Transgender Individuals in the Military Services."

5. On April 26, 2018, Plaintiffs served a second set of requests for production. This set sought an additional 10 categories of documents from DoD. Like the first set, many of these requests specifically targeted information subject to the deliberative process privilege. For example, Request 27 sought all "[d]ocuments or Communications relating or referring to Secretary James Mattis's February 22, 2018, Memorandum for the President with Subject: Military Service by Transgender Individuals (the "February 22, 2018, Memorandum"), including without limitation: (a) all documents reviewed, considered, or relied upon in preparing the February 22, 2018, Memorandum; and (b) all drafts of the February 22, 2018, Memorandum."

Request 28 sought "[a]ll Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the final draft of the February 22, 2018, Memorandum." Request 30 sought "[a]ll Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the Report and Recommendations."

Purpose of this Declaration

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

Information Subject to the Deliberative Process Privilege

7. The discovery sought by Plaintiffs in this case has been extremely broad. The current DoD policy on military service by transgender individuals has been under development since the Obama administration, and internal deliberative discussions regarding the policy began in earnest as far back as 2015. Several of Plaintiff's Requests for Production span nearly three years of policy development and reach multiple components of DoD, including each of the Military Services, the Office of the Secretary of Defense (OSD), and the Defense Health Agency (DHA). For example, in Request 14, Plaintiffs sought "[a]ll Documents and Communications relating to the RAND Report." In Request #23, Plaintiff's sought "[a]ll Documents or Communications relating to the reasons, grounds, or bases for the decision set forth in a June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of

Staff from Secretary James Mattis with Subject: Accession of Transgender Individuals in the Military Services."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Robert E. Easton

ROBERT E. EASTON
Director, Office of Litigation Counsel