

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

BROCK STONE, et al.,

Plaintiffs,

vs.

DONALD J. TRUMP, et al.,

Defendants.

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

Hon. George Levi Russell, III

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' MOTION TO STAY THE PRELIMINARY INJUNCTION
AND REQUEST FOR EXPEDITED RULING**

Plaintiffs respectfully submit this Response to Defendants' Motion to Stay the Preliminary Injunction and Request for Expedited Ruling (ECF 234). In light of the Supreme Court's order staying the preliminary injunctions in *Karnoski* and *Stockman*, Plaintiffs do not oppose a stay of the nationwide effect of this Court's preliminary injunction pending appeal. However, Plaintiffs do oppose any stay of the injunction as applied to a subset of named Plaintiffs who have made a strong showing of imminent and irreparable harm: Niko Branco, John Doe 2, Ryan Wood, Airman First Class Seven Ero George, and Petty Officer First Class Teagan Gilbert. After investing significant time and effort to satisfy the military's standards, these individual Plaintiffs are all on the cusp of being able to enlist in the military or commission as officers, but they will lose that opportunity if the Implementation Plan's new accessions policy takes effect.

The Supreme Court had no reason to consider whether the government had shown a stay was warranted in light of the specific circumstances surrounding any individual plaintiff. Plaintiffs respectfully ask the Court to continue enforcing the preliminary injunction with respect

to these Plaintiffs so they may complete the process of enlisting and commissioning, which would allow them to receive the protections provided to current service members under the Implementation Plan’s grandfathering provision. Although this narrow relief would not fully protect the Plaintiffs from the harm caused by Defendants’ facially discriminatory policy, it would mitigate the most severe and immediate effects. Because Defendants cannot show that a stay is warranted with regard to these five individuals, such a stay should not issue.¹

THIS COURT HAS DISCRETION TO STAY ONLY THE NATIONWIDE SCOPE OF THE PRELIMINARY INJUNCTION.

Defendants assert that the Supreme Court’s action “must result in a stay of this Court’s preliminary injunction, in its entirety.” ECF 234 at 4; *see id.* at 5–6. Defendants are incorrect. The government’s stay applications to the Supreme Court focused extensively on staying the nationwide aspect of the preliminary injunctions issued in *Karnoski* and *Stockman*. *See, e.g.*, Part I and II Headings of the Karnoski Stay Appl., at 19, 27 (arguing that two of the three stay factors would be satisfied only “if the court of appeals affirms the injunction *and its nationwide scope*.” (emphasis added)). Although the government alternatively proposed—in passing—a narrower stay that excluded the individual plaintiffs, *see id.* at 3, the plaintiffs responded by arguing that anything short of a continued nationwide injunction would cause harm; thus, they did not propose a stay of the nationwide scope of the injunction with exceptions for individual plaintiffs. *See* Karnoski Stay Appl. Opp’n at 33, No. 18A-625 (S. Ct. 2018) (“Anything less than a policy-wide injunction . . . threaten[s] Plaintiffs with actual harm.”); *id.* at 38 (“Narrowing the

¹ Defendants incorrectly assert that in granting a stay of the injunctions in *Karnoski* and *Stockman*, “the Supreme Court considered the same factors the district court must consider here.” ECF 234 at 5. To the contrary, the courts of appeals require a litigant to demonstrate a likelihood of success on the merits, ECF 234 at 4, while the Supreme Court requires only “a fair prospect that a majority of the Court will conclude that the decision below was erroneous.” *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009).

injunction to the individual Plaintiffs would fail to provide complete relief.”); Stockman Stay Appl. Opp’n at 38, No. 18A-627 (S. Ct. 2018) (“[T]he harms inflicted on Respondents by the ban cannot be remedied by narrowing the injunction to apply only to them.”).²

The Supreme Court was only presented with the question whether to impose a blanket stay or no stay at all. Accordingly, and contrary to Defendants’ argument, this Court is not prohibited from considering whether, on the facts of the case before it, there should not be a stay applied to specific individual Plaintiffs. *See In re Grand Jury Subpoena*, 870 F.3d 312, 318–19 (4th Cir. 2017) (“[A] prior case ‘is not a binding precedent’ for questions ‘not . . . raised in briefs or argument nor discussed in the opinion of the Court.’”); *see also Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.” (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925))).

**CERTAIN NAMED PLAINTIFFS IN THIS CASE PRESENT UNIQUE
CIRCUMSTANCES JUSTIFYING A NARROW EXEMPTION FROM THE STAY
THAT THE COURT SHOULD OTHERWISE ENTER.**

Although a nationwide injunction is the only remedy that will provide *complete* relief to Plaintiffs, permitting its enforcement as to five of the named Plaintiffs would significantly mitigate Plaintiffs’ irreparable harm. The Supreme Court did not have an opportunity to consider the individualized circumstances facing Plaintiffs in this case were they to be subject to a stay of the injunction. And Defendants cannot articulate any injury they would suffer from allowing these specific individuals to complete the process of enlisting or commissioning after

² Defendants’ argument to the contrary is misleading. *See* ECF 234 at 6–7. The *Karnoski* and *Stockman* oppositions to the stay applications made only generalized assertions of harm that *all* similarly situated transgender individuals would face under a stay. *E.g.*, *Karnoski* Stay Appl. Opp’n at 30 (“Plaintiffs *and other transgender persons* would suffer serious irreparable injury from a stay.” (emphasis added)).

having taken steps in reliance on both the Department of Defense and this Court's injunction to prepare to do so. Exempting them from a stay of the injunction would merely provide the same protections that the Implementation Plan already provides to current service members through the grandfathering provision.

A. Plaintiffs Branco, Doe 2, Wood, George, and Gilbert Will Suffer Irreparable Harm if They Are Subject to the Stay.

The circumstances of Plaintiffs Branco, Doe 2, Wood, George, and Gilbert show their entitlement to the continued protection of the preliminary injunction. Absent exemption from the stay, there is no question that they will suffer immediate, irreparable harm.

1. Irreparable Harm to Plaintiffs Branco, Doe 2, and Wood

Under the Open Service Directive, Mr. Branco, Mr. Doe 2, and Mr. Wood are eligible to enlist because: (i) they have been stable without clinically significant distress or impairment as the result of gender dysphoria for more than 18 months; (ii) they have completed all medical treatment associated with gender transition, been stable in their gender for more than 18 months, and been stable on cross-sex hormone therapy post-gender transition for more than 18 months; and (iii) more than 18 months have elapsed since the date of their most recent transition-related surgery and no functional limitations or complications persist, nor do they require any further surgery. Doe 2 Decl. ¶ 2 (attached hereto); ECF 139-32 (Branco) ¶¶ 7–9, 13, 16; ECF 139-36 (Wood) ¶ 10. If the injunction is stayed, all of them will be prohibited from enlisting merely because they have undergone surgery related to gender transition. *See* ECF 120-1 at 2 (Implementation Plan, disqualifying all individuals who “have undergone gender transition”); Branco Decl. ¶ 13 (attached hereto); Doe 2 Decl. ¶ 8; ECF 139-36 (Wood) ¶ 12.

2. *Irreparable Harm to Plaintiffs George and Gilbert*

Airman First Class George and Petty Officer Gilbert plan to apply for commissions immediately following the completion of their educational programs in August 2019. George Decl. ¶ 5 (attached hereto); Gilbert Decl. ¶ 3 (attached hereto). But they are in the dark as to whether the Implementation Plan allows them to do so, given Defendants' statement that "DoD has not yet formed a policy regarding commissioning." ECF 176 at 15 (citing Stephanie Barna Decl. ¶ 7). Moreover, Petty Officer Gilbert is approaching the age cut-off for certain officer programs (including her first choice in Space Operations); if she is unable to apply for a commission shortly after graduation, she risks losing her eligibility for these programs entirely, which would be a significant setback to her career. Gilbert Decl. ¶¶ 12–13. Airman First Class George is also approaching the age cut-off for applying for a commission. George Decl. ¶ 12.

B. Defendants Fail to Show Entitlement to a Stay.

1. *Defendants Will Not Suffer Irreparable Harm if These Five Plaintiffs Are Exempted from the Stay of the Injunction.*

Defendants bear the burden of establishing that exempting these five Plaintiffs from an otherwise complete stay of the injunction will cause Defendants irreparable harm. *Real Truth*, 575 F.3d at 346; *see* ECF 234 at 4. They do not even attempt to meet their burden. Moreover, the Implementation Plan *already* grants an exception to the Ban via a grandfather clause, which allows an unknown number of transgender individuals to remain in the military. ECF 120-2. Adding three individuals seeking to enlist and two already-serving individuals seeking to commission to the thousands of currently serving transgender individuals cannot conceivably cause irreparable harm to Defendants—particularly since four of the five Plaintiffs have completed their surgeries related to gender transition and will not require expenditure of government funds for further procedures, while any future surgery for Petty Officer First Class

Gilbert will be paid for out of pocket or by private insurance. ECF 139-32 (Branco) ¶ 9; ECF 140-1 (Doe 2) ¶ 14; ECF 139-36 (Wood) ¶ 6; George Decl. ¶ 3; Gilbert Decl. ¶ 7.

2. *The Equities Are in Plaintiffs' Favor.*

The equities also strongly favor exempting these five Plaintiffs. In reliance on this Court's decision to preliminarily enjoin the Transgender Service Member Ban, all five undertook significant efforts to enlist. As just one example, Mr. Wood has postponed pursuing an alternative career as a firefighter, because his first and foremost goal is to serve his country in the military. ECF 139-36 (Wood) ¶ 16. He has been working to enlist since the accessions ban was lifted at the beginning of 2018, including repeated follow-up appointments with his recruiter and medical personnel to provide additional medical information, putting an alternative career on hold. *Id.* ¶¶ 8, 11. The other four Plaintiffs have similarly diligently pursued their careers in military service, which is a lengthy, iterative process that involves multiple visits with doctors and recruiters and extensive paperwork. For example, Mr. Branco has done everything his recruiter asked of him to meet the military's accession standards, at considerable personal expense. Branco Decl. ¶¶ 10–11; *see* Doe 2 Decl. ¶ 3; George Decl. ¶ 9; Gilbert Decl. ¶¶ 4–6.

CONCLUSION

In deference to the order the Supreme Court issued in related cases, Plaintiffs largely do not oppose the stay pending appeal Defendants seek here. But the Supreme Court's order does not require this Court to stay the preliminary injunction *in its entirety*, irrespective of the facts and circumstances of individual Plaintiffs before this Court. This Court should exercise its equitable discretion, tailor its stay to the facts of this case, and permit the preliminary injunction to remain in force as it applies to the very narrow circumstances of Plaintiffs Niko Branco, John Doe 2, Ryan Wood, Airman First Class Seven Ero George, and Petty Officer First Class Teagan Gilbert.

Dated: January 30, 2019

David M. Zionts*
Carolyn F. Corwin*
Mark H. Lynch (Bar No. 12560)
Augustus Golden*
Jeff Bozman*
Marianne F. Kies (Bar No. 18606)
Joshua Roselman*
Peter J. Komorowski (Bar No. 20034)
Mark Andrews-Lee*
Covington & Burling LLP
One CityCenter
850 Tenth St. NW
Washington, DC 20001
Telephone: (202) 662-6000
Fax: (202) 778-5987
dzionts@cov.com
ccorwin@cov.com
mlynch@cov.com
agolden@cov.com
jbozman@cov.com
mkies@cov.com
jroselman@cov.com
pkomorowski@cov.com
mandrewslee@cov.com

Mitchell A. Kamin*
Nicholas M. Lampros*
Covington & Burling LLP
1999 Avenue of the Stars, Suite 3500
Los Angeles, California 90067
Telephone: (424) 332-4800
Facsimile: (424) 332-4749
mkamin@cov.com
nlampros@cov.com

* *Admitted pro hac vice*

Respectfully submitted,

/s/ Peter J. Komorowski

Peter J. Komorowski

Deborah A. Jeon (Bar No. 06905)
David Rocah (Bar No. 27315)
American Civil Liberties Union Foundation of
Maryland
3600 Clipper Mill Road, #350
Baltimore, MD 21211
Telephone: (410) 889-8555
Fax: (410) 366-7838
jeon@aclu-md.org
rocah@aclu-md.org

Joshua A. Block*
Chase B. Strangio*
James Esseks*
Leslie Cooper*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: 212-549-2627
Fax: 212-549-2650
jblock@aclu.org
cstrangio@aclu.org
jesseks@aclu.org
lcooper@aclu.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2019, a copy of the foregoing was served via CM/ECF on all counsel of record.

/s/ Peter J. Komorowski

Peter J. Komorowski

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

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

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

DECLARATION OF NIKOLAI BRANCO
IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION TO STAY THE PRELIMINARY INJUNCTION

I, Nikolai "Niko" Branco, hereby declare:

1. The facts set forth in this declaration are based on my personal knowledge.

Accession Updates Since My Last Declaration

2. In May 2018, the Army recruiter who I worked with informed me that the recruiting center possessed all of the necessary paperwork and he would submit my completed paperwork to the United States Military Entrance Processing Command ("MEPS").
3. Nine weeks later, in August my recruiter informed me that MEPS reviewed all of my paperwork and transferred my enlistment application to the U.S. Army Recruiting Command ("USAREC") for finalization. They told me that USAREC could take a couple of weeks to review my application and that I would soon after be able to enlist.
4. In early September, however, the Army requested additional bloodwork. In response, my endocrinologist submitted a letter to the Army informing them that she did not

need additional bloodwork in order to certify to my stability. I was later informed that the Army was mistaken and they did not need additional bloodwork.

5. In October, after not learning of any progress on my application from the Army, I worked with my lawyers to request information from the military as to why it was delaying my enlistment application.

6. In early November my recruiter informed me that the Army came back to him and requested additional information. He told me that the Army would not move forward with processing my application until they received it.

7. After 11 months since the Open Service Carter Policy began and 11 months working with the Army, I remained committed to serving my country, but decided that seeking out enlistment opportunities through other military services could prove more efficient.

8. In December, I contacted a recruiter with the U.S. Navy. After the recruiter tried to transfer all of my paperwork from the Army to the Navy, the recruiter informed me that MEPS misplaced all of my medical documentation related to my transition and stability. I began, once again, gathering and submitting all of the necessary paperwork.

9. While my discussions were ongoing with the Navy, I learned of a transgender applicant successfully enlisting through a different route.

10. In January 2019, I met with a recruiter from the Army National Guard for the State of Connecticut. On January 8, my recruiter informed me that he possessed all of the necessary paperwork to move my application forward. He told me there was nothing else he needed from me and that MEPS could take up to 30 days to approve my application or request additional information. I am now waiting to hear back.

Effects of the Ban Applying to Me

11. Since January 2018, I have relied on the protections provided by the Carter Policy remaining in place. In addition to all of the time I invested, I made significant financial commitments. To date, I paid \$240 to remove a tattoo and \$500 for other necessary surgical procedures in order to comply with Army standards. In addition, I personally spent approximately \$920 in doctor visit copays and medical tests requested by the military. This represents a significant sum of money for my family.

12. On January 22, 2019, I learned that the Mattis Policy and ban on transgender service members may soon go into effect. This created substantial unease and called into question all of my career plans that I have worked so hard to advance over the past year. I'm nervous about the future, and the situation creates emotional angst.

13. If this Court allows the ban to apply to me, I likely will be unable to ever serve in the military because of the Mattis Policy's prohibition on those who have undergone medically-necessary transition surgery. My family cannot wait a year or more before I know whether a long-term career in the Army is an option open to me. Our financial obligations would require me to look elsewhere.

14. Despite all of this, I still intend to serve 20 years in the U.S. military if afforded the opportunity.

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

Executed on the 27 day of January, 2019 in Bantam, Connecticut.

Nikolai Branco

NIKOLAI BRANCO

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

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

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

**DECLARATION OF SEVEN GEORGE
IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION TO STAY THE PRELIMINARY INJUNCTION**

I, Seven Ero George, hereby declare:

1. The facts set forth in this declaration are based on my personal knowledge.

My Current Status

2. I continue to serve in the United States Air National Guard. When on duty with the Guard, I continue to work in Security Forces at Selfridge Air National Guard Base in Michigan.

3. My last surgery related to gender transition occurred in 2016, and I do not anticipate requiring any further surgeries.

4. I am currently enrolled in an educational program at the University of Michigan, Flint, to receive a Bachelor's of Science in Nursing. I am scheduled to graduate from that program in August 2019. I also work as a civilian nurse.

5. I have been pursuing my education to become a nurse with the primary goal of applying for a commission with the United States Army to work as a nurse, which requires a bachelor's degree in nursing, or in a related medical field. I intend to apply for a commission

immediately upon completion of my degree in August. I have already identified the commanding officers and individuals I intend to ask to provide me with letters of recommendation in support of my application for a commission.

6. In addition, there continue to be protracted delays beyond my control in processing my request to update my gender marker in DEERS. I began that process in December 2016, but unfortunately it remains ongoing. Each time new information or documentation has been requested of me, I have quickly provided it.

7. My command and co-workers continue to be supportive of me.

Effects of the Ban on my Life

8. Since 2016, I have relied on the protections provided by the Carter Policy remaining in place. The education I have pursued—first an associate’s degree, and now a bachelor’s degree—has been in furtherance of my goal of becoming a nurse in the Army.

9. I have also spent significant time and money working with various military and medical personnel in preparation to apply for a commission. This has included discussions with recruiters, meetings with my current command and other military personnel, gathering paperwork, attending medical appointments, identifying potential individuals to provide recommendations, and repeatedly and continuously following-up on the progress of my request for a gender marker update. In total, I estimate I have spent approximately \$1,000 on this process, and more than 100 hours of my time, which represents a considerable investment for me and my family.

10. I continue to have significant concerns about my future in the military. These concerns were significantly heightened when I learned of the recent Supreme Court decision and that the Implementation Plan for the ban on transgender service members may soon go into effect. These developments have caused me significant anxiety for me, and for my future.

11. If the ban should be applied to me, it appears that I might never be able to apply for a commission in the Army, because of the Implementation Plan's prohibition on those who have undergone medically-necessary transition surgery, such as myself.

12. Additionally, I am currently approaching the age cut-off for applying for a commission, meaning that if I am not able to apply for a commission relatively soon after my graduation in August of this year, I could be deprived of the opportunity to ever do so.

13. Not being able to apply for a commission would be a major blow to my career, both personally and financially. I would not be able to fulfill my goal of serving as a nurse in the Army, and would instead have to pursue an alternative career, likely as a civilian nurse. Although I could attempt to find a medical or nursing job in the Air National Guard, those positions are rare and would not allow me to serve on active duty like being a nurse in the Army would. Additionally, my current contract with the Air National Guard expires in 2021, and under the Implementation Plan, it is unclear whether I would be able to renew that contract to continue serving past that point.

14. My goal has been and remains to serve 20 years in the U.S. military if afforded the opportunity. To be denied that goal due to the Implementation Plan policy would be devastating.

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

Executed on the 30th day of January, 2019 in Dearborn, MI.


SEVEN ERO GEORGE

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

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

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

DECLARATION OF TEAGAN GILBERT
IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION TO STAY THE PRELIMINARY INJUNCTION

I, Teagan Gilbert, hereby declare:

1. The facts set forth in this declaration are based on my personal knowledge.

My Current Status

2. I serve in the United States Navy Reserve. Since this lawsuit was initiated I have continued to serve in the same command. My command and co-workers continue to be supportive of me.
3. I am currently enrolled at Arizona State University and I am scheduled to graduate in August 2019. My plan continues to be to apply for a commission in the United States Air Force immediately upon graduation and return to active duty.
4. My primary goal in pursuing my college degree was to commission as an officer in the military. My college education first began back in 2011, but has been delayed several times—including by a deployment to Afghanistan—and I am now extremely close to achieving

my goal. All of the time and money I have spent on college has been with the goal of graduating, and using the degree I earn to apply for a commission as an officer.

5. To prepare for that process, I have contacted at least three past commanding and other superior officers about providing me with letters of recommendation. They agreed to provide me with those letters.

6. I also recently engaged an Air Force recruiter to begin preparing my commissioning package. Because I intend to switch branches and enter the Air Force's Space Operations program, this process is more involved than it would be if I were applying for a commission within the Navy.

7. I may pursue future surgery related to my gender transition, however I anticipate paying for that surgery out of pocket or through private insurance, so the military healthcare system will not bear those costs.

Effects of the Ban on my Life

8. Since 2016, I have relied on the protections provided by the Carter Policy remaining in place.

9. I am very worried and stressed about my future in the military. This stress has only increased recently when I learned that the Implementation Plan may go into effect.

10. If the Implementation Plan were to be applied to me, I understand I may not be eligible for a commission due to the Implementation Plan's prohibition on those who have undergone gender transition—such as myself.

11. This would be devastating to me, both personally and financially. Becoming an officer has been my goal for a long time, and to have it taken away from me when I am so close would be a tremendous blow. I have invested significant time and money in my education,

relying on the fact that it would allow me to become an officer. On a personal level it would also be incredibly painful, to feel like my years of service and hard work were not appreciated.

12. The program I hope to apply to commission is in the Air Force's Space Operations. This is a unique opportunity only available in the Air Force. If I were not able to apply for a commission, I would have to adjust my career plans in a major way and find different civilian employment. Because of the nature of this program, there is nothing really comparable in the civilian world. This would be a major setback to my career.

13. Additionally, I am currently approaching the age cut-off for that program, which is 35-years old. By the time I graduate from college I will be 33. That means that if I am not able to apply for a commission relatively soon after my graduation in August of this year, I could be deprived of the opportunity to ever do so.

14. Not being able to apply for a commission would also put my long-term military career at risk. My current contract will take me to approximately 18 years of service time, and I plan reenlist to serve 20 years or more. However if I am not allowed to reenlist, I will lose access to the retirement benefits available at 20 years. Additionally, if I am not able to become an officer I may not be able to continue to serve beyond 20 years, as that is the retirement cut-off for my current rank (Petty Officer First Class - E6). If I am able to become an officer, I could—and would—continue to serve my country past that point.

15. My goal has been and remains to serve 20 years or more in the U.S. military if afforded the opportunity. To be denied that goal due to the Implementation Plan policy would be devastating.

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

Executed on the 29 day of January, 2019 in Tempe, Arizona.


TEAGAN GILBERT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Brock Stone, et al.

Plaintiff,

v.

Donald J. Trump, et al.

Defendant.

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Case No. 17-cv-02459

NOTICE OF FILING OF DOCUMENT UNDER SEAL

Check one.

Exhibit _____ which is an attachment to _____

_____ will be electronically filed under seal within 24 hours of the filing of this Notice.

Declaration of John Doe 2 in Support of Opposition to Motion to Stay the Preliminary Injunction

_____ (title of document)

_____ will be electronically filed under seal within 24 hours of the filing of this Notice.

I certify that at the same time I am filing this Notice, I will serve copies of the document identified above by First Class Mail.

January 30, 2019

Date



Signature

Peter J. Komorowski III (Bar. No. 20034)

Printed Name and Bar Number

850 10th Street, NW, Washington, D.C. 20001

Address

pkomorowski@cov.com

Email Address

202-662-5780

Telephone Number

202-778-5780

Fax Number