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 Hon. George L. Russell, III

PLAINTIFFS' RESPONSE TO
DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs hereby respond to Defendants' Notice of Supplemental Authority (ECF 251) regarding *Doe 2 v. Shanahan*, No. 18-5257 (D.C. Cir. filed Mar. 8, 2019) (Wilkins, J., concurring; Williams, J., concurring in the result) (ECF 251-1). As a threshold matter, of the two concurring opinions in *Doe 2*, the only one even arguably relevant here is that of Judge Wilkins. Judge Wilkins, whose vote was necessary for the two-judge majority that issued the earlier *per curiam* opinion, expounded on the panel's reasons for reversing the district court without prejudice, and made clear that the panel had not opined on the merits of the claims asserted by the *Doe 2* plaintiffs. Judge Williams's opinion, which concurred in the result only and expressed his view on the merits the panel considered premature to decide, did not command a majority of the panel.

Far from supporting Defendants' position, Judge Wilkins's concurring opinion demonstrates why their motions should be denied. *First*, as Judge Wilkins observes, the panel found only that changed circumstances warranted "assessing the Mattis Plan anew." Slip op. at 18. It did not conclude that a preliminary injunction staying the Mattis Plan would be improper.

This leaves open consideration of the argument that, despite differences between the Implementation Plan and the original directives, the Implementation Plan was meaningfully constrained by the terms of those directives. *Doe 2 v. Shanahan*, No. 18-5257, *Per Curiam* Opinion (D.C. Cir. filed Jan. 4, 2019) (ECF 230-1) at 3; *see* Pls.' Opp'n to Defs.' Motion to Dissolve (ECF 139) at 6, 9–12 & Exs. 4, 6, 9. It also leaves open consideration of whether, even when judged on its own terms, the reasons given for barring transgender people from serving make sense "in light of how the [military] treat[s] other groups similarly situated in relevant respects." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001); Pls.' Mem. in Support of Summary Judgment (ECF 163-2) at 40. Judge Wilkins specifically "express[ed] no views on the merits or the outcome" of whether the Mattis Plan "was a product of comparable 'considered professional judgment' as the policy" in *Goldman v. Weinberger*, 475 U.S. 503 (1986). Slip op. at 18–19.

Second, based on the record before him, Judge Wilkins declined to conclude "that the Mattis Plan is not a hardship for transgender servicemembers who wish to transition"; nor could he say that the record was "dispositive of whether the Mattis Plan targets *only* transgender persons or is instead facially neutral." Slip op. at 13 (emphasis in original); *see* ECF 227 at 11 ("Prohibiting transgender persons who have undergone transition clearly discriminates on the basis of transgender identity.").

Indeed, Judge Wilkins "express[ed] no views" about whether the Plan is facially neutral, slip op. at 18–19—or even whether facial neutrality would suffice to render the Plan constitutional, *id.* at 16–19. Judge Wilkins observed that the level of scrutiny applied to the policy would also turn on:

> whether [the Implementation Plan] targets a suspect class, whether the class is similarly situated to others affected, whether the policy

> was motivated by animus, whether it infringes upon a fundamental right (and, if so, how), what military purposes are furthered by the policy, whether those purposes are legitimate, and whether Congress or the Executive used considered professional judgment and accommodated the servicemembers' rights in a reasonable and evenhanded manner, given the rights at issue.

Id. at 18. Judge Wilkins explained that courts are not required to defer to legislators or military officials who implement a facially discriminatory policy. *See id.* at 17–18.

Third, Judge Wilkins's opinion supports further discovery prior to any ruling against Plaintiffs on the merits. As Judge Wilkins wrote, it would be "premature" to "take the drastic step of precluding any discovery and dismissing the lawsuit." *Id.* at 19; *see also id.* at 22 ("It is one thing to defer to the government's justification for military policy; it is quite another not to require the government to explain fully, under oath, that justification. The former custom of deference is reasonable, but the latter is imprudent.").

Dated: March 25, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2019, a copy of the foregoing was served via CM/ECF on all counsel of record.

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