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Counsel continued on Next Page

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AIDEN STOCKMAN, et al.

Plaintiffs,

v.

DONALD J. TRUMP, et al.

Defendants.

STATE OF CALIFORNIA,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, et al.

Defendants.

CASE NO. 5:17-CV-01799-JGB-KK

PLAINTIFFS' NOTICE OF MOTION AND MOTION TO VACATE AMENDED ORDER ON JOINT STIPULATION TO MODIFY CASE SCHEDULE (ECF NO. 145); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Declaration of Adam S. Sieff and Proposed Order filed concurrently herewith]

Hearing
Date: June 3, 2019
Time: 9:00 a.m.
Courtroom: 1
Judge: Hon. Jesus G. Bernal

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 3, 2019 at 9:00 a.m., or as soon thereafter as the matter may be heard before the Honorable Jesus G. Bernal in Courtroom 1 of the United States District Court for the Central District of California, located at the George E. Brown, Jr. Federal Building and United States Courthouse, 3470 Twelfth Street, Riverside, CA 92501, Plaintiffs Aiden Stockman, Nicolas Talbott, Tamasyn Reeves, Jaquice Tate, John Does 1-2, Jane Doe, and Equality California (collectively, "Plaintiffs") will and hereby do move the Court to (i) vacate the Amended Order on Joint Stipulation to Modify Case Schedule (ECF No. 145) and (ii) order the parties to submit a joint proposal for a revised case schedule within 21 days after the United States Court of Appeals for the Ninth Circuit rules on the mandamus petition pending in *Trump v. Karnoski*, No. 18-72159 (9th Cir.).

This Motion is made following the conference of counsel pursuant to L.R. 7-3, which took place via teleconference on April 23, 2019 (*see* Declaration of Adam S. Sieff, ¶ 8), and is based upon this Notice, the accompanying Memorandum of Points and Authorities, the Declaration of Adam S. Sieff filed herewith, the pleadings, records and files referenced herein, and upon such further oral and documentary evidence as may be presented at a hearing on this Motion.

Dated: May 6, 2019

Respectfully submitted,

LATHAM & WATKINS LLP
Marvin S. Putnam
Amy C. Quartarolo
Adam S. Sieff
Harrison J. White

By _____
Adam S. Sieff
Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs reluctantly move this Court for an order vacating the current case schedule (the "Motion") to prevent upcoming case deadlines from prejudicing Plaintiffs' ability to obtain relevant evidence necessary to prosecute their claims.

In particular, key discovery issues are now pending before the Ninth Circuit in connection with the mandamus petition filed in the separate but related matter of *Trump v. Karnoski*, No. 18-72159 (9th Cir.) (argued Oct. 10, 2018) (the "Mandamus Petition"). At the time the parties negotiated and submitted the Joint Stipulation to Modify Case Schedule (ECF No. 143), they expected a ruling from the Ninth Circuit in the near future. But months later, these critical issues remain unresolved. Because the parties cannot reasonably expect an appellate ruling on the Mandamus Petition in advance of several critical discovery deadlines in this case, and because Defendants have refused to stipulate to a sensible solution that aligns the case and discovery schedule with the Ninth Circuit—as they did in *Karnoski v. Trump*, No. 2:17-CV-01297-MJP, ECF No. 331 (W.D. Wash. Feb. 20, 2019) (granting joint stipulation) (attached as Ex. C to the Declaration of Adam S. Sieff ("Sieff Decl.")))—Plaintiffs respectfully request an order (i) vacating the Amended Order on Joint Stipulation to Modify Case Schedule (ECF No. 145), and (ii) ordering the parties to submit a joint proposal for a revised case schedule within 21 days after the Ninth Circuit rules on the Mandamus Petition.

II. RELEVANT BACKGROUND

A. Plaintiffs Coordinate Discovery With Other Pending Actions

This case is one of four constitutional challenges to the government's policy banning military service by transgender individuals. In the weeks following Plaintiffs' filing of this action, and at Defendants' insistence, the parties entered into the Protective Order and Cross-Use Agreement (ECF No. 96), which was intended to enable the parties to coordinate discovery across all four actions and minimize the

burden on Defendants in having to respond to duplicative discovery. In negotiating the cross-use provisions, Defendants specifically requested that Plaintiffs avoid serving discovery early in the action that may be duplicative of discovery served in the other earlier-filed actions, and even suggested that Plaintiffs wait to review discovery responses and document productions made in the other actions. (Sieff Decl., ¶ 2.) Accordingly, Plaintiffs have reviewed the discovery responses served and documents produced in the other actions, and only served written discovery that they believed was not already covered by Defendants' other productions and responses. (Sieff Decl., ¶ 3.)

B. Defendants' Deficient Discovery Responses in the Other Actions

Pursuant to the cross-use agreement, plaintiffs in all of the related actions pending around the country have been seeking discovery into key fact issues for more than a year. Because proof of Plaintiffs claims may, among other issues, turn upon the purported government interests supporting the ban and the "deliberative process" preceding its announcement, many of the requests served seek information related to who Defendants consulted before announcing and implementing the ban, what information or evidence Defendants considered, and what instructions, limitations, or other objectives Defendants had in mind, or were required to follow, in developing the policy.

Defendants have responded to discovery requests addressing these and other topics by broadly invoking the presidential communications and deliberative process privileges. These assertions culminated in a string of discovery disputes that Defendants repeatedly lost. *See Karnoski v. Trump*, No. 2:17-CV-01297-MJP, ECF No. 204 (W.D. Wash. Mar. 14, 2018) (granting plaintiffs' motion to compel and ordering production); *Karnoski v. Trump*, No. 2:17-CV-01297-MJP, ECF No. 299 (W.D. Wash. Jul. 27, 2018) (granting plaintiffs' motion to compel and ordering Defendants to turn over documents that have been withheld solely under the deliberative process privilege within 10 days of the date of this order); *Stone v.*

Trump, No. 1:17-CV-12459-GLR, ECF No. 227 (D. Md. Nov. 30, 2018) (ordering Defendants' to produce documents withheld under deliberative process and presidential communications privileges).[1] These orders are attached as Exhibits E–G to the Sieff Declaration. The two *Karnoski* orders compelling Defendants to produce the withheld documents have been stayed pending a decision on Defendants' Mandamus Petition in *Trump v. Karnoski*, No. 18-72159 (9th Cir.) (argued Oct. 10, 2018), and the *Stone* court stayed compliance with its order pending disposition of that Mandamus Petition as well, *see Stone*, No. 1:17-CV-12459-GLR, ECF No. 227 at 22. As a result, Defendants have not yet complied with any of these orders, and none of these critical documents will be produced to Plaintiffs, or any of the other plaintiffs in the related cases, at least until the Ninth Circuit rules on Defendants' petition.

C. Plaintiffs Serve Additional Discovery & Attempt to Meet and Confer with Defendants

Following the U.S. Supreme Court's denial of Defendants' petition for a writ of certiorari before judgment, *Trump v. Stockman*, 586 U.S. ___ (2019), and order staying this Court's preliminary injunction against the ban, *see Trump v. Stockman*, Order List, 586 U.S. 18A627 (Jan. 22, 2019), Plaintiffs served Defendants with additional discovery requests in April 2019. (Sieff Decl., Ex. D.) These discovery requests target new issues not previously addressed by Defendants' responses and productions in connection with discovery served in the other actions. (Sieff Decl., ¶ 6.)

Before serving these requests, Plaintiffs contacted Defendants to advise that the requests were coming, and also to ask Defendants to consider whether they believed the new discovery would lead to similar disputes regarding privilege. (Sieff

[1] In *Doe 2 v. Shanahan*, No. 1:17-CV-01597-CKK, ECF No. 188 (D.D.C. Jan. 30, 2019), the district court denied plaintiffs' motion to compel production of the withheld material without prejudice, essentially as moot following rulings by the D.C. Circuit and the U.S. Supreme Court, but did not address, let alone endorse, Defendants' position on the merits.

Decl., ¶ 5.) Defendants asked to see the requests before commenting, so Plaintiffs served them on April 15, 2019, and the parties agreed to discuss the requests and related privilege issues on April 23, 2019. (Sieff Decl., ¶ 5–7.)

During the April 23, 2019 teleconference, Defendants indicated that while they were not prepared to address the substance of their responses, they reserved their right to assert the same contested privileges, and to continue to withhold purportedly privileged documents while the Ninth Circuit considers the merits of their Mandamus Petition. (Sieff Decl., ¶ 8.) In response, Plaintiffs proposed that the parties continue to aggressively pursue discovery where they could, but stipulate to vacate the current case schedule pending the Ninth Circuit's decision on the privilege issues, as Defendants had already done in *Karnoski* .[2] (Sieff Decl. ¶ 9, Exs. A–C.) Plaintiffs explained that proceeding with the current case calendar would otherwise risk reaching critical discovery deadlines before the Ninth Circuit could rule. (Sieff Decl., ¶ 9.) These include cutoff dates to disclose expert witnesses (May 24, 2019), to disclose rebuttal witnesses (June 14, 2019), to serve written discovery (June 21, 2019), and to complete all discovery (August 5, 2019). (*See* ECF No. 145.) Maintaining the current schedule, Plaintiffs explained, would in all likelihood deprive Plaintiffs of relevant evidence, and at a minimum deprive Plaintiffs of necessary guidance to tailor their discovery requests, and claims, moving forward. (Sieff Decl., ¶ 9.) Defendants declined to agree either to vacate the schedule or stipulate to a further continuance. (Sieff Decl., ¶ 10.) Unable to reach a resolution, Plaintiffs have no choice but to seek relief from the Court.

III. ARGUMENT

[2] Defendants had initially suggested that the parties to this action also agree to vacate the schedule—just as they had done in *Karnoski*. However, Defendants subsequently agreed with Plaintiffs to adopt an aggressive set schedule. Because Plaintiffs anticipated a prompt decision on the Mandamus Petition from the Ninth Circuit, they believed this schedule would be adequate. (Sieff Decl., ¶ 4) It is now clear that additional time is needed, and that there is no certainty as to when the Ninth Circuit will issue its decision.

Scheduling orders "entered before the final pretrial conference may be modified upon a showing of 'good cause[.]'" *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992) (citing Fed. R. Civ. P. 16(b)). In the Ninth Circuit, four factors are weighed in order to determine whether there is good cause to modify a case scheduling order: (1) whether the moving party has been diligent in prosecuting its case and seeking the modification; (2) the usefulness of the requested modification; (3) the extent to which granting the modification would inconvenience the court, the opposing party, and the witnesses; and (4) prejudice to the moving party if a modification is not granted. *United States v. 2.61 Acres of Land*, 791 F.2d 666, 671-72 (9th Cir. 1985) (per curiam) (citing *United States v. Flynt*, 756 F.2d 1352, 1359-62 (9th Cir. 1985)).

Courts often find good cause to modify or vacate case schedules when necessary to account for pending appeals and related collateral review. *See, e.g.*, *Farris v. Seabrook*, 2011 WL 3665123, at *2 (W.D. Wash. Aug. 19, 2011) (finding good cause under Rule 16(b)(4) to vacate "all deadlines . . . pending a decision from the Ninth Circuit Court of Appeals"); *Art Etc. v. Angel Gifts, Inc.*, 2011 WL 13232190, at *1 (S.D. Iowa Sept. 12, 2011) (finding "good cause to grant the motion" vacating "all other unexpired deadlines in the case including, specifically, the expert witness disclosure, discovery . . . and dispositive motion deadlines" until "the Eighth Circuit rules on the appeal" at which time "the Court will enter an order concerning resetting deadlines"); *Pogue v. Nw. Mut. Life Ins. Co.*, 2016 WL 3546395, at *2 (W.D. Ky. June 23, 2016) ("The Court concludes that good cause exists to modify the existing case management deadlines in this case . . . pending resolution" of district court's review of the magistrate's order); *see also Koninklijke Philips N.V. v. Zoll Med. Corp.*, 217 F. Supp. 3d 362, 366 (D. Mass. 2016) (finding good cause to modify deadlines because plaintiff's "damages theory may be modified to reflect the ruling of the Federal Circuit in this case").

Here, good cause exists to vacate the case schedule pending the Ninth Circuit's disposition of the *Karnoski* Mandamus Petition, or, at a minimum, continue the deadlines set forth in the current schedule.[3]

First, Plaintiffs have and continue to be diligent in readying their case for trial. Including the discovery served in accordance with the Protective Order and Cross-Use Agreement between the parties to all four of the related actions (ECF No. 96), as well as the most recent document requests that Plaintiffs served on April 15, 2019, Defendants have been served with 182 requests for production and 192 interrogatories. (Sieff Decl., ¶ 3.)

Moreover, Plaintiffs have been diligent in seeking the relief sought by this Motion. On April 12, 2019, prior to service of Plaintiffs' most recent requests, Plaintiffs conferred by phone with Defendants' counsel in an attempt to determine whether and to what extent Defendants would be willing to waive any privilege objections to supplemental discovery requests pending the Ninth Circuit's review of their Mandamus Petition in *Karnoski*. (Sieff Decl., ¶ 5.) On April 22, 2019, within a week of service, Plaintiffs followed up by email in order to schedule further discussion with Defendants. (Sieff Decl., ¶ 7.) The parties then discussed the discovery and case schedule on April 23, 2019. (Sieff Decl., ¶ 8–10.) When it became clear on the call that Defendants were not inclined to agree to any modification of the schedule, Plaintiffs promptly prepared this Motion and filed it on the first Monday following the mandatory seven-day waiting period required by Local Rule 7-3.

Second, the requested modification will ensure that the parties have adequate time to pursue informed, targeted, and useful discovery following the Ninth Circuit's decision on the *Karnoski* Mandamus Petition. Plaintiffs will almost certainly need to serve new discovery requests, and further meet and confer with Defendants, in

[3] While Plaintiffs are open to negotiate a further amended case schedule, to avoid the need to return to the Court again with a similar request, their preference is to vacate the schedule at this time—as the parties have done in *Karnoski*.

response to the Ninth Circuit's ruling on the privilege issues. Modification of the current schedule is necessary to give Plaintiffs time to engage in those discovery efforts, as well as to obtain and review Defendants' responses. Moreover, once those materials are received, Plaintiffs will need time to review and analyze any additional information produced and to depose relevant witnesses. Vacating the case schedule pending the Ninth Circuit's decision and requiring the parties to present the Court with a proposed revised schedule within 21 days will accommodate these needs without preventing the parties from pressing ahead in the interim as they can.

Third, Plaintiffs' requested modification will not prejudice Defendants, and it should not inconvenience the Court. It is apparent that Defendants will not suffer any prejudice because the requested modification is the *very same* sensible modification Defendants already agreed to in *Karnoski*. (*See* Sieff Decl., Exs. A–B.) Nor should the requested modification inconvenience the Court, at least apart from the regrettable need to have this Motion heard. Vacating the case calendar and allowing the parties to propose a new schedule following the Ninth Circuit's decision will avoid the need to adjust future deadlines piecemeal.

Fourth, the requested modification is necessary to avoid the appreciable risk of substantial prejudice to Plaintiffs in the absence of relief. Because there is no guarantee that the Ninth Circuit will issue its decision on the Mandamus Petition in advance of several critical and upcoming discovery deadlines—including deadlines to disclose expert witnesses, serve written discovery and deposition requests, and even complete discovery itself (*see* ECF No. 145)—adhering to the current case calendar could foreclose Plaintiffs from obtaining relevant, discoverable evidence currently withheld by Defendants, deposing defense witnesses about that evidence, providing that evidence to Plaintiffs' experts, or even retaining new and unanticipated experts as needed to analyze that evidence.

Simply put, with no way of estimating when the Ninth Circuit will rule on Defendants' Mandamus Petition in *Karnoski*, it could become impossible for

Plaintiffs to obtain and develop all of the relevant facts necessary to prove their claims. The severity of that risk alone warrants the reasonable relief that Plaintiffs seek here, and to which Defendants have elsewhere already assented.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request an order (i) vacating the Amended Order on Joint Stipulation to Modify Case Schedule (ECF No. 145), and (ii) ordering the parties to submit a joint proposal for a revised case schedule within 21 days after the Ninth Circuit rules on the Mandamus Petition pending in *Trump v. Karnoski*, No. 18-72159 (9th Cir.).

Dated: May 6, 2019

Respectfully submitted,

LATHAM & WATKINS LLP

By _____
Adam S. Sieff
Attorneys for Plaintiffs

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AIDEN STOCKMAN, et al.

Plaintiffs,

v.

DONALD J. TRUMP, et al.

Defendants.

CASE NO. 5:17-CV-01799-JGB-KK

DECLARATION OF ADAM S. SIEFF IN SUPPORT OF PLAINTIFFS' NOTICE OF MOTION AND MOTION TO VACATE AMENDED ORDER ON JOINT STIPULATION TO MODIFY CASE SCHEDULE (ECF NO. 145)

I, Adam S. Sieff, declare as follows:

1. I am an attorney at Latham & Watkins LLP licensed to practice law in the State of California. I am counsel of record for Plaintiffs in the above-captioned litigation. I submit this declaration in support of Plaintiffs' Motion to Vacate Scheduling and Case Management. I have personal knowledge of the facts set forth in this declaration and if called as a witness, could and would testify competently thereto.

2. On April 25, 2018, the parties jointly stipulated and entered into a Protective Order and Cross Use Agreement (ECF No. 96) along with plaintiffs in the three other constitutional challenges to the government's policy banning transgender individuals from serving in the military. This agreement was formed at the request of Defendants, who asked Plaintiffs to minimize their burden of responding to multiple duplicative requests. Defendants also asked that Plaintiffs refrain from serving additional discovery until after Plaintiffs had the opportunity to review the discovery and requests for production in other cases.

3. Since entering into the agreement, Plaintiffs have reviewed the discovery requests and document productions made in other actions, and have made an effort to ensure that discovery requests served on Defendants are not covered by productions made in related cases. Collectively, Plaintiffs and the plaintiffs in the other three cases have served Defendants with 182 requests for production and 192 interrogatories.

4. Following decisions by the U.S. Supreme Court in January 2019 denying Defendants' petition for certiorari before judgment, *Trump v. Stockman*, 586 U.S. ___ (2019), and staying this Court's preliminary injunction, *see Trump v. Stockman*, Order List, 586 U.S. 18A627 (Jan. 22 2019), the parties met and conferred to set a new case schedule. On February 15, 2019, the Court granted the parties' joint stipulation to modify the case schedule (ECF No. 145). At the time, Plaintiffs anticipated a prompt ruling on the mandamus petition Defendants filed in *Trump v.*

Karnoski, No. 18-72159 (9th Cir.) (argued Oct. 10, 2018), which challenged the Western District of Washington's order to produce previously withheld documents ("Mandamus Petition"). Four days after this Court entered the order establishing the current schedule in this case, on February 19, 2019, Defendants proposed a joint stipulation to the district court in *Karnoski v. Trump, et al*, No. 17-CV-01297 (MJP) (W.D. Wash.) requesting to vacate the remaining case schedule in that case pending a ruling by the Ninth Circuit on the Mandamus Petition. A true and correct copy of that joint stipulation is attached hereto as **Exhibit A**. The Western District of Washington had previously granted a joint stipulation vacating some calendar deadlines pending the Ninth Circuit's decision on the Mandamus Petition. A true and correct copy of that order is attached hereto as **Exhibit B**. The Western District of Washington granted the subsequent stipulation to vacate the remaining dates on February 20, 2019. A true and correct copy of that order is attached hereto as **Exhibit C**.

5. On April 12, 2019, I contacted counsel for Defendants, Matthew Skurnik, to inform him of Plaintiffs' intention to serve Defendants with additional requests for production. I asked Mr. Skurnik whether Defendants foresaw that similar disputes regarding Defendants' previous privilege assertions might arise in connection with the new discovery requests. Mr. Skurnik asked for the opportunity to view the requests before responding. I also alerted Mr. Skurnik to Plaintiffs' concern about the Ninth Circuit Court of Appeals' unexpected continued consideration of the Mandamus Petition in *Karnoski*, and how that continued review could frustrate or altogether prevent Plaintiffs from obtaining relevant evidence under the current case schedule if Defendants continued to assert privilege over the requested documents.

6. Three days later, on April 15, 2019, Plaintiffs served Defendants with the additional requests for production. A true and correct copy of these requests is attached hereto as **Exhibit D**. These requests cover issues not previously addressed

by the Defendants in any of their responses or productions made in related actions.

7. On April 22, 2019, I e-mailed Mr. Skurnik to follow up on our discussion from April 12, 2019. I sought to determine whether and to what extent Defendants would be willing to waive any claim of privilege, and whether Defendants believed the Ninth Circuit's delay in issuing an opinion should inform the case schedule in this matter, as it evidently did in *Karnoski*. I emphasized that Plaintiffs intended to continue to pursue discovery efficiently, but that Plaintiffs were also concerned that the current schedule, in light of the pending appeal, risked prejudicing Plaintiffs' ability to obtain relevant evidence and prosecute their claims. The parties agreed to schedule a discussion via teleconference on the following day.

8. During the April 23, 2019 teleconference, counsel for Plaintiffs, counsel for the State of California, and counsel for Defendants met and conferred to discuss discovery and to address whether the present case schedule was feasible given the Ninth Circuit's extended consideration of Defendants' Mandamus Petition. Defendants stated at the outset of the conversation that they were not prepared to address the substance of any responses to Plaintiffs most recent discovery requests, and that they intended to use the full 30 days allotted to submit those responses. They also stated that they reserved their rights to withhold purportedly privileged documents while the Ninth Circuit considers the Mandamus Petition.

9. In response to Defendants, Plaintiffs' counsel proposed that the parties continue to vigorously pursue discovery, but stipulate to vacate the current case schedule pending a decision by the Ninth Circuit, and agree to return to the Court with a proposed schedule within some number of days following such a decision, as Defendants had already agreed to do in *Karnoski*, *see* **Exhibit B**. Plaintiffs' counsel again explained its rationale for the proposal: under the current schedule, critical discovery deadlines might pass before the Ninth Circuit issues a decision, which could prejudice Plaintiffs by preventing them from obtaining relevant evidence,

developing expert testimony, and undermining Plaintiffs' ability to adequately prepare their claims for trial.

10. Defendants' counsel, Mr. Skurnik, stated that his clients opposed Plaintiffs' proposal, and stated that any negotiation regarding the case schedule should be placed on hold until after the Ninth Circuit issues its decision or until after Defendants respond to Plaintiffs' requests for production. Plaintiffs' counsel again expressed concern that by waiting, Defendants could effectively run the clock out on Plaintiffs' ability to obtain relevant evidence and prepare their case for trial. Yet Defendants remained steadfast in their opposition. Unable to reach an agreement, Plaintiffs' counsel explained that Plaintiffs would file this motion to seek the same relief Defendants would not stipulate to, again noting that Defendants had already agreed to the same in *Karnoski*. The parties agreed that this April 23, 2019 meet and confer teleconference would serve as the mandatory Local Rule 7-3 pre-motion conference.

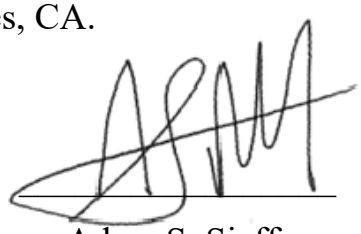
11. Attached hereto as **Exhibit E** is a true and correct copy of the *Order Granting Plaintiffs' Motion to Compel*, filed on March 14, 2018, in the related matter of *Karnoski v. Trump, et al*, No. 17-CV-01297 (MJP) (W.D. Wash.), as Docket No. 204 in that case.

12. Attached hereto as **Exhibit F** is a true and correct copy of the *Order Granting Plaintiffs' Motion to Compel*, filed on July 27, 2018, in the related matter of *Karnoski v. Trump, et al*, No. 17-CV-01297 (MJP) (W.D. Wash.), as Docket No. 299 in that case.

13. Attached hereto as **Exhibit G** is a true and correct copy of the *Order Granting Plaintiffs' Motion to Compel*, filed on November 30, 2018, in the related matter of *Stone v. Trump, et al*, No. 17-CV-12459 (GLR) (D. Md.), as Docket No. 227 in that case.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed May 6, 2019 in Los Angeles, CA.



Adam S. Sieff

Exhibit A

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

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

Defendants.

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

JOINT STIPULATION TO VACATE THE CURRENT CASE SCHEDULE AND ORDERING THE PARTIES TO PROPOSE A NEW CASE SCHEDULE

NOTE ON MOTION CALENDAR:
February 19, 2019

Plaintiffs Ryan Karnoski, Cathrine Schmid, D.L., formerly known as K.G., by his next friend and mother, Laura Garza, Lindsey Muller, Terece Lewis, Phillip Stephens, Megan Winters, Jane Doe, Conner Callahan, Human Rights Campaign, Gender Justice League, and American Military Partner Association (collectively, "Plaintiffs"); Plaintiff-Intervenor State of Washington; and Defendants Donald J. Trump, the United States of America, Patrick Shanahan, and the United States Department of Defense (collectively, "Defendants"), stipulate and move the Court as follows:

WHEREAS, pursuant to the Court's order (Dkt. No. 234), Plaintiffs, Plaintiff-Intervenor, and Defendants ("the Parties") filed their Updated Joint Status Report and Discovery Plan on May 4, 2018 (Dkt. No. 241), and the Court entered the case scheduling order on May 9, 2018 (Dkt. No. 242), that currently governs the case.

WHEREAS, the Parties stipulated to extend discovery and dispositive motion deadlines on September 27, 2018, due to upcoming deadlines for filing and noting discovery motions, completing discovery, and filing dispositive motions. (Dkt. No. 318.)

WHEREAS, the Court granted the Parties' stipulation on September 28, 2018, vacating the deadlines for filing and noting discovery motions, completing discovery, and filing dispositive motions, and further ordered the parties to submit proposed revisions to the case schedule within 21 days after the Ninth Circuit rules on the pending Mandamus Petition. (Dkt. No. 319.) All other deadlines in the case schedule remained unchanged. (*Id.*)

WHEREAS, the Ninth Circuit has not yet ruled on the pending Mandamus Petition, discovery is not complete, and trial is currently set for April 8, 2019.

WHEREAS, the Parties have agreed further revisions to the case schedule are warranted—including vacating the March 4, 2019 motions in limine deadline, the March 27, 2019 pretrial order deadline, and the March 27, 2019 proposed findings of fact and conclusions of law deadline, and the March 29, 2019 pretrial conference, and the April 8, 2019 trial date.

NOW THEREFORE, Plaintiffs, Plaintiff-Intervenor, and Defendants, through their respective counsel of record, do hereby stipulate and agree, and respectfully request, that the Court enter an order as follows:

1. The March 4, 2019 motions in limine deadline, March 27, 2019 pretrial order deadline, March 27, 2019 proposed findings of fact and conclusions of law deadline, March 29, 2019 pretrial conference, and April 8, 2019 trial date are hereby vacated.

2. The parties shall submit a joint proposal for revisions to the case schedule within 21 days after the Ninth Circuit rules on the Mandamus Petition.

SO STIPULATED

Respectfully submitted February 19, 2019.

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Counsel for Plaintiffs

UNITED STATES DEPARTMENT OF JUSTICE

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OFFICE OF THE WASHINGTON STATE ATTORNEY GENERAL

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Counsel for Intervenor-Plaintiff State of Washington

[PROPOSED] ORDER

This matter comes before the Court on the Parties' Joint Stipulation to Vacate the Current Case Schedule and Ordering the Parties to Propose a New Case Schedule. After considering the Parties' Joint Stipulation, IT IS HEREBY ORDERED THAT:

1. The March 4, 2019 motions in limine deadline, March 27, 2019 pretrial order deadline, March 27, 2019 proposed findings of fact and conclusions of law deadline, March 29, 2019 pretrial conference, and April 8, 2019 trial date are hereby vacated;

2. The parties shall submit a joint proposal for revisions to the case schedule within 21 days after the Ninth Circuit rules on the Mandamus Petition.

IT IS SO ORDERED.

Dated this _____ day of _____, 2019.

Marsha J. Pechman
United States District Judge

PRESENTED BY:

NEWMAN DU WORS LLP

/s/ Jason B. Sykes
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UNITED STATES DEPARTMENT OF JUSTICE

/s/ Andrew E. Carmichael
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Counsel for Intervenor-Plaintiff State of Washington

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on February 19, 2019.

/s/ Jason B. Sykes

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Exhibit B

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

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

Defendants.

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

JOINT STIPULATION AND [PROPOSED] ORDER EXTENDING DISCOVERY AND DISPOSITIVE MOTION DEADLINES

NOTE ON MOTION CALENDAR: September 27, 2018

Plaintiffs Ryan Karnoski, Cathrine Schmid, D.L., formerly known as K.G., by his next friend and mother, Laura Garza, Lindsey Muller, Terece Lewis, Phillip Stephens, Megan Winters, Jane Doe, Conner Callahan, Human Rights Campaign, Gender Justice League, and American Military Partner Association (collectively, "Plaintiffs"); Plaintiff-Intervenor State of Washington; and Defendants Donald J. Trump, the United States of America, James N. Mattis, and the United States Department of Defense, stipulate and move the Court as follows:

1. On May 9, 2018, this Court entered a case scheduling order, which remains in effect and currently governs the case. (Dkt. 242.)

2. On May 10, 2018, Plaintiffs moved to compel information and documents withheld by Defendants solely on grounds of the deliberative process privilege. (Dkt. 245.) Defendants subsequently sought a protective order to shield discovery against President Donald J. Trump on executive privilege grounds. (Dkt. 268.)

3. On July 27, 2018, this Court granted Plaintiffs' motion to compel and denied Defendants' motion for protective order, and required the President to expressly assert the presidential communications privilege and produce a revised privilege log and required Defendants to produce documents withheld solely on deliberative process grounds. (Dkt. 299.)

4. On July 31, 2018, Defendants moved this Court to stay its July 27, 2018 order. (Dkt. 300.) Defendants petitioned the Ninth Circuit for a writ of mandamus and an emergency stay the following day.

5. On August 20, 2018, this Court denied Defendants' stay request, but extended the deadline for compliance until the Ninth Circuit ruled on Defendants' mandamus petition, and directed Defendants 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," so that Defendants could certify to the Court that they had taken these steps by October 10, 2018. (Dkt. 311.) On September 17, 2018, the Ninth Circuit granted Defendants' emergency motion for a stay pending consideration of the mandamus petition.

6. In light of the above, Plaintiffs assert that they cannot proceed with depositions and other discovery necessary to meet several existing deadlines in the case schedule.

7. Therefore, the parties believe that the October 10, 2018 deadline for filing and noting discovery motions, the November 9, 2018 deadline for completing discovery, and the December 10, 2018 deadline for filing dispositive motions should be vacated, and should be re-set after the Ninth Circuit decides the mandamus petition. The parties do not currently seek to extend any of the existing trial or pre-trial dates.

8. Accordingly, the parties move the Court to vacate the October 10, 2018, November 9, 2018, and December 10, 2018 deadlines in the case schedule, and allow the parties to submit a joint proposal for revisions to the case schedule within 21 days after the Ninth Circuit rules on the mandamus petition.

SO STIPULATED.

Respectfully submitted September 27, 2018.

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Counsel for Intervenor Plaintiff State of Washington

ORDER

This matter having come before the Court on the above stipulated motion of the parties, the Court finds good cause to vacate certain deadlines in the case schedule. (Dkt. 242.) Accordingly, IT IS HEREBY ORDERED THAT:

1. The October 10, 2018 deadline for filing and noting discovery motions, the November 9, 2018 deadline for completing discovery, and the December 10, 2018 deadline for filing dispositive motions are hereby vacated.

2. The parties are ordered to submit proposed revisions to the case schedule within 21 days after the Ninth Circuit rules on the mandamus petition.

3. All other deadlines in the current case schedule (Dkt. 242) shall remain the same.

IT IS SO ORDERED.

Dated this _____ day of _____, 2018.

Marsha J. Pechman
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on September 27, 2018.

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Exhibit C

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

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

Defendants.

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

ORDER GRANTING STIPULATION TO VACATE THE CURRENT CASE SCHEDULE

Plaintiffs Ryan Karnoski, Cathrine Schmid, D.L., formerly known as K.G., by his next friend and mother, Laura Garza, Lindsey Muller, Terece Lewis, Phillip Stephens, Megan Winters, Jane Doe, Conner Callahan, Human Rights Campaign, Gender Justice League, and American Military Partner Association (collectively, "Plaintiffs"); Plaintiff-Intervenor State of Washington; and Defendants Donald J. Trump, the United States of America, Patrick Shanahan, and the United States Department of Defense (collectively, "Defendants"), stipulate and move the Court as follows:

WHEREAS, pursuant to the Court's order (Dkt. No. 234), Plaintiffs, Plaintiff-Intervenor, and Defendants ("the Parties") filed their Updated Joint Status Report and Discovery Plan on May 4, 2018 (Dkt. No. 241), and the Court entered the case scheduling order on May 9, 2018 (Dkt. No. 242), that currently governs the case.

WHEREAS, the Parties stipulated to extend discovery and dispositive motion deadlines on September 27, 2018, due to upcoming deadlines for filing and noting discovery motions, completing discovery, and filing dispositive motions. (Dkt. No. 318.)

WHEREAS, the Court granted the Parties' stipulation on September 28, 2018, vacating the deadlines for filing and noting discovery motions, completing discovery, and filing dispositive motions, and further ordered the parties to submit proposed revisions to the case schedule within 21 days after the Ninth Circuit rules on the pending Mandamus Petition. (Dkt. No. 319.) All other deadlines in the case schedule remained unchanged. (*Id.*)

WHEREAS, the Ninth Circuit has not yet ruled on the pending Mandamus Petition, discovery is not complete, and trial is currently set for April 8, 2019.

WHEREAS, the Parties have agreed further revisions to the case schedule are warranted—including vacating the March 4, 2019 motions in limine deadline, the March 27, 2019 pretrial order deadline, and the March 27, 2019 proposed findings of fact and conclusions of law deadline, and the March 29, 2019 pretrial conference, and the April 8, 2019 trial date.

NOW THEREFORE, Plaintiffs, Plaintiff-Intervenor, and Defendants, through their respective counsel of record, do hereby stipulate and agree, and respectfully request, that the Court enter an order as follows:

1. The March 4, 2019 motions in limine deadline, March 27, 2019 pretrial order deadline, March 27, 2019 proposed findings of fact and conclusions of law deadline, March 29, 2019 pretrial conference, and April 8, 2019 trial date are hereby vacated.

2. The parties shall submit a joint proposal for revisions to the case schedule within 21 days after the Ninth Circuit rules on the Mandamus Petition.

SO STIPULATED

Respectfully submitted February 19, 2019.

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Counsel for Intervenor-Plaintiff State of Washington

ORDER

This matter comes before the Court on the Parties' Joint Stipulation to Vacate the Current Case Schedule and Ordering the Parties to Propose a New Case Schedule. After considering the Parties' Joint Stipulation, IT IS HEREBY ORDERED THAT:

The March 4, 2019 motions in limine deadline, March 27, 2019 pretrial order deadline, March 27, 2019 proposed findings of fact and conclusions of law deadline, March 29, 2019 pretrial conference, and April 8, 2019 trial date are hereby vacated;

1. The parties shall submit a joint proposal for revisions to the case schedule within 21 days after the Ninth Circuit rules on the Mandamus Petition.

IT IS SO ORDERED.

Dated this 20th day of February, 2019.

Marsha J. Pechman
United States District Judge

Exhibit D

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Attorneys for Plaintiffs Aiden Stockman et al.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AIDEN STOCKMAN; NICOLAS TALBOTT; TAMASYN REEVES; JAQUICE TATE; JOHN DOES 1-2; JANE DOE; and EQUALITY CALIFORNIA,

Plaintiffs,

v.

DONALD J. TRUMP, et al.

Defendants.

CASE NO. 5:17-cv-01799-JGB-KKx

PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS

PROPOUNDING PARTY: Plaintiffs Aiden Stockman, Nicolas Talbott, Tamasyn Reeves, Jaquice Tate, John Does 1-2, Jane Doe, and Equality California

RESPONDING PARTY: Defendants Donald J. Trump, et al.

SET NO.: One

Pursuant to Federal Rule of Civil Procedure 34, Plaintiffs, by their counsel, hereby request that Defendants respond to the following Requests for Production (the "Requests"), separately and fully, in writing, and serve a copy of such answers upon counsel for Plaintiffs within thirty (30) days from the date of service. Plaintiffs also hereby request that Defendants produce all documents responsive to the Requests at the offices of Latham & Watkins LLP, 355 South Grand Avenue, Suite 100, Los Angeles, California, 90071 within thirty (30) days after service of the Requests.

DEFINITIONS

1. "And" and "or" shall be construed conjunctively or disjunctively as necessary to bring within the scope of the requests all information that might otherwise be construed to be outside of its scope.

2. "Any" and "each" include and encompass "all."

3. The term "Carter Policy" shall refer to the 2016 policy announced by then Defense Secretary Ash Carter allowing transgender service members to serve openly in the United States military.

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

5. The term "Department of Defense" shall mean the Department of Defense and all officers and employees thereof, including, but not limited to, the Secretary of Defense, the Deputy Secretary of Defense, any Undersecretary of Defense, any Assistant Secretary of Defense, any Deputy Assistant Secretary of Defense, the Chairman and Vice Chairman of the Joint Chiefs of Staff, and all employees and officers of the Office of the Secretary of Defense, the Department of the Navy, the Department of the Army, and the Department of the Air Force.

6. The term "Department of Homeland Security" shall mean the Department of Homeland Security and all officers and employees thereof, including, but not limited to, the Secretary of Homeland Security, the Deputy Secretary of Homeland Security, any Undersecretary of Homeland Security, any Assistant Secretary of Homeland Security, any Deputy Assistant Secretary of Homeland Security, and all employees and officers of the Office of the Secretary of Homeland Security.

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

printouts and records of all types; instruction manuals; policy manuals and statements; books; pamphlets; and every other device or medium by which information or intelligence of any type is transmitted, recorded, or preserved, or from which intelligence or information can be perceived.

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

9. The term "Mattis Plan" shall refer to the memorandum issued by then Secretary of Defense James N. Mattis on February 22, 2018 titled "Memorandum for the President" with the subject "Military Service by Transgender Individuals" that included the Department of Defense Report entitled "Department of Defense Report and Recommendations on Military Service by Transgender Persons."

10. The term "Medical and Personnel Executive Steering Committee" shall refer to the standing group of the Surgeons General and Service Personnel Chiefs, led by Personnel and Readiness, that provided the Panel of Experts with an analysis of accession standards, a multi-disciplinary review of data, and information about the medical treatment for gender dysphoria and gender transition-related medical care.

11. The term "Panel of Experts" shall mean the group of senior uniformed and civilian leaders of the Department of Defense and the U.S. Coast Guard established by then Secretary of Defense James Mattis on September 14, 2017, to conduct a review and study of the relevant data and information pertaining to transgender service members.

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

13. The term "President of the United States" shall mean and include President Donald J. Trump, the office of the President of the United States, and all people working for and on behalf of the President or the office of the President of

the United States, including, but not limited to, the President's Chief of Staff and his office, the Advisors, Senior Advisors, Chief Strategists, and Counselors to the President and their offices, the Assistant to the President for National Security Affairs (also known as the National Security Advisor) and his office, the White House Counsel and his office, and all officers and employees of the National Security Council.

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

15. The term "Service Branch" shall refer to any of the United States Army, the United States Marine Corps, the United States Navy, the United States Air Force, or the United States Coast Guard.

16. The term "Terms of Reference" shall mean the memorandum issued by Secretary Mattis titled "Terms of Reference—Implementation of Presidential Memorandum on Military Service by Transgender Individuals" dated September 14, 2017.

17. The term "Transgender" shall describe a person whose gender identity differs from the sex assigned at birth.

18. The term "Transgender Service Policy Working Group" shall refer to the group of medical and personnel experts from across the Department of Defense that submitted policy recommendations and a proposed implementation plan for the Panel of Experts to consider.

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

INSTRUCTIONS

20. You shall respond to these Requests in accordance with the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Central District of California.

21. Defendants are requested to produce all documents in their possession, custody or control, including non-privileged documents in the possession, custody or control of their counsel.

22. Although these Requests seek answers as of the date hereof, pursuant to Rule 26(e) of the Federal Rules of Civil Procedure, each Request is deemed to be continuing to the date of trial. If Defendants or their counsel learn that any response is inaccurate or incomplete, or if a response becomes inaccurate or incomplete by reason of a development occurring after Defendants' initial response, Defendants must promptly serve a supplemental response or responses and produce or make any additional responsive documents available for inspection and copying.

23. With respect to any documents withheld on a claim of any legally recognized privilege, state in writing for each document information sufficient to assess the claimed privilege, including: (1) the nature of the privilege claimed; (2) the name of the document's author or actual or intended recipients (including those listed as "cc" or "bcc"); and (3) the document's date, title, number of pages, and a brief statement of the nature of its contents.

24. To the extent that any of the following results in a more complete disclosure: the singular shall be construed to include the plural and vice versa; the present tense shall be construed to include the past tense and the past tense shall be construed to include the present tense; and male or female references shall be construed in the generic sense.

25. Different versions of the same documents, handwritten notes or notations in any form, draft documents and documents with handwritten notations

or marks not found in the original or on other copies are considered to be different documents.

26. All documents and things produced in response to these Requests shall be produced along with any and/or all attachments and/or enclosures as have ever been attached to and/or enclosed with the document at any time.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Documents and communications between the President of the United States, on the one hand, and the Department of Defense, on the other hand, between January 20, 2017 and March 23, 2018, related to the service and/or accession of Transgender individuals in any Service Branch.

2. Documents and communications between the President of the United States, on the one hand, and the Department of Homeland Security, on the other hand, between January 20, 2017 and March 23, 2018, related to the service and/or accession of Transgender individuals in any Service Branch.

3. Documents and communications between the President of the United States, on the one hand, and any Service Branch, on the other hand, between January 20, 2017 and March 23, 2018, related to the service and/or accession of Transgender individuals in any Service Branch.

4. Documents and communications between the Department of Defense, on the one hand, and any Service Branch, on the other hand, between January 20, 2017 and March 23, 2018, related to the service and/or accession of Transgender individuals in any Service Branch.

5. Documents and communications between the Department of Homeland Security, on the one hand, and any Service Branch, on the other hand, between January 20, 2017 and March 23, 2018, related to the service and/or accession of Transgender individuals in any Service Branch.

6. Documents and communications between the President of the United States, on the one hand, and Department of Defense, on the other hand, regarding

the Terms of Reference.

7. Documents and communications between the President of the United States, on the one hand, and the Department of Defense, on the other hand, related to the purpose of the "further study" that the President of the United States deemed necessary to determine whether the Carter Policy would have negative effects, including, but not limited to "hinder[ing] military effectiveness and lethality, disrupt[ing] unit cohesion, or tax[ing] military resources," as stated on page 17 of the Mattis Plan.

8. Documents and communications between the President of the United States, on the one hand, and the Department of Homeland Security, on the other hand, related to the objectives of the "further study" that the President of the United States deemed necessary to determine whether the Carter Policy would have negative effects, including, but not limited to "hinder[ing] military effectiveness and lethality, disrupt[ing] unit cohesion, or tax[ing] military resources," as stated on page 17 of the Mattis Plan.

9. Documents and communications submitted to the President of the United States after August 25, 2017 related to any "recommendation to the contrary" to the Presidential Memorandum, as stated on page 17 of the Mattis Plan.

10. Documents and communications related to how the President of the United States determined whether any "recommendation to the contrary" to the Presidential Memorandum was sufficiently "convincing," as stated on page 17 of the Mattis Plan.

11. All versions and drafts of policies related to Transgender military service developed or considered between the issuance of the Presidential Memorandum on August 25, 2017 and the Mattis Plan and Report on February 22, 2018.

12. Documents and communications related to the establishment of the Panel of Experts announced in the Terms of Reference, including but not limited to

how the Panel of Experts was selected and who was involved in the process of appointing the Panel of Experts.

13. Documents and communications between the President of the United States, on the one hand, and the Panel of Experts, on the other hand, relating to or concerning the service and/or accession of Transgender individuals in any Service Branch, between August 25, 2017 and March 23, 2018.

14. Documents and communications between the Department of Defense, on the one hand, and the Panel of Experts, on the other hand, relating to the service and/or accession of Transgender individuals in any Service Branch, including such documents and communications that contain information not included in the Mattis Plan, through the present day.

15. Documents and communications between the Department of Homeland Security, on the one hand, and the Panel of Experts, on the other hand, relating to the service and/or accession of Transgender individuals in any Service Branch.

16. Documents created by, relied upon, or considered by the Panel of Experts related to the service and/or accession of Transgender individuals in any Service Branch.

17. Documents created by the Transgender Service Policy Working Group regarding the service and/or accession of Transgender individuals in any Service Branch.

18. Documents and communications shared between the President of the United States, on the one hand, and the Medical and Personnel Executive Steering Committee, on the other hand, regarding the service and/or accession of transgender individuals in any Service Branch.

19. Documents and communications shared between the Department of Defense, on the one hand, and Medical and Personnel Executive Steering Committee, on the other hand, regarding the service and/or accession of Transgender individuals in any Service Branch.

20. Documents and communications shared between the Department of Homeland Security, on the one hand, and Medical and Personnel Executive Steering Committee, on the other hand, regarding the service and/or accession of Transgender individuals in any Service Branch.

21. Documents and communications shared between the President of the United States, on the one hand, and the "separate working group tasked with enhancing the lethality of our Armed Forces," referenced on page 18 of the Mattis Plan, on the other hand, related to the service and/or accession of Transgender individuals in any Service Branch.

22. Communications between the Department of Defense, on the one hand, and the "separate working group tasked with enhancing the lethality of our Armed Forces," referenced on page 18 of the Mattis Plan, on the other hand, related to the service and/or accession of Transgender individuals in any Service Branch.

23. Communications between the Department of Homeland Security, on the one hand, and the "separate working group tasked with enhancing the lethality of our Armed Forces," referenced on page 18 of the Mattis Plan, on the other hand, related to the service and/or accession of Transgender individuals in any Service Branch.

24. Communications between the President of the United States, on the one hand, and the "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" referenced on page 18 of the Mattis Plan, on the other hand, regarding the service and/or accession of Transgender individuals in any Service Branch.

25. Communications between the Department of Defense, on the one hand, and the "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"

referenced on page 18 of the Mattis Plan, on the other hand, regarding the service and/or accession of Transgender individuals in any Service Branch.

26. Communications between the Department of Homeland Security, on the one hand, and the "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" referenced on page 18 of the Mattis Plan, on the other hand, regarding the service and/or accession of Transgender individuals in any Service Branch.

27. Documents and communications reviewed or considered by the Panel of Experts to render its opinions and conclusions related to gender dysphoria, including but not limited to the "information and analyses about gender dysphoria" stated on page 18 of the Mattis Plan that the Panel of Experts reviewed.

28. Documents reviewed, considered, or relied upon by the Panel of Experts concerning "the treatment of gender dysphoria" as stated on page 18 of the Mattis Plan, including a list of individuals with whom the Panel of Experts communicated regarding the efficacy of such treatments.

29. Documents reviewed, considered, or relied upon by the Panel of Experts concerning "the effects of currently serving individuals with gender dysphoria on military effectiveness, unit cohesion, and resources" as stated on page 18 of the Mattis Plan.

30. Documents and communications reflecting or relating to "the Department's [of Defense] own data and experience obtained since the Carter [P]olicy took effect," as stated, *inter alia*, on page 18 of the Mattis Plan, including such documents and communications that contain information not included in the Mattis Plan, through the present day.

31. Documents reviewed, considered, or relied upon by the Panel of Experts concerning whether Transgender individuals should be permitted to join or serve in any Service Branch.

32. Documents reviewed, considered, or relied upon by the Panel of Experts concerning whether Transgender individuals should be permitted to transition gender while serving in any Service Branch, and what, if any, treatment(s) or service(s) should be authorized.

33. Documents reviewed, considered, or relied upon by the Panel of Experts concerning how the Department of Defense should treat Transgender individuals who are currently serving in any Service Branch.

34. Documents sufficient to identify all Military Health System expenditures for services related to the treatment of gender dysphoria from January 1, 2014 through the present.

35. Documents sufficient to identify total Military Health System expenditures for all services rendered from January 1, 2014 through the present.

36. Documents with respect to each Service Branch related to or concerning the calculations of the actual, estimated, or projected cost of allowing transgender individuals to serve in each Service Branch.

37. Documents sufficient to support Defendants' contention that the accession or continued service of Transgender individuals in any Service Branch will undermine unit cohesion by non-Transgender individuals.

38. Documents and communications relating to complaints, if any, received between June 1, 2016 and the present day by any Service Branch from any service member concerning Transgender military service or service in any Service Branch by one or more Transgender individual(s), including but not limited to the "equal opportunity complaint from biological females in the unit who believed that granting a biological male, even one who identified as a female, access to their showers violated their privacy" referenced at page 37 of the Mattis Plan.

39. Documents and communications related to the assertion on page 21 of the Mattis Plan that "Transgender persons with gender dysphoria suffer from high rates of mental health conditions such as anxiety, depression, and substance use

disorders."

40. Documents and communications related to the assertion on page 21 of the Mattis Plan that "[h]igh rates of suicide ideation, attempts, and completion among people who are transgender are also well documented," including a list of individuals with whom the Panel of Experts communicated regarding that assertion.

41. Documents and communications related to the assertion on page 32 of the Mattis Plan that "persons who are diagnosed with gender dysphoria . . . [and] have already transitioned to their preferred gender, should be disqualified from service" because it "undermines readiness."

42. Documents related the waiver for deployability that is required for "[a]ny DSM-5 disorder with residual symptoms, or medication side effects, which impair social or occupational performance," as stated on page 34 of the Mattis Plan.

43. Documents and communications related to the Panel of Experts' consideration of evidence from other countries that allow Transgender military service.

44. All documents and communications related to any information or documents provided by You to USA Today in connection with the article published by USA Today on February 27, 2019, entitled *Exclusive: Pentagon spent nearly $8 million to treat 1,500 transgender troops since 2016.*

45. Documents sufficient to show, for each Service Branch each Service Branch's policies in force or effect at any time on or after January 1, 2016 related to "limited duty," as used on page 33 of the Mattis Plan, including without limitation the reasons for and/or circumstances under which a service member will or may be placed on limited duty.

46. All documents reflecting, referring, or relating to the reasons that Transgender service members have been placed on "limited duty" in the Army and Air Force over the "one-year period" referenced on page 33 of the Mattis Plan.

47. All documents reflecting or relating to the "input" the Panel of Experts

received "from transgender service members, commanders of transgender Service members, military medical professionals, and civilian medical professionals," as set forth at page 18 of the Mattis Plan.

48. Documents sufficient to show the Service Branch, rank, military unit, and circumstances of any Transgender service members recalled from deployment due to the medical and/or mental health reasons since June 30, 2016, including the nature of the medical or mental health reason and the circumstances that led to the decision to evacuate.

49. Documents sufficient to show the Service Branch, rank, and military unit of any Transgender service member who has been/is deployed overseas, and the duration, location, and nature of their deployment.

50. Documents sufficient to show the Service Branch, rank, military unit, of any Transgender service member You contend was non-deployable due to gender dysphoria or transition-related medical care, and the duration of and specific reason(s) for such non-deployability.

51. All documents referring or relating to the deployability of Transgender individuals in any Service Branch.

52. All documents reflecting or relating to (a) the "[d]ata retrieved from [the] Military Health System data repository" that is cited in footnotes 64, 65 and 66 at pages 21-22, and at footnote 161 at page 41 of the February 2018 Report; (b) the "[d]ata reported by the Departments of Army, Navy, and Air Force" that is cited in footnote 114 at page 31, footnotes 121 and 123 at page 33, and footnote 163 at page 41 of the February 2018 Report; and (c) the "Defense Health Agency, Supplemental Health Care Program Data" cited at footnotes 119 and 120 at pages 31 and 32, and footnote 162 at page 41, of the Mattis Plan.

53. All documents referring or relating to the effect of service by Transgender individuals on unit cohesion.

54. All documents referring or relating to the effect of service by

Transgender individuals on military readiness, effectiveness, and/or lethality.

55. All documents referring or relating to the fitness of Transgender individuals for military service.

56. All documents referring or relating to the effect Transgender service members have on "good order and discipline" in the military, as referenced *inter alia* at page 35 of the Mattis Plan.

57. All documents referring or relating to standards for military service that are not strictly limited by biological sex.

58. Documents sufficient to show the number of individuals who were permitted to enlist in any Service Branch since June 30, 2016 with mental health conditions and disorders, while on long-term hormones, or while taking long-term medication for endometriosis, abnormal menstruation, or dysmenorrhea, including detail regarding how many such individuals were allowed to enlist pursuant to a medical waiver and how many were allowed to enlist without a medical waiver.

59. Documents sufficient to show the number of individuals who were permitted to enlist in any Service Branch since January 1, 2014 with a diagnosis of gender dysphoria, or after undergoing a gender transition, including detail regarding how many such individuals were allowed to enlist pursuant to a medical waiver and how many were allowed to enlist without a medical waiver.

60. All records of decisions on all waiver applications, whether granted or denied, for the medical conditions identified in Requests 58-59.

61. Documents sufficient to show the number of services members who have been and/or are deployed on or after January 1, 2014 while on long-term medication management for any medical condition.

Dated: April 15, 2019

By:/s/ *Amy C. Quartarolo*
Amy C. Quartarolo

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Exhibit E

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

THIS MATTER comes before the Court on Plaintiffs' Motion to Compel Initial Disclosures. (Dkt. No. 190.) Having reviewed the Motion, the Response (Dkt. No. 199), the Reply (Dkt. No. 203) and all related papers, the Court GRANTS the Motion.

Federal Rule of Civil Procedure 26(a)(1) requires parties to serve initial disclosures identifying "each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses" as well as "all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses . . ." Fed. R. Civ. P. 26(a)(1)(A)(i)-(ii). Initial disclosures are to be based upon information "then readily

available" to the party, and "[a] party is not excused from making its disclosures because it has not fully investigated the case." Fed. R. Civ. P. 26(a)(1)(E). The purpose of the disclosure requirement is to elicit "basic information that is needed in most cases to prepare for trial or to make an informed decision about settlement." Advisory Committee Notes to 1993 Amendments to Fed. R. Civ. P. 26.

Under Rule 26(a)(1) and this Court's Scheduling Order, Defendants were required to serve their disclosures by February 9, 2018. (Dkt. No. 124.) On February 8, Defendants served initial disclosures limited to the following statement:

> The Department of Defense is currently undertaking a study of policies concerning transgender service members and upon completion of that study, and the development of any new policies resulting from that study, Defendants will supplement these disclosures as appropriate consistent with Federal Rule of Civil Procedure 26(e).
>
> (Dkt. No. 191, Ex. 2.)

On February 16, Defendants served amended initial disclosures, which included the statement above, along with a list of the Plaintiffs in this case. (Dkt. No. 191, Ex. 3.) Neither the initial disclosures nor the amended initial disclosures provide any actual information concerning Defendants' claims or defenses.

While Defendants claim their initial and amended initial disclosures list "all of the witnesses and documents that they currently intend to rely upon to support their defenses," and that they will not know what individuals and documents they will ultimately rely upon "to defend a future policy that has yet to be announced" (Dkt. No. 199 at 3), this case arises not out of any new or future policy that is in the process of being developed, but rather out of the *current* policy prohibiting military service by openly transgender persons, announced on Twitter by President Trump on July 26, 2017 and formalized in an August 25, 2017 Presidential Memorandum.

Defendants cannot reasonably claim there are *no* individuals likely to have discoverable information and *no* documents relevant to their claims and defenses regarding the current policy. President Trump's own announcement states "*[a]fter 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." (Dkt. No. 149, Ex. 1) (emphasis added). Similarly, Defendants have asserted that "well before the President made statements on Twitter, Secretary Mattis received counsel from the Service Chiefs and Secretaries and determined that additional time was needed to study whether accession of transgender individuals into the military would impact readiness and lethality." (Dkt. No. 194 at 18.) Which Generals and military experts were consulted? Which Service Chiefs and Secretaries provided counsel? What information did they review or rely upon in formulating the current policy? Were the Court to credit Defendants' Initial Disclosures and Amended Disclosures, the answer to these questions apparently would be "none."

The Court finds that Defendants have failed to provide the required initial disclosures under Federal Rule of Civil Procedure 26(a)(1), and therefore GRANTS Plaintiffs' Motion to Compel Initial Disclosures. Defendants have five days from the date of this Order to produce the required disclosures, which shall identify all information Defendants may use to support their claims or defense with respect to the *current* policy prohibiting military service by openly transgender persons (i.e., the policy announced on Twitter by President Trump on July 26, 2017 and formalized in an August 25, 2017 Presidential Memorandum).

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

Dated March 14, 2018.

Marsha J. Pechman
United States District Judge

Exhibit F

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

Exhibit G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al.,	:	
Plaintiffs,	:	
v.	:	Civil Action No. GLR-17-2459
DONALD J. TRUMP, et al.,	:	
Defendants.	:	

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendants President Donald J. Trump, Secretary of Defense James Mattis, Secretary of the Army Mark Esper, Secretary of the Navy Richard Spencer, Secretary of the Air Force Heather Wilson, Secretary of Homeland Security Kirstjen Nielsen, and Commandant of the U.S. Coast Guard Paul Zukunft's Objections to the Magistrate Judge's Memorandum Opinion and Order (ECF No. 209) and Motion to Stay Compliance with the Magistrate Judge's Memorandum Order and Opinion (ECF No. 208). This case involves equal protection and substantive due process challenges to President Trump's policy banning transgender persons from serving in the military. The Objections and Motion to Stay are ripe for disposition, and no hearing is necessary. See Local Rule 105.6 (D.Md. 2016). For the reasons outlined below, the Court will overrule the Objections and grant the Motion to Stay.[1]

[1] Also pending is Plaintiffs' Motion to Set a Date Certain for Compliance with Discovery Order (ECF No. 222). Because the Court will stay the effect of the August 14, 2018 Discovery Order pending the United States Court of Appeals for the Ninth Circuit's decision on a petition for writ of mandamus in a related case, In re Donald J. Trump, No.

I. BACKGROUND[2]

A. Factual Background

In 2016, the Department of Defense ("DOD"), after completing a thorough analysis of military costs, readiness, and other factors, concluded that "there was no basis for the military to exclude men and women who are transgender from openly serving their country, subject to the same fitness requirements as other service members." (2d Am. Compl. ¶ 5, ECF No. 148). Subsequently, the Secretary of Defense issued the Open Service Directive to permit transgender persons to serve openly starting July 1, 2017. (Id.).

On July 26, 2017, however, President Trump published a series of Tweets[3] stating, "[T]he United States Government will not accept or allow . . . [t]ransgender individuals to serve in any capacity in the U.S. Military." (Id. ¶ 6). On August 25, 2017, President Trump issued a "Memorandum for the Secretary of Defense and the Secretary of Homeland Security" ("Transgender Service Member Ban"), which formalized the ban on transgender service members. (Id. ¶ 8). In addition, President Trump directed the Secretary of Defense to develop a plan for implementing the policy directives by February 21, 2018 (the "Implementation Plan"), with full implementation by March 23, 2018. (Id.).

18-72159 (9th Cir. argued Oct. 10, 2018), the Court will deny the Motion to Set a Date Certain as moot.

[2] Unless otherwise noted, the Court takes the following facts from Plaintiffs' Second Amended Complaint. The Court will address additional facts when discussing applicable law.

[3] A Tweet is a short message posted on the social media website Twitter.

On September 14, 2017, the Secretary of Defense issued Terms of Reference for developing the Implementation Plan, which directed the Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff to lead the development of the Implementation Plan and to convene a Panel of Experts from within DOD to conduct a study to inform the Implementation Plan. (Pls.' Cert. Conf. Counsel Ex. 20 at 2–3, ECF No. 177-24).[4] In March 2018, the Secretary of Defense publically released the Implementation Plan, which: (1) prohibited transgender individuals who "require or have undergone gender transition" from serving in the military; and (2) permitted all other transgender individuals to serve "in their biological sex" as long as they do not have a history or diagnosis of gender dysphoria. (2d Am. Compl. ¶ 11; Defs.' Mot. Dissolve Prelim. Inj. Ex. 1 at 2–3, ECF No. 120-1). These three policy directives: (1) the presidential Tweets; (2) the Transgender Service Member Ban; and (3) the Implementation Plan and related Panel of Experts, are at issue in this case.

On August 28, 2017, fourteen transgender individuals[5] and the American Civil Liberties Union of Maryland, Inc. filed suit against Defendants. (ECF No. 1). Plaintiffs allege that President Trump's ban on transgender persons serving in the military violates: (1) the Equal Protection component of the Due Process Clause to the Fifth Amendment of

[4] Citations to Exhibit 20 to Plaintiffs' Certificate of Conference of Counsel refer to the pagination the Court's Case Management and Electronic Court Filing system assigned.

[5] The individual Plaintiffs are Petty Officer First Class Brock Stone, Staff Sergeant Kate Cole, Staff Sergeant John Doe 1, Airman First Class Seven Ero George, Petty Officer First Class Teagan Gilbert, Technical Sergeant Tommie Parker, Teddy D'Atri, Ryan Wood, Niko Branco, John Doe 2, Jane Roe 1, John Doe 3, Jane Roe 2, and John Doe 4. (2d Am. Compl. ¶¶ 17–106). Plaintiffs include current military service members, as well as individuals seeking to enlist in the military. (See id.).

the United States Constitution; (2) substantive due process; and (3) 10 U.S.C. § 1074 (2018), which entitles current and certain former members of the military to medical care. (Am. Compl. at 32, 36, 38, ECF No. 39).[6]

B. Procedural Background

On September 14, 2017, Plaintiffs filed a Motion for a Preliminary Injunction. (ECF No. 40). On October 12, 2017, Defendants filed a Motion to Dismiss and Opposition to Plaintiff's Motion for a Preliminary Injunction. (ECF No. 52). On November 21, 2017, this Court granted Plaintiffs' Motion for a Preliminary Injunction[7] and Defendant's Motion to Dismiss the 10 U.S.C. § 1074 claim. (Nov. 21, 2018 Mem. & Order at 52–53, ECF No. 85).[8]

On May 4, 2018, the Court referred this case to a United States Magistrate Judge ("USMJ") for all discovery. (ECF No. 152). On June 15, 2018, Plaintiffs filed a Motion to Compel Supplemental Interrogatory Answers and Production. (ECF No. 177-1). In

[6] Around the same time, three similar lawsuits challenging the constitutionality of the Transgender Service Member Ban were filed in other federal district courts. These cases are: Doe v. Trump, No. 17-cv-01597 (D.D.C. filed Aug. 9, 2017), Karnoski v. Trump, No. 17-cv-01297 (W.D.Wash. filed Aug. 28, 2017), and Stockman v. Trump, No. 17-cv-01799 (C.D.Cal. filed Sept. 5, 2017). These cases remain pending.

[7] The federal courts in Doe, Karnoski, and Stockman also "issued preliminary injunctions prohibiting the White House and the military from taking any action to enforce President Trump's ban." (2d Am. Compl. ¶ 10). "As a result of those injunctions, the Open Service policy remained in effect, and the military began accepting transgender recruits on January 1, 2018." (Id.).

[8] Defendants later appealed the Preliminary Injunction. (ECF No. 86). Defendants also filed a Motion for Judgment on the Pleadings and a Motion to Partially Dissolve the Preliminary Injunction (ECF No. 115), a Motion to Dissolve the Preliminary Injunction (ECF No. 120), a Motion for a Protective Order (ECF No. 121), and Motion to Dismiss Plaintiffs' Second Amended Complaint, or, in the Alternative, Defendants' Motion for Summary Judgment (ECF No. 158). Plaintiffs also filed a Cross-Motion for Summary Judgment (ECF No. 163). These Motions remain pending before the Court.

their Motion to Compel, Plaintiffs sought deliberative materials regarding: (1) President Trump's July 2017 Tweets and the Transgender Service Member Ban; (2) the DOD's Panel of Experts; and (3) the Implementation Plan and President Trump's acceptance of the Plan. (Pls.' Mot. Compel at 1, ECF No. 177-1). At the same time, Plaintiffs filed a Motion for a Judicial Determination of Privilege Claims (ECF No. 178 (sealed document)) on a PowerPoint presentation that the Army inadvertently produced and Defendants sought to clawback on the theory that it, too, is protected by deliberative process privilege. (Defs.' Objs. Magistrate Judge's Mem. Op. & Order at 5, ECF No. 209). On June 18, 2018, Defendants filed a Motion for a Protective Order to preclude discovery directed at the President and other sources concerning presidential communications and deliberations. (ECF No. 179).[9]

On August 14, 2018, the USMJ issued a Memorandum Opinion and Order on these three Motions. (Aug. 14, 2018 Mem. Op. ["Mem. Op."], ECF No. 204; Aug. 14, 2018 Order, ECF No. 205). The USMJ granted Plaintiffs' Motion to Compel, dismissed Plaintiffs' Motion for a Judicial Determination of Privilege Claims as moot, and granted Defendants' Motion for a Protective Order as to the President, but denied the Protective

[9] The other cases involving the Transgender Service Member Ban raise similar discovery issues. In Doe, plaintiffs filed a Motion to Compel Production of Documents and Information Withheld under the Deliberative Process Privilege. No. 17-cv-01597, ECF No. 169. That Motion remains pending before the U.S. District Court for the District of Columbia. In Karnoski, the U.S. District Court for the Western District of Washington granted the plaintiffs' Motion to Compel, ordering defendants to turn over documents that the defendants withheld solely under the deliberative process privilege. No. 17-cv-01297, ECF No. 299. The defendants then filed a Petition for a Writ of Mandamus and Emergency Motion for Stay Pending Consideration of the Petition. No. 17-cv-01297, ECF No. 302. That Petition remains pending before the United States Court of Appeals for the Ninth Circuit. In re Donald J. Trump, No. 18-72159.

Order as to others who communicate with the President. (Mem. Op. at 11; Aug. 14, 2018 Order ¶¶ 1–3). The USMJ granted Plaintiff's Motion to Compel because there were no justifiable reasons to stay discovery. (Mem. Op. at 4). In addition, applying In re Subpoena Duces Tecum Served on Office of Comptroller of the Currency, 145 F.3d 1422, 1424 (D.C. Cir. 1998), the USMJ concluded that deliberative process privilege does not apply given that government intent "is at the very heart of this litigation." (Id. at 5–6). The USMJ dismissed Plaintiffs' Motion for Judicial Determination of Privilege Claims as moot because the USMJ determined that deliberative process privilege does not apply to Plaintiffs' discovery requests. (Id. at 11). Finally, balancing deference to the Executive with Plaintiffs' need for discovery, the USMJ granted Defendants' Motion for a Protective Order as to the President but not as to individuals with whom the President communicates. (Id. at 9–11).

Defendants now object to the USMJ's Memorandum Opinion and Order, and move to stay the Order. (ECF Nos. 208, 209). Plaintiffs filed an Opposition to Defendants' Motion to Stay on August 31, 2018. (ECF No. 211). Plaintiffs also filed an Opposition to Defendants' Objections to the USMJ's Order on September 14, 2018. (ECF No. 216). On September 28, 2018, Defendants filed a Reply. (ECF No. 221).

II. DISCUSSION

A. Objections to the Magistrate Judge's Order

1. Standard of Review

Under Federal Rule of Civil Procedure 72(a), a district court "must consider timely objections" to a USMJ's order on nondispositive, pretrial matters and "modify or

set aside any part of the order that is clearly erroneous or is contrary to law." "The 'clearly erroneous' standard applies to factual findings, while legal conclusions will be rejected if they are 'contrary to law.'" Sky Angel U.S., LLC v. Discovery Commc'ns, LLC, 28 F.Supp.3d 465, 479 (D.Md. 2014).

Under the clearly erroneous standard, the reviewing court does not ask whether a finding is "the best or only conclusion permissible based on the evidence." In re Subpoena of Am. Nurses Ass'n, No. 08-CV-0378, 2013 WL 5741242, at *1 (D.Md. Aug. 8, 2013) (quoting Huggins v. Prince George's Cty., 750 F.Supp.2d 549, 559 (D.Md. 2010)). "Rather, the Court is 'only required to determine whether the magistrate judge's findings are reasonable and supported by the evidence." Id. (quoting Huggins, 750 F.Supp.2d at 559). The Court will affirm findings of fact "unless [the Court's] review of the entire record leaves [it] with the definite and firm conviction that a mistake has been committed." Harman v. Levin, 772 F.2d 1150, 1153 (4th Cir. 1985) (citing United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)).

"The 'contrary to law' standard ordinarily suggests a plenary review of legal determinations, but many courts have noted that decisions of a magistrate judge concerning discovery disputes . . . should be afforded 'great deference.'" In re Outsidewall Tire Litig., 267 F.R.D. 466, 470 (E.D.Va. 2010); see also Neighborhood Dev. Collaborative v. Murphy, 233 F.R.D. 436, 438 (D.Md. 2005) (stating that "[a] district court owes substantial deference to a magistrate judge in considering a magistrate judge's ruling on a non-dispositive motion"); 12 Charles Allen Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice & Procedure § 3069 (2d ed. 1997) (observing that

altering a magistrate judge's nondispostive orders is extremely difficult to justify). "In light of the broad discretion given to a magistrate judge in the resolution of nondispositive discovery disputes, the court should only overrule a magistrate judge's determination if this discretion is abused." Patrick v. PHH Mortg. Corp., 298 F.R.D. 333, 336 (N.D.W.Va. 2014) (quoting Shoop v. Hott, 2010 WL 5067567, *2 (N.D.W.Va. Dec. 6, 2010)). Under the "contrary to law" standard, "the critical inquiry is whether there is legal authority that supports the magistrate's conclusion." Guiden v. Leatt Corp., No. 5:10-CV-00175, 2013 WL 4500319, at *3 (W.D.Ky. Aug. 21, 2013) (citing Carmona v. Wright, 233 F.R.D. 270, 276 (N.D.N.Y. 2006)). "That reasonable minds may differ on the wisdom of a legal conclusion does not mean it is clearly erroneous or contrary to law." Id. Importantly, "it is not the function of objections to discovery rulings to allow wholesale relitigation of issues resolved by the magistrate judge." Buchanan v. Consol. Stores Corp., 206 F.R.D. 123, 124 (D.Md. 2002).

2. Analysis

Defendants challenge three aspects of the USMJ's discovery Order: (1) certain factual findings; (2) the grant of Plaintiffs' Motion to Compel and the finding of mootness as to Plaintiffs' Motion for Judicial Determination of Privilege Claims; and (3) the partial denial of the Protective Order.

a. Factual Findings

Defendants argue that the USMJ's Memorandum Opinion and Order are based on "clearly erroneous" findings of fact. (Defs.' Objs. Magistrate Judge's Mem. Op. & Order at 24–28). Defendants contend that the USMJ erred in finding that: (1) DOD's Panel of

Experts would not have existed but for President Trump's August 2017 Tweets; (2) the circumstances regarding military readiness and deployability could not have changed so dramatically between 2016 and 2018 to warrant the creation of a new policy; and (3) the new policy bans transgender persons from military service.

Here, the USMJ's factual findings are reasonable. First, the USMJ's conclusion that the DOD Panel of Experts would not exist but for President Trump's Tweets on transgender military service is supported by evidence in the record. President Trump issued his series of Tweets on July 26, 2017. When the Secretary of Defense issued Terms of Reference for developing the Implementation Plan over a month later on September 14, 2017, he directed the Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff to convene a Panel of Experts from within DOD to conduct a study to inform the Implementation Plan. (Pls.' Cert. Conf. Counsel Ex. 20 at 2–3). The timeline of these events would, therefore, make it reasonable to conclude that the Panel of Experts was born of President Trump's Tweets.

Nevertheless, Defendants argue that DOD began a review of its transgender service member policy before President Trump's Tweets, and that this review was the true impetus for convening the Panel of Experts. Plaintiffs explain, however, that this review was designed to assess the military's readiness to implement the Open Service Directive, not whether to implement the Open Service Directive at all. Thus, it was reasonable for the USMJ to find that the Panel of Experts would not exist without President Trump's Tweets announcing a change to the policy on transgender military service.

Second, the USMJ's finding that the circumstances regarding military readiness and deployability could not have changed so dramatically between 2016 and 2018 to warrant the creation of a new policy is reasonable based on the limited evidence in the record. Defendants suggest that this finding is clearly erroneous because the review for the Open Service Directive was based on limited and heavily caveated data from an external source, whereas the Panel of Experts' review was based on DOD's own data and experience. Plaintiffs and the USMJ regard the first review as valid because that process incorporated both the military leadership and transgender representatives. In order to explain how conditions changed so dramatically between 2016 and 2018, Defendants would need to produce additional information about the Panel of Experts that they currently seek to protect under deliberative process privilege. Given the lack of evidence in the record suggesting substantial changes to military readiness and deployability, the USMJ's finding that any such changes are too minor to warrant a change in policy is reasonable.

Finally, the USMJ's finding that the Transgender Service Member Ban bans transgender persons from military service is reasonable. Defendants argue that the Implementation Plan would not result in a ban of transgender persons from the military because the new policy is not based on transgender status, but rather on the medical condition of gender dysphoria. The Court is not persuaded. The Implementation Plan states: (1) "transgender persons who require or have undergone gender transition are disqualified from military service"; and (2) "transgender persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve . . . in

their biological sex." (Mot. Dissolve Prelim. Inj. at 3–4). Prohibiting transgender persons who have undergone transition clearly discriminates on the basis of transgender identity. Moreover, requiring transgender persons who have not undergone transition to serve in their biological sex forces them to "suppress the very characteristic that defines them as transgender in the first place." Karnoski v. Trump, 328 F.Supp.3d 1156, 1160 n.1 (W.D.Wash. 2018). As the Karnoski court explained, "that the Ban turns on transgender identity—and not on any medical condition—could not be clearer." Id. at 1160.

The Court will, therefore, overrule Defendants' Objections related to the USMJ's factual findings.

b. Motion to Compel

Defendants raise three main objections to the USMJ's Memorandum Opinion and Order addressing Plaintiffs' Motion to Compel and Motion for Judicial Determination of Privilege Claims: (1) the USMJ prematurely decided discovery motions because dispositive motions are still pending; (2) the USMJ failed to apply precedent from the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit in determining that Plaintiffs' requested discovery is not protected by deliberative process privilege; and (3) the Motion for Judicial Determination of Privilege Claims is not moot because deliberative process privilege should apply. The Court disagrees.

i. Discovery Decisions Not Premature

"District courts enjoy substantial discretion in the management of discovery and whether to grant motions to compel." E.E.O.C. v. Freeman, 288 F.R.D. 92, 98 (D.Md. 2012) (first citing Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc., 43 F.3d

922, 929 (4th Cir. 1995); then citing LaRouche v. Nat'l Broad. Co., Inc., 780 F.2d 1134, 1139 (4th Cir. 1986); and then citing Clark v. Unum Life Ins. Co. of Am., 799 F.Supp.2d 527, 531 (D.Md 2011)). In granting a motion to compel discovery, a court may consider its interest in judicial economy and in moving a case toward a conclusion. Landis v. N. Am. Co., 299 U.S. 248, 254 (1936); Bost v. Wexford Health Sources, Inc., No. ELH-15-3278, 2017 WL 3084953, *1–6 (D.Md. June 19, 2017) (granting a motion to compel in part because "this Court has a vested interest in moving this case toward conclusion"). In denying a motion to compel discovery, a court may consider whether compelling discovery is necessary. Freeman, 288 F.R.D. at 98 (first citing Cabana v. Forcier, 200 F.R.D. 9, 17 (D.Mass. 2001); then citing Tillman v. Lincoln Warehouse Corp., No. 83 CIV. 5381 (CSH), 1987 WL 7933, at *3 (S.D.N.Y. Mar. 13, 1987); then citing In re Folding Carton Antitrust Litig., 83 F.R.D. 132, 134 (N.D.Ill. 1979); then citing Oliver v. Comm. for the Re-Election of the President, 66 F.R.D. 553, 555 (D.D.C. 1975); and then citing 8B Charles Alan Wright et al., Federal Practice and Procedure § 2286 (3d ed. 2012)).

"Federal district courts often stay discovery pending the outcome of dispositive motions that will terminate the case." Cleveland Const., Inc. v. Schenkel & Schultz Architects, P.A., No. 3:08-CV-407RJCDCK, 2009 WL 903564, *2 (W.D.N.C. Mar. 31, 2009) (collecting cases). Ultimately, however, trial courts "are given wide discretion to control [the] discovery process." Thigpen v. United States, 800 F.2d 393, 397 (4th Cir. 1986) (first citing Land v. Dollar, 330 U.S. 731, 735 n.4 (1947); and then citing Prakash v. American University, 727 F.2d 1174, 1179–80 (D.C.Cir. 1984), overruled on other

grounds by Sheridan v. United States, 487 U.S. 392 (1988); see also Tilley v. United States, 270 F.Supp.2d 731, 734 (M.D.N.C. 2003), aff'd, 85 F.App'x 333 (4th Cir. 2004); Simpson v. Specialty Retail Concepts, Inc., 121 F.R.D. 261, 263 (M.D.N.C. 1988); Chavous v. District of Columbia, 201 F.R.D. 1, 3 (D.D.C. 2001)). In this Court, "the existence of a discovery dispute as to one matter does not justify delay in taking any other discovery." Local Rule 104.3 (D.Md. 2016).

Here, the USMJ did not rule contrary to law in granting Plaintiffs' Motion to Compel. It is within the Court's discretion to determine whether to stay discovery pending the resolution of dispositive motions. Thigpen, 800 F.2d at 396–97. The USMJ acted well within the bounds of his broad discretion when deciding to grant the Motion to Compel, particularly given the interest of this Court in moving the case toward a conclusion where "the parties appear to be very litigious." (Mem. Op. at 4); see Local Rule 104.3 (directing the court to move forward with discovery despite pending discovery disputes).

The Court will, therefore, overrule Defendants' Objections related to the USMJ prematurely deciding discovery motions.

ii. Deliberative Process Privilege

Defendants raise two arguments related to the USMJ's decision that deliberative process privilege does not apply to the documents Plaintiffs request. First, Defendants argue that the USMJ erred in failing to apply the factors from Cipollone v. Liggett Grp. Inc., 812 F.2d 1400 (4th Cir. 1987) (unpublished table decision) (per curiam), to determine the applicability of deliberative process privilege. Second, Defendants contend

that government intent is not at issue in this case because the government is afforded great deference in military policy under Trump v. Hawaii, 138 S.Ct. 2392 (2018). If government intent is not at issue, Defendants assert, deliberative process privilege should apply to the documents Plaintiffs request.

A court should deny a motion to compel discovery where the requested discovery is protected by deliberative process privilege. See City of Va. Beach v. U.S. Dept. of Commerce, 995 F.2d 1247, 1253 (4th Cir. 1993) (stating that deliberative process privilege protects certain documents from disclosure). Deliberative process privilege is designed to enhance the quality of agency decisions by promoting candid communication among policymakers without the fear that their remarks will be subject to discovery. EPA v. Mink, 410 U.S. 73, 86–87 (1973). Accordingly, deliberative process privilege protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8 (2001) (quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975)). Deliberative process privilege does not protect purely factual information, unless it is inextricably intertwined with deliberative material. City of Va. Beach, 995 F.2d at 1253.

Deliberative process privilege is not absolute and courts may balance the "public interest in nondisclosure with the need for the information as evidence." Cipollone, 812 F.2d 1400. In striking this balance, courts have considered "(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government's role (if any) in the litigation, and (4) the extent to which disclosure

would hinder frank and independent discussion regarding contemplated policies and decisions." Id. (citing FTC v. Warner Commcn's, Inc., 742 F.2d 1156, 1161 (9th Cir. 1984)).

In weighing the government's role, some courts have held that the deliberative process privilege does not apply where "the plaintiff's cause of action is directed at the government's intent." In re Subpoena Duces Tecum, 145 F.3d at 1424; see also Children First Found., Inc. v. Martinez, 2007 WL 4344915, at *7 (N.D.N.Y. Dec. 10, 2007) ("[I]f the party's cause of action is directed at the government's intent in rendering its policy decision and closely tied to the underlying litigation then the deliberative process privilege 'evaporates.'"); Jones v. City of Coll. Park, 237 F.R.D. 517, 521 (N.D.Ga. 2006) ("[T]he privilege is simply inapplicable, because government intent is at the heart of the issue in this case."); United States v. Lake Cty. Bd. of Comm'rs, 233 F.R.D. 523, 527 (N.D.Ind. 2005) ("[T]he deliberative process privilege does not apply when the government's intent is at issue.").

Here, the USMJ did not act contrary to law in finding that deliberative process privilege does not protect the information Plaintiffs requested in their Motion to Compel. The standard of review for objections to a USMJ's ruling looks to whether there is legal authority that supports the USMJ's conclusion. Guiden, 2013 WL 4500319, at *3 (citing Carmona, 233 F.R.D. at 276). While there is no binding legal authority on the application of deliberative process privilege in the Fourth Circuit, both In re Subpoena Duces Tecum and Cipollone provide legal authority to support the USMJ's conclusion. The USMJ applied In re Subpoena Duces Tecum and concluded that deliberative process privilege

does not apply to the documents Plaintiffs requested because the government's intent is at the heart of the issue in this case.

Even if the USMJ had applied the Cipollone balancing test, he would have reached the same conclusion. First, the deliberative evidence Plaintiffs seek on government intent is highly relevant to the lawsuit because it may explain why the Government changed its policy on transgender service members and whether that policy change was motivated by a legitimate government interest. Second, no alternative evidence on government intent is available to Plaintiffs. Third, the Government plays a central role in the litigation because Defendants—the parties being sued—are government officials and the parties that created the challenged Transgender Service Member Ban. These three factors weigh strongly in favor of disclosure and outweigh the fourth factor—the risk that disclosure will chill future policymaking discussions.[10]

Nevertheless, Defendants argue that the Cipollone balancing test would not weigh in favor of disclosure because government intent is not at issue. Defendants maintain that government intent is not at issue because Trump v. Hawaii, affords great deference to the government on issues of military policy. Plaintiffs aptly point out, however, that the deference afforded to military policy in Hawaii applies to a facially neutral policy. Unlike the policy in Hawaii, which was "facially neutral towards religion," the "[Transgender Service Member] Ban is facially discriminatory." Karnoski, 328 F.Supp.3d at 1160; (see

[10] Defendants argue that disclosure of deliberative documents will chill candid discussions about military policy between subordinates and military leaders. Defendants do not explain, , however, why the chilling effect is particularly great in this case or why it is great enough to outweigh the other three Cipollone factors.

also Nov. 21, 2017 Mem. & Order at 43–44 (holding that transgender persons are at least a quasi-suspect class, intermediate scrutiny is appropriate, and "the lack of any justification for the abrupt policy change, combined with the discriminatory impact to a group of our military service members who have served our country capably and honorably, cannot possibly constitute a legitimate governmental interest")). As a result, the deference afforded to the government's military policy in Hawaii does not apply in this case.

The Court will, therefore, overrule Defendants' Objections related to the deliberative process privilege.

iii. Judicial Determination of Privilege Moot

Defendants argue that deliberative process privilege applies in this case and that it protects a PowerPoint document Defendants inadvertently disclosed to Plaintiffs. As a result, Defendants conclude that a judicial determination of privilege on the PowerPoint document that they seek to clawback is not moot.[11]

Here, the USMJ correctly concluded that Plaintiffs' Motion for a Judicial Determination of Privilege Claims on the PowerPoint that Defendants seek to clawback is moot. As discussed above, the USMJ correctly determined that deliberative process privilege does not apply to Plaintiffs' requested discovery, which rendered Defendants

[11] The USMJ describes Plaintiffs' Motion for Judicial Determination of Privilege Claims as relating to two documents. (Mem. Op. at 11). The parties, however, describe the same Motion as relating to one PowerPoint briefing. (Defs.' Objs. Magistrate Judge's Mem. Op. & Order at 23).

attempt to clawback the PowerPoint moot because it is not covered by deliberative process privilege.

The Court will, therefore, overrule Defendants' Objections related to the mootness of judicial determination of privilege of the PowerPoint.

c. Protective Order and Presidential Communications Privilege

Defendants argue that the Protective Order should be extended not only to the President, but also to those with whom the President communicates because the same separation-of-powers concerns are at issue. Plaintiffs note that they are not seeking any information covered by presidential communications privilege at this time, but rather they are only seeking deliberative material. Plaintiffs plan to "exhaust this category of discovery before determining whether it is necessary to challenge Defendants' assertion of the presidential communications privilege." (Pls.' Resp. Defs.' Objs. Magistrate Judge's Mem. Op. & Order at 7, ECF No. 216).

Under Federal Rule of Civil Procedure 26(c)(1), "[a] party or any person from whom discovery is sought may move for a protective order." The government may seek a protective order in the interest of protecting presidential communications. Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367, 381 (2004) (discussing the Vice President's motion for a protective order as to discovery sought from him). "A President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual.'" United States v. Nixon, 418 U.S., 683, 715 (1974). Although the President "has a powerful interest in confidentiality of communications between

himself and his advisers, that interest must yield to a demonstrated specific need for evidence." Herbert v. Lando, 441 U.S. 153, 175 (1979).

Here, the USMJ did not err in granting the Protective Order only as to the President. Defendants argue that the USMJ's partial denial of Defendants' Motion for a Protective Order means that Plaintiffs may move to compel the disclosure of presidential communications "in the possession of Defendants other than the President." (Defs.' Reply Objs. Magistrate Judge's Mem. Op. & Order at 14, ECF No. 221). That is not how the Court understands the scope of the Protective Order. On the contrary, the Court construes the Protective Order to encompass communications both to and from the President. Consequently, any concerns Defendants have over a potential motion to compel disclosure of presidential communications is mitigated.

The Court will, therefore, overrule Defendants' Objections related to the Protective Order.

B. Motion to Stay Compliance with Magistrate Judge's Order

Defendants move to stay compliance with the USMJ's Memorandum Opinion and Order. They note that the Ninth Circuit granted the Karnoski defendants' motion for a stay pending consideration of the petition for writ of mandamus in In re Donald Trump. The stay in the Ninth Circuit precludes disclosure of documents protected by deliberative process privilege. See Karnoski, 328 F.Supp.3d at 1163 (compelling disclosure of "documents that have been withheld solely under the deliberative process privilege"); Sept. 17, 2018 Order, In re Donald J. Trump, No. 18-72159 (9th Cir. argued Oct. 10, 2018), ECF No. 36 (granting stay of the Karnoski court's order compelling discovery of,

among other things, documents withheld under the deliberative process privilege).[12] Defendants argue that many of those same documents will be disclosed in this case if the Court enforces the USMJ's Order.

"The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Donnelly v. Branch Banking & Trust Co., 971 F.Supp.2d 495, 501 (D.Md. 2013) (quoting Landis v. N. Am. Co., 299 U.S. 248, 254 (1936)). The Court considers the following factors when determining whether to grant a stay: "the length of the requested stay, the hardship that the movant would face if the motion were denied, the burden a stay would impose on the nonmovant, and whether the stay would promote judicial economy by avoiding duplicative litigation." Id. at 501–02 (quoting In re Mut. Funds Inv. Litig., No. MDL 1586, 2011 WL 3819608, at *1 (D.Md. Aug. 25, 2011)).

"A district court ordinarily has discretion to delay proceedings when a higher court will issue a decision that may affect the outcome of the pending case." White v. Ally Fin. Inc., 969 F.Supp.2d 451, 461–62 (S.D.W.Va. 2013) (first citing Kelley v. Metro. Cty. Bd. of Educ., 436 F.2d 856, 863 (6th Cir. 1970) (Celebrezze, J., concurring in part and dissenting in part); and then citing Hickey v. Baxter, 833 F.2d 1005 (4th Cir. 1987)

[12] The Court acknowledges that the appeal of the motion to compel discovery in In re Donald J. Trump applies to documents that the Karnoski defendants maintain the presidential communications privilege covers, as well as documents they assert the deliberative process privilege covers. Nevertheless, one of the issues on appeal is the applicability of deliberative process privilege to documents that are similar to documents Plaintiffs seek in the instant case.

(unpublished table decision)); see also Int'l Refugee Assistance Project v. Trump, 323 F.Supp.3d 726, 732 (D.Md. 2018) (granting a stay where "resolution of the issues before the Supreme Court will likely have a direct impact on the future course of the case").

Here, all four factors weigh in favor of staying the USMJ's Order compelling production of documents Defendants maintain are covered by the deliberative process privilege. A stay would promote judicial economy because the Karnoski defendants have appealed a similar motion to compel discovery of documents claiming deliberative process privilege. The Ninth Circuit stayed the district court's order compelling discovery of these documents until it issues a decision on the writ. There is significant overlap between the documents the Karnoski plaintiffs seek and the deliberative documents Plaintiffs seek in this case. Compare Karnoski, 328 F.Supp.3d at 1159 (requesting, among other things, discovery regarding "[t]he 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), with (Pls.' Mot. Compel ¶ 1) (requesting, among other things, "deliberative materials relating to the President's original July 2017 Tweets and August 2017 Memorandum banning transgender individuals from military service). As a result, staying the order compelling production of these documents purportedly covered by the deliberative process privilege until the resolution of the appeal in Karnoski could avoid duplicative litigation. Moreover, the length of the stay should be brief, given that the Ninth Circuit heard oral argument on the issue on October 10, 2018. Denying the stay would impose a burden on Defendants by requiring them to disclose deliberative documents that are currently being

withheld under a stay in the Ninth Circuit. While granting a stay may burden Plaintiffs by delaying the litigation, the Court has a strong interest in consistency with the parallel proceeding in the Ninth Circuit. Accord White, 969 F.Supp.2d at 461–62.

Thus, the Court, will grant Defendants' Motion to Stay the Magistrate's Order as to the Motion to Compel until the Ninth Circuit issues its opinion in In re Donald J. Trump.

III. CONCLUSION

For the foregoing reasons, the Court will overrule Defendants' Objections to the USMJ's Memorandum Opinion and Order (ECF No. 209) and grant Defendants' Motion to Stay the USMJ's Memorandum Opinion and Order (ECF No. 208), pending the decision on the petition for writ of mandamus in the Ninth Circuit. A separate order follows.

Entered this 30th day of November, 2018

/s/
George L. Russell, III
United States District Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

AIDEN STOCKMAN, et al.

Plaintiffs,

v.

DONALD J. TRUMP, et al.

Defendants.

CASE NO. 5:17-cv-01799-JGB-KKx

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION TO VACATE AMENDED ORDER ON JOINT STIPULATION TO MODIFY CASE SCHEDULE (ECF NO. 145)

[PROPOSED] ORDER

THIS MATTER comes before the Court upon the Motion to Vacate Amended Order on Joint Stipulation to Modify Case Schedule (ECF No. 145) (the "Motion") filed by Plaintiffs Aiden Stockman, Nicolas Talbott, Tamasyn Reeves, Jaquice Tate, John Does 1-2, Jane Doe, and Equality California (collectively, "Plaintiffs"). Having considered the Motion and all declarations and evidence submitted in support thereof, the opposition papers and all evidence submitted by Defendants, Plaintiffs' reply brief, and all evidence and argument presented at the hearing on the Motion, it is hereby:

ORDERED that the motion is **GRANTED** and the remaining deadlines set forth in the Court's Amended Scheduling Order, ECF No. 145, are suspended: (1) the May 24, 2019 deadline for initial designation of expert witnesses, (2) the June 14, 2019 deadline for designation of rebuttal expert witnesses, (3) the June 21, 2019 deadline to initiate discovery other than depositions, (4) the August 5, 2019 discovery cut-off, (5) the August 26, 2019 settlement conference deadline, (6) the September 16, 2019 deadline to file dispositive motions, (7) the October 21, 2019 dispositive motion hearing cut-off, (8) the January 27, 2020 final pretrial conference, and (9) the February 11, 2020 trial date.

It is **FURTHER ORDERED** that the parties are to meet and confer and file a proposed amended schedule to reset these deadlines within 21 calendar days after the Ninth Circuit rules on the Mandamus Petition in *Trump v. Karnoski*, No. 18-72159 (9th Cir.) (argued Oct. 10, 2018).

IT IS SO ORDERED.

Dated this _____ day of _____, 2019

_____
Hon. Jesus G. Bernal
United States District Judge