XAVIER BECERRA
Attorney General of California
MARK R. BECKINGTON
Supervising Deputy Attorney General
AMIE L. MEDLEY
Deputy Attorney General
State Bar No. 266586
LARA HADDAD
Deputy Attorney General
State Bar No. 319630
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6250
Fax: (213) 897-5775
E-mail: Lara.Haddad@doj.ca.gov
Attorneys for Plaintiff-Intervenor State of California

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RIVERSIDE DIVISION

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.

STATE OF CALIFORNIA,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 5:17-CV-01799-JGB-KKx

PLAINTIFF-INTERVENOR STATE OF CALIFORNIA'S NOTICE OF MOTION AND MOTION TO VACATE SCHEDULING ORDER; MEMORANDUM OF POINTS AND AUTHORITIES; [PROPOSED] ORDER

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

NOTICE OF MOTION TO VACATE SCHEDULING ORDER

TO ALL PARTIES HEREIN, THEIR COUNSEL OF RECORD, AND THE CLERK OF THE COURT:

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 above entitled Court, Plaintiff-Intervenor the State of California ("the State") hereby joins in the motion by Plaintiffs Aiden Stockman, Nicolas Talbott, Tamasyn Reeves, Jaquice Tate, John Does 1-2, Jane Doe, and Equality California (collectively, "Individual Plaintiffs") ("State of California" together with Plaintiff-Intervenor, "Plaintiffs"), and moves this Court pursuant to Rule 16 of the Federal Rules of Civil Procedure, for an order vacating the Amended Order on Joint Stipulation to Modify Case Schedule, issued February 28, 2019 (ECF No. 145), to allow Plaintiffs to properly conduct discovery once the Ninth Circuit has ruled on the mandamus petition currently pending in a related matter, *Trump v. Karnoski*, No. 18-72159 (9th Cir.) ("*Karnoski* petition"). On February 13, 2019, Plaintiffs entered into a stipulation modifying the discovery and trial schedule with Defendants Donald J. Trump, Patrick M. Shanahan, Joseph F. Dunford, Jr., Richard V. Spencer, Mark T. Esper, Heather A. Wilson, and Kirstjen M. Nielsen (collectively, "Defendants") (ECF No. 143), which set deadlines to designate expert witnesses and initiate discovery in May and June 2019. But because the disposition of the *Karnoski* petition directly impacts the discovery in this matter, and because Plaintiffs had anticipated that the Ninth Circuit would have ruled on the *Karnoski* Petition by this point but it has not done so, Plaintiff-Intervenor files the instant motion to vacate the current Scheduling Order.

This Motion is made following the conference of counsel for the Parties pursuant to L.R. 7-3, which took place on April 23, 2019.

This Motion is based on this Notice of Motion and Motion; the attached Memorandum of Points and Authorities; the Declaration of Amie L. Medley filed

herewith; the related Motion filed by Plaintiffs Stockman et al. (ECF No. 150), which is incorporated by reference below; oral argument at any hearing on the motion; and all other papers and pleadings filed herein.

Dated: May 6, 2019

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
MARK R. BECKINGTON
Supervisory Deputy Attorney General
AMIE L. MEDLEY
Deputy Attorney General

/s/ Lara Hadad
LARA HADDAD
Deputy Attorney General
Attorneys for Plaintiff-Intervenor State of California

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The State joins in the Motion to Vacate the Scheduling Order filed by the Individual Plaintiffs in this case (ECF No. 150), incorporated by reference into this Motion.[1] The State moves this Court for an order vacating the current case schedule ("Motion") in order to ensure that Plaintiffs are able to develop their case, conduct meaningful discovery, and avoid prejudice resulting from circumstances outside their control.

The parties in this matter previously stipulated to a discovery and trial schedule fully anticipating that the Ninth Circuit would soon resolve the discovery issues pending in the *Karnoski* petition, given the many months that had already passed since the Ninth Circuit heard arguments in that case. Plaintiffs do not wish to delay proceedings in the instant case, and have a substantive interest in pursuing it as efficiently and expeditiously as possible, given the ongoing harms suffered by Plaintiffs that the federal government's ban on military service by transgender individuals ("the Ban") has caused. However, the crucial discovery issues raised in the *Karnoski* petition remain unresolved, and the Ninth Circuit's ruling on those issues will directly impact Plaintiffs' own discovery requests and the development of their case in chief. Thus, Plaintiffs respectfully request the Court issue an order vacating the current Scheduling Order and ordering the parties in this matter to submit a joint proposal for a revised case schedule within 21 days after the Ninth Circuit rules on the *Karnoski* petition.

II. RELEVANT BACKGROUND

The instant case is one of several challenging the constitutionality of the Ban, and the majority of named defendants in each case are the same,[2] each represented

[1] Plaintiff-Intervenor also incorporates by reference into this Motion the Declaration of Adam S. Sieff ("Sieff Decl.") and the attached exhibits, filed by Plaintiffs Stockman et al. with their Motion, and refers to them throughout.

[2] Each case names as defendants Donald J. Trump, and various individuals

by the U.S. Department of Justice.[3] The State intervened as a plaintiff in this case to protect the interests of its citizens and to ensure the State may continue to comply with its own non-discrimination laws and maintain the strongest possible National Guard. ECF No. 52.

The plaintiffs and defendants in this case and in three other cases challenging the Ban (*Stone*, *Karnoski*, and *Doe*), entered into sharing agreements for the discovery produced in each case. The sharing agreement filed in the instant case states, "the parties to each of the four cases have agreed that discovery material that is produced by any party or non-party in any of the named actions will be deemed produced in all four of the cases." *See* Protective Order and Cross-Use Agreement (April 25, 2018), ECF No. 96 ("Cross-Use Agreement"). Defendants had specifically requested that Plaintiffs hold off on serving discovery requests that were duplicative of discovery requests in other actions. Sieff Decl., ¶ 2. Plaintiffs complied, understanding that they would be able to use the discovery produced in the other cases pursuant to the Cross-Use Agreement.

However, there have been multiple discovery disputes in *Karnoski* and *Stone*, where defendants in those cases raised the "deliberative process" and "presidential communication" privileges in response to most of the plaintiffs' requests— disputes that the defendants lost at the district court level in both cases. *See* Sieff Decl., Exhibits E-G. In each of those cases, the District Court ordered the defendants to produce the requested discovery. *Id.* The *Karnoski* plaintiffs then filed a petition for writ of mandamus challenging the District Court's discovery order. Declaration of Amie L. Medley ("Medley Decl."), Exhibit 1 attached thereto, "*Karnoski* Petition for Writ of Mandamus." The District Courts' orders in *Karnoski* and *Stone* requiring the production of the requested documents were then stayed pending a

from the United States Department of Defense. Each case also raises similar constitutional challenges to the Ban.

[3] Those cases are: *Karnoski v. Trump* (Case No. 2:17-cv-01297-MJP) ("*Karnoski*"); *Doe v. Trump* (Case No. 1:17-cv-01597-CKK) ("*Doe*"); and *Stone v. Trump* (Case No. 1:17-cv-02459-GLR) ("*Stone*").

Ninth Circuit decision on the *Karnoski* Petition, which was argued on October 10, 2018. Medley Decl., Exhibits 2 and 3 attached thereto, "*Karnoski* Stay Order" and "*Stone* Stay Order."

By early 2019, Plaintiffs in the instant case anticipated an imminent Ninth Circuit decision on the *Karnoski* Petition. Accordingly, on February 13, 2019, Plaintiffs entered into a stipulation with Defendants governing the current discovery and trial schedule, with upcoming dates in May and June 2019. *See* ECF No. 143. On February 15, 2019, this Court issued an Order adopting that stipulation. ECF No. 144.[4] However, on February 19, 2019, merely four days after entering into the stipulation in this case, the parties in *Karnoski* entered into a stipulation proposing that their current discovery and trial schedule be *vacated* and that the parties would submit a jointly proposed case schedule within 21 days after the Ninth Circuit rules on the *Karnoski* Petition. *See* Sieff Decl., Exhibit A. On February 20, 2019, the court in *Karnoski* issued an Order adopting the terms of that stipulation. *See* Sieff Decl., Exhibit C.

After several developments in the last several months, including the issuance of the Memorandum by the acting Deputy Secretary of Defense on March 12, 2019, concerning military service by transgender individuals ("March 12, 2019 Directive"), the State determined that additional discovery requests were necessary, and it issued its own requests for the production of documents on April 15, 2019. *See* Medley Decl., Exhibit 4 attached thereto, "Plaintiff-Intervenor State of California's First Set of Requests for Production."

The requests include the production of documents relevant to the harms to the State caused by the Ban, such as communications between Defendants and any state military department concerning the Ban's impact, documents relating to the

[4] On February 28, 2019, this Court issued an Amended Order changing one date in the schedule. *See* ECF No. 145.

formulation of the waiver process, and documents showing the number of service members expected to be impacted by the Ban. *See* Medley Decl., Exhibit 4.

The State's requests for production are similar in nature to the requests served by plaintiffs in *Karnoski*. Both sets of requests seek documents relating to the formulation of the Ban, the formulation of the waiver process, and the number of individuals that the Ban will impact. Medley Decl., Exhibit 5 attached thereto, "*Karnoski* Plaintiffs' Exhibit to Motion to Compel." In response to each and every production request by the *Karnoski* plaintiffs, the defendants claimed the deliberative process privilege, and these requests are included in the *Karnoski* Petition. Medley Decl., Exhibit 6 attached thereto, "*Karnoski* Plaintiffs' Motion to Compel."

Defendants in the instant case are very likely to claim the same privileges that they have asserted in *Karnoski* and *Stone*. During the April 23, 2019, teleconference between the parties, Defendants stated they reserved their right to assert the same contested privileges to withhold documents while the *Karnoski* Petition was pending. Sieff Decl., ¶8. On that call, Plaintiffs proposed vacating the current case schedule given the discovery issues, just as the parties had done in *Karnoski*, given the importance and relevance of the discovery sought to Plaintiffs' case and the approaching discovery deadlines, but Defendants declined. *Id.* at ¶¶8-10. Defendants suggested that the parties should wait to address the discovery and trial schedule in this case until they respond to Plaintiffs' requests for production. But those responses are not due until May 15, 2019, nine days before the deadline to disclose expert witnesses. Defendants' refusal was surprising, given the fact they had stipulated to vacate the schedule in *Karnoski* only four days after entering into the current schedule with Plaintiffs in this case.

Given the upcoming discovery deadlines and still-pending *Karnoski* petition, Plaintiffs filed this Motion.

III. ARGUMENT

The Court may modify a scheduling order upon a showing of good cause. Fed. R. Civ. P. 16(b)(4). In considering whether there is good cause for a schedule modification, the court considers whether the moving party has been diligent in pursuing its case, the necessity of the modification, the inconvenience to the court and opposing party, and the prejudice to the moving party if the modification is not granted. *U.S. v. 2.61 Acres of Land*, 791 F.2d 666, 671 (9th Cir. 1985) (citing *United States v. Flynt*, 756 F.2d 1352, 1359-62 (9th Cir. 1985)). Courts have found good cause where pending appeals will affect the current case. *See, e.g. Farris v. Seabrook*, 2011 WL 3665123, at 2 (W.D. Wash. Aug. 19, 2011) (finding good cause to modify the case schedule pending the decision from the Ninth Circuit, and further stating that "the Court and the parties would benefit from the direction from the Ninth Circuit on the issues raised in this case.").

Good cause to vacate the case schedule clearly exists here. Plaintiffs have been diligent in pursuing their case. In addition to the steps described by the Individual Plaintiffs in their Motion, the State has served its own discovery requests and is preparing to initially designate expert witnesses in compliance with the May 24, 2019, deadline set forth in the current Order.[5]

Further, modification of the current schedule is necessary. Though Defendants have not yet asserted the deliberative process privilege in response to Plaintiffs' discovery requests, given the similarities in nature between the pending requests and the requests in *Karnoski*, there is a strong likelihood that Defendants will do so. The State in particular has requested documents concerning the formulation of the exemption process described in the March 12, 2019 Directive

[5] Given the pending *Karnoski* petition and Defendants' likely privilege assertions, however, the State anticipates the need to designate additional expert witnesses after the current deadline, because it will not have received the requested discovery (in either this case or in the related cases) that will necessarily inform its choice of experts.

and the estimated number of service members impacted—the same types of production requests made by the *Karnoski* plaintiffs about a memorandum on military service by transgender individuals from the Secretary of Defense in 2018.[6] *See* Medley Decl., Exhibit 4. The information the State has requested is relevant to the harms the Ban has caused and will continue to cause to the State and to its citizens. The Ninth Circuit's ruling on the privilege issues directly affects how Defendants will respond to the pending requests for production, future discovery requests, and future depositions. Even if Defendants do not assert such privilege, Plaintiffs in this case have complied closely with the Cross-Use Agreement, which has informed Plaintiffs' production requests (as Plaintiffs have endeavored not to serve duplicative requests)—thus, Plaintiffs are awaiting the responses to the discovery requests in *Karnoski* and *Stone*, which are necessary to shape their case in chief.

Also, as Individual Plaintiffs argue in their Motion, the requested modification will not prejudice or inconvenience Defendants. Plaintiffs' proposed order contains the same terms that the parties in *Karnoski* agreed to, and which the judge in that case accepted. *See* Sieff Decl., Exhibits A, C. As noted above, the proceedings are also stayed in *Stone* while the parties await the Ninth Circuit's decision. Vacating the current schedule to conform with the schedule ordered in *Karnoski* will allow Defendants to streamline their discovery responses and eventual document production across all four cases. Vacating the schedule would also avoid the need for Defendants to adhere to the quickly-approaching discovery deadlines in this case against a background of uncertainty as to what universe of documents they will be required to produce.

Finally, Plaintiffs are at risk of substantial prejudice if the Motions to Vacate the Schedule are not granted. In addition to the reasons described by Individual

[6] And like *Karnoski* Plaintiffs, the State has also requested production concerning this 2018 memorandum.

Plaintiffs in their Motion, the State, with no way of knowing when and how the Ninth Circuit will rule on the *Karnoski* Petition, cannot rely on receiving *any* of the materials requested from Defendants (given the similarity of the requests to those made by the *Karnoski* Plaintiffs). Furthermore, Plaintiffs should not be forced to prepare their case without the benefit of documents that may be produced in the *Karnoski* and *Stone* cases, should the Ninth Circuit affirm the District Court's Order in *Karnoski* (documents they would be entitled to rely on under the sharing agreement). Without a modification to the current schedule, the State is at a severe risk of being able to properly prepare its case.

IV. CONCLUSION

For the foregoing reasons, the State joins in the Motion made by Individual Plaintiffs and respectfully requests an order vacating the current case schedule and ordering the parties to submit a joint proposal for a revised case schedule within 21 days after the Ninth Circuit rules on the *Karnoski* petition.

Dated: May 6, 2019

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
MARK R. BECKINGTON
Supervising Deputy Attorney General
AMIE L. MEDLEY
Deputy Attorney General

/s/ Lara Haddad
LARA HADDAD
Deputy Attorney General
Attorneys for Plaintiff-Intervenor State of California

CERTIFICATE OF SERVICE

Case Name:	**Stockman, Aiden, et al. v. Donald J. Trump, et al.**	No.	**5:17-CV-01799-JGB-KKx**

I hereby certify that on May 6, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

PLAINTIFF-INTERVENOR STATE OF CALIFORNIA'S NOTICE OF MOTION AND MOTION TO MODIFY SCHEDULING ORDER; MEMORANDUM OF POINTS AND AUTHORITIES; [PROPOSED] ORDER

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 6, 2019, at Los Angeles, California.

Amie L. Medley	*/s/ Amie L. Medley*
Declarant	Signature

53398612.docx

XAVIER BECERRA
Attorney General of California
MARK R. BECKINGTON
Supervising Deputy Attorney General
AMIE L. MEDLEY
Deputy Attorney General
LARA HADDAD
Deputy Attorney General
State Bar No. 319630
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6250
Fax: (213) 897-5775
E-mail: Lara.Haddad@doj.ca.gov
Attorneys for Plaintiff-Intervenor State of California

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RIVERSIDE DIVISION

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.

STATE OF CALIFORNIA,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 5:17-CV-01799-JGB-KKx

DECLARATION OF AMIE L. MEDLEY IN SUPPORT OF MOTION TO VACATE SCHEDULING ORDER

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

I, AMIE L. MEDLEY, declare:

1. I am a Deputy Attorney General at the California Department of Justice and one of the attorneys of record for Plaintiff-Intervenor State of California. The facts stated in this declaration are within my own personal knowledge, and if called upon to do so, I could and would competently testify thereto.

2. Attached hereto as Exhibit 1 is a true and correct copy of the Petition for Writ of Mandamus filed by the plaintiffs in *Trump v. Karnoski*, No. 18-72159 (9th Cir.) (argued Oct. 10, 2018) ("*Karnoski*").

3. Attached hereto as Exhibit 2 is a true and correct copy of the Ninth Circuit's Order issued in *Karnoski* on September 17, 2018, staying the District Court's order to Defendants to produce requested discovery, pending consideration of Defendants' petition for writ of mandamus.

4. Attached hereto as Exhibit 3 is a true and correct copy of the Memorandum Opinion of the United State District Court for the District of Maryland in *Stone v. Trump*, No. GLR-17-2459 (D. Md.) on November 30, 2018, granting a stay of that Court's order requiring Defendants to produce requested discovery.

5. Attached hereto as Exhibit 4 is a true and correct copy of Plaintiff-Intervenor State of California's First Set of Requests for Production, served on April 15, 2019.

6. Attached hereto as Exhibit 5 is a true and correct copy of the Requests for Production service by the plaintiffs in *Karnoski* on December 27, 2017, which were attached as Exhibit 2 to the Motion to Compel filed by the *Karnoski* plaintiffs on May 10, 2018.

7. Attached hereto as Exhibit 6 is a true and correct copy of the Motion to Compel filed by the plaintiffs in *Karnoski*, filed on May 10, 2018.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on May 6, 2019 in Los Angeles, California.

/s/ *Amie L. Medley*
Amie L. Medley
Deputy Attorney General

EXHIBIT 1

No. 18-_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES OF AMERICA; JAMES N. MATTIS, in his official capacity as Secretary of Defense; U.S. DEPARTMENT OF DEFENSE; U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN, Secretary of Homeland Security,
Petitioners-Defendants,

v.

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

RYAN KARNOSKI; CATHRINE SCHMID; D.L.; LAURA GARZA; HUMAN RIGHTS CAMPAIGN; GENDER JUSTICE LEAGUE; LINDSEY MULLER; TERECE LEWIS; PHILLIP STEPHENS; MEGAN WINTERS; JANE DOE; CONNER CALLAHAN; AMERICAN MILITARY PARTNER ASSOCIATION;
Real Parties in Interest-Plaintiffs,

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

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AND EMERGENCY MOTION FOR STAY PENDING CONSIDERATION OF THE PETITION

CHAD A. READLER
Acting Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

BRINTON LUCAS
Counsel to the Assistant Attorney General

MARK R. FREEMAN
MARK B. STERN
MARLEIGH D. DOVER
TARA S. MORRISSEY
BRAD HINSHELWOOD
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7261
950 Pennsylvania Ave., NW
Washington, DC 20530

CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

(1) Telephone numbers and addresses of the attorneys for the parties

Counsel for Petitioners Donald Trump, et al.:

Chad A. Readler (Chad.A.Readler@usdoj.gov)
Hashim M. Mooppan (Hashim.Mooppan@usdoj.gov)
Brinton Lucas (Brinton.Lucas@usdoj.gov)

Mark R. Freeman (Mark.Freeman2@usdoj.gov)
Mark B. Stern (Mark.Stern@usdoj.gov)
Marleigh D. Dover (Marleigh.Dover@usdoj.gov)
Tara S. Morrissey (Tara.Morrissey@usdoj.gov)
Brad Hinshelwood (Bradley.A.Hinshelwood@usdoj.gov)
Attorneys, Appellate Staff
Civil Division, Room 7261
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
(202) 353-9018

Counsel for Real Party in Interest-Intervenor Plaintiff

La Rond Baker (larondb@atg.wa.gov)
Colleen M. Melody (colleenm1@atg.wa.gov)
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206-464-7744

Counsel for Real Party in Interest- Plaintiffs

Vanessa Barsanti (vanessa.barsanti@kirkland.com)
Jordan M. Heinz (jheinz@kirkland.com)
James F. Hurst (james.hurst@kirkland.com)
Scott Lerner (scott.lerner@kirkland.com)
Daniel I. Siegfried (Daniel.siegfried@kirkland.com)
Joseph B. Tyson (Ben.Tyson@kirkland.com)
Stephen R. Patton (Stephen.patton@kirkland.com)
Kirkland & Ellis
300 North LaSalle
Chicago, IL 60654
312-862-2205

Tara Borelli (tborelli@lambdalegal.org)
Jon W. Davidson (jdavidson@lambdalegal.org)
Natalie Nardecchia (nnardecchia@lambdalegal.org)
Peter C. Renn (prenn@lambdalegal.org)
Lambda Legal Defense & Education Fund, Inc.
3325 Wilshire Blvd, Suite 1300
Los Angeles, CA 90010
213-382-7600

Sasha J. Buchert (sbuchert@lamdalegal.org)
Carl Charles (ccharles@lambdalegal.org)
Lambda Legal Defense & Education Fund, Inc.
1875 I Street, NW, 5th Floor
Washington, DC 20006
202-999-8083

Kara N. Ingelhart (kingelhart@lambdalegal.org)
Camilla B. Taylor (ctaylor@lambdalegal.org)
105 W. Adams St., Suite 2600
Chicago, IL 60603-6208
312-663-4413

Paul D Castillo (Pcastillo@lambdalegal.Org)
Lambda Legal Defense & Education Fund, Inc.
3500 Oak Lawn Avenue, Ste 500
Dallas, TX 75219
214-302-2216

Samantha Everett (samantha@newmanlaw.com)
Derek Alan Newman (Derek@newmanlaw.com)
Jason Sykes (jason@newmanlaw.com)
Newman & Du Wors LLP
2101 Fourth Avenue, Suite 1500
Seattle, WA 98121
206-274-2800

Peter E. Perkowski (peterp@outserve.org)
Outserve-SLDN, Inc.
c/o Perkowski Legal
445 S. Figueroa St., Suite 3100
Los Angeles, CA 90071
213-426-2137

(2) Facts showing the existence and nature of the emergency

As set forth more fully in the petition, the district court on Friday, July 27, 2018, ordered the President to comply with an extraordinarily burdensome discovery order within ten days—*i.e.*, by Monday, August 6, 2018. The court ordered the President to comb through presidential communications and deliberations encompassing approximately 9,000 documents to produce a privilege log "on a document-by-document basis," without even requiring plaintiffs to show that relevant information is unavailable through other avenues, to limit the scope of their discovery, or to make a focused demonstration of need. Additionally, it ordered all government defendants to produce every document they withheld solely under the deliberative process privilege—well over 19,000 documents—thus revealing the military's internal deliberations regarding its policy on military service by transgender

individuals. In so doing, the district court has created extremely serious separation-of-powers concerns, imposed an extraordinary burden on the President and the military, and intruded on the government's decision-making process regarding military policies. And it has done all of this even though the government has already produced over 30,000 documents in discovery, including a complete administrative record, and has a fully briefed preliminary-injunction appeal on the merits pending in this Court, which, if successful, would eliminate the justification for much if not all of the requested discovery.

This Court's immediate correction is required. This Court should grant a stay pending consideration of the petition for a writ of mandamus as expeditiously as possible, as well as an administrative stay. We request that the Court act on the administrative stay request by August 2, so that the Solicitor General will have sufficient time to seek Supreme Court review if necessary.

(3) When and how counsel notified

Government counsel notified plaintiffs' counsel by e-mail of the government's intent to file this petition and stay motion. Service will be effected by electronic service through the CM/ECF system and e-mail. Plaintiffs' counsel Jordan M. Heinz (for the individual and organizational plaintiffs) and La Rond Baker (for the State of Washington) indicated that plaintiffs oppose the stay motion.

(4) Submissions to the district court

The government requested a protective order to stay discovery, Doc.225, which the district court denied, Add.13-15. The government requested a protective order to preclude discovery directed at the President and discovery of information concerning presidential communications and deliberations, Doc.268, which the district court denied, Add.1-12. The district court also granted plaintiffs' motion to compel discovery of documents withheld under the deliberative process privilege, which the government opposed. *Id.* The district court ordered the government to turn over all documents withheld solely under the deliberative process privilege within ten days and to produce revised, "document-by-document" privilege logs within ten days, including for "documents, communications, and other materials" withheld under the presidential communications privilege. Add.11. On July 31, 2018, the government moved for a stay in district court. Doc.300. That motion remains pending.

Counsel for Defendants

CHAD A. READLER
Acting Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

BRINTON LUCAS
Counsel to the Assistant Attorney General

MARK R. FREEMAN
MARK B. STERN
MARLEIGH D. DOVER
TARA S. MORRISSEY
BRAD HINSHELWOOD
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7261
950 Pennsylvania Ave., NW
Washington, DC 20530

INTRODUCTION AND SUMMARY

Pursuant to the All Writs Act, 28 U.S.C. § 1651, and Rule 21 of the Federal Rules of Appellate Procedure, the federal government respectfully asks this Court to issue a writ of mandamus directing the district court to vacate its order of July 27, 2018, grant the government's motion for a protective order (Doc.268), and deny plaintiffs' motion to compel (Doc.245)—or, at a minimum, to stay the discovery at issue in the July 27 order until the government's pending appeal in *Karnoski v. Trump*, No. 18-35347 (9th Cir.), is resolved.

The July 27 order requires the government within ten days—*i.e.*, by August 6—to make particularized, document-by-document objections of executive privilege for a sweeping array of White House documents and communications and to produce to plaintiffs every single document—over 19,000 documents—it has withheld solely under the deliberative process privilege. Because that order would impose extraordinary burdens on the government while this mandamus petition is pending—especially given the impractical ten-day deadline, which plaintiffs did not even request—we also respectfully ask that the Court grant, as expeditiously as possible, a stay of the district court's order pending its consideration of this petition, as well as an administrative stay pending its consideration of this stay request. Because the district court's order threatens such an extraordinary disruption of the operations of the Executive Branch, we request that the Court act on the administrative stay request by

August 2, so that the Solicitor General will have sufficient time to seek Supreme Court review if necessary.[1]

The district court's July 27 order plainly warrants an exercise of this Court's mandamus jurisdiction. By any measure, the order is extraordinary: (1) it requires the President, on a ten-day deadline, to produce a "document-by-document" privilege log making particularized objections to thousands of documents—including draft presidential memoranda, emails among presidential advisers, communications between the President and military leadership, and more—that have been withheld under the presidential communications privilege, and to do so in a manner that may require disclosure of privileged information; and (2) it orders the Department of Defense, on the same arbitrary timeline, to disclose every single document withheld solely under the deliberative process privilege, totaling over 19,000 documents—including sensitive communications to Secretary of Defense James Mattis and his personal notes on those communications—without any particularized showing of need.

The district court's order is all the more extraordinary because this Court is already poised to review the legal premises of the court's ruling, thereby potentially obviating the need for much, if not all, of the discovery at issue. As justification for

[1] The government has asked the district court for a stay pending this Court's review (Doc.301), and we will promptly inform the Court of any action on that motion.

the discovery required by the July 27 order, the district court cited the reasoning in its earlier April 13 order, which preliminarily enjoined a new military policy regarding service by transgender individuals and declared that the policy would be subject to strict scrutiny. The government's expedited appeal from that April 13 order is fully briefed and is scheduled to be argued to this Court on October 10 (if not sooner, as the government has a pending motion to further expedite the argument). *See Karnoski v. Trump*, No. 18-35347. That appeal presents for this Court's review several issues central to the district court's discovery ruling, and the Court's disposition of the appeal may demonstrate that the discovery is improper in whole or in part.

The district court offered no reason for imposing this massive burden (let alone on an impossible schedule) while its April 13 order is under review. Among other things, this Court's resolution of the government's appeal will clarify what policy is actually at issue in this litigation. Although plaintiffs' amended complaint challenges a policy allegedly announced by the President in a 2017 memorandum, the President revoked that memorandum in light of a new policy proposed by Secretary Mattis in March 2018. Despite that revocation, the district court refused to dissolve the preliminary injunction it entered against the President's 2017 memorandum and enjoined the military's new 2018 policy. The district court's discovery order is predicated on its facially erroneous assertion that the 2018 policy is not a "new policy" but "rather a plan to implement" the 2017 memorandum, Add.14, which the court claimed had not been "substantively rescind[ed] or revoke[d]," Add.27. But in March

2018, the President expressly "revoke[d] [his 2017] memorandum" and "any other directive" to allow Secretary Mattis to implement the military's proposed policy, Add.70, which was based on the military's professional, independent judgment, Add. 70, 72-74. The substantive terms of the 2018 policy, moreover, expressly draw classifications based on the medical diagnosis of gender dysphoria, not based on transgender status, Add.73-74, as the district court wrongly asserted, Add.4-5.

The government's pending appeal further explains the errors in the key premises underlying the district court's July 27 discovery order. If this Court agrees that the district court has erroneously focused its analysis on a now-revoked presidential memorandum, much of the justification for the discovery order will disappear, as there will be no need to obtain discovery from the President regarding his now-revoked memorandum. Moreover, because the 2018 policy draws classifications based on gender dysphoria, rather than transgender status, the policy is subject to rational-basis review—not strict scrutiny, as the district court concluded. Add.7-8, 39. Indeed, the Supreme Court has never applied strict scrutiny in similar circumstances, and instead has stressed that deference is owed to the military's judgment. Again, if this Court agrees, an essential premise of the court's extraordinary discovery order will fall away. *See* Add.7-8. Under rational-basis review, there is no basis to probe internal Presidential and military deliberations. *See Hawaii v. Trump*, 138 S. Ct. 2392, 2420 (2018). And because the district court has enjoined both

the rescinded 2017 memorandum and the current policy announced in March 2018, plaintiffs will suffer no injury by awaiting this Court's guidance on these questions.

The Supreme Court's decision in *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004), leaves no doubt that the district court wrongly ordered intrusive and burdensome discovery from the White House under these circumstances. *Cheney* explains that mandamus is appropriate "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities," particularly when a court fails to "explore other avenues." *Id.* at. 382, 390. Nevertheless, the district court inexplicably declared that there was "no support" for the government's argument that the court should explore alternatives before requiring the President to assert executive privilege or respond to burdensome discovery requests. Add.10. Yet *Cheney* makes clear that there is, to the contrary, "no support" for the district court's approach of requiring the Executive Branch to "bear the burden" of "making particularized objections" to broad discovery requests—especially without even attempting to consider "other avenues." 542 U.S. at 388, 390.

The court's blanket order to the military to produce every single document withheld solely under the deliberative process—over 19,000 documents concerning military deliberations—is equally unsound. The court purported to analyze the relative interests in confidentiality and disclosure in a page and a half. Rather than explain why plaintiffs had demonstrated a need for any category or subcategory of documents, the court broadly declared that evidence concerning the military's

deliberations is "central to the litigation" because of "the searching judicial inquiry that strict scrutiny requires." Add.7. As explained, that critical assumption as to the appropriate standard of review is erroneous and currently on appeal. Moreover, 30,000 documents (totaling roughly 150,000 pages), including a complete administrative record, have already been produced.

Furthermore, the district court abdicated its duties in cursorily dispatching the military's interest in confidential deliberations. It rejected as "mere speculation" the military's concerns regarding the chilling effect on deliberations over "sensitive personnel and security matters" and the "direct negative impact to national security" from disclosure. Add.8. This reasoning is facially flawed given the sensitivity of the communications at issue, including those at the highest levels of the Department of Defense. The court could reach this incorrect conclusion only by issuing a sweeping categorical ruling, rather than performing a more particularized balancing inquiry.

In sum, the district court's order hinges on erroneous legal rulings that are already being reviewed by this Court and also threatens extraordinary intrusions that should not be permitted pending resolution of these issues. Independently, the court's disregard for the significant concerns raised by discovery requests to the President, and for the military's interest in confidential deliberations, warrants the exercise of mandamus authority. Because this order would impose enormous burdens on the government while this petition is pending—especially given the imminent (and impossible) ten-day deadline—we respectfully ask this Court to grant a stay of the

court's July 27 order pending the Court's disposition of this mandamus petition and an immediate administrative stay pending consideration of the stay motion.

STATEMENT

The factual and legal background of this litigation is set out in detail in the government's briefs in *Karnoski v. Trump*, No. 18-35347 (9th Cir.), which is currently set for oral argument on October 10. We summarize that background below as it relates to the district court's July 27 discovery order.

A. Background

1. In June 2016, then-Secretary of Defense Ashton Carter ordered the armed forces to revise their standards for accession into the military by transgender individuals, setting an implementation date of July 1, 2017. Doc.48-3. Longstanding military standards had presumptively barred transgender individuals from entering the military on the basis of transgender status. Doc.197, ex. 5, at 27, 48. The Carter policy altered these standards to turn on the medical diagnosis of "gender dysphoria," which involves a "clinically significant distress or impairment in social, occupational, or other important areas of functioning." Doc.224-2, at 12-13, 20. Under the Carter policy, a "history of gender dysphoria" was disqualifying unless a medical provider certified that the applicant had been stable for 18 months. Doc.48-3, attach., at 1. Similarly, a "history of medical treatment associated with gender transition" to address gender dysphoria—*e.g.*, hormone therapy, sex-reassignment surgery—was disqualifying absent 18 months of stability following the completion of treatment. *Id.*

While those who had transitioned could serve in their preferred gender, transgender individuals without a history of gender dysphoria could serve on the same terms as all others—*i.e.*, subject to the terms and conditions applicable to their biological sex. *Id.* at 1-2; Doc.224-2, at 4.

2. On June 30, 2017, the day before the Carter accession standards took effect, Secretary Mattis deferred their implementation until January 1, 2018, pending a five-month review of the issue. Doc.197, ex. 3.

On July 26, 2017, the President stated on Twitter that "[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." Add.77.

The President issued a memorandum in August 2017 calling for further study on this issue and directing the military to "return to the longstanding policy" on service by transgender individuals "until such time as a sufficient basis exists upon which to conclude that terminating [it] would not have . . . negative effects" on the military. Add.75. The President stressed, however, that the Secretary of Defense, in consultation with the Secretary of Homeland Security, could provide "a recommendation to the contrary that I find convincing" and "may advise me at any time, in writing, that a change to this policy is warranted." *Id.*

3. In February 2018, following an extensive review by a panel of experts, Secretary Mattis proposed a new policy that differed from both the Carter policy and

the longstanding policy addressed in the 2017 memorandum. Add.72-74. The Secretary recommended that the President "revoke" his 2017 memorandum, "thus allowing" the military to adopt the new policy. Add.74. In response, the President issued a memorandum on March 23, 2018, stating "I hereby revoke my [2017] memorandum . . . and any other directive I may have made with respect to military service by transgender individuals." Add.70.

The military's 2018 policy, like the Carter policy, does not operate on the basis of transgender status. *Both* policies allow transgender individuals without a history of gender dysphoria to serve, if they meet the standards associated with their biological sex. Add.74. And *both* policies restrict the ability of transgender individuals with a history of gender dysphoria to serve, though they differ as to the scope of the restrictions. Under the 2018 policy, individuals with a history of gender dysphoria may join the military if they can show 36 months of stability (as opposed to the Carter policy's 18 months) before applying and neither need nor have undergone gender transition. Add.73. Current servicemembers diagnosed with gender dysphoria may continue serving either in their preferred gender (if, under a reliance exemption, they received that diagnosis from a military medical provider while the Carter policy was in effect) or in their biological sex. *Id.*

B. Prior Proceedings

1. In August 2017, several individuals and organizations brought this constitutional challenge against the July 2017 Twitter announcement and the 2017

presidential memorandum, and they moved for a preliminary injunction. Docs.1, 30. The State of Washington intervened as a plaintiff. Doc.101.

In December 2017, the district court entered a preliminary injunction, enjoining the government "from taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement" on Twitter. Add.68. The parties filed cross-motions for summary judgment. Docs.129, 150, 194.

2. In March 2018, the government informed the district court that, at Secretary Mattis's request, the President had revoked the earlier 2017 presidential memorandum to allow the Secretary to implement his proposed new policy based on the advice of a panel of military experts, and accordingly moved to dissolve the preliminary injunction. Docs.213, 223. The motion explained that plaintiffs' challenge to the 2017 presidential memorandum was moot, that plaintiffs lacked standing to challenge the new policy, and they could not, in any event, demonstrate a likelihood of success on the merits of a challenge to the new policy. Doc.223.

Neither plaintiffs nor Washington amended their complaints to assert claims against the 2018 policy, but they nevertheless continued to urge the district court to grant summary judgment. Docs.227, 228. On April 13, 2018, the district court refused to dissolve the December 2017 injunction and instead extended it to enjoin the 2018 policy as well. Add.16-46.

The court held that plaintiffs' claims were not moot because the 2018 policy did not "substantively rescind or revoke" the 2017 presidential memorandum, but merely "implemented" its directives. Add.27. It held that strict scrutiny applies and directed the parties to "prepare for trial" on the questions of "whether, and to what extent, deference is owed" to the military and whether the challenged policy is constitutional. Add.45, 46. Although the court accepted the government's argument that the President cannot be subject to injunctive relief here, it held that the President could be subject to declaratory relief. Add.43-45.

3. The government appealed the district court's April 13 order. Briefing has been completed, and argument is currently scheduled for October 10, 2018 (and the government's motion to further expedite the argument is pending). *See Karnoski v. Trump*, No. 18-35347 (9th Cir.). Resolution of that appeal may effectively terminate the litigation or, at a minimum, sharply circumscribe its scope. The government's brief explains that the district court fundamentally erred in enjoining the 2018 policy on the basis of its earlier ruling with respect to the rescinded 2017 memorandum—the 2018 policy is manifestly not the same as the policy set forth in the 2017 memorandum. Gov't Br. 40-45. On the merits, plaintiffs cannot show that they are likely to succeed in a challenge to the 2018 policy, particularly in light of the deference afforded to professional military judgments. *Id.* at 19-40. Additionally, plaintiffs have failed to demonstrate irreparable harm resulting from that policy or standing to challenge it. *Id.* at 49-53.

C. Discovery

1. Notwithstanding the issuance of the 2018 policy and the pendency of the government's appeal in this Court, the district court has declared that discovery shall proceed. In light of the 2018 policy, the government moved to stay discovery pending resolution of its motion to dissolve the December 2017 preliminary injunction and any appeal. Doc.225. The court denied that motion and allowed discovery to proceed—discovery premised on the court's view that the March 2018 policy is simply an extension of the now-revoked 2017 policy, that strict scrutiny applies, and that principles of military deference depend on factual questions about the nature of the military's deliberative process. Add.13-15, 16-46. The court declared that "discovery related to President Trump is not 'irrelevant'" because the 2018 policy is not a "new policy" but "rather a plan to implement, with few exceptions, the directives of the 2017 Memorandum." Add.14. The court further stated that if the government "intend[s] to claim Executive privilege," it must "expressly make the claim" and "provide a privilege log" describing the privileged documents or communications without revealing information that is itself privileged. Add.15 (citing Fed. R. Civ. P. 26(b)(5)(i), (ii)).

2. Plaintiffs have served broad discovery requests on the government defendants, including the President. These requests include detailed interrogatories, requests for production of documents, and requests for admission directed to the defendants. Docs.246-1, 246-2, 246-3, 269-1, 269-2. To date, the government has

produced over 30,000 documents (corresponding to roughly 150,000 pages), including a complete administrative record, over the course of 16 document productions. In addition, plaintiffs are in a cross-use agreement with the plaintiffs in other cases, *see* Doc.183, and those other plaintiffs have deposed various military officials.

The discovery requests directed to defendants—including the President—purport to require cataloguing and disclosing the totality of the President's deliberations concerning his announcements in 2017 and 2018—including who was involved, when and how they were involved, and what advice was communicated to the President. For example, plaintiffs request:

- "All [d]ocuments and [c]ommunications" relating to "President Trump's consultation" with the military regarding "transgender military service." Doc.246-2, at 2 (Req. 7).

- "All [d]ocuments and [c]ommunications relating to" the 2017 presidential memorandum and the President's March 23, 2018 memorandum, including "all drafts." Doc.246-2, at 2 (Req. 6); Doc.269-2, at 3 (Req. 32).

- "[A]ll documents reviewed, considered, or relied upon in preparing" the President's March 23, 2018 memorandum. Doc.269-2, at 3 (Req. 32).

- "All [c]ommunications" between the President or the Executive Office of the President and the Department of Defense regarding "military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general." Doc.269-2, at 3 (Req. 34).

- Identification of "all individuals" with whom President Trump discussed "past, present, or potential future governmental policies on transgender military service." Doc.246-1, at 1-2 (Interrog. 4).

- An explanation of the "process [President Trump] used to formulate the Tweets [and] the Presidential Memorandum" and identification of "all sources of fact or opinion" that he "consulted [or] considered." Doc.246-1, at 2 (Interrog. 7).

The President did not provide substantive responses to plaintiffs' requests, and objected to plaintiffs' requests on several grounds, including the presidential communications privilege. *See* Docs.246-6, 246-7, 246-10, 279-1, 279-2, 279-3, 279-5, 279-6.

Plaintiffs also seek "[a]ll [d]ocuments and [c]ommunications" regarding the military's deliberative process. Secretary Mattis and the Department of Defense have substantively responded to Plaintiffs' requests, subject to privilege. *E.g.*, Docs.246-4, 246-5, 246-9. The Office of the Secretary of Defense withheld 19,770 documents solely on the basis of the deliberative process privilege. Add.101.

3. Following a dispute among the parties over issues of discovery directed to the President, the government moved for a protective order to preclude plaintiffs' discovery requests to the President. Doc.268. The government explained that plaintiffs' requests implicate the presidential communications privilege because they seek to "probe sensitive communications and deliberations related to [the President] and his advisors' formation of policy." *Id.* at 2-3. Relying on separation-of-powers principles, the government argued that discovery should not be directed to the President and that, in any event, the court should not force the President to formally invoke the presidential communications privilege at this juncture. *Id.* at 4-5, 9-12.

The government explained that plaintiffs must first exhaust other sources of non-privileged discovery and establish "a heightened, particularized need for the specific information or documents" by "at a minimum substantially narrow[ing] any requests directed at presidential deliberations." *Id.* at 1. The government provided plaintiffs with a privilege log for the President, *see* Doc.282; Add.80-81, 85-89, while explaining that under *Cheney*, it need not provide a log nor formally assert the privilege at this stage, Doc.268 at 8 n.3. The government later produced a supplemental privilege log, which covered a total of 9,000 documents grouped into 66 categories and which described the documents in a manner that avoided revealing privileged information. Add.81, 91-97. Each privilege log took at least ten White House staff members, including many attorneys, "hundreds of hours to complete." Add.81, 82.

4. Plaintiffs filed a separate motion to compel discovery withheld under the deliberative process privilege, noting that they had rejected the government's prior attempts "to resolve disputes about the deliberative process privilege on a document-by-document basis or based on a representative sample of documents." Doc.245, at 4. Instead, they argued that "the privilege has no application in this case." *Id.*

5. On July 27, 2018, the district court denied the government's motion for a protective order and granted plaintiffs' motion to compel. Add.1-12. The court briefly acknowledged that discovery against the President "involves 'special considerations,'" but nonetheless concluded that such discovery is permitted "where, as in this case, he is a party or has information relevant to the issues in dispute."

Add.9. It further ruled that the President has "failed to demonstrate that he need not invoke the presidential communications privilege" at this stage. Add.11. And it found "no support" for the government's argument that plaintiffs must exhaust other sources of non-privileged discovery, demonstrate a particularized need for the information, and narrow any discovery requests before the President must formally assert the privilege. Add.10.

The district court then ordered the government to "produce a privilege log identifying the documents, communications, and other materials they have withheld under the presidential communications privilege within 10 days." Add.11. And it made clear it deemed insufficient the privilege log previously submitted by the President, ordering the government to "produce revised privilege logs within 10 days" that "identify individual author(s) and recipient(s)" and "include *specific, non-boilerplate* privilege descriptions *on a document-by-document basis*." *Id.* "Only then," the court explained, "can the Court evaluate whether the privilege applies and if so, whether Plaintiffs have established a showing of need sufficient to overcome it." Add.10.

The court also ordered the government to produce, within ten days, all "documents that have been withheld solely under the deliberative process privilege." Add.11. Consistent with plaintiffs' refusal to consider the application of the privilege to documents or classes of documents, the court did not evaluate the applicability of the privilege with respect to any individual document or category of documents. Instead, after discussing the interests in disclosure and confidentiality in a page and a

half, the court ordered wholesale disclosure, declaring that evidence concerning the military's deliberations is "central to the litigation" because of "the searching judicial inquiry that strict scrutiny requires." Add.7. It dismissed out of hand the military's interest in confidentiality, declaring that concerns about the impact of blanket disclosure were "mere speculation." Add.8. And it gave no explanation for requiring compliance within ten days—a deadline that plaintiffs did not even request. Add.11.

ARGUMENT

I. This Court Should Exercise Its Mandamus Authority To Correct An Order That Disregards Established Separation-Of-Powers Principles, Imposes Intolerable Burdens On The Executive Branch, And Requires Disclosure Of Military Deliberations.

A. Mandamus Review Is Appropriate.

The Supreme Court in *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004), made clear that mandamus is appropriate "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Id.* at. 382. Yet the district court here ordered a substantial intrusion on the Executive Branch without even asking whether "other avenues" are available. *Id.* at 390. Moreover, compliance with the order would impose an enormous burden on the Executive Branch. *See id.* at 382. The requirement to disclose over 19,000 documents withheld under the deliberative process privilege similarly intrudes on the internal deliberations of the military and imposes an extraordinary burden. Add.101-07.

The factors that typically inform this Court's exercise of its mandamus jurisdiction—whether the petitioner has "no other adequate means" of relief or will suffer harm that is not correctable on appeal, and whether the order is "clearly erroneous as a matter of law," reflects a frequent error or "persistent disregard of the federal rules," or raises "new and important problems"—confirm that mandamus is warranted. *Bauman v. United States Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977). These factors "serve as guidelines," and "[n]ot every factor need be present at once" or even "point in the same direction." *Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010). Here, the government has "no other adequate means" to obtain relief from the district court's discovery demands. *Bauman*, 557 F.2d at 654. And the extraordinary burdens that these demands would impose on the President and the military—and the intrusion into their deliberations and consultations that would result—cannot be undone. *Id.* The district court's order is based on serious legal errors and cannot be reconciled with *Cheney*'s admonition that courts should be "mindful of the burdens imposed on the Executive Branch." 542 U.S. at 391; *see also Bauman*, 557 F.2d at 654-55.

B. The Discovery Order Is Premised On Issues That This Court Will Decide In The Government's Pending Appeal.

The premises of the July 27 order are set out in the district court's opinion and order of April 13. The government's appeal of that order is fully briefed and is currently scheduled for argument on October 10 (absent further expedition). *Karnoski*

v. Trump, No. 18-35347 (9th Cir.). The resolution of that appeal may eliminate the purported basis for the discovery and, at a minimum, will clarify the issues presented and the standard of review. The district court could not properly impose intrusive discovery obligations on the White House while this Court is reviewing the predicate of the discovery order, and the significant consequences of the court's error call for this Court's immediate exercise of its mandamus authority. *See In re United States*, 138 S. Ct. 443, 445 (2017) (per curiam) (vacating denial of mandamus and recognizing that "the Government's threshold arguments . . . , if accepted, likely would eliminate the need for the District Court to examine" the requested materials).

Among other things, the disposition of the appeal will clarify which policy is properly the subject of the court's review. The government's briefs explain that the governing policy is that established by Secretary Mattis in 2018, and that the policy should be reviewed on its own terms, without regard to any rescinded presidential directives. *See* Gov't Br. 40-49; Reply Br. 2-10; *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (upholding presidential proclamation based solely on its text and the "review process" that supported it, without regard to previous executive orders or past statements by the President, or any discovery into that deliberative process).

By contrast, the district court's decision to allow "discovery related to President Trump" is premised on the mistaken assumption that the 2018 policy announced by Secretary Mattis is "not a 'new policy,' but rather a plan to implement . . . the directives of the 2017 Memorandum." Add.14. That is incorrect, and much of the

requested discovery has nothing to do with the new policy. The district court's theory rests on its view that the President did not "substantively rescind or revoke" his 2017 memorandum and statements, Add.27—a conclusion that inexplicably disregards the President's unambiguous action "revok[ing]" the 2017 memorandum and "any other directive . . . with respect to military service by transgender individuals." Add.70. It also overlooks the substantive terms of the 2018 policy, which draws classifications based on the medical condition of gender dysphoria, rather than on transgender status. *Compare* Add.73-74, *with* Add.4-5.

The pending appeal will address these and other errors infecting the court's conclusion that strict scrutiny applies. That view has shaped the district court's discovery orders, and it is the linchpin of the court's ruling requiring the wholesale production of documents subject to the deliberative process privilege. The government's briefs explain that this standard is inapplicable and that "great deference" is owed to "the professional judgment of military authorities," *Winter v. NRDC*, 555 U.S. 7, 24 (2008). *See* Gov't Br. 19-40; *see also Hawaii*, 138 S. Ct. at 2421 (emphasizing that courts "cannot substitute [their] own assessment for the Executive's predictive judgments" on matters of "national security").

In affording deference to military decisions, courts do not reexamine *de novo* the "timing and thoroughness" of military studies and deliberations. Add.41; *cf. Hawaii*, 138 S. Ct. at 2421 (rejecting attempt to discredit "the thoroughness of [a] multi-agency review" on the ground that the final government "report 'was a mere 17 pages'").

Rather, it is sufficient that such questions have been "decided by the appropriate military officials" in "their considered professional judgment." *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986); *see also Hawaii*, 138 S. Ct. at 2419-20 (observing that judicial "inquiry into matters of . . . national security is highly constrained," even when evaluating "a 'categorical' . . . classification that discriminate[s] on the basis of sex") (discussing *Fiallo v. Bell*, 430 U.S. 787 (1977)); *Rostker v. Goldberg*, 453 U.S. 57, 71-72 (1981) (recognizing the "deference due" to the political branches' "choices among alternatives" in military affairs, even when those choices involved facial "gender-based" classifications).

The district court offered no reason for authorizing intrusive discovery while this Court considers the basis of the discovery orders. Still less did it justify its ten-day time frame. Mandamus is clearly warranted.

C. Mandamus Would Be Warranted Even Absent The Pending Appeal.

1. The order imposing discovery obligations on the President is squarely foreclosed by *Cheney.*

Plaintiffs have imposed sweeping discovery obligations regarding the President's conduct and deliberations as Commander-in-Chief, implicating material that is plainly subject to executive privilege. They seek, for example, all documents and communications relating to the President's consultation with the military regarding "transgender military service"; all communications between the President and the Department of Defense on broad topics such as "public policy regarding

transgender people" and "transgender people in general"; "all drafts" of the President's memoranda; and all documents "reviewed, considered, or relied upon in preparing" the 2018 memorandum. Doc.246-2, at 2 (Req. for Prod. 6, 7); Doc.269-2, at 3 (Req. for Prod. 32, 34).

Without regard to the serious separation-of-powers concerns raised by these demands, the district court commanded the President to produce a detailed privilege log that requires the White House to identify and individually address each of the 9,000 documents encompassed by the expansive discovery requests. Add.11; Add.80, 82. The court declared that the privilege log previously submitted by the White House, which identified 66 categories of documents grouped in a manner intended to avoid revealing privileged information, was insufficient. Without even considering whether "other avenues" are available, *Cheney*, 542 U.S. at 390, the court instead demanded that the government identify presidential communications and deliberations "on a document-by-document basis"—and that it do so within ten days. Add.11. Such an order is plainly improper.

a. The district court made no attempt to reconcile its order with *Cheney* and the separation-of-powers principles underlying that decision. Unlike other civil litigants, the President comes to court with unique "constitutional responsibilities and status." *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982). The "high respect" owed to the President "should inform the conduct of the entire proceeding, including the timing and scope of discovery." *Cheney*, 542 U.S. at 385 (quoting *Clinton v. Jones*, 520 U.S.

681, 707 (1997)). Litigation against the president does not proceed as it would "against an ordinary individual." *Id.* at 381-82 (quoting *United States v. Burr*, 25 F. Cas. 187, 192 (CC Va. 1807) (Marshall, C.J.)). Even assuming *arguendo* that some circumscribed discovery of the President could properly be permitted in extraordinary circumstances, the Court stressed, a court could countenance such intrusions only after assuring itself of the necessity of doing so. *See id.* at 389-90.

Cheney precludes the district court's license of wholesale—and unnecessary—discovery into the President's deliberations. Indeed, the Court reversed an order of the D.C. Circuit far less intrusive than the district court's order here. In *Cheney,* plaintiffs sought discovery from the Office of the Vice President as to the identities of participants in a presidential advisory group, in an effort to prove that the group included non-federal participants and was therefore subject to open-meeting and disclosure laws. 542 U.S. at 374. The district court rejected the government's efforts to narrow discovery, insisting that the Vice President must "winnow the discovery orders by asserting specific claims of privilege and making more particular objections." *Id.* at 389. The D.C. Circuit declined to address the merits of that ruling on mandamus review, even though "the scope of [the] requests [was] overly broad," and instructed that the Vice President "shall bear the burden of invoking executive privilege and filing objections to the discovery orders with detailed precision." *Id.* at 376-77.

The Supreme Court vacated the judgment of the court of appeals, declining to "require the Executive Branch to bear the onus of critiquing . . . unacceptable discovery requests line by line." *Cheney*, 542 U.S. at 388. Underscoring the separation-of-powers concerns at issue, the Court made clear that a court of appeals may invoke its mandamus authority "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Id.* at 382. The Court explained that discovery directed to the Office of the Vice President raised "special considerations" regarding "the Executive Branch's interests in maintaining the autonomy of its office," the "energetic performance" of the Commander-in-Chief's "constitutional responsibilities," and "[t]he high respect that is owed to the office of the Chief Executive." *Id.* at 382, 385 (alteration in original).

The Court explained that there is "no support for the proposition that the Executive Branch 'shall bear the burden' of invoking executive privilege with sufficient specificity and of making particularized objections" to broad discovery requests. *Cheney*, 542 U.S. at 388. "Executive privilege is an extraordinary assertion of power 'not to be lightly invoked,'" the Court continued, and once it is asserted, "coequal branches of the Government are set on a collision course" through adjudications of the privilege. *Id.* at 389. The Court explained that this "'constitutional confrontation between the two branches' should be avoided whenever possible," and it encouraged district courts to "explore other avenues" and consider "the choices available." *Id.* at 389-90.

A plaintiff, moreover, must "satisf[y] his burden of showing the propriety of the requests." *Cheney*, 542 U.S. at 388. The Court noted that even in a criminal case, a court must find a specific "need" for information that implicates presidential deliberations before it undertakes to balance the competing needs of the Executive Branch. *Id.* (discussing *Nixon v. United States*, 418 U.S. 683, 713 (1984)). When privileged material is sought in a civil case, the burden to overcome the privilege is even greater, as "the right to production of relevant evidence in civil proceedings does not have the same 'constitutional dimensions'" or "share the urgency or significance" of evidence in criminal prosecutions. *Id.* at 384.

b. Plaintiffs' requests are far more intrusive than those in *Cheney*, and they target not the Vice President, but the President himself. Nevertheless, the district court required the President to object to these requests "line-by-line," without even attempting to explore "other avenues." *Cheney*, 542 U.S. at 388, 390. This course is particularly improper where, as here, the government's pending appeal will clarify the issues presented and the governing standard of review, and may eliminate the purported basis for the discovery altogether. *See id.* at 390.

At the very least, the district court should have made some effort to narrow plaintiffs' broad discovery requests, consider the non-privileged discovery that is available, and ask whether plaintiffs have demonstrated a particularized need. *See Cheney*, 542 U.S. at 388-90. Instead, the court inexplicably declared that there was "no support" for the government's argument that such steps are required. Add.10. But

the Supreme Court in *Cheney* could not have been more clear: It is the district court's approach that has "no support." 542 U.S. at 388.

Moreover, the district court's order reflects no regard for "the burdens imposed on the Executive Branch." *Cheney*, 542 U.S. at 391. The burden of producing a highly specific, "document-by-document" privilege log in response to these broad requests would be extraordinary. Approximately 9,000 documents are at issue, and the White House has already provided a detailed privilege log for these documents that spans 66 categories of documents and describes the nature of the documents "without revealing information [that is] itself privileged." Fed. R. Civ. P. 26(b)(5)(A)(ii); *see* Add.80, 82. It took White House staffers and attorneys "hundreds of hours to complete" both the initial version of the privilege log and the supplemental log. Add.81, 82. The district court's order would require creation of a new, highly specific privilege log on a document-by-document basis—that is, a log with approximately 9,000 individual entries. Add.11, 80, 82. *Cheney* forecloses this "line-by-line" critique of privileged information and documents, which would plainly "interfer[e] with a coequal branch's ability to discharge its constitutional responsibilities." 542 U.S. at 388.

Quite apart from this wholly unwarranted burden, there is a significant risk that the court's order, which requires a highly specific privilege log, will itself require disclosure of privileged material. *See* Add.83 (noting that prior privilege log was designed to describe materials without disclosing privileged information). For

example, the district court specified that the log "must . . . identify individual author(s) and recipients," together with the date of each document or communication. Add.11. The presidential communications privilege, however, protects the President from being compelled to disclose the identities of the particular advisors from whom he sought advice on particular subjects, or the timing or sequence of those deliberations. The privilege is broad, protecting the "confidentiality of Presidential communications in performance of the President's responsibilities." *Nixon*, 418 U.S. at 711. It protects facts and "sources of information," as well as "documents or other materials that reflect presidential decisionmaking and deliberations." *In re Sealed Case*, 121 F.3d 729, 744, 750 (D.C. Cir. 1997). Disclosing the authors and recipients of communications and deliberations in formulating military policy would reveal the President's deliberative process in a field in which concerns about the "confidentiality of Presidential communications in performance of the President's responsibilities," *Nixon*, 418 U.S. at 711, are at their zenith. *See* Add.83.

c. The district court's order is erroneous for the additional reason that, because the ultimate injunctive and declaratory relief requested is not available against the President, he is not properly named as a party defendant for purposes of discovery. *See* Add.9 (noting that the President "is a party"). The Supreme Court has long held that it has "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866); *see also Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (plurality op.) (explaining that "injunctive relief

against the President himself is extraordinary"). Thus, even the district court recognized that injunctive relief against the President in this case is foreclosed. Add.43-45. The court erred, however, by failing to recognize (Add.43-45) that this principle likewise precludes claims for declaratory relief against the President. *See, e.g.*, *Franklin*, 505 U.S. at 827 (Scalia, J., concurring) ("[W]e cannot issue a declaratory judgment against the President."); *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) ("[S]imilar considerations regarding a court's power to issue [injunctive] relief against the President himself apply to [a] request for a declaratory judgment."); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) ("[C]ourts . . . have never submitted the President to declaratory relief.").

2. The district court impermissibly required wholesale disclosure of military deliberations.

Even apart from the pendency of the government's appeal, the Court would properly exercise mandamus review to correct the district court's ruling on the deliberative process privilege. In cursory fashion, that ruling compels disclosure of *all* documents that the government declined to produce solely on grounds of deliberative process privilege—over 19,000 documents from the Office of the Secretary of Defense alone—thereby ordering the blanket disclosure of military deliberations without discussing a single document or category of documents.

The deliberative process privilege is a subset of executive privilege and protects from disclosure documents "reflecting advisory opinions, recommendations and

deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). "[I]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny." *National Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988) (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)).

The privilege is qualified and may be overcome if a litigant's "need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *FTC v. Warner Communc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (per curiam). In assessing a claim under the privilege, a court considers "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.*

The district court purported to apply these factors to tens of thousands of documents in a page and a half, declaring that these considerations required disclosure of *all* documents withheld under the deliberative process privilege alone. Add.7-8. This approach was improper. Just as application of "the deliberative process privilege is . . . dependent upon the individual document and the role it plays in the administrative process," *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980), so too is the analysis undertaken in determining whether the privilege is overcome. The *Warner* factors reflect the need for granular consideration

of documents, as the precise balancing of those factors varies from document to document depending on their degree of relevance to plaintiffs' claims, the availability of other sources of evidence, and the chilling effect of disclosure on government deliberations. The district court's decision to conduct the *Warner* balancing en masse, rather than assessing specific documents or categories of documents, requires this Court's intervention.

The district court further erred both in its general negation of the government's interest in confidentiality and its all-inclusive assumption of plaintiffs' demonstrated need. Despite never questioning the deliberative nature of any of the documents, the court dismissed concerns regarding the impact of disclosure as "mere speculation." Add.8. It then declared that the government must identify "specific, credible risks which cannot be mitigated by the existing protective order in this case." *Id.* But it is unclear why the court disparaged the government's concerns as speculative, or what "specific" risks it believed would satisfy its standard. As the Supreme Court has explained, the deliberative process privilege exists because disclosure of deliberative documents chills the willingness of government officials to engage in "open, frank discussion between subordinate and chief concerning administrative action." *Mink*, 410 U.S. at 87. Those risks are heightened where, as here, the challenged action relates to military readiness and national security as well as implicates sensitive and controversial issues. And they are further exacerbated by the district court's sweeping order, which would indiscriminately expose every document remotely connected to

the deliberative process here. It is far from "speculative" to say that laying bare the entirety of a lengthy process of formulating multiple policies by military officials will have a substantial chilling effect on future internal deliberations, and the court's two-sentence dismissal of these consequences only illustrates its failure to grapple with the core concerns of the privilege.

The district court's reference to the protective order illustrates its fundamental misunderstanding of the importance of the privilege to government deliberations. It has never been thought that privileges, including the deliberative process privilege, are adequately protected by limiting disclosure to adversaries in litigation. A protective order neither eliminates the chilling effect created by disclosures of deliberative materials, nor justifies disregarding the government's interest in maintaining the documents' confidentiality. *Cf. Perry v. Schwarzenegger*, 591 F.3d 1147, 1163-64 (9th Cir. 2009) (granting defendants' mandamus petition and overruling a district court's order compelling the defendants to produce documents whose disclosure threatened to "inhibit[] internal campaign communications that are essential to effective association and expression," while emphasizing that "[a] protective order limiting dissemination of this information will ameliorate but cannot eliminate these threatened harms").

The district court's radical discounting of the government's interest in confidentiality was compounded by its cursory consideration of plaintiffs' need. In considering a massive disclosure of military deliberations, the court was required to give serious consideration to plaintiffs' demonstrated need for the documents, judged

by reference to the voluminous information already in their possession. A general declaration that all documents relating to the military deliberations must be "relevant" is plainly inadequate. Add.7. Even a cursory review of the privilege logs should have given the court pause. Many of the documents involve high-level discussions within the Department of Defense, or even the Secretary's own handwritten notes—documents where the government's interest in confidentiality and the risk of chilling future deliberations are at their highest. *See* Add. 101-02 (noting examples of documents, including a draft memorandum to the President containing the Secretary's handwritten notes and a memorandum from the Undersecretary for Personnel and Readiness to the Deputy Secretary of Defense and Vice-Chairman of the Joint Chiefs of Staff). Moreover, although plaintiffs here challenge neither decision, some of the documents record deliberations preceding the Secretary's decision to defer implementation of the Carter policy, while others predate the formulation of the Carter policy in the first instance. *See id.* (noting as examples a June 28, 2017 memorandum from the Deputy Secretary to the Secretary and cover letter with the Secretary's handwritten notes, as well as pre-decisional documents prepared under Secretary Carter). The district court never explained the relevance of any of these documents, much less how the plaintiffs have made out the showing of need required to overcome the privilege.

The court's assumption that plaintiffs had demonstrated a need sufficient to outweigh the important interests in confidentiality is particularly striking because it

never asked plaintiffs to show why the discovery they have already obtained is inadequate. The government has produced over 30,000 documents totaling roughly 150,000 pages, including a complete administrative record, over the course of 16 document productions, and has responded to written interrogatories. In addition, plaintiffs in related litigation have deposed numerous military officials, and plaintiffs here may rely on those depositions. *See* Doc.183. Before contemplating an order of this kind, it was incumbent on the district court to ascertain that the discovery that plaintiffs have already received did not diminish or eliminate the need for one or more categories of the privileged documents.

II. This Court Should Grant A Stay Pending Review Of The Petition And An Immediate Administrative Stay.

This Court should also stay the district court's order pending its consideration of this petition and grant an administrative stay pending its consideration of the stay motion. This Court commonly grants stays pending disposition of a writ of mandamus, including in cases involving challenges to discovery orders. *See, e.g.*, Order, *In re United States of America*, No. 17-72917 (Oct. 24, 2017) (staying discovery and record supplementation); *Barton v. U.S. Dist. Court for Cent. Dist. of Cal.*, 410 F.3d 1104, 1106 (9th Cir. 2005); *Calderon v. U.S. Dist. Court for the N. Dist. of Cal.*, 98 F.3d 1102, 1104 (9th Cir. 1996). A stay is equally appropriate here.

A stay is required to prevent the violation of established separation-of-powers principles that will occur if the President is required to respond to plaintiffs' discovery

requests with a privilege log on a "document-by-document basis" that may require disclosure of privileged information, and to prevent disclosure of over 19,000 privileged communications regarding the military's deliberative process. Add.11. The burdens of attempting to comply with the district court's order are extraordinary. *See* Add.82-83, 102-04. The government accordingly asks that the Court issue, as expeditiously as possible, a stay of the district court's order pending its consideration of the mandamus petition, as well as an administrative stay pending its consideration of the stay motion. We respectfully ask that the Court rule on the administrative stay request by August 2, to allow the Solicitor General sufficient time to seek Supreme Court review if necessary.

No countervailing harm will result from granting a stay while this Court considers the government's petition. Plaintiffs already have obtained a preliminary injunction, and thus face no harm in the interim. Moreover, the district court has already ruled on the parties' cross-motions for summary judgment, and trial is not scheduled to begin until April 2019.

Finally, a stay is particularly appropriate given that the legal premises of the discovery ruling are currently on appeal to this Court, where argument is currently scheduled for October 10 (and may be expedited further).

CONCLUSION

For the foregoing reasons, this Court should grant an immediate administrative stay and grant a stay pending resolution of the petition for mandamus. Additionally,

this Court should grant the petition for writ of mandamus; vacate the order of July 27, 2018; and order the district court to grant the government's motion for a protective order (Doc.268) and deny plaintiffs' motion to compel (Doc.245)—or, at a minimum, to stay all such discovery until the government's pending appeal is resolved.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

BRINTON LUCAS
Counsel to the Assistant Attorney General

MARK R. FREEMAN
MARK B. STERN
MARLEIGH D. DOVER

s/ Tara S. Morrissey
TARA S. MORRISSEY
BRAD HINSHELWOOD
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7261
950 Pennsylvania Ave., NW
Washington, DC 20530
202-353-9018

AUGUST 2018

STATEMENT OF RELATED CASES

Petitioners are aware of one related appeal in this same matter, *Karnoski v. Trump*, No. 18-35347 (9th Cir), which raises issues closely related to those raised in this petition.

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the limit of Ninth Circuit Rule 21-2(c) and 32-3(2) because it totals 8,358 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this petition complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 14-point Garamond font.

s/ Tara S. Morrissey
TARA S. MORRISSEY

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2018, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service has been accomplished via e-mail to the following counsel:

Counsel for Real Party in Interest-Intervenor Plaintiff:

La Rond Baker (larondb@atg.wa.gov)
Colleen M. Melody (colleenm1@atg.wa.gov)

Counsel for Real Party in Interest- Plaintiffs:

Vanessa Barsanti (vanessa.barsanti@kirkland.com)
Jordan M. Heinz (jheinz@kirkland.com)
James F. Hurst (james.hurst@kirkland.com)
Scott Lerner (scott.lerner@kirkland.com)
Daniel I. Siegfried (Daniel.siegfried@kirkland.com)
Joseph B. Tyson (Ben.Tyson@kirkland.com)
Stephen R. Patton (Stephen.patton@kirkland.com)
Tara Borelli (tborelli@lambdalegal.org)
Jon W. Davidson (jdavidson@lambdalegal.org)
Natalie Nardecchia (nnardecchia@lambdalegal.org)
Peter C. Renn (prenn@lambdalegal.org)
Sasha J. Buchert (sbuchert@lamdalegal.org)
Carl Charles (ccharles@lambdalegal.org)
Kara N. Ingelhart (kingelhart@lambdalegal.org)
Camilla B. Taylor (ctaylor@lambdalegal.org)
Paul D. Castillo (pcastillo@lambdalegal.org)
Samantha Everett (samantha@newman.com)
Derek Alan Newman (Derek@newmanlaw.com)
Jason Sykes (jason@newmanlaw.com)
Peter E. Perkowski (peterp@outserve.org)

The district court has been provided with a copy of this petition for writ of mandamus.

s/ *Tara S. Morrissey*
TARA S. MORRISSEY

EXHIBIT 2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: DONALD J. TRUMP, in his official capacity as President of the United States; et al., DONALD J. TRUMP, in his official capacity as President of the United States; et al., Petitioners, v. UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SEATTLE, Respondent, RYAN KARNOSKI; et al., Real Parties in Interest.	No. 18-72159 D.C. No. 2:17-cv-01297-MJP Western District of Washington, Seattle ORDER

Petitioners' emergency motion for stay pending consideration of the petition for a writ of mandamus is GRANTED, until further order of this court, while we consider the merits of the petition for writ of mandamus.

FOR THE COURT:
MOLLY C. DWYER

CLERK OF COURT

By: Omar Cubillos
Deputy Clerk
Ninth Circuit Rule 27-7

EXHIBIT 3

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

EXHIBIT 4

XAVIER BECERRA
Attorney General of California
MARK R. BECKINGTON
Supervising Deputy Attorney General
LARA HADDAD
Deputy Attorney General
AMIE L. MEDLEY
Deputy Attorney General
State Bar No. 266586
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6226
Fax: (213) 897-5775
E-mail: Amie.Medley@doj.ca.gov
Attorneys for Plaintiff-Intervenor State of California

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RIVERSIDE DIVISION

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.

STATE OF CALIFORNIA,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, et al.,

Defendants.

5:17-CV-01799-JGB-KKx

PLAINTIFF-INTERVENOR STATE OF CALIFORNIA'S FIRST SET OF REQUESTS FOR PRODUCTION

PROPOUNDING PARTY: Plaintiff-Intervenor State of California

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

SET No: One

Pursuant to Federal Rule of Civil Procedure 34, Plaintiff-Intervenor the State of California, by its counsel, hereby requests that Defendants respond to the following (the "Requests"), separately and fully, in writing, and serve a copy of such answers upon counsel for Plaintiff within thirty (30) days from the date of service. Plaintiffs also hereby request that Defendants produce for inspection and copying at the Office of the Attorney General, 300 S. Spring Street, Suite 1702, Los Angeles, CA 90013, within thirty (30) days after service of this Request, originals and any and all copies of the documents described below. Defendants are requested to produce all documents in their possession, custody or control, and in the possession, custody or control of their agents and experts, including non-privileged documents in the possession, custody or control of their attorneys.

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.

DEFINITIONS

1. "March 12, 2019 Directive" shall refer to the document issued by David L. Norquist, acting Deputy Secretary of Defense, on March 12, 2019 with the Subject "Directive-type Memorandum (DTM)-19-004 – Military Service by Transgender Persons and Persons with Gender Dysphoria."

2. "February 22, 2018 Memorandum" 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."

3. 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.

4. 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.

5. The term "President" shall mean President Donald J. Trump (and also Donald J. Trump before his inauguration to the Presidency), the office of President Donald J. Trump, and all people working for and on behalf of President Donald J. Trump or the office of the President Donald J. Trump, 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.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Any and all documents and communications between the President, the Department of Defense, the Department of Homeland Security, or any Service Branch of the United States Military with any state, state's military department, or any other state agency relating to the implementation of the policy announced in the March 12, 2019 Directive.

2. Any and all documents and communications between the President, the Department of Defense, the Department of Homeland Security, or any Service Branch of the United States Military with any state, state military department, or other state agency relating to the formulation and/or implementation of the policy announced in the February 22, 2018 Memorandum.

3. Any and all documents and communications relating to the cost or estimated cost to states, state military departments, or other state agencies of the formulation and/or implementation of the policy announced in the March 12, 2019 Directive.

4. Any and all documents and communications relating to the cost or estimated cost to states, state military departments, or other state agencies of the formulation and/or implementation of the policy announced in the February 22, 2018 Memorandum.

5. Any and all documents and communications, including but not limited to, studies, memoranda, or reports relating to the impact on states, state military departments, or other state agencies of the formulation and/or implementation of the policy announced in the March 12, 2019 Directive.

6. Any and all documents and communications, including but not limited to, studies, memoranda, or reports relating to the impact on states, state military departments, or other state agencies of the formulation and/or implementation of the policy announced in the February 22, 2019 Memorandum.

7. Any and all documents and communications related to the formulation and/or implementation of Attachment 3, Procedures—Section I: Exempt Individuals, pages 7-8, of the March 12, 2019 Directive.

8. Any and all documents and communications related to the formulation and/or implementation of Section C, Paragraph 3, "Exempting Current Service Members Who Have Already Received a Diagnosis of Gender Dysphoria," page 43, of the Department of Defense Report and Recommendations on Military Service by Transgender Persons of the February 22, 2018 Memorandum.

9. Any and all documents and communications related to the numbers of service members or estimated numbers of service members who currently qualify or will qualify as exempt as provided for in the March 12, 2019 Directive.

10. Any and all documents and communications related to the numbers of service members or estimated numbers of service members who currently qualify or will qualify as exempt as provided for in the February 22, 2018 Memorandum.

11. Any and all documents and communications relating to the formulation, definition and/or implementation of Attachment 3, Procedures—Section III: Additional Policy Guidance, paragraphs (a) and (b), pages 10-11, of the March 12, 2019 Directive.

12. Any and all documents and communications relating to formulation, definition and/or implementation of the waiver for service members diagnosed with gender dysphoria referenced throughout the Department of Defense Report and Recommendations on Military Service by Transgender Persons in the February 22, 2018 Memorandum.

13. Any and all documents and communications relating to the numbers of service members or estimated numbers of service members, currently stationed in California and California residents currently stationed elsewhere, who qualify and/or would qualify for a waiver as provided for in Attachment 3, Procedures—

Section III: Additional Policy Guidance, paragraphs (a) and (b), pages 10-1, of the March 12, 2019 Directive.

14. Any and all documents and communications relating to the numbers of individuals or estimated numbers of service members, currently stationed in California and California residents currently stationed elsewhere, who qualify and/or would qualify under the medical policy as provided for in Attachment 3, Procedures—Section III: Additional Policy Guidance, paragraphs (a) and (b), pages 10-11 of the March 12, 2019 Directive.

15. Any and all documents and communications relating to any request for or action on waivers of enlistment or commissioning criteria for transgender people between July 1, 2010 and the present.

Dated: April 15, 2019

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
MARK R. BECKINGTON
Supervising Deputy Attorney General
LARA HADDAD
Deputy Attorney General

AMIE L. MEDLEY
Deputy Attorney General
Attorneys for Plaintiff-Intervenor State of California

DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **Stockman, Aiden, et al. v. Donald J. Trump, et al.**
Case No.: **5:17-CV-01799-JGB-KKx**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 15, 2019, I served the attached **PLAINTIFF-INTERVENOR STATE OF CALIFORNIA'S FIRST SET OF REQUESTS FOR PRODUCTION** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

Andrew R. Carmichael
Andrew.E.Carmichael@usdoj.gov
Matthew Skurnik
Matthew.Skurnik@usdoj.gov
Robert M. Norway
Robert.M.Norway@usdoj.com
United States Department of Justice
Civil Division, Federal Programs Branch
950 Pennsylvania Avenue NW, Rm. 7326
Washington, D.C. 20530

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 15, 2019, at Los Angeles, California.

Colby Luong
Declarant

Signature

SA2017109391
53343907.docx

EXHIBIT 5

Exhibit 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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

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

REQUESTS FOR PRODUCTION

1. All Documents and Communications related to the Policy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DEFINITIONS AND INSTRUCTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: December 29, 2017

/s/ Jordan M. Heinz

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

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

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

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

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

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

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

s/ Jordan M. Heinz

EXHIBIT 6

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

PLAINTIFFS' MOTION TO COMPEL DEFENDANTS' DISCOVERY WITHHELD UNDER THE DELIBERATIVE PROCESS PRIVILEGE

NOTE ON MOTION CALENDAR:
May 25, 2017

ORAL ARGUMENT REQUESTED

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Rules

The Court's summary judgment opinion crystalized two inquiries that are central to this case and directed the parties to "proceed with discovery" to answer them: (1) whether Defendants are entitled to any judicial deference based on the deliberative process they undertook following President Trump's July 2017 tweets and August 2017 Presidential Memorandum, and (2) whether that deliberative process reveals any constitutionally adequate justification to survive strict scrutiny. (*See* Dkt. No. 233 (April 13, 2018 Op. & Order (hereinafter "MSJ Op.")) at 31.) While these questions place Defendants' deliberative process in the spotlight, Defendants seek to hide their deliberations from Plaintiffs and from the Court. Defendants invoke the deliberative process privilege in response to every single one of Plaintiffs' interrogatories and RFPs, citing it as the sole basis to withhold or redact approximately 15,000 responsive and otherwise non-privileged documents. These privilege claims fail for four reasons:

First, the deliberative process privilege exists to shield governmental decision-making in cases where the deliberative process is collateral to a plaintiff's claims. Where, as here, the claims put the deliberative process squarely in issue and challenge the government's intent and conduct in generating a policy, the privilege does not apply.

Second, Defendants themselves have put their deliberative process in issue by seeking judicial deference on the basis of that process. Plaintiffs cannot use the deliberative process as a sword against Plaintiffs' claims while using the privilege as a shield to prevent discovery into those deliberations.

Third, even if the privilege did apply here—and it does not—the facts and circumstances of this case favor disclosure. Given the government's role as defendant in this case, the constitutional claims at issue, and the importance of this discovery to those claims, the Ninth Circuit's balancing test weighs strongly in favor of overcoming the privilege and compelling discovery. The privilege must yield.

Fourth, even setting aside whether Defendants can invoke the privilege, their privilege logs make it clear that they have improperly asserted the privilege over thousands of documents that fall outside the privilege's scope. The privilege only applies to pre-decisional, deliberative, and non-factual materials. Nevertheless, Defendants assert the privilege over thousands of documents that

were (1) created *after* the President's tweets; (2) relate only to *how* to implement the Ban, not *whether* to do so; or (3) contain only factual data. None of these categories of documents can be withheld from production regardless of whether the privilege is applicable in this case.

BACKGROUND

A. The Importance of Defendants' Deliberative Process to Plaintiffs' Claims.

The Court issued a preliminary injunction against the Transgender Military Ban on December 11, 2017. (Dkt. No. 10 at 2.) While Plaintiffs' motion for summary judgment was pending, Defendants announced the "Implementation Plan" for the policy directives set forth in the President's tweets and August 2017 Presidential Memorandum, which Defendants argued constituted a new and different policy from the Ban. (Dkt. No. 226 (hereinafter "Defs. Supp. Opp'n") at 1-2.) The Court was not persuaded, holding that the Implementation Plan threatened the "very same violations" that warranted a preliminary injunction in the first place. (Dkt. No. 233 at 11-14.)

The Court granted partial summary judgment to Plaintiffs, holding that the Ban must be subjected to strict scrutiny as a matter of law because transgender status constitutes a suspect classification. (*Id.* at 20-24.) But the Court did not go further and conclude that the Ban failed strict scrutiny as a matter of law because Defendants argued that the Implementation Plan called into question whether the Ban was entitled to any judicial deference. (*Id.* at 24-27.) The Court noted that Plaintiffs had "not yet had an opportunity to test or respond" to Defendants' claims for deference based on the Implementation Plan. Nor could the Court conclude, "on the present record" that Defendants' "deliberative process . . . is of the type to which Courts typically should defer." (*Id.* at 26.) Similarly, the Court deferred deciding whether the Ban could survive strict scrutiny: "Whether Defendants have satisfied their burden of showing that the Ban is constitutionally adequate (*i.e.*, that it was sincerely motivated by compelling state interests, rather than by prejudice or stereotype) necessarily turns on facts related to Defendants' deliberative process." (*Id.* at 28.) The Court's reasoning plainly indicated that further discovery into Defendants' deliberative process was required.

B. The Parties' Discovery Dispute.

Plaintiffs served interrogatories and requests for production ("RFPs") on December 29, 2017, and served requests for admission ("RFAs") on January 26, 2018. The discovery sought information relevant to Plaintiffs' claims that the Ban was animated not by any sound military judgment or concerns, but was instead the product of unlawful animus and discriminatory intent. (Declaration of Daniel Siegfried ("Siegfried Decl.") Ex. 1, 12/29/17 Pls.' Interrogatories to Defs.; Ex. 2, 12/29/17 Pls.' RFPs to Defs.; Ex. 3 1/26/18 Pls.' RFAs to Defs.)

Defendants objected to every interrogatory and RFP to the extent a discovery request sought "communications or information protected by the deliberative process privilege."[1] They likewise relied heavily on the privilege in their RFA responses—Secretary Mattis and the Department of Defense ("DoD") asserted it in response to six of sixteen RFA responses; the President asserted it for eleven of sixteen responses.[2] (Siegfried Decl. Ex. 9, 2/26/18 Mattis & DoD RFA Responses; Ex. 10, 2/26/18 POTUS RFA Responses.)

On February 23, 2018, Plaintiffs sent a deficiency letter regarding Defendants' interrogatory and RFP responses, explaining that Defendants could not properly rely on the deliberative process privilege given the constitutional claims and the needs of the case. (Siegfried Decl. Ex. 8, 2/23/18 J. Heinz Ltr. to R. Parker at 1-4.) Plaintiffs requested that Defendants withdraw their privilege assertion and provide a log identifying the documents being withheld under the privilege. Defendants never responded to Plaintiffs' letter or supplemented any of their interrogatory responses.

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[1] *See* Siegfried Decl. Ex. 4, 2/9/18 Mattis & DoD RFP Responses; Ex. 5, 2/9/18 Mattis & DoD Interrog. Responses; Ex. 6, 2/9/18 POTUS RFP Responses; Ex. 7, 2/9/18 POTUS Interrog. Responses.

[2] The President did not provide a single substantive response to Plaintiffs' RFAs based on a general objection that the President is immune from discovery requests based on separation of powers principles. Plaintiffs dispute this position but do not raise it here because it should be negated by this Court's subsequent ruling the President is a proper defendant not excused from suit. Defendants have said they intend to file a motion for a protective order on this issue in the near future, and if Defendants do not soon bring the issue before the Court, Plaintiffs will do so.

On March 20, 2018, Defendants served 17 privilege logs on behalf of six agencies and entities—the DoD, Air Force, Army, Navy, Chairman of the Joint Chiefs of Staff, and Defense Health Agency.[3] To date, Defendants have asserted the deliberative process privilege as a basis for withholding or redacting approximately 18,000 documents, and as the *sole* basis for withholding or redacting approximately 15,000 documents.[4]

After reviewing Defendants' privilege logs, Plaintiffs sent another letter to Defendants reiterating that Defendants cannot rely on the deliberative process privilege in this case and also identifying various categories of documents that facially fall outside the scope of the privilege. (*See* Siegfried Decl. Ex. 28, 4/26/18 D. Siegfried Ltr. to R. Parker at 3-5 (identifying post-decisional, non-deliberative, and factual materials improperly withheld under the privilege).) Plaintiffs again requested that Defendants withdraw their deliberative process privilege assertions and requested revised discovery responses by May 1, or alternatively, for Defendants to propose a time to meet and confer. (*Id.* at 7.)

On May 1, 2018, the parties conferred telephonically in a good faith effort to resolve their disputes. Counsel for Defendants expressed their desire to resolve disputes about the deliberative process privilege on a document-by-document basis or based on a representative sample of documents. Plaintiffs' counsel explained that it made little sense to expend resources on document-by-document disputes where Plaintiffs' threshold position was that the law and facts demonstrated that the privilege has no application in this case and that broad categories of information, *e.g.*, materials after the President's July 26, 2017 tweets, fell outside the scope of the privilege. Defendants reiterated their opposition to Plaintiffs' positions on those threshold issues. (Decl. of D. Siegfried at ¶ 8).

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[3] Siegfried Decl. Ex. 11 through Ex. 27. Noticeably absent was any privilege log from the President or Executive Office of the President. Plaintiffs have demanded a privilege log on behalf of the President in compliance with Fed. R. Civ. P. 26(b)(5). To date, no such log has been provided.

[4] Defendants recently advised that "tens of thousands responsive documents" remain to be produced and therefore the number of withheld or redacted documents will likely increase.

LEGAL STANDARD

"The party that resists discovery has the burden to show why the discovery request should be denied," including where a privilege forms the basis for nondisclosure. *Alexander v. U.S. Bank N.A.*, No. C16-1045RSM, 2016 WL 9525593, at *1 (W.D. Wash. Dec. 1, 2016); *Newport Pac. Inc. v. Cty. of San Diego*, 200 F.R.D. 628, 636 (S.D. Cal. 2001) ("As with any privilege, the burden of establishing the application of the deliberative process privilege is on the party opposing discovery."); *see also Dole v. Milonas*, 889 F.2d 885, 889 (9th Cir. 1989) ("[T]he party asserting the privilege has the burden of showing that it applies in the circumstances."); *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975) ("Under the liberal discovery principles of the Federal Rules defendants were required to carry a heavy burden of showing why discovery was denied.").

ARGUMENT

I. THE DELIBERATIVE PROCESS PRIVILEGE DOES NOT APPLY BECAUSE PLAINTIFFS CHALLENGE DEFENDANTS' DECISION-MAKING AND INTENT.

The deliberative process privilege "was fashioned" to prevent discovery into governmental deliberations "in cases where the governmental decisionmaking process is collateral to the plaintiff's suit." *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998); *Allen v. Woodford*, No. CV-F-05-1104 OWW LJO, 2007 WL 309945, at *9 (E.D. Cal. Jan. 30, 2007) ("The deliberative process privilege only applies where the governmental decision-making is collateral to the litigation."). The privilege has no application where plaintiffs challenge the constitutionality of a government decision and allege animus or discriminatory intent. *In re Subpoena Duces Tecum*, 145 F.3d at 1424 (where "the Constitution makes the nature of governmental officials' deliberations *the* issue, the privilege is a nonsequitur"); *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997) ("[T]he privilege disappears altogether when there is any reason to believe government misconduct occurred"); *United States v. Lake Cty. Bd. of Comm'rs*, 233 F.R.D. 523, 526 (N.D. Ind. 2005) ("[T]he deliberative process privilege simply does not apply in civil rights cases in which the defendant's intent to discriminate is at issue."); *McPeek v. Ashcroft*, 202 F.R.D. 332, 335 (D.D.C. 2001) (the deliberative process privilege "yields when the

lawsuit is directed at the government's subjective motivation in taking a particular action").

That is the case here. Plaintiffs allege that the Ban violates their constitutional rights to equal protection, due process, and freedom of expression, and ask the Court to declare the policy unconstitutional and permanently enjoin Defendants from enforcing it. (Dkt. No. 30 ¶¶ 1, 215-38.) To support their claims, Plaintiffs propounded discovery seeking information about what deliberations (if any) took place both prior to and after the announcement of the Ban. Such information bears directly on the government's justifications, and whether the deliberations evince unconstitutional animus or discriminatory intent, or (as Defendants claim) reasoned military judgment. The government's deliberations, therefore, are not merely collateral to Plaintiffs' claims; they are "the heart of the issue." *Jones v. City of Coll. Park, Ga.*, 237 F.R.D. 517, 521 (N.D. Ga. 2006). In such cases, the deliberative process privilege is "simply inapplicable." *Id.*

There is good reason to suspect that discriminatory intent, rather than valid governmental interests, motivated the Ban. The Court already held that Defendants' policy is subject to strict scrutiny because it targets "one of the most vulnerable groups in our society," and one that has "long been subjected to systemic oppression." (Dkt. No. 233 at 2, 24.) The very purpose of heightened scrutiny is to examine closely the government's use of a "highly suspect tool"—discrimination against a suspect class—and to "smoke out" whether the government's claimed justification is legitimate or not. *Mitchell v. Washington*, 818 F.3d 436, 445 (9th Cir. 2016) (quoting *Johnson v. California*, 543 U.S. 499, 506 (2005)). Yet, that necessary scrutiny cannot be accomplished if the government's deliberations are shielded from discovery. Permitting the privilege to exist in cases involving heightened scrutiny would be self-defeating. Courts routinely deny application of the privilege in cases challenging the government's intent in enacting a policy, particularly where the claim affects a suspect class or implicates a constitutional right. *See Jones*, 237 F.R.D. at 521 (holding privilege inapplicable in case alleging racial discrimination in violation of Title VII); *Children First Found., Inc. v. Martinez*, 2007 WL 4344915, at *7 (N.D.N.Y. Dec. 10, 2007) (holding privilege inapplicable in case alleging viewpoint-based discrimination in violation of First Amendment); *Waters v. U.S. Capitol Police Bd.*, 218 F.R.D. 323, 324 (D.D.C. 2003) (holding defendant may not assert "the deliberative process privilege to thwart discovery of information in a

case in which a plaintiff challenges governmental action as discriminatory"). This Court should reach the same conclusion and hold that Defendants may not invoke the deliberative process privilege in this case and should be compelled to disclose the withheld information.

II. DEFENDANTS WAIVED ANY PRIVILEGE BY PUTTING THEIR DELIBERATIVE PROCESS "IN ISSUE."

Even if the deliberative process privilege did apply in this case (it does not), Defendants cannot invoke it because they put their deliberative process "in issue" by premising their defense on purported military judgment. The Ninth Circuit has long held that a party may not rely on privileged information to establish a claim or defense and at the same time withhold access to that material. *See Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992). That is because privilege "may not be used both as a sword and shield": "Where a party raises a claim which in fairness requires disclosure of the protected information, the privilege may be implicitly waived." *Id.* This bedrock legal principal applies to the deliberative process privilege. *Coleman v. Schwarzenegger*, 2007 WL 4328476, at *8 (E.D. Cal. Dec. 6, 2007); *Kintera, Inc. v. Convio, Inc.*, 219 F.R.D. 503, 512 (S.D. Cal. 2003); *Pac. Gas & Elec. Co. v. Lynch*, 2002 WL 32812098, at *3 (N.D. Cal. Aug. 19, 2002). The Ninth Circuit "gives the holder of the privilege a choice: If you want to litigate this claim, then you must waive your privilege to the extent necessary to give your opponent a fair opportunity to defend against it." *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003).

Defendants chose to put their deliberative process in issue by asserting that the Ban passes constitutional review because special deference is owed to their military judgment. (*See*, *e.g.*, Dkt. No. 69 at 26-30; Dkt. No. 194 at 13-15.) Since Defendants announced the Implementation Plan in March 2018, they have only doubled down on this position. (*See* Dkt. No. 238 at 9.) But in touting their deliberative process as a defense against Plaintiffs' constitutional claims, Defendants necessarily open their deliberations to discovery and judicial scrutiny. *Coleman*, 2007 WL 4328476, at *8 ("[I]t is evident from the record before this court that the manner in which these proceedings are being defended involves presentation of material which will constitute a waiver of the deliberative process privilege."); *Kintera*, 219 F.R.D. at 512-13 (police review board could not

disclose favorable portions of a report then claim the deliberative process privilege nonetheless shields the rest from discovery).

The Court denied summary judgment in part because it was unable to "determine whether the DoD's deliberative process . . . is of the type to which Courts typically should defer." (MSJ Op. at 26.) And the question whether "the Ban is constitutionally adequate . . . *necessarily* turns on facts related to Defendants' deliberative process." (*Id.* at 28 (emphasis added).) Because the outcome of the case hinges on these inquiries, the Court explained that Plaintiffs must be given an "opportunity to test" defendants' assertions. (*Id*. at 26.) But Plaintiffs cannot do so if discovery into Defendants' deliberative process is foreclosed by invocation of the privilege. The Court should not "permit defendants to use the privilege as both a sword and a shield." *See Pac. Gas & Elec. Co.*, 2002 WL 32812098, at *3 (denying motion to quash based on deliberative process privilege where subpoena sought non-public information underlying public report that the government-defendant cited as support for its challenged decision). To do so would risk the "distortions that could occur" if Defendants use their military judgment argument offensively and at the same time "use . . . privilege to prevent any adversarial testing of the truth of that [information]." *See U.S. v. $133,420.00 in U.S. Currency*, 672 F.3d 629, 640 (9th Cir. 2012). Any deference to Defendants' purported military judgment must be contingent on Defendants' compliance with Plaintiffs' requests aimed at fairly testing that purported judgment. Defendants cannot have it both ways. If Defendants do not allow Plaintiffs the opportunity to test their deference defense through discovery, then the Court should reject that defense outright.

III. EVEN IF THE PRIVILEGE APPLIED, PLAINTIFFS' NEED FOR THE DISCOVERY OVERCOMES IT UNDER THE APPLICABLE BALANCING TEST.

"The deliberative process privilege is a qualified privilege that requires a balancing of the public interest in nondisclosure with the movant's need for the material." *Fishermen's Finest, Inc. v. Gutierrez*, No. C07-1574-MJP, 2008 WL 2782909, at *3 (W.D. Wash. July 15, 2008). Thus, even if the privilege applied in this case, Plaintiffs have made the showing necessary to overcome it. The Ninth Circuit has held that "[a]mong the factors to be considered in making this determination are:

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." *F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Other factors a court may consider include: "(5) the interest of the litigant, and ultimately society, in accurate judicial fact finding, (6) the seriousness of the litigation and the issues involved, (7) the presence of issues concerning alleged governmental misconduct, and (8) the federal interest in the enforcement of federal law." *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003); *Newport*, 200 F.R.D. at 638-40; *see also U.S. v. Grace*, 455 F. Supp. 2d 1140, 1144 (D. Mont. 2006).

All eight factors weigh in favor of disclosure. First, Defendants' process, motive, and intent behind the Ban is at the heart of this case, making this discovery necessary to Plaintiffs' claims. *See N. Pacifica*, 274 F. Supp. 2d at 1124 ("Because the City Council's motive and intent are central to [plaintiff's] equal protection claim, and at issue is alleged governmental misconduct, these factors weigh strongly in favor of disclosure."); *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1027 (E.D. Cal. 2010), *clarified*, 2010 WL 797019 (E.D. Cal. Mar. 5, 2010) (explaining that "seek[ing] to discover information relevant to an important issue in this action weighs heavily against Respondent's assertion of the deliberative process privilege"); *U.S. v. Bd. of Educ. of City of Chicago*, 610 F. Supp. 695, 700 (N.D. Ill. 1985) (ordering discovery where "the decisionmaking process is not 'swept up into' the case, it *is* the case"). Second, only Defendants have access to the highly relevant evidence of their decision-making regarding the Ban. Third, the government's role is central to this case: Defendants are government officials sued in their official capacities for unlawful discrimination against transgender individuals. *See All. for the Wild Rockies v. Pena*, No. 2:16-CV-294-RMP, 2017 WL 8778579, at *7 (E.D. Wash. Dec. 12, 2017) (government's role as a defendant weighs in favor of disclosure); *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 2015 WL 3606419, at *7 (C.D. Cal. Feb. 4, 2015) (same); *Thomas*, 715 F. Supp. 2d at 1028 (collecting cases). Fourth, disclosure of Defendants' decision-making process here is unlikely to have a chilling effect on frank and independent discussion because the government has already unveiled its conclusions and does not seek to study them further, but rather to implement them as quickly as it can.

Conversely, discouraging the formation of unconstitutional policies would actually be a constructive result. *See Newport*, 200 F.R.D. at 640 ("[I]f because of this case, members of government agencies acting on behalf of the public at large are reminded that they are subject to scrutiny, a useful purpose will have been served.").

The remaining additional factors also favor disclosure. This case deals with critical and timely constitutional questions affecting a suspect classification that targets individuals who this Court held have been subjected to a "history of discrimination and systemic oppression [that] is long and well-recognized." (Dkt. No. 233 at 21.) In such circumstances, "the interest in accurate judicial fact finding is heightened because equal protection rights are at stake." *N. Pacifica*, 274 F. Supp. 2d at 1124; *see also Newport*, 200 F.R.D. at 640 (noting "[t]he tendency is . . . to allow discovery" for constitutional issues). Finally, this case raises the specter of government misconduct. Defendants cannot use the deliberative process privilege to hide any animus underlying the Ban.

IV. DEFENDANTS HAVE IMPROPERLY WITHHELD INFORMATION OR MATERIALS THAT FALL OUTSIDE THE SCOPE OF THE PRIVILEGE.

Defendants have improperly asserted the deliberative process privilege over documents that indisputably fall outside its scope. Defendants claim the privilege covers broad swathes of post-decisional, non-deliberative, and factual materials—such as those reviewed or generated by the so-called "Panel of Experts"—none of which fit within the narrow sweep of the privilege. Indeed, Defendants' "[b]lanket assertions of the privilege" fail to provide the "precise and certain reasons" needed to even evaluate their privilege claims. *Greenpeace v. Nat'l Marine Fisheries Serv.*, 198 F.R.D. 540, 543 (W.D. Wash. 2000). But no reasoning could support Defendants' attempt to avoid discovery of the post-decisional, non-deliberative, and factual materials Plaintiffs seek.

First, to qualify for the privilege, documents must be "'predecisional' in that they have been generated prior to an agency's adoption of a policy or decision." *Seafirst Corp. v. Jenkins*, 644 F. Supp. 1160, 1163 (W.D. Wash. 1986), *rep. and rec. adopted*, 1986 WL 566 (D.D.C. July 18, 1986). To be considered "predecisional," a document must both "predate[] a decision chronologically" and be "prepared in order to assist an agency decisionmaker in arriving at his decision." *Carter v. U.S.*

Dep't. of Commerce, 307 F.3d 1084, 1089 (9th Cir. 2002) (quoting *Assembly of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 920-21 (9th Cir. 1992)). Here, no claim of privilege can attach to documents generated after July 26, 2017, when President Trump issued the Ban, since those documents could not have assisted the President in arriving at his decision. *See Fishermen's Finest Inc.*, 2008 WL 2782909, at *2 ("A document that was prepared to support a decision already made is not predecisional."). Defendants' privilege logs show they have withheld over 5,500 documents under the deliberative process privilege that were created *after* the President's July 26, 2017 tweets.

Second, the privilege only applies to documents that are "'deliberative' in that they reflect the give-and-take of a deliberative decision-making process." *Seafirst*, 644 F. Supp. at 1163. Such documents are only privileged if they "bear on the formulation or exercise of agency policy-oriented *judgment*." *Fishermen's Finest*, 2008 WL 2782909, at *2 (quoting *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992)). Defendants assert the privilege covers communications and documents generated by the "Panel of Experts" and other DoD officials, who were charged with implementing the President's Ban, not advising him on whether to issue the Ban in the first place. (*See* Dkt. No. 233 at 12 ("The 2017 Memorandum did not direct Secretary Mattis to determine *whether* or not the directives should be implemented, but instead ordered the directives to be implemented by specific dates and requested a plan for *how* to do so.")) The constrained scope of DoD's purview in formulating the implementation plan is fatal to Defendants' privilege claim. The deliberative process privilege is inapplicable where, as here, the agency had "very limited policy-making authority" and did not "exercise[] any policy-making judgment." *Fishermen's Finest*, 2008 WL 2782909, at *3-4.

Finally, the privilege does not extend to purely factual information or expert opinion and scientific conclusions regarding facts. *See Greenpeace*, 198 F.R.D. at 544 ("[T]he fact that scientific expertise is brought to bear 'does not transform interpretations of facts into communications protected by the deliberative process privilege.'"). Defendants' privilege logs evidence their improper reliance on the privilege to withhold factual information.[5]

[5] *See* Siegfried Decl. Ex. 13 DoD Privilege Log for Soper Dep., at SOPER DEP RFP 1 8 00608-661 (withholding "Health Data for Members with Gender Dysphoria") and SOPER DEP RFP 21

Defendants' blanket assertion of deliberative process privilege is improper and would sweep mounds of post-decisional, non-deliberative, and factual material under the rug. The Court should reject their misuse of the privilege and compel them to provide the improperly withheld information.

CONCLUSION

The Court should order that the deliberative process privilege does not apply in this case and compel Defendants to disclose all information and documents withheld on that basis.

Dated: May 10, 2018

NEWMAN DU WORS LLP

Derek A. Newman, WSBA No. 26967
dn@newmanlaw.com
Jason B. Sykes, WSBA No. 44369
jason@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
Tara Borelli, WSBA No. 36759
tborelli@lambdalegal.org
Camilla B. Taylor (admitted pro hac vice)
Peter C. Renn (admitted pro hac vice)
Natalie Nardecchia (admitted pro hac vice)
Sasha Buchert (admitted pro hac vice)
Kara Ingelhart (admitted pro hac vice)
Carl Charles (admitted pro hac vice)

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

00765-00820 (withholding presentation regarding "Health Data on Active Duty Service Members with Gender Dysphoria"; Ex. 27, Army Privilege Log, at ARMY 341 (withholding document concerning "surgical procedures performed at MTFs") and ARMY 352-383 (withholding presentation "summarizing health and readiness data of Active Duty members with gender dysphoria").

KIRKLAND & ELLIS LLP
James F. Hurst, P.C. (admitted pro hac vice)
Jordan M. Heinz (admitted pro hac vice)
Scott Lerner (admitted pro hac vice)
Vanessa Barsanti (admitted pro hac vice)
Daniel I. Siegfried (admitted pro hac vice)
Ben Tyson (admitted pro hac vice)

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

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

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

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

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL DEFENDANTS' DISCOVERY WITHHELD UNDER THE DELIBERATIVE PROCESS PRIVILEGE

NOTE ON MOTION CALENDAR:
May 25, 2017

ORAL ARGUMENT REQUESTED

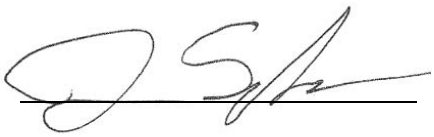
Before the Court is Plaintiffs' Motion to Compel Defendants' Discovery Withheld Under the Deliberative Process Privilege. The Court has reviewed Plaintiffs' motion, Defendants' opposition, and Plaintiffs' reply. After considering the parties' arguments, the Court GRANTS the Motion.

Dated this ___ day of _____, 2018.

_____
The Honorable Marsha J. Pechman
United States District Court Judge

NEWMAN DU WORS LLP
2101 Fourth Avenue, Suite 1500
Seattle, Washington 98121
(206) 274-2800

Presented by:



Jason B. Sykes, WSBA #44369

CERTIFICATE OF SERVICE

Case Name:	**Stockman, Aiden, et al. v. Donald J. Trump, et al.**	No.	**5:17-CV-01799-JGB-KKx**

I hereby certify that on May 6, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DECLARATION OF AMIE L. MEDLEY IN SUPPORT OF MOTION TO VACATE SCHEDULING ORDER

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 6, 2019, at Los Angeles, California.

Amie L. Medley	*/s/ Amie L. Medley*
Declarant	Signature

53398636.docx

IN THE UNITED STATES DISTRICT COURT

FOR THE 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.

STATE OF CALIFORNIA,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 5:17-CV-01799-JGB-KKx

[PROPOSED] ORDER GRANTING MOTION TO VACATE

Good cause appearing, the motion of Plaintiff-Intervenor State of California to vacate the schedule in this case is hereby **GRANTED.** The current case schedule is hereby vacated.

The parties are ordered to submit a joint proposed case schedule within twenty-one days of the issuance of the Ninth Circuit's decision on the petition for writ of mandamus file by the plaintiffs in *Trump v. Karnoski*, No. 18-72159 (9th Cir.).

IT IS SO ORDERED.

Dated: _____

_____
The Honorable Jesus G. Bernal

CERTIFICATE OF SERVICE

Case Name:	**Stockman, Aiden, et al. v. Donald J. Trump, et al.**	No.	**5:17-CV-01799-JGB-KKx**

I hereby certify that on May 6, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

[PROPOSED] ORDER GRANTING MOTION TO VACATE

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 6, 2019, at Los Angeles, California.

Amie L. Medley	*/s/ Amie L. Medley*
Declarant	Signature

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