UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RYAN KARNOSKI, *et al*., *Plaintiffs*, and State of Washington, *Plaintiff-Intervener*, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al*., Defendants. CASE NO. 2:17-CV-01297-MJP WESTERN DISTRICT OF WASHINGTON	CASE NO. 1:18-mc-00674 **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL DISCOVERY FROM DR. PAUL R. MCHUGH, M.D.**

Pursuant to Federal Rule of Civil Procedure 45, Plaintiffs request an order compelling Dr. Paul R. McHugh, M.D., to produce or otherwise make available documents and information requested in Plaintiffs' subpoena *duces tecum* (the "Subpoena") dated August 22, 2018. Barsanti Decl. Ex. A (Subpoena). Additionally, Plaintiffs request an order compelling Dr. McHugh to provide a detailed privilege log for each document requested by the Subpoena that he has withheld on privilege or work product grounds.

Dr. McHugh is a Professor of Psychiatry and Behavioral Sciences at Johns Hopkins University School of Medicine who is a vocal critic of lesbian, gay, bisexual, and transgender people, and whose views on medical treatment of transgender people have been widely discredited by the medical community, including his own co-workers. Documents produced by the Government Defendants reveal that Dr. McHugh communicated with the Government regarding

the implementation of an official federal policy of discrimination against transgender military service (the "Ban"). Those communications are directly relevant to the Government's intent behind the Ban and its implementation—including whether the Ban was motivated by unconstitutional prejudice, stereotypes, animus, or ill-will towards transgender people—which goes to the very heart of Plaintiffs' constitutional challenge of the Ban. Dr. McHugh contends that these communications are somehow privileged, yet that position is without support given that Dr. McHugh is a private non-governmental third party. It is the most basic principle of privilege—if documents or information are disclosed to a third party they cannot be privileged. In fact, because Dr. McHugh is a private third party, he lacks standing altogether to assert both the deliberative process and executive privileges. As such, Plaintiffs are entitled to the subpoenaed documents.

BACKGROUND

This Subpoena arises out of the case *Karnoski, et al., v. Trump, et al*., No. 2:17-cv-01297 (W.D. Wash.) ("*Karnoski*"), pending before the Honorable Marsha J. Pechman in the United States District Court for the Western District of Washington (the "*Karnoski* District Court"). As set forth in Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief, Plaintiffs are challenging the constitutionality of the Ban. *Karnoski*, Dkt. No. 030 ("Pls.' Am. Compl.").[1]

The Ban arose when, on July 26, 2017, President Trump stated on Twitter that "the United States would no longer accept or allow…transgender people to serve in any capacity in the U.S. Military." *Karnoski*, Dkt. No. 233 at 3 ("Order Granting in Part & Den. in Part Pls.' Mot. for Summ. J."). In August 2017, President Trump formalized that Ban in an executive memorandum, ordering the Department of Defense to submit "a plan for implementing" the Ban by February 21, 2018. *Id.* at 4. Following that memorandum, Secretary of Defense James Mattis delivered the

[1] All docket references herein refer to the *Karnoski* District Court docket.

required implementation plan to the President on February 22, 2018, which (1) bans transgender persons from military service if they require or have undergone gender transition, and (2) requires those who have not transitioned to suppress their gender identity and serve only in their birth-assigned sex. *Id.* at 5.

Plaintiffs in *Karnoski* are challenging the Ban on the following grounds: (i) the Ban violates constitutional equal protection guarantees because it facially and intentionally discriminates against transgender individuals; (ii) the Ban violates due process, by infringing upon the right of transgender individuals to live openly in accordance with their gender identity; and (iii) the Ban violates the First Amendment, as it burdens and chills the exercise of Plaintiffs' protected speech, expression, expressive conduct, and expressive association, based on the content and viewpoint of their speech. *Karnoski*, Dkt. No. 030 at ¶¶ 34-35, 216-217, 233. A similar case challenging the Ban is currently pending before this Court in *Stone v. Trump et al.*, Case No. 1:17-cv-02459-GLR (D. Md.) ("*Stone*").[2]

Plaintiffs moved for summary judgment on their claims, which the *Karnoski* District Court granted in part and denied in part on April 13, 2018. *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *14 (W.D. Wash. Apr. 13, 2018). The court granted Plaintiffs' motion for summary judgment regarding the applicable level of scrutiny, finding that strict scrutiny applies due to the history of discrimination against transgender individuals, the fact that such discrimination is unrelated to their ability to perform and contribute to society, the immutability of the characteristics that define transgender individuals as a discrete and insular minority, and the group's lack of political power. *Id.* at *9-11. The *Karnoski* District Court denied the motion for

[2] "The *Karnoski* case is based upon the same basic facts and the pending discovery motions were, at least as discernible from the opinion, the same as presented here." *Stone v. Trump*, No. 1:17-cv-2459, 2018 WL 3866676, at *3 (D. Md. Aug. 14, 2018).

summary judgment as to the alleged violations of equal protection, due process, and the First Amendment, finding that more facts are necessary to determine what level of deference, if any, is owed to the Ban. *Id*. at *11-12. Determining the level of deference turns, in part, on whether Defendants can show that the Ban was "sincerely motivated by compelling state interests, rather than by prejudice or stereotype," which "necessarily turns on facts related to Defendants' deliberative process." *Id*. at *13. As such, Defendants' actual motivations and justifications behind the Ban remain in contention and discovery on these issues is necessary.

A. General Discovery History

As a part of its discovery efforts, Plaintiffs served Defendants with requests for production of documents, including requests for communications Defendants had regarding transgender military service and the Ban.[3] *Karnoski*, Dkt. No. 245 at 3-4 ("Pls.' Mot. to Compel Defs.' Disc. Withheld Under the Deliberative Process Privilege"); Barsanti Decl. at ¶ 3. In spite of the fact that Defendants have repeatedly argued that the Ban is a product of "considered reason [and] deliberation," "exhaustive study," and "comprehensive review,"[4] Defendants refused to produce all documents and information to support those assertions in response to Plaintiffs' discovery requests, claiming that such documents are protected from disclosure by the executive communications privilege and deliberative process privilege. *Karnoski*, Dkt. No. 245 at 3-4; Barsanti Decl. ¶ 5. After attempts to resolve these discovery disputes, and in light of the *Karnoski* District Court's summary judgment holding that the constitutional adequacy of the Ban

[3] For example, Plaintiffs' Request for Production No. 1 requests "[a]ll Documents and Communications related to the Policy," and Plaintiffs' Request for Production No. 7 requests "[a]ll Documents and Communications related to President Trump's consultation with employees, agents, contractors, or consultants of the United States Armed Forces regarding transgender military service or related healthcare." Barsanti Decl. at ¶ 3.

[4] *Karnoski*, Dkt No. 194 at 17 (Defs.' Mot. for Partial Summ. J.); Dkt. No. 226 at 9 (Defs.' Suppl. Br. in Opp'n to Mot. for Summ. J.).

"necessarily turns on facts related to Defendants' deliberative process," Plaintiffs moved to compel production of documents withheld on the basis of the deliberative process privilege, and Defendants moved for a protective order concerning discovery served on President Trump. *Karnoski*, Dkt. No. 245.

On July 27, 2018, the *Karnoski* District Court granted Plaintiffs' motion to compel and denied Defendants' motion for a protective order. *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 3608401 (W.D. Wash. July 27, 2018). The *Karnoski* court concluded that "the deliberative process privilege does not apply in this case" and ordered Defendants to produce documents that have been withheld solely under the deliberative process privilege. *Id.* at *4, 6. The *Karnoski* District Court also denied Defendants' motion for a protective order and ordered Defendants to "produce a privilege log identifying the documents, communications, and other materials they have withheld under the [executive] privilege." *Id.* at *5-6. The *Karnoski* court further found that non-presidential privilege logs the government had provided "are deficient and do not comply with Federal Rule of Civil Procedure 26(b)(5)(A)(i)-(ii)." *Id.* at *6. Defendants have filed a petition for writ of mandamus based on the *Karnoski* District Court's July 27, 2018 order with the Ninth Circuit Court of Appeals and continue to withhold approximately 44,000 documents based on deliberative process and another 9,000 or so based on presidential privilege. *In re Donald J. Trump, et al.* No. 18-72159 (9th Cir.). This petition is pending and is set for oral argument on October 10, 2018.

B. Discovery Relating to Dr. McHugh

As noted above, Dr. McHugh is known as a vocal critic of lesbian, gay, bisexual, and

transgender people.[5] In particular, Dr. McHugh opposes surgical treatment for gender dysphoria.[6] Dr. McHugh claims to present "scientific" views on the treatment of transgender people, yet his views have been widely discredited as unscientific and lacking medical justification.[7]

As part of its document productions, Defendants produced an email chain dated February

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[5] For example, Dr. McHugh contends, contrary to understood science, that sexual orientation is not biologically determined and that "[homosexuality] is erroneous desire", Lydia Evans, Charleston, SC: Dr. Paul McHugh: "There is No Gay Gene," VIRTUE ONLINE, THE VOICE FOR GLOBAL ORTHODOX ANGLICANISM, Jan. 26, 2010, http://www.virtueonline.org/charleston-sc-dr-paul-mchugh-there-no-gay-gene. Dr. McHugh has also filed multiple amicus briefs advocating against LGBT rights, including an amicus brief supporting Proposition 8, which banned same-sex couples from marrying in California and was held unconstitutional in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), Brief Amicus Curiae of Paul McHugh, M.D., *Perry v. Schwarzenegger*, No. 10-16696, Dkt. No. 69 (N.D. Cal. Sept. 24, 2010), available at http://cdn.ca9.uscourts.gov/datastore/general/2010/10/26/amicus21.pdf, and an amicus brief opposing transgender student Gavin Grimm's right to use gender-appropriate restrooms at his public school, Brief Amicus Curiae of Paul McHugh, M.D. et al., *Gloucester Cnty. School Board v. G.G.*, No. 16-273 (U.S. Jan. 10, 2017), available at https://www.aclu.org/legal-document/gloucester-county-school-board-v-gg-dr-paul-r-mchugh-et-al.

[6] *See* Dr. Paul McHugh, *Surgical Sex: Why We Stopped Doing Sex Change Operations*, FIRST THINGS (Nov. 2004) https://www.firstthings.com/article/2004/11/surgical-sex (arguing against surgical treatment for transgender people and describing transgender people as "caricatures of women"). First Things describes itself as "America's most influential journal of religion and public life." *Id*.

[7] Dr. McHugh recently published a report purporting to "present[] a careful summary and an up-to-date explanation of research — from the biological, psychological, and social sciences — related to sexual orientation and gender identity," including treatment outcomes for transgender people. Lawrence S. Mayer & Paul R. McHugh, Special Report, *Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences*, 50 THE NEW ATLANTIS 1 (Fall 2016), available at https://www.thenewatlantis.com/docLib/20160819_TNA50SexualityandGender.pdf. The NEW ATLANTIS was founded by the Ethics & Public Policy Center, which describes itself on its website as "Washington, D.C.'s premier institute dedicated to applying the Judeo-Christian moral tradition to critical issues of public policy." https://eppc.org/about.

Dr. McHugh's conclusions in this articlehave been widely debunked and criticized, including by his own colleagues at Johns Hopkins. *See* Chris Beyrer, Robert W. Blum, & Tonia C. Poteat, *Hopkins Faculty Disavow 'Troubling' Report on Gender and Sexuality*, BALTIMORE SUN (Sept. 28, 2016), http://www.baltimoresun.com/news/opinion/oped/bs-ed-lgbtq-hopkins-20160928-story.html; *see also* Amy E. Nutt, *Long Shadow Cast by Psychiatrist on Transgender Issues Finally Recedes at Johns Hopkins*, WASHINGTON POST (Apr. 5, 2017), https://www.washingtonpost.com/national/health-science/long-shadow-cast-by-psychiatrist-on-transgender-issues-finally-recedes-at-johns-hopkins/2017/04/05/e851e56e-0d85-11e7-ab07-07d9f521f6b5_story.html?utm_term=.5866a16e62b4 (noting that Dr. McHugh's Special Report was "not published in the scientific literature, where it would have been subject to rigorous peer review prior to publication" and that it is not "a comprehensive portrayal of the current science") Additionally, *six-hundred* researchers and clinicians with "expertise in gender and sexuality" signed a letter stating that the Dr. McHugh's report does "not reflect current scientific or medical consensus about sexual orientation or gender identity research findings or clinical care recommendations." March 22, 2017 Letter, https://www.vumc.org/lgbti/files/lgbti/publication_files/ExpertLGBTIConcensusLetter.pdf. They further cautioned that the "report's conclusions should not be viewed as a source of scientific or medical justification to support any legislation, judicial action, policymaking or clinical decision-making…" *Id*.

5, 2018 through February 14, 2018 between Dr. McHugh and Mr. William Bushman from the Office of the Secretary of Defense indicating that Dr. McHugh spoke to the government and provided advice regarding transgender military service.[8] Barsanti Decl. ¶ 4, Ex. B (USDOE00206512). Defendants' discovery responses indicate that Bushman attended meetings of the "Panel of Experts" charged with evaluating and implementing the Ban. Barsanti Decl. ¶ 4.

Additionally, the Department of Defense's privilege log indicates that Defendants are withholding multiple "[e]mail[s] involving transgender research" between Dr. McHugh and Mr. Bushman dated February 5, 2018 through February 13, 2018 on the basis of "deliberative process privilege."[9] Barsanti Decl. at ¶ 6. As discussed above, Defendants have continued to refuse to produce any documents withheld on the basis of deliberative process privilege, including those documents involving third-parties such as Dr. McHugh, where the privilege claim is baseless. In response, Plaintiffs are forced to turn to Dr. McHugh directly.

Plaintiffs served Dr. McHugh with a Subpoena requesting that he produce all documents and communications from June 16, 2015 through the present between Dr. McHugh and President Trump, the Executive Office of the President, the Trump Campaign, Vice President Pence, the Office of the Vice President, or the Department of Defense, concerning military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general. Barsanti Decl. ¶ 2, Ex. A (Subpoena). Dr. McHugh has objected to the Subpoena on the grounds that the requested materials are "privileged as either

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[8] "I mentioned these several articles in our conversation," and "Thank you again for speaking to us and providing additional information. During our call, I believe you mentioned there were other individuals who could also serve as resources for our policy review. Do you know of any other persons we should consider reaching out to?" Barsanti Decl. ¶ 4, Ex. B (USDOE00206512).

[9] The withheld documents are Bates-stamped USDOE00206875, USDOE00206903, USDOE00206909, USDOE00207030, USDOE00207812, and USDOE00207814. Barsanti Decl. ¶ 6.

attorney work product" or "privileged, at least as a communication with the President bearing upon his (the President's) Executive responsibilities." Barsanti Decl. Ex. C (July 19, 2018 Bradley email to Barsanti). Plaintiffs' request that Dr. McHugh provide a privilege log were left unanswered. Barsanti Decl. ¶ 8.

Dr. McHugh's counsel declined to engage in a telephonic meet and confer regarding these privilege claims. Barsanti Decl. ¶ 8. Given Dr. McHugh's refusal to meet and confer and unwillingness to produce *a single* document or a privilege log of withheld documents in response to the Subpoena to support his supposed claims of privilege, Plaintiffs believe they have exhausted their efforts to resolve this matter without the need for motion practice.

LEGAL STANDARD

"Discovery under the Federal Rules of Civil Procedure is broad in scope and freely permitted." *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003); *Waterkeeper All., Inc. v. Alan & Kristin Hudson Farm*, 278 F.R.D. 136, 140 (D. Md. 2011). Specifically, Rule 26 permits parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." FED. R. CIV. P. 26(b)(1). "The scope of relevancy under discovery rules is broad, such that relevancy encompasses any matter that bears or may bear on any issue that is or may be in the case." *Carr v. Double T Diner*, 272 F.R.D. 431, 433 (D. Md. 2010); *see also Kantsevoy v. LumenR LLC*, No. ELH-17-359, 2017 WL 4516553, at *3 (D. Md. Oct. 6, 2017) (quoting *Johns Hopkins Univ. v. Datascope Corp.*, No. WDQ-05-759, 2007 WL 1450367, at *1 (D. Md. May 16, 2007)) ("[A]lthough relevance is not defined by Rule 26(b)(1), the definition in Fed. R. Evid. 401 is useful—whether the information has any tendency to make a fact that is of consequence to the litigation more probable or less probable than it would be without it."); *Wright & Miller*, 8B Fed.

Prac. & Proc. § 2165 ("The information sought must be relevant to the claims or defenses but this is viewed very liberally and admissibility in evidence is not required.").

Non-party subpoenas are governed by Rule 45. *See Boukadoum v. Hubanks*, 239 F.R.D. 427, 429 (D. Md. 2006) ("Federal Rule of Civil Procedure 45 provides for production of records by non-parties"). The principles applicable to Rule 26 apply when evaluating discovery via a non-party subpoena under Rule 45. *Phillips v. Ottey*, No. DKC 14-0980, 2016 WL 6582647, at *2 (D. Md. Nov. 7, 2016) ("[T]he scope of discovery allowed under a subpoena is the same as the scope of discovery allowed under Rule 26. Thus, regardless of whether the Court considers Plaintiff's Motion under Rule 45 or Rule 26, the Court must review Defendant's subpoenas under the relevancy standards set forth in Rule 26(b).") (quoting *Singletary v. Sterling Transp. Co., Inc.*, 289 F.R.D. 237, 240-41 (E.D. Va. 2012)). If a non-party objects to a Rule 45 subpoena, "the serving party may move the court for the district where compliance is required for an order compelling production or inspection." FED. R. CIV. P. 45(d)(2)(B)(i).[10]

ARGUMENT

Dr. McHugh asserts a number of bare-bones and unsupported objections to the Subpoena in its entirety on the basis of what appears to be executive privilege and work product privilege. In fact, it is difficult to determine what privilege protections Dr. McHugh is asserting at all from his communications. While Dr. McHugh does not directly assert the deliberative process privilege, it is the basis on which the Government has withheld the majority of its communications with Dr. McHugh, and as such is addressed here in addition to executive and work product privilege.

[10] Pursuant to Rule 45(c)(2), Plaintiffs requested that Dr. McHugh produce the requested documents in Baltimore, Maryland, where Dr. McHugh lives. Accordingly, "the district where compliance is required" is the District of Maryland and therefore, this Court is the proper forum for Plaintiffs to seek enforcement of the Subpoenas through a motion to compel.

However, even if Dr. McHugh clearly asserted the deliberative process privilege or executive privilege, neither privilege could protect his communications with the Government because, as a non-governmental third-party, Dr. McHugh lacks standing to assert these privileges and because the materials sought by the Subpoena are relevant to whether the motivation of the decision to adopt the Ban, which goes to the heart of Plaintiffs' constitutional claims. Furthermore, Dr. McHugh's failure to provide a privilege log prevents Plaintiffs from being able to perform any assessment whatsoever regarding the validity of Dr. McHugh's claim of work product privilege. The Court should therefore compel Dr. McHugh to produce the materials sought by the Subpoena and to provide a privilege log of materials withheld for privilege.

I. THE DELIBERATIVE PROCESS PRIVILEGE DOES NOT APPLY TO DR. MCHUGH'S RELEVANT DOCUMENTS.

As an initial matter, Dr. McHugh—a private party not affiliated with the government—does not have standing to assert the deliberative process privilege because it:

> may only be claimed by the appropriate representative of the government entity at issue and may not be claimed by a private party or a private organization even though the organization may be partially controlled or constrained by state or federal regulations. This is also the case if the documents alleged to be privileged are in the hands of a private party or if the documents, such as income tax returns, would be protected if held by the government.

Persons who may assert a claim on behalf of the government, Federal Testimonial Privileges § 5:12 (2d ed.) (discussing all privileges affecting the executive branch including the deliberative process privilege); *see also United States v. Rozet*, 183 F.R.D. 662, 665 (N.D. Cal. 1998) (stating that the deliberative process privilege "belongs only to the Plaintiff; private parties can neither assert nor waive the privilege") (citing *U.S. v. Reynolds*, 345 U.S. 1, 7 (1953)).

Moreover, even if Dr. McHugh had standing to assert the deliberative process privilege (which he does not), the deliberative process privilege does not extend to communications with

Dr. McHugh regarding the Ban. As this Court explained in *Stone*, the deliberative process privilege applies to materials that were "both predecisional and deliberative.'" *Stone*, 2018 WL 3866676, at *2 (internal citations omitted) (emphasis in original); *see also Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 372-73 (4th Cir. 2009); *accord Karnoski*, 2018 WL 3608401, at *3-4. Yet the deliberative process privilege is not absolute. In *Stone*, this Court found that the deliberative process privilege did not apply to the Ban:

> The [deliberative process] privilege is simply inapplicable where government intent is at the heart of the issue. The Court agrees with Plaintiffs that each of the categories of compelled documents is likely to contain evidence reflecting Defendants' intent. It also could not be more clear that the Defendants' intent—whether it was for military purposes or whether it was purely for political and discriminatory purposes—is at the very heart of this litigation.

Stone, 2018 WL 3866676, at *3 (internal citations omitted).

Likewise, the *Karnoski* District Court found that the deliberative process privilege did not apply to the Ban. In its July 27, 2018 decision, the *Karnoski* District Court balanced the factors applied by the Ninth Circuit in *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)) (the "*Warner* factors"), namely: (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. *Karnoski*, 2018 WL 3608401, at *3. District courts in the Fourth Circuit have also applied the *Warner* factors. *See Scott v. PPG Indus., Inc.*, 142 F.R.D. 291, 294 (N.D. W.Va. 1992) (describing the four factors and citing *Warner Communications, Inc.*, 742 F.2d at 1161); *Tafas v. Dudas*, 530 F. Supp. 2d 786, 800 (E.D. Va. 2008) (same); *see also Cipollone v. Liggett Grp. Inc.*, Nos. 86-1198, 86-1223, 1987 WL 36515 (4th Cir. Feb. 13, 1987) (applying factors that are materially the same factors as the *Warner* factors).

Here all four *Warner* factors support disclosure of Dr. McHugh's relevant materials. *First*, the documents sought by the Subpoena are highly relevant to Plaintiffs' claims because they are likely to bear directly on whether the decision to adopt the Ban was motivated by unconstitutional prejudice, stereotype, animus, or ill-will against transgender individuals, or other impermissible considerations, rather than the requisite reasoned justification. *See Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (explaining that governmental policies must be narrowly tailored "to ensure that 'the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate [] prejudice or stereotype'") (alternation in original); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (explaining that it is unconstitutional for the government to give effect to private bias, whether directly or indirectly). Dr. McHugh's hostility towards transgender people is well documented. Though his views are cloaked in "science," they have been discredited time and time again as unsupported by and in direct contradiction to science and medicine. Dr. McHugh likely shared those views with the Government as part of its decision-making regarding the Ban, which would speak directly to the Ban's intentions.

Second, there is no indication or suggestion by Dr. McHugh that the information contained in his communications with the government can be obtained from another source. The Government itself has argued that "Plaintiffs must exhaust other sources of non-privileged discovery" before seeking discovery from the Government. *Karnoski*, Dkt. No. 268 at 1; *In re Donald J. Trump*, No. 18-72159, Dkt. No. 1 at 15 (9th Cir.). This is precisely what Plaintiffs are seeking to do here: obtain non-privileged communications between Dr. McHugh and the Government. *Third*, the government remains a party in the *Karnoski* litigation for which the Subpoena was issued. *Fourth*, there is no indication or suggestion by Dr. McHugh that disclosure of Dr. McHugh's materials would hinder policy discussions. The *Karnoski* Court has already

rejected the Government's concerns regarding hindrance of independent discussion and national security as "mere speculation." *Karnoski*, 2018 WL 3608401, at *4. For all of these reasons, the Government's communications with Dr. McHugh are not protected by the deliberative process privilege.

II. THE EXECUTIVE PRIVILEGE DOES NOT APPLY TO DR. MCHUGH'S RELEVANT DOCUMENTS.

Dr. McHugh also does not have standing to assert the executive privilege because he is a private party not affiliated with the government. *See* Procedures, Federal Testimonial Privileges § 6:3 (2d ed.) (stating that the presidential privilege may be invoked by a sitting or former president). But even if Dr. McHugh had standing to assert the executive privilege, it would not apply here.

The executive privilege protects only communications directly with the President regarding executive communications and decision-making as well as "communications authored or solicited and received by those members of an immediate White House adviser's staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate." *Am. Civil Liberties Union v. Cent. Intelligence Agency*, 109 F. Supp. 3d 220, 238 (D.D.C. 2015), *aff'd sub nom. Am. Civil Liberties Union v. U.S. Dep't of Justice*, 640 F. App'x 9 (D.C. Cir. 2016) (quoting *In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997)). The executive privilege is narrowly construed because it is "in derogation of the search for truth" and can "cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." *United States v. Nixon*, 418 U.S. 683, 710, 712 (1974). Even if executive privilege has been properly invoked, it can still be overcome by an adequate showing of need for the discovery sought. *Id*. at 713.

As is the case with any type of privilege, the executive privilege must be expressly claimed and the nature of the withheld documents must be described adequately. FED. R. CIV. P. 45(d)(2); *Karnoski*, 2018 WL 3608401, at *5-6; *Pulte Home Corp. v. Montgomery Cnty., Md.*, No. GJH-14-3955, 2017 WL 2361167, at *13 (D. Md. May 31, 2017). There is no indication from either Defendants' privilege logs or Dr. McHugh's objections that Dr. McHugh's relevant documents constitute presidential communications subject to the executive privilege. Indeed, based on their privilege logs, Defendants have not even claimed executive privilege regarding Dr. McHugh's materials or that Dr. McHugh had any communications directly with President Trump or his close advisors. Barsanti Decl. at ¶ 6. The produced document and the Department of Defense's privilege logs indicate that Dr. McHugh communicated with Mr. Bushman, who works for the Office of the Secretary Defense. Barsanti Decl. at ¶¶ 4-6. Mr. Bushman is neither White House staff nor within the group of presidential advisors to whom the executive privilege could apply. For all these reasons, the executive privilege is inapplicable here.

III. EVEN IF THE DELIBERATIVE PROCESS PRIVILEGE OR EXECUTIVE PRIVILEGE APPLIED, DR. MCHUGH HAS FAILED TO MEET HIS BURDEN TO PROVE THAT THE SUBPOENAED DOCUMENTS ARE PRIVILEGED.

Even if, for argument's sake, the deliberative process privilege or executive privilege applied, Dr. McHugh has failed to meet his burden to prove that the relevant documents are privileged. *See, e.g.*, *Jones v. Murphy*, 256 F.R.D. 510, 512-13 (D. Md. 2008), *aff'd*, No. CIV. CCB-05-1287, 2009 WL 604937 (D. Md. Feb. 23, 2009) ("When the requesting party challenges the sufficiency of the privilege assertion, the producing party bears the burden of establishing an evidentiary basis (such as an affidavit) to support each element of each privilege or work product protection sought, for each document."); *Pulte Home Corp.*, 2017 WL 2361167, at *13 ("The burden is on the party asserting the executive privilege to establish its applicability.").

Federal Rule of Civil Procedure 45 requires that the person withholding subpoenaed information under a privilege claim "describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim." FED. R. CIV. P. 45(e)(2)(A)(ii); *Am. Home Assur. Co. v. KBE Bldg. Corp.*, No. CIV. CCB-13-1941, 2015 WL 348292, at *13 (D. Md. Jan. 13, 2015) ("The party asserting such [privilege] protection must carry this burden 'with particularity for each document, or category of documents, for which privilege/protection is claimed,' by 'describ[ing] the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.'") (internal citations omitted) (alteration in original); *Kimberlin v. Frey*, No. GJH-13-3059, 2015 WL 13203619, at *3 (D. Md. July 27, 2015) ("When, however, a person asserts a claim of privilege in responding to or objecting to a subpoena, the person withholding the information must '(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.'"). Likewise, Guideline 10(d) of the Discovery Guidelines of the United States District Court for the District of Maryland requires the party asserting privilege to provide a privilege log identifying separately for each document:

> (i) the type of document;
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> (ii) the general subject matter of the document;
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> (iii) the date of the document; and
>
> (iv) such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and, where not apparent, the relationship of the author, addressee, custodian, and any other recipient to each other.

"The standard for testing the adequacy of the privilege log is whether, as to each document, it sets forth facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed." *Lord & Taylor, LLC v. White Flint, L.P.*, No. RWT 13-1912, 2015 WL 13309999, at *2 (D. Md. Mar. 23, 2015) (quoting *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B*, 230 F.R.D. 398, 406 (D. Md. 2005)).

Despite Rule 45, the relevant case law, this District's Discovery Guidelines, the Subpoena's specific instructions to provide a privilege log, and Plaintiffs' direct requests for a privilege log, Dr. McHugh has refused to provide a privilege log. Barsanti Decl. ¶ 8. And Dr. McHugh's assertions of privilege do not otherwise provide the information needed necessary to function as an adequate privilege log. Dr. McHugh has only made a barebones statement that documents responsive to the Subpoena are "privileged, at least as a communication with the President bearing upon his (the President's) Executive responsibilities." Exhibit C, July 19, 2018 email from Dr. McHugh's counsel; Barsanti Decl. ¶ 7. This response provides none of the requisite detail about the persons, date, or content of the alleged communications. Based solely on this statement, one would believe that Dr. McHugh had communicated solely and directly with the President, yet the government's privilege logs show otherwise, which calls into question the statement's accuracy. Barsanti Decl. ¶ 6. Plaintiffs cannot assess Dr. McHugh's executive privilege claims when it cannot even determine whether Dr. McHugh actually communicated with the President.

Since Dr. McHugh failed to provide a privilege log, he has failed to meet his burden to prove privilege and his privilege claims are therefore waived. *See Ambling Mgmt. Co. v. Univ. View Partners LLC*, No. CIV. WDQ-07-2071, 2010 WL 2465021, at *3 (D. Md. June 11, 2010) (finding that "[b]y not filing [] logs with their objections to the discovery requests, [the parties]

forfeited the opportunity to cure their deficient logs by later supplementation" and finding that the magistrate judge properly granted a motion to compel); *Am. Home Assur. Co.*, 2015 WL 348292, at *13 ("Failure to provide [] a [privilege] log, or equivalent information, may forfeit the claimed privilege.").

IV. DR. MCHUGH HAS NOT MET HIS BURDEN TO PROVE THAT THE SUBPOENAED DOCUMENTS ARE PROTECTED BY THE WORK PRODUCT DOCTRINE.

In addition to the deliberative process privilege, Dr. McHugh has refused to produce relevant documents that he claims are "privileged as . . . attorney work product." Barsanti Decl. Ex. C (Email from Mr. Bradley). Only documents made "in anticipation of litigation or for trial" may be protected from discovery under the work product doctrine. FED. R. CIV. P. 26(b)(3); *Neuberger*, 230 F.R.D. at 417-18. The party asserting the work product doctrine must provide "more than mere assertions . . . that documents or other tangible items were created in anticipation of litigation" and must "establish the underlying nexus between the preparation of the document and the specific litigation." *Neuberger*, 230 F.R.D. at 417-18 (internal citations and quotation marks omitted).

Dr. McHugh has failed to provide *any* information except the statement that the documents "are privileged as [] attorney-work product." This is certainly not adequate information to assess whether any work product protection might apply. *See*, *e.g.*, *Am. Home Assur. Co.*, 2015 WL 348292, at *13; *Kimberlin*, 2015 WL 13203619, at *3; *Lord & Taylor*, *LLC*, 2015 WL 13309999, at *2. As with the deliberative process privilege, Dr. McHugh is required to provide a privilege log to support his work product claims.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court grant its Motion to Compel the production of documents requested in the Subpoena and the preparation of a detailed privilege log of all withheld documents.

Dated: October 3, 2018

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that, on October 3, 2018, a copy of the document above was served by email and U.S. Mail on the following counsel:

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