

The Honorable Marsha J. Pechman

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**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

**DECLARATION OF VANESSA
BARSANTI IN SUPPORT OF
PLAINTIFFS' MOTION TO COMPEL
DEFENDANTS TO ADEQUATELY
RESPOND TO PLAINTIFFS' FIRST,
SECOND, AND THIRD SETS OF
REQUESTS FOR PRODUCTION OF
DOCUMENTS AND
INTERROGATORIES**

NOTE ON MOTION CALENDAR:
August 30, 2019

1 I, Vanessa Barsanti, swear under penalty of perjury under the laws of the United States to
2 the following:

3 1. I am counsel of record for Plaintiffs in this action, am over the age of 18, and am
4 competent to be a witness. I make this declaration in support of Plaintiffs' Motion to Compel
5 Defendants to More Fully Respond to Plaintiffs' First, Second, and Third Sets of Requests for
6 Production of Documents and Interrogatories based on facts within my personal knowledge.

7 2. On February 9, 2018, Defendant Donald J. Trump, in his official capacity as President
8 of the United States ("Defendant Trump"), served his Objections to Plaintiffs' First Set of Requests
9 for Production, a true and correct copy of which is attached hereto as Exhibit 1. On February 9,
10 2018, the acting Secretary of Defense and the United States Department of Defense ("Defendant
11 DoD") served their Objections and Responses to Plaintiffs' First Set of Requests for Production,
12 a true and correct copy of which is attached hereto as Exhibit 2.

13 3. On May 29, 2018, Defendant Trump served his Objections to Plaintiffs' Second Set
14 of Requests for Production, a true and correct copy of which is attached hereto as Exhibit 3. On
15 May 29, 2018, Defendant DoD served their Objections Plaintiffs' Second Set of Requests for
16 Production, a true and correct copy of which is attached hereto as Exhibit 4.

17 4. On May 28, 2019, Defendant Trump served his Objections to Plaintiffs' Third Set of
18 Requests for Production, a true and correct copy of which is attached hereto as Exhibit 5. On May
19 28, 2019, Defendant DoD served their Objections Plaintiffs' Third Set of Requests for Production,
20 a true and correct copy of which is attached hereto as Exhibit 6.

21 5. On February 9, 2018, Defendant Trump served his Objections to Plaintiffs' First Set
22 of Interrogatories, a true and correct copy of which is attached hereto as Exhibit 7. Defendant DoD
23 also originally provided responses on February 9, 2018, but later provided Objections, Responses,
24 and Supplemental Responses to Plaintiffs' First Set of Interrogatories on June 1, 2018, a true and
25 correct copy of which is attached hereto as Exhibit 8.

26 6. On May 29, 2018, Defendant Trump served his Objections to Plaintiffs' Second Set
27 of Interrogatories, a true and correct copy of which is attached hereto as Exhibit 9. On May 29,
28

1 2018, Defendant DoD served their Objections to Plaintiffs' Second Set of Interrogatories, a true
2 and correct copy of which is attached hereto as Exhibit 10.

3 7. On May 28, 2019, Defendant Trump served his Objections to Plaintiffs' Third Set of
4 Interrogatories, a true and correct copy of which is attached hereto as Exhibit 11. On May 28,
5 2019, Defendant DoD served their Objections and Responses to Plaintiffs' Third Set of
6 Interrogatories, a true and correct copy of which is attached hereto as Exhibit 12.

7 8. On July 17, 2019, the parties met and conferred via phone regarding Defendants'
8 boilerplate discovery objections, among other discovery issues and disputes.

9 9. On July 25, 2019, my colleague Daniel Siegfried sent a letter to Defendants' counsel
10 regarding their boilerplate objections, a true and correct copy of which is attached hereto as Exhibit
11 13. This letter reiterated Plaintiffs' request that Defendants remedy their responses.

12 10. On August 2, 2019, counsel for Defendants replied with a letter that did not address
13 Plaintiffs' concerns regarding boilerplate objections and instead provided general, non-specific
14 information as to how documents were collected, from whom documents were collected, and how
15 Defendants searched for relevant documents, a true and correct copy of which is attached hereto
16 as Exhibit 14. Defendants then provided a conclusory statement that this information satisfied
17 their discovery obligations under Federal Rule of Civil Procedure 34.

18 11. On August 9, 2019, the parties met and conferred to further narrow the issues in
19 dispute, yet remain at an impasse regarding the sufficiency of Defendants' discovery responses.

20
21 I declare under the penalty of perjury that the foregoing is true and correct.

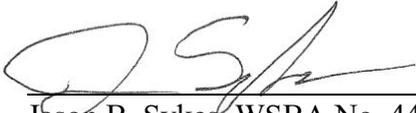
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23 DATED: August 15, 2019

/s/ Vanessa Barsanti

Vanessa Barsanti

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 August 15, 2019.



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EXHIBIT 1

The Honorable Marsha J. Pechman

**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

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' FIRST REQUESTS FOR
PRODUCTION TO DEFENDANT DONALD J. TRUMP**

Pursuant to Federal Rules of Civil Procedure 26 and 34 and the Local Rules of the U.S. District Court for the District of Columbia, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs' First Set of Requests for Production of Documents to Defendant Donald J. Trump, served December 29, 2017.¹ In presenting these objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

¹ These objections are limited to President Trump. Defendants will produce, or already have produced, separate objections for other Defendants.

Objection to Definitions

Defendants object to Plaintiffs' Definition 6 of "Document" as encompassing "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," insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

General Objection to All Requests for Production

Defendants object to any discovery directed to the President of the United States in this case, on several grounds, including that such discovery should be foreclosed in this case based on separation of powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege.

First, such discovery requests are inappropriate where, as here, they are premised on claims for declaratory and injunctive relief brought directly against the President of the United States, who is not a proper defendant on such claims. The Supreme Court has 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); *id.* at 500 ("The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department."). A plurality of the Court later reiterated this principle in *Franklin v. Massachusetts*, 505 U.S. 788, 802–803 (1992). The plurality in *Franklin* found it "extraordinary" that the district court in that case had issued an injunction against the President and two other government officials. *Id.* at 802, 806. "At the threshold," it said, "the

District Court should have evaluated whether injunctive relief against the President was available, and if not, whether appellees' injuries were nonetheless redressable." *Id.* at 803. Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827–28 (noting that such principle is “a functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history”). He reasoned that just as the President is absolutely immune from official capacity damages suits, so is he immune from efforts to enjoin him in his official capacity. *Id.* at 827 (“Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President’s performance of executive functions”). The lower courts have often applied this settled principle. *See e.g.*, *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) (“similar considerations regarding a court’s power to issue [injunctive] relief against the President himself apply to [the] request for a declaratory judgment”); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (“With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.”) (citations omitted). Under that principle, the President should not be subject to discovery in this case.

Second, the Supreme Court has made clear that discovery directed to the President in civil litigation raises significant separation of powers concerns and should be strictly circumscribed. In *Cheney v. U.S. District Court for District of Columbia*, the Supreme Court explained that where the discovery requests were directed to the Vice President and other senior officials of the Executive Branch who gave advice and made recommendations to the President,

it was “not a routine discovery dispute.” 542 U.S. 367, 385 (2004). The Court emphasized that “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.” *Id.* at 385. The Supreme Court “has held, on more than one occasion, that ‘[t]he highest respect that is owed to the office of the Chief Executive ... is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.’” *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Further, the Court has held that the Executive’s “constitutional responsibilities and status [are] factors counseling judicial deference and restraint” in the conduct of the litigation against it. *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

In *Cheney*, the district court permitted broad discovery directed to the Vice President and other senior officials, and the D.C. Circuit dismissed the government’s mandamus petition to vacate the district court’s discovery orders, holding that the government officials, “to guard against intrusion into the President’s prerogatives, must first assert privilege.” 542 U.S. at 375–76. In vacating the D.C. Circuit’s decision, the Supreme Court described as “anything but appropriate” the “overly broad discovery requests” directed to the Vice President and other senior officials, which were “unbounded in scope,” and asked for “everything under the sky.” *Id.* at 387–88 (“The Government [] did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored.”). Noting the separation of powers concerns, the Supreme Court instructed the D.C. Circuit to analyze, on remand, whether the district court’s actions in permitting discovery against the Vice President and other senior officials constituted “an unwarranted impairment of another branch in the performance of its constitutional duties.” *Id.* at 390. It rejected the D.C. Circuit’s “mistaken assumption that the

assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections." *Id.* at 391. *Cf. United States v. Poindexter*, 727 F. Supp. 1501, 1503–04 (D.D.C. 1989) (agreeing with the President that "it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents" and deciding to narrow, on its own, the scope of the discovery directed to the President). These separation of powers concerns were also recognized in *American Historical Association v. National Archives & Records Administration*. 402 F. Supp. 2d 171, 181 (D.D.C. 2005) (Kollar-Kotelly, J.). The Court there found the reasoning in *Cheney* instructive, reiterating the *Cheney* Court's view that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Id.* at 181 (quoting *Cheney*, 542 U.S. at 385) (internal quotation marks omitted).

In light of these compelling separation of powers concerns, the Court should, at a minimum, require Plaintiffs to exhaust alternative sources of discovery before subjecting the President to discovery. Indeed, on February 21, 2018—a mere two weeks from now—the Secretary of Defense is expected to submit an implementation plan to the President, which could narrow, if not completely eliminate, any purported reason for such broad discovery directed to the President. Military policy concerning transgender persons will be set forth in that plan, and any discovery, if permitted at all, into the basis for that policy should be directed at DoD in the first instance at that time. This timeline alone weighs heavily in favor of not subjecting the sitting President to discovery.

Finally, virtually all of the discovery directed to the President in this case is subject to the presidential communications privilege. The "presumptive privilege" that attaches to presidential

communications is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon*, 418 U.S. 683, 708 (1974); *see In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (describing the privilege’s “constitutional origins”). The privilege is broad, protecting the “confidentiality of Presidential communications in performance of the President’s responsibilities.” *United States v. Nixon*, 418 U.S. at 711. *See also In re Sealed Case*, 121 F.3d at 744 (“The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations.”). Documents subject to the presidential communications privilege are shielded in their entirety, and the privilege “covers final and post-decisional material as well as pre-deliberative ones.” *In re Sealed Case*, 121 F.3d at 745.

Although the presidential communications privilege is not absolute, the bar to overcoming the privilege is high; it is “more difficult to surmount” than the deliberative process privilege. *In re Sealed Case*, 121 F.3d at 746. A party seeking otherwise privileged presidential material must demonstrate a “focused demonstration of need.” *Id.*; *See also Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). Courts will balance “the public interests served by protecting the President’s confidentiality in a particular context with those furthered by requiring disclosure.” *In re Sealed Case*, 121 F.3d at 753. To meet this heavy burden of “specific need” in a criminal matter, the party seeking the privileged material must first demonstrate “that each discrete group of the subpoenaed materials likely contains important evidence”—that is, evidence “directly relevant to issues that are expected to be central to the trial,” and not evidence that is “only tangentially relevant or would relate to side issues.” *Id.* at 753–55. The party seeking the discovery must also show “that this evidence is not available with

due diligence elsewhere”—that is, notwithstanding other sources of information, the privileged documents are “still needed.” *Id.* (explaining that this standard reflects the Supreme Court’s “insistence that privileged presidential communications should not be treated as just another source of information”).

Where privileged material is sought for use in a civil case, the burden to overcome the presidential communications privilege is even greater. The greater scrutiny is appropriate because “the right to production of relevant evidence in civil proceedings does not have the same ‘constitutional dimensions’” as a request for information in a criminal case. *Cheney*, 542 U.S. at 384 (quoting *United States v. Nixon*, 418 U.S. at 713); *see also Am. Historical Ass’n*, 402 F. Supp. 2d at 181 (explaining that the *Cheney* Court noted that “while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch’s essential functions, the same could not be said of document requests in the civil context”); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) (“[T]he sufficiency of the Committee’s showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee’s functions.”) (emphasis added).

In this case—a civil matter seeking discovery directly from the President, in his capacity as Commander-in-Chief, related to his decisionmaking process on a topic involving national security and military concerns—Plaintiffs face a significant burden in order to negate a valid assertion of the presidential communications privilege. Plaintiffs cannot meet this burden, especially where the requested discovery seeks information that, on its face, is privileged (including information about presidential communications, attorney-client and work product materials, and drafts of presidential documents) and would plainly intrude on core presidential

deliberations, or where the requested discovery seeks information that could be sought from the Department of Defense or other sources, including publicly available ones.

Accordingly, Defendants object to any discovery requests directed to the President of the United States in this case based on these compelling separation of powers concerns, and in particular object to the discovery sought that is subject to the presidential communications privilege. Based on the foregoing objections, the President will not produce privileged or non-privileged documents and information that have been identified as potentially responsive.

Specific Objections to Requests for Production

RFP No. 1: All Documents and Communications related to the Policy.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President also objects to the scope of this RFP on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the

reference to “[a]ll Documents and Communications” purports to require the President to search for and produce documents and communications in any and all locations, regardless of whether the documents and communications would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 2: All Documents supporting, refuting, or relating to Your contention that transgender service members hinder military readiness and lethality.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents” purports to require the President to search for and produce documents in any and all

locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 3: All Documents supporting, refuting, or relating to Your contention that transgender service members disrupt unit cohesion.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 4: All Documents supporting, refuting, or relating to Your contention that transgender service members tax military resources.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 5: All documents relating to any justification considered by Defendants for the Policy other than those identified in Requests for Production Nos. 1-4.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 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.”

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents and Communications” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 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.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents and Communications” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, the President objects to the extent that “consultation” is vague and undefined.

The President will not produce any documents responsive to this RFP.

RFP No. 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.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All studies, reports, instructions, directives, or other Documents” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents

would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 9: All Documents and Communications between January 20, 2017 and July 28, 2017 related to military spending on gender confirmation surgeries.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 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.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

The foregoing objections do not foreclose the possibility that, to the extent any responsive documents exist, a Member of Congress may seek to oppose the production of information in this case based on the Speech or Debate Clause.

RFP No. 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.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects to the extent that “reflecting” is vague and undefined.

The President will not produce any documents responsive to this RFP.

RFP No. 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.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents related to, and Communications with” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 13: All currently operative military policies, directives, or procedures that pertain exclusively to transgender service members.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The

President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 14: All Documents and Communications relating to the RAND Report.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log

will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents and Communications” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 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.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log

will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents or Communications” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

The President will not produce any documents responsive to this RFP.

RFP No. 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.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c)

communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 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.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not

party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects to the extent that “sufficient to show” is vague and undefined.

The President will not produce any documents responsive to this RFP.

RFP No. 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.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not

party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 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.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log

will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 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.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 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.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 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.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President furthers objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents and Communications” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, the President objects to the extent that “subject matter set forth in” is vague and undefined.

The President will not produce any documents responsive to this RFP.

RFP No. 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.

Specific Objections:

The President objects on the grounds that this RFP is not properly directed to him and should instead be directed to DoD, as the documents referred to in this RFP would not all be in the possession, custody, and control of the President.

To the extent that this RFP is deemed to be properly directed to any documents that may be in the possession of the President, the President makes the following objections. The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log

will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents or Communications” purports to require the President to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, the President objects to the extent that “reasons, grounds, or bases” is vague and undefined.

The President will not produce any documents responsive to this RFP.

RFP No. 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.”

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential

communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

RFP No. 25: All estimates or calculations, and related Documents and Communications, relating to the cost of separating currently serving transgender people from the military.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the general and specific objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The President will not produce any documents responsive to this RFP.

Date: February 9, 2018

Respectfully submitted,

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Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
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CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

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/s/ Ryan Parker
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EXHIBIT 2

The Honorable Marsha J. Pechman

**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

**DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIRST SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS TO SECRETARY MATTIS AND
THE UNITED STATES DEPARTMENT OF DEFENSE**

Pursuant to Federal Rules of Civil Procedure 26 and 34 and the Local Rules of the U.S. District Court for the Western District of Washington, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' First Set of Requests for Production of Documents to Defendant James N. Mattis, in his official capacity as Secretary of Defense, and the United States Department of Defense, served December 29, 2017.¹ In presenting these objections and responses, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance,

¹ These objections and responses are limited to Secretary Mattis and the Department of Defense. Defendants will produce, or already have produced, separate objections for other Defendants.

materiality, privilege, competency, or any other appropriate ground. ESI will be produced in TIF format.

Objection to Definitions

Defendants object to Plaintiffs' Definition 6 of "Document" as encompassing "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," insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

Specific Objections and Responses to Requests for Production

RFP No. 1:

All Documents and Communications related to the Policy.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All

Documents and Communications” purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 2:

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

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents” purports to require Defendants to search for and produce documents in any and all

locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 3:

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

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 4:

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

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 5:

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

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

RFP No. 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.”

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents and Communications” purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 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.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents and Communications" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, Defendants object to the extent that "consultation" is vague and undefined.

RFP No. 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.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All studies, reports, instructions, directives, or other Documents" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 9:

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

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 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.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The foregoing objections do not foreclose the possibility that, to the extent any responsive documents exist, a Member of Congress may seek to oppose the production of information in this case based on the Speech or Debate Clause.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 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.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which

would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object to the extent that “reflecting” is vague and undefined.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 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.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents related to, and Communications with” purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 13:

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

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 14:

All Documents and Communications relating to the RAND Report.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents and Communications" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

RFP No. 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.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "All Documents or Communications" purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 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.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 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.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or

information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object to the extent that “sufficient to show” is vague and undefined.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 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.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which

describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 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.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 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.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 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.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which

would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 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.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents and Communications” purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, Defendants object to the extent that “subject matter set forth in” is vague and undefined.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 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.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “All Documents or Communications” purports to require Defendants to search for and produce documents in any and all locations, regardless of whether the documents would be redundant and/or regardless of whether such searches would be likely to yield information that is distinct or that is relevant.

Additionally, Defendants object to the extent that “reasons, grounds, or bases” is vague and undefined.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 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.”

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which

would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 25:

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

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

Date: February 9, 2018

Respectfully submitted,

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Acting Assistant Attorney General
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Deputy Assistant Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

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EXHIBIT 3

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-Cv-1297-MJP

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' SECOND SET
OF REQUESTS FOR PRODUCTION TO DEFENDANT DONALD J. TRUMP**

Pursuant to Federal Rules of Civil Procedure 26 and 34, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs' Second Set of Requests for Production of Documents to Defendant Donald J. Trump, served April 26, 2018.¹ In presenting these objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

¹ These objections are in response to the requests as they are directed to Defendant President Trump and as they are intended to apply to the Vice President or the Office of the Vice President. Defendants will produce, or already have produced, separate objections for other Defendants.

Objections to Definitions and Instructions

1. Defendants object to Definition 1 of “You,” “your,” and “yours” as substantially overbroad, ambiguous, and disproportionate to the needs of the case.

2. Defendants object to Definition 2 of “President Trump” and the “President” as substantially overbroad, ambiguous, and disproportionate to the needs of the case because “indirectly by” or “under the control of Donald J. Trump” is overbroad, ambiguous, and disproportionate to the needs of the case because these terms would encompass all employees of every Executive Branch Department and agency. In these objections, Defendants will construe the terms “President Trump” and the “President” to refer only to the President and his immediate advisors in the White House and their staff, as well as officials and employees of the Executive Office of the President and EOP components.

3. Defendants object to Definition 3 of “Vice President Pence” and the “Vice President” as overbroad, unduly burdensome and disproportionate to the needs of the case to the extent that it includes “persons engaged . . . indirectly by” and “under the control of Michael R. Pence.” In these objections, Defendants will construe the terms “Vice President Pence” and the “Vice President” to refer only to the Vice President and to employees of the Office of the Vice President.

4. Defendants object to Plaintiffs’ Definition 9 of “Communication” as encompassing “electronically stored information (ESI) containing, summarizing, or memorializing any communication,” insofar as electronic information collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

5. Defendants object to Plaintiffs' Definition 10 of "Document" and "documents" as encompassing "ESI," and "computer data," insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

General Objection to All Requests for Production

Defendants object to any discovery directed to the President of the United States in this case, on several grounds, including that such discovery should be foreclosed in this case based on separation of powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege. *See* Defendants' Motion for Protective Order, ECF No. 268.

First, Plaintiffs should not be permitted to request the President to respond to discovery because doing so would intrude on established separation of powers principles. Indeed, this Court has already concluded that Plaintiffs may not seek injunctive relief against the President based on the *Mississippi v. Johnson*, 71 U.S. at 501, line of cases. *See* ECF No. 233 at 30; ECF No. 194 at 22–24. An order directing the President to respond to discovery raises the same core separation-of-powers concerns as the Court identified in *Mississippi v. Johnson*. *See* 71 U.S. at 499 (reasoning that when presidential action requires "the exercise of judgment," "general principles . . . forbid judicial interference with the exercise of Executive discretion."); *see also Franklin v. Massachusetts*, 505 U.S. 788, 827–28 (1992) (Scalia, J., concurring in part and concurring in the judgment) (the principle that the President "may not be ordered to perform particular executive . . . acts at the behest of the Judiciary" is "implicit in the separation of powers"). Forcing the President to respond to discovery where he is sued in his official capacity,

even where declaratory relief is at issue or otherwise, would “not only distract him from his constitutional responsibility to ‘take Care that the Laws be faithfully executed,’” but “would produce needless head-on confrontations between district judges and the chief executive.” *Id.* at 828; *see Swan v. Clinton*, 100 F.3d 973, 977 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.”). In light of these concerns, the Court should order that Plaintiffs may not seek discovery from the sitting President or any discovery of information concerning presidential communications and deliberations.

Second, the Supreme Court has made clear that discovery directed to the President in civil litigation raises significant separation of powers concerns and should be strictly circumscribed. In *Cheney v. U.S. District Court for the District of Columbia*, the Supreme Court explained that where the discovery requests were directed to the Vice President and other senior officials of the Executive Branch who gave advice and made recommendations to the President, it was “not a routine discovery dispute.” 542 U.S. 367, 385 (2004). The Court emphasized that “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.” *Id.* at 385. The Supreme Court “has held, on more than one occasion, that ‘[t]he highest respect that is owed to the office of the Chief Executive ... is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.’” *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Further, the Court has held that the Executive’s “constitutional responsibilities and status [are] factors counseling judicial deference and restraint” in the conduct of the litigation against it. *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

In *Cheney*, the district court permitted broad discovery directed to the Vice President and other senior officials, and the D.C. Circuit dismissed the government's mandamus petition to vacate the district court's discovery orders, holding that the government officials, "to guard against intrusion into the President's prerogatives, must first assert privilege." 542 U.S. at 375-76. In vacating the D.C. Circuit's decision, the Supreme Court described as "anything but appropriate" the "overly broad discovery requests" directed to the Vice President and other senior officials, which were "unbounded in scope," and asked for "everything under the sky." *Id.* at 387-88 ("The Government [] did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored."). Noting the separation of powers concerns, the Supreme Court instructed the D.C. Circuit to analyze, on remand, whether the district court's actions in permitting discovery against the Vice President and other senior officials constituted "an unwarranted impairment of another branch in the performance of its constitutional duties." *Id.* at 390. It rejected the D.C. Circuit's "mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections." *Id.* at 391. *Cf. United States v. Poindexter*, 727 F. Supp. 1501, 1503-04 (D.D.C. 1989) (agreeing with the President that "it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents" and deciding to narrow, on its own, the scope of the discovery directed to the President). These separation of powers concerns were also recognized in *American Historical Association v. National Archives & Records Administration*. 402 F. Supp. 2d 171, 181 (D.D.C. 2005) (Kollar-Kotelly, J.). The Court there found the reasoning in *Cheney* instructive, reiterating the *Cheney* Court's view that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Id.* at 181 (quoting *Cheney*, 542 U.S. at 385) (internal quotation

marks omitted). In light of these compelling separation-of-powers concerns, Plaintiffs are required, at a minimum, to exhaust alternative sources of discovery before seeking discovery of the President and discovery from other sources that seeks information concerning presidential communications and deliberations. *See Cheney*, 542 U.S. at 391.

Finally, virtually all of the discovery directed to the President in this case is subject to the presidential communications privilege. The “presumptive privilege” that attaches to presidential communications is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon*, 418 U.S. 683, 708 (1974); *see In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (describing the privilege’s “constitutional origins”). The privilege is broad, protecting the “confidentiality of Presidential communications in performance of the President’s responsibilities.” *United States v. Nixon*, 418 U.S. at 711. *See also In re Sealed Case*, 121 F.3d at 744 (“The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations.”). Documents subject to the presidential communications privilege are shielded in their entirety, and the privilege “covers final and post-decisional material as well as pre-deliberative ones.” *In re Sealed Case*, 121 F.3d at 745.

Although the presidential communications privilege is not absolute, the bar to overcoming the privilege is high; it is “more difficult to surmount” than the deliberative process privilege. *In re Sealed Case*, 121 F.3d at 746. A party seeking otherwise privileged presidential material must demonstrate a “focused demonstration of need.” *Id.*; *See also Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). Courts will balance “the public interests served by protecting the President’s confidentiality in a particular context with those furthered by requiring disclosure.” *In re Sealed Case*, 121 F.3d at 753. To meet this heavy

burden of “specific need” in a criminal matter, the party seeking the privileged material must first demonstrate “that each discrete group of the subpoenaed materials likely contains important evidence”—that is, evidence “directly relevant to issues that are expected to be central to the trial,” and not evidence that is “only tangentially relevant or would relate to side issues.” *Id.* at 753–55. The party seeking the discovery must also show “that this evidence is not available with due diligence elsewhere”—that is, notwithstanding other sources of information, the privileged documents are “still needed.” *Id.* (explaining that this standard reflects the Supreme Court’s “insistence that privileged presidential communications should not be treated as just another source of information”).

Where privileged material is sought for use in a civil case, the burden to overcome the presidential communications privilege is even greater. The greater scrutiny is appropriate because “the right to production of relevant evidence in civil proceedings does not have the same ‘constitutional dimensions’” as a request for information in a criminal case. *Cheney*, 542 U.S. at 384 (quoting *United States v. Nixon*, 418 U.S. at 713); *see also Am. Historical Ass’n*, 402 F. Supp. 2d at 181 (explaining that the *Cheney* Court noted that “while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch’s essential functions, the same could not be said of document requests in the civil context”); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) (“[T]he sufficiency of the Committee’s showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee’s functions.”) (emphasis added).

In this case—a civil matter seeking discovery directly from the President, in his capacity as Commander-in-Chief, related to his decisionmaking process on a topic involving national security and military concerns—Plaintiffs face a significant burden in order to negate a valid

assertion of the presidential communications privilege. Plaintiffs cannot meet this burden, especially where the requested discovery seeks information that, on its face, is privileged (including information about presidential communications, attorney-client and work product materials, and drafts of presidential documents) and would plainly intrude on core presidential deliberations, or where the requested discovery seeks information that could be sought from the Department of Defense or other sources, including publicly available ones.

Accordingly, Defendants object to any discovery requests directed to the President of the United States in this case based on these compelling separation of powers concerns, and in particular object to the discovery sought that is subject to the presidential communications privilege. The foregoing objection also applies to discovery of any information, documents or materials from the Vice President of the United States and the Office of the Vice President.

Specific Objections to Requests for Production

RFP No. 26: Documents sufficient to show the total annual amount spent and average, actual, or estimated annual per-person cost of hormone therapy provided to service members for each of fiscal years 2015, 2016, and 2017, and for the year to date of fiscal year 2018, including without limitation hormone therapy for the treatment of hypogonadism, hypothyroidism, hyperthyroidism, prostate cancer, breast cancer, growth hormone deficiency, menopause, osteoporosis, and transgender hormone therapy.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material

the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. The President further objects to this RFP to the extent that it seeks documents that are not within his custody or control.

Response:

The President will not produce any documents responsive to this RFP.

RFP No. 27: All Documents or Communications relating or referring to Secretary James Mattis's February 22, 2018, Memorandum for the President with Subject: Military Service by Transgender Individuals (the "February 22, 2018, Memorandum"), including without limitation: (a) all documents reviewed, considered, or relied upon in preparing the February 22, 2018, Memorandum; and (b) all drafts of the February 22, 2018, Memorandum.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. The President further objects to this RFP to the extent that it seeks documents that are not within his custody or control.

Response:

The President will not produce any documents responsive to this RFP.

RFP No. 28: All Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the final draft of the February 22, 2018, Memorandum.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. The President further objects to this RFP to the extent that it seeks documents that are not within his custody or control.

Response:

The President will not produce any documents responsive to this RFP.

RFP No. 29: All Documents or Communications relating or referring to the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons (the "Report and Recommendations"), including without limitation: (a) all documents received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (b) all Communications to, from, or copying the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (c) all Documents reflecting, containing, or setting forth any

information or data received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (d) all Documents relating, reflecting, or referring to matters discussed at any meeting of the Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (e) all drafts of the Report and Recommendations.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. The President further objects to this RFP to the extent that it seeks documents that are not within his custody or control.

Response:

The President will not produce any documents responsive to this RFP.

RFP No. 30: All Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the Report and Recommendations.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. The President further objects to this RFP to the extent that it seeks documents that are not within his custody or control.

Response:

The President will not produce any documents responsive to this RFP.

RFP No. 31: All Documents and Communications relating or referring to any person or group providing analysis, advice, or recommendations to Secretary Mattis, the Department of Defense, and/or the Panel of Experts concerning the Report and Recommendations, military service by transgender people or any restrictions on such service, including the Transgender Service Policy Working Group and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material

the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. The President further objects to this RFP to the extent that it seeks documents that are not within his custody or control.

Response:

The President will not produce any documents responsive to this RFP.

RFP No. 32: All Documents or Communications relating or referring to President Trump's March 23, 2018, Memorandum for the Secretary of Defense and the Secretary of Homeland Security with Subject: Military Service by Transgender Individuals (the "March 23, 2018, Memorandum"), including without limitation: (a) all documents reviewed, considered, or relied upon in preparing the March 23, 2018, Memorandum; and (b) all drafts of the March 23, 2018, Memorandum.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Response:

The President will not produce any documents responsive to this RFP.

RFP No. 33: All Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the March 23, 2018, Memorandum.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Response:

The President will not produce any documents responsive to this RFP.

RFP No. 34: All Communications, on or after January 20, 2017 to the present, between the President, the Executive Office of the President, the Vice President, and/or the Office of the Vice President, on the one hand, and Secretary Mattis and/or the Department of the Defense, on the other hand, relating or referring to military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Response:

The President will not produce any documents responsive to this RFP. To the extent this request is directed at documents, information, or materials in the custody of the Vice President and the Office of the Vice President—who are not defendants in this action—any responsive Vice Presidential materials will also not be produced based on the general objection above. *See Cheney v. U.S. District Court for the District of Columbia.*

RFP No. 35: All Communications, on or after January 20, 2017 to the present, between the President, the Executive Office of the President, the Vice President, the Office of the Vice President, Secretary Mattis, the Department of Defense, and/or the Panel of Experts, on the one hand, and non-government third parties, including but not limited to the Heritage Foundation, Heritage Action for America, the Family Research Council, the Center for Military Readiness, the Liberty Council, lobbyists, think tanks, nonprofit organizations, religious organizations, and individuals, on the other hand, concerning military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objection.

The President further objects to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Response:

The President will not produce any documents responsive to this RFP. To the extent this request is directed at documents, information, or materials in the custody of the Vice President and the Office of the Vice President—who are not defendants in this action—any responsive Vice Presidential materials will also not be produced based on the general objection above. *See Cheney v. U.S. District Court for the District of Columbia.*

Dated: May 29, 2018

Respectfully submitted,

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Acting Assistant Attorney General
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BRETT A. SHUMATE
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Counsel for Defendants

EXHIBIT 4

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-Cv-1297-MJP

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' SECOND SET OF
REQUESTS FOR PRODUCTION TO SECRETARY MATTIS AND
THE UNITED STATES DEPARTMENT OF DEFENSE**

Pursuant to Federal Rules of Civil Procedure 26 and 34, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' Second Set of Requests for Production of Documents to Defendant James N. Mattis, in his official capacity as Secretary of Defense, and the United States Department of Defense, served April 26, 2018.¹ In presenting these objections, Defendants do not waive any further objection in pretrial motions

¹ These objections and responses are limited to Secretary Mattis and the Department of Defense. Defendants will produce, or already have produced, separate objections for other Defendants.

practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Objections to Definitions and Instructions

1. Defendants object to Definition 1 of “You,” “your,” and “yours” as substantially overbroad, ambiguous, and disproportionate to the needs of the case.

2. Defendants object to Definition 2 of “President Trump” and the “President” as substantially overbroad, ambiguous, and disproportionate to the needs of the case because “indirectly by” or “under the control of Donald J. Trump” is overbroad, ambiguous, and disproportionate to the needs of the case because these terms would encompass all employees of every Executive Branch Department and agency. In these objections, Defendants will construe the terms “President Trump” and the “President” to refer only to employees of the Executive Office of the White House.

3. Defendants object to Definition 3 of “Vice President Pence” and the “Vice President” as overbroad, unduly burdensome and disproportionate to the needs of the case to the extent that it includes “persons engaged . . . indirectly by” and “under the control of Michael R. Pence.” In these objections, Defendants will construe the terms “Vice President Pence” and the “Vice President” to refer only to employees of the Office of the Vice President.

4. Defendants object to Plaintiffs’ Definition 9 of “Communication” as encompassing “electronically stored information (ESI) containing, summarizing, or memorializing any communication,” insofar as electronic information collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

5. Defendants object to Plaintiffs' Definition 10 of "Document" and "documents" as encompassing "ESI," and "computer data," insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

Specific Objections and Responses to Requests for Production

RFP No. 26: Documents sufficient to show the total annual amount spent and average, actual, or estimated annual per-person cost of hormone therapy provided to service members for each of fiscal years 2015, 2016, and 2017, and for the year to date of fiscal year 2018, including without limitation hormone therapy for the treatment of hypogonadism, hypothyroidism, hyperthyroidism, prostate cancer, breast cancer, growth hormone deficiency, menopause, osteoporosis, and transgender hormone therapy.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The Department of Defense also objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for

“[d]ocuments sufficient to show the total annual amount spent and average, actual, or estimated annual per-person cost of hormone therapy provided to service members” embraces the primary medical records for service members over a four-year period, requiring a search of potentially millions of records. Consequently, the Department of Defense construes this request as excluding service member medical records and information, and as limited to seeking documents that contain summaries of “total annual amount spent and average, actual, or estimated annual per-person cost of hormone therapy provided to service members” for fiscal years 2015 through and including 2018.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants’ possession, custody, and control.

RFP No. 27: All Documents or Communications relating or referring to Secretary James Mattis’s February 22, 2018, Memorandum for the President with Subject: Military Service by Transgender Individuals (the “February 22, 2018, Memorandum”), including without limitation: (a) all documents reviewed, considered, or relied upon in preparing the February 22, 2018, Memorandum; and (b) all drafts of the February 22, 2018, Memorandum.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by

the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 28: All Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the final draft of the February 22, 2018, Memorandum.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 29: All Documents or Communications relating or referring to the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons (the "Report and Recommendations"), including without limitation: (a) all documents received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender

Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (b) all Communications to, from, or copying the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (c) all Documents reflecting, containing, or setting forth any information or data received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (d) all Documents relating, reflecting, or referring to matters discussed at any meeting of the Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (e) all drafts of the Report and Recommendations.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 30: All Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the Report and Recommendations.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 31: All Documents and Communications relating or referring to any person or group providing analysis, advice, or recommendations to Secretary Mattis, the Department of Defense, and/or the Panel of Experts concerning the Report and Recommendations, military service by transgender people or any restrictions on such service, including the Transgender Service Policy Working Group and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege;

(c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 32: All Documents or Communications relating or referring to President Trump's March 23, 2018, Memorandum for the Secretary of Defense and the Secretary of Homeland Security with Subject: Military Service by Transgender Individuals (the "March 23, 2018, Memorandum"), including without limitation: (a) all documents reviewed, considered, or relied upon in preparing the March 23, 2018, Memorandum; and (b) all drafts of the March 23, 2018, Memorandum.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 33: All Documents or Communications reflecting, referring, or relating to any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the March 23, 2018, Memorandum.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Subject to and without waiving the above objections, Defendants will produce any nonprivileged documents responsive to this RFP in Defendants' possession, custody, and control.

RFP No. 34: All Communications, on or after January 20, 2017 to the present, between the President, the Executive Office of the President, the Vice President, and/or the Office of the Vice President, on the one hand, and Secretary Mattis and/or the Department of the Defense, on the other hand, relating or referring to military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Secretary Mattis and the United States Department of Defense will not produce any documents responsive to this RFP.

RFP No. 35: All Communications, on or after January 20, 2017 to the present, between the President, the Executive Office of the President, the Vice President, the Office of the Vice President, Secretary Mattis, the Department of Defense, and/or the Panel of Experts, on the one hand, and non-government third parties, including but not limited to the Heritage Foundation, Heritage Action for America, the Family Research Council, the Center for Military Readiness, the Liberty Council, lobbyists, think tanks, nonprofit organizations, religious organizations, and individuals, on the other hand, concerning military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general.

Specific Objections:

Defendants object to this RFP to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material

the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Response:

Secretary Mattis and the United States Department of Defense will not produce any documents responsive to this RFP.

Dated: May 29, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

BRETT A. SHUMATE
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
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Counsel for Defendants

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Dated: May 29, 2018

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Counsel for Defendants

EXHIBIT 5

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-Cv-1297-MJP

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' THIRD SET
OF REQUESTS FOR PRODUCTION TO DEFENDANT DONALD J. TRUMP**

Pursuant to Federal Rules of Civil Procedure 26 and 34, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs' Third Set of Requests for Production of Documents to Defendant Donald J. Trump, served April 12, 2019.¹ In presenting these objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

¹ These objections are in response to the requests as they are directed to Defendant President Trump. Defendants will produce, or already have produced, separate objections for other Defendants.

Objections to Definitions and Instructions

1. Defendants object to Definition 1 of “You,” “your,” and “yours” as substantially overbroad, ambiguous, and disproportionate to the needs of the case. Plaintiffs have defined “You,” “your,” and “yours” to encompass all “current and former employees agents, affiliates, contractors, consultants, representatives, and other persons engaged directly or indirectly by or under the control of Defendants,” thus covering more than a million people.

2. Defendants object to Plaintiffs’ Definition 6 of “Communication” as encompassing “electronically stored information (ESI) containing, summarizing, or memorializing any communication,” insofar as electronic information collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

3. Defendants object to Plaintiffs’ Definition 7 of “Document” and “documents” as encompassing “ESI,” and “computer data,” insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

4. Defendants object to Plaintiffs’ Definition 8 of “Identify” as encompassing individuals’ “full name[s], job title[s], and employer[s] during the period referred to, and

current or last-known address[es] and telephone number[s] and business address[es] and telephone number[s]” as being overbroad and disproportionate to the needs of the case. Defendants further object on the grounds that this definition is an unwarranted invasion of the privacy of non-parties and seeks information protected by the Privacy Act, 5 U.S.C. § 552a, et seq.

5. Defendants object to Instruction 12 directing Defendants to produce “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” as being overbroad and disproportionate to the needs of the case.

General Objections to All Interrogatories

1. Defendants object to any discovery directed to the President of the United States in this case, on several grounds, including that such discovery should be foreclosed in this case based on separation-of-powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege.

First, such discovery requests are inappropriate where, as here, they are premised on claims for declaratory and injunctive relief brought directly against the President of the United States, who is not a proper defendant on such claims. *See Doe v. Shanahan*, No. 17-cv-1597 (D.D.C. Aug. 9, 2017), Dkt. 155 at 6 (“Defendants’ motion presents sound reasons for dismissing the President based on well-established separation of power principles set

forth in United States Supreme Court and D.C. Circuit precedent.”). The Supreme Court has 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); *id.* at 500 (“The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department.”). A “majority of the Justices” in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), reaffirmed these fundamental principles. *Swan v. Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996). The four-Justice plurality in *Franklin* found it “extraordinary” that the district court in that case had issued an injunction against the President and two other government officials. 505 U.S. at 802, 806. “At the threshold,” it said, “the District Court should have evaluated whether injunctive relief against the President was available, and if not, whether appellees’ injuries were nonetheless redressable.” *Id.* at 803. Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827–28 (noting that such principle is “a functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history”). He reasoned that just as the President is absolutely immune from official capacity damages suits, so is he immune from efforts to enjoin him in his official capacity. *Id.* at 827 (“Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President’s performance of executive functions”). The lower courts have often applied this settled principle. *See e.g., Swan*, 100

F.3d at, 976 n.1 (“similar considerations regarding a court’s power to issue [injunctive] relief against the President himself apply to [the] request for a declaratory judgment”); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (“With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.” (citations omitted)). Under that principle, the President should not be subject to discovery in this case.

Second, the Supreme Court has made clear that discovery directed to the President in civil litigation raises significant separation of powers concerns and should be strictly circumscribed. In *Cheney v. U.S. District Court for District of Columbia*, the Supreme Court explained that where the discovery requests were directed to the Vice President and other senior officials of the Executive Branch who gave advice and made recommendations to the President, it was “not a routine discovery dispute.” 542 U.S. 367, 385 (2004). The Court emphasized that “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.” *Id.* at 385. The Supreme Court “has held, on more than one occasion, that ‘[t]he highest respect that is owed to the office of the Chief Executive ... is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.’” *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Further, the Court has held that the Executive’s “constitutional responsibilities and status [are] factors counseling judicial deference and restraint” in the conduct of the litigation against it. *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

In *Cheney*, the district court permitted broad discovery directed to the Vice President and other senior officials, and the D.C. Circuit dismissed the government's mandamus petition to vacate the district court's discovery orders, holding that the government officials, "to guard against intrusion into the President's prerogatives, must first assert privilege." 542 U.S. at 375–76. In vacating the D.C. Circuit's decision, the Supreme Court described as "anything but appropriate" the "overly broad discovery requests" directed to the Vice President and other senior officials, which were "unbounded in scope," and asked for "everything under the sky." *Id.* at 387–88 ("The Government [] did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored."). Noting the separation of powers concerns, the Supreme Court instructed the D.C. Circuit to analyze, on remand, whether the district court's actions in permitting discovery against the Vice President and other senior officials constituted "an unwarranted impairment of another branch in the performance of its constitutional duties." *Id.* at 390. It rejected the D.C. Circuit's "mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections." *Id.* at 391. These separation of powers concerns were also recognized in *American Historical Association v. National Archives & Records Administration*. 402 F. Supp. 2d 171, 181 (D.D.C. 2005). The Court there found the reasoning in *Cheney* instructive, reiterating the *Cheney* Court's view that "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Id.* at 181 (quoting *Cheney*, 542 U.S. at 385) (internal quotation marks omitted). In light of these compelling separation of powers concerns, the Court should, at a minimum,

require Plaintiffs to exhaust alternative sources of discovery before subjecting the President to discovery. *See Doe 2 v. Shanahan*, 917 F.3d 694, 736 (D.C. Cir. 2019) (Williams, J., concurring) (explaining that “[t]he present case implicates sensitive separation of powers concerns—all in the context of military preparedness” and that “a highly intrusive examination of the President’s mental processes [] would thus be idle, or worse” (citations omitted)).

Finally, virtually all of the discovery directed to the President in this case is subject to the presidential communications privilege. The presidential communications privilege is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon*, 418 U.S. 683, 708 (1974); *see In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (describing the privilege’s “constitutional origins”). The privilege is broad, protecting the “confidentiality of Presidential communications in performance of the President’s responsibilities.” *Nixon*, 418 U.S. at 711; *see also In re Sealed Case*, 121 F.3d at 744 (“The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations.”). In addition to the substance of deliberations and communications, the presidential communications privilege protects “purely factual material,” *In re Sealed Case*, 121 F.3d at 750, and whether particular “sources of information” were considered by the President and his immediate advisors. *See id.* at 745, 750; *Loving v. Dep’t of Def.*, 550 F.3d 32, 38 (D.C. Cir. 2008) (contrasting the deliberative process privilege). Such information plainly “reflect[s] presidential decisionmaking and deliberations,” and disclosure of this information

would intrude on presidential deliberations and impede the President's ability to perform his constitutional duty. *See In re Sealed Case*, 121 F.3d at 744, 751.

In light of separation-of-powers considerations discussed above, the Supreme Court in *Cheney* expressly rejected the notion that the Executive Branch at its highest level shall bear the initial burden of invoking executive privilege with specificity or making particular objections to discovery on a line-by-line basis to safeguard executive functions and maintain the separation of powers. 542 U.S. at 383, 388; *see also id.* at 389 (“Executive privilege is an extraordinary assertion of power ‘not to be lightly invoked.’” (citation omitted)). Even in a criminal case, before the burden shifts to the Office of the President to formally invoke the presidential communications privilege by affidavit, plaintiffs must first demonstrate a specific “need” for information that implicates presidential deliberations by “satisfy[ing] exacting standards of ‘(1) relevancy; (2) admissibility; [and] (3) specificity.’” *Id.* at 386 (quoting *Nixon*, 418 U.S. at 700).

Where privileged material is sought for use in a civil case, Plaintiffs' initial burden is even greater. The greater scrutiny is appropriate because “the right to production of relevant evidence in civil proceedings does not have the same ‘constitutional dimensions’” as a request for information in a criminal case. *Cheney*, 542 U.S. at 384 (quoting *Nixon*, 418 U.S. at 713); *see also Am. Historical Ass'n*, 402 F. Supp. 2d at 181 (explaining that the *Cheney* Court noted that “while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch's essential functions, the same could not be said of document requests in the civil context”); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) (“[T]he sufficiency of the

Committee’s showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee’s functions.” (emphasis added)).

Here, Plaintiffs have not attempted to satisfy the “exacting standards” of “relevancy,” “admissibility,” and “specificity,” pursuant to the Supreme Court’s analysis of this issue in *Cheney*. See 542 U.S. at 386. The August 2017 Presidential Memorandum concerning military service by transgender individuals was revoked in March 2018 when the Department of Defense issued the current policy. Discovery into the President’s communications and deliberations therefore has no relevance on its face. See *Doe 2 v. Shanahan*, 755 F. App’x 19, 23 (D.C. Cir. 2019) (concluding that “[i]t was clear error to say there was no significant change with respect to at least two aspects of [the Mattis] policy); see also *Doe 2 v. Shanahan*, 917 F.3d 694, 707, 728 (D.C. Cir. 2019) (Williams, J., concurring in result) (exhaustively explaining why “the record and the law require dismissal of plaintiffs’ claims” and faulting Plaintiffs for “writ[ing] off the entire Mattis policy (along with the extensive supporting study) as fruit of the poisonous tweet”). Additionally, the Supreme Court has stayed the preliminary injunctions against the current policy, see *Trump v. Karnoski*, No. 18A625 (U.S. Jan. 22, 2019); *Trump v. Stockman*, No. 18A627 (U.S. Jan. 22, 2019), indicating that the Supreme Court understood the current policy to be distinct from the August 2017 Presidential Memorandum. Moreover, as the Supreme Court explained in *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018), the Court’s review of the Department of Defense policy must focus on the stated justifications for the policy—which are set forth in the Memorandum issued by the Secretary of Defense on February 22, 2018 and its accompanying report—not

on underlying presidential communications or deliberations, particularly as to prior policy statements.

Accordingly, Defendants object to any discovery requests directed to the President of the United States in this case based on these compelling separation of powers concerns, and in particular object to the discovery sought that is subject to the presidential communications privilege. The foregoing objection also applies to discovery of any information, documents or materials from the Vice President of the United States and the Office of the Vice President.

2. Defendants object to Plaintiffs' requests that purport to seek information outside of the administrative record because discovery beyond the limits of the Administrative Procedure Act is inappropriate in this case. The Department of Defense's administrative processes resulted in final agency action supported by the administrative record. In determining whether that final agency action is "contrary to constitutional right," 5 U.S.C. § 706(2)(B), the Court "shall review the whole record," *id.* § 706. The Court's review is therefore limited to "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

Further, as recently emphasized by the D.C. Circuit in a challenge to the same military policy at issue in this litigation, the Court must give great deference to the judgment of military officials. *Doe 2 v. Shanahan*, 755 F. App'x 19, 24–25 (D.C. Cir. 2019) (*per curiam*). Such deference means that neither Plaintiffs, Plaintiffs' witnesses, nor the Court may undertake an independent evaluation of the evidence, as Plaintiffs propose to do here

through their discovery requests. *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981) (“In relying on this testimony . . . the District Court palpably exceeded its authority when it ignored Congress’ considered response to this line of reasoning.”); *id.* at 82–83 (“The District Court was quite wrong in undertaking an independent evaluation of this evidence.”); *Goldman v. Weinberger*, 475 U.S. 501, 508 (1986) (“[W]hether or not expert witnesses may feel that religious exceptions to [the challenged military regulation] are desirable is quite beside the point.”); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 25 (2008) (“We accept these officers’ assertions [that a certain practice] is of the utmost importance to the Navy and the Nation.”). Accordingly, the discovery sought cannot be considered by the Court, and Plaintiffs’ requests are overbroad, unduly burdensome, and disproportionate to the needs of the case. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court’s role in evaluating military policy is so circumscribed that arguments based on extra-record evidence and discovery are “quite beside the point”) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in “*Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)). Moreover, as the Supreme Court recently emphasized in *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018), the Court’s review of the Department of Defense policy must focus on the stated justifications for the policy—which are set forth in the Secretary of Defense’s Memorandum dated February 22, 2018 and its accompanying report—not on underlying communications or deliberations, particularly as to prior policy statements. Accordingly, Plaintiffs’ discovery requests that seek to conduct a

fishing expedition into allegations of animus are overbroad, unduly burdensome, and disproportionate to the needs of the case.

Specific Objections to Requests for Production

RFP No. 36: All documents reflecting, referring, or relating to any complaints arising from or attributed to open service by transgender service members, accessions by transgender individuals, or the Carter Policy.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 37: Documents sufficient to show the number of persons accessed into the military while known by military officials to be transgender, and the number of persons retained by the military after becoming known as transgender, since June 30, 2016.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

REF No. 38: Documents sufficient to show both the number of persons accessed into the military while known by the military to have a diagnosis of gender dysphoria, and the number of persons retained by the military after a diagnosis of gender dysphoria while in military service, since June 30, 2016.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d)

material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 39: All documents relating to numbers or estimates of persons with gender dysphoria (whether or not presently diagnosed) currently serving in the military, or who are in the process of accessing.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 40: All documents relating to the numbers or estimates of transgender persons (whether or not open about their gender identity) currently serving in the military, or who are in the process of accessing.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 41: All documents describing or relating to differences in the number of transgender persons in the military and the number of persons with gender dysphoria in the military, if a difference in those numbers exists.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 42: Documents sufficient to show, for each service branch since June 30, 2016, the name, rank, and service unit of each service member a) who requested a change to their gender marker in the Defense Enrollment Eligibility Reporting System (DEERS), and b) whose gender marker in DEERS has been changed.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 43: Documents sufficient to show the number, identity, service branch and military unit, theatre, and circumstances of any transgender service member evacuated from theatres of deployment due to medical and/or mental health reasons since June 30, 2016, including the nature of the medical or mental health reason and the circumstances that led to the decision to evacuate.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 44: Documents sufficient to show, for each service branch since June 30, 2016, the name, rank, and service unit of each transgender service member rendered non-

deployable on account of gender dysphoria or transition-related medical care, and the duration of and specific reason(s) for such non-deployability.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 45: Documents sufficient to show, for each service branch for the period since June 30, 2016, the name, rank, and service unit of each transgender service member who was deployed overseas, and the duration, location, and nature of their deployment.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege;

(c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 46: Documents sufficient to show the considerations the military takes into account, and the process it utilizes, in determining which medical and mental health conditions and treatments should be included in Department of Defense Instruction (DODI) 6130.03.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 47: Documents sufficient to show, for each service branch, the considerations the branch takes into account, and the process(es) it utilizes, both as to accession into military service and with respect to retention in service of current service members, when determining whether to grant applications for waivers of disqualifying mental or medical conditions including: hypogonadism; chest surgery; genital repair and/or reconstruction surgery; adrenal dysfunction; hyperparathyroidism; hypoparathyroidism; pituitary dysfunction; hormone treatment; conditions or medical histories described by DODI 6130.03 §§ 5.13-5.14; anxiety; depression; body dysmorphia; suicidal ideation; past suicide attempts; history of self-harm; post-traumatic stress disorder; and history of malignancy, including prostate, testicular, ovarian and breast malignancies.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 48: Documents sufficient to show the total number of applications granted, and number of applications denied, for waiver of disqualifying conditions listed in DODI 6130.03, since June 30, 2016.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 49: Documents sufficient to show the number of waivers granted upon accession, and number of waivers denied upon accession, for each of the following conditions: hypogonadism; chest surgery; genital repair and/or reconstruction surgery; adrenal dysfunction; hyperparathyroidism; hypoparathyroidism; pituitary dysfunction; and hormone treatment; conditions or medical histories described by DODI 6130.03 §§ 5.13-5.14; anxiety; depression; body dysmorphia; suicidal ideation; past suicide attempts; history

of self-harm; and post-traumatic stress disorder; history of malignancy, including without limitation history of prostate, testicular, ovarian or breast malignancies; since June 30, 2016.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 50: Documents sufficient to show the number of waivers granted for service members seeking retention, and number of waivers denied for service members seeking retention, for each of the following conditions: hypogonadism; chest surgery; genital repair and/or reconstruction surgery; adrenal dysfunction; hyperparathyroidism; hypoparathyroidism; pituitary dysfunction; and hormone treatment; conditions or medical histories described by DODI 6130.03 §§ 5.13-5.14; anxiety; depression; body dysmorphia; suicidal ideation; past suicide attempts; history of self-harm; and post-traumatic stress

disorder; history of malignancy, including without limitation history of prostate, testicular, ovarian or breast malignancies; since June 30, 2016.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 51: Documents sufficient to show the number of openly transgender individuals granted waivers for non-gender-dysphoria conditions or histories, and allowed to be accessed or retained pursuant to those waivers, since June 30, 2016.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege;

(c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 52: Documents sufficient to show the number of openly transgender individuals denied waivers for non-gender-dysphoria conditions or histories, and denied accession or retention absent those waivers, since June 30, 2016.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 53: All documents reflecting, referring or relating to any request by transgender persons for medical and/or mental health waivers of conditions disqualifying them from accession to or retention in the military, including without limitation all documents reflecting the date of and grounds for such request, whether the request was for accession or retention, whether the request was granted or denied, and the basis for such decision.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 54: All documents reflecting, referring, contemplating, or relating to requests made on or after April 12, 2019 to waive the disqualifying condition of gender dysphoria, including without limitation documents reflecting criteria that will inform decisions upon those waiver requests, documents reflecting the date of and grounds for each

such request, documents showing whether each request was granted or denied and the basis for such decision, and documents showing whether those decisions were made upon the subject individual's attempted accession into, or instead retention by, the military.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 55: Documents sufficient to show the total number of mental health visits by all service members for each branch of service, by month, since July 13, 2015.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege;

(c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 56: Documents sufficient to show, for each branch of service since June 30, 2016, the number of exceptions to or exemptions made from sex-based standards for non-transgender females, and the reason(s) for such exceptions, including without limitation exceptions for standards respecting: physical fitness tests; body fat; dress standards; and/or boxing and combatives.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 57: Documents sufficient to show, for each branch of service since June 30, 2016, the branch's policies with respect to "limited duty," including without limitation the reasons for and/or circumstances under which a service member will or may be placed on limited duty.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 58: All documents reflecting, referring, or relating to the reasons that transgender service members were placed on "limited duty" in the Army and Air Force over

the “one-year period” referenced on page 33 of the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 59: Documents sufficient to show, for each service branch by fiscal year from October 1, 2014 to the present, the name, rank, and service unit of each service member who has been discharged from military service due, in whole or in part, to their transgender status or diagnosis of gender dysphoria, including without limitation documents showing the date and specific stated reason for their discharge.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 60: All documents reflecting or relating to the “policy recommendations and a proposed implementation plan for the Panel’s consideration” that were developed and/or provided to the Panel of Experts by the “Transgender Service Policy Working Group,” as set forth at page 18 of the Report.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 61: All documents reflecting or relating to the “analysis of accession standards, multi-disciplinary review of relevant data, and information about medical treatment for gender dysphoria and gender transition related medical care” that was provided to the Panel of Experts by the “Medical and Personnel Executive Steering Committee,” as set forth at page 18 of the Report.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 62: All documents reflecting or relating to the reports and the responses to “queries for additional information and analysis to support the Panel’s review and

deliberations” by the “Transgender Service Policy Working Group” and/or the “Medical and Personnel Executive Steering Committee,” as set forth at page 18 of the Report.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 63: All documents reflecting or relating to the “input” the Panel of Experts received “from transgender Service members, commanders of transgender Service members, military medical professionals, and civilian medical professionals,” as set forth at page 18 of the Report.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

REF No. 64: All documents reflecting or relating to the “information and analyses about gender dysphoria, the treatment of gender dysphoria, and the effects of currently serving individuals with gender dysphoria on military effectiveness, unit cohesion, and resources” that was received and/or reviewed by the Panel of Experts as set forth at page 18 of the Report.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations

of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 65: All documents reflecting or relating to “the Department’s own data and experience obtained since the Carter policy took effect” that is referenced at page 18 of the Report.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 66: All documents reflecting or relating to the following references in the February 2018 Department of Defense Report and Recommendations on Military Service

by Transgender Persons (“Report”): (a) the “[d]ata retrieved from [the] Military Health System data repository” cited at pages 21-22, footnotes 64-66, and page 41, footnote 161; (b) the “[d]ata reported by the Departments of Army, Navy, and Air Force” cited at page 31, footnotes 114-115, as well as at page 33, footnote 121 and page 41, footnote 163, and (c) the “Defense Health Agency, Supplemental Health Care Program Data” cited at pages 31-32, footnotes 119-120, and page 41, footnote 162.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

RFP No. 67: All documents referring or relating to the equal opportunity complaints discussed at page 37 of the Report, including copies of the complaints, email or other correspondence related to the complaints, and documents reflecting how the complaints were resolved.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

REF No. 68: Documents sufficient to show the basis for, and all data underlying or relating to, the purported increase in medical costs for service members with gender dysphoria as compared to service members without gender dysphoria, referenced at page 41 of the Report.

Specific Objections:

The President objects to any discovery request directed to the President and incorporates by reference the above General Objections.

The President further objects to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d)

material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects to this request to the extent that it seeks documents that are not within his custody or control.

The President will not produce any documents responsive to this request.

Dated: May 28, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 28, 2019, a copy of the document above was served by email on the following:

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EXHIBIT 6

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' THIRD SET OF
REQUESTS FOR PRODUCTION TO SECRETARY SHANAHAN AND
THE UNITED STATES DEPARTMENT OF DEFENSE**

Pursuant to Federal Rules of Civil Procedure 26 and 34, Defendants, through their undersigned counsel, hereby submit initial objections and responses to Plaintiffs' Third Set of Requests for Production of Documents to Defendant Patrick Shanahan, in his official capacity as acting Secretary of Defense, and the United States Department of Defense, served April 12, 2019.¹ In presenting these objections, Defendants do not waive any further

¹ These objections and responses are limited to Secretary Shanahan and the Department of Defense. Defendants will produce, or already have produced, separate objections for other Defendants.

objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Objections to Definitions and Instructions

1. Defendants object to Definition 1 of “You,” “your,” and “yours” as substantially overbroad, ambiguous, and disproportionate to the needs of the case. Plaintiffs have defined “You,” “your,” and “yours” to encompass all “current and former employees agents, affiliates, contractors, consultants, representatives, and other persons engaged directly or indirectly by or under the control of Defendants,” thus covering millions of people.

2. Defendants object to Plaintiffs’ Definition 6 of “Communication” as encompassing “electronically stored information (ESI) containing, summarizing, or memorializing any communication,” insofar as electronic information collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

3. Defendants object to Plaintiffs’ Definition 7 of “Document” and “documents” as encompassing “ESI,” and “computer data,” insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

4. Defendants object to Plaintiffs' Definition 8 of "Identify" as encompassing individuals' "full name[s], job title[s], and employer[s] during the period referred to, and current or last-known address[es] and telephone number[s] and business address[es] and telephone number[s]" as being overbroad and disproportionate to the needs of the case. Defendants further object on the grounds that this definition is an unwarranted invasion of the privacy of non-parties and seeks information protected by the Privacy Act, 5 U.S.C. § 552a, et seq.

5. Defendants object to Instruction 12 directing Defendants to produce "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" as being overbroad and disproportionate to the needs of the case.

General Objection to All Requests for Production

Defendants object to Plaintiffs' requests that purport to seek information outside of the administrative record as discovery beyond the limits of the Administrative Procedure Act is inappropriate in this case. The Department of Defense's administrative processes resulted in final agency action supported by the administrative record. In making its determination whether those policies are "contrary to constitutional right," 5 U.S.C. § 706(2)(B), the Court "shall review the whole record," *id.* § 706. The Court's review is therefore limited to "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

Further, as recently emphasized by the D.C. Circuit in a challenge to the same military policy at issue in this litigation, the Court must give great deference to the judgment of military officials. *Doe 2 v. Shanahan*, 755 F. App'x 19, 24–25 (D.C. Cir. 2019) (per curiam). Such deference means that neither the Plaintiffs, Plaintiffs' witnesses, nor the Court may undertake an independent evaluation of the evidence as Plaintiffs propose to do through these discovery requests. *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981) (“In relying on this testimony . . . the District Court palpably exceeded its authority when it ignored Congress’ considered response to this line of reasoning.”); *id.* at 82-83 (“The District Court was quite wrong in undertaking an independent evaluation of this evidence.”); *Goldman v. Weinberger*, 475 U.S. 501, 508 (1986) (“[W]hether or not expert witnesses may feel that religious exceptions to [the challenged military regulation] are desirable is quite beside the point.”); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 25 (2008) (“We accept these officers’ assertions [that a certain practice] is of the utmost importance to the Navy and the Nation.”). Accordingly, the discovery sought cannot be considered by the Court and therefore Plaintiffs’ requests are overbroad, unduly burdensome, and disproportionate to the needs of the case. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court’s role in evaluating military policy is so circumscribed that extra-record evidence and discovery is “quite beside the point” (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986))); *see also id.* (noting that the Supreme Court in “*Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)). Moreover, as the Supreme Court recently emphasized in *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018), the Court’s review of the Department of Defense policy must

focus on the stated justifications for the policy—which are set forth in the Secretary of Defense’s Memorandum dated February 22, 2018 and its accompanying report—not on underlying communications or deliberations, particularly as to prior policy statements. Accordingly, Plaintiffs’ discovery requests that seek to conduct a fishing expedition into allegations of animus are overbroad, unduly burdensome, and disproportionate to the needs of the case.

Specific Objections and Responses to Requests for Production

RFP No. 36: All documents reflecting, referring, or relating to any complaints arising from or attributed to open service by transgender service members, accessions by transgender individuals, or the Carter Policy.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs’ witnesses nor the Court may undertake an independent

evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Defendants object to the use of the term "complaint" as it is overboard, unduly burdensome, vague, ambiguous, and undefined. Specifically, the Department of Defense is an organization consisting of over two million employees stationed throughout the world and the Department does not maintain a central repository of "complaints" pertaining to the Carter Policy.

Defendants also object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case and is an unwarranted invasion of the privacy of non-parties in that it seeks information from current and former service members protected by the Privacy Act, 5 U.S.C. § 552a, et seq. The substance of the information considered by the Panel of Experts in forming its policy recommendations to the Secretary of Defense is summarized in the administrative record previously provided to Plaintiffs, *see* ECF No. 249-1, and further "complaints" containing sensitive personally identifiable information are irrelevant to the adjudication of Plaintiffs' facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections and subject to applicable privileges, the Department of Defense has produced materials responsive to Plaintiffs' request between June 30, 2016 and March 23, 2018.

RFP No. 37: Documents sufficient to show the number of persons accessed into the military while known by military officials to be transgender, and the number of persons retained by the military after becoming known as transgender, since June 30, 2016.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanaban*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for

‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to “transgender persons,” “transgender individuals,” or “transgender service members.” Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the Department of Defense objects to the language “known by military officials” as it is overbroad, unduly burdensome, vague, ambiguous, and undefined. Specifically, the term “military officials” could encompass millions of employees stationed throughout the world.

Defendants also object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case and is an unwarranted invasion of the privacy of non-parties in that it seeks information from current and former service members protected by the Privacy Act, 5 U.S.C. § 552a, et seq. Documents sufficient to “the number of persons accessed into the military while known by military officials to be transgender, and the number of persons retained by the military after becoming known as transgender, since June 30, 2016” even if such information existed, are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 38: Documents sufficient to show both the number of persons accessed into the military while known by the military to have a diagnosis of gender dysphoria, and the number of persons retained by the military after a diagnosis of gender dysphoria while in military service, since June 30, 2016.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses, nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for

‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)).

Further, Defendants object to this request because it includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and medical information stored in electronic databases. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files “containing personal information such as health screenings, pre-employment testing, and background checks” because plaintiff had not demonstrated a “compelling need for such a broad disclosure of personal information”).

Moreover, the Department of Defense objects to the language “known by the military” as it is overbroad, unduly burdensome, vague, ambiguous, and undefined. Specifically, the term “military” could encompass millions of employees stationed throughout the world.

Response: Subject to and without waiving the above objections, Defendants will produce nonprivileged documents containing general treatment and cost data for current service members with a diagnosis of gender dysphoria and data regarding applicants for accession with a diagnosis of gender dysphoria through February 2019 that are responsive to this request and prepared at the request of the House Armed Service Committee in Defendants' possession, custody, or control.

RFP No. 39: All documents relating to numbers or estimates of persons with gender dysphoria (whether or not presently diagnosed) currently serving in the military, or who are in the process of accessing.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent

evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, Defendants object to this request because it includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs' facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and neither Plaintiffs nor Plaintiffs' counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and medical information stored in electronic databases. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files "containing personal information such as health screenings, pre-employment testing, and background checks")

because plaintiff had not demonstrated a “compelling need for such a broad disclosure of personal information”).

Moreover, the Department of Defense objects to the language “whether or not presently diagnosed” as it is overbroad, unduly burdensome, vague, ambiguous, and undefined. Specifically, the Department of Defense has no way of identifying persons serving in the military, or in the process of accessing in the military who may have undiagnosed gender dysphoria. Further, the Department objects to the language “in the process of accessing” as it is overbroad, unduly burdensome, vague, ambiguous, and undefined.

Response: Subject to and without waiving the above objections, Defendants will produce nonprivileged documents containing general treatment and cost data for current service members with a diagnosis of gender dysphoria and data regarding applicants for accession with a diagnosis of gender dysphoria through February 2019 that are responsive to this request and prepared at the request of the House Armed Service Committee in Defendants’ possession, custody, or control.

RFP No. 40: All documents relating to the numbers or estimates of transgender persons (whether or not open about their gender identity) currently serving in the military, or who are in the process of accessing.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege;

(c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to "transgender persons," "transgender individuals," or "transgender service members." Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Further, the Department objects to the language “in the process of accessing” as it is overbroad, unduly burdensome, vague, ambiguous, and undefined. The Department of Defense also objects to the language “whether or not open about their gender identity” as it is overbroad, unduly burdensome, vague, ambiguous, and undefined.

Defendants also object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case and is an unwarranted invasion of the privacy of non-parties in that it seeks information from current and former service members protected by the Privacy Act, 5 U.S.C. § 552a, et seq. Documents sufficient to “the numbers or estimates of transgender persons (whether or not open about their gender identity) currently serving in the military, or who are in the process of accessing” even if such information existed, are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections and subject to applicable privileges, the Department of Defense has produced materials responsive to Plaintiffs’ request between January 1, 2016 and March 23, 2018.

RFP No. 41: All documents describing or relating to differences in the number of transgender persons in the military and the number of persons with gender dysphoria in the military, if a difference in those numbers exists.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege;

(c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to "transgender persons," "transgender individuals," or "transgender service members." Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections and subject to applicable privileges, the Department of Defense has produced materials responsive to Plaintiffs' request between January 1, 2016 and March 23, 2018.

RFP No. 42: Documents sufficient to show, for each service branch since June 30, 2016, the name, rank, and service unit of each service member a) who requested a change to their gender marker in the Defense Enrollment Eligibility Reporting System (DEERS), and b) whose gender marker in DEERS has been changed.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the

court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Defendants also object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case and is an unwarranted invasion of the privacy of non-parties in that it seeks information from current and former service members protected by the Privacy Act, 5 U.S.C. § 552a, et seq. A request for the "name, rank, and service unit of each service member a) who requested a change to their gender marker in the Defense Enrollment Eligibility Reporting System (DEERS), and b) whose gender marker in DEERS has been changed[,]" would require the review of more than a thousand medical and service records of current and former service members and this information is irrelevant to the adjudication of Plaintiffs' facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 43: Documents sufficient to show the number, identity, service branch and military unit, theatre, and circumstances of any transgender service member evacuated from theatres of deployment due to medical and/or mental health reasons since June 30, 2016, including the nature of the medical or mental health reason and the circumstances that led to the decision to evacuate.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to "transgender persons," "transgender

individuals,” or “transgender service members.” Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Moreover, Defendants object to this request, on the grounds that even if such information did exist, it is overbroad, unduly burdensome, and disproportionate to the needs of the case because it seeks medical records and sensitive privacy data from both current and former service members. This information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 44: Documents sufficient to show, for each service branch since June 30, 2016, the name, rank, and service unit of each transgender service member rendered non-deployable on account of gender dysphoria or transition-related medical care, and the duration of and specific reason(s) for such non-deployability.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege;

(c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to "transgender persons," "transgender individuals," or "transgender service members." Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Moreover, Defendants object to this request, on the grounds that even if such information did exist, it is overbroad, unduly burdensome, and disproportionate to the needs

of the case because it seeks medical records and sensitive privacy data from both current and former service members. This information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 45: Documents sufficient to show, for each service branch for the period since June 30, 2016, the name, rank, and service unit of each transgender service member who was deployed overseas, and the duration, location, and nature of their deployment.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to "transgender persons," "transgender individuals," or "transgender service members." Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Moreover, Defendants also object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case and is an unwarranted invasion of the privacy of non-parties in that it seeks information from current and former service members protected by the Privacy Act, 5 U.S.C. § 552a, et seq. Documents sufficient to "show, for each service branch for the period since June 30, 2016, the name, rank, and service unit of each transgender service member who was deployed overseas, and the

duration, location, and nature of their deployment” even if such information existed, are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 46: Documents sufficient to show the considerations the military takes into account, and the process it utilizes, in determining which medical and mental health conditions and treatments should be included in Department of Defense Instruction (DODI) 6130.03.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs’ witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court’s role in evaluating military policy is so circumscribed that extra-record evidence and

discovery is “quite beside the point”) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in “*Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)).

Further, Department of Defense Instruction (DODI) 6130.03 itself which is publically available online at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003p.pdf?ver=2018-05-04-113917-883> and the references identified therein show the considerations the military takes into account, and the process it utilizes, in determining which medical and mental health conditions and treatments should be included in Department of Defense Instruction (DODI) 6130.03. Moreover, the Accessions Medical Standards and Research Activity (AMSARA) produces an evidence-based evaluation of accessions medical standards annually to assist the Accessions Medical Standards Working Group in making these determinations which is publically available at: <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>. Such information is equally available to all parties in this case. Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants will conduct a reasonable search for official guidance from the Department of Defense pertaining to the considerations taken into account when determining whether to revise DoDI 6130.03.

RFP No. 47: Documents sufficient to show, for each service branch, the considerations the branch takes into account, and the process(es) it utilizes, both as to accession into military service and with respect to retention in service of current service members, when determining whether to grant applications for waivers of disqualifying mental or medical conditions including: hypogonadism; chest surgery; genital repair and/or reconstruction surgery; adrenal dysfunction; hyperparathyroidism; hypoparathyroidism; pituitary dysfunction; hormone treatment; conditions or medical histories described by DODI 6130.03 §§ 5.13-5.14; anxiety; depression; body dysmorphia; suicidal ideation; past suicide attempts; history of self-harm; post-traumatic stress disorder; and history of malignancy, including prostate, testicular, ovarian and breast malignancies.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the

court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, the Department objects to this request because the language pertaining to "waivers" for "retention" is vague, ambiguous, and undefined. The Department of Defense Disability Evaluation System (DES) Manual (DoDM 1332.18) available online at: <https://www.esd.whs.mil/directives/issuances/dodm/> sets DoD policy and provides procedures for the referral, evaluation, return to duty, separation, or retirement of service members for disability. Retention is based on a physical evaluation process and is not based on a waiver process.

Response: Subject to and without waiving the above objections, Defendants will conduct a reasonable search for current, official guidance from the Military Services pertaining to the review of medical accession waivers and the Department of Defense Disability Evaluation System as it is applied to each Military Service.

RFP No. 48: Documents sufficient to show the total number of applications granted, and number of applications denied, for waiver of disqualifying conditions listed in DODI 6130.03, since June 30, 2016.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Defendants object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for "[d]ocuments sufficient to show the total number of applications granted, and number of applications denied, for waiver of disqualifying conditions" includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs' facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and neither Plaintiffs nor Plaintiffs' counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and information, including information stored in electronic databases, and as limited to seeking documents that contain summaries of descriptive statistics of waiver considerations of applicants who received a permanent medical disqualification for a disqualifying condition. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files "containing personal information such as health screenings, pre-employment testing, and background checks" because plaintiff had not demonstrated a "compelling need for such a broad disclosure of personal information").

Defendants publish annual reports containing descriptive statistics of accessions waiver considerations at <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>. Such information is equally available to all parties in this case. Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 49: Documents sufficient to show the number of waivers granted upon accession, and number of waivers denied upon accession, for each of the following conditions: hypogonadism; chest surgery; genital repair and/or reconstruction surgery; adrenal dysfunction; hyperparathyroidism; hypoparathyroidism; pituitary dysfunction; and hormone treatment; conditions or medical histories described by DODI 6130.03 §§ 5.13-5.14; anxiety; depression; body dysmorphia; suicidal ideation; past suicide attempts; history of self-harm; and post-traumatic stress disorder; history of malignancy, including without limitation history of prostate, testicular, ovarian or breast malignancies; since June 30, 2016.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See*

Doe 2 v. Shanahan, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Defendants object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for "[d]ocuments sufficient to show the number of waivers granted upon accession, and number of waivers denied upon accession, for each of the following conditions..." includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs' facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and neither Plaintiffs nor Plaintiffs' counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and information, including information stored in electronic databases, and as limited to seeking documents that contain summaries of descriptive statistics of waiver considerations of applicants who received a permanent medical disqualification for a disqualifying condition.

See, e.g., Hemphill v. ARAMARK Corp., No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files “containing personal information such as health screenings, pre-employment testing, and background checks” because plaintiff had not demonstrated a “compelling need for such a broad disclosure of personal information”).

Defendants publish annual reports containing descriptive statistics of accessions waiver considerations at <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>. Such information is equally available to all parties in this case. Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 50: Documents sufficient to show the number of waivers granted for service members seeking retention, and number of waivers denied for service members seeking retention, for each of the following conditions: hypogonadism; chest surgery; genital repair and/or reconstruction surgery; adrenal dysfunction; hyperparathyroidism; hypoparathyroidism; pituitary dysfunction; and hormone treatment; conditions or medical histories described by DODI 6130.03 §§ 5.13-5.14; anxiety; depression; body dysmorphia; suicidal ideation; past suicide attempts; history of self-harm; and post-traumatic stress

disorder; history of malignancy, including without limitation history of prostate, testicular, ovarian or breast malignancies; since June 30, 2016.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Moreover, the Department objects to this request because the language pertaining to "waivers" for "retention" are vague, ambiguous, and undefined. The Department of Defense Disability Evaluation System (DES) Manual (DoDM 1332.18) available online at:

<https://www.esd.whs.mil/directives/issuances/dodm/> sets DoD policy and provides procedures for the referral, evaluation, return to duty, separation, or retirement of Service members for disability. Retention is based on a physical evaluation process and is not based on a waiver process.

Further, Defendants object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for “[d]ocuments sufficient to show the number of waivers granted for service members seeking retention, and number of waivers denied for service members seeking retention, for each of the following conditions...,” even if such documents existed, would include medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11).

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 51: Documents sufficient to show the number of openly transgender individuals granted waivers for non-gender-dysphoria conditions or histories, and allowed to be accessed or retained pursuant to those waivers, since June 30, 2016.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does

not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to “transgender persons,” “transgender individuals,” or “transgender service members.” Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Moreover, the Department objects to this request because the language pertaining to “waivers” for “retention” are vague, ambiguous, and undefined. The Department of Defense Disability Evaluation System (DES) Manual (DoDM 1332.18) available online at: <https://www.esd.whs.mil/directives/issuances/dodm/> sets DoD policy and provides procedures for the referral, evaluation, return to duty, separation, or retirement of Service members for disability. Retention is based on a physical evaluation process and is not based on a waiver process.” Further, Defendants object to the term “openly transgender individuals” because it is vague and undefined.

Moreover, Defendants object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for “[d]ocuments sufficient to show the number of openly transgender individuals granted waivers for non-gender-dysphoria conditions or histories, and allowed to be accessed or retained pursuant to those waivers, since June 30, 2016[,]” even if such information does exist, includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy. Moreover, this information is protected from

disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and information, including information stored in electronic databases, and as limited to seeking documents that contain summaries of descriptive statistics of waiver considerations of applicants who received a permanent medical disqualification for a disqualifying condition. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files “containing personal information such as health screenings, pre-employment testing, and background checks” because plaintiff had not demonstrated a “compelling need for such a broad disclosure of personal information”).

Defendants publish annual reports containing descriptive statistics of accessions waiver considerations at <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>. Such information is equally available to all parties in this case. Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants will not produce documents responsive to this request.

RFP No. 52: Documents sufficient to show the number of openly transgender individuals denied waivers for non-gender-dysphoria conditions or histories, and denied accession or retention absent those waivers, since June 30, 2016.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does

not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to “transgender persons,” “transgender individuals,” or “transgender service members.” Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Moreover, the Department objects to this request because the language pertaining to “waivers” for “retention” are vague, ambiguous, and undefined. The Department of Defense Disability Evaluation System (DES) Manual (DoDM 1332.18) available online at: <https://www.esd.whs.mil/directives/issuances/dodm/> sets DoD policy and provides procedures for the referral, evaluation, return to duty, separation, or retirement of Service members for disability. Retention is based on a physical evaluation process and is not based on a waiver process.” Further, Defendants object to the term “openly transgender individuals” because it is vague and undefined.

Moreover, Defendants object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for “[d]ocuments sufficient to show the number of openly transgender individuals denied waivers for non-gender-dysphoria conditions or histories, and denied accession or retention absent those waivers, since June 30, 2016[,]” even if such information does exist, includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health

Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and information, including information stored in electronic databases, and as limited to seeking documents that contain summaries of descriptive statistics of waiver considerations of applicants who received a permanent medical disqualification for a disqualifying condition. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files “containing personal information such as health screenings, pre-employment testing, and background checks” because plaintiff had not demonstrated a “compelling need for such a broad disclosure of personal information”).

Defendants publish annual reports containing descriptive statistics of accessions waiver considerations at <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>. Such information is equally available to all parties in this case. Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants will not produce documents responsive to this request.

RFP No. 53: All documents reflecting, referring or relating to any request by transgender persons for medical and/or mental health waivers of conditions disqualifying them from accession to or retention in the military, including without limitation all

documents reflecting the date of and grounds for such request, whether the request was for accession or retention, whether the request was granted or denied, and the basis for such decision.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all service members. Thus, DoD does

not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to “transgender persons,” “transgender individuals,” or “transgender service members.” Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Moreover, the Department objects to this request because the language pertaining to “waivers” for “retention” are vague, ambiguous, and undefined. The Department of Defense Disability Evaluation System (DES) Manual (DoDM 1332.18) available online at: <https://www.esd.whs.mil/directives/issuances/dodm/> sets DoD policy and provides procedures for the referral, evaluation, return to duty, separation, or retirement of Service members for disability. Retention is based on a physical evaluation process and is not based on a waiver process.”

Further, Defendants object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for “[d]ocuments reflecting, referring or relating to any request by transgender persons for medical and/or mental health waivers of conditions disqualifying them from accession to or retention in the military, including without limitation all documents reflecting the date of and grounds for such request, whether the request was for accession or retention, whether the request was granted or denied, and the basis for such decision [.]” even if such information does exist, includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of

Plaintiffs' facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and neither Plaintiffs nor Plaintiffs' counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and information, including information stored in electronic databases, and as limited to seeking documents that contain summaries of descriptive statistics of waiver considerations of applicants who received a permanent medical disqualification for a disqualifying condition. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files "containing personal information such as health screenings, pre-employment testing, and background checks" because plaintiff had not demonstrated a "compelling need for such a broad disclosure of personal information").

Defendants publish annual reports containing descriptive statistics of accessions waiver considerations at <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>. Such information is equally available to all parties in this case. Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants will not produce documents responsive to this request.

RFP No. 54: All documents reflecting, referring, contemplating, or relating to requests made on or after April 12, 2019 to waive the disqualifying condition of gender dysphoria, including without limitation documents reflecting criteria that will inform decisions upon those waiver requests, documents reflecting the date of and grounds for each such request, documents showing whether each request was granted or denied and the basis for such decision, and documents showing whether those decisions were made upon the subject individual's attempted accession into, or instead retention by, the military.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and

discovery is “quite beside the point”) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in “*Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Defendants object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for “[d]ocuments reflecting, referring, contemplating, or relating to requests made on or after April 12, 2019 to waive the disqualifying condition of gender dysphoria, including without limitation documents reflecting criteria that will inform decisions upon those waiver requests, documents reflecting the date of and grounds for each such request, documents showing whether each request was granted or denied and the basis for such decision, and documents showing whether those decisions were made upon the subject individual’s attempted accession into, or instead retention by, the military[.]” includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and

information, including information stored in electronic databases, and as limited to seeking documents that contain summaries of descriptive statistics of waiver considerations of applicants who received a permanent medical disqualification for a disqualifying condition. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files “containing personal information such as health screenings, pre-employment testing, and background checks” because plaintiff had not demonstrated a “compelling need for such a broad disclosure of personal information”).

Defendants publish annual reports containing descriptive statistics of accessions waiver considerations at <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>. Such information is equally available to all parties in this case. Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants will conduct a reasonable search for official guidance from the Department of Defense and the Military Services pertaining to accession waivers for the medical condition of gender dysphoria in accordance with Directive-type Memorandum (DTM) 19-004.

RFP No. 55: Documents sufficient to show the total number of mental health visits by all service members for each branch of service, by month, since July 13, 2015.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege;

(c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Defendants object to this request on the grounds that it is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, a request for "[d]ocuments sufficient to show the total number of mental health visits" includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of

non-parties to the litigation are irrelevant to the adjudication of Plaintiffs' facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and neither Plaintiffs nor Plaintiffs' counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Consequently, Defendants construe this request as excluding medical records and information, including information stored in electronic databases. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files "containing personal information such as health screenings, pre-employment testing, and background checks" because plaintiff had not demonstrated a "compelling need for such a broad disclosure of personal information").

Defendants have already provided medical utilization data of service members (to include utilization of mental health service) from October 1, 2015 to October 3, 2017. Accordingly, Plaintiffs request to expand this data from July 13, 2015 to present is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs' requests from October 1, 2015 to October 3, 2017, and will not produce further responsive documents.

RFP No. 56: Documents sufficient to show, for each branch of service since June 30, 2016, the number of exceptions to or exemptions made from sex-based standards for

non-transgender females, and the reason(s) for such exceptions, including without limitation exceptions for standards respecting: physical fitness tests; body fat; dress standards; and/or boxing and combatives.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Moreover, the Department of Defense objects to the use of the language "exceptions to or exemptions made from sex-based standards for non-transgender females" as it is

overboard, unduly burdensome, vague, ambiguous, and undefined. Specifically, the Department of Defense is an organization consisting of over two million employees stationed throughout the world and the Department does not maintain a central repository of “exceptions” or “exemptions” to “sex –based standards” for “non-transgender females.”

Further, Defendants also object on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case and is an unwarranted invasion of the privacy of non-parties in that it seeks information from current and former service members protected by the Privacy Act, 5 U.S.C. § 552a, et seq. Documents sufficient to show “for each branch of service since June 30, 2016, the number of exceptions to or exemptions made from sex-based standards for non-transgender females, and the reason(s) for such exceptions, including without limitation exceptions for standards respecting: physical fitness tests; body fat; dress standards; and/or boxing and combatives[.]” even if such information existed, are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 57: Documents sufficient to show, for each branch of service since June 30, 2016, the branch’s policies with respect to “limited duty,” including without limitation the reasons for and/or circumstances under which a service member will or may be placed on limited duty.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants will conduct a reasonable search for current, official guidance from the Department of Defense

and the Military Services pertaining to the designation or placement of a service member on limited duty.

RFP No. 58: All documents reflecting, referring, or relating to the reasons that transgender service members were placed on “limited duty” in the Army and Air Force over the “one-year period” referenced on page 33 of the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs’ witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court’s role in evaluating military policy is so circumscribed that extra-record evidence and

discovery is “quite beside the point”) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in “*Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Defendants object to this request because the phrase “[d]ocuments reflecting, referring, or relating to the reasons that transgender service members were placed on ‘limited duty’ in the Army and Air Force” includes medical records and sensitive privacy data from both current and former service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy. Consequently, Defendants construe this request as excluding medical records and medical information stored in electronic databases. *See, e.g., Hemphill v. ARAMARK Corp.*, No. CIV. ELH-12-1584, 2013 WL 1662963, at *2 (D. Md. Apr. 15, 2013) (denying motion to compel production of overbroad request for employee personnel files “containing personal information such as health screenings, pre-employment testing, and background checks” because plaintiff had not demonstrated a “compelling need for such a broad disclosure of personal information”).

Further, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all Service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to “transgender persons,” “transgender individuals,” or “transgender service members.” Nor does page 33 of the Department of Defense Report refer to “transgender service members...placed on ‘limited duty’ in the Army and Air Force” as stated in Plaintiffs’ request. Accordingly, this request is vague, ambiguous, overbroad, unduly burdensome, and disproportionate to the needs of the case.

Defendants have already provided documents responsive to this request considered by the Panel of Experts. Accordingly, Plaintiffs’ request seeking further documents “reflecting, referring, or relating to the reasons” those service members were placed on “limited duty” is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs’ request that were considered by the Panel of Experts and will not produce further responsive documents.

RFP No. 59: Documents sufficient to show, for each service branch by fiscal year from October 1, 2014 to the present, the name, rank, and service unit of each service member who has been discharged from military service due, in whole or in part, to their transgender status or diagnosis of gender dysphoria, including without limitation documents showing the date and specific stated reason for their discharge.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Further, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all Service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to "transgender persons," "transgender

individuals,” or “transgender service members.” Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Moreover, Plaintiffs’ request seeks medical records and sensitive privacy data from both current and former service members that are not parties to this litigation and is irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy. Further, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11).

Department of Defense also objects to the time period of the request as overboard and unduly burdensome as it encompasses a time period years prior to the effective date of the challenged policy.

Response: Subject to and without waiving the above objections, Defendants will not produce any documents responsive to this request.

RFP No. 60: All documents reflecting or relating to the “policy recommendations and a proposed implementation plan for the Panel’s consideration” that were developed and/or provided to the Panel of Experts by the “Transgender Service Policy Working Group,” as set forth at page 18 of the Report.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege;

(c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs' request or withheld documents responsive to Plaintiffs' request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

RFP No. 61: All documents reflecting or relating to the “analysis of accession standards, multi-disciplinary review of relevant data, and information about medical treatment for gender dysphoria and gender transition related medical care” that was provided to the Panel of Experts by the “Medical and Personnel Executive Steering Committee,” as set forth at page 18 of the Report.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs’ witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court’s role in evaluating military policy is so circumscribed that extra-record evidence and discovery is “quite beside the point”) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in “*Rostker* chastised the district court for

‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs’ request or withheld documents responsive to Plaintiffs’ request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

RFP No. 62: All documents reflecting or relating to the reports and the responses to “queries for additional information and analysis to support the Panel’s review and deliberations” by the “Transgender Service Policy Working Group” and/or the “Medical and Personnel Executive Steering Committee,” as set forth at page 18 of the Report.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above,

neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanaban*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs' request or withheld documents responsive to Plaintiffs' request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

RFP No. 63: All documents reflecting or relating to the "input" the Panel of Experts received "from transgender Service members, commanders of transgender Service members, military medical professionals, and civilian medical professionals," as set forth at page 18 of the Report.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and

expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs' request or withheld documents responsive to Plaintiffs' request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

RFP No. 64: All documents reflecting or relating to the "information and analyses about gender dysphoria, the treatment of gender dysphoria, and the effects of currently serving individuals with gender dysphoria on military effectiveness, unit cohesion, and

resources” that was received and/or reviewed by the Panel of Experts as set forth at page 18 of the Report.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs’ witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court’s role in evaluating military policy is so circumscribed that extra-record evidence and discovery is “quite beside the point”) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in “*Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs' request or withheld documents responsive to Plaintiffs' request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

RFP No. 65: All documents reflecting or relating to "the Department's own data and experience obtained since the Carter policy took effect" that is referenced at page 18 of the Report.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the

court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs' request or withheld documents responsive to Plaintiffs' request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

RFP No. 66: All documents reflecting or relating to the following references in the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons ("Report"): (a) the "[d]ata retrieved from [the] Military Health System data repository" cited at pages 21-22, footnotes 64-66, and page 41, footnote 161; (b) the "[d]ata reported by the Departments of Army, Navy, and Air Force" cited at page 31, footnotes 114-115, as well as at page 33, footnote 121 and page 41, footnote 163, and (c) the "Defense Health Agency, Supplemental Health Care Program Data" cited at pages 31-32, footnotes 119-120, and page 41, footnote 162.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege;

(d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs' request or withheld documents responsive to Plaintiffs' request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

RFP No. 67: All documents referring or relating to the equal opportunity complaints discussed at page 37 of the Report, including copies of the complaints, email or other

correspondence related to the complaints, and documents reflecting how the complaints were resolved.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The Department of Defense further objects on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Defendants also object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case and is an unwarranted invasion of the privacy of non-parties in that it seeks information from current and former service members protected by the Privacy Act, 5 U.S.C. § 552a, et seq. The substance of the communications that Plaintiffs request is summarized in the administrative record previously provided to Plaintiffs, *see* ECF No. 249-1, and the personally identifiable information from the equal opportunity complaints themselves is irrelevant to the adjudication of Plaintiffs' facial challenge to the Mattis policy.

Response: Subject to and without waiving the above objections and subject to applicable privileges, the Department of Defense has produced materials responsive to Plaintiffs' request considered by the Panel of Experts or withheld documents responsive to Plaintiffs' request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

RFP No. 68: Documents sufficient to show the basis for, and all data underlying or relating to, the purported increase in medical costs for service members with gender dysphoria as compared to service members without gender dysphoria, referenced at page 41 of the Report.

Specific Objections:

Defendants object to this request to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege;

(d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege. Without waiver of the objections, a privilege log will be provided by the government, which describes the privileged documents that have been withheld and the basis for privilege at issue for those documents.

The Department of Defense further objects on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point") (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Response: Subject to and without waiving the above objections, Defendants have already produced documents responsive to Plaintiffs' request or withheld documents responsive to Plaintiffs' request pursuant to a valid privilege and provided Plaintiffs with a log documenting that withholding.

Dated: May 28, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 28, 2019, a copy of the document above was served by email on the following:

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EXHIBIT 7

The Honorable Marsha J. Pechman

**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

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' FIRST SET
OF INTERROGATORIES TO DEFENDANT DONALD J. TRUMP**

Pursuant to Federal Rules of Civil Procedure 26 and 33, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs' First Set of Interrogatories to Defendant Donald J. Trump, served December 29, 2017.¹ In presenting these objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

¹ These objections are limited to President Trump. Defendants will produce, or already have produced, separate objections for other Defendants.

Objections to Definitions and Instructions

1. Defendants object to Plaintiffs’ Definition 5 of “Communication” as encompassing “electronically stored information (ESI) containing, summarizing, or memorializing any communication,” insofar as electronic information collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

2. Defendants object to Plaintiffs’ Definition 6 of “Document” and “documents” as encompassing “ESI,” and “computer data,” insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

General Objection to All Interrogatories

Defendants object to any discovery directed to the President of the United States in this case, on several grounds, including that such discovery should be foreclosed in this case based on separation of powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege.

First, such discovery requests are inappropriate where, as here, they are premised on claims for declaratory and injunctive relief brought directly against the President of the United States, who is not a proper defendant on such claims. The Supreme Court has 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); *id.* at 500 (“The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department.”). A plurality of the Court later reiterated this principle in *Franklin v. Massachusetts*, 505 U.S. 788, 802–803 (1992). The plurality in *Franklin*

found it “extraordinary” that the district court in that case had issued an injunction against the President and two other government officials. *Id.* at 802, 806. “At the threshold,” it said, “the District Court should have evaluated whether injunctive relief against the President was available, and if not, whether appellees’ injuries were nonetheless redressable.” *Id.* at 803. Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827-28 (noting that such principle is “a functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history”). He reasoned that just as the President is absolutely immune from official capacity damages suits, so is he immune from efforts to enjoin him in his official capacity. *Id.* at 827 (“Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President’s performance of executive functions”). The lower courts have often applied this settled principle. *See e.g., Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) (“similar considerations regarding a court’s power to issue [injunctive] relief against the President himself apply to [the] request for a declaratory judgment”); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (“With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.”) (citations omitted). Under that principle, the President should not be subject to discovery in this case.

Second, the Supreme Court has made clear that discovery directed to the President in civil litigation raises significant separation of powers concerns and should be strictly circumscribed. In *Cheney v. U.S. District Court for District of Columbia*, the Supreme Court

explained that where the discovery requests were directed to the Vice President and other senior officials of the Executive Branch who gave advice and made recommendations to the President, it was “not a routine discovery dispute.” 542 U.S. 367, 385 (2004). The Court emphasized that “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.” *Id.* at 385. The Supreme Court “has held, on more than one occasion, that ‘[t]he highest respect that is owed to the office of the Chief Executive ... is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.’” *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Further, the Court has held that the Executive’s “constitutional responsibilities and status [are] factors counseling judicial deference and restraint” in the conduct of the litigation against it. *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

In *Cheney*, the district court permitted broad discovery directed to the Vice President and other senior officials, and the D.C. Circuit dismissed the government’s mandamus petition to vacate the district court’s discovery orders, holding that the government officials, “to guard against intrusion into the President’s prerogatives, must first assert privilege.” 542 U.S. at 375-76. In vacating the D.C. Circuit’s decision, the Supreme Court described as “anything but appropriate” the “overly broad discovery requests” directed to the Vice President and other senior officials, which were “unbounded in scope,” and asked for “everything under the sky.” *Id.* at 387-88 (“The Government [] did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored.”). Noting the separation of powers concerns, the Supreme Court instructed the D.C. Circuit to analyze, on remand, whether the district court’s actions in permitting discovery against the Vice President and other senior

officials constituted “an unwarranted impairment of another branch in the performance of its constitutional duties.” *Id.* at 390. It rejected the D.C. Circuit’s “mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government’s separation-of-powers objections.” *Id.* at 391. *Cf. United States v. Poindexter*, 727 F. Supp. 1501, 1503–04 (D.D.C. 1989) (agreeing with the President that “it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents” and deciding to narrow, on its own, the scope of the discovery directed to the President). These separation of powers concerns were also recognized in *American Historical Association v. National Archives & Records Administration*. 402 F. Supp. 2d 171, 181 (D.D.C. 2005) (Kollar-Kotelly, J.). The Court there found the reasoning in *Cheney* instructive, reiterating the *Cheney* Court’s view that “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.” *Id.* at 181 (quoting *Cheney*, 542 U.S. at 385) (internal quotation marks omitted).

In light of these compelling separation of powers concerns, the Court should, at a minimum, require Plaintiffs to exhaust alternative sources of discovery before subjecting the President to discovery. Indeed, on February 21, 2018—a mere two weeks from now—the Secretary of Defense is expected to submit an implementation plan to the President, which could narrow, if not completely eliminate, any purported reason for such broad discovery directed to the President. Military policy concerning transgender persons will be set forth in that plan, and any discovery, if permitted at all, into the basis for that policy should be directed at DoD in the first instance at that time. This timeline alone weighs heavily in favor of not subjecting the sitting President to discovery.

Finally, virtually all of the discovery directed to the President in this case is subject to the presidential communications privilege. The “presumptive privilege” that attaches to presidential communications is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon*, 418 U.S. 683, 708 (1974); see *In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (describing the privilege’s “constitutional origins”). The privilege is broad, protecting the “confidentiality of Presidential communications in performance of the President’s responsibilities.” *United States v. Nixon*, 418 U.S. at 711. See also *In re Sealed Case*, 121 F.3d at 744 (“The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations.”). Documents subject to the presidential communications privilege are shielded in their entirety, and the privilege “covers final and post-decisional material as well as pre-deliberative ones.” *In re Sealed Case*, 121 F.3d at 745.

Although the presidential communications privilege is not absolute, the bar to overcoming the privilege is high; it is “more difficult to surmount” than the deliberative process privilege. *In re Sealed Case*, 121 F.3d at 746. A party seeking otherwise privileged presidential material must demonstrate a “focused demonstration of need.” *Id.*; See also *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). Courts will balance “the public interests served by protecting the President’s confidentiality in a particular context with those furthered by requiring disclosure.” *In re Sealed Case*, 121 F.3d at 753. To meet this heavy burden of “specific need” in a criminal matter, the party seeking the privileged material must first demonstrate “that each discrete group of the subpoenaed materials likely contains important evidence”—that is, evidence “directly relevant to issues that are expected to be central to the

trial,” and not evidence that is “only tangentially relevant or would relate to side issues.” *Id.* at 753–55. The party seeking the discovery must also show “that this evidence is not available with due diligence elsewhere”—that is, notwithstanding other sources of information, the privileged documents are “still needed.” *Id.* (explaining that this standard reflects the Supreme Court’s “insistence that privileged presidential communications should not be treated as just another source of information”).

Where privileged material is sought for use in a civil case, the burden to overcome the presidential communications privilege is even greater. The greater scrutiny is appropriate because “the right to production of relevant evidence in civil proceedings does not have the same ‘constitutional dimensions’” as a request for information in a criminal case. *Cheney*, 542 U.S. at 384 (quoting *United States v. Nixon*, 418 U.S. at 713); *see also Am. Historical Ass’n*, 402 F. Supp. 2d at 181 (explaining that the *Cheney* Court noted that “while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch’s essential functions, the same could not be said of document requests in the civil context”); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) (“[T]he sufficiency of the Committee’s showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee’s functions.”) (emphasis added).

In this case—a civil matter seeking discovery directly from the President, in his capacity as Commander-in-Chief, related to his decisionmaking process on a topic involving national security and military concerns—Plaintiffs face a significant burden in order to negate a valid assertion of the presidential communications privilege. Plaintiffs cannot meet this burden, especially where the requested discovery seeks information that, on its face, is privileged

(including information about presidential communications, attorney-client and work product materials, and drafts of presidential documents) and would plainly intrude on core presidential deliberations, or where the requested discovery seeks information that could be sought from the Department of Defense or other sources, including publicly available ones.

Accordingly, Defendants object to any discovery requests directed to the President of the United States in this case based on these compelling separation of powers concerns, and in particular object to the discovery sought that is subject to the presidential communications privilege.

Specific Objections to Interrogatories

Interrogatory No. 1: Identify and describe each of the governmental purposes or interests that you contend will be advanced by the Policy (including, but not limited to, any purported interest in military readiness, lethality, unit cohesion, and military resources).

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 2: For each governmental purpose or interest identified in Your answers to Interrogatory 1 above, describe in detail all facts that You contend establish the need

or justification to further each purpose or interest, including all Documents that You contend might establish the existence of such facts.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to this interrogatory to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 2 includes at least two discrete subparts: (1) a detailed description of the facts that establish a government interest, and (2) all documents that establish the existence of those facts. *See Paananen v. Cellco P'ship*, No. C08-1042 RSM, 2009 WL 3327227, at *3 (W.D. Wash. Oct. 8, 2009) (concluding that an interrogatory had two discrete subparts where it asked both for “a defendant to summarize and state all the facts that support an affirmative defense,” and for “a defendant to identify the evidence (documents and witnesses) that support that affirmative defense”); *Smith v. Cafe Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009) (explaining that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”).

Interrogatory No. 3: For each governmental purpose or interest identified in Your answers to Interrogatory 1 above, describe in detail all facts that You contend demonstrate that the Policy furthers that purpose or interest, including all Documents that You contend might establish the existence of such facts.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to this interrogatory to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 3 includes at least two discrete subparts: (1) a detailed description of the facts that demonstrate that the policy furthers a particular government interest, and (2) all documents that establish the existence of those facts. *See Paananen*, No. C08-1042 RSM, 2009 WL 3327227, at *3 (concluding that an interrogatory had two discrete subparts where it asked both for “a defendant to summarize and state all the facts that support an affirmative defense,” and for “a defendant to identify the evidence (documents and witnesses) that support that affirmative defense”); *Smith*, 256 F.R.D. at 254 (explaining that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”).

Interrogatory No. 4: Identify all individuals with whom President Trump has discussed or corresponded with regarding the United States' past, present, or potential future governmental policies on transgender military service or related healthcare, and the dates of each discussion, from November 9, 2016 to the present.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "all individuals" purports to require Defendants to identify every single person President Trump has communicated with regarding transgender policies, regardless of the (a) type, (b) location, (c) amount, or (d) context of the communication.

Interrogatory No. 5: State the Date on which President Trump decided that "the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military."

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege, or (b) communications or information protected by the presidential communications privilege.

The President objects to this interrogatory to the extent that “decided” is vague and ambiguous, as well as undefined by Plaintiffs.

Interrogatory No. 6: Identify all individuals with whom President Trump communicated or consulted in deciding that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military,” including each of the “Generals and military experts” referenced in President Trump’s July 26, 2017 tweet.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 7: Explain the process You used to formulate the Tweets, the Presidential Memorandum, the Interim Guidance, and the Implementation Plan, and identify all sources of fact or opinion You consulted, considered, or otherwise referred to and the dates on which You first consulted, considered, or otherwise referred to such sources of information or opinion.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects to this interrogatory to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 7 includes at least two discrete subparts: (1) an explanation of the process used to develop various policies, (2) all sources of fact or opinion consulted in developing those policies, and the dates of such consultation. *See Paananen*, No. C08-1042 RSM, 2009 WL 3327227, at *3 (concluding that an interrogatory had two discrete subparts where it asked both for “a defendant to summarize and state all the facts that support an affirmative defense,” and for “a defendant to identify the evidence (documents and witnesses) that support that affirmative defense”); *Smith*, 256 F.R.D. at 254 (explaining that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”).

Interrogatory No. 8: Explain President Trump’s purported concerns regarding the RAND Report or any other study or review that the Department of Defense relied upon when adopting Secretary Ash Carter’s policy allowing transgender people to serve openly in the military.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 9: Identify all members of 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.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Interrogatory No. 10: Identify all Department of Defense and Department of Homeland Security employees who worked with, provided information to, or communicated with employees of the RAND National Defense Research Institute concerning the studies and/or fact gathering that resulted in the RAND Report.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD and DHS.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Interrogatory No. 11: Identify all persons with authority to approve medical waivers requested by transgender service members or transgender individuals seeking to join the U.S. military during the period from January 1, 2010 to the present.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; (b) communications or information protected by the presidential communications privilege; or (c) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation

Interrogatory No. 12: Identify all persons with authority, during the period from January 1, 2010 to the present, to involuntarily discharge or separate service members on account of transgender status (including those individuals with authority to initiate any necessary proceedings for involuntary discharge or separation, even if final adjudicatory authority resides elsewhere).

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege; or (c) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Interrogatory No.13: Describe in detail the circumstances leading to Secretary James Mattis's June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff with Subject: Accession of Transgender Individuals in the Military Services, including all reasons for the decision set forth in the memo (whether or not such reasons were publicly stated or acknowledged).

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 14: Identify all persons with knowledge or information concerning the facts set forth in your response to Interrogatory No. 13, including all persons who requested, advised, or consulted on the result set forth in the June 30, 2017 memorandum.

Specific Objections:

The President objects on the grounds that this Interrogatory is not properly directed to him and should instead be directed to DoD.

To the extent that this interrogatory is deemed to be properly directed to the President, the

President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) communications or information protected by the presidential communications privilege; or (e) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Interrogatory No. 15: Identify all communications between a member of Congress, on the one hand, and President Trump or any officer or employee of the Executive Office of the President, on the other, from January 20, 2017 to July 26, 2017, concerning military service by transgender people.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

The foregoing objections do not foreclose the possibility that, to the extent any responsive documents exist, a Member of Congress may seek to oppose the production of information in this case based on the Speech or Debate Clause.

Date: February 9, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2018, a copy of the document above was served by email on the following:

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EXHIBIT 8

The Honorable Marsha J. Pechman

**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

**DEFENDANTS' OBJECTIONS, RESPONSES, AND SUPPLEMENTAL RESPONSES
TO PLAINTIFFS' FIRST SET OF INTERROGATORIES TO SECRETARY MATTIS
AND THE UNITED STATES DEPARTMENT OF DEFENSE**

Pursuant to Federal Rules of Civil Procedure 26 and 33, Defendants, through their undersigned counsel, hereby submit objections, responses, and supplemental responses to Plaintiffs' First Set of Interrogatories to James N. Mattis, in his official capacity as Secretary of Defense, and the United States Department of Defense (collectively, "Department of Defense"), served December 29, 2017.¹ In presenting these objections and responses, Defendants do not

¹ These objections and responses are limited to Secretary Mattis and the Department of Defense. Defendants will produce, or already have produced, separate objections and responses for other Defendants.

waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Objections to Definitions and Instructions

1. The Department of Defense objects to Definition 1 of “You,” “your,” and “yours” as substantially overbroad and problematic because the Department of Defense has more than three million current personnel, and millions more former personnel.

2. The Department of Defense objects to Plaintiffs’ Definition 2 of “The Policy” as substantially overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to “all changes . . . undertaken or contemplated” as an “indirect result of the Tweets and/or the Presidential Memorandum” is objectionable to the extent that it could be construed to apply to documents and communications with mere peripheral connections to the claims and defenses in this case, and identifying all such documents and communications would be excessively burdensome and disproportionate to the needs of the case.

3. The Department of Defense objects to Plaintiffs’ Definition 5 of “Communication” as encompassing “electronically stored information (ESI) containing, summarizing, or memorializing any communication,” insofar as electronic information collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

4. The Department of Defense objects to Plaintiffs’ Definition 6 of “Document” and “documents” as encompassing “ESI,” and “computer data,” insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts.

Specific Objections to Interrogatories

Interrogatory No 1:

Identify and describe each of the governmental purposes or interests that you contend will be advanced by the Policy (including, but not limited to, any purported interest in military readiness, lethality, unit cohesion, and military resources).

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege. Consequently, and for the reasons presented in Defendant's Motion for a Protective Order, ECF No. 268, the Department of Defense will not provide substantive responses to the extent that this interrogatory calls for the disclosure of presidential communications.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in an upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Supplemental Response:

While studying the issue of military service by transgender individuals, the Department of Defense considered and developed policy proposals that would enhance the readiness, lethality, and effectiveness of the military.

Because the burden of deriving or ascertaining the answer to this interrogatory is substantially the same for both Plaintiffs and Defendants, pursuant to Federal Rule of Civil

Procedure 33(d), Defendants identify the following documents, which contain additional information responsive to this interrogatory:

- The Secretary's February 22, 2018 Memorandum for the President (ECF No. 216-1); and
- The report accompanying the Secretary's February 22, 2018 Memorandum for the President (ECF No. 216-2).

Interrogatory No. 2:

For each governmental purpose or interest identified in Your answers to Interrogatory 1 above, describe in detail all facts that You contend establish the need or justification to further each purpose or interest, including all Documents that You contend might establish the existence of such facts.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege. Consequently, and for the reasons presented in Defendant's Motion for a Protective Order, ECF No. 268, the Department of Defense will not provide substantive responses to the extent that this interrogatory call for the disclosure of presidential communications.

The Department of Defense also objects to this interrogatory to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 2 includes at least two discrete subparts: (1) a detailed description of the facts that establish a government interest, and (2) all documents that establish the existence of those facts. See *Paananen v. Cellco P'ship*, No. C08-1042 RSM, 2009 WL

3327227, at *3 (W.D. Wash. Oct. 8, 2009) (concluding that an interrogatory had two discrete subparts where it asked both for “a defendant to summarize and state all the facts that support an affirmative defense,” and for “a defendant to identify the evidence (documents and witnesses) that support that affirmative defense”); *Smith v. Cafe Asia*, 256 F.R.D. 247, 254 (D.D.C. 2009) (explaining that “each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”).

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in an upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Supplemental Response:

Because the burden of deriving or ascertaining the answer to this interrogatory is substantially the same for both Plaintiffs and Defendants, pursuant to Federal Rule of Civil Procedure 33(d), Defendants identify the following documents, which contain information responsive to this interrogatory:

| <u>Administrative Record (AR) Bates Range</u> | <u>Document</u> |
|--|--|
| 000001-000011 | Under Secretary of Defense for Personnel and Readiness, “Fiscal Year 2016 Report to Congress on the Review of Enlistment of Individuals with Disabilities in the Armed Forces” (Apr. 2016) |
| 000032-000033 | Under Secretary of Defense for Personnel and Readiness, “DoD Retention Policy for Non-Deployable Service Members” (Feb. 14, 2018) |
| 000034-000092 | The Lewin Group, Inc., “Qualified Military Available (QMA) and Interested Youth: Final Technical Report” (Sept. 2016) |
| 000093-000192 | RAND National Defense Research Institute, <i>Assessing the Implications of Allowing Transgender Personnel To Serve Openly</i> (RAND Corporation 2016), available at https://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf (“RAND Study”) |

| <u>Administrative Record (AR) Bates Range</u> | <u>Document</u> |
|--|---|
| 000193-000198 | Human Rights Campaign, "Understanding the Transgender Community," https://www.hrc.org/resources/understanding-the-transgender-community (last visited Feb. 14, 2018) |
| 000199-000209 | <i>Diagnostic and Statistical Manual of Mental Disorders</i> (DSM-5), p. 453 (5 th ed. 2013) |
| 000210-000261 | Department of Defense Instruction (DoDI) 6130.03, <i>Medical Standards for Appointment, Enlistment, or Induction in the Military Services</i> (Apr. 28, 2010), incorporating Change 1, (Sept. 13, 2011) |
| 000262-000269 | Department of Defense Instruction (DoDI) 6485.01, <i>Human Immunodeficiency Virus (HIV) in Military Service Members</i> (Jun. 7, 2013) |
| 000270-000284 | American Psychiatric Association, <i>Diagnostic and Statistical Manual of Mental Disorders (DSM-III)</i> , pp. 261-264 (3rd ed. 1980) |
| 000285-000298 | American Psychiatric Association, <i>Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)</i> , pp. 76-77 (3rd ed. Revised 1987) |
| 000299-000309 | American Psychiatric Association, <i>Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)</i> , pp. 532-538 (4th ed. 1994) |
| 000310-000313 | Hayes Directory, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria," p. 1 (May 15, 2014) |
| 000314-000318 | Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," <i>Military Medicine</i> , Vol. 181 (2016) |
| 000319 | Memorandum from Ashton Carter, Secretary of Defense, "Transgender Service Members" (July 28, 2015) |
| 000320-000325 | Memorandum from Ashton Carter, Secretary of Defense, "Directive-type Memorandum (DTM) 16-005, 'Military Service of Transgender Service Members'" (June 30, 2016) |
| 000326 | Memorandum from James N. Mattis, Secretary of Defense, "Accession of Transgender Individuals into the Military Services" (June 30, 2017) |
| 000327-000329 | Memorandum from Donald J. Trump, President of the United States, "Military Service by Transgender Individuals" (Aug. 25, 2017) |
| 000330-000331 | Memorandum from James N. Mattis, Secretary of Defense, "Terms of Reference -- Implementation of Presidential Memorandum on Military Service by Transgender Individuals" (Sept. 14, 2017) |
| 000332-000351 | Deployment Health Clinical Center, "Mental Health Disorder Prevalence Among Active Duty Service Members in the Military Health System, Fiscal Years 2005-2016" (Jan. 2017) |
| 000352-000356 | American Psychiatric Association, "Expert Q&A: Gender Dysphoria," available at https://www.psychiatry.org/patients-families/gender-dysphoria/expert-qa (last visited Feb. 14, 2018) |
| 000357-000378 | M. Jocelyn Elders, George R. Brown, Eli Coleman, Thomas Kolditz & Alan Steinman, "Medical Aspects of Transgender Military Service, <i>Armed Forces & Society</i> (Mar. 2014) |

| <u>Administrative Record (AR) Bates Range</u> | <u>Document</u> |
|--|--|
| 000379-000393 | Cecilia Dhejne, Roy Van Vlerken, Gunter Heylens & Jon Arcelus, "Mental health and gender dysphoria: A review of the literature," <i>International Review of Psychiatry</i> , Vol. 28 (2016) |
| 000394-000405 | George R. Brown & Kenneth T. Jones, "Mental Health and Medical Health Disparities in 5135 Transgender Veterans Receiving Healthcare in the Veterans Health Administration: A Case-Control Study," <i>LGBT Health</i> , Vol. 3 (Apr. 2016) |
| 000406-000423 | Ann P. Haas, Philip L. Rodgers & Jody L. Herman, <i>Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey</i> (American Foundation for Suicide Prevention and the Williams Institute, University of California, Los Angeles, School of Law 2014), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf |
| 000424-000429 | H.G. Virupaksha, Daliboyina Muralidhar, & Jayashree Ramakrishna, "Suicide and Suicidal Behavior Among Transgender Persons," <i>Indian Journal of Psychological Medicine</i> , Vol. 38 (2016) |
| 000430-000437 | Claire M. Peterson, Abigail Matthews, Emily Copps-Smith & Lee Ann Conard, "Suicidality, Self-Harm, and Body Dissatisfaction in Transgender Adolescents and Emerging Adults with Gender Dysphoria," <i>Suicide and Life Threatening Behavior</i> , Vol. 47, (Aug. 2017) |
| 000438-000449 | Raymond P. Tucker, Rylan J. Testa, Mark A. Reger, Tracy L. Simpson, Jillian C. Shipherd, & Keren Lehavot, "Current and Military-Specific Gender Minority Stress Factors and Their Relationship with Suicide Ideation in Transgender Veterans," <i>Suicide and Life Threatening Behavior</i> DOI: 10.1111/sltb.12432 (epub ahead of print) (2018) |
| 000450-000457 | Craig J. Bryan, AnnaBelle O. Bryan, Bobbie N. Ray-Sannerud, Neysa Etienne & Chad E. Morrow, "Suicide attempts before joining the military increase risk for suicide attempts and severity of suicidal ideation among military personnel and veterans," <i>Comprehensive Psychiatry</i> , Vol. 55 (2014) |
| 000458-000462 | Hayes Directory, "Hormone Therapy for the Treatment of Gender Dysphoria," (May 19, 2014). |
| 000463-000497 | Wylie C. Hembree, Peggy Cohen-Kettenis, Louis Gooren, Sabine Hannema, Walter Meyer, M. Hassan Murad, Stephen Rosenthal, Joshua Safer, Vin Tangpricha, & Guy T'Sjoen, "Endocrine Treatment of Gender-Dysphoric/Gender Incongruent Persons: An Endocrine Society Clinical Practice Guideline," <i>The Journal of Clinical Endocrinology & Metabolism</i> , Vol. 102 (Nov 2017) |
| 000498-000505 | Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, "Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden," <i>PLoS One</i> , Vol. 6 (Feb. 2011) |

| <u>Administrative Record (AR) Bates Range</u> | <u>Document</u> |
|--|---|
| 000506-000520 | Hayes Annual Review, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria" (Apr. 18, 2017; Apr. 12, 2016; May 11, 2015) |
| 000521-000526 | Memorandum from Defense Health Agency, "Information Memorandum: Interim Defense Health Agency Procedures for Reviewing Requests for Waivers to Allow Supplemental Health Care Program Coverage of Sex Reassignment Surgical Procedures" (Nov. 13, 2017) |
| 000527-000725 | University of California, San Francisco, Center of Excellence for Transgender Health, "Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People," available at http://transhealth.ucsf.edu/trans?page=guidelines-home (last visited Feb. 16, 2018) |
| 000726-001027 | Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, <i>The Report of the 2015 U.S. Transgender Survey</i> (National Center for Transgender Equality 2016), available at https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF |
| 001028-001177 | Tamara Jensen, Joseph Chin, James Rollins, Elizabeth Koller, Linda Gousis & Katherine Szarama, "Final Decision Memorandum on Gender Reassignment Surgery for Medicare Beneficiaries with Gender Dysphoria," Centers for Medicare & Medicaid Services (Aug. 30, 2016) ("CMS Report") |
| 001178-001195 | Mohammad Hassan Murad, Mohamed B. Elamin, Magaly Zumaeta Garcia, Rebecca J. Mullan, Ayman Murad, Patricia J. Erwin & Victor M. Montori, "Hormonal therapy and sex reassignment: a systematic review and meta-analysis of quality of life and psychosocial outcomes," <i>Clinical Endocrinology</i> , Vol. 72 (2010) |
| 001216-001283 | Department of the Army, Training and Doctrine Command, TRADOC Regulation 350-6, "Enlisted Initial Entry Training Policies and Administration" (Mar. 20, 2017) |
| 001284-001289 | Department of the Air Force, Air Force Instruction 32-6005, "Unaccompanied Housing Management" (Jan. 29, 2016) |
| 001290-001291 | Department of the Army, Human Resources Command, AR 600-85, "Substance Abuse Program" (Dec. 28, 2012) |
| 001292-001333 | Department of the Army, Army Regulation 600-9, "The Army Body Composition Program" (June 28, 2013) |
| 001334-001392 | Department of the Navy, Office of the Chief of Navy Operations Instruction 6110.1J, "Physical Readiness Program" (July 11, 2011) |
| 001393-001539 | Department of the Air Force, Air Force Instruction 36-2905, "Fitness Program" (Aug. 27, 2015) |
| 001540-001603 | Department of the Navy, Marine Corps Order 6100.13, "Marine Corps Physical Fitness Program" (Aug. 1, 2008) |

| <u>Administrative Record (AR) Bates Range</u> | <u>Document</u> |
|--|---|
| 001604-001608 | Department of the Navy, Marine Corps Order 6110.3A, “Marine Corps Body Composition and Military Appearance Program” (Oct. 12, 2017) |
| 001609-001661 | Department of the Navy, Marine Corps Order 6110.3A CH-1, “Marine Corps Body Composition and Military Appearance Program” (Dec. 15, 2016) |
| 001662-001693 | United States Military Academy, Office of the Commandant of Cadets, “Physical Program Whitebook AY 16-17,” p. 13 |
| 001694-002099 | Headquarters, Department of the Army, TC 3-25.150, “Combatives” (Feb. 2017) |
| 002100-002109 | Major Alex Bedard, Major Robert Peterson & Ray Barone, “Punching Through Barriers: Female Cadets Integrated into Mandatory Boxing at West Point,” Association of the United States Army (Nov. 16, 2017), https://www.ausa.org/articles/punching-through-barriers-female-cadets-boxing-west-point |
| 002110-002112 | International Olympic Committee Consensus Meeting on Sex Reassignment and Hyperandrogenism (Nov. 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf |
| 002113-002150 | NCAA Office of Inclusion, NCAA Inclusion of Transgender Student-Athletes (Aug. 2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf |
| 002151-002153 | Department of the Navy, Navy Personnel Command, Navy Personnel Instruction 15665I, “Uniform Regulations,” Art. 2101.1, (modified 12/21/2017) |
| 002154-002221 | Department of the Army, Army Regulation 670-1, “Wear and Appearance of Army Uniforms and Insignia” (Mar. 31, 2014) |
| 002222-002329 | Department of the Air Force, Air Force Instruction 36-2903, “Dress and Personal Appearance of Air Force Personnel” (Feb. 9, 2017) |
| 002330-002413 | Department of the Navy, Marine Corps Order P1020.34G, “Marine Corps Uniform Regulations” (Mar. 31, 2003) |
| 002414-002431 | Department of Defense Instruction 1300.28, <i>In-Service Transition for Service Members Identifying as Transgender</i> (June 30, 2016) |
| 002432-002583 | Institute for Defense Analyses, “Force Impact of Expanding the Recruitment of Individuals with Auditory Impairment” Draft Final (January 2016) |
| 002584-002614 | Modification Thirteen to U.S. Central Command Individual Protection and Individual-Unit Deployment Policy, Tab A (Mar. 2017) |
| 002615-002619 | Memorandum from the Assistant Secretary of Defense for Health Affairs, “Clinical Practice Guidance for Deployment-Limiting Mental Disorders and Psychotropic Medications” (Oct. 7, 2013) |

| Administrative Record (AR) Bates Range | Document |
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| 002620-002624 | National Institute of Mental Health, "Bipolar Disorder" (Nov. 2017), https://www.nimh.nih.gov/health/statistics/bipolar-disorder.shtml |
| 002625-002627 | National Institute of Mental Health, "Schizophrenia" (Nov. 2017), https://www.nimh.nih.gov/health/statistics/schizophrenia.shtm |
| 002628 | Douglas MacAurthur, <i>Respectfully Quoted: A Dictionary of Quotations</i> (1989), available at http://www.bartleby.com/73/1874.html |
| 002629-002781 | Nathaniel Frank, "Gays in Foreign Militaries 2010: A Global Primer" (<i>The Palm Center</i> , Feb. 2010), https://www.palmcenter.org/wpcontent/uploads/2017/12/FOREIGNMILITARIESPRIMER2010FINAL.pdf |
| 002782-002802 | Anne Speckhard & Reuven Paz, "Transgender Service in the Israeli Defense Forces: A Polar Opposite Stance to the U.S. Military Policy of Barring Transgender Soldiers from Service" (2014), http://www.researchgate.net/publication/280093066 |
| 002803-002816 | Alan Okros & Denise Scott, "Gender Identity in the Canadian Forces," <i>Armed Forces and Society</i> , Vol. 41 (2014) |
| 002817-002820 | Leo Shane III, "Poll: Active-duty troops worry about military's transgender policies," <i>Military Times</i> (July 27, 2017), available at https://www.militarytimes.com/news/pentagon-congress/2017/07/27/poll-active-duty-troops-worry-about-militarys-transgender-policies/ |
| 002821-002824 | Minutes, POE Meeting 1 (Oct. 13, 2017) |
| 002825-002829 | Minutes, POE Meeting 2 (Oct. 19, 2017) |
| 002830-002835 | Minutes, POE Meeting 3 (Oct. 26, 2017) |
| 002836-002839 | Minutes, POE Meeting 4 (Nov. 2, 2017) |
| 002840-002847 | Minutes, POE Meeting 5 (Nov. 9, 2017) |
| 002848 | Agenda, POE Meeting 1 (Oct. 13, 2017) |
| 002849-002852 | Office of People Analytics, 2016 Workplace and Gender Relations Survey of Active Duty Members: Transgender Service Members, Study Conclusions |
| 002853-002856 | Slides With Office of People Analytics, 2016 Workplace and Gender Relations Survey of Active Duty Members: Transgender Service Members (Survey Results) |
| 002857 | Agenda, POE Meeting 2 (Oct. 19, 2017) |
| 002858-002866 | Transgender Policy Panel Meeting Background Information Slides (Oct. 19, 2017) |
| 002867-002880 | DoD Transgender Service in the U.S. Military, Implementation Handbook (excerpts) (Sept. 30, 2016) |
| 002881 | Agenda, POE Meeting 3 (Oct. 26, 2017) |
| 002882 | Agenda, POE Meeting 4 (Nov. 2, 2017) |
| 002883-002904 | Health Data for Service Members with Gender Dysphoria (Nov. 2, 2017) |
| 002905 | Agenda, POE Meeting 5 (Nov. 9, 2017) |

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| 002906 | Agenda, POE Meeting 6 (Nov. 16, 2017) |
| 002907-002910 | Non-deployable Working Group Information Briefing (Nov. 16, 2017) |
| 002911-002940 | Medical and Surgical Treatment for Gender Dysphoria (Nov. 7, 2017) |
| 002941 | Comparison of Civilian Insurers and MHS |
| 002942 | Agenda, POE Meeting 7 (Nov. 21, 2017) |
| 002943-002963 | 2015 Transgender Survey (December 2016) and Additional Administrative Data (Nov. 21, 2017) |
| 002964 | Reasons for Separation (table) |
| 002965 | Agenda, POE Meeting 8 (Nov. 30, 2017) |
| 002966-002976 | Admin Data Presented During Panel Meetings |
| 002977 | Agenda, POE Meeting 9 (Dec. 7, 2017) |
| 002978-002981 | The Federal Aviation Administration (FAA) and Gender Dysphoria (Dec. 4, 2017) |
| 002982-002985 | Time To Return to Full Duty After Transition Surgery in MTFs (slide deck) |
| 002986-002997 | Admin Data Presented During Panel Meetings (version 2) |
| 002998 | Agenda, POE Meeting 10 (Dec. 13, 2017) |
| 002999-003010 | Data Extracts: Key information used by the Panel to make recommendations |
| 003011-003042 | Health Data on Active Duty Service Members with Gender Dysphoria (Dec. 13, 2017) |
| 003043-003055 | Admin Data Presented During Panel Meeting (version 3) |
| 003056 | Agenda, POE Meeting 11 (Dec. 22, 2017) |
| 003057 | Agenda, POE Meeting 12 (Jan. 4, 2018) |
| 003058 | Agenda, POE Meeting 13 (Jan. 11, 2018) |
| 003059-003067 | Action Memo from Under Secretary of Defense (Personnel and Readiness) to the Secretary of Defense re: Recommendations by the Transgender Review Panel of Experts (Jan. 11, 2018) |
| 003068-003075 | Hormone Therapy White Paper |

Interrogatory No. 3:

For each governmental purpose or interest identified in Your answers to Interrogatory 1 above, describe in detail all facts that You contend demonstrate that the Policy furthers that purpose or interest, including all Documents that You contend might establish the existence of such facts.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege. Consequently, and for the reasons presented in Defendant's Motion for a Protective Order, ECF No. 268, the Department of Defense will not provide substantive responses to the extent that this interrogatory calls for the disclosure of presidential communications.

The Department of Defense also objects to this interrogatory to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 3 includes at least two discrete subparts: (1) a detailed description of the facts that demonstrate that the policy furthers a particular government interest, and (2) all documents that establish the existence of those facts. *See Paananen*, No. C08-1042 RSM, 2009 WL 3327227, at *3 (concluding that an interrogatory had two discrete subparts where it asked both for "a defendant to summarize and state all the facts that support an affirmative defense," and for "a defendant to identify the evidence (documents and witnesses) that support that affirmative defense"); *Smith*, 256 F.R.D. at 254 (explaining that "each interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories").

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in an

upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Supplemental Response:

Because the burden of deriving or ascertaining the answer to this interrogatory is substantially the same for both Plaintiffs and Defendants, pursuant to Federal Rule of Civil Procedure 33(d), Defendants identify the following documents, which contain information responsive to this interrogatory:

| <u>Administrative Record (AR) Bates Range</u> | <u>Document</u> |
|--|--|
| 000001-000011 | Under Secretary of Defense for Personnel and Readiness, "Fiscal Year 2016 Report to Congress on the Review of Enlistment of Individuals with Disabilities in the Armed Forces" (Apr. 2016) |
| 000032-000033 | Under Secretary of Defense for Personnel and Readiness, "DoD Retention Policy for Non-Deployable Service Members" (Feb. 14, 2018) |
| 000034-000092 | The Lewin Group, Inc., "Qualified Military Available (QMA) and Interested Youth: Final Technical Report" (Sept. 2016) |
| 000093-000192 | RAND National Defense Research Institute, <i>Assessing the Implications of Allowing Transgender Personnel To Serve Openly</i> (RAND Corporation 2016), available at https://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf ("RAND Study") |
| 000193-000198 | Human Rights Campaign, "Understanding the Transgender Community," https://www.hrc.org/resources/understanding-the-transgender-community (last visited Feb. 14, 2018) |
| 000199-000209 | <i>Diagnostic and Statistical Manual of Mental Disorders</i> (DSM-5), p. 453 (5 th ed. 2013) |
| 000210-000261 | Department of Defense Instruction (DoDI) 6130.03, <i>Medical Standards for Appointment, Enlistment, or Induction in the Military Services</i> (Apr. 28, 2010), incorporating Change 1, (Sept. 13, 2011) |
| 000262-000269 | Department of Defense Instruction (DoDI) 6485.01, <i>Human Immunodeficiency Virus (HIV) in Military Service Members</i> (Jun. 7, 2013) |
| 000270-000284 | American Psychiatric Association, <i>Diagnostic and Statistical Manual of Mental Disorders (DSM-III)</i> , pp. 261-264 (3rd ed. 1980) |
| 000285-000298 | American Psychiatric Association, <i>Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)</i> , pp. 76-77 (3rd ed. Revised 1987) |
| 000299-000309 | American Psychiatric Association, <i>Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)</i> , pp. 532-538 (4th ed. 1994) |

| <u>Administrative Record (AR) Bates Range</u> | <u>Document</u> |
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| 000310-000313 | Hayes Directory, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria," p. 1 (May 15, 2014) |
| 000314-000318 | Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," <i>Military Medicine</i> , Vol. 181 (2016) |
| 000319 | Memorandum from Ashton Carter, Secretary of Defense, "Transgender Service Members" (July 28, 2015) |
| 000320-000325 | Memorandum from Ashton Carter, Secretary of Defense, "Directive-type Memorandum (DTM) 16-005, 'Military Service of Transgender Service Members'" (June 30, 2016) |
| 000326 | Memorandum from James N. Mattis, Secretary of Defense, "Accession of Transgender Individuals into the Military Services" (June 30, 2017) |
| 000327-000329 | Memorandum from Donald J. Trump, President of the United States, "Military Service by Transgender Individuals" (Aug. 25, 2017) |
| 000330-000331 | Memorandum from James N. Mattis, Secretary of Defense, "Terms of Reference -- Implementation of Presidential Memorandum on Military Service by Transgender Individuals" (Sept. 14, 2017) |
| 000332-000351 | Deployment Health Clinical Center, "Mental Health Disorder Prevalence Among Active Duty Service Members in the Military Health System, Fiscal Years 2005-2016" (Jan. 2017) |
| 000352-000356 | American Psychiatric Association, "Expert Q&A: Gender Dysphoria," available at https://www.psychiatry.org/patients-families/gender-dysphoria/expert-qa (last visited Feb. 14, 2018) |
| 000357-000378 | M. Jocelyn Elders, George R. Brown, Eli Coleman, Thomas Kolditz & Alan Steinman, "Medical Aspects of Transgender Military Service, Armed Forces & Society (Mar. 2014) |
| 000379-000393 | Cecilia Dhejne, Roy Van Vlerken, Gunter Heylens & Jon Arcelus, "Mental health and gender dysphoria: A review of the literature," <i>International Review of Psychiatry</i> , Vol. 28 (2016) |
| 000394-000405 | George R. Brown & Kenneth T. Jones, "Mental Health and Medical Health Disparities in 5135 Transgender Veterans Receiving Healthcare in the Veterans Health Administration: A Case-Control Study," <i>LGBT Health</i> , Vol. 3 (Apr. 2016) |
| 000406-000423 | Ann P. Haas, Philip L. Rodgers & Jody L. Herman, <i>Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey</i> (American Foundation for Suicide Prevention and the Williams Institute, University of California, Los Angeles, School of Law 2014), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf |
| 000424-000429 | H.G. Virupaksha, Daliboyina Muralidhar, & Jayashree Ramakrishna, "Suicide and Suicidal Behavior Among Transgender Persons," <i>Indian Journal of Psychological Medicine</i> , Vol. 38 (2016) |

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| 000430-000437 | Claire M. Peterson, Abigail Matthews, Emily Coppins-Smith & Lee Ann Conard, "Suicidality, Self-Harm, and Body Dissatisfaction in Transgender Adolescents and Emerging Adults with Gender Dysphoria," <i>Suicide and Life Threatening Behavior</i> , Vol. 47, (Aug. 2017) |
| 000438-000449 | Raymond P. Tucker, Rylan J. Testa, Mark A. Reger, Tracy L. Simpson, Jillian C. Shipherd, & Keren Lehavot, "Current and Military-Specific Gender Minority Stress Factors and Their Relationship with Suicide Ideation in Transgender Veterans," <i>Suicide and Life Threatening Behavior</i> DOI: 10.1111/sltb.12432 (epub ahead of print) (2018) |
| 000450-000457 | Craig J. Bryan, AnnaBelle O. Bryan, Bobbie N. Ray-Sannerud, Neysa Etienne & Chad E. Morrow, "Suicide attempts before joining the military increase risk for suicide attempts and severity of suicidal ideation among military personnel and veterans," <i>Comprehensive Psychiatry</i> , Vol. 55 (2014) |
| 000458-000462 | Hayes Directory, "Hormone Therapy for the Treatment of Gender Dysphoria," (May 19, 2014). |
| 000463-000497 | Wylie C. Hembree, Peggy Cohen-Kettenis, Louis Gooren, Sabine Hannema, Walter Meyer, M. Hassan Murad, Stephen Rosenthal, Joshua Safer, Vin Tangpricha, & Guy T'Sjoen, "Endocrine Treatment of Gender-Dysphoric/Gender Incongruent Persons: An Endocrine Society Clinical Practice Guideline," <i>The Journal of Clinical Endocrinology & Metabolism</i> , Vol. 102 (Nov 2017) |
| 000498-000505 | Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, "Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden," <i>PLoS One</i> , Vol. 6 (Feb. 2011) |
| 000506-000520 | Hayes Annual Review, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria" (Apr. 18, 2017; Apr. 12, 2016; May 11, 2015) |
| 000521-000526 | Memorandum from Defense Health Agency, "Information Memorandum: Interim Defense Health Agency Procedures for Reviewing Requests for Waivers to Allow Supplemental Health Care Program Coverage of Sex Reassignment Surgical Procedures" (Nov. 13, 2017) |
| 000527-000725 | University of California, San Francisco, Center of Excellence for Transgender Health, "Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People," available at http://transhealth.ucsf.edu/trans?page=guidelines-home (last visited Feb. 16, 2018) |
| 000726-001027 | Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, <i>The Report of the 2015 U.S. Transgender Survey</i> (National Center for Transgender Equality 2016), available at https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF |

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| 001028-001177 | Tamara Jensen, Joseph Chin, James Rollins, Elizabeth Koller, Linda Gousis & Katherine Szarama, "Final Decision Memorandum on Gender Reassignment Surgery for Medicare Beneficiaries with Gender Dysphoria," Centers for Medicare & Medicaid Services (Aug. 30, 2016) ("CMS Report") |
| 001178-001195 | Mohammad Hassan Murad, Mohamed B. Elamin, Magaly Zumaeta Garcia, Rebecca J. Mullan, Ayman Murad, Patricia J. Erwin & Victor M. Montori, "Hormonal therapy and sex reassignment: a systematic review and meta-analysis of quality of life and psychosocial outcomes," <i>Clinical Endocrinology</i> , Vol. 72 (2010) |
| 001196-001215 | <i>United States v. Virginia</i> , 518 U.S. 515 (1996) |
| 001216-001283 | Department of the Army, Training and Doctrine Command, TRADOC Regulation 350-6, "Enlisted Initial Entry Training Policies and Administration" (Mar. 20, 2017) |
| 001284-001289 | Department of the Air Force, Air Force Instruction 32-6005, "Unaccompanied Housing Management" (Jan. 29, 2016) |
| 001290-001291 | Department of the Army, Human Resources Command, AR 600-85, "Substance Abuse Program" (Dec. 28, 2012) |
| 001292-001333 | Department of the Army, Army Regulation 600-9, "The Army Body Composition Program" (June 28, 2013) |
| 001334-001392 | Department of the Navy, Office of the Chief of Navy Operations Instruction 6110.1J, "Physical Readiness Program" (July 11, 2011) |
| 001393-001539 | Department of the Air Force, Air Force Instruction 36-2905, "Fitness Program" (Aug. 27, 2015) |
| 001540-001603 | Department of the Navy, Marine Corps Order 6100.13, "Marine Corps Physical Fitness Program" (Aug. 1, 2008) |
| 001604-001608 | Department of the Navy, Marine Corps Order 6110.3A, "Marine Corps Body Composition and Military Appearance Program" (Oct. 12, 2017) |
| 001609-001661 | Department of the Navy, Marine Corps Order 6110.3A CH-1, "Marine Corps Body Composition and Military Appearance Program" (Dec. 15, 2016) |
| 001662-001693 | United States Military Academy, Office of the Commandant of Cadets, "Physical Program Whitebook AY 16-17," p. 13 |
| 001694-002099 | Headquarters, Department of the Army, TC 3-25.150, "Combatives" (Feb. 2017) |
| 002100-002109 | Major Alex Bedard, Major Robert Peterson & Ray Barone, "Punching Through Barriers: Female Cadets Integrated into Mandatory Boxing at West Point," Association of the United States Army (Nov. 16, 2017), https://www.ausea.org/articles/punching-through-barriers-female-cadets-boxing-west-point |

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| 002110-002112 | International Olympic Committee Consensus Meeting on Sex Reassignment and Hyperandrogensim (Nov. 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf |
| 002113-002150 | NCAA Office of Inclusion, NCAA Inclusion of Transgender Student-Athletes (Aug. 2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf |
| 002151-002153 | Department of the Navy, Navy Personnel Command, Navy Personnel Instruction 15665I, "Uniform Regulations," Art. 2101.1, (modified 12/21/2017) |
| 002154-002221 | Department of the Army, Army Regulation 670-1, "Wear and Appearance of Army Uniforms and Insignia" (Mar. 31, 2014) |
| 002222-002329 | Department of the Air Force, Air Force Instruction 36-2903, "Dress and Personal Appearance of Air Force Personnel" (Feb. 9, 2017) |
| 002330-002413 | Department of the Navy, Marine Corps Order P1020.34G, "Marine Corps Uniform Regulations" (Mar. 31, 2003) |
| 002414-002431 | Department of Defense Instruction 1300.28, <i>In-Service Transition for Service Members Identifying as Transgender</i> (June 30, 2016) |
| 002432-002583 | Institute for Defense Analyses, "Force Impact of Expanding the Recruitment of Individuals with Auditory Impairment" Draft Final (January 2016) |
| 002584-002614 | Modification Thirteen to U.S. Central Command Individual Protection and Individual-Unit Deployment Policy, Tab A (Mar. 2017) |
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| 002625-002627 | National Institute of Mental Health, "Schizophrenia" (Nov. 2017), https://www.nimh.nih.gov/health/statistics/schizophrenia.shtm |
| 002628 | Douglas MacAurthur, <i>Respectfully Quoted: A Dictionary of Quotations</i> (1989), available at http://www.bartleby.com/73/1874.html |
| 002629-002781 | Nathaniel Frank, "Gays in Foreign Militaries 2010: A Global Primer" (<i>The Palm Center</i> , Feb. 2010), https://www.palmcenter.org/wpcontent/uploads/2017/12/FOREIGNMILITARIESPRIMER2010FINAL.pdf |
| 002782-002802 | Anne Speckhard & Reuven Paz, "Transgender Service in the Israeli Defense Forces: A Polar Opposite Stance to the U.S. Military Policy of Barring Transgender Soldiers from Service" (2014), http://www.researchgate.net/publication/280093066 |

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| 002803-002816 | Alan Okros & Denise Scott, "Gender Identity in the Canadian Forces," <i>Armed Forces and Society</i> , Vol. 41 (2014) |
| 002817-002820 | Leo Shane III, "Poll: Active-duty troops worry about military's transgender policies," <i>Military Times</i> (July 27, 2017), available at https://www.militarytimes.com/news/pentagon-congress/2017/07/27/poll-active-duty-troops-worry-about-militarys-transgender-policies/ |
| 002821-002824 | Minutes, POE Meeting 1 (Oct. 13, 2017) |
| 002825-002829 | Minutes, POE Meeting 2 (Oct. 19, 2017) |
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| 002836-002839 | Minutes, POE Meeting 4 (Nov. 2, 2017) |
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| 002849-002852 | Office of People Analytics, 2016 Workplace and Gender Relations Survey of Active Duty Members: Transgender Service Members, Study Conclusions |
| 002853-002856 | Slides With Office of People Analytics, 2016 Workplace and Gender Relations Survey of Active Duty Members: Transgender Service Members (Survey Results) |
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| 002858-002866 | Transgender Policy Panel Meeting Background Information Slides (Oct. 19, 2017) |
| 002867-002880 | DoD Transgender Service in the U.S. Military, Implementation Handbook (excerpts) (Sept. 30, 2016) |
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| 002882 | Agenda, POE Meeting 4 (Nov. 2, 2017) |
| 002883-002904 | Health Data for Service Members with Gender Dysphoria (Nov. 2, 2017) |
| 002905 | Agenda, POE Meeting 5 (Nov. 9, 2017) |
| 002906 | Agenda, POE Meeting 6 (Nov. 16, 2017) |
| 002907-002910 | Non-deployable Working Group Information Briefing (Nov. 16, 2017) |
| 002911-002940 | Medical and Surgical Treatment for Gender Dysphoria (Nov. 7, 2017) |
| 002941 | Comparison of Civilian Insurers and MHS |
| 002942 | Agenda, POE Meeting 7 (Nov. 21, 2017) |
| 002943-002963 | 2015 Transgender Survey (December 2016) and Additional Administrative Data (Nov. 21, 2017) |
| 002964 | Reasons for Separation (table) |
| 002965 | Agenda, POE Meeting 8 (Nov. 30, 2017) |
| 002966-002976 | Admin Data Presented During Panel Meetings |
| 002977 | Agenda, POE Meeting 9 (Dec. 7, 2017) |
| 002978-002981 | The Federal Aviation Administration (FAA) and Gender Dysphoria (Dec. 4, 2017) |

| <u>Administrative Record (AR) Bates Range</u> | <u>Document</u> |
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| 002982-002985 | Time To Return to Full Duty After Transition Surgery in MTFs (slide deck) |
| 002986-002997 | Admin Data Presented During Panel Meetings (version 2) |
| 002998 | Agenda, POE Meeting 10 (Dec. 13, 2017) |
| 002999-003010 | Data Extracts: Key information used by the Panel to make recommendations |
| 003011-003042 | Health Data on Active Duty Service Members with Gender Dysphoria (Dec. 13, 2017) |
| 003043-003055 | Admin Data Presented During Panel Meeting (version 3) |
| 003056 | Agenda, POE Meeting 11 (Dec. 22, 2017) |
| 003057 | Agenda, POE Meeting 12 (Jan. 4, 2018) |
| 003058 | Agenda, POE Meeting 13 (Jan. 11, 2018) |
| 003059-003067 | Action Memo from Under Secretary of Defense (Personnel and Readiness) to the Secretary of Defense re: Recommendations by the Transgender Review Panel of Experts (Jan. 11, 2018) |
| 003068-003075 | Hormone Therapy White Paper |

Interrogatory No. 4:

Identify all individuals with whom President Trump has discussed or corresponded with regarding the United States' past, present, or potential future governmental policies on transgender military service or related healthcare, and the dates of each discussion, from November 9, 2016 to the present.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The Department of Defense also objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "all individuals" purports to require the Department of Defense to identify every single person

President Trump has communicated with regarding transgender policies, regardless of the (a) type, (b) location, (c) amount, or (d) context of the communication.

Interrogatory No. 5:

State the Date on which President Trump decided that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military.”

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 6:

Identify all individuals with whom President Trump communicated or consulted in deciding that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. military,” including each of the “Generals and military experts” referenced in President Trump’s July 26, 2017 tweet.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 7:

Explain the process You used to formulate the Tweets, the Presidential Memorandum, the Interim Guidance, and the Implementation Plan, and identify all sources of fact or opinion You consulted, considered, or otherwise referred to and the dates on which You first consulted, considered, or otherwise referred to such sources of information or opinion.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege. Consequently, and for the reasons presented in Defendant's Motion for a Protective Order, ECF No. 268, the Department of Defense will not provide substantive responses to the extent that this interrogatory calls for the disclosure of presidential communications.

The Department of Defense also objects to this interrogatory to the extent that it creates interrogatories with multiple discrete subparts, thus leading to Plaintiffs exceeding the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Interrogatory No. 7 includes at least two discrete subparts: (1) an explanation of the process used to develop various policies, (2) all sources of fact or opinion consulted in developing those policies, and the dates of such consultation. *See Paananen*, No. C08-1042 RSM, 2009 WL 3327227, at *3 (concluding that an interrogatory had two discrete subparts where it asked both for "a defendant to summarize and state all the facts that support an affirmative defense," and for "a defendant to identify the evidence (documents and witnesses) that support that affirmative defense"); *Smith*, 256 F.R.D. at 254 (explaining that "each

interrogatory that seeks identification of documents in addition to an answer will be counted as two interrogatories”).

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in an upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Supplemental Response:

Because the burden of deriving or ascertaining the answer to this interrogatory is substantially the same for both Plaintiffs and Defendants, pursuant to Federal Rule of Civil Procedure 33(d), Defendants identify the following documents, which contain information responsive to this interrogatory:

- The Secretary’s February 22, 2018 Memorandum for the President (ECF No. 216-1);
- The report accompanying the Secretary’s February 22, 2018 Memorandum for the President (ECF No. 216-2); and
- The follow documents produced in the administrative record at the following Bates numbers:

| <u>Administrative Record (AR) Bates Range</u> | <u>Document</u> |
|--|--|
| 000001-000011 | Under Secretary of Defense for Personnel and Readiness, “Fiscal Year 2016 Report to Congress on the Review of Enlistment of Individuals with Disabilities in the Armed Forces” (Apr. 2016) |
| 000032-000033 | Under Secretary of Defense for Personnel and Readiness, “DoD Retention Policy for Non-Deployable Service Members” (Feb. 14, 2018) |
| 000034-000092 | The Lewin Group, Inc., “Qualified Military Available (QMA) and Interested Youth: Final Technical Report” (Sept. 2016) |

| <u>Administrative Record (AR) Bates Range</u> | <u>Document</u> |
|--|--|
| 000093-000192 | RAND National Defense Research Institute, <i>Assessing the Implications of Allowing Transgender Personnel To Serve Openly</i> (RAND Corporation 2016), available at https://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf (“RAND Study”) |
| 000193-000198 | Human Rights Campaign, “Understanding the Transgender Community,” https://www.hrc.org/resources/understanding-the-transgender-community (last visited Feb. 14, 2018) |
| 000199-000209 | <i>Diagnostic and Statistical Manual of Mental Disorders</i> (DSM-5), p. 453 (5 th ed. 2013) |
| 000210-000261 | Department of Defense Instruction (DoDI) 6130.03, <i>Medical Standards for Appointment, Enlistment, or Induction in the Military Services</i> (Apr. 28, 2010), incorporating Change 1, (Sept. 13, 2011) |
| 000262-000269 | Department of Defense Instruction (DoDI) 6485.01, <i>Human Immunodeficiency Virus (HIV) in Military Service Members</i> (Jun. 7, 2013) |
| 000270-000284 | American Psychiatric Association, <i>Diagnostic and Statistical Manual of Mental Disorders (DSM-III)</i> , pp. 261-264 (3rd ed. 1980) |
| 000285-000298 | American Psychiatric Association, <i>Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)</i> , pp. 76-77 (3rd ed. Revised 1987) |
| 000299-000309 | American Psychiatric Association, <i>Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)</i> , pp. 532-538 (4th ed. 1994) |
| 000310-000313 | Hayes Directory, “Sex Reassignment Surgery for the Treatment of Gender Dysphoria,” p. 1 (May 15, 2014) |
| 000314-000318 | Irene Folaron & Monica Lovasz, “Military Considerations in Transsexual Care of the Active Duty Member,” <i>Military Medicine</i> , Vol. 181 (2016) |
| 000319 | Memorandum from Ashton Carter, Secretary of Defense, “Transgender Service Members” (July 28, 2015) |
| 000320-000325 | Memorandum from Ashton Carter, Secretary of Defense, “Directive-type Memorandum (DTM) 16-005, ‘Military Service of Transgender Service Members’” (June 30, 2016) |
| 000326 | Memorandum from James N. Mattis, Secretary of Defense, “Accession of Transgender Individuals into the Military Services” (June 30, 2017) |
| 000327-000329 | Memorandum from Donald J. Trump, President of the United States, “Military Service by Transgender Individuals” (Aug. 25, 2017) |
| 000330-000331 | Memorandum from James N. Mattis, Secretary of Defense, “Terms of Reference -- Implementation of Presidential Memorandum on Military Service by Transgender Individuals” (Sept. 14, 2017) |
| 000332-000351 | Deployment Health Clinical Center, “Mental Health Disorder Prevalence Among Active Duty Service Members in the Military Health System, Fiscal Years 2005-2016” (Jan. 2017) |

| <u>Administrative Record (AR) Bates Range</u> | <u>Document</u> |
|--|--|
| 000352-000356 | American Psychiatric Association, "Expert Q&A: Gender Dysphoria," available at https://www.psychiatry.org/patients-familites/gender-dysphoria/expert-qa (last visited Feb. 14, 2018) |
| 000357-000378 | M. Jocelyn Elders, George R. Brown, Eli Coleman, Thomas Kolditz & Alan Steinman, "Medical Aspects of Transgender Military Service, Armed Forces & Society (Mar. 2014) |
| 000379-000393 | Cecilia Dhejne, Roy Van Vlerken, Gunter Heylens & Jon Arcelus, "Mental health and gender dysphoria: A review of the literature," <i>International Review of Psychiatry</i> , Vol. 28 (2016) |
| 000394-000405 | George R. Brown & Kenneth T. Jones, "Mental Health and Medical Health Disparities in 5135 Transgender Veterans Receiving Healthcare in the Veterans Health Administration: A Case-Control Study," <i>LGBT Health</i> , Vol. 3 (Apr. 2016) |
| 000406-000423 | Ann P. Haas, Philip L. Rodgers & Jody L. Herman, <i>Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey</i> (American Foundation for Suicide Prevention and the Williams Institute, University of California, Los Angeles, School of Law 2014), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf |
| 000424-000429 | H.G. Virupaksha, Daliboyina Muralidhar, & Jayashree Ramakrishna, "Suicide and Suicidal Behavior Among Transgender Persons," <i>Indian Journal of Psychological Medicine</i> , Vol. 38 (2016) |
| 000430-000437 | Claire M. Peterson, Abigail Matthews, Emily Copps-Smith & Lee Ann Conard, "Suicidality, Self-Harm, and Body Dissatisfaction in Transgender Adolescents and Emerging Adults with Gender Dysphoria," <i>Suicide and Life Threatening Behavior</i> , Vol. 47, (Aug. 2017) |
| 000438-000449 | Raymond P. Tucker, Rylan J. Testa, Mark A. Reger, Tracy L. Simpson, Jillian C. Shipherd, & Keren Lehavot, "Current and Military-Specific Gender Minority Stress Factors and Their Relationship with Suicide Ideation in Transgender Veterans," <i>Suicide and Life Threatening Behavior</i> DOI: 10.1111/sltb.12432 (epub ahead of print) (2018) |
| 000450-000457 | Craig J. Bryan, AnnaBelle O. Bryan, Bobbie N. Ray-Sannerud, Neysa Etienne & Chad E. Morrow, "Suicide attempts before joining the military increase risk for suicide attempts and severity of suicidal ideation among military personnel and veterans," <i>Comprehensive Psychiatry</i> , Vol. 55 (2014) |
| 000458-000462 | Hayes Directory, "Hormone Therapy for the Treatment of Gender Dysphoria," (May 19, 2014). |

| <u>Administrative Record (AR) Bates Range</u> | <u>Document</u> |
|--|---|
| 000463-000497 | Wylie C. Hembree, Peggy Cohen-Kettenis, Louis Gooren, Sabine Hannema, Walter Meyer, M. Hassan Murad, Stephen Rosenthal, Joshua Safer, Vin Tangpricha, & Guy T'Sjoen, "Endocrine Treatment of Gender-Dysphoric/Gender Incongruent Persons: An Endocrine Society Clinical Practice Guideline," <i>The Journal of Clinical Endocrinology & Metabolism</i> , Vol. 102 (Nov 2017) |
| 000498-000505 | Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, "Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden," <i>PLoS One</i> , Vol. 6 (Feb. 2011) |
| 000506-000520 | Hayes Annual Review, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria" (Apr. 18, 2017; Apr. 12, 2016; May 11, 2015) |
| 000521-000526 | Memorandum from Defense Health Agency, "Information Memorandum: Interim Defense Health Agency Procedures for Reviewing Requests for Waivers to Allow Supplemental Health Care Program Coverage of Sex Reassignment Surgical Procedures" (Nov. 13, 2017) |
| 000527-000725 | University of California, San Francisco, Center of Excellence for Transgender Health, "Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People," available at http://transhealth.ucsf.edu/trans?page=guidelines-home (last visited Feb. 16, 2018) |
| 000726-001027 | Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, <i>The Report of the 2015 U.S. Transgender Survey</i> (National Center for Transgender Equality 2016), available at https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF |
| 001028-001177 | Tamara Jensen, Joseph Chin, James Rollins, Elizabeth Koller, Linda Gousis & Katherine Szarama, "Final Decision Memorandum on Gender Reassignment Surgery for Medicare Beneficiaries with Gender Dysphoria," Centers for Medicare & Medicaid Services (Aug. 30, 2016) ("CMS Report") |
| 001178-001195 | Mohammad Hassan Murad, Mohamed B. Elamin, Magaly Zumaeta Garcia, Rebecca J. Mullan, Ayman Murad, Patricia J. Erwin & Victor M. Montori, "Hormonal therapy and sex reassignment: a systematic review and meta-analysis of quality of life and psychosocial outcomes," <i>Clinical Endocrinology</i> , Vol. 72 (2010) |
| 001196-001215 | <i>United States v. Virginia</i> , 518 U.S. 515 (1996) |
| 001216-001283 | Department of the Army, Training and Doctrine Command, TRADOC Regulation 350-6, "Enlisted Initial Entry Training Policies and Administration" (Mar. 20, 2017) |
| 001284-001289 | Department of the Air Force, Air Force Instruction 32-6005, "Unaccompanied Housing Management" (Jan. 29, 2016) |

| <u>Administrative Record (AR) Bates Range</u> | <u>Document</u> |
|--|---|
| 001290-001291 | Department of the Army, Human Resources Command, AR 600-85, "Substance Abuse Program" (Dec. 28, 2012) |
| 001292-001333 | Department of the Army, Army Regulation 600-9, "The Army Body Composition Program" (June 28, 2013) |
| 001334-001392 | Department of the Navy, Office of the Chief of Navy Operations Instruction 6110.1J, "Physical Readiness Program" (July 11, 2011) |
| 001393-001539 | Department of the Air Force, Air Force Instruction 36-2905, "Fitness Program" (Aug. 27, 2015) |
| 001540-001603 | Department of the Navy, Marine Corps Order 6100.13, "Marine Corps Physical Fitness Program" (Aug. 1, 2008) |
| 001604-001608 | Department of the Navy, Marine Corps Order 6110.3A, "Marine Corps Body Composition and Military Appearance Program" (Oct. 12, 2017) |
| 001609-001661 | Department of the Navy, Marine Corps Order 6110.3A CH-1, "Marine Corps Body Composition and Military Appearance Program" (Dec. 15, 2016) |
| 001662-001693 | United States Military Academy, Office of the Commandant of Cadets, "Physical Program Whitebook AY 16-17," p. 13 |
| 001694-002099 | Headquarters, Department of the Army, TC 3-25.150, "Combatives" (Feb. 2017) |
| 002100-002109 | Major Alex Bedard, Major Robert Peterson & Ray Barone, "Punching Through Barriers: Female Cadets Integrated into Mandatory Boxing at West Point," Association of the United States Army (Nov. 16, 2017), https://www.ausa.org/articles/punching-through-barriers-female-cadets-boxing-west-point |
| 002110-002112 | International Olympic Committee Consensus Meeting on Sex Reassignment and Hyperandrogensim (Nov. 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf |
| 002113-002150 | NCAA Office of Inclusion, NCAA Inclusion of Transgender Student-Athletes (Aug. 2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf |
| 002151-002153 | Department of the Navy, Navy Personnel Command, Navy Personnel Instruction 15665I, "Uniform Regulations," Art. 2101.1, (modified 12/21/2017) |
| 002154-002221 | Department of the Army, Army Regulation 670-1, "Wear and Appearance of Army Uniforms and Insignia" (Mar. 31, 2014) |
| 002222-002329 | Department of the Air Force, Air Force Instruction 36-2903, "Dress and Personal Appearance of Air Force Personnel" (Feb. 9, 2017) |
| 002330-002413 | Department of the Navy, Marine Corps Order P1020.34G, "Marine Corps Uniform Regulations" (Mar. 31, 2003) |

| <u>Administrative Record (AR) Bates Range</u> | <u>Document</u> |
|--|--|
| 002414-002431 | Department of Defense Instruction 1300.28, <i>In-Service Transition for Service Members Identifying as Transgender</i> (June 30, 2016) |
| 002432-002583 | Institute for Defense Analyses, “Force Impact of Expanding the Recruitment of Individuals with Auditory Impairment” Draft Final (January 2016) |
| 002584-002614 | Modification Thirteen to U.S. Central Command Individual Protection and Individual-Unit Deployment Policy, Tab A (Mar. 2017) |
| 002615-002619 | Memorandum from the Assistant Secretary of Defense for Health Affairs, “Clinical Practice Guidance for Deployment-Limiting Mental Disorders and Psychotropic Medications” (Oct. 7, 2013) |
| 002620-002624 | National Institute of Mental Health, “Bipolar Disorder” (Nov. 2017), https://www.nimh.nih.gov/health/statistics/bipolar-disorder.shtml |
| 002625-002627 | National Institute of Mental Health, “Schizophrenia” (Nov. 2017), https://www.nimh.nih.gov/health/statistics/schizophrenia.shtm |
| 002628 | Douglas MacAurthur, <i>Respectfully Quoted: A Dictionary of Quotations</i> (1989), available at http://www.bartleby.com/73/1874.html |
| 002629-002781 | Nathaniel Frank, “Gays in Foreign Militaries 2010: A Global Primer” (<i>The Palm Center</i> , Feb. 2010), https://www.palmcenter.org/wpcontent/uploads/2017/12/FOREIGNMILITARIESPRIMER2010FINAL.pdf |
| 002782-002802 | Anne Speckhard & Reuven Paz, “Transgender Service in the Israeli Defense Forces: A Polar Opposite Stance to the U.S. Military Policy of Barring Transgender Soldiers from Service” (2014), http://www.researchgate.net/publication/280093066 |
| 002803-002816 | Alan Okros & Denise Scott, “Gender Identity in the Canadian Forces,” <i>Armed Forces and Society</i> , Vol. 41 (2014) |
| 002817-002820 | Leo Shane III, “Poll: Active-duty troops worry about military’s transgender policies,” <i>Military Times</i> (July 27, 2017), available at https://www.militarytimes.com/news/pentagon-congress/2017/07/27/poll-active-duty-troops-worry-about-militarys-transgender-policies/ |
| 002821-002824 | Minutes, POE Meeting 1 (Oct. 13, 2017) |
| 002825-002829 | Minutes, POE Meeting 2 (Oct. 19, 2017) |
| 002830-002835 | Minutes, POE Meeting 3 (Oct. 26, 2017) |
| 002836-002839 | Minutes, POE Meeting 4 (Nov. 2, 2017) |
| 002840-002847 | Minutes, POE Meeting 5 (Nov. 9, 2017) |
| 002848 | Agenda, POE Meeting 1 (Oct. 13, 2017) |
| 002849-002852 | Office of People Analytics, 2016 Workplace and Gender Relations Survey of Active Duty Members: Transgender Service Members, Study Conclusions |
| 002853-002856 | Slides With Office of People Analytics, 2016 Workplace and Gender Relations Survey of Active Duty Members: Transgender Service Members (Survey Results) |
| 002857 | Agenda, POE Meeting 2 (Oct. 19, 2017) |

| <u>Administrative Record (AR) Bates Range</u> | <u>Document</u> |
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| 002858-002866 | Transgender Policy Panel Meeting Background Information Slides (Oct. 19, 2017) |
| 002867-002880 | DoD Transgender Service in the U.S. Military, Implementation Handbook (excerpts) (Sept. 30, 2016) |
| 002881 | Agenda, POE Meeting 3 (Oct. 26, 2017) |
| 002882 | Agenda, POE Meeting 4 (Nov. 2, 2017) |
| 002883-002904 | Health Data for Service Members with Gender Dysphoria (Nov. 2, 2017) |
| 002905 | Agenda, POE Meeting 5 (Nov. 9, 2017) |
| 002906 | Agenda, POE Meeting 6 (Nov. 16, 2017) |
| 002907-002910 | Non-deployable Working Group Information Briefing (Nov. 16, 2017) |
| 002911-002940 | Medical and Surgical Treatment for Gender Dysphoria (Nov. 7, 2017) |
| 002941 | Comparison of Civilian Insurers and MHS |
| 002942 | Agenda, POE Meeting 7 (Nov. 21, 2017) |
| 002943-002963 | 2015 Transgender Survey (December 2016) and Additional Administrative Data (Nov. 21, 2017) |
| 002964 | Reasons for Separation (table) |
| 002965 | Agenda, POE Meeting 8 (Nov. 30, 2017) |
| 002966-002976 | Admin Data Presented During Panel Meetings |
| 002977 | Agenda, POE Meeting 9 (Dec. 7, 2017) |
| 002978-002981 | The Federal Aviation Administration (FAA) and Gender Dysphoria (Dec. 4, 2017) |
| 002982-002985 | Time To Return to Full Duty After Transition Surgery in MTFs (slide deck) |
| 002986-002997 | Admin Data Presented During Panel Meetings (version 2) |
| 002998 | Agenda, POE Meeting 10 (Dec. 13, 2017) |
| 002999-003010 | Data Extracts: Key information used by the Panel to make recommendations |
| 003011-003042 | Health Data on Active Duty Service Members with Gender Dysphoria (Dec. 13, 2017) |
| 003043-003055 | Admin Data Presented During Panel Meeting (version 3) |
| 003056 | Agenda, POE Meeting 11 (Dec. 22, 2017) |
| 003057 | Agenda, POE Meeting 12 (Jan. 4, 2018) |
| 003058 | Agenda, POE Meeting 13 (Jan. 11, 2018) |
| 003059-003067 | Action Memo from Under Secretary of Defense (Personnel and Readiness) to the Secretary of Defense re: Recommendations by the Transgender Review Panel of Experts (Jan. 11, 2018) |
| 003068-003075 | Hormone Therapy White Paper |

Interrogatory No. 8:

Explain President Trump's purported concerns regarding the RAND Report or any other study or review that the Department of Defense relied upon when adopting Secretary Ash Carter's policy allowing transgender people to serve openly in the military.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Interrogatory No. 9:

Identify all members of 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.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

The panel of experts is composed of the following individuals who held or hold the following positions:

Chair

- Anthony M. Kurta – Performing the Duties of Under Secretary of Defense (Personnel & Readiness)
- Robert Wilkie – Under Secretary of Defense for Personnel and Readiness

Members

- Thomas Kelly III – Performing the Duties of the Under Secretary of the Army
- Thomas Dee – Performing the Duties of the Under Secretary of the Navy
- Matthew Donovan – Under Secretary of the Air Force
- Charles D. Michel – Vice Commandant of the Coast Guard
- James McConville – Vice Chief of Staff of the Army
- William Moran – Vice Chief of Naval Operations
- Stephen Wilson – Vice Chief of Staff of the Air Force
- Glenn Walters – Assistant Commandant of the Marine Corps
- Daniel Hokanson – Vice Chief of Staff National Guard Bureau
- John Wayne Troxell – Senior Enlisted Advisor to the Vice Chairman of the Joint Chiefs of Staff
- Daniel Daily – Sergeant Major of the Army
- Steven S. Giordano – Master Chief Petty Officer of the Navy
- Kaleth O. Wright – Chief Master Sergeant of the Air Force
- Ronald L. Green – Sergeant Major of the Marine Corps
- Steven W. Cantrell – Master Chief Petty Officer of the Coast Guard
- Christopher Kepner – Senior Enlisted Advisor National Guard Bureau

Interrogatory No. 10:

Identify all Department of Defense and Department of Homeland Security employees who worked with, provided information to, or communicated with employees of the RAND National Defense Research Institute concerning the studies and/or fact gathering that resulted in the RAND Report.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; or (b) communications or information protected by the presidential communications privilege.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in an upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Supplemental Response:

The Acting Under Secretary of Defense for Personnel and Readiness, Brad Carson, directed “the RAND National Defense Research Institute to conduct a study to (1) identify the health care needs of the transgender population, transgender service members’ potential health care utilization rates, and the costs associated with extending health care coverage for transition-related treatments; (2) assess the potential readiness implications of allowing transgender service members to serve openly; and (3) review the experiences of foreign militaries that permit transgender service members to serve openly.” AR95; Decl. of Brad R. Carson in Support of

Plaintiffs' Motion For Preliminary Injunction (ECF No. 252) ¶ 11. Mr. Carson and Department of Defense employees acting under Mr. Carson's direction communicated with RAND.

Interrogatory No. 11:

Identify all persons with authority to approve medical waivers requested by transgender service members or transgender individuals seeking to join the U.S. military during the period from January 1, 2010 to the present.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; (b) communications or information protected by the presidential communications privilege; or (c) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

The Department of Defense further objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, due to Plaintiffs' definition of "Identify," the reference to "Identify all persons" purports to require the Department of Defense to provide the full name, job title, employer from January 1, 2010 to present, current or last known address and telephone number, and business address and telephone number, of likely hundreds of individuals who had medical waiver authority during the designated time period.

Response:

Department of Defense Instruction 6130.03, which is publicly available at <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003p.pdf>, directs the

Secretaries of the Military Departments and the Commandant of the Coast Guard to “[a]uthorize the waiver of the [medical] standards [for appointment, enlistment, or induction in the military services] in individual cases for applicable reasons and ensure uniform waiver determinations.” DoDI 6130.03, Enclosure 2, paragraph 3b. The Services have implemented this direction and authority in different ways.

Army. In the Army, for example, the Army’s medical waiver authorities are identified in Army Regulation 40-501, paragraph 1-6. The current version of this regulation is available at: https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN3801_AR40-501_Web_FINAL.pdf. The appropriate waiver authority varies depending on the applicable accession program. For example, the Commanding General, United States Army Recruiting Command (USAREC) is the waiver authority for original enlistments, *see* AR 40-501, paragraph 1-6d, while the waiver authority for commissioning United States Military Academy (USMA) cadets is the Superintendent, USMA, following consultation with the USMA Surgeon. *Id.* at paragraph 1-6c(2). By previously produced memorandum, *see* Bates ARMY_00000582, the Secretary of the Army on April 20, 2017, withdrew and re-delegated medical waiver authority for transgender applicants to the Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA)(M&RA).

Navy. In the Navy, assignment of authority to grant a medical waiver is by position/title and outlined in the Manual of the Medical Department (MANMED), specifically section 15-31, which provides:

15-31 Waivers of the Physical Standards

(1) For some applicants, their current level of functioning and/or state of health in spite of the presence of a disqualifying medical condition warrants a waiver of the standards.

(2) Waivers of the standards do not make an applicant “physically qualified” but rather provide the applicant the opportunity to enlist or commission despite the fact that a disqualifying condition exists.

(3) The authority to grant a waiver lies with the commander charged with enlisting or commissioning the applicant and the specific program desired (e.g., Commander, Marine Corps Recruiting Command is the authority for applicants desiring enlistment in the Marine Corps). The medical authority to recommend a waiver of the standards to these various commands resides with the Chief, Bureau of Medicine and Surgery. By direction authority to carry out this function has been granted to:

(a) The Director, BUMED Qualifications and Standards. Provides waiver recommendations to: Commander, Marine Corps Recruiting Command; Commander, Naval Services Training Command (NROTC entry, commission of NROTC enrollees, commission of MMR, USNR enrollees); Commander, Naval Medical Education and Training Command; Commander, Officer Candidate School; Superintendent, U.S. Naval Academy; Superintendent, United States Merchant Marine Academy (USMMA entry); Commander, Navy Recruiting Command (Health Professions Scholarship Program, Nurse Commissioning Program). Additionally, the Director, Bureau of Medicine and Surgery, Qualifications and Standards provides guidance to the Navy and Marine Corps Reserve commands regarding physical qualification for retention of service members in the reserves and to the recruit training commands regarding retention of recruits found to have disqualifying medical conditions.

(b) The Senior Medical Officer, Naval Recruiting Command. Provides waiver recommendations to: Commander, Naval Recruiting Command (including Reserve Recruiting Command, excepting the programs listed in article 15-31 (3)(a) above).

(c) The Navy Brigade Surgeon, Uniformed Services University of Health Sciences.

Provides waiver recommendations to: Assistant Secretary of Defense for Health Affairs (enrollment and graduation commissions).

(4) The processes for requesting a waiver vary based on the program the applicant is seeking.

Review the pertinent guidance issued by the enlisting or commissioning authority above.

However, regardless of the specific procedures involved, most delays in waiver recommendations result from inadequate information provided with the waiver request. When assembling a waiver request package ensure, at a minimum, the following information is included: most recent complete physical examination, all pertinent past medical records, documentation regarding past and current limitations of activity associated with the condition, and the results of any laboratory testing or specialty evaluation initiated by the examiner.

(5) Results of waiver requests (approved or denied) should be recorded in block 76 or 77 of the DD 2808.

(6) Waiver processes for special duty examinations and assignments are contained in Section IV within the description of the standards for each specific program.

(7) The Navy Medicine Operational Training Center Detachment, Naval Aerospace Medical Institute, (NAMI Code 342) is designated as the Program Manager for assessment and determination of the qualification of applicants, both enlisted and commissioned, for duties involving aviation. In this capacity, NAMI is authorized to issue correspondence recommending waivers of physical standards to the commander charged with enlisting or commissioning and the specific program desired. Such correspondence shall include letters recommending commissioning by the appropriate authority.

Air Force. The Air Force medical waiver authority is discussed in Air Force Instruction 48-123, Section 6 B, but particularly paragraph 6.4 and Attachment 2. This instruction is publicly available at http://static.e-publishing.af.mil/production/1/af_sg/publication/afi48-123/afi48-123.pdf.

Additional information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in an upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Interrogatory No. 12:

Identify all persons with authority, during the period from January 1, 2010 to the present, to involuntarily discharge or separate service members on account of transgender status (including those individuals with authority to initiate any necessary proceedings for involuntary discharge or separation, even if final adjudicatory authority resides elsewhere).

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) communications or information protected by the deliberative process privilege; (b) communications or information protected by the presidential communications privilege; or (c) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Response:

The information responsive to this interrogatory, to the extent that it is not privileged, may be derived from a review of certain documents that will be provided to Plaintiffs in an

upcoming document production. The Department of Defense will supplement this interrogatory response, as needed, following the document production.

Supplemental Response:

In a memorandum for the Secretaries of the Military Departments, dated, July 28, 2015, Secretary of Defense Ash Carter directed that no Service member shall be involuntarily separated or denied reenlistment or continuation of active or reserve status on the basis of their gender identity without the approval of the Under Secretary of Defense for Personnel and Readiness. The memorandum was produced at Bates number AR319.

Interrogatory No. 13:

Describe in detail the circumstances leading to Secretary James Mattis's June 30, 2017, Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff with Subject: Accession of Transgender Individuals in the Military Services, including all reasons for the decision set forth in the memo (whether or not such reasons were publicly stated or acknowledged).

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Response:

Considering the responses from the Secretaries of the Military Departments and Chiefs of the Military Services to the Deputy Secretary of Defense's May 8, 2017 directive to assess their

readiness to begin accessing transgender applicants into military service on July 1, 2017, and after consulting with the Service Chiefs and Secretaries, Secretary Mattis concluded it was necessary to defer the July 1, 2017 accessions date for six months in order to evaluate more carefully the impact of transgender accessions on readiness and lethality and to ensure that he personally had the benefit of the views of the military leadership and senior civilian officials who were then arriving in the Department of Defense.

Interrogatory No. 14:

Identify all persons with knowledge or information concerning the facts set forth in your response to Interrogatory No. 13, including all persons who requested, advised, or consulted on the result set forth in the June 30, 2017 memorandum.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) communications or information protected by the presidential communications privilege; or (e) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

Response:

Individuals with relevant knowledge and information include:

- Former Acting Secretary of the Navy, Sean J. Stackley
- Chief of Naval Operations, Admiral John M. Richardson
- Former Director of the Navy Staff, Admiral James G. Foggo

- Commandant of the Marine Corps, General Robert B. Neller
- Secretary of the Air Force, Heather Wilson
- Air Force Chief of Staff, General David L. Goldfein
- Former Acting Secretary of the Army, Robert M. Speer
- Chief of Staff of the Army, General Mark A. Milley.

Interrogatory No. 15:

Identify all communications between a member of Congress, on the one hand, and President Trump or any officer or employee of the Executive Office of the President, on the other, from January 20, 2017 to July 26, 2017, concerning military service by transgender people.

Specific Objections:

The Department of Defense objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) communications or information protected by the presidential communications privilege; or (e) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation.

As to the responses to the interrogatories, see Attachment A. As to the supplemental responses to the interrogatories, see Attachment B.

As to the objections:

Date: June 1, 2018

Respectfully submitted,

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Acting Assistant Attorney General
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BRETT A. SHUMATE
Deputy Assistant Attorney General

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Counsel for Defendants

Attachment A

ATTACHMENT A

VERIFICATION

Based on information that I obtained in the course of my official duties, I declare under penalty of perjury that the substance of the responses to these interrogatories are true and correct to the best of my knowledge and belief.

Date: Feb. 9, 2018

Signature: Stephanie P. Miller
STEPHANIE P. MILLER

Attachment B

ATTACHMENT B

VERIFICATION

Based on information that I obtained in the course of my official duties, I declare under penalty of perjury that the substance of the supplemental responses to these interrogatories are true and correct to the best of my knowledge and belief.

Date: 01 June 2018

Signature: Stephanie P. Miller
STEPHANIE P. MILLER

CERTIFICATE OF SERVICE

I hereby certify that, on June 1, 2018, a copy of the document above was served by email on the following:

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Trial Attorney
U.S. Department of Justice

EXHIBIT 9

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-Cv-1297-MJP

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' SECOND
SET OF INTERROGATORIES TO DEFENDANT DONALD J. TRUMP**

Pursuant to Federal Rules of Civil Procedure 26 and 33, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs' Second Set of Interrogatories to Defendant Donald J. Trump, served April 26, 2018.¹ In presenting these objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

¹ These objections are in response to the requests as they are directed to Defendant President Trump and as they are intended to apply to the Vice President or the Office of the Vice President. Defendants will produce, or already have produced, separate objections for other Defendants.

Objections to Definitions and Instructions

1. Defendants object to Definition 1 of “You,” “your,” and “yours” as substantially overbroad, ambiguous, and disproportionate to the needs of the case.

2. Defendants object to Definition 2 of “President Trump” and the “President” as substantially overbroad, ambiguous, and disproportionate to the needs of the case because “indirectly by” or “under the control of Donald J. Trump” is overbroad, ambiguous, and disproportionate to the needs of the case because these terms would encompass all employees of every Executive Branch Department and agency. In these objections, Defendants will construe the terms “President Trump” and the “President” to refer only to the President and his immediate advisors in the White House and their staff, as well as officials and employees of the Executive Office of the President and EOP components.

3. Defendants object to Definition 3 of “Vice President Pence” and the “Vice President” as overbroad, unduly burdensome and disproportionate to the needs of the case to the extent that it includes “persons engaged . . . indirectly by” and “under the control of Michael R. Pence.” In these objections, Defendants will construe the terms “Vice President Pence” and the “Vice President” to refer only to employees of the Office of the Vice President.

4. Defendants object to Plaintiffs’ Definition 8 of “Communication” as encompassing “electronically stored information (ESI) containing, summarizing, or memorializing any communication,” insofar as electronic information collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

5. Defendants object to Plaintiffs' Definition 9 of "Document" and "documents" as encompassing "ESI," and "computer data," insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

General Objection to All Interrogatories

Defendants object to any discovery directed to the President of the United States in this case, on several grounds, including that such discovery should be foreclosed in this case based on separation of powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege. *See* Defendants' Motion for Protective Order, ECF No. 268.

First, Plaintiffs should not be permitted to request the President to respond to discovery because doing so would intrude on established separation of powers principles. Indeed, this Court has already concluded that Plaintiffs may not seek injunctive relief against the President based on the *Mississippi v. Johnson*, 71 U.S. at 501, line of cases. *See* ECF No. 233 at 30; ECF No. 194 at 22–24. An order directing the President to respond to discovery raises the same core separation-of-powers concerns as the Court identified in *Mississippi v. Johnson*. *See* 71 U.S. at 499 (reasoning that when presidential action requires "the exercise of judgment," "general principles . . . forbid judicial interference with the exercise of Executive discretion."); *see also Franklin v. Massachusetts*, 505 U.S. 788, 827–28 (1992) (Scalia, J., concurring in part and concurring in the judgment) (the principle that the President "may not be ordered to perform particular executive . . . acts at the behest of the Judiciary" is "implicit in the separation of powers"). Forcing the President to respond to discovery where he is sued in his official capacity,

even where declaratory relief is at issue or otherwise, would “not only distract him from his constitutional responsibility to ‘take Care that the Laws be faithfully executed,’” but “would produce needless head-on confrontations between district judges and the chief executive.” *Id.* at 828; *see Swan v. Clinton*, 100 F.3d 973, 977 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.”). In light of these concerns, the Court should order that Plaintiffs may not seek discovery from the sitting President or any discovery of information concerning presidential communications and deliberations.

Second, the Supreme Court has made clear that discovery directed to the President in civil litigation raises significant separation of powers concerns and should be strictly circumscribed. In *Cheney v. U.S. District Court for the District of Columbia*, the Supreme Court explained that where the discovery requests were directed to the Vice President and other senior officials of the Executive Branch who gave advice and made recommendations to the President, it was “not a routine discovery dispute.” 542 U.S. 367, 385 (2004). The Court emphasized that “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.” *Id.* at 385. The Supreme Court “has held, on more than one occasion, that ‘[t]he highest respect that is owed to the office of the Chief Executive ... is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.’” *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Further, the Court has held that the Executive’s “constitutional responsibilities and status [are] factors counseling judicial deference and restraint” in the conduct of the litigation against it. *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

In *Cheney*, the district court permitted broad discovery directed to the Vice President and other senior officials, and the D.C. Circuit dismissed the government’s mandamus petition to vacate the district court’s discovery orders, holding that the government officials, “to guard against intrusion into the President’s prerogatives, must first assert privilege.” 542 U.S. at 375-76. In vacating the D.C. Circuit’s decision, the Supreme Court described as “anything but appropriate” the “overly broad discovery requests” directed to the Vice President and other senior officials, which were “unbounded in scope,” and asked for “everything under the sky.” *Id.* at 387-88 (“The Government [] did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored.”). Noting the separation of powers concerns, the Supreme Court instructed the D.C. Circuit to analyze, on remand, whether the district court’s actions in permitting discovery against the Vice President and other senior officials constituted “an unwarranted impairment of another branch in the performance of its constitutional duties.” *Id.* at 390. It rejected the D.C. Circuit’s “mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government’s separation-of-powers objections.” *Id.* at 391. *Cf. United States v. Poindexter*, 727 F. Supp. 1501, 1503–04 (D.D.C. 1989) (agreeing with the President that “it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents” and deciding to narrow, on its own, the scope of the discovery directed to the President). These separation of powers concerns were also recognized in *American Historical Association v. National Archives & Records Administration*. 402 F. Supp. 2d 171, 181 (D.D.C. 2005) (Kollar-Kotelly, J.). The Court there found the reasoning in *Cheney* instructive, reiterating the *Cheney* Court’s view that “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.” *Id.* at 181 (quoting *Cheney*, 542 U.S. at 385) (internal quotation

marks omitted). In light of these compelling separation-of-powers concerns, Plaintiffs are required, at a minimum, to exhaust alternative sources of discovery before seeking discovery of the President and discovery from other sources that seeks information concerning presidential communications and deliberations. *See Cheney*, 542 U.S. at 391.

Finally, virtually all of the discovery directed to the President in this case is subject to the presidential communications privilege. The “presumptive privilege” that attaches to presidential communications is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon*, 418 U.S. 683, 708 (1974); *see In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (describing the privilege’s “constitutional origins”). The privilege is broad, protecting the “confidentiality of Presidential communications in performance of the President’s responsibilities.” *United States v. Nixon*, 418 U.S. at 711. *See also In re Sealed Case*, 121 F.3d at 744 (“The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations.”). Documents subject to the presidential communications privilege are shielded in their entirety, and the privilege “covers final and post-decisional material as well as pre-deliberative ones.” *In re Sealed Case*, 121 F.3d at 745.

Although the presidential communications privilege is not absolute, the bar to overcoming the privilege is high; it is “more difficult to surmount” than the deliberative process privilege. *In re Sealed Case*, 121 F.3d at 746. A party seeking otherwise privileged presidential material must demonstrate a “focused demonstration of need.” *Id.*; *See also Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1112 (D.C. Cir. 2004). Courts will balance “the public interests served by protecting the President’s confidentiality in a particular context with those furthered by requiring disclosure.” *In re Sealed Case*, 121 F.3d at 753. To meet this heavy

burden of “specific need” in a criminal matter, the party seeking the privileged material must first demonstrate “that each discrete group of the subpoenaed materials likely contains important evidence”—that is, evidence “directly relevant to issues that are expected to be central to the trial,” and not evidence that is “only tangentially relevant or would relate to side issues.” *Id.* at 753–55. The party seeking the discovery must also show “that this evidence is not available with due diligence elsewhere”—that is, notwithstanding other sources of information, the privileged documents are “still needed.” *Id.* (explaining that this standard reflects the Supreme Court’s “insistence that privileged presidential communications should not be treated as just another source of information”).

Where privileged material is sought for use in a civil case, the burden to overcome the presidential communications privilege is even greater. The greater scrutiny is appropriate because “the right to production of relevant evidence in civil proceedings does not have the same ‘constitutional dimensions’” as a request for information in a criminal case. *Cheney*, 542 U.S. at 384 (quoting *United States v. Nixon*, 418 U.S. at 713); *see also Am. Historical Ass’n*, 402 F. Supp. 2d at 181 (explaining that the *Cheney* Court noted that “while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch’s essential functions, the same could not be said of document requests in the civil context”); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) (“[T]he sufficiency of the Committee’s showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee’s functions.”) (emphasis added).

In this case—a civil matter seeking discovery directly from the President, in his capacity as Commander-in-Chief, related to his decisionmaking process on a topic involving national security and military concerns—Plaintiffs face a significant burden in order to negate a valid

assertion of the presidential communications privilege. Plaintiffs cannot meet this burden, especially where the requested discovery seeks information that, on its face, is privileged (including information about presidential communications, attorney-client and work product materials, and drafts of presidential documents) and would plainly intrude on core presidential deliberations, or where the requested discovery seeks information that could be sought from the Department of Defense or other sources, including publicly available ones.

Accordingly, Defendants object to any discovery requests directed to the President of the United States in this case based on these compelling separation of powers concerns, and in particular object to the discovery sought that is subject to the presidential communications privilege. The foregoing objection also applies to discovery of any information, documents or materials from the Vice President of the United States and the Office of the Vice President.

Specific Objections to Interrogatories

Interrogatory No. 16: Identify the principal author(s) and each person who reviewed, revised, or commented on any drafts, including but not limited to the final draft, of Secretary James Mattis's February 22, 2018, Memorandum for the President with Subject: Military Service by Transgender Individuals.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects that this interrogatory calls for information that is not within his custody or control.

Interrogatory No. 17: Identify the principal author(s) and each person who reviewed, revised, or commented on any drafts, including but not limited to the final draft, of the February

2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects that this interrogatory calls for information that is not within his custody or control.

Interrogatory No. 18: Identify each person who attended any meeting of the Panel of Experts and/or provided the Panel of Experts or its members any information, statement, advice, opinion, or other input of any nature or kind, including without limitation the Transgender Service Policy Working Group, any other group or committee within the Department of Defense that reviewed or considered transgender issues, members of agencies other than the Department of Defense, military medical professionals, civilian medical professionals, transgender service members, the commanders of transgender service members, elected officials, third parties, lobbyists, experts, and/or consultants, and describe in detail the information, statement, advice, opinion, or other input such person provided.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects that this interrogatory calls for information that is not within his custody or control.

Interrogatory No. 19: Identify each member of the Transgender Service Policy Working Group and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues, and each person who attended any meeting of such group and/or

provided such group or its members any information, statement, advice, opinion, or other input of any nature or kind, including without limitation military medical professionals, civilian medical professionals, transgender service members, the commanders of transgender service members, members of agencies other than the Department of Defense, elected officials, third parties, lobbyists, experts, and/or consultants, and describe in detail the information, statement, advice, opinion, or other input such person provided.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects that this interrogatory calls for information that is not within his custody or control.

Interrogatory No. 20: Identify the principal author(s) and each person who reviewed, revised, or commented on any drafts, including but not limited to the final draft, of President Trump's March 23, 2018, Memorandum for the Secretary of Defense and the Secretary of Homeland Security with Subject: Military Service by Transgender Individuals.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

The President also objects on the grounds that this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Specifically, the reference to "each

person” purports to require the President to identify every single person who (1) reviewed, (2) revised, or (3) commented on any drafts of his March 23, 2018, Memorandum for the Secretary of Defense and the Secretary of Homeland Security with Subject: Military Service by Transgender Individuals.

Interrogatory No. 21: Identify all Communications, on or after January 20, 2017 to the present, between the President, the Executive Office of the President, the Vice President, and/or the Office of the Vice President, on the one hand, and Secretary Mattis and/or the Department of the Defense, on the other hand, relating or referring to military service by transgender people, public policy regarding transgender people, medical treatment for transgender people, and/or transgender people in general, including but not limited to oral communications.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objection.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; or (d) communications or information protected by the presidential communications privilege.

Dated: May 29, 2018

Respectfully submitted,

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ANTHONY J. COPPOLINO
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CERTIFICATE OF SERVICE

I hereby certify that, on May 29, 2018, a copy of the document above was served by email on the following:

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EXHIBIT 10

Filed Under Seal

EXHIBIT 11

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-Cv-1297-MJP

**DEFENDANTS' OBJECTIONS TO PLAINTIFFS' THIRD
SET OF INTERROGATORIES TO DEFENDANT DONALD J. TRUMP**

Pursuant to Federal Rules of Civil Procedure 26 and 33, Defendants, through their undersigned counsel, hereby submit initial objections to Plaintiffs' Third Set of Interrogatories to Defendant Donald J. Trump, served April 12, 2019.¹ In presenting these objections, Defendants do not waive any further objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

¹ These objections are in response to the requests as they are directed to Defendant President Trump. Defendants will produce, or already have produced, separate objections for other Defendants.

Objections to Definitions and Instructions

1. Defendants object to Definition 1 of “You,” “your,” and “yours” as substantially overbroad, ambiguous, and disproportionate to the needs of the case. Plaintiffs have defined “You,” “your,” and “yours” to encompass all “current and former employees agents, affiliates, contractors, consultants, representatives, and other persons engaged directly or indirectly by or under the control of Defendants,” thus covering more than a million people.

2. Defendants object to Plaintiffs’ Definition 6 of “Communication” as encompassing “electronically stored information (ESI) containing, summarizing, or memorializing any communication,” insofar as electronic information collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

3. Defendants object to Plaintiffs’ Definition 7 of “Document” and “documents” as encompassing “ESI,” and “computer data,” insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

4. Defendants object to Plaintiffs’ Definition 8 of “Identify” as encompassing individuals’ “full name[s], job title[s], and employer[s] during the period referred to, and

current or last-known address[es] and telephone number[s] and business address[es] and telephone number[s]” as being overbroad and disproportionate to the needs of the case. Defendants further object on the grounds that this definition is an unwarranted invasion of the privacy of non-parties and seeks information protected by the Privacy Act, 5 U.S.C. § 552a, et seq.

General Objections to All Interrogatories

1. Defendants object to any discovery directed to the President of the United States in this case, on several grounds, including that such discovery should be foreclosed in this case based on separation-of-powers principles and that virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege.

First, such discovery requests are inappropriate where, as here, they are premised on claims for declaratory and injunctive relief brought directly against the President of the United States, who is not a proper defendant on such claims. *See Doe v. Shanahan*, No. 17-cv-1597 (D.D.C. Aug. 9, 2017), Dkt. 155 at 6 (“Defendants’ motion presents sound reasons for dismissing the President based on well-established separation of power principles set forth in United States Supreme Court and D.C. Circuit precedent.”). The Supreme Court has 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); *id.* at 500 (“The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department.”). A “majority of the Justices” in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), reaffirmed these fundamental principles. *Swan*

v. Clinton, 100 F.3d 973, 977 (D.C. Cir. 1996). The four-Justice plurality in *Franklin* found it “extraordinary” that the district court in that case had issued an injunction against the President and two other government officials. 505 U.S. at 802, 806. “At the threshold,” it said, “the District Court should have evaluated whether injunctive relief against the President was available, and if not, whether appellees’ injuries were nonetheless redressable.” *Id.* at 803. Concurring in *Franklin*, Justice Scalia explained that, under *Mississippi*, courts may impose neither injunctive nor declaratory relief against the President in his official capacity. *Id.* at 827–28 (noting that such principle is “a functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history”). He reasoned that just as the President is absolutely immune from official capacity damages suits, so is he immune from efforts to enjoin him in his official capacity. *Id.* at 827 (“Many of the reasons [the Court] gave in *Nixon v. Fitzgerald*, [457 U.S. 731, 749 (1982)], for acknowledging an absolute Presidential immunity from civil damages for official acts apply with equal, if not greater, force to requests for declaratory or injunctive relief in official-capacity suits that challenge the President’s performance of executive functions”). The lower courts have often applied this settled principle. *See e.g., Swan*, 100 F.3d at 976 n.1 (“similar considerations regarding a court’s power to issue [injunctive] relief against the President himself apply to [the] request for a declaratory judgment”); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (“With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.” (citations omitted)). Under that principle, the President should not be subject to discovery in this case.

Second, the Supreme Court has made clear that discovery directed to the President in civil litigation raises significant separation of powers concerns and should be strictly circumscribed. In *Cheney v. U.S. District Court for District of Columbia*, the Supreme Court explained that where the discovery requests were directed to the Vice President and other senior officials of the Executive Branch who gave advice and made recommendations to the President, it was “not a routine discovery dispute.” 542 U.S. 367, 385 (2004). The Court emphasized that “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.” *Id.* at 385. The Supreme Court “has held, on more than one occasion, that “[t]he highest respect that is owed to the office of the Chief Executive ... is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.” *Id.* (quoting *Clinton v. Jones*, 520 U.S. 681, 707 (1997)). Further, the Court has held that the Executive’s “constitutional responsibilities and status [are] factors counseling judicial deference and restraint” in the conduct of the litigation against it. *Id.* (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753 (1982)) (internal quotation marks omitted).

In *Cheney*, the district court permitted broad discovery directed to the Vice President and other senior officials, and the D.C. Circuit dismissed the government’s mandamus petition to vacate the district court’s discovery orders, holding that the government officials, “to guard against intrusion into the President’s prerogatives, must first assert privilege.” 542 U.S. at 375–76. In vacating the D.C. Circuit’s decision, the Supreme Court described as “anything but appropriate” the “overly broad discovery requests” directed to the Vice President and other senior officials, which were “unbounded in scope,” and asked for

“everything under the sky.” *Id.* at 387–88 (“The Government [] did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored.”). Noting the separation of powers concerns, the Supreme Court instructed the D.C. Circuit to analyze, on remand, whether the district court’s actions in permitting discovery against the Vice President and other senior officials constituted “an unwarranted impairment of another branch in the performance of its constitutional duties.” *Id.* at 390. It rejected the D.C. Circuit’s “mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government’s separation-of-powers objections.” *Id.* at 391. These separation of powers concerns were also recognized in *American Historical Association v. National Archives & Records Administration*, 402 F. Supp. 2d 171, 181 (D.D.C. 2005). The Court there found the reasoning in *Cheney* instructive, reiterating the *Cheney* Court’s view that “special considerations control when the Executive Branch’s interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated.” *Id.* at 181 (quoting *Cheney*, 542 U.S. at 385) (internal quotation marks omitted). In light of these compelling separation of powers concerns, the Court should, at a minimum, require Plaintiffs to exhaust alternative sources of discovery before subjecting the President to discovery. *See Doe 2 v. Shanahan*, 917 F.3d 694, 736 (D.C. Cir. 2019) (Williams, J., concurring) (explaining that “[t]he present case implicates sensitive separation of powers concerns—all in the context of military preparedness” and that “a highly intrusive examination of the President’s mental processes [] would thus be idle, or worse” (citations omitted)).

Finally, virtually all of the discovery directed to the President in this case is subject to the presidential communications privilege. The presidential communications privilege is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *United States v. Nixon*, 418 U.S. 683, 708 (1974); see *In re Sealed Case*, 121 F.3d 729, 743 (D.C. Cir. 1997) (describing the privilege’s “constitutional origins”). The privilege is broad, protecting the “confidentiality of Presidential communications in performance of the President’s responsibilities.” *Nixon*, 418 U.S. at 711; see also *In re Sealed Case*, 121 F.3d at 744 (“The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations.”). In addition to the substance of deliberations and communications, the presidential communications privilege protects “purely factual material,” *In re Sealed Case*, 121 F.3d at 750, and whether particular “sources of information” were considered by the President and his immediate advisors. See *id.* at 745, 750; *Loving v. Dep’t of Def.*, 550 F.3d 32, 38 (D.C. Cir. 2008) (contrasting the deliberative process privilege). Such information plainly “reflect[s] presidential decisionmaking and deliberations,” and disclosure of this information would intrude on presidential deliberations and impede the President’s ability to perform his constitutional duty. See *In re Sealed Case*, 121 F.3d at 744, 751.

In light of separation-of-powers considerations discussed above, the Supreme Court in *Cheney* expressly rejected the notion that the Executive Branch at its highest level shall bear the initial burden of invoking executive privilege with specificity or making particular objections to discovery on a line-by-line basis to safeguard executive functions and maintain

the separation of powers. 542 U.S. at 383, 388; *see also id.* at 389 (“Executive privilege is an extraordinary assertion of power ‘not to be lightly invoked.’” (citation omitted)). Even in a criminal case, before the burden shifts to the Office of the President to formally invoke the presidential communications privilege by affidavit, plaintiffs must first demonstrate a specific “need” for information that implicates presidential deliberations by “satisfy[ing] exacting standards of ‘(1) relevancy; (2) admissibility; [and] (3) specificity.’” *Id.* at 386 (quoting *Nixon*, 418 U.S. at 700).

Where privileged material is sought for use in a civil case, Plaintiffs’ initial burden is even greater. The greater scrutiny is appropriate because “the right to production of relevant evidence in civil proceedings does not have the same ‘constitutional dimensions’” as a request for information in a criminal case. *Cheney*, 542 U.S. at 384 (quoting *Nixon*, 418 U.S. at 713); *see also Am. Historical Ass’n*, 402 F. Supp. 2d at 181 (explaining that the *Cheney* Court noted that “while withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch’s essential functions, the same could not be said of document requests in the civil context”); *cf. Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc) (“[T]he sufficiency of the Committee’s showing must depend solely on whether the subpoenaed evidence is *demonstrably critical* to the responsible fulfillment of the Committee’s functions.” (emphasis added)).

Here, Plaintiffs have not attempted to satisfy the “exacting standards” of “relevancy,” “admissibility,” and “specificity,” pursuant to the Supreme Court’s analysis of this issue in *Cheney*. *See* 542 U.S. at 386. The August 2017 Presidential Memorandum concerning military

service by transgender individuals was revoked in March 2018 when the Department of Defense issued the current policy. Discovery into the President’s communications and deliberations therefore has no relevance on its face. *See Doe 2 v. Shanahan*, 755 F. App’x 19, 23 (D.C. Cir. 2019) (concluding that “[i]t was clear error to say there was no significant change with respect to at least two aspects of [the Mattis] policy); *see also Doe 2 v. Shanahan*, 917 F.3d 694, 707, 728 (D.C. Cir. 2019) (Williams, J., concurring in result) (exhaustively explaining why “the record and the law require dismissal of plaintiffs’ claims” and faulting Plaintiffs for “writ[ing] off the entire Mattis policy (along with the extensive supporting study) as fruit of the poisonous tweet”). Additionally, the Supreme Court has stayed the preliminary injunctions against the current policy, *see Trump v. Karnoski*, No. 18A625 (U.S. Jan. 22, 2019); *Trump v. Stockman*, No. 18A627 (U.S. Jan. 22, 2019), indicating that the Supreme Court understood the current policy to be distinct from the August 2017 Presidential Memorandum. Moreover, as the Supreme Court explained in *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018), the Court’s review of the Department of Defense policy must focus on the stated justifications for the policy—which are set forth in the Memorandum issued by the Secretary of Defense on February 22, 2018 and its accompanying report—not on underlying presidential communications or deliberations, particularly as to prior policy statements.

Accordingly, Defendants object to any discovery requests directed to the President of the United States in this case based on these compelling separation of powers concerns, and in particular object to the discovery sought that is subject to the presidential communications privilege. The foregoing objection also applies to discovery of any

information, documents or materials from the Vice President of the United States and the Office of the Vice President.

2. Defendants object to Plaintiffs' requests that purport to seek information outside of the administrative record because discovery beyond the limits of the Administrative Procedure Act is inappropriate in this case. The Department of Defense's administrative processes resulted in final agency action supported by the administrative record. In determining whether that final agency action is "contrary to constitutional right," 5 U.S.C. § 706(2)(B), the Court "shall review the whole record," *id.* § 706. The Court's review is therefore limited to "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

Further, as recently emphasized by the D.C. Circuit in a challenge to the same military policy at issue in this litigation, the Court must give great deference to the judgment of military officials. *Doe 2 v. Shanahan*, 755 F. App'x 19, 24–25 (D.C. Cir. 2019) (per curiam). Such deference means that neither Plaintiffs, Plaintiffs' witnesses, nor the Court may undertake an independent evaluation of the evidence, as Plaintiffs propose to do here through their discovery requests. *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981) ("In relying on this testimony . . . the District Court palpably exceeded its authority when it ignored Congress' considered response to this line of reasoning."); *id.* at 82–83 ("The District Court was quite wrong in undertaking an independent evaluation of this evidence."); *Goldman v. Weinberger*, 475 U.S. 501, 508 (1986) ("[W]hether or not expert witnesses may feel that religious exceptions to [the challenged military regulation] are desirable is quite beside the

point.”); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 25 (2008) (“We accept these officers’ assertions [that a certain practice] is of the utmost importance to the Navy and the Nation.”). Accordingly, the discovery sought cannot be considered by the Court and Plaintiffs’ requests are overbroad, unduly burdensome, and disproportionate to the needs of the case. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court’s role in evaluating military policy is so circumscribed that arguments based on extra-record evidence and discovery are “quite beside the point”) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in “*Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)). Moreover, as the Supreme Court recently emphasized in *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018), the Court’s review of the Department of Defense policy must focus on the stated justifications for the policy—which are set forth in the Secretary of Defense’s Memorandum dated February 22, 2018 and its accompanying report. Accordingly, Plaintiffs’ discovery requests that seek to conduct a fishing expedition into allegations of animus are overbroad, unduly burdensome, and disproportionate to the needs of the case.

Specific Objections to Interrogatories

Interrogatory No. 22: Identify any transgender service members evacuated from theatres of deployment due to medical and/or mental health reasons, including by stating the date of evacuation and describing the medical or mental health reason and the circumstances that led to the decision to evacuate.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objections.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects that this interrogatory calls for information that is not within his custody or control.

Interrogatory No. 23: Page 42 of Your February 2018 Report contends that making gender dysphoria a disqualifying condition, subject to waiver, “is consistent with the Department’s handling of other mental conditions that require treatment.” Similarly, Page 3 of Your March 2019 DTM-19-004 provides that “[a]ccession and retention standards for gender dysphoria and the treatment of gender dysphoria will be aligned with analogous conditions and treatments, including stability periods and surgical procedures.” Identify and describe in detail these “other mental conditions that require treatment” and the “analogous conditions and treatments, including stability periods and surgical procedures,” to which accession and retention standards for gender dysphoria will be aligned.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objections.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

The President further objects that this interrogatory calls for information that is not within his custody or control.

The President also objects to this interrogatory because Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). *See* Fed. R. Civ. P. 33(a)(1) (“Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts.”).

Interrogatory No. 24: Identify the number of individuals known to You to be transgender who have been allowed to access or be retained consistent with and pursuant to the Carter Policy since June 30, 2016, specifying how many of those individuals were granted a waiver of Defense Department accessions or retention criteria (including non-gender-dysphoria-related criteria, and including without limitation all criteria contained in DODI

6130.03) and how many transgender individuals applied for and were denied a waiver of those criteria.

Specific Objections:

The President objects to any discovery requests directed to the President and incorporates by reference the above General Objections.

The President further objects to this interrogatory to the extent that it seeks (a) attorney work product; (b) communications or information protected by the attorney-client privilege; (c) communications or information protected by the deliberative process privilege; (d) material the disclosure of which would violate legitimate privacy interests and expectations of persons not party to this litigation; or (e) communications or information protected by the presidential communications privilege.

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Dated: May 28, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 28, 2019, a copy of the document above was served by email on the following:

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EXHIBIT 12

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-Cv-1297-MJP

**DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFFS' THIRD
SET OF INTERROGATORIES TO SECRETARY SHANAHAN AND
THE UNITED STATES DEPARTMENT OF DEFENSE**

Pursuant to Federal Rules of Civil Procedure 26 and 33, Defendants, through their undersigned counsel, hereby submit their objections and responses to Plaintiffs' Third Set of Interrogatories to Secretary Shanahan, in his official capacity as Acting Secretary of Defense, served April 12, 2019.¹ In presenting these objections, Defendants do not waive any further

¹ These objections and responses are limited to Secretary Shanahan and the Department of Defense. Defendants will produce, or already have produced, separate objections for other Defendants.

objection in pretrial motions practice or at trial to the admissibility of evidence on the grounds of relevance, materiality, privilege, competency, or any other appropriate ground.

Objections to Definitions and Instructions

1. Defendants object to Definition 1 of “You,” “your,” and “yours” as substantially overbroad, ambiguous, and disproportionate to the needs of the case. Plaintiffs have defined “You,” “your,” and “yours” to encompass all “current and former employees agents, affiliates, contractors, consultants, representatives, and other persons engaged directly or indirectly by or under the control of Defendants,” thus covering millions of people.

2. Defendants object to Plaintiffs’ Definition 6 of “Communication” as encompassing “electronically stored information (ESI) containing, summarizing, or memorializing any communication,” insofar as electronic information collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

3. Defendants object to Plaintiffs’ Definition 7 of “Document” and “documents” as encompassing “ESI,” and “computer data,” insofar as data collection and translation are appropriate only to the extent reasonable and proportional to the needs of the case, taking into account any technical limitations and costs associated with such efforts. Defendants object further to this definition to the extent that the term ESI differs from the specification format used in prior productions in this action.

4. Defendants object to Plaintiffs' Definition 8 of "Identify" as encompassing individuals' "full name[s], job title[s], and employer[s] during the period referred to, and current or last-known address[es] and telephone number[s] and business address[es] and telephone number[s]" as being overbroad and disproportionate to the needs of the case. Defendants further object on the grounds that this definition is an unwarranted invasion of the privacy of non-parties and seeks information protected by the Privacy Act, 5 U.S.C. § 552a, et seq.

General Objection to All Interrogatories

Defendants object to Plaintiffs' requests that purport to seek information outside of the administrative record as discovery beyond the limits of the Administrative Procedure Act is inappropriate in this case. The Department of Defense's administrative processes resulted in final agency action supported by the administrative record. In making its determination whether those policies are "contrary to constitutional right," 5 U.S.C. § 706(2)(B), the Court "shall review the whole record," *id.* § 706. The Court's review is therefore limited to "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

Further, as recently emphasized by the D.C. Circuit in a challenge to the same military policy at issue in this litigation, the Court must give great deference to the judgment of military officials. *Doe 2 v. Shanahan*, 755 F. App'x 19, 24–25 (D.C. Cir. 2019) (per curiam). Such deference means that neither the Plaintiffs, Plaintiffs' witnesses, nor the Court may undertake an independent evaluation of the evidence as Plaintiffs propose to do through these discovery requests. *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981) ("In relying on this

testimony . . . the District Court palpably exceeded its authority when it ignored Congress’ considered response to this line of reasoning.”); *id.* at 82-83 (“The District Court was quite wrong in undertaking an independent evaluation of this evidence.”); *Goldman v. Weinberger*, 475 U.S. 501, 508 (1986) (“[W]hether or not expert witnesses may feel that religious exceptions to [the challenged military regulation] are desirable is quite beside the point.”); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 25 (2008) (“We accept these officers’ assertions [that a certain practice] is of the utmost importance to the Navy and the Nation.”). Accordingly, the discovery sought cannot be considered by the Court and therefore Plaintiffs’ requests are overbroad, unduly burdensome, and disproportionate to the needs of the case. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court’s role in evaluating military policy is so circumscribed that extra-record evidence and discovery is “quite beside the point” (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986))); *see also id.* (noting that the Supreme Court in “*Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)). Moreover, as the Supreme Court recently emphasized in *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018), the Court’s review of the Department of Defense policy must focus on the stated justifications for the policy—which are set forth in the Secretary of Defense’s Memorandum dated February 22, 2018 and its accompanying report. Accordingly, Plaintiffs’ discovery requests that seek to conduct a fishing expedition into allegations of animus are overbroad, unduly burdensome, and disproportionate to the needs of the case.

Specific Objections to Interrogatories

Interrogatory No. 22: Identify any transgender service members evacuated from theatres of deployment due to medical and/or mental health reasons, including by stating the date of evacuation and describing the medical or mental health reason and the circumstances that led to the decision to evacuate.

Specific Objections:

Defendants object on the grounds that this interrogatory is overbroad, unduly burdensome, and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs' witnesses, nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanaban*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point" (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986))); *see also id.* (noting that the Supreme Court in "*Rostker* chastised the district court for 'palpably exceed[ing] its authority' in 'relying on [such] testimony'" (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all Service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to "transgender persons," "transgender individuals," or "transgender service members." Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case.

Further, Defendants object to this request, on the grounds that even if such information did exist, it is overbroad, unduly burdensome, and disproportionate to the needs of the case because it seeks medical records and sensitive privacy data from both current and former service members. This information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and the Privacy Act, 5 U.S.C. § 552a, et seq., and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11). Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy.

Response: The Department of Defense does not require service members to disclose their gender identity, thus the Department has no means of searching for the requested information as it pertains to “transgender service members.” Beyond this information, Defendant Department of Defense stands on the foregoing objections.

Interrogatory No. 23: Page 42 of Your February 2018 Report contends that making gender dysphoria a disqualifying condition, subject to waiver, “is consistent with the Department’s handling of other mental conditions that require treatment.” Similarly, Page 3 of Your March 2019 DTM-19-004 provides that “[a]ccession and retention standards for gender dysphoria and the treatment of gender dysphoria will be aligned with analogous conditions and treatments, including stability periods and surgical procedures.” Identify and describe in detail these “other mental conditions that require treatment” and the “analogous

conditions and treatments, including stability periods and surgical procedures,” to which accession and retention standards for gender dysphoria will be aligned.

Specific Objections:

Defendants object to this interrogatory because Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Absent Court order, Defendants will not provide a response to this interrogatory. *See* Fed. R. Civ. P. 33(a)(1) (“Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts.”).

The Defendants further object on the grounds that this request is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs’ witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court’s role in evaluating military policy is so circumscribed that extra-record evidence and discovery is “quite beside the point”) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)); *see also id.* (noting that the Supreme Court in “*Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)).

Interrogatory No. 24: Identify the number of individuals known to You to be transgender who have been allowed to access or be retained consistent with and pursuant to

the Carter Policy since June 30, 2016, specifying how many of those individuals were granted a waiver of Defense Department accessions or retention criteria (including non-gender-dysphoria-related criteria, and including without limitation all criteria contained in DODI 6130.03) and how many transgender individuals applied for and were denied a waiver of those criteria.

Specific Objections:

Defendants object to this interrogatory because Plaintiffs have exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Federal Rule of Civil Procedure 33(a)(1). Absent Court order, Defendants will not provide a response to this interrogatory. *See* Fed. R. Civ. P. 33(a)(1) (“Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts.”).

Defendants further object on the grounds that this interrogatory is overbroad, unduly burdensome and disproportionate to the needs of the case. As further explained above, neither Plaintiffs, Plaintiffs’ witnesses nor the Court may undertake an independent evaluation of military data as Plaintiffs propose to do through these discovery requests. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (noting the court’s role in evaluating military policy is so circumscribed that extra-record evidence and discovery is “quite beside the point” (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986))); *see also id.* (noting that the Supreme Court in “*Rostker* chastised the district court for ‘palpably exceed[ing] its authority’ in ‘relying on [such] testimony’” (quoting *Rostker*, 453 U.S. at 81)).

Moreover, Department of Defense policy prohibits discrimination on the basis of gender identity and seeks to protect the privacy of all Service members. Thus, DoD does not track service members or applicants by gender identity and has no means of searching for the requested information as it pertains to “transgender persons,” “transgender individuals,” or “transgender service members.” Accordingly, this request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the Department of Defense objects to the language “known to You” as it is overbroad, unduly burdensome, vague, ambiguous, and undefined. Specifically, the term “You” as Plaintiffs have defined it could encompass millions of government employees stationed throughout the world.

Further, Defendants object to this request because it includes medical records and sensitive privacy data from both current, former, and prospective service members and therefore the request is overbroad, unduly burdensome, and disproportionate to the needs of the case. Further, the medical records and personally identifiable information of non-parties to the litigation are irrelevant to the adjudication of Plaintiffs’ facial challenge to the Mattis policy. Moreover, this information is protected from disclosure by the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and neither Plaintiffs nor Plaintiffs’ counsel have provided Defendants satisfactory assurances that they have complied with the provision of 42 U.S.C. § 1320d et seq. and 45 C.F.R. § 164.512(e). *See also* 5 U.S.C. § 552a(b)(11).

As to the response, see Attachment A.

As to the objections:

Dated: May 28, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs
Branch

/s/ Andrew E. Carmichael
ANDREW E. CARMICHAEL
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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that, on May 28, 2019, a copy of the document above was served by email on the following:

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Dated: May 28, 2019

/s/ Andrew E. Carmichael

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Counsel for Defendants

ATTACHMENT A

VERIFICATION

Based on information that I obtained in the course of my official duties, I declare under penalty of perjury that the substance of the response to Interrogatory 22 is true and correct to the best of my knowledge and belief.

Date: 23 May 2019

Signature: Stephanie P. Miller
STEPHANIE P. MILLER

EXHIBIT 13

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

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July 25, 2019

By E-mail

Andrew Carmichael
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
andrew.e.carmichael@usdoj.gov

Re: Documents Withheld Under the Deliberative Process Privilege – *Karnoski v. Trump*, 2:17-cv-01297-MJP (W.D. Wash.)

Dear Drew:

I write to follow up on our July 17, 2019 telephone conference regarding responsive documents Defendants withheld under the deliberative process privilege.

First, you indicated during our call that you would provide a document production containing documents over which Defendants are waiving their deliberative process privilege assertion. Please confirm you have sent this production. You also indicated we would receive revised privilege logs excluding these newly produced documents and providing additional detail regarding certain privilege assertions. Please provide these logs as soon as possible so Plaintiffs can better understand the current state and scope of Defendants' privilege claims.

Second, on our July 17 call we expressed concerns about Defendants' boilerplate assertion of the deliberative process privilege in response to every single one of Plaintiffs' requests for production. I noted that none of Defendants' responses states whether Defendants are withholding any responsive documents based on this objection, as Federal Rule of Civil Procedure 34 expressly requires.¹ Defendants' failure to comply with Rule 34 leaves Plaintiffs unable to assess the scope of Defendants' privilege assertion for purposes of a motion to compel.

¹ See Fed. R. Civ. P. 34(b)(2)(C) (“An objection must state whether any responsive materials are being withheld on the basis of that objection.”); *Weidenhamer v. Expedia, Inc.*, 2015 WL 1292978, at *9 (W.D. Wash. Mar. 23, 2015) (ordering party to “prepare new responses” that state “with reasonable specificity, the extent to which [it] is withholding responsive documents based on those objections”).

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July 25, 2019
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Please revise all of Defendants' responses to Plaintiffs' document requests to state with specificity whether any responsive documents have been withheld under the deliberative process privilege. If Defendants have not withheld any documents under the deliberative process privilege in response to a particular request, please withdraw the privilege objection.

Third, and relatedly, many of Plaintiffs' document requests seek documents and information that do not implicate the privilege at all, and Defendants should at the very least withdraw their privilege assertions regarding these requests. As you know, the deliberative process privilege is limited to policy-oriented opinions and deliberations that directly contribute to the formulation of public policy. *E.g.*, *Greenpeace v. Nat'l Marine Fisheries Serv.*, 198 F.R.D. 540 (W.D. Wash. 2000). It does not shield non-deliberative information, including factual material, and it does not apply to non-policy-oriented decisions. Many of Plaintiffs' document requests exclusively seek documents that fall into these categories and do not possibly warrant a deliberative process privilege objection. These requests include, at a minimum, RFP Nos. 9, 11-13, 16-19, 24-26, 31, 35-45, 47-59, 63, 65-68.² Please confirm that Defendants will withdraw their assertion of privilege for each of these requests. If you intend to maintain your assertion of privilege, please explain your basis for doing so.

Finally, Plaintiffs continue to maintain that the deliberative process privilege does not apply at all in this case because Plaintiffs' constitutional claims "turn[] on the government's intent." *See, e.g., In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998). Independently, however, Plaintiffs identify the following categories of documents where either the privilege does not apply at all or Plaintiffs' "need for the materials ... override[s] the government's interest in nondisclosure" under *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, (9th Cir. 1984):

- Documents related to the formulation of the Carter Policy;
- Documents related to the implementation of the Carter Policy;

² We understand that Defendants believe the presidential communications privilege protects some of this factual information—for instance: "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" (RFP 11). While Plaintiffs disagree that the presidential communications privilege applies to this information—and Plaintiffs reserve all rights regarding the presidential communications privilege, which is beyond the scope of this meet and confer—at present we ask only that Defendants withdraw any deliberative process objection regarding this purely factual information, as there is no conceivable claim it is deliberative.

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- Documents related to military service by transgender individuals between President Trump's inauguration and the President's July 2017 tweets;
- Documents related to the formation and work of the so-called Panel of Experts;
- Communications by or among the Panel of Experts' members, or members of its working group, related to Panel's work;
- Testimony, documents, data, and other information received by the Panel of Experts;
- Documents reflecting the Panel of Experts' deliberations and decisions;
- Documents related to the February 2018 Department of Defense Report and Recommendation on Military Service by Transgender Persons and Secretary Mattis' February 23, 2018 memorandum;
- Documents related to President Trump's March 2018 memorandum;
- Documents related to the implementation of Secretary Mattis' February 2018 memorandum and transgender military service since February 2018.

This list is not intended to be exhaustive, but rather meant to identify key categories of documents that Plaintiffs will seek to compel if Defendants continue to assert the deliberative process privilege. Please let me know if Defendants intend to withdraw or otherwise waive the privilege on any of these categories of documents.

As you know, Plaintiffs' motion to compel on these issues is due on August 22, 2019. To allow Plaintiffs to evaluate Defendants' positions on these issues and hopefully narrow the issues in dispute before that deadline, please immediately provide revised privilege logs and revised responses to Plaintiffs' three sets of requests for production that comply with Rule 34(b)(2)(C). We look forward forward to your responses on the remaining issues in this letter as soon as possible.

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Sincerely,

A handwritten signature in black ink that reads "Daniel" followed by a stylized monogram "DS".

Daniel I. Siegfried

EXHIBIT 14



U.S. Department of Justice
Civil Division, Federal Program Branch

Andrew E. Carmichael
Trial Attorney

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August 2, 2019

By Email

Daniel I. Siegfried
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Counsel for Plaintiffs

Re: Documents Withheld Under the Deliberative Process Privilege – *Karnoski v. Trump*, 2:17-cv-01297-MJP (W.D. Wash.)

Dear Daniel,

Thank you for your letter of July 25, 2019. Regarding the first issue you raised in your letter, Defendants previously sent you a production of documents via Fed Ex on May 28, 2019. Please verify that you received the package from May 28, 2019. If you have not received it, we will resend that production.

Regarding the second issue you raised in your letter, as I explained on our July 17, 2019 telephone call, Defendants did not conduct separate searches for each of Plaintiffs' requests for production, and Defendants only applied the deliberative process privilege after it conducted a search for responsive records. For example, in response to Plaintiffs' first and second set of discovery requests and the discovery requests propounded in the related litigation, the Department of Defense Office of General Counsel ("DoD OGC") conducted multiple electronic searches on several network domains to gather potentially responsive documents. Searches were conducted at the server level by DoD IT personnel in consultation with DoD OGC attorneys and, in some cases, with assistance from the Office of Secretary of Defense Records Management Office and Defense Information Systems Agency personnel. Data was digitally gathered from current and former DoD officials who were involved in the development of the Carter and/or Mattis policies. Broadly crafted search terms, like "transgend*," "trans gender," or "gender dysphoria" were used to capture all potentially responsive data. Additionally, some custodians conducted a self-collection of their data to meet urgent discovery deadlines. For these custodians, the broader digital search supplemented their self-collections and any duplicates from the data sets were retained.

DoD IT personnel applied relevant search parameters while conducting their digital searches as directed by DoD OGC attorneys. The only parameters applied were date range, search term(s), and custodian email address. No additional filters were applied by DoD IT. After collection, DoD OGC staff reviewed the collected documents using Relativity and made privilege determinations for privileges such as the deliberative process privilege. Accordingly, in each instance where DoD or the Military Services assert the deliberative process privilege, it is specifically noted in one of the privilege logs Defendants have provided. Defendants have complied with their discovery obligations under the Federal Rules of Civil Procedure. *See* Committee Notes on the 2015 Amendment to Rule 34(b)(2)(C) (explaining that stating “the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been ‘withheld’”); *Rowan v. Sunflower Elec. Power Corp.*, 2016 WL 3743102, at *5 (D. Kan. July 13, 2016) (explaining that a party’s discovery responses “state the limits that controlled its search for responsive documents” and that “[c]onsequently, the Advisory Committee’s note makes clear that [the party’s] responses are sufficient”).

Regarding the third issue you raised in your letter, as explained above, Defendants applied the deliberative process privilege based on a document-by-document review and did not apply the privilege categorically to any of Plaintiffs’ discovery requests. For example, from February 2018 to July 2018, a document review team of DoD OGC attorneys, trained legal support personnel, and other offices within DoD OGC reviewed documents responsive to your first and second set of discovery requests in Relativity. As to each document withheld for the deliberative process privilege, DoD OGC staff determined that the document contained pre-decisional and deliberative material that would chill agency deliberations if released. Accordingly, if a document was responsive to Plaintiffs’ discovery requests and contained purely factual material, it was not withheld on the basis of the deliberative process privilege. However, where the factual material was “so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government’s deliberations,” Defendants properly withheld such material, and the withholding is noted in one of Defendants’ privilege logs. *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

Regarding your final point, the categories you have identified appear to cover virtually all deliberative documents from July 2015 to present. This is certainly not what the Ninth Circuit contemplated in its recent ruling. We believe it would be more productive for Plaintiffs to identify specific documents from Defendants’ privilege logs (or, at the very least, discrete categories of documents) over which they would like Defendants to consider waiving the deliberative process privilege. Further, the Ninth Circuit specifically questioned the relevance of much of the material you have identified in your letter and indicated that the Court’s inquiry should instead focus on the military’s justifications for the Department’s 2018 Policy. *Karnoski v. Trump*, Nos. 18-35347, 18-72159, slip op. at 54-56 (9th Cir. June 14, 2019). To that end, Defendants have prepared revised privilege logs that I am sending by email along with this correspondence. These privilege logs were revised for the related *Doe* litigation and specifically include documents considered or generated by the Panel of Experts as well as communications to or from members of the Panel regarding their work over which Defendants have asserted the deliberative process privilege. *See Doe v. Esper*, 17-cv-01597-CKK (D.D.C.), Minute Order, Apr. 16, 2019. Although Defendants maintain that Plaintiffs cannot make the requisite showing of need to overcome the deliberative process privilege as to any

of these documents, the documents identified on these logs are the only ones that are even relevant under the standard of review articulated by the Ninth Circuit.

Accordingly, Defendants propose that Plaintiffs review the attached logs from *Doe* and identify specific documents (or narrow categories of documents) over which you would like Defendants to reconsider their assertion of the deliberative process privilege.

Sincerely,

/s/ Andrew E. Carmichael

Andrew E. Carmichael