

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
**REPLY IN SUPPORT OF PLAINTIFFS’
RENEWED MOTION TO COMPEL
DOCUMENTS WITHHELD UNDER THE
DELIBERATIVE PROCESS PRIVILEGE**

NOTE ON MOTION CALENDAR:
September 27, 2019

ORAL ARGUMENT REQUESTED

1 The government’s opposition rests on two flawed premises. *First*, Defendants repeatedly
 2 misconstrue the Ninth Circuit’s direction in *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019).
 3 They claim, for example, that the Ninth Circuit required “discovery in stages” and a “much more
 4 granular” approach to the deliberative process privilege. Opp. 4–5. But the court actually
 5 declined to “mandate any particular course of action,” aside from placing the burden on
 6 *Defendants* to “persuasively argue that a more granular analysis would be proper” (and they have
 7 not). *Karnoski*, 926 F.3d at 1206. Nor did the Ninth Circuit create a new heightened scrutiny test
 8 for this case that excised the relevance of Defendants’ “genuine ... motivations.” *Compare id.* at
 9 1202, *with* Opp. 7. Absent Defendants’ distortion of the decision, their position falls apart.

10 *Second*, and equally meritless, Defendants contend the categories identified in Plaintiffs’
 11 motion are “far too broadly defined for the Court to properly” balance the relevant factors, again
 12 supposedly relying on the appellate decision. Opp. 5. The Ninth Circuit never suggested that,
 13 either. Indeed, relying on the Ninth Circuit’s opinion, another court just two weeks ago rejected
 14 this very argument based on the same evidence the government relies on here, holding that
 15 similarly situated plaintiffs overcame the privilege for all documents “used or considered in the
 16 development of the Mattis Plan”—one of the categories Defendants say is unworkably broad
 17 here. *Doe 2 v. Esper*, 2019 WL 4394842, at *9 (D.D.C. Sept. 13, 2019).

18 This Court should do the same and overrule Defendants’ objections for each category
 19 Plaintiffs identified. The information Plaintiffs seek is relevant and in Defendants’ control; the
 20 government is a party to this case implicating unconstitutional discrimination by one of our
 21 nation’s most important public institutions; and “Defendants’ feared chilling effect” does not
 22 overcome Plaintiffs’ need for the materials, particularly because “the public’s interest in honest,
 23 effective government ... overcome[s] the governmental interest in hiding such misconduct” and
 24 the Court can take steps to assuage any potential chill. *Doe*, 2019 WL 4394842, at *9.

25 ARGUMENT

26 **A. Defendants Misinterpret the Ninth Circuit’s Ruling in Attempting to Minimize the** 27 **Relevance of the Information They Withheld.**

28 As detailed in Plaintiffs’ motion, the discovery Plaintiffs seek is all directly relevant to

1 their constitutional claims. None of Defendants’ arguments to the contrary has merit.

2 *First*, Defendants argue that discovery aimed at uncovering their genuine motivations and
3 the existence of less intrusive means to achieve their objectives is irrelevant because military
4 deference should apply and, to prevail on the merits of Plaintiffs’ constitutional claims, they
5 supposedly “need only establish that they reasonably determined the policy significantly furthers
6 the government’s important interests.” Opp. 7 (quotations omitted). That is wrong. Defendants’
7 “genuine ... motivations”—including whether their proffered rationale is a *post hoc* excuse for
8 impermissible discrimination—are essential under heightened scrutiny. *Karnoski*, 926 F.3d at
9 1202. Nor does Defendants’ appeal to military deference change that standard. The Ninth Circuit
10 applied the heightened scrutiny standard from *Witt v. Dep’t of the Air Force*, which determined
11 that even where military deference *did* apply, the court still must decide whether “the intrusion
12 significantly furthers[s]” “an important government interest” that “*a less intrusive means* [would]
13 be unlikely to achieve substantially.” 527 F.3d 806, 819 (9th Cir. 2008) (emphasis added);
14 *Karnoski*, 926 F.3d at 1200, 1202. The Ninth Circuit also expressly envisioned that Plaintiffs
15 would have the opportunity “to present additional evidence” that “the 2018 Policy was not an
16 exercise of independent military judgment”—which is precisely the evidence in the
17 government’s possession that rebuts its factual basis for military deference. *Id.* at 1201.

18 *Second*, Defendants incorrectly suggest Plaintiffs must make some threshold evidentiary
19 showing to establish the relevance of discovery they seek. Opp. 8. That is not how discovery
20 works. *E.g.*, *Smith v. Dohtry*, 2018 WL 1470896, at *1 (W.D. Wash. Mar. 26, 2018) (“The party
21 who resists discovery has the burden to show that discovery should not be allowed.”). Nor can
22 Defendants rely on the Ninth Circuit’s suggestion that “the existing record is not adequate to
23 evaluate the relevance of all of the requested information” to require such a showing. Opp. 1.
24 The Ninth Circuit was referring to the decision below, which was vacated to permit additional
25 legal analysis of relevance; it did not purport to create a Catch-22 requiring Plaintiffs to cite
26 evidence Defendants are withholding to establish the relevance of the documents they seek.

27 *Third*, even if some threshold showing were required to establish relevance, Plaintiffs have
28 made it. The Ninth Circuit confirmed Plaintiffs raised “non-frivolous arguments” based on the

1 existing record that the military’s decision-making process was constrained. *Karnoski*, 926 F.3d
 2 at 1204. And the McHugh materials show Defendants did not rely only on the so-called “Panel
 3 of Experts,” whose conclusions Defendants say motivated their policy. Defendants insist there is
 4 “nothing nefarious ... about receiving input from experts with differing views,” where “there is
 5 robust and substantial good faith disagreement dividing respected members of the expert medical
 6 community.” Opp. 8–9 (quoting *Gibson v. Collier*, 920 F.3d 212, 220–22 (5th Cir. 2019)). But
 7 the Ninth Circuit has expressly rejected their “at best outdated, premise: that there is no medical
 8 consensus that [surgical care] is a necessary or even effective treatment for gender dysphoria.”
 9 *Edmo v. Corizon, Inc.*, 935 F.3d 757, 794–95 (9th Cir. 2019). The evidence shows DoD solicited
 10 McHugh precisely because of his known anti-transgender views. *See* Siegfried Supp. Decl., Exs.
 11 62–64 (McHugh describing surgery for transition as “slashing with a knife at perfectly well
 12 formed organs ... hop[ing] surgery may do the poor wretch some good” and asserting “the
 13 ghastliness of the mutilated anatomy” constitutes a “moral matter[.]”).¹

14 *Finally*, Defendants do not refute the relevance of Plaintiffs’ categories, which, as detailed
 15 in Plaintiffs’ motion, are all directly relevant to their claims. Mot. 5–8. In fact, Defendants tacitly
 16 concede relevance by pointing to already produced documents within these categories to argue
 17 Plaintiffs already have all the evidence they need. *See* Easton Decl. ¶¶ 8–10. Defendants cannot
 18 selectively produce a handful responsive documents and unilaterally determine they have
 19 produced enough evidence while withholding other responsive information. Defendants also
 20 suggest the Ninth Circuit “questioned the relevance of material pre-dating” the so-called “Panel
 21 of Experts.” Opp. 6. But it expressly left that issue for this Court to resolve while also finding
 22 that “the litigation may require the district court to consider the basis of the President’s initial
 23 decision.” *Karnoski*, 926 F.3d at 1204. And Defendants’ claim that Plaintiffs failed to show “a
 24 particularized need” for Panel-related materials is doubly wrong, Opp. 8: that is not Plaintiffs’
 25 burden, and it is also inaccurate, since Plaintiffs have shown that evidence of Defendants’
 26 genuine motivations is central to whether military deference even applies and whether they can

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 28 ¹ Defendants’ attempt to bolster McHugh’s credibility (by relying on Carter policy materials they simultaneously
 claim are irrelevant) only confirms the opposite. *See* Dkt. No. 381-8 (cautioning any purported expert would first
 need to be vetted to confirm they were actually “experienced specialists who provide care to this population”).

1 ultimately overcome heightened scrutiny. *Karnoski*, 926 F.3d at 1200; *see* Mot. 6.

2 **B. Purported Chilling Concerns Do Not Outweigh All Other Factors.**

3 The Ninth Circuit directed the Court to balance military secrecy—the possibility of a
4 chilling effect—against the other *Warner* factors, and said it is “not insurmountable.” *Karnoski*,
5 926 F.3d at 1206. Defendants, however, made no effort to tailor their claims of purported chill to
6 the circumstances of this case. Instead, they warn of an “immediate chilling effect” that would
7 pervade all levels of the military and “potentially lead[] to a direct negative impact to national
8 security,” just because the case involves the military. Opp. 10 (quoting Easton Decl. ¶¶ 24, 27).

9 Defendants’ abstract invocations of a chilling effect, untethered from the actual
10 circumstances here, are insufficient to tip the *Warner* balance. Defendants suggest the fourth
11 *Warner* factor is presumptively dispositive in the military context, but tellingly cite no support
12 for that claim. Opp. 9. The case law actually shows the opposite—courts in this circuit *have*
13 found the privilege yields where military and national defense interests are implicated. *Vietnam*
14 *Veterans of Am. v. C.I.A.*, 2011 WL 4635139, at *10 (N.D. Cal. Oct. 5, 2011) (deliberative
15 process privilege overcome for documents related to military veteran health care and medical
16 testing policies); *see also Lahr v. Nat’l Transp. Safety Bd.*, 569 F.3d 964, 981 (9th Cir. 2009)
17 (suggesting government misconduct exception applies in military and national security context).
18 Indeed, if Defendants were right, the Ninth Circuit would have had no reason to remand.

19 Plaintiffs, meanwhile, set forth multiple compelling reasons—all tailored to the specific
20 circumstances of this case—showing that any chilling effect would be minimal or nonexistent.
21 Defendants have no meaningful response to any of them: Defendants do not address the fact that
22 both sides of the challenged policy have been openly aired, debated, and adopted in the past
23 several years, Mot. 9; they do not respond to the many cases holding chilling concerns are
24 minimal where, as here, the only views that might be chilled are unlawful ones, *id.* at 8–9; and,
25 other than invoking the talisman of military decisionmaking, Defendants offer no reason why the
26 military is more likely to temper its candor than other agencies—and indeed, the case law says
27 otherwise, *id.* at 10. Nor do Defendants respond substantively to the Court’s ability to protect the
28 military’s interests through a protective order, aside from their *ipse dixit* assertion—contrary to

1 judicial consensus—that it would be ineffective. Opp. 10. Defendants accuse Plaintiffs of
2 wielding arguments that would apply “in *any* case,” Opp. 9, but in fact the opposite is true.

3 Equally important, the *Doe* court recently weighed the same chilling concerns Defendants
4 assert here—down to a nearly identical declaration from Robert Easton setting forth their
5 arguments—and found that, notwithstanding “the seriousness of Defendants’ concerns,” the
6 plaintiffs still overcame the privilege for one of the very categories of deliberative documents at
7 issue here.² *Doe*, 2019 WL 4394842, at *9. *Doe* found not only that “Defendants’ feared chilling
8 effect can be somewhat assuaged by taking certain steps to restrict the public disclosure of
9 sensitive information,” but also that because disclosure may reveal “governmental misconduct,
10 such as discrimination against transgender servicemembers, the public’s interest in honest,
11 effective government would overcome the governmental interest in hiding such misconduct.” *Id.*

12 *Doe*’s reasoning applies with equal force to the categories Plaintiffs identified. Giving
13 “careful consideration” to the government’s interests, *Karnoski*, 926 F.3d at 1206, this Court
14 should hold that any chilling concerns are minimal in these unique circumstances, outweighed by
15 the important public interests at stake, and can be mitigated through protective measures. *See*,
16 *e.g.*, *Marilley v. McCamman*, 2012 WL 4120633, at *6 (N.D. Cal. Sept. 19, 2012).

17 **C. The Deliberative Process Privilege Does Not Apply at All to Many Requests.**

18 Independently, the Court should overrule Defendants’ privilege assertions for specific
19 discovery requests where the privilege facially does not apply. *See* Mot. 11–12 & App’x A.
20 Defendants claim this is “not possible and not warranted” due to the one-size-fits all manner in
21 which they conducted searches and privilege review. *See* Opp. 11; *see* Dkt. 371-1 at 4–5. But this
22 only confirms the incompleteness of their production and the impropriety of their boilerplate
23 privilege assertions. For example, RFP No. 47 seeks no deliberative materials and instead
24 requests documents regarding standards for medical waivers for a number of mental or medical
25 conditions. App’x A at 5. But Defendants nevertheless asserted the deliberative process privilege
26 and have since revealed that their search terms do not reach these documents. So too for RFP

27 _____
28 ² While *Doe*, which was constrained by a fundamentally different appellate decision, overruled the privilege only for
this category, it does not suggest the Court should limit its ruling here. Notably, *Doe* directed that its holding should
guide the parties in resolving their remaining disputes. 2019 WL 4394842, at *2, 12.

1 Nos. 48–50, all of which seek factual and non-deliberative information not captured by
 2 Defendants’ searches. App’x A at 5–7. The Court should overrule Defendants’ objections where
 3 the privilege is facially inapplicable. *See generally* App’x A (cataloging document requests).

4 Nor can Defendants argue that privileged documents lurk in facially non-privileged
 5 categories. Opp. 11 (referencing “clarifying guidance” and “progress reports” concerning Carter
 6 and Mattis policies). The Ninth Circuit has expressly rejected that argument, explaining that
 7 “post-decisional records fall outside the deliberative process privilege if they follow a final
 8 decision and are designed to explain a decision already made.” *Lahr*, 569 F.3d at 981.

9 “[C]larifying guidance,” explanations of the “underlying reasoning” of decisions already made,
 10 and “progress reports” on the implementation of those decisions are precisely the sort of post-
 11 decisional communications that fall outside the qualified privilege. *Id.*; *see, e.g., N.*
 12 *Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003) (“[T]he privilege
 13 is strictly confined within the narrowest possible limits consistent with the logic of its
 14 principles.”).

15 Defendants also overstate what the law deems “deliberative,” asserting that the privilege
 16 extends beyond deliberations pertaining to the formulation of policy. Opp. 12. But the privilege
 17 only protects “documents reflecting advisory opinions, recommendations and deliberations
 18 comprising part of a process by which governmental decisions and policies are formulated.”
 19 *Karnoski*, 926 F.3d at 1203. It does not shield the routine personnel decisions at issue in many of
 20 Plaintiffs’ documents requests about specific waiver applications and discharge proceedings.
 21 App’x at 1–2 (RFP Nos. 16–20); *see, e.g., Soto v. City of Concord*, 162 F.R.D. 603, 612 (N.D.
 22 Cal. 1995); *Scott v. Bd. of Educ. of City of E. Orange*, 219 F.R.D. 333, 338 (D.N.J. 2004).

23 Finally, Defendants do not engage with Plaintiffs’ requests seeking statistical data,
 24 App’x A at 2–6, much less try to explain how they expose deliberations or are “so interwoven”
 25 with deliberative materials to render them “not severable.” *Warner*, 742 F.2d at 1161; Opp. 12.

26 CONCLUSION

27 For all of these reasons, the Court should grant Plaintiffs’ Renewed Motion to Compel.
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1 Respectfully submitted September 27, 2019.

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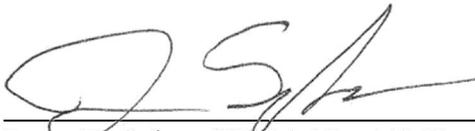
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on September 27, 2019.



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