IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case 1:17-cv-02459-GLR

Hon. George Levi Russell, III

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO SERVE ADDITIONAL DISCOVERY

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Plaintiffs challenge, on equal protection grounds, the military's policy regarding service by transgender individuals and individuals diagnosed with gender dysphoria that was proposed by then-Secretary of Defense Mattis to the President in February 2018 ("Mattis Plan"), reflecting the recommendations of a Panel of Experts ("Panel") the Secretary convened to study the matter. In concluding Plaintiffs stated a claim on which relief could be granted on their equal protection count, this Court found that Plaintiffs were entitled to discovery regarding the deliberations of the Panel "that could create genuine disputes of material fact." Memorandum Opinion ("Merits Order") 50–51, ECF No. 263. The Court also agreed discovery was appropriate "[t]o determine how much deference, if any, the Court should afford the" recommendations of the Panel of Experts regarding military service by transgender individuals because "the Court must be able to assess *the evidence the Panel gathered* and the military's evaluation of that evidence." *Id.* at 58 (emphasis added). Defendants have now produced an unredacted version of the Administrative Record and unredacted meeting minutes of the Panel of Experts, which contain a record of the deliberations of the Panel members. Defendants have also provided to Plaintiffs the documents and communications to or from voting and non-voting members of the Panel dated from September 14, 2017 to March 23, 2018, which were originally withheld pursuant to the deliberative process privilege and were used or considered in the development of the Mattis Plan.

Defendants' production gives Plaintiffs all the materials they needed to proceed with their facial challenge to the Mattis Plan. Instead, Plaintiffs now seek leave from limitations set by this Court on interrogatories, Fed. R. Civ. P. 33(a)(1), and requests for production, D. Md. L.R. 104.1, to serve still more written discovery on Defendants. Whereas the Court's merits order focused on the need for the evidence the Panel gathered and the military evaluated to develop its current policy and directives, Plaintiffs now seek evidence that they believe will show "the data Defendants relied on in crafting the Plan (as well as the assertions purportedly supported by that data) were knowingly

represented in an incomplete and misleading manner" to the Panel. Pls.' MTC 2, ECF No. 292. Plaintiffs are necessarily seeking data that the Panel *did not gather* and that the military *did not evaluate* in reaching its conclusion, based entirely on their speculation that this data will show that the data the Panel actually considered was "incomplete" or "misleading," steering the military to the wrong conclusions and calling the validity of the Panel's work into question. Pls.' Mot. 2, ECF No. 292. Plaintiffs' motion should be denied, for at least three reasons.

First, Plaintiffs are only seeking leave because they have not properly used the discovery tools available to them to obtain the information they seek. Their correspondence with Defendants prior to the filing of this motion reveals that Plaintiffs believed much of the discovery they now seek was already addressed by previously served discovery requests, which Defendants initially answered in 2018 and have supplemented as recently as November 2019. This request for additional discovery is simply an end run around the Local Rules, which prohibit untimely motions to compel. Plaintiffs also used numerous requests for production and interrogatories to explore policies that predate the Mattis Plan, and insisted on pursuing such discovery even after Defendants objected that challenges to those policies were moot. The failure of some of Plaintiffs' legal theories to gain acceptance by this Court, as well as other courts, is not cause for excusing Plaintiffs from discovery limits intended to focus the parties on the key claims and issues. The Court should reject Plaintiffs' tactical discovery behavior by and deny this motion.

Second, even if Plaintiffs had not passed up on opportunities to seek this discovery, what they seek now is not relevant to the legal questions before the Court. When Plaintiffs' claim is eventually adjudicated on the merits, they are free to make whatever argument they see fit about the perceived inadequacies in the Panel's process, including the limitations of the information it considered. But Plaintiffs do not need additional discovery to make their legal arguments, as they now have every deliberative document sent from, received by, generated by, presented to, or considered by the Panel

that formulated the Mattis Plan. Moreover, by explicitly seeking discovery beyond the scope of what the Panel considered, including data that postdates the policy recommendations the Panel made, Plaintiffs are in effect asking for this Court to substitute its own judgment for that of the military. As the Court's original order acknowledges, this is not the proper role for a district court in a facial challenge to military policy. Because the discovery being sought is neither relevant nor necessary, it should not be authorized.

Finally, proportionality considerations tip the scales decisively in Defendants' favor. As their lackadaisical approach to obtaining this discovery demonstrates, the relevance of the data Plaintiffs now seek is, at best, marginal. By contrast, the burden on Defendants of collecting much of this information and turning it over in discovery is substantial, as Plaintiffs already should be aware from their correspondence with Defendants. Responding to many of the requests would require Defendants to search for and review voluminous medical and personnel records of individual non-party service members. There is no need to further prolong discovery to complete these burdensome tasks, which will do little, if anything, to advance resolution of this case.

For these reasons, Plaintiffs' motion for leave should be denied.

BACKGROUND

I. Plaintiffs' Previous Requests for Discovery

The background of discovery in this action should assist the Court in understanding why Plaintiffs are now seeking discovery well beyond the limits imposed by the Rules. Plaintiffs filed this action almost two-and-a-half years ago, on August 28, 2017, to raise constitutional challenges to what they contend is a ban on the service of transgender individuals in the military. ECF No. 1. Following the issuance of a Presidential Memorandum in August 2017 ("2017 Memorandum"), which explained that DoD would be convening experts to study the issue and make policy recommendations, Plaintiffs amended their complaint, ECF No. 39, and moved to preliminarily enjoin the President's decision,

ECF No. 40. The Court preliminarily enjoined Defendants from implementing the policies and directives encompassed by the 2017 Memorandum on October 30, 2017. ECF No. 84. Plaintiffs then proceeded to conduct written discovery. Between January and May of 2018, Plaintiffs propounded twenty-one requests for production of documents (RFPs) and twenty-four interrogatories on Defendants.[1] In response, Defendants collected and reviewed hundreds of thousands of pages of non-privileged records, and produced nearly 40,000 pages of documents. Defs.' Mot for Protective Order 4, ECF No. 121.

Meanwhile, DoD convened the Panel in order to make policy recommendations for military service by transgender persons. In February 2018, Secretary of Defense James Mattis, with the agreement of the Secretary of Homeland Security, sent the President a memorandum proposing a new policy consistent with the Panel's conclusions. *See* Mattis Memorandum, ECF No. 120-1. The memorandum was accompanied by a 44-page report provided by the Under Secretary of Defense for Personnel and Readiness setting forth in detail the bases for the Department of Defense's recommended new policy. Department of Defense Report and Recommendations on Military Service by Transgender Persons (Feb. 2018), ECF No. 120-2. On March 23, 2018, the President issued a new memorandum concerning transgender military service. Presidential Memorandum (2018 Memorandum), ECF No. 120-3. The 2018 Memorandum revoked the 2017 Memorandum, thereby allowing the Secretaries of Defense and Homeland Security to "exercise their authority to implement appropriate policies concerning military service by transgender persons." *Id.*

After the issuance of the 2018 Memorandum, Defendants moved for dismissal, or, in the alternative, summary judgment, and also moved to dissolve the preliminary injunction. ECF Nos.

[1] Plaintiffs across the four related cases challenging the military policy at issue in this case have served DoD with over 200 requests for production. *See* Decl. of Robert E. Easton ¶¶ 13, 18 (Oct. 25, 2019), ECF No. 281-1. Documents produced in response to RFPs in the related cases were produced to Plaintiffs in this case pursuant to the cross-use agreement. *See* Uniform Protective Order and Cross-Use Agreement, ECF No. 111.

115, 120, 158, 163. On the same day the President issued the 2018 Memorandum, Defendants moved for a protective order from Plaintiffs' written discovery requests. ECF No. 121. As relevant here, the gravamen of the request for a protective order was that the discovery "related to the President's statements on Twitter on July 26, 2017, and the Presidential Memorandum issued on August 25, 2017" was no longer relevant in light of the mootness of the 2017 Memorandum, and that subsequent discovery should be limited to the administrative record that formed the basis for Secretary Mattis's decision. *Id.* at 5–7. Plaintiffs opposed this motion, ECF No. 128 at 6–7, and the Court denied it, ECF No. 170 at 2, allowing discovery to proceed during the pendency of the merits motions.

On August 20, 2019, the Court issued its ruling on the various merits motions propounded by Plaintiffs and Defendants. The Court found that the 2017 Memorandum was moot and that it was therefore appropriate to dissolve the preliminary injunction previously entered. Nonetheless, the Court agreed that some discovery regarding the process of the Panel of Experts that led to the Mattis Plan was appropriate, on the strength of a Rule 56(d) objection raised by Plaintiffs. The Court's ruling set out three sets of reasons for allowing further discovery. First, the Court agreed with Plaintiffs that "the level of deference, if any, to which Defendants' decisions related to the Implementation Plan are entitled turns on whether and to what extent the record supports Secretary Mattis's recommendations to President Trump." Merits Order 50. It concluded Plaintiffs were entitled to discovery on "the evidence the Panel gathered and the military's evaluation of that evidence" in order to set the appropriate level of deference. *Id.* at 58. Second, the Court pointed to outstanding disputes regarding Defendants' assertion of privilege, which are not at issue in this motion. *Id.* Third, the Court accepted Plaintiffs' specific enumeration of information it could seek in discovery that had the potential of creating genuine disputes of material fact, including:

- "all documents and communications" the Panel received;
- "the identity of all persons" involved in developing the Implementation Plan;

- "all documents and communications within Defendants' possession that were received from outside parties opposed to military service by transgender individuals";

- "all documents and communications" related to the functioning of the Panel, including but not limited to, research, analysis, and recommendations underlying the Implementation Plan;

- "directives underlying the Implementation Plan";

- "potential alternatives" to the Implementation Plan the Panel considered and "dissenting opinions voiced within" the Panel.

Id. 50–51 (quoting Declaration of Marianne F. Kies ¶¶ 41, 43, 46, 48, 50, 51, 55, ECF No. 163-16.).

The current production addresses each and every discovery request the Plaintiffs' previously articulated in their Rule 56(d) declaration and that the Court identified in its merits order. Defendants have produced all deliberative documents and communications that any member of the Panel sent or received, or that were presented to any Panel member, during the decision-making process, even where that document or communication was authored, sent, received, or presented by someone who was not a member of the Panel at all. In other words, Plaintiffs have received each and every "input" to the Panel, and, as such, should be in a position to conduct depositions and otherwise litigate the constitutionality of the Mattis Plan.

II. Plaintiffs' New RFPs and Interrogatories

Plaintiffs' motion seeks leave to serve nineteen new RFPs and nine new interrogatories. There is no dispute that these new requests would put Plaintiffs over the limits for both RFPs and interrogatories with respect to each individual Defendant. *See* Fed. R. Civ. P. 33(a)(1); D. Md. L.R. 104.1. And despite the previous focus of both Plaintiffs and the Court on the work done by the Panel, many of Plaintiffs' requests have no reference at all to the Panel's deliberations. For instance, RFPs 29, 30, and 37 through 45 seek documents without reference to the Panel's work or the time frame in which it deliberated:

- Information regarding medical waivers for a number of medical conditions with treatments Plaintiffs contend are analogous to the medical needs of transgender service members (RFP Nos. 29, 30);

- "exceptions to or exemptions made from sex-based standards for non-transgender service members" (RFP No. 37);

- each service branch's policies with respect to "limited duty" (RFP No. 38);

- statistics regarding the accessions of persons known by the military to be transgender or known to have a diagnosis of gender dysphoria (RFP Nos. 39-40);

- waiver requests for gender dysphoria, as well as "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 DODI 6130.03" (RFP Nos. 41–42); and

- data on the individual level regarding deployments of transgender service members, determinations that transgender service members were non-deployable, and decisions to evacuate transgender service members from a theater (RFP Nos. 43–45).

Likewise, interrogatories 34 and 36 through 41 seek detailed data without attempting to tie their request to the deliberations of the Panel:

- aggregate information regarding the 424 treatment plans for transgender service members identified in the Report (No. 34);

- identification of transgender service members evacuated for medical reasons from theater or placed on limited duty (Nos. 36, 37);

- data regarding waivers granted to both transgender and non-transgender individuals since January 1, 2018 (Nos. 38, 39); and

- cost data for transition-related treatment and for treatment related to a variety of other medical conditions (Nos. 40, 41).

Although the precise justifications for each request varies, four common themes can be discerned from Plaintiffs' explanation of the relevance of these requests to the case. First, Plaintiffs claim that the information is needed to show that various justifications given by the Panel for treating transgender service members differently are "pretextual and lack[] a rational basis," or to "establish the irrational and pretextual nature of the [Report's] justifications." *See* Appendix 1 (RFP Nos. 29–

30, 32, 35, 37, 43–44; Interrogatory No. 33). Second, Plaintiffs assert they need some of the information to prove that the Mattis Plan is an "effectively categorical" prohibition on transgender service by reference to its implementation. *Id.* (RFP Nos. 39–42, Interrogatory Nos. 38–39). Third, Plaintiffs believe the discovery will show that the Panel's recommended policy "lacks empirical support." *Id.* (RFP Nos. 29–30, 36–37; Interrogatory Nos. 33, 36–37). Fourth, Plaintiffs contend the discovery will demonstrate that the Report represented data in an "incomplete and misleading manner," or that assertions in the report are "incomplete, misleading, and/or simply incorrect." *Id.* (RFP Nos. 31, 33, 36, 38, 42, 45–46; Interrogatory Nos. 34–37, 40–41).

A handful of the new discovery requests do attempt to tie themselves to the work done by the Panel, but in ways designed to extract data that the Panel did *not* consider and, in some cases, could not have considered. For instance, RFP Nos. 31, 33, and 34 seek documents reflecting data presented in the DoD's Report and Recommendation. But RFP Nos. 32 and 35 seek "subsequent updates to the data sets subject to" RFPs 31 and 34, respectively, and RFP No. 33 also explicitly seeks "updated versions of data generated subsequent to the report." *Id.* (RFP Nos. 31–35). Likewise, interrogatory No. 35 seeks "the value of . . . statistic[s], chart[s], or data point[s] for the time period June 30, 2016 until the present day." *Id.* (Interrogatory No. 35). And while some of these requests do purport to seek information to determine whether the Mattis Plan is "the product of an independent military policy-making process and should be afforded deference," *Id.* (RFP Nos. 31, 33–34), they all seek to do so by showing that the data the Panel considered were "represented in an incomplete and misleading manner," *id.* (RFP Nos. 31, 33–34; Interrogatory No. 35), or to show "the irrational and pretextual nature of the Plan's justifications," *id.* (RFP No. 32). In short, the goal all of the requests is the same: to require Defendants to provide information to Plaintiffs that the Panel not only did not consider, but that in many instances would have been impossible for the Panel to consider because it postdates the Panel's deliberations.

III. Procedural History

Plaintiffs' certificate of good-faith conference of counsel, Pls.' Mot. at 27, traces the current discovery dispute back to June 21, 2019. That letter asked for correction of deficient RFP and interrogatory responses Defendants provided to Plaintiffs in February and May of *2018*, more than a year before Plaintiffs sent their letter. The letter raised the same argument Plaintiffs raise here: that "the data Defendants cite [in the Report and Recommendation] has been presented in an incomplete and misleading manner" and asserted that their previously served discovery requests already "encompass (a) all of the underlying data that Defendants considered and analyzed in forming the Mattis Policy and Implementation Report released on March 23, 2018, and (b) underlying data regarding transgender service members under the Open Service Policy up to the present." Komorowski Decl. Ex. L (Lampros 6/21/19 Letter) at 2–3.

Defendants responded to this letter on July 24, 2019. Komorowski Decl. Ex. M (Enlow 7/24/19 Letter). The letter, written before the Court's Merits Order issued on August 20, 2019, reasserted the Government's position that broad discovery was incompatible with principles of military deference and that Plaintiffs' discovery requests were disproportionate to the needs of the case. But Defendants also noted that Plaintiffs' efforts to dispute Defendants' responses were untimely, as the Local Rules require parties who have been "unable to resolve informally . . . any disputes with the responding party" to "serve a motion to compel within thirty (30) days of the party's receipt of the response. Komorowski Decl. Ex. M. at 1 (quoting D. Md. L.R. 104.8(a)). Plaintiffs sent additional letters, *see* Gerardi Decl. Ex. 1 (Lampros 7/30/19 Letter). *id.* Ex. 2 (Lampros 8/13/19), and met and conferred over the phone twice with Defendants. In a letter dated September 6, 2019, Defendants offered to supplement two interrogatory responses in order to address some of the issues Plaintiffs raised. *See* Gerardi Decl. Ex. 3 (Enlow 9/6/19 Letter). Defendants provided this supplementation on November 8, 2019. There were no further discussions regarding Plaintiffs'

requests for supplementation until Plaintiffs notified Defendants about their intent to seek leave for additional discovery requests in January of this year.

LEGAL STANDARD

Civil Rule 26(b)(2) governs requests to alter the Court's discovery limits. The rule provides additional discovery should not be allowed (i) if it is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive"; (ii) if "the party seeking discovery has had ample opportunity to obtain the information by discovery in the action"; or (iii) if "the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Civil Rule 26(b)(1) limits all discovery to "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." The burden falls on Plaintiffs to explain why discovery beyond the limits imposed by the Court is necessary. *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 2002 WL 534459, at *4 (W.D. Va. Mar. 18, 2002) ("Frequently, the issue becomes whether the requesting party has adequately shown that the benefits of additional interrogatories outweigh the burden to the opposing party."). These written discovery limits "serve a vital purpose and should not be disregarded lightly" by the parties. *Martin v. State Farm Auto. Ins. Co.*, 2011 WL 13228851, at *5 (S.D. W. Va. Jan. 20, 2011).

ARGUMENT

I. Plaintiffs Have Already Had Ample Opportunity To Take This Discovery

Plaintiffs' purported need for additional RFPs and interrogatories is not a result of a lack of opportunities to conduct discovery, but of a failure to properly use the tools available to them under the Civil Rules and Local Rules. In their letters to Defendants in the summer of 2019, Plaintiffs claimed that their earlier discovery responses were already broad enough to capture much of the information they seek here, but they failed to timely challenge Defendants' supposedly deficient responses under the Local Rules. They also insisted on pressing ahead with discovery requests related

to now-moot claims, over Defendants' objections. These sorts of tactical choices are not a basis for allowing additional discovery. *See EEOC v. Bardon, Inc.*, 2010 WL 1780126, at *2 (D. Md. May 3, 2010) (denying leave to reopen a deposition pursuant to Rule 26 because "[t]he tactical decision by [defendant] to depose plaintiff for two hours and twenty-five minutes does not demonstrate that the deposition was in any way deficient"). As such, Plaintiffs' motion should be denied irrespective of their professed need for this additional discovery.

More specifically, the instant dispute began not as a disagreement over serving additional discovery requests, but over whether or not Defendants' responses to Plaintiffs' preexisting discovery requests were adequate. In June 2019, Plaintiffs asserted that their prior requests already covered "all of the underlying data that Defendants considered and analyzed in forming the Mattis Policy," as well as "underlying data regarding transgender service members under the Open Service Policy up to the present." Komorowski Decl. Ex. L at 2; *see also* Pls.' Mot. at 9 ("[I]n order to fully make their case, Plaintiffs need access to the data underlying the Mattis Plan itself and data reflecting the military's more recent experience."). Many of the proposed RFPs and interrogatories Plaintiffs now seek leave to serve request information that Plaintiffs specifically asked Defendants to provide in response to previous discovery requests. *Compare* Komorowski Decl. Ex. L at 4–5 *with* Appendix 1 (RFP Nos. 30 (waivers for gender dysphoria and other diseases), 31–35 (data sets relevant to the DoD Report and Recommendation and Panel of Experts materials), 39–40 (accessions data for persons known to be transgender and persons with gender dysphoria), 44 (non-deployability of transgender service members due to gender dysphoria)); *id.* (Interrogatory Nos. 34 (treatment plan data for transgender service members), 35 (value of each "statistic, chart, or data point" in study presented to panel up to "the present day"); 40 (cost data for providing medical care for transition)).

Although these sorts of objections could have been the subject of a timely motion to compel, Plaintiffs are barred from bringing such a motion by the Local Rules. "[W]hen a party asserts, as

Plaintiff[s] [have] done, that the opposing party provided substantially inadequate discovery responses, the party must follow the procedures set out in Local Rule 104.8." *Anderson v. Reliance Standard Life Ins. Co.*, No. WDQ-11-1188, 2011 WL 4828891, at *2 (D. Md. Oct. 11, 2011). And Local Rule 104.8 requires that a motion to compel be served "within thirty (30) days of the party's receipt of the response" it deems inadequate. D. Md. L.R. 104.8(a). Plaintiffs received the initial responses to the discovery requests at issue in the June 2019 letter in the summer of 2018, so the time limit for compelling a different response elapsed more than a year ago—well beyond the 30-day limit set forth in the Local Rules. Indeed, Plaintiffs would be time-barred from moving to compel a different response in light of Defendants' most recent supplementation of their interrogatory responses, served in November 2019.

Plaintiffs argued at the time that the Local Rules did not prevent them from disputing discovery responses or bringing a motion to compel, but these arguments were weak when lodged and are even less persuasive now. Ex. 1 at 2–3. First, Plaintiffs argued that Defendants had a duty to supplement their discovery responses. Defendants do not disagree that they have a duty to supplement (they have done so numerous times in this case), but this argument misses the mark. The parties' key discovery disagreement has been over the breadth of information Plaintiffs are seeking through written discovery. Second, Plaintiffs incorrectly asserted that they needed to wait for Defendants to supplement some of their responses in May 2019 before filing a motion to compel. But Plaintiffs had no basis for this argument at the time, and, in any event, they never filed a motion. Such a motion would clearly be untimely now, more than half a year after Defendants served those supplemental responses. Finally, the prejudice to Defendants caused by Plaintiffs sitting on these issues for months, particularly after Defendants supplemented their interrogatories, is manifest. Discovery has been ongoing for years, and Defendants have already produced tens of thousands of pages of documents, including those the Panel actually considered that the Court wished to see

produced so it could evaluate the independence of the military's judgment in shaping the Mattis Plan. Further discovery will merely drag out this litigation and prevent resolution of the merits questions. This is precisely the type of untimely discovery dispute the Local Rules were meant to prevent.

To avoid the procedural bar on a motion to compel, Plaintiffs have changed tactics and sought to serve additional discovery requests instead. Their motion asserts "Defendants have repeatedly attempted to block discovery related to the Mattis Plan and its factual and analytical underpinnings," and that "in view of this history, it is appropriate for Plaintiffs to serve additional requests that squarely seek information on developments since the initial requests, rather than pursuing updates of responses to prior requests in the face of Defendants' resistance." Pls.' Mot at 21. But the proper response to such disputes would have been to file a timely motion to compel within the proper time period. Plaintiffs' failure to properly challenge previous discovery responses is not a valid reason for obtaining leave for new requests, particularly where, as here, Plaintiffs have conceded many of their requests are duplicative. *Alvarez v. Johns Hopkins University*, 2019 WL 2210644, at *8 (D. Md. May 21, 2019) (admonishing parties that additional requests for production should not be "duplicative of previous discovery requests"); *Capacchione v. Charlotte-Mecklenburg Schools*, 182 F.R.D. 486, 492 (W.D.N.C. 1998) (recognizing that allegedly non-responsive answers to an initial set of interrogatories did not, in and of itself, justify serving additional interrogatories over the limit imposed by the Civil Rules). Granting Plaintiffs' motion would frustrate the purpose of the Local Rules, allowing parties to resuscitate untimely discovery disputes simply by serving new, duplicative discovery requests above the Court's limits. Plaintiffs have therefore had "ample opportunity" to obtain what they seek within the limits of the Local Rules and Civil Rules. Fed. R. Civ. P. 26(b)(2)(ii).

In addition, Plaintiffs' need for expanded discovery is a product, at least in part, of its early choices in the case to insist on discovery on topics that were irrelevant. Plaintiffs served numerous RFPs and interrogatories regarding statements President Trump issued on Twitter on July 26, 2017,

as well as the 2017 Memorandum, the working group established to develop the policy on military service by transgender individuals in the Obama Administration, and other events and documents predating the establishment of the Panel. *See, e.g.*, Komorowski Decl. Ex. H (Plaintiffs' First Set of RFPs) (RFP Nos. 7, 8, 14, 17, 18); *Id.* Ex. I (Plaintiffs' First Set of Interrogatories) (Interrogatory Nos. 1–11, 13–14, 18); *Id.* Ex. K (Plaintiffs' Second Set of Interrogatories) (Interrogatory Nos. 27, 29–30). Defendants objected to this discovery because the 2017 Memorandum was withdrawn by the President and the legal questions to be resolved related to the Mattis Plan, which arose out of the deliberations of the Panel of Experts. ECF No. 121 at 5. Plaintiffs proceeded with their discovery over those objections. The Court then held that claims directed at the 2017 Memorandum were indeed moot, recognizing that "the Implementation Plan did not suffer from the same procedural defects as the August 2017 Memorandum" and was not a continuation of that policy. Merits Order 12–24.

This context should not be ignored in weighing Plaintiffs' request for additional discovery. Plaintiffs assert that it is "unfair to prevent [them] from serving additional discovery requests" because much of their discovery was served before the Mattis Plan issued, Pls.' Br. 20–21, but as the record shows, there is no unfairness here: Plaintiffs chose to push ahead with the discovery over Defendants' objections, knowing the risks. The written discovery to date was served on or after January 2018, by which point the Panel process was well underway, as Plaintiffs were aware. *See, e.g.*, ECF No. 40-23 (attachment to Plaintiffs' motion for a preliminary injunction, in which Secretary Mattis states his intention to create a Panel of Experts); Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. 8–9, ECF No. 52-1 (stating that "[w]hen the Interim Guidance was issued, Defendants' counsel provided it to Plaintiffs' counsel and asked Plaintiffs to amend their complaint and withdraw or, at least narrow, their motion for a preliminary injunction to account for arguments and allegations that have been overcome by the current operative policy regarding military service by transgender individuals," but that "Plaintiffs refused to do so"). Plaintiffs thus made a choice to use their discovery requests to pursue legal theories

that proved to be meritless. Granting a motion for leave to file still more discovery requests, after Plaintiffs insisted on using their interrogatories and RFPs to pursue these theories, would encourage precisely the sort of imprudent and unfocused use of written discovery that the numerical limits are designed to prevent.

In sum, Plaintiffs' approach to discovery is marked by repeated failures to make good use of the discovery tools available to them. Because they have already had ample opportunity to seek this information within the confines of the discovery limits set by the Civil Rules and Local Rules, Plaintiffs' motion should be denied under Civil Rule 26(b)(2)(ii).

II. Plaintiffs' Requests Go Beyond What This Court and Other Courts Have Deemed Relevant to Plaintiffs' Claims

Although the Court allowed discovery to proceed in this case, what it permitted was carefully circumscribed. In agreeing that Plaintiffs had satisfied their burden of showing further discovery was needed pursuant to Civil Rule 56(d), the Court found that the workings of the Panel were a relevant topic of discovery in order to "counter Defendants' assertions that, as a product of independent military judgment," the policy recommended by the Panel of Experts and approved by Secretary Mattis was entitled to deference. Merits Order at 50–51. And although Defendants continue to maintain that discovery is not appropriate in a case such as this, Defendants have complied with the Court's directive by producing all of the Panel's "inputs," including an unredacted Administrative Record, unredacted meeting minutes of the Panel, and deliberative documents sent from, received by, generated by, presented to, or considered by the Panel.[2]

[2] The Government produced the majority of these deliberative documents pursuant to an order by the U.S. District Court for the District of Columbia, in another challenge to the Mattis Plan—even though the government disagrees with that order—after that court concluded that the plaintiffs there had overcome the deliberative process privilege for documents that were used or considered by the panel of experts in the development of the Mattis Plan. *Doe 2 v. Esper*, 2019 WL 4394842, at *8-10 (D.D.C. Sept. 13, 2019).

Yet, as Plaintiffs' motion for leave shows, they no longer consider the Panel's deliberations as a limit on the scope of the discovery to which they are entitled. Their motion claims that "new developments" should license additional discovery under four different categories. Pls.' Mot. 14. First, Plaintiffs seek medical data related to deployability, including data about service members who completed transition before joining the military; data about the military's treatment of service members other than those with gender dysphoria who require hormone therapy; and "more recent data on non-deployability" that post-date the Panel's deliberations in late 2017. *Id.* at 15–17. Second, Plaintiffs seek updated cost data about transgender medical care on the grounds that the Panel recognized limitations in the cost data it considered in its deliberations. *Id.* at 17–18. Third, Plaintiffs broadly seek data on "other exceptions or exemptions to sex-based standards for, inter alia, uniform standards, and athletic competition and training," that, in their view, will undermine the DOD Report and Recommendation's conclusions about unit cohesion. *Id.* at 18. Finally, Plaintiffs assert that the evidence they seek, including the categories of evidence described above, "is also relevant to whether or not the Mattis Plan is based on legitimate justifications that can survive heightened scrutiny, and this issue too bears on whether deference is appropriate or whether the military has disregarded its own experience." *Id.* at 19–20.

The common thread among these disparate requests, as well as the various relevance rationales Plaintiffs advance, is that they seek to scrutinize the Mattis Plan through the use of data that the Panel did not actually consider and, in many cases, could not have considered. To the extent the requests overlap with information the Panel considered, Defendants have already produced it. Allowing further discovery would go beyond the Court's directive, in its summary judgment order, that the scope of permitted discovery in this case is "the evidence *the Panel gathered* and the military's evaluation of that evidence." Merits Order 58 (emphasis added). Granting a motion for leave to take further discovery of the sort Plaintiffs contemplate is not permitted under Civil Rule 26 where "[t]he issue in

the case is [Defendants'] actions and statements based on what they did do and did know—not what they could have done or could have known." *Medibill of Maryland, Inc. v. Anesthesia Business Consultants, LLC*, 2005 WL 8174469, at *4 (D. Md. Dec. 23, 2005).

The Supreme Court has repeatedly rejected the use of evidence the decision-makers could not have considered in cases related to military deference. *See Winter v. NRDC*, 555 U.S. 7, 24 (2008) (making clear that "great deference" is owed to "the professional judgment of military authorities"); *Goldman v. Weinberger*, 475 U.S. 508, 509 (1986) (describing expert witness testimony as "quite beside the point"); *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981) (concluding district court had "palpably exceeded its authority" in relying on deposition testimony); *see also Doe 2 v. Shanahan*, 917 F.3d 694, 736–37 (D.C. Cir. 2019) (Williams, J., concurring) ("[I]t does not appear that the Supreme Court considered any evidence uncovered by those trial courts' explorations to be necessary—or even pertinent—to its disposition of" the *Rostker* and *Goldman* cases). The Court's role in this case is not to "substitute its 'own evaluation of evidence for a reasonable evaluation' by the military," but to test whether the decision the military made, in light of the evidence that it actually considered, is justifiable and entitled to deference. *Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019) (quoting *Rostker*, 453 U.S. at 68 (1981)). Plaintiffs' insistence on extra-record discovery would essentially create a new record and invite the Court to make its own determination of the appropriate policy on the basis of data the Panel never gathered and did not consider in reaching its conclusions.

Moreover, there is no limiting principle to Plaintiffs' argument that it can seek data the Panel did not (or could not) consider. Embedded in their professed need for this additional discovery is Plaintiffs' assertion that "Defendants have a continuing obligation to ensure that their policy decisions satisfy the Equal Protection Clause's heightened scrutiny test—both at the time the policy was adopted and today." Appendix A at 4 (RFP 35); *see also* Pls.' Br. at 23. But it does not follow from this assertion that Plaintiffs have a right to effectively displace the Panel by updating the data they considered and

exercising their own judgment over whether the Mattis Plan is an appropriate policy, supervised by this Court. Such remedial measures are inappropriate during discovery, when the Court has yet to adjudicate the merits of Plaintiffs' claims.

For instance, in *Goldman*, the Supreme Court majority did not even acknowledge evidence developed in the district court that the plaintiff "had worn a yarmulke on base for years," in violation of Air Force policy, "without any adverse effect on his performance, any disruption of operations at the base, or any complaints from other personnel." 475 U.S. at 526 (Blackmun, J., dissenting). The Constitution places the responsibility for evaluating the ongoing viability of policies such as the Mattis Plan on the "[t]rained professionals" in the military, "subject to the day-to-day control of the responsible civilian authorities." *Gilligan v. Morgan*, 413 U.S. 1, 8 (1973) (rejecting court of appeals' suggestion to district court to "survey certain materials not then in the record of the case" on remand). And "[i]t would be inappropriate for a district judge to undertake this responsibility in the unlikely event that he possessed requisite technical competence to do so." *Id.*

The D.C. Circuit and district court in the related *Doe* litigation have already addressed these concerns, in some detail. The appellate panel's order in *Doe*, 755 F. App'x 19 (D.C. Cir. Jan. 4, 2019), acknowledged the principles of military deference outlined in Supreme Court precedent. In explaining the holdings of these cases, the *Doe* court emphasized that the focus should be on the information the relevant, politically accountable decision-makers considered. *Id.* at 25 ("'[W]e of course do not defer to the Government's reading of the' Constitution, but 'the *Executive's* evaluation of the underlying facts is entitled to appropriate weight.'" (emphasis added) (quoting *Trump v. Hawai'i*, 138 S. Ct. 2392, 2421–22)); *id.* ("Instead of an 'independent evaluation' of the evidence, the Court adopted 'an appropriately deferential examination of *Congress'* evaluation of that evidence.'" (quoting *Rostker*, 453 U.S. at 83)). And in a recent hearing before the district court in *Doe*, the district court echoed this theme time and again in rejecting overtures for further discovery. *See* Gerardi Decl. Ex. 4 (*Doe v. Esper*

Teleconference Transcript, Jan. 4, 2020) at 30:6–9 ("I'm cabined to some degree by the Court of Appeals' opinion which made it pretty clear that going beyond what was considered by the panel, Mattis, or anybody else is a problem."); *id.* at 31:19–22 ("Again, looking at all the personnel records, I think, is a problem. Nobody developing the Mattis plan appears to have looked at any individual record or personnel record; so I'd be ordering something they didn't consider."); *id.* at 32:21 ("[T]he Court of Appeals' opinion . . . indicated . . . that they appeared to cabin what I would be able to require from the Defendant, sort of outside what was actually considered in developing what we've been calling the final Mattis Plan."); *id.* at 20:5 (describing requests for e-mail from an individual outside of what he sent to Panel members "fishing"). Similar circumspection is warranted here, particularly since Plaintiffs have not engaged with the key Supreme Court cases regarding military deference, and none of the cases on which they rely arose out of the military context. Pls.' Br. at 23.

Limiting discovery to items the Panel reviewed and considered should not hinder Plaintiffs in challenging the Mattis Plan. They are free to argue that evidence the Panel considered does not support the conclusions it reached, that the Panel misstated or misrepresented evidence, that the Panel ignored relevant factors, and that, as a result, the Panel's work is not the product of independent military judgment and not entitled to deference. But what they cannot do is require Defendants to go back and gather all of the evidence that Plaintiffs believe should have been considered, but was not, in order to assess the Mattis Plan against a set of facts that were never considered by the individuals who made the decision. That would essentially substitute one decision-making process, conducted by the military, for another, supervised by this Court. Because Plaintiffs' "inquiries are clearly irrelevant in determining" the constitutionality of the Mattis Plan, and "there [is] sufficient information before the court to determine" the answer to that legal question, the Court should refuse Plaintiffs' overture for additional discovery. *Cohn v. Bond*, 953 F.2d 154, 159 (4th Cir. 1991) (affirming district court's refusal "to allow continued discovery where it was unnecessary").

III. Even If Not Procedurally Barred or Irrelevant, the Burdens of the Requested Discovery Are Likely Disproportionate to This Case

Finally, in addition to being procedurally proper and relevant, discovery must be "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). This involves weighing, among other things, "whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* Typically, Defendants would have thirty days to provide written objections to Plaintiffs' discovery requests after service. Fed. R. Civ. P. 34(b)(2)(A) (RFPs); *id.* 33(b)(2) (interrogatories). If the Court grants leave to serve these requests, Defendants will provide their objections and responses at the appropriate time, including objections about the burden of obtaining the evidence relative to its benefits, and the parties will work through disagreements on this score through the procedures set forth in the Local Rules. But even a cursory review of Plaintiffs' requests demonstrates that the burden of responding to them will greatly outweigh the probative significance of the evidence to be adduced, particularly in light of Defendants' decision to produce all of the "inputs" to the Panel of Experts. As such, burden and proportionality concerns provide an additional ground for the Court to prevent Plaintiffs from moving forward with additional discovery in the first place.

Plaintiffs, for their part, focus on the proportionality concerns with RFP Nos. 31–35, related to "the data underlying the Mattis Plan and its justifications," and the burden of collecting information from dynamic databases. Pls.' Mot. at 21–22. The health data compiled for review by the Panel of Experts was obtained through searches and extracted data from the Administrative Database Military Health System Data Repository ("MDR"), an administrative database which receives data from DoD's worldwide healthcare network and from the TRICARE Purchase Care program. Gerardi Decl. Ex. 5 (Adirim Decl.) ¶ 5. Plaintiffs' initial, June 21 letter proposed that Defendants query the MDR for data on eleven separate topics which, as discussed above, overlap with many of the discovery requests they seek to propound here. Komorowski Decl. Ex. L at 4–5.

The problem with this approach is that MDR searches are unlikely to be sufficient to answer Plaintiffs' inquiries, as Plaintiffs are already well aware. As Dr. Terry Adirim explained in a declaration filed in the *Doe* case that was attached to Defendants' correspondence with Plaintiffs, the MDR does not contain actual medical records of service members (which are kept by the various individual medical centers across the country and around the world operated by DoD). Gerardi Decl. Ex. 5 ¶¶ 6–10. Defendants explained that "at least some" of the data requested was not found in the MDR, but in "service members' medical or personnel files," and that, given the diffuse nature of these records, there would be significant time and expense involved in collecting such documents. Komorowski Decl.., Ex. M at 5 (quoting Ex. 5 at ¶ 12).

Acknowledging the reasonableness of these concerns, Plaintiffs clarified they were "not asking Defendants to search any personnel files, underlying medical records, field reports, or other back-up documentation relating to particular service members or medical plans"; rather, they were merely seeking "underlying data that was extracted from the MDR to create" a variety of charts and presentations that were shown to the Panel, sufficient to allow Plaintiffs to make thirteen discrete factual determinations. Gerardi Decl. Ex. 2 at 2–4. Defendants explained in response that the data needed to respond to all but four of these requests were not contained in the MDR. *Id.* Ex. 3 at 3. That remains true of many of the requests Plaintiffs' have propounded here. For instance, in addition to RFP Nos. 31–35, which are not materially different from what Plaintiffs were seeking from Defendants in June of 2019, Interrogatory No. 34 seeks "aggregated information regarding the 424 treatment plans for transgender service members identified in the Mattis Plan" on a level of detail that would necessarily require Defendants to seek out individual medical files of service members, including the "number and type of gender confirmation surgeries recommended," "any recommended monitoring in the treatment plans," and "any stated restrictions on duty." By focusing on the MDR, Plaintiffs' motion fails to take account of the most serious potential issues related to the burden of

obtaining and producing the medical information it seeks.

Plaintiffs' requests regarding waivers raise similar issues. For example, RFP 30 asks Defendants to turn over "all documents referring to records of decisions on all enlistment medical waiver applications" for at least twenty different medical, psychological, and psychiatric conditions, including gender dysphoria. RFP 41 seeks "all documents reflecting, referring, contemplating, or relating to requests made on or after April 12, 2019 to waive . . . gender dysphoria." And interrogatory nos. 38 and 39 seek detailed statistical information about waivers, including the number of non-transgender and transgender individuals who have been allowed to access pursuant to a waiver since January 1, 2018, the number of waivers denied, and the time it took the military to make decisions on those waivers. Although the services do report some standardized data about medical waivers,[3] fully responding to these requests would likely require collection, review, and analysis of actual waiver requests, which implicate both the medical history of non-parties and sensitive privacy data generated in the process of considering waivers that is protected from disclosure by federal law. *See, e.g.*, Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320d *et seq.*; Privacy Act, 5 U.S.C. § 552a, *et seq.* The Army alone considered 85,000 waiver applications in 2017, so the potential volume of data to be considered is immense. Annual Report at 7. Therefore, absent significant narrowing, the burden of these requests will vastly outweigh the probative value of any information likely to be generated. *See, e.g., Hemphill v. ARAMARK Corp.*, 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

[3] *See* Dep't of Defense, Accession Medical Standards Analysis & Research Activity: Annual Report 2018 at 67-68 ("Annual Report") (describing types of data on waivers reported by the services, https://www.amsara.amedd.army.mil/Documents/AMSARA_2018_Report/AMSARA_AR_2018.pdf

disclosure of personal information"); Gerardi Decl. Ex. 4 at 31:6–9 (rejecting review of medical records as an invasion of privacy); *id.* at 30:10–12 ("So if the experts did not look at the personnel records, did not look at the individual medical records, and you're asking to look at it, it does go beyond that.").

Other discovery requests present similar burden concerns. Plaintiffs also seek highly granular information about the deployments (RFP No. 43), non-deployability determinations (RFP No. 44), and evacuations from theater (RFP No. 45, Interrogatory No. 36) of transgender service members, but DoD does not track service members or applicants by gender identity and Defendants therefore have no means of searching for such information.[4] Nor does DoD have the ability, absent great effort, to collect all documents referring to the amount of exceptions granted to non-transgender military members from sex-based requirements (RFP 37), or regarding limited duty placements for non-transgender military members (Interrogatory No. 37), as such decisions are dispersed worldwide within the military hierarchy. Other requests simply reflect a lack of diligence on the part of Plaintiffs to search the collection. For example, Defendants have already produced to Plaintiffs each service branch's policies with respect to "limited duty" assignments (RFP No. 38) as part of the cross-use agreement with related cases.

Where the current production does not already answer Plaintiffs' questions, there will be significant burdens for Defendants to bear in responding. Those burdens should not be imposed on Defendants given how far removed the requests are from the deliberations of the Panel. This gives the Court yet another reason to deny the motion.

[4] The most recent iteration of the National Defense Authorization Act does require DoD to prepare a report for Congress on waivers of gender dysphoria and retention of members of the armed forces diagnosed with gender dysphoria on or after April 12, 2019. National Defense Authorization Act for Fiscal Year 2020 § 596, Pub. L. No. 116-92. The Department of Defense currently is in the process of determining how to collect the information required for this report.

CONCLUSION

For these reasons, Plaintiffs' motion for leave to serve additional discovery should be denied.

February 12, 2020

Respectfully submitted,

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Assistant Attorney General
Civil Division

ALEXANDER K. HAAS
Director, Federal Programs Branch

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

/s/ Michael J. Gerardi
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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2020, I electronically transmitted the foregoing to the parties and the clerk of court for the United States District Court for the District of Maryland using the CM/ECF filing system. I further certify that I have made arrangements for delivery of a courtesy copy of this response to the Court.

/s/ Michael J. Gerardi
Michael J. Gerardi

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*, *Plaintiffs*, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, *Defendants*.	Case 1:17-cv-02459-GLR Hon. George Levi Russell, III

DECLARATION OF MICHAEL J. GERARDI

I, Michael J. Gerardi, declare as follows:

1. I am a trial attorney within the Federal Programs Branch of the Civil Division of the United States Department of Justice. I make this declaration based on my personal knowledge in connection with Defendants' opposition to Plaintiffs' Motion for Leave to Serve Additional Discovery.

2. Attached as Exhibit 1 to this Declaration is a true and correct copy of a letter sent by Nicholas M. Lampros to Courtney Enlow, dated July 30, 2019.

3. Attached as Exhibit 2 to this Declaration is a true and correct copy of is a true and correct copy of a letter sent by Nicholas M. Lampros to Courtney Enlow, dated August 13, 2019.

4. Attached as Exhibit 3 to this Declaration is a true and correct copy of is a true and correct copy of a letter sent by Courtney Enlow to Nicholas M. Lampros, dated September 6, 2019.

5. Attached as Exhibit 4 to this Declaration is a true and correct copy of the transcript of a telephone conference before the Honorable Colleen Kollar-Kotelly, United States District Judge, in *Jane Doe 1 v. Esper*, No. 17-01597 (D.D.C. Jan. 14, 2020).

6. Attached as Exhibit 5 to this Declaration is a true and correct copy of a declaration from Dr. Terry Adirim, M.D., M.P.H., filed in the *Doe* litigation on June 25, 2019, and attached by Defendants to Ms. Enlow's letter to Mr. Lampros dated July 24, 2019. The July 24 letter is attached as Exhibit M to the Declaration of Peter J. Komorowski, III.

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

Executed this twelfth day of February, 2020.

/s/*Michael J. Gerardi*
Michael J. Gerardi

EXHIBIT 1

COVINGTON

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Re: Deficiencies in Defendants' Discovery Responses in *Stone v. Trump et al.*, U.S.D.C. D. Md. Case No. 1:17-cv-02459-GLR

Dear Counsel:

We write regarding the discovery deficiencies raised in our June 21, 2019 letter. In that letter, we addressed three issues: (1) Plaintiffs' request that Defendants confer to determine minimally-burdensome search protocols by which to access critical data in Defendants' possession that is directly relevant to Plaintiffs' claims and responsive to Plaintiffs' discovery requests (including data required under Defendants' continuing duty to supplement their responses pursuant to Federal Rule of Civil Procedure 26(e)); (2) Defendants' legally defective assertion of Rule 33(d) in responding to certain of Plaintiffs' interrogatories; and (3) Defendants' incomplete production of documents on specified topics regarding the process of developing the Mattis Policy.

We requested that Defendants provide their availability to meet and confer by July 5, 2019, and correct certain deficiencies in their discovery responses, or else explain why they would not do so, no later than July 8, 2019. Defendants, however, refused to confer within the time period we requested and advised that they would respond only on July 24, 2019, more than two weeks later. Defendants also refused our request to fix a date during the week of July 24 on which to conduct the requested meet and confer.

We have now reviewed the letter Defendants provided on July 24, purporting to respond to Plaintiffs' June 21 letter. Despite taking more than a month to consider Plaintiffs' letter, Defendants fail entirely to engage with the specific issues Plaintiffs identified. Defendants appear to have instead simply recycled—often verbatim—blanket objections to further discovery they raised in the *Doe* litigation in response to different requests in a different jurisdiction, with different law of the case. *See, e.g.*, *Doe 2 v. Shanahan*, No. 17-cv-01598 (CKK), ECF 218 at 14–16 (Defendants' Response to Plaintiffs' Motion to Compel) (D.D.C. June 25, 2019).

Much of Defendants' "response" to Plaintiffs here merely reiterates their position that further discovery is foreclosed by principles of military deference. This position is both squarely at odds with the orders issued in this case and contrary to governing law, which provide that the

Mattis Policy is subject to at least intermediate scrutiny and that the information Plaintiffs seek is therefore relevant. *See, e.g.*, ECF 227 at 16–17 (finding that Mattis Policy facially discriminates based on transgender status and therefore is subject to intermediate scrutiny); *see also Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) (per curiam) ("*Karnoski*") (finding that heightened scrutiny still applied in the military context because "deference informs the application of intermediate scrutiny, but it does not displace intermediate scrutiny and replace it with rational basis review[,]" and permitting plaintiffs to present additional evidence on remand). In support of their view, Defendants principally cite statements of a single appellate judge, whose opinion did not garner a majority of the *Doe* panel—while the judge whose opinion did command the majority of the panel acknowledged that courts are not required to defer to legislators or military officials who implement a facially discriminatory policy. *See Doe 2 v. Shanahan*, 917 F.3d 694, 704-05 (D.C. Cir. 2019) (Wilkins, J., concurring) ("*Doe*"). Contrary to Defendants' assertion, the appellate decisions in the related cases of *Karnoski* and *Doe* do not support Defendants' view, and in fact further support Plaintiffs' requested discovery. *See* ECF 260 at 15–18 (Plaintiffs' Opposition to Defendants' Motion for Reconsideration); ECF 256 (Plaintiffs' Response to Defendants' Notice of Supplemental Authority regarding *Karnoski*); ECF 252 (Plaintiffs' Response to Defendants' Notice of Supplemental Authority regarding *Doe*).

Defendants also assert, in broad boilerplate fashion, the objection that Plaintiffs' discovery imposes an "extraordinary burden" that is disproportionate to the needs of the case. Despite making this blanket assertion, Defendants do not appear to have made any attempt to evaluate the specific types of data and information sought in Plaintiffs' letter, or the particular burden incurred in providing it. Instead, Defendants offer a declaration from Dr. Terry Adirim that was produced in a different case, where different requests are at issue, propounded by a different set of plaintiffs. We note that the declaration does not discuss the specific requests Plaintiffs raised, and is dated June 24, 2019—just three days after Plaintiffs sent their June 21 letter—suggesting that the declaration likely was prepared well in advance of the receipt of Plaintiffs' letter, and without any knowledge of the categories of data identified therein.

Indeed, Dr. Adirim's declaration only further demonstrates why Defendants should provide the data Plaintiffs have requested. For example, a number of Plaintiffs' requests relate to information stored in the Department of Defense's Military Health System Data Depository ("MDR"). The Panel of Experts and the Implementation Report relied on charts that were based on data extracted from the MDR to justify the Implementation Plan's recommendations. Plaintiffs have asked Defendants to update those charts to reflect more recent data. Both the declaration and Defendants' July 24 letter expressly acknowledge that Defendants have access to the MDR. The declaration and Defendants' letter also implicitly concede that much of the data Plaintiffs request could in fact be extracted from the MDR system, with far less burden than Defendants claim. Yet Defendants have entirely ignored Plaintiffs' request that the parties discuss a procedure to provide such data.

Defendants also mount a non-substantive challenge to Plaintiffs' requested discovery, resting on the technicality that any motion to compel on these issues would supposedly be untimely. Not so. First, Defendants are obligated under Rule 26(e) to supplement their discovery responses where, as here, they have learned that their "prior response is in some

material respect incomplete or incorrect, or corrective action has not otherwise been made to the plaintiffs." *See Tucker v. Ohtsu Tire & Rubber Co., Ltd.*, 191 F.R.D. 495, 502 (D. Md. 2000). Second, any "delay" here is caused by Defendants, not Plaintiffs: when Plaintiffs previously raised Defendants' failure to supplement, Defendants advised that they would do so in April 2019 and deferred conferring with Plaintiffs until after that had occurred. In fact, Defendants' supplemental responses followed in May 2019. By Local Rule, Plaintiffs could not have moved to compel before engaging in such discussions. *See* L.R. 104.8(b). Third, Defendants have not been prejudiced in any way by the fact that Plaintiffs did not file a separate motion to compel on these issues at an earlier date. *See Tucker*, 191 F.R.D. at 497 (declining to deny motion to compel that was untimely under Local Rule 104.8 because defendant had "identified no prejudice it would suffer if the motion is received"); *Equal Rights Center v. Equity Residential*, 2008 WL 11363366, at *1 n.2 (D. Md. 2008) (same). Finally, to the extent Defendants assert the deliberative process privilege in refusing to provide any of the information sought in Plaintiffs' letter, much of that information may be subject to Plaintiffs' prior motion to compel, and the stay of Defendants' compliance with the Court's ruling on that motion was only recently lifted.

Accordingly, Plaintiffs reiterate the request posed in their June 21 letter that Defendants confer to determine a reasonable, minimally-burdensome procedure by which Plaintiffs would be able to access the categories of data previously identified. Other than interposing the meritless objections discussed above, Defendants still have not stated that they are willing to discuss such a procedure. Please immediately confirm whether Defendants are willing to meet and confer in good faith to discuss a procedure by which Plaintiffs may obtain access to the categories of data identified in our June 21 letter, or advise that Defendants refuse entirely to do so.

Separately, because Defendants' July 24 letter entirely ignores Section II of Plaintiffs' June 21 letter, identifying Defendants' failure to properly assert Rule 33(d) in responding to Plaintiffs' interrogatories, Plaintiffs will assume that Defendants agree with Plaintiffs' position on that issue and will provide all of the information Plaintiffs request, both for past responses and going forward. If this understanding is incorrect, please advise us immediately.

Finally, we gather from your letter that all of the information sought in Section III of Plaintiffs' prior letter—regarding the process of developing the Mattis Policy—has been withheld by Defendants based on claims of the deliberative process privilege. As you know, Defendants' compliance with Magistrate Judge Copperthite's August 14, 2018 Memorandum Opinion and Order is no longer stayed now that the Ninth Circuit has issued its *Karnoski* opinion. Accordingly, Defendants should produce all such documents at the same time they produce the other documents the Magistrate Judge ordered be produced. If Defendants have any additional basis for withholding these documents, please advise us immediately.

* * *

We welcome your offer to discuss these issues this week. We propose Thursday, August 1, 2019 for our initial discussion of the issues. We are also available next week.

Sincerely,

Nicholas M. Lampros

Counsel for Plaintiffs

EXHIBIT 2

COVINGTON

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Re: Deficiencies in Defendants' Discovery Responses in *Stone v. Trump et al.*, U.S.D.C. D. Md. Case No. 1:17-cv-02459-GLR

Dear Counsel:

We write in regard to our teleconference on August 8, 2019, during which we discussed the issues raised in Plaintiffs' June 21, 2019 and July 30, 2019 letters.

During the August 8 call, Plaintiffs asked Defendants to discuss a procedure by which they would provide the data requested in Section I of Plaintiffs' June 21 letter. You indicated that Defendants object to Plaintiffs' request for three reasons: (1) such data are, in Defendants' view, irrelevant in view of Defendants' position on the level of deference to military decision-making that should apply to this case; (2) Plaintiffs' requests are, in Defendants' view, unduly burdensome and disproportionate to the needs of the case; and (3) Defendants will not produce records containing personally-identifying information for military service members. However, you stated that, if Plaintiffs provided narrowed requests for data in writing, you would present these requests to Defendants for their further consideration.

To be clear, Plaintiffs maintain that Defendants' objections are unsupported, and that Defendants are required to produce all of the information Plaintiffs identified in our June 21 letter. Nonetheless, in an effort to find common ground, Plaintiffs hereby provide below narrowed requests for data, which have been tailored based on the limited information Defendants have provided to date regarding the purported burden associated with responding to the data requests identified in Plaintiffs' June 21 letter.[1] As we discussed on August 8, to the extent that Defendants can provide information regarding how the specific data requested by

[1] As set forth in our prior correspondence, Defendants' obligation to provide this data dates back to discovery requests Plaintiffs served more than a year ago, and which Defendants are obligated to provide pursuant to Federal Rule of Civil Procedure 26(e). *See Tucker v. Ohtsu Tire & Rubber Co., Ltd.*, 191 F.R.D. 495, 502 (D. Md. 2000).

Plaintiffs are stored, the structure of the databases involved, and the format in which data can be extracted from those databases, it would greatly assist us in attempting to frame requests to minimize any burden on Defendants. Absent such basic information, it is impossible for Plaintiffs to know what information is accessible and how to reduce any burden involved in production.

As we discussed during our phone call, our requests for "data" refer to data contained in the Administrative Database Military Health System Data Repository ("MDR"). Unlike the *Doe* plaintiffs, we are not asking Defendants to search any personnel files, underlying medical records, field reports, or other back-up documentation relating to particular service members or medical plans, as referenced in Paragraphs 4 and 10–11 of the June 24, 2019 Declaration of Dr. Terry Adirim.[2] Rather, Plaintiffs request that Defendants provide information generated by the process outlined in Paragraphs 5–8 of Dr. Adirim's declaration—that is, running searches and extracting data from the MDR.

Specifically, please provide us with the underlying data that was extracted from the MDR to create the following charts and presentations, as well as the underlying data necessary to regenerate the following charts and summaries for the time period of June 30, 2016 to June 1, 2019: Health Data for Service Members with Gender Dysphoria, Nov. 2, 2017 (AR 002883-002904); Medical and Surgical Treatment for Gender Dysphoria, Nov. 7, 2017 (AR 002911-002940); Admin Data Presented During Panel Meetings (AR 002966-002976); Time To Return to Full Duty After Transition Surgery in MTFs (slide deck) (AR 002982-002985); Admin Data Presented During Panel Meetings (version 2) (AR 002986-002997); Data Extracts: Key information used by the Panel to make recommendations (AR 002999-003010); Health Data on Active Duty Service Members with Gender Dysphoria, Dec. 13, 2017 (AR 003011-003042); and Admin Data Presented During Panel Meeting (version 3) (AR 003043-003055).

The data provided should be sufficient to allow Plaintiffs to determine:

1. The number of individuals diagnosed with gender dysphoria who have accessed consistent with and pursuant to the Open Service Directive since January 1, 2018 (broken down by service and occupation);

2. The number of individuals diagnosed with gender dysphoria whose applications for a waiver consistent with and pursuant to the Open Service Directive were denied since January 1, 2018, including the asserted basis for each such denial;

3. A list of the geographical locations (country and zone) where a record indicates a service member diagnosed with gender dysphoria did not have access to hormone therapy, or where a service member was deemed not able to deploy due to his or her

[2] Defendants submitted this declaration in the *Doe* litigation, in response to a different set of discovery requests submitted by different plaintiffs. *See Doe 2 v. Esper*, No. 17-cv-01597-CKK, ECF No. 218-5 (D. D.C. June 25, 2019).

need for hormone therapy, since the Open Service Directive was issued on June 30, 2016;

4. The total cost to Defendants of providing medical care for service members who accessed pursuant to the Open Service Directive or were diagnosed with gender dysphoria while in service following issuance of the Open Service Directive, calculated using the same methodology Defendants previously used to calculate average medical costs as discussed in Paragraph 8 of Dr. Adirim's Declaration;

5. For each service member diagnosed with gender dysphoria since the Open Service Directive was issued on June 30, 2016, the duration of any limitations on deployability due to that service member undergoing hormone therapy or transition-related surgery;

6. The number of military-approved transgender treatment plans for service members, and the number of such plans that include hormone therapy or transition-related surgery;

7. The rate of psychotherapy or mental health utilization among the study group identified on USDOE00002639-40, exclusive of psychotherapy or mental health utilization encounters that service members diagnosed with gender dysphoria were required to undergo in connection with preparation or completion of a transgender treatment plan, updated for the time period identified above (i.e., June 30, 2016 to June 1, 2019);

8. The incidence of suicide attempts among the study group population described in USDOE00002641, updated for the time period identified above;

9. For all service members diagnosed with gender dysphoria, the number of medical evacuations resulting from or related to a mental health diagnosis or following a primary diagnosis of gender dysphoria as partially summarized at USDOE00002643-44, updated for the time period identified above;

10. The number of service members diagnosed with gender dysphoria who have been placed on limited or restricted duty, the length and scope of all such limitations or restrictions, including the length of time which such limitations or restrictions prevented such service members from deploying, as partially summarized on USDOE00002648, updated for the time period identified above;

11. The number of medical procedures of the types described on USDOE00002651-57 that have been completed, for both individuals diagnosed with gender dysphoria and those without such a diagnosis, across the time period identified above;

12. The number of individuals with a diagnosis of gender dysphoria who have been separated from the military, including the data presented on USDOE00002659, updated for the time period identified above; and

13. The number, length, and purported basis (by category) for all determinations of non-deployability made for service members diagnosed with gender dysphoria during the time period identified above.

In the unlikely event that this process generates personally-identifiable information on military service members, Plaintiffs agree that such information may be redacted.

In order to inform future discussion, we also ask Defendants to provide a description of all the "fields" of data concerning service members diagnosed with gender dysphoria that can be extracted from the MDR.

Finally, Plaintiffs reiterate that Defendants must provide data on the costs purportedly incurred by Defendants in revoking the Open Service Directive and implementing the Mattis Policy, from June 30, 2016 to June 1, 2019. That request is not medical in nature, and therefore it does not appear that the burden or personal privacy concerns identified in Dr. Adirim's declaration or in our prior conversation are applicable to that data. Plaintiffs suspect that such data may not be available within the MDR, but would instead be housed in other formats. To the extent that Defendants object that providing such information would be unduly burdensome, please explain how such information is maintained and the burden involved in accessing it.

Separately, Plaintiffs wish to confirm our discussion of the other two subjects raised in our June 21 letter. If our understanding of our position on either point is incorrect, please advise:

First, regarding Defendants' interrogatory responses, you stated during our August 8 conference that Defendants refuse to provide supplemental interrogatory responses to correct the deficiencies Plaintiffs identified in Defendants' use of Rule 33(d). You stated that this was because (1) it is your view that any motion to compel supplemental interrogatory responses would be untimely, and (2) it is your view that Defendants have provided the information required by Rule 33(d). As discussed, we dispute both grounds as set forth in our prior letters. Indeed, as we noted on our phone call, some of the interrogatories call for information from time periods that were not studied by the panel of experts, including Interrogatory Nos. 22–24.

Second, regarding the production of documents related to the Mattis Policy, you stated that all responsive documents have either been produced, designated as part of the Administrative Record, or withheld subject to the deliberative process privilege. You confirmed that any documents withheld under the deliberative process privilege would be produced upon entry of a final order requiring the production of documents subject to Plaintiffs' prior Motion to Compel (ECF 177-1) and the Court's prior orders thereon (ECF 204; ECF 227) and any appeals thereto, including Defendants' pending Motion for Reconsideration (ECF 257).

* * *

Please confirm no later than August 23, 2019 that Defendants will provide the information requested above, and the anticipated production date. If you have any questions or wish to discuss these issues further, we are available for a further teleconference.

Sincerely,

Nicholas M. Lampros

Counsel for Plaintiffs

EXHIBIT 3

U.S. Department of Justice
Civil Division, Federal Program Branch

Courtney D. Enlow
Trial Attorney

Tel: (202) 616-8467
Email: courtney.d.enlow@usdoj.gov

September 6, 2019

By Email

Nicholas M. Lampros
Covington & Burling LLP
1999 Avenue of the Stars
Los Angeles, CA 90067-4643
nlampros@cov.com

Counsel for Plaintiffs

Re: *Stone v. Trump*, No. 17-cv-2459-GLR (D. Md.)

Dear Counsel,

I write in response to your letter dated August 13, 2019, in which Plaintiffs clarified their requests for certain data from the Department of Defense's ("DoD") Military Health System Data Repository ("MDR").

As an initial matter, Defendants maintain and incorporate by reference the legal and procedural arguments related to Plaintiffs' requests that we raised in our July 24, 2019 letter. However, in an effort to narrow the dispute, DoD is willing to do as follows.

First, Plaintiffs request the "underlying data that was extracted from the MDR to create the following charts and presentations, as well as the underlying data necessary to regenerate the following charts and summaries for the time period of June 30, 2016 to June 1, 2019: Health Data for Service Members with Gender Dysphoria, Nov. 2, 2017 (AR 002883-002904); Medical and Surgical Treatment for Gender Dysphoria, Nov. 7, 2017 (AR 002911-002940); Admin Data Presented During Panel Meetings (AR 002966-002976); Time To Return to Full Duty After Transition Surgery in MTFs (slide deck) (AR 002982-002985); Admin Data Presented During Panel Meetings (version 2) (AR 002986-002997); Data Extracts: Key information used by the Panel to make recommendations (AR 002999-003010); Health Data on Active Duty Service Members with Gender Dysphoria, Dec. 13, 2017 (AR 003011-003042); and Admin Data Presented During Panel Meeting (version 3) (AR 003043-003055)" (hereinafter "Administrative Record Documents").

It is Defendants' understanding that data underlying the Administrative Record Documents has already been produced to Plaintiffs in various productions. To provide a few examples, in Production 6, DoD produced documents with the identifiers DOD00014445

(USDOE00095125-95164) and DOD00014449 (USDOE00095170), and in Production 18, DoD produced a document with the identifier DOD000143323 (USDOE00268251). Defendants anticipate that there are additional documents within the productions that contain data underlying the Administrative Record Documents. Defendants are willing to search for and identify those additional documents within the productions and to provide a list of those documents by document identifier to Plaintiffs.

To the extent that other documents reflecting the data underlying the Administrative Record Documents exist and have not yet been produced, DoD is willing to produce them in an upcoming production. Defendants are unaware of any such documents at this time, but will conduct the appropriate inquiries to determine whether such documents exist.

Defendants will provide only the data underlying the Administrative Record Documents because the Administrative Record Documents were considered by the Department of Defense in forming its policy. Defendants will not, as Plaintiffs request, update the data underlying the Administrative Record Documents through June 1, 2019.[1] Data that post-dates DoD's policy was not presented to the Panel of Experts and was not before the Secretary of Defense when the challenged policy was developed, and is thus entirely irrelevant to Plaintiffs' challenge to the constitutionality of DoD's policy.

The Court recently denied the parties' summary judgment motions and found that Plaintiffs are entitled to discovery on "the evidence the Panel gathered and the military's evaluation of that evidence." Dkt. 263 at 58. That discovery necessarily does not extend to evidence that post-dates Secretary Mattis's February 2018 decision memorandum or evidence that was never gathered and presented to the Panel. Moreover, under no circumstances may Plaintiffs, Plaintiffs' witnesses, nor the Court "substitute its 'own evaluation of evidence for a reasonable evaluation' by the military" as Plaintiffs' purport to do through these interrogatory requests. *Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981)); *see also Rostker* 453 U.S. at 81 ("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, additional data not considered by the Department in forming its decision 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.,

[1] Defendants previously provided data post-dating the formation of DoD's policy because those documents were presented to the House Armed Services Committee. For example, in Production 27, DoD produced a document with the identifier DOD00143689 (USDOE00284622-00284631).

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)).

Plaintiffs assert that the data underlying the Administrative Record Documents "should be sufficient to allow Plaintiffs to determine" the answers to 13 separate inquiries. By making these 13 separate inquiries, it is unclear whether Plaintiffs request not only the data underlying the Administrative Record Documents but additional data as well. To the extent that these are separate requests, Defendants will provide supplemental responses to certain interrogatories, as set forth below, but aside from supplementing those responses, Defendants will not provide additional data. In addition to the legal and procedural defects with Plaintiffs' requests as outlined in our July 24, 2019 letter, providing such data would be an undue burden on DoD and would be disproportionate to the needs of the case, as explained below. *See* Fed. R. Civ. Pro. 26(b).

We understand from your letter that Plaintiffs' "requests for 'data' refer to data contained in the Administrative Database Military Health System Data Repository ('MDR')," and that Plaintiffs' requests are limited to DoD "running searches and extracting data from the MDR." It is Defendants' understanding that the data necessary to answer the majority of the 13 requests is not in the MDR. Specifically, all of the data needed to respond to Requests 2, 3, 5, 6, 7, 8, 9, 10, and 13 are not contained within the MDR.

We further understand that Plaintiffs "are not asking Defendants to search any personnel files, underlying medical records, field reports, or other back-up documentation relating to particular service members or medical plans." But to respond to certain of your requests, DoD would have to search for and review voluminous medical records of individual service members. For example, to respond to Requests 6 and 7 would require DoD to review individual medical records.

As an example of the burden to respond, Plaintiffs' Request 8 requests "[t]he incidence of suicide attempts among the study group population described in USDOE00002641, updated [through June 1, 2019]." But determining the incidence (defined as new cases during a specific time period, expressed as a proportion or rate) of suicide attempts during the specified time period requires the inclusion of all completed suicides. This would require manually cross-matching MDR suicide attempt data with the Armed Forces Medical Examiner System data on suicides. Completing this would require the names of all individuals who committed suicide during the time period studied and manually reviewing the files of a cohort of approximately 1,000 individuals.

Separately, Plaintiffs request "data on the costs purportedly incurred by Defendants in revoking the Open Service Directive and implementing the Mattis Policy, from June 30, 2016 to

June 1, 2019." Responding to this request would place an undue burden on DoD because it would require a determination of the total number of DoD and Service staff who have worked on the implementation of the Mattis Policy (where staff time is not tracked according to each individual subject or topic), the hourly compensation rate of each individual, and an estimation of the specific amount of time spent by each individual.

Second, the Department of Defense is willing to provide supplemental responses to interrogatories 23 and 24 that DoD anticipates will provide at least partial responses to Requests 1, 4, and 11. Interrogatory 23 states, "State, broken down by Military Service, the number of current and former service members whom military medical personnel have diagnosed with gender dysphoria since June 30, 2016." Interrogatory 24 states, "State, broken down by Military Service, the number of surgeries performed as treatment for gender dysphoria that the military has performed on current and former service members since June 30, 2016, Including as to each surgery the date, description of the procedure, and cost to the military of the procedure." Defendants have not identified any other interrogatory responses to supplement at this time.

Finally, Plaintiffs request that Defendants provide various types of information regarding the MDR itself. The MDR is accessed and queried by subject-matter experts. To the extent that Plaintiffs wish to learn more information regarding the MDR, Defendants will make a DoD official available for a deposition.

* * *

If you would like to discuss, I am available next week.

Best regards,

/s/ Courtney D. Enlow
COURTNEY D. ENLOW

EXHIBIT 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * * * * * * * * * * * * * * *	)	
JANE DOE 1, et al.,	)	Civil Action
	)	No. 17-01597
Plaintiffs,	)	
	)	
vs.	)	
	)	
MARK T. ESPER, et al.,	)	Washington, DC
	)	January 14, 2020
Defendants.	)	9:05 a.m.
	)	
* * * * * * * * * * * * * * * * * *	)	

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE COLLEEN KOLLAR-KOTELLY,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: (*Appearing Telephonically*)

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APPEARANCES, CONT'D:

FOR THE DEFENDANTS:	ANDREW CARMICHAEL, ESQ.
(Appearing Telephonically)	COURTNEY ENLOW, ESQ. U.S DEPARTMENT OF JUSTICE CIVIL DIVISION, FEDERAL PROGRAMS BRANCH 1100 L Street, Northwest Suite 550 Washington, DC 20005
REPORTED BY:	LISA EDWARDS, RDR, CRR Official Court Reporter United States District Court for the District of Columbia 333 Constitution Avenue, NW Room 6706 Washington, DC 20001 (202) 354-3269

THE COURT: Good morning, everyone.

MR. CARMICHAEL: Good morning.

MS. SLACHETKA: Good morning, your Honor.

THE COURT: This is in the matter of Jane Doe, et al., versus Esper, et al. And it's 17-CV-1597.

If Plaintiffs' counsel would identify themselves, please.

MS. SLACHETKA: Good morning, your Honor. This is Meg Slachetka of Lowenstein Sandler here on behalf of Plaintiff. With me I have my colleagues, Zachary Rosenbaum and Jennifer Delgado, as well as Jennifer Levi of GLAD and Shannon Minter.

THE COURT: Good morning.

Who do we have for the Defendant?

MR. CARMICHAEL: Good morning, your Honor. It's Andrew Carmichael from the Department of Justice on behalf of the Defendants. And with me is Courtney Enlow from the Department of Justice.

THE COURT: If you could speak up just a little bit more, I'd appreciate it.

I have a court reporter here. We've done these conference calls before. So I'm going to set out some premises and some questions, and I'll call on you. It may not be by name, since there are too many people on here, but I'll say Plaintiffs' counsel, defense counsel.

What I would ask is that you identify yourself with your last name so we ascribe the comments to the correct people.

I may control things in terms of how much you get to say on some of these issues. But at the end, I'll let you say whatever it is that you want to say additionally.

So this relates to a discovery dispute. I had issued a memorandum opinion back on September 13th of 2019 relating to various issues relating to the discovery requests. And this is a followup of, at this point, it looks like disputes.

Let me just set out what -- I understand the process was in making the decision for the Mattis plan. My understanding is there was a panel of experts that developed a plan and then the plan and whatever other documents there might have been were considered, and a report was done which presumably was sent to Mattis at the time.

So, defense counsel, in broad strokes, is that accurate?

MR. CARMICHAEL: Yes; with some differences, your Honor.

There was the panel that Secretary Mattis appointed in September.

THE COURT: Right.

MR. CARMICHAEL: And they met for a period of

three months until about the middle of December. And they came up with their formal recommendation and then they briefed the Deputy Secretary of Defense and the Vice Chair of the Joint Chiefs. And then there was a separate briefing to Secretary Mattis and then with a formal -- with a formal recommendation. And that is on, I think, January 11th of 2018. And that's in the record.

And then at the -- at that briefing, Secretary Mattis said: Okay. I'm going to accept your recommendation. Go ahead and make a report for me.

THE COURT: Okay. So we basically have the experts -- I'm trying to make a distinction between the plan and the report.

So the experts developed the plan. There were then briefings with two different officials in the Department of Defense with a formal recommendation, which -- I take it the formal recommendation was from the expert panel, the panel of experts.

And then there was a report that was developed based on, in part, the recommendation, which came from the panel of experts.

So is that accurate?

MR. CARMICHAEL: Yes. Yes, your Honor.

THE COURT: So as I understand it, Defendants have said that they have produced all of the documents that were

distributed or communicated to the panel of experts or whatever the panel of experts actually considered.

Is that accurate?

MR. CARMICHAEL: Yes, your Honor. That's accurate.

THE COURT: From the Plaintiffs' perspective, do you have a dispute with that? I'm only talking about the panel of experts and their material.

MS. SLACHETKA: Your Honor, I don't think we have a large dispute with that.

But I think --

THE COURT: Who is this, please?

MS. SLACHETKA: Apologies, your Honor. This is Ms. Slachetka.

I don't think we have a significant dispute here. I think we may have some document-level disputes that I don't think your Honor wants to wade into at this juncture. But in broad strokes, no.

THE COURT: Thank you.

So as I understand it, what you're now asking for is roughly two categories: One is metadata that you can search. Is that correct?

MS. SLACHETKA: Yes, your Honor.

THE COURT: Defendant, do you have a problem with that?

MR. CARMICHAEL: We're looking at how burdensome that is. Our intention was to produce metadata. So we thought we did, and we're just going back to -- they gave us some specific requests that they would want to make it searchable.

I don't think that that's going to be an issue. We're just verifying it, because that was our intent from the very beginning, was to have all the metadata. The original documents are loaded. So I don't think that's going to be an issue, your Honor.

THE COURT: The next thing as I understand it that Plaintiffs are asking for, leaving aside personnel and medical records stuff, is any documents or communications that were done that related or were created after the panel's work that were used in the preparation of the final report.

Am I describing what you're looking for in terms of the final report, Plaintiff?

MS. SLACHETKA: Yes, your Honor. This is Ms. Slachetka again.

And I think one thing that might be helpful for this conversation is -- and I'm happy to use whatever terminology Mr. Carmichael would like. But there's a panel report and then there's also what we've been referring to as the Mattis report, which is dated in February. I just

wanted to make sure we're drawing a distinction between the report that the panel prepared together with its recommendation and the report that was prepared at the end of February by Secretary Mattis, with that recommendation.

THE COURT: So as I understand it, you had received all the -- well, the Defendant says they've provided you with everything from the expert panel, which I assume includes whatever their report was.

Defense counsel, is that what you've produced, just so we're all talking about the same thing?

MR. CARMICHAEL: Yes, your Honor. They have created a draft slide show which has all the information they considered that they're needing. And that is in the production we gave.

THE COURT: So, Plaintiffs counsel, as I understand it, what you're asking for is after the panel of experts prepared whatever the report is they did, without getting into plan and report terminology issues, there was a final report that included the experts and may have included or have considered other documents. Is that what you're asking about?

MS. SLACHETKA: This is Ms. Slachetka again. Yes, your Honor.

And I would make one amendment to that, which is what the Government has produced to us, as reflected in the

joint status report, is -- I'm sure Mr. Carmichael will correct me if I get the terminology wrong -- but communications or documents that were provided to the voting members of the panel.

So among the documents that Plaintiffs continue to seek are communications and documents that were exchanged during the time period that the panel was working that were not communicated to only the voting members of the panel, but also other individuals who attended the panel meetings and other individuals within DOD who were briefing the panel or otherwise doing work and presenting to the panel to enable the panel to make its recommendation.

THE COURT: So we're back to the panel.

So is there material that was not produced that would be people who came and made productions or had discussions with the panel? Because it sounds like what you've produced is what the panel did itself, but you may not have produced other materials that others either briefed or provided to the panel.

Defense counsel?

MR. CARMICHAEL: Your Honor, we produced all of the information that the panel received and all of the communications of the panel.

What we have not produced is communications that were never shared with any panel member. So if it was a

lower-level person that attended the meeting that never actually produced their communication, the panel never saw them, we didn't produce that. But if a lower-level person communicated anything to the panel during this period, we produced it.

THE COURT: Plaintiffs' counsel, is there anything left on that, assuming they're correct?

MS. SLACHETKA: Yes, your Honor.

Our position is that there is something left. So just by way of example, there are individuals whose documents and communications we're still seeking during this time period. Some of them include a person named Dr. Terry Adirim, who we understand was the person who was responsible for collecting and synthesizing and analyzing the data that the panel relied upon.

And Mr. Carmichael is correct that the Government has endeavored to give us -- you know, whether it's a slide deck or some kind of summary of the data. But Plaintiffs continue to seek the underlying data that was reviewed and summarized for the panel. That's one example.

Another example is a gentleman whose name I always mispronounce, whose name is Lernes Hebert, who at the time was the Acting Deputy Assistant Secretary For Military Personnel Policy. And while Mr. Hebert was not a voting member of the panel, he attended the majority, if not all,

of the panel meetings. And so his communications and documents relating to the work of the panel are an example of another category of documents the Plaintiffs are seeking.

THE COURT: If you can spell for the court reporter the two individuals you mentioned.

MS. SLACHETKA: Absolutely. The doctor's name is Terry Adirim, A-D-I-R-I-M; and Mr. Hebert's first name is Lernes, L-E-R-N-E-S, last name H-E-B-E-R-T.

THE COURT: So, defense counsel, what about those two examples?

MR. CARMICHAEL: For those, I don't think that they were actually before the Court and were the subject of the motion, your Honor.

If you remember, we had a long negotiation over the summer as to who -- as to the dispute. And one of the disputes was to communications of panel members; and there was actually a *Vaughn* index -- a minute order that is what we were supposed to create on the *Vaughn* index. And that's what we've created on the *Vaughn* index. And I think you can do panel members all the same, because they have the same rules.

But if you start expanding that to anybody that attended certain meetings or you expand it to certain people, they actually have to have new briefings to say who those people are. You can't just say, like, in one sentence

in a conference call who these people are. They have to actually brief who these people are and why their communications would be necessary for the process.

So we think that there would need to be new briefing.

THE COURT: Let me stop you right there.

MR. CARMICHAEL: And so the --

THE COURT: Excuse me. Remember my rule. If I interrupted you, please be quiet.

The way the Plaintiffs have described it is they didn't just show up; they provided material. And what she seems to be asking for is the material that these two individuals provided.

Am I correct, Plaintiffs' counsel? It was actually material, not just that they attended?

MS. SLACHETKA: Yes, your Honor. There are documents and communications. And I would say that those two are examples. They're not the universe of individuals' documents that Plaintiffs are seeking.

THE COURT: So, defense counsel, it's documents these people produced to the expert panel. My understanding is -- I have to go back and look at the contours of what was presented. But I had understood that we were basically going to have Plaintiff be provided everything that the expert panel considered. If these two people came and

presented something, whether it got used or not, it seems to me it would be covered. I'm separating out anything about the final report. I'm talking about strictly the expert panel.

They're not talking about somebody who just came and sat in on the meeting. They're talking about two people, according to them, that produced documents.

So why aren't they covered? I don't think they need new briefing for that.

MR. CARMICHAEL: So their information they presented to the panel we already produced. We've considered that covered, because anything that these individuals produced to the panel would necessarily be covered on the other end because the panel member saw it. So this is only things that they never produced to the panel.

Anything that they showed to the panel would have been already produced on November 22nd or December 20th. And specifically, the Dr. Adirim, the underlying --

THE COURT: So --

MR. CARMICHAEL: I'm sorry, your Honor.

THE COURT: Go ahead. Finish.

MR. CARMICHAEL: Specifically as to Dr. Adirim, that was -- Plaintiffs made a request to go sort of backwards and say: Okay. She's so important because of the

medical data. We want how she put together the medical data.

So we went back. And that's part of their separate request for the underlying data. So we did that for her specifically at their request. But we haven't done it for other ones unless she identifies a specific person and says, "We need the underlying thing they didn't even present to the panel."

THE COURT: It's not clear to me, then. It sounds to me, Plaintiffs' counsel, as if they've given it to you. At least I'm missing the point of what you want.

MS. SLACHETKA: Your Honor, I think what -- where the disconnect is -- this is Ms. Slachetka -- is defense counsel is drawing a distinction and saying that only if any of these individuals' documents or communications were then provided to a voting member of the panel should they be produced to Plaintiffs.

And our contention is that under your September 13th opinion and order, you didn't artificially restrict the scope of the waiver of deliberative process privilege and you said that we were entitled to the production of documents that were used or considered in the development of the Mattis plan.

And so the way that we read that instruction was that it was not only a document that was literally provided

to a voting member of the panel, but also documents and communications that were created in the furtherance of the panel's work and in the drafting of the Mattis plan.

THE COURT: Well, the problem is that we're getting into issues about the plan versus the final report.

Let me separate it out. The plan is whatever the experts developed. Okay? We'll call it that. I'm not sure that's the way you all are talking about it. It's the way I'm talking about it.

The final report is the report after they -- after the panel of experts have produced their report. They had the briefings and Mattis requested that there be a final report.

So the final report we'll leave out. I know you're asking for stuff for that. Let's leave that out.

We'll still back at whatever the panel of experts considered.

You're making a distinction, and I'm missing it here. It seems to me that if they produce documents, as I understand it from defense counsel -- and correct me if I'm wrong -- if a document was produced, whether it was used or not by the panel, you have provided it to Plaintiffs. Is that correct? Or are you making some artificial distinctions about who it was produced to?

Defense counsel?

MR. CARMICHAEL: Well, I think that --

THE COURT: You're going to have to speak louder.

MR. CARMICHAEL: Yeah.

THE COURT: You're on a conference call.

We need to find out -- I'm trying to figure out what the difference is between what Plaintiff is asking for and defense say you have provided.

Have you provided everything that somebody has produced, whether to a voting member or not a voting member, but as part of the panel work? Have you produced all documents? That seems to be the dispute here.

MR. CARMICHAEL: Yes. Yes, your Honor. Anything that was actually produced to the panel we produced.

I think what this really is is this is sort of a fishing expedition, because they think that perhaps there were no -- that Mr. Hebert or Adirim made some conversations, or some other non-panel member, and they want to see whether or not there was some sort of comment that they said to somebody else that never even went in front of the panel.

But everything that they brought to the panel -- and when we're talking about voting members or nonvoting members, there is -- there is one nonvoting member, and we're going to add that person in, just to clear that particular one up, because it's a person that joined halfway

through who didn't actually cast a vote. So we'll clear that distinction up.

So it'll be every -- so this is all documents that were produced that the panel considered, all documents that the panel had and all their communications during that period regarding the panel we have already produced.

THE COURT: So I'm not sure, Plaintiffs, what you're asking for that you don't have, at least in terms of the panel.

MS. SLACHETKA: Your Honor, respectfully, I think Mr. Carmichael didn't quite answer your question, because I believe the question you asked was: Has the Government produced all documents, whether or not provided to voting members of the panel?

And I agree with Mr. Carmichael that the Government has endeavored to produce to us the documents that were provided to voting members of the panel. Where we have the dispute is documents and communications that did not pass through the hands of a voting member of the panel.

I'll just say briefly, one -- by way of example, one of the reasons that we're seeking these documents is -- I apologize -- Mr. Hebert -- I'm going to keep saying "Herbert" -- is an individual who attended nearly all of the panel meetings, including the meetings that occurred in late December and early January, towards the end of the panel

report that the Government has characterized, "These are the meetings in which the bulk of the deliberations took place."

And these are meetings at which -- for which no minutes were prepared.

And so Plaintiffs would very much like to know what occurred at those meetings. And we are seeking the communications and documents by way of example of Mr. Hebert in an effort to understand those facts.

THE COURT: So the voting members, they've indicated there's one nonvoting member and they've included him in it. So that's different.

In terms of Mr. Hebert, is there some documents that he has developed near the end, since, as she said, no minutes, that would reflect what happened at the meetings or his views or anything else? Anything else you haven't produced that he put together, "he" being Mr. Hebert?

MR. CARMICHAEL: So he produced a summary of what occurred at the panel and the summary of the recommendations and sent that to the lead panel member. And because it was sent to the panel member, it was -- it was shared.

What wouldn't be in there is his early-draft versions of that that he decided he wasn't going to send to the panel member because, you know, they weren't good enough at that point.

So --

THE COURT: So the summary of what occurred --

MR. CARMICHAEL: -- we can --

THE COURT: Excuse me, sir.

The summary you have produced; just not the earlier versions of his draft. Am I correct?

MR. CARMICHAEL: Yes. That is correct, your Honor.

THE COURT: So, Plaintiffs, I don't know that getting earlier drafts of something that he decided not to send forward -- but this summary you have. So I'm not sure what you're looking for.

MS. SLACHETKA: Yes, your Honor. I agree with that.

But his emails have not been produced to us. They've been withheld on the basis of deliberative process privilege. So that's an example of a large category of documents that we're seeking.

THE COURT: So what about the emails, defense counsel? Are there any?

MR. CARMICHAEL: Emails to panel members. There are lots of these emails during the period. But his email to panel members, anything he communicated to a panel member, would have been disclosed. So things that would not be included are things that he did not communicate to panel members.

THE COURT: I'm not sure, Plaintiffs' counsel, that you're entitled to anything beyond what he sent to -- his emails to the panel members. You're going to have to be much more specific about what you want. This seems to me, you know, just fishing around here.

If he did emails and they went to the panel members, whether it was the nonvoting member or the voting members, you have them, according to the Defendant. So I'm not sure what other emails there might be if they didn't go to them so that they wouldn't be included in their considerations.

I'm not sure what you're asking for. So I think that goes beyond it.

Is there anything else on this issue of what you think you don't have other than the metadata that you want in relationship to what I'll call the expert panel, whatever their communications are, whatever came to them and what they ultimately put together? Anything else on that?

MS. SLACHETKA: Yes, your Honor.

I wanted to go back to something that Mr. Carmichael referenced earlier, which was with respect to the data that we were seeking that was worked on by Dr. Adirim.

I know that the Government represented that they would go back and search for those documents, and they did

make a production of data in late December.

However, the production that we received consisted almost entirely of what we call, you know, one-page slip sheets. So it's a one-page image that says: This document is an Excel file. And we haven't actually received the underlying Excel files. And I know this is something we'll continue to discuss with the Government, but I wanted to raise it because I don't think we've yet received all of the underlying data that the Government has represented it would produce.

THE COURT: Government, are you going to be producing the underlying data?

MR. CARMICHAEL: Yes. I mean, we thought we did, though there was -- they raised this with us in a conference call Tuesday and then again on Thursday.

So we're having a last look at it to make sure that that was -- that that included -- that will be produced. I think we noticed a couple already specifically in the production of documents that were inadvertently left out. And we'll probably have to do a reproduction of that part.

THE COURT: Can you tell me what kind of a phone you're talking through? Because we're having a lot of trouble, frankly, understanding you. So are you talking through a --

MR. CARMICHAEL: I'm sorry. It's just -- it's just a regular phone, your Honor. I'm sorry, because we usually come into the office for this. Because Ms. Enlow and I have a flight to catch in a couple hours to get to a deposition, you know, so I'm using a personal phone instead.

THE COURT: Is it a hard line or a cell phone?

MR. CARMICHAEL: It's a cell phone, your Honor.

THE COURT: That's the problem.

You need to slow down, be distinct --

MR. CARMICHAEL: Talk slowly.

THE COURT: Yes. Be distinct in your enunciation and loud, so we can hear you.

We'll leave the issue of the metadata and the underlying material that relates to the data as an issue that you're in the process of taking care of in terms of the panel, the expert panel.

So let's move to -- there's three other issues. One is the issue of after the report from the experts came, and there then was a final what I'll call the final report that was put together that had the recommendation in it. And as I understand it -- so this is after the expert panel had produced their work.

Plaintiffs are asking for any other documents that were prepared or considered either for the briefings or that went into the final report or recommendation.

Am I correct, Plaintiff, that that's what you're asking for?

MS. SLACHETKA: Yes, your Honor.

THE COURT: So what about that? Are there documents? Defense counsel?

MR. CARMICHAEL: Draft documents, your Honor. Your Honor, this is Mr. Carmichael. There are drafts of the report, because there were several versions.

Essentially, the final report, the February 22nd report, is the summary of the 3,000-page administrative record. I think the Secretary Mattis thought nobody was going to read a 3,000-page administrative record but wanted a good summary that we could present to the President and to Congress.

And there are -- you know, over the course of about a month and ten days, there are drafts of that report that sort of float around within his senior executives, where people put comments on those drafts and decide various things to highlight from the 3,000-page administrative record.

But there's nothing new that has not been produced to Plaintiffs. This is just drafts and the deliberative process as people are deciding what is important to actually summarize from this.

THE COURT: As a practical matter, the report

reflects what Mattis had already decided. Is that correct?

MR. CARMICHAEL: Yes, your Honor. If you look at the recommendations from January 11th, 2018, they were exactly the same from what was in the report from February 22nd, 2018.

THE COURT: So, Plaintiffs' counsel, what are you asking for?

MS. SLACHETKA: Your Honor, I think again Mr. Carmichael is leaving out what we think is a significant category of documents that we continue to seek, which are email communications concerning that culling process, the drafting of the report, the information that would be incorporated into the report.

And I know Mr. Carmichael characterized it as a summary of the administrative record, but we know, because Defendants have produced certain email communications between DOD and external third parties, some dated mere days and weeks before the publication of the Mattis report in February, that there was external information coming in and new information being incorporated into the report. So that's by way of example the kind of emails.

And I think in particular we cited in our submissions an individual William Bushman, B-U-S-H-M-A-N, who was at the time a special assistant to Secretary Mattis, who we understand was responsible primarily for drafting the

Mattis report. And so he's an example of an individual whose emails we continue to seek.

THE COURT: Defense counsel, is there outside material that came in from third parties?

MR. CARMICHAEL: There was -- I believe there was a phone call with additional studies with an outside expert. I think there were three, maybe, additional studies. Those three additional studies were provided by the outside person and they're -- they're in the report. And the email in which he provides the outside studies are in the report.

We're not aware of anything else that was provided by an outside person that we didn't produce. So these communications are all essentially how to phrase the draft rather than additional information.

THE COURT: In terms of Mr. Bushman, is there material that he -- besides his writing various drafts and doing the final report, is there other materials that relate to him? And if there are, how would you characterize them?

MR. CARMICHAEL: Well, he was one of Secretary Mattis's special assistants and one of the people working on the report.

There was communications. So what I think the defense counsel -- or the Plaintiffs' counsel is getting at is there was an email where Secretary Mattis wanted him to contact two additional people and get their views because

somebody else had asked him to do that. And we included that, those communications with those outside people. We produced those.

And that's I think what Plaintiffs' counsel is getting at. We're not aware of anything else there as to any outside communications.

So everything else would be internal as to how to -- as to creating the actual draft and comments on the draft. The draft went out to some subject-matter experts, and they would do some comments: Maybe you should highlight this; maybe you should not highlight this; maybe you should rephrase this; rephrase it that way. So there's that sort of internal communication between January 11th and February 22nd.

THE COURT: Plaintiffs' counsel, it sounds as if what you are looking for in terms of the outside material that they've produced it, according to the Defendant.

MS. SLACHETKA: Yes, your Honor. And to be clear, the outside material was an example of the kind of communications that we know exist. It's hard for us to articulate with specificity what we don't have.

But we are continuing to seek internal DOD communications while the report was being drafted. And Mr. Bushman's emails are an example of that type of document.

THE COURT: So what you want is if he sent out drafts, what people's comments were back?

MS. SLACHETKA: Yes.

THE COURT: Defense counsel?

MR. CARMICHAEL: Your Honor, as you pointed out, the recommendation and the final product didn't change at all. It's exactly the same from January 11th to February 22nd.

So really going through these various comments of how you're going to phrase something in a report that you're going to present to Congress and the President really doesn't have any bearing on the actual recommendation itself or the actual policy itself. It's just what DOD is choosing to highlight from the 3,000-page administrative record in that report and essentially what things they chose not to highlight in earlier drafts. Essentially, these drafts are things that Secretary Mattis did not accept. And only the one that he accepted of the summary should be -- has any moment.

THE COURT: Plaintiffs' counsel, I think unless -- at least at this point, unless you come up with something more specific, you indicate you can't ask for something you don't know. Well, I can't order something that you can't tell me about. So I'll leave that issue out there.

It seems to me you're going to have to be much

more specific about what you want, at least at this point. It doesn't sound as if you've got the outside materials. I'm not sure that getting a series of different drafts or what they want to highlight or not highlight is going to go anywhere in terms of what their presentation is, as long as it didn't change from what originally was presented from the panel of experts and the briefings.

At least at this point, I'm not going to do anything more in terms of ordering something. The metadata is definitely something that -- or data that you are required to get, it's still sitting out there.

Let me move to two other major areas. One is the medical records and one is personnel records. I think one thing that does need to be done, if you do not have it -- and it's unclear why you don't -- but at any rate, whether you asked for it or not, I think you need to get records, medical and personnel records, of the Plaintiffs that you do represent.

Do you have that material or not, Plaintiffs?

MS. SLACHETKA: No, your Honor, we don't, although defense counsel provided us with I think the official form that our Plaintiffs need to fill out in order to formally request those documents. So we are proceeding with that process.

THE COURT: My suggestion, very strongly, is that

you get those records. And you should get the full records. They're your clients. There shouldn't be any HIPAA things or anything related to it. You should get the full personnel records for them and the full -- and everything -- and the medical records and take a look at them because they obviously will be the records that everybody else is going to have in terms of how they're set out, since most of these things are frankly done on the computer, they're not like the old handwritten notes. At least that's my understanding, especially since they're recent records. They're not going to be old records from the '90s or something.

You need to take a look at that to see whether in looking at that you can come up with more grounds as to why you should get the medical records broadly beyond your clients and the personnel records.

And let me point out, you've asked that in terms of their going for appointments, of the service members that are transgender, there is a combination of their requesting a medical appointment and evidently some required appointments.

And putting it in very summary terms, the expert report indicated they went for more medical appointments than others that were not transgender.

Now, it doesn't say what these medical

appointments were about or what actually happened at them. So they could show up at the medical appointment and say: There's nothing wrong. I have nothing to tell you. We don't know that because the panel never looked to see what the records actually had.

So I'm cabined to some degree by the Court of Appeals' opinion which made it pretty clear that going beyond what was considered by the panel, Mattis, or anybody else is a problem.

So if the experts did not look at the personnel records, did not look at the individual medical records, and you're asking to look at it, it does go beyond that.

I also think there's problems with, frankly, your grounds for it. I think it's insufficient, which is why I'd suggest you get your clients' records and look at them and see whether there's another way of getting at this material.

The problem that I see -- and you can make whatever arguments you want about this -- is that the medical appointments are just simply a statistic of going. It doesn't tell you, frankly, one way or the other whether they went and indicated they had any mental issues or any issues relating to their diagnosis or their transgender status.

I mean, they could be required to go and say, "I have no problems" or they could at the appointments they

actually made have problems. There's no way of knowing that, based on the information the Defendants put together, frankly. And you're trying to figure out which ones they -- which were required and which ones were not. It's not going to tell you that, either.

The only way would be is if you actually looked individually at each of the records of everybody who's transgender. I'm not prepared to order that. I think that invades privacy, has a lot of other issues. And you have not set up enough grounds to basically look at the appointments to see whether when they went to them, even if they went more often, they actually had any issues that made a difference, that differentiated them from everybody else who wasn't transgender.

The personnel records are the same sort of problem. This is again your wanting to show that the members didn't have lower levels of deployability and were not disruptive.

Again, looking at all the personnel records, I think, is a problem. Nobody developing the Mattis plan appears to have looked at any individual record or personnel record; so I'd be ordering something they didn't consider. Again, I have a problem with what the grounds are for you -- this is very confidential. We don't really have a class action here. So you're looking at beyond the people that

you're recommending.

So at least on the record I have now, I'm not prepared to order them to make accessible all of the personnel records of everybody who would be considered transgender or all of the medical records of somebody who would be considered transgender.

You're going to have to come up with different -- I'm not going to close the door altogether. Maybe you'll figure out another way of doing it.

But I do think it would be helpful to look at your clients' records and see how they list deployability. Where is it? How easily extracted is this? Or some other way of getting at the information that you want, which is that they're not less deployable. And you're obviously -- you also want to show that the fact that they went to the doctor more often doesn't necessarily mean that they had problems with being transgender. They just may have been required to go, but nothing came out of it.

So at least in terms of my ordering, which appears to be what we're getting at, sort of a broad review on their part or making it accessible to you, I am not going to do that without a better grounds, particularly in light of the Court of Appeals' opinion which indicated -- I'm not talking about Judge Williams's opinion, but the other two judges -- that they appeared to cabin what I would be able to require

from the Defendant, sort of outside what was actually considered in developing what we've been calling the final Mattis plan.

So that's where I am on those two requests.

Plaintiffs' counsel, anything you want to comment?

MS. SLACHETKA: Yes, your Honor.

Thank you for that.

We will work with defense counsel to request our clients' medical records.

And Mr. Carmichael will correct me if I'm wrong, but I don't believe Defendants have communicated to us a formal process by which we would request our clients' personnel files. But we can speak to the DOJ about that and come back to you if there are issues.

The only other thing I wanted to raise on this point was an issue that was highlighted -- I believe it was Ms. Enlow's email to chambers in response to some of the questions that your Honor had posed to us, specifically on the deployability information and to your point, your Honor, that -- what was relied upon by the panel in terms of the deployability information. And Ms. Enlow's email reflected that the panel views databases where such information is routinely inputted in the ordinary course of business.

And those are databases that contain aggregate data regarding deployment history, service member physical

profile data and separation.

So that may be an avenue to explore in order for us to seek this specific data that may not be reflected in personnel files.

But I suspect we need to speak some more with the Government about those types of databases.

THE COURT: That's fine. I mean, I'm not foreclosing any of this. I'm just looking at all the records and saying it isn't going to happen based on the grounds that I have at least at this point.

As I said, it may not turn out to be helpful. But I do think looking at your own clients' records will tell you how these records are kept and whether there's an easier way or another way of getting at the information that you actually want.

So I would leave it -- I'm assuming that the Defendant doesn't have any problem providing that, assuming they put the proper paperwork in, to get their clients' medical records as well as personnel records or, if the deployability is not in those records, in whatever record it is in. I'm assuming it's in their personnel records, but I could be wrong.

So do you know where the deployability for each of these people would be? Would it be in either one of those records, defense counsel?

MR. CARMICHAEL: Well, the current deployment status would be in the personnel record. I don't know if a history would be.

But generally, service members are entitled to any of their own records, just kind of across the board. So we can work with the Plaintiffs' counsel to provide them with any of their own records.

THE COURT: What I'd like to do is to set sort of an outside date by which you would have hopefully have resolved more of these, the metadata, have looked at some of these things.

Do you have a proposal as to sort of an outside date by which hopefully these discovery issues have been resolved or provided?

Plaintiffs' counsel?

I'm trying to set up an outside -- I don't want to just leave this open-ended.

MS. SLACHETKA: Yes. Yes, your Honor.

We would love to set that date for the end of the month.

THE COURT: That's what? Two weeks? Three weeks? Two weeks.

MS. SLACHETKA: Yes.

THE COURT: I think that's probably not -- well, let me just ask.

Defense counsel?

MR. CARMICHAEL: I don't know, just because -- I don't know. I just got the whole request on Thursday for the metadata. I hesitate to say we can absolutely do that, just because I haven't heard back from my lab yet on how quickly they can do a production with the overlay. You know, it seems reasonable to me, but I don't know the answer right now.

THE COURT: My suggestion would be a different --

MR. CARMICHAEL: It's probably pretty --

THE COURT: My suggestion would be the following: I would ask that I get a status report by March 1st, which would indicate all of the discovery is done as we have discussed it. If you've got individual things in the meantime before we reach that date and you need to get back to me, then we can do that. I'm not precluding that. But in terms of discussing additional discovery things, you know, if something comes up once you start looking at this.

And at that point in the joint status, hopefully, that's the end of the discovery; and you set out whatever briefing schedule you want.

So I would see the status report as discovery is finished.

You've gotten what you're going to get, Plaintiffs' counsel.

And we're setting out a briefing schedule to move the case forward.

I'm not precluding, as I said, in the meantime between now and this report -- if there's issues that come up, as they have, I'm happy to engage you if you come up with better grounds or once you look at the stuff there's other ways of getting material and you cannot work it out among yourselves, which I hope you would. But if you can't, then get back to me.

But I think that is an outside date, both in terms of the discovery done, looked at, follow-through and setting a briefing schedule going forward.

So that would be my -- I think the way to go. It may -- you may not need all of that for the discovery. But you're still going to have to look at things. There's a fair amount of stuff here that's going to take some time for you to look at once you get it to see if there's anything else that it prompts you to get, because I want a drop-dead date for discovery. I don't want to have this issue keep popping up, especially if we're moving to briefing. I want the discovery done and then we'll move to the briefing.

So you would propose whatever briefing schedule you're going to have. I know defense counsel has indicated motions, and I don't know whether Plaintiffs' counsel wants to file some motions as well. All right?

So I'm going to leave it to you to -- I've gone as far as I know based on the information. Obviously, the metadata, et cetera: Go back and make sure all of this information is there. Get the records. Take a look at it. See the -- talk about the database and see if there's some way of culling some information out, especially if that's what they relied on, is this database about deployability. It seems to me that potentially would be within the purview of the Plaintiffs.

So anything else from Plaintiffs' counsel?

MS. SLACHETKA: Your Honor, if I may: When you say a March 1 cutoff for discovery, are you contemplating document production or all fact discovery, including all fact depositions on that date?

THE COURT: If you can get it done by then, yes. If you think you need more time -- what I'm trying to do is set it so you've done the discovery and we're doing a briefing schedule. If you need more time to do all of that, wrap it up, including depositions, tell me a day.

What I want to do is have an outside date. You may have different things that come up in the meantime, and I understand that. But an outside date with a proposal for a briefing. If you need more than that, tell me what you need.

MS. SLACHETKA: Thank you, your Honor. I think

that setting March 1st for a document -- completion of document production should be workable. I'm sure Mr. Carmichael can weigh in if he disagrees.

But I think we'll probably need a little bit more time to complete fact depositions. On our end, we were thinking about an April 30th close of fact discovery.

THE COURT: All right. If you get it all done by then, that's fine with me. By that point, we would be getting a status report setting out a briefing schedule.

Defense counsel?

MR. CARMICHAEL: Yes, your Honor. That's all right with us. I think we probably could finish that by the end of -- we had scheduled completing ours by the end of March. So I still would want to keep the joint status report date, so we could at least at that time say: Here is the schedule for all our depositions, and we'll be done by this time.

THE COURT: What we'll do is leave the March date. We'll expect document production to be done. And you would at that point be indicating what else you need to do, understanding that fact depositions will probably not have been completed.

So you would then set out a schedule to complete the rest of the discovery and I would wait before setting out a briefing schedule until you've actually finished

everything. All we do is -- I do orders and we keep extending them. It's a waste of time. So what I would do is, let's do reports around the discovery. Get that done and then have a report that sets out a briefing schedule that we stick to. All right?

Does that work, Plaintiffs' counsel?

MS. SLACHETKA: Yes, your Honor.

THE COURT: Defense counsel?

MR. CARMICHAEL: Yes. That works for us, your Honor.

THE COURT: All right. Thank you. I appreciate it.

And the emails were very helpful in terms of figuring this out, so I could have at least somewhat of an intelligent conversation on my end in terms of what is a fairly complicated process and factual record.

I think the court reporter will put together -- will look at the transcript. She does realtime, so she's really good. And in the context of what you were saying, she may contact you to figure out what it is that you were saying.

We have had trouble with grasping what you're saying, defense counsel, which is -- I understand, and I appreciate the fact you're doing this on your way out to fly out. Cell phones are not the clearest way of doing it.

So she's probably going to reach out to you to try to figure out what's missing if the tape she has doesn't make it clear enough, just so you know.

The parties are excused. Take care.

(Proceedings concluded.)

CERTIFICATE

I, LISA EDWARDS, RDR, CRR, do hereby certify that the foregoing constitutes a true and accurate transcript of my stenographic notes, and is a full, true, and complete transcript of the proceedings produced to the best of my ability.

Dated this 14th day of January, 2020.

/s/ Lisa Edwards, RDR, CRR
Official Court Reporter
United States District Court for the District of Columbia
333 Constitution Avenue, NW, Room 6706
Washington, DC 20001
(202) 354-3269

EXHIBIT 5

Exhibit 5

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*,

Plaintiffs,

v.

MARK T. ESPER, in his official capacity as Acting Secretary of the Department of Defense, *et al.*,

Defendants.

Civil Action No. 17-cv-1597 (CKK)

DECLARATION OF TERRY ADIRIM, M.D., M.P.H.

I, Terry Adirim, declare as follows:

1. I am Terry Adirim, M.D., M.P.H., Deputy Assistant Secretary of Defense for Health Policy and Oversight in the Office of the Assistant Secretary of Defense for Health Affairs. I have held this position since July 2016. Before coming to the Department of Defense (DoD), my prior positions included: Professor of Pediatrics and Emergency Medicine at Drexel University College of Medicine and attending physician at St. Christopher's Hospital for Children (2014-2016); Director of the Office of Special Health Affairs at the Health Resources and Services Administration in the U.S. Department of Health and Human Services (2010-2014); and Senior Advisor in the Office of Health Affairs at the U.S. Department of Homeland Security (2007-2010). I graduated from the University of Miami Miller School of Medicine with research distinction and completed pediatrics training at the Children's Hospital of Philadelphia. I completed pediatric emergency medicine and sports medicine fellowship training at Children's

National Medical Center in Washington, D.C. I also earned a Master's degree in Public Health from the Harvard School of Public Health. I am board certified in pediatrics, pediatric emergency medicine and sports medicine. I have been significantly involved since coming to DoD in matters of DoD policy on transgender healthcare.

2. The information in this declaration is based on my personal knowledge and upon my personal review of information made available to me in my official capacity. I am submitting this declaration in support of Defendants' opposition to Plaintiffs' Motion to Compel, Dkt. 216 ("Plaintiffs' Motion"). I have reviewed Plaintiffs' Motion, including various categories of healthcare-related disputed documents identified by Plaintiffs.

3. During the course of the Panel of Experts review process, my office compiled and presented to the Panel for their consideration relevant health-related data, information, and statistics. I understand that the three versions of this Administrative Data presented to the Panel was produced in this litigation as part of the Administrative Record at Tabs 92, 96, and 100.[1] In addition, we produced to the Panel data and analysis compiled as "Health Data for Service Members with Gender Dysphoria." I understand that the two versions of this compilation were produced in this lawsuit as part of the Administrative Record at Tab 82 (dated November 2, 2017) and Tab 99 (dated December 13, 2017). In addition, at the end of the Panel of Experts process, portions of this data was compiled in a document titled, "Data Extracts: Key information used by the Panel to make recommendations" and presented to the Deputy Secretary of Defense and Vice Chairman of the Joint Chiefs of Staff. Again, I understand this document was made

[1] I understand that the final version of this Administrative Data was also provided to the Deputy Secretary of Defense and Vice Chairman of the Joint Chiefs of Staff as part of a "Summary of Information Presented to the Panel," and has been furnished to the Plaintiffs in this litigation. *See* Rosenbaum Decl., Dkt. 214, Ex. K.

available to the Plaintiffs as Tab 98 of the Administrative Record. *See also* Rosenbaum Decl., Dkt. 214, Ex. H. Subsequently, in 2019, my office compiled and produced in response to requests by the House Armed Services Committee ("HASC"), certain data relating to service members with a diagnosis of gender dysphoria, including medical treatment and costs, as well as a chart comparing the average cost of medical treatment of service members generally with the cost for members with gender dysphoria. The data for the information provided at the HASC's request was current as of February 1, 2019. I understand the data provided to the HASC were produced to the Plaintiffs here on April 30, 2019. *See* Rosenbaum Decl., Dkt. 214, Ex. G and I.

4. In their Motion to Compel, I understand the Plaintiffs to complain that DoD has not produced "the underlying data, personnel files, field reports and other back-up documentation" that support the data compilations, analysis, and conclusions described above and previously produced to Plaintiffs. Plaintiffs' complaint reflects their misunderstanding of how DoD manages healthcare data.

5. To create the summaries, charts, and documents described above for the Panel of Experts, the Deputy Secretary of Defense and Vice Chairman of the Joint Chiefs of Staff, and the HASC, my office ran searches and extracted data from the Administrative Database Military Health System Data Repository ("MDR" or "Admin Database"). The MDR is DoD's centralized data repository that captures, validates, integrates, distributes, and archives the Military Health System healthcare data. It receives and validates data from DoD's worldwide network of more than 260 healthcare facilities and from the TRICARE Purchase Care program. The MDR processes more than 60 billion records annually and provides support information to DoD decision-makers responsible for managing healthcare policy.

6. The MDR is similar to an administrative claims database used by other health plans and health systems. The Administrative Database does not contain the actual medical records but rather certain data points that were extracted from the medical records. No personnel medical records were searched and no documents were created, rather searches were run within the database and analyzed using a standard statistical analytic package called SAS, which produced the numbers and outputs that supported the summaries, charts, and documents given to the Panel of Experts and HASC.

7. The MDR permits searches by using the International Classification of Disease (ICD) codes. These codes allowed my office to identify active duty service members with a diagnosis of gender dysphoria and to create comparisons of healthcare utilization between service members with gender dysphoria and service members without gender dysphoria, as requested by the Panel of Experts.

8. Plaintiffs reference footnotes 64, 65, 66 of the February 2018 Department of Defense Report and Recommendation on Military Service by Transgender Persons in their Motion. To create the chart and documents referenced in footnotes 65 and 66 regarding mental health visits, my office extracted data from the Admin Database by using ICD codes. This is likewise true for the data collected comparing average costs seen at Exhibit I to the Rosenbaum Declaration and for the document entitled "Summary of Information Presented to the Panel" seen at Exhibit K to the Rosenbaum Declaration.

9. Regarding footnote 64, which analyzes the suicidality of service members with gender dysphoria, DoD contracted Kennell and Associates, Inc., ("Kennell") a research and consulting firm specializing in healthcare policy analysis. My office shared our methodology for using the Admin Database once filtered to service members with gender dysphoria and then

Kennell used their own analysis to create comparison of mental health diagnoses in service members with gender dysphoria and mental health diagnoses in service members without gender dysphoria.

10. My office used the Admin Database rather than pulling the underlying medical records for all service members with gender dysphoria because collecting these medical records would have constituted a considerable burden at an unwarranted cost, particularly given that the data is already collected. Because medical records and personnel files are kept in hundreds of separate locations and databases, based on each Service member's military component, gathering each individual's record would have proven incredibly challenging and wholly unnecessary. Such an effort would likely have taken many months, and would have cost the Department hundreds of man-hours and considerable resources. Moreover, give the diffuse nature of the records at issue, gathering the personnel files for these Service members would have created a stronger likelihood of the unintentional disclosure of private medical information, as opposed to using the Admin Database.

11. Likewise, the Plaintiffs' request for data, personnel files, and field reports would constitute an undue burden on the Department, entail considerable cost, and would likely lead to the unintentional disclosure of private medical information. Harms the Department purposefully avoided by extracting data from the Admin Database instead of gathering the individual medical records, personnel files and other raw data.

12. To meet the Plaintiff's demands to produce "the underlying data, personnel files, field reports and other back-up documentation," DoD would have to hire a third-party contractor at a cost of likely hundreds of thousands of dollars. DoD does not have the manpower within the Office of the Assistant Secretary for Health Affairs or its other health agencies to perform this

task. This is primarily because the task demanded as noted above, would require extracting the electronic medical records from multiple, separate data systems, for example a pharmacy system, our patient records system and the test result system. This would take a third-party contractor considerable time. It could take months if a team of analysts were hired, and would likely take over a year if only a few people were hired full-time.

13. Moreover, even if DoD were to produce the records after many months of collecting them from multiple data systems, Plaintiffs would need to review each record and then upload the material into a database in order to perform any statistical analysis. The database would include millions of data points for 1.4 million active duty service members, and this data would have personal identifying information and thus would have to be maintained in a highly secure environment.

Pursuant to 28 U.S.C. § 1746(2), I declare under the penalty of perjury that the foregoing is true and correct.

Executed on June 24, 2019.

Terry Adirim, M.D., M.P.H.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*, *Plaintiffs*, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, *Defendants*.	Case 1:17-cv-02459-GLR Hon. George Levi Russell, III

[PROPOSED] ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO SERVE ADDITIONAL DISCOVERY

Upon consideration of Plaintiffs' Motion for Leave to Serve Additional Discovery, it is hereby ORDERED that Plaintiffs' Motion is DENIED.

DATED this _____ day of _____, 2020.

Hon. George L. Russell, III
United States District Judge