





1 On March 12, 2020, the Government responded, agreeing with Plaintiffs that many of the  
2 topics of inquiry implicate deliberative process privilege issues currently before the Ninth  
3 Circuit. The Government also informed Plaintiffs that many of the remaining topics of inquiry  
4 could be pursued through the depositions of individual DoD officials whose depositions were  
5 already being scheduled. *Id.* ¶ 4, Ex 3.

6 Plaintiffs responded to the Government's letter on March 18, 2020, stating that they  
7 would take the noticed Rule 30(b)(6) deposition off calendar and work with Defendants on  
8 rescheduling it for a mutually agreeable date in the future. *Id.* ¶ 5, Ex 4. Plaintiffs acknowledged  
9 that the Ninth Circuit stayed "the district court's December 18, 2019, February 3, 2020, and  
10 February 7, 2020 orders[,]" *id.*, but clarified that they did not believe that the Ninth Circuit's  
11 administrative stay applied to Plaintiffs' Notice. Further, Plaintiffs asserted that the Ninth  
12 Circuit's stay did not apply to this Court's Order, also issued on February 3, 2020, "that  
13 deponents should answer questions over any deliberative process objection, and the deposition  
14 will be sealed until a determination can be made on the Government's purported objection." *Id.*  
15 ¶ 5, Ex 4. (quoting 2/3/20 Hrg. Tr. at 64.). Moreover, Plaintiffs stated that "the Government is  
16 free to designate as representatives witnesses who are already being deposed in their individual  
17 capacity; however, these witnesses will need to sit for up to seven hours of questioning in their  
18 individual capacity and for up to seven hours in their Rule 30(b)(6) capacity." *Id.* ¶ 5, Ex 4.

19 On April 17, 2020, the Government responded with a letter detailing its specific  
20 objections to each of Plaintiffs' Rule 30(b)(6) deposition topics and proposing to narrow the  
21 scope of those topics. *Id.* ¶ 6, Ex 5. The Government further noted that the Ninth Circuit had  
22 stayed this Court's February 3, 2020 Order in its entirety and that, therefore, except where  
23 otherwise noted, the Government expected to instruct its witness not to answer questions where  
24 the answer would be protected from disclosure pursuant to the deliberative process privilege. *Id.*  
25 Moreover, the Government identified DoD employees and former DoD employees whom  
26 Plaintiffs were already scheduled to depose that could likely provide answers to the majority of  
27 the non-privileged portions of Plaintiffs' identified topics. *Id.*

1 The parties met and conferred regarding the Government's letter on April 21, 2020 and  
2 Plaintiffs declined to further narrow their Rule 30(b)(6) deposition topics. Accordingly,  
3 Defendants now seek entry of a protective order to limit the identified topics of Rule 30(b)(6)  
4 testimony sought by Plaintiffs to non-duplicative and non-privileged information regarding  
5 DoD's reasons and justifications for the challenged policy.

### 6 STANDARDS GOVERNING A RULE 30(B)(6) PROTECTIVE ORDER

7 Federal Rule of Civil Procedure 30(b)(6) permits a party to name a government agency  
8 or other entity as a deponent and "describe with reasonable particularity the matters for  
9 examination." The agency must then "designate one or more officers, directors, or managing  
10 agents . . . and it may set out the matters on which each person designated will testify." A party  
11 may seek to limit a Rule 30(b)(6) deposition topic that seeks privileged material or is otherwise  
12 burdensome, irrelevant, or otherwise inappropriate through a protective order. *See, e.g., Adidas*  
13 *Am., Inc. v. TRB Acquisitions Ltd. Liab. Co.*, 324 F.R.D. 389, 401 (D. Or. 2017). While privilege  
14 may be protected by instructing a witness not to answer at a 30(b)(6) deposition, *see generally*  
15 *Rule 30(c)(2)* ("A person may instruct a deponent not to answer . . . when necessary to preserve  
16 a privilege . . ."), courts should consider whether other grounds exist to resolve discovery  
17 disputes *before* the need for, or consideration of, formal privilege assertions, including whether  
18 the information sought is relevant and necessary to litigate the claims. *See, e.g. Alexander v. FBI*,  
19 186 F.R.D. 188, 192 (D.D.C. 1999). A plaintiff may overcome the deliberative process privilege  
20 "if his or her need for the materials and the need for accurate fact-finding override the  
21 government's interest in non-disclosure." *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir.  
22 2019) (quoting *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)).

### 23 DEPOSITION TOPICS AT ISSUE

24 **Topic 1.** Panel of Experts, including: its formation; its mission, purpose, assignment(s), and  
25 deliverables; the potential courses of action and/or policy options it considered; the issues it  
26 addressed; the information it requested and/or considered; its deliberations, conclusions, and  
27 recommendations, including to whom those recommendations were made; and the Panel's Final  
28 Report and Recommendation.

1 **Defendants' Objection.** Unduly burdensome and disproportionate to the needs of the case  
2 because it is duplicative of material previously sought and provided through document  
3 productions, interrogatory responses, and expected deposition testimony of other DoD personnel.

4 **Scope of Response.** Notwithstanding the above objections, DoD will identify an individual to  
5 answer questions regarding the reasons and justifications of the challenged policy including the  
6 meaning of acronyms, military phrases, and jargon that appear in the Administrative Record and  
7 the Panel's meeting minutes that may not be readily understandable by individuals without a  
8 military background.

9 **Identified DoD Employee or Former Employee Who Plaintiffs Are Scheduled to Depose.**  
10 Mr. Anthony Kurta, Mr. Thomas Dee, Dr. Terry Adirim, Mr. Lernes Hebert, Ms. Stephanie  
11 Miller.

12 **Topic 2.** The preparation, review, and approval of Panel meeting minutes, including: the identity  
13 of any individuals who were responsible for documenting Panel meetings and drafting,  
14 reviewing, finalizing and approving minutes before they were submitted to the Panel; the  
15 process(es) these individuals followed for documenting Panel meetings; why minutes were  
16 prepared for some, but not all, Panel meetings, including the Panel's last four meetings; and the  
17 identity of any individuals who decided whether minutes would or would not be prepared and  
18 the reasons why minutes were or were not prepared.

19 **Defendants' Objection.** Irrelevant, unduly burdensome, and disproportionate to the needs of  
20 the case because it is duplicative of material previously sought and provided through document  
21 productions, interrogatory responses, and expected deposition testimony of other DoD  
22 personnel.

23 **Scope of those Responding.** Notwithstanding the above objections, DoD will identify an  
24 individual to answer the questions raised in this topic (except where the topic calls for privileged  
25 information) if other DoD officials who Plaintiffs already plan to depose are unable to speak to  
26 these topics.

27 **Identified DoD Employee or Former Employee Who Plaintiffs Are Scheduled to Depose.**  
28 Mr. Lernes Hebert.

**Topic 3.** 'Transgender Service Policy Working Group' or 'Transgender Personnel Policy  
Working Group,' including: the identity of any individuals who served as chairperson, members,  
or presented at or participated in the Group's meetings; the Group's mission, purpose, and  
assignment(s); the potential courses of action the Group considered; the issues addressed by the  
Group; any information the Group requested and/or considered; the Group's deliberations,  
conclusions, and recommendations; any reports, presentations, recommendations, or other  
communications the Group had or shared with the Panel; and any records or other documents  
that reflect the Group's work, deliberations, conclusions, and/or recommendations.

**Defendants' Objection.** Unduly burdensome and disproportionate to the needs of the case as  
it is largely duplicative of discovery previously sought and provided through document  
productions, interrogatory responses that answer these same questions, and expected deposition

1 testimony of other DoD personnel. Further, portions of this topic call for information protected  
2 by the deliberative process privilege and risks circumvention of the Ninth Circuit's stay order.

3 **Scope of those Responding.** Notwithstanding the above objections, DoD will identify an  
4 individual to answer the questions raised in this topic (except where the topic calls for privileged  
5 information) if other DoD officials who Plaintiffs already plan to depose are unable to speak to  
6 these topics.

7 **Identified DoD Employee or Former Employee Who Plaintiffs Are Scheduled to Depose.**  
8 Ms. Stephanie Miller.

9 **Topic 4.** Any discussion, consideration, conclusions or recommendations relating to gender  
10 dysphoria, gender transition or accession into the military or military service by transgender  
11 persons by the Department of Defense's Medical and Personnel Executive Steering Committee  
12 (MEDPERS) during the period July 1, 2015 to the present.

13 **Defendants' Objection.** Except where this topic seeks factual information regarding the work  
14 of MEDPERS on the challenged policy this topic is unduly burdensome, disproportionate to the  
15 needs of the case, and outside of the temporal scope of the litigation. Further, portions of this  
16 topic call for information protected by the deliberative process privilege and risks  
17 circumvention of the Ninth Circuit's stay order.

18 **Scope of those Responding.** Notwithstanding the above objections, DoD will identify an  
19 individual to answer the questions raised in this topic as far as they pertain to MEDPERS work  
20 with the Panel of Experts (except where the topic calls for privileged information) if other DoD  
21 officials who Plaintiffs already plan to depose are unable to speak to these topics.

22 **Identified DoD Employee or Former Employee Who Plaintiffs Are Scheduled to Depose.**  
23 Mr. Lernes Hebert, Dr. Terry Adirim.

24 **Topic 5.** The meeting on or around December 15, 2017 at which the Panel presented its  
25 recommendations to the Deputy Secretary of Defense ("DSD") and the Vice Chair of the Joint  
26 Chiefs of Staff ("VCJCS"), including: the identity of all individuals present at the meeting; the  
27 content of all presentations or written materials provided at the meeting; the reactions and/or  
28 response(s) of the DSD and the VCJCS to the Panel's recommendations; any directions by or  
requests from the DSD and the VCJCS as to additional or further work the Panel should perform;  
any documents that reflect what was said, presented, discussed, or decided at the meeting; any  
follow-up or further work performed by the Panel or others in response to any concerns, reactions  
or other views or directions of the DSD and/or the VCJCS as a result of the meeting; and any  
subsequent meetings or communications with or between the Panel and the DSD and/or VCJCS.

**Defendants' Objection.** Irrelevant, unduly burdensome and disproportionate to the needs of  
the case because it is duplicative of material previously sought and provided through document  
productions, interrogatory responses, and expected deposition testimony of other DoD  
personnel. Further, as far as this topic calls for the "reactions" of the DSD and VCJCS that  
were not vocalized during the December 15, 2017 meeting DoD does not possess this  
information.

1 **Scope of those Responding.** Notwithstanding the above objections, DoD will identify an  
2 individual to answer the questions raised in this topic (except where the topic calls for privileged  
3 information) if other DoD officials who Plaintiffs already plan to depose are unable to speak to  
4 these topics.

5 **Identified DoD Employee or Former Employee Who Plaintiffs Are Scheduled to Depose.**  
6 Mr. Anthony Kurta, Mr. Lernes Hebert.

7 **Topic 6.** The February 2018 Department of Defense “Report and Recommendations on Military  
8 Service by Transgender Persons” (the “Report”), including the identity of any individuals who  
9 approved the Report before it was submitted to Secretary Mattis; the role, if any, of Secretary  
10 Mattis in drafting, preparing, reviewing, revising and/or finalizing the Report before it was  
11 presented to him; the process that was followed and the information and alternatives that were  
12 considered in drafting, revising, finalizing, and approving the Report; the identity and role of any  
13 persons who were not current employees of the Department of Defense or one of the branches of  
14 the military who were involved in any way in providing information that was considered or used  
15 in preparing the Report or in drafting, reviewing, revising, finalizing and approving the Report.”

16 **Defendants’ Objections.** Irrelevant, unduly burdensome and disproportionate as it is outside  
17 of the scope of the lawsuit or duplicative of discovery previously sought and provided through  
18 document productions and interrogatory responses that answer these same questions. Further,  
19 this topic specifically calls for privileged information including the mental impressions of  
20 senior government officials implicated in the Government’s pending mandamus petition and  
21 seeks circumvention of the Ninth Circuit’s stay order.

22 **Scope of those Responding.** Notwithstanding the above objections the Department of Defense  
23 will identify an individual to be deposed to answer any technical questions such as to the meaning  
24 of acronyms, military phrases, and jargon that appear in the Report that may not be readily  
25 understandable by individuals without a military background.

26 **Topic 7.** The February 22, 2018 Memorandum for the President from Secretary Mattis  
27 concerning Military Service by Transgender Individuals (“Memorandum”), including: the  
28 principal author(s) of the Memorandum; the identity of any individuals who were involved in  
29 drafting and preparing, reviewing and revising, finalizing and/or approving the Memorandum  
30 before it was submitted to Secretary Mattis; the role, if any, of Secretary Mattis in drafting,  
31 preparing, reviewing, revising and/or finalizing the Memorandum; the process that was  
32 followed and the information and alternatives that were considered in drafting, revising,  
33 finalizing, and approving the Memorandum; and the identity and role of any persons who were  
34 not current employees of the Department of Defense or one of the branches of the military who  
35 were involved in any way in drafting, reviewing, revising, finalizing and/or approving the  
36 Memorandum.

37 **Defendant’s Objections.** Irrelevant, unduly burdensome and disproportionate as it is outside  
38 of the scope of the lawsuit or duplicative of discovery previously sought and provided through  
39 document productions and interrogatory responses that answer these same questions. Further,  
40 this topic specifically calls for privileged information including the mental impressions of

1 senior government officials implicated in the Government's pending mandamus petition and  
2 seeks circumvention of the Ninth Circuit's stay order.

3 **Scope of those Responding.** Notwithstanding the above objections the Department of Defense  
4 will identify an individual to be deposed to answer any technical questions such as to the meaning  
5 of acronyms, military phrases, and jargon that appear in the Memorandum that may not be readily  
6 understandable by individuals without a military background.

7 **Topic 8.** Any requests for waivers, exceptions and/or Exceptions to Policy (ETPs) (a) between  
8 January 1, 2016 and April 11, 2019 and (b) since April 12, 2019 with respect to military  
9 accession or service by transgender persons, persons who have been diagnosed with or have  
10 gender dysphoria, and/or persons who have transitioned or need or seek to transition to a  
11 gender other than their birth-assigned gender, including: the number of such requests; the stated  
12 reasons for and in support of, and the facts and circumstances concerning, each such request;  
13 and the disposition of each such request, including whether it was granted or denied and the  
14 reasons provided for each such disposition.

15 **Defendants' Objection.** Unduly burdensome and disproportionate to the needs of the case  
16 because it is duplicative of material previously sought and provided through document  
17 productions and is outside of the temporal scope of the litigation.

18 **Scope of those Responding.** Notwithstanding the above objections the Department of Defense  
19 will identify an individual to answer any technical questions regarding ETPs under its current  
20 policy such as the meaning of acronyms, military phrases, and jargon that appear in the ETPs  
21 themselves and action on those ETPs that may not be readily understandable by individuals  
22 without a military background.

23 **Topic 9.** The statement, at page 33 of the Report, that "currently available in-service data already  
24 show that, cumulatively, transitioning Service members in the Army and Air Force have averaged  
25 167 and 159 days of limited duty, respectively, over a one-year period," including: any data or  
26 other information on which this statement was based; how these averages were calculated and by  
27 whom; how "limited duty" was defined and determined for purposes of these calculations; and  
28 why such calculations were provided with respect to the Army and Air Force, but not the Navy  
and the Marine Corps.

**Defendants' Objection.** No objection.

## DEFENDANTS' ARGUMENT

"A party who notices a Rule 30(b)(6) deposition should apply fairness and reasonableness  
to the scope of the matters that the witness is required to testify about," *Madrigal v. Allstate  
Indem. Co.*, No. 14-4242, 2015 WL 12746225, at \*5 (C.D. Cal. Apr. 22, 2015), as the task of  
making "a good faith effort to prepare . . . [one or more] 30(b)(6) witness[es] to 'fully and  
unevasively answer questions about the designated [topics] . . . becomes less realistic and

1 increasingly impossible as the number and breadth of noticed subject areas expand.” *Id.*  
2 (citations omitted); *see also* 8A Charles Alan Wright et. al., *Federal Practice and Procedure* §  
3 2103 (3d ed.) (“[T]he burdens faced by the responding party [served with a 30(b)(6) notice] are  
4 considerably more challenging than with an ordinary deposition.”).

5 Here, Plaintiffs’ proposed Rule 30(b)(6) topics should be limited for three main reasons:  
6 1) several of Plaintiffs’ topics extend well beyond the scope of the litigation; 2) the majority  
7 Plaintiffs’ their topics are duplicative of information they have obtained through other discovery  
8 methods or the expected deposition testimony of other current or former DoD employees; and 3)  
9 four of Plaintiffs’ topics (3, 4, 6, and 7) call for the same privileged deliberations that are currently  
10 at issue in the Governments pending mandamus petition. Accordingly, this Court should issue a  
11 protective order limiting the scope of Plaintiffs’ proposed topics to specific factual questions  
12 regarding the reasons and justifications for the challenged policy. In the alternative, the Court  
13 should issue an order (a) limiting Plaintiffs to one 7-hour deposition of DoD officials (or former  
14 officials) currently scheduled for deposition where the Government has indicated that they have  
15 sufficient knowledge to answer non-privileged questions regarding Plaintiffs’ proposed topics  
16 and (b) deferring any deposition as to Plaintiffs’ topics implicated in the Government’s pending  
17 mandamus petition until the Ninth Circuit has ruled on that petition.

18 **A. Many of Plaintiffs’ Topics Fall Outside of the Scope of the Litigation.**

19 As an initial matter, because the Ninth Circuit has previously ruled that the inquiry in this  
20 case is limited to whether DoD “reasonably determined [its] policy ‘significantly furthers’ the  
21 government’s important interests,” *Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019), and  
22 specifically prohibited this Court from “substitut[ing] its ‘own evaluation of evidence for a  
23 reasonable evaluation’ by the military,” *id.* (quoting *Rostker v. Goldberg*, 453 U.S. 57, 68  
24 (1981)), any Rule 30(b)(6) deposition should be limited to DoD’s reasons and justifications for  
25 the challenged policy. “In short the district court must apply appropriate military deference to  
26 its evaluation of the 2018 policy.” *Id.*

27 Discovery requests must both seek relevant information and be “proportional to the needs  
28 of the case, considering the importance of the issues at stake in the action, the amount in

1 controversy, the parties' relative access to relevant information, the parties' resources, the  
2 importance of the discovery in resolving the issues, and whether the burden or expense of the  
3 proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2); *see also Crystal Lakes*  
4 *v. Bath & Body Works, LLC*, No. 2:16-CV-2989-MCE-GGH, 2018 WL 533915, at \*1 (E.D. Cal.  
5 Jan. 23, 2018) ("Relevancy alone is, therefore, no longer sufficient to obtain discovery in the absence  
6 of proportionality." (citing *Lauris v. Novartis AG*, 2015 WL 7178602 \*2 (E.D. Cal. 2015)). And  
7 the Court must limit discovery where "the discovery sought is unreasonably cumulative or  
8 duplicative, or can be obtained from some other source that is more convenient, less burdensome,  
9 or less expensive" and where "the party seeking discovery has had ample opportunity to obtain  
10 the information." Fed. R. Civ. P. 26(b)(2)

11 Here, Plaintiffs' topics stray far afield from anything this Court would be permitted to  
12 consider in its evaluation of the constitutionality of the challenged policy. The drafting of the  
13 meeting minutes of the Panel of Experts (topic 2), discussions of DoD's Medical and Personnel  
14 Executive Steering Committee ("MEDPERS") that occurred as early as July 1, 2015 and  
15 extending to the present day (topic 4), details about a particular meeting involving the Deputy  
16 Secretary of Defense ("DSD") and Vice Chairman of the Joint Chiefs ("VCJC") (topic 5), the  
17 process of drafting DoD's Report and Secretary Mattis' Memorandum (topics 6 and 7), and  
18 waiver and Exceptions to Policy Requests (topic 8) extending well after the formation of the  
19 challenged policy, all have no bearing on whether the challenged policy "significantly furthers"  
20 the government's important interests." *Karnoski*, 926 F.3d at 1202. "[A]though the standard of  
21 relevance in the context of discovery may be broader than in the context of admissibility, 'this  
22 often intoned legal tenet should not be misapplied so as to allow fishing expeditions in  
23 discovery.'" *Heller v. HRB Tax Grp., Inc.*, 287 F.R.D. 483, 485 (E.D. Mo. 2012) (quoting *Hofer*  
24 *v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1993)). Accordingly, this Court should limit  
25 the scope of Plaintiffs' proposed topics to specific factual questions regarding the reasons and  
26 justifications for the challenged policy or at least limit the relevant time period to the actual  
27 formation of the challenged policy. *See Karnoski*, 926 F.3d at 1202 (questioning the relevance  
28

1 of the Presidential Memorandum because it was issued prior to the formation of the Panel of  
2 Experts).

3 **B. Plaintiffs' Topics Are Duplicative of Other Discovery.**

4 Even if the Court permits some inquiry into the topics Plaintiffs have identified, it should  
5 not permit questioning that is duplicative of other deposition testimony and other discovery  
6 methods. Here, each of Plaintiffs' proposed topics 1 through 8 are "unreasonably cumulative or  
7 duplicative" in some respect. Fed. R. Civ. P. 26(b)(2). For each, either Plaintiffs have already  
8 obtained the same information through other discovery methods, or Plaintiffs are already  
9 planning to depose the same individuals who DoD would designate to answer their Rule 30(b)(6)  
10 topics.

11 For example, topic 1 encompasses virtually anything having to do with the Panel of  
12 Experts process. Aside from being entirely too broad for a Rule 30(b)(6) deposition, this topic is  
13 wholly duplicative of thousands of pages of documents and interrogatory responses Plaintiffs  
14 have already obtained through other discovery methods. For instance, Secretary Mattis' Terms  
15 of Reference—contained in the Administrative Record at 000330–000331—describes the  
16 formation, mission, purpose, assignment, deliverables and to whom the recommendations of the  
17 Panel would be made. *See* Dkt. 249-1; Dkt. 255-2. The Panel's meeting minutes, provided to  
18 Plaintiffs on November 1, 2019, detail the potential courses of action and policy options it  
19 considered, as well as the issues it addressed and its deliberations. *See* Dkt 398 at 2. The 3075-  
20 page Administrative Record provides the materials the Panel considered. *See* Dkt. 249-1. The  
21 Administrative Record also contains the Panel's conclusions and recommendations. *See* Dkt.  
22 249-1; Dkt. 405-4. DoD has also provided all communications of Panel members regarding their  
23 work on the Panel from their time on the Panel. *See* Dkt. 405 at 2. Moreover, in its answer to  
24 Interrogatory 18, DoD described in detail the information, statements, advice, opinions, or other  
25 input of each current DoD employee who attended Panel meetings. Dkt. 458 at 4. To obtain this  
26 information, DoD interviewed all current employees who attended Panel meetings, including  
27 several senior military officials including the current Chief of Staff of the Army and Vice Chief  
28 of Staff of the Air Force (the highest and second highest ranking uniformed officers in the Army

1 and Air Force). Simply put, through other discovery tools, Plaintiffs have already obtained the  
2 most fulsome answer to this topic that DoD can provide. To prepare an agency official for the  
3 Rule 30(b)(6) deposition on this topic, Defendants would simply have the official review the  
4 information above and summarize or recite it at the deposition. As a result, any further testimony  
5 would be entirely duplicative and therefore an unnecessary and unduly burdensome on  
6 Defendants. *See E.E.O.C. v. Boeing Co.*, 2007 WL 1146446, at \*3 (D. Ariz. Apr. 18, 2007)  
7 (finding topic duplicative where it requested information already provided).

8 Moreover, Plaintiffs have already sought, and Defendants have provided, dates for the  
9 depositions of two Panel members—Mr. Thomas Dee and Mr. Anthony Kurta—and several  
10 officials who attended Panel meetings, including Dr. Terry Adirim, Mr. Lernes Hebert, and Ms.  
11 Stephanie Miller. Accordingly, the addition of a Rule 30(b)(6) deposition on the same topic  
12 merely designed to obtain an additional deposition from a DoD official is entirely unnecessary.

13 For topics 6 and 7—information pertaining to the drafting of DoD’s Report and Secretary  
14 Mattis’ Memorandum—what Plaintiffs seek is either (a) protected by privilege and at issue in  
15 the Ninth Circuit’s mandamus petition (*e.g.*, drafts of the Report and Memorandum); (b)  
16 duplicative of information previously provided to Plaintiffs in discovery, where Defendants have  
17 already produced all non-privileged documents relating to the Memorandum and Report, or (c)  
18 duplicative of information Plaintiffs recently obtained through the Court’s Orders regarding  
19 interrogatories 16 and 17 and third party communications. *See* Dkt 454 and 458.<sup>1</sup> It would be  
20 burdensome and entirely unnecessary to have a DoD employee sit for a deposition just to provide  
21 the same information to Plaintiffs again.

22  
23  
24 <sup>1</sup> The Court’s Order regarding Plaintiffs’ Interrogatories 16 and 17 required DoD to identify the  
25 “principal authors” of DoD’s Report and Recommendations and Secretary Mattis’ Memorandum  
26 in addition to identifying all persons who “reviewed, revised, or commented on any drafts” of  
27 those documents. *See* Dkt 458 at 1–2. The Court’s Order regarding third party communications  
28 required DoD to disclose such communications or formally assert the consultant corollary  
exception. *See* Dkt 454 at 1–2. DoD asserted privilege as to communications with two of its  
contractors RAND Corporation and Kennell and Associates, Inc., and disclosed all other third  
party communications. Dkt. 460 at 2.

1 For topic 8—seeking requests for waivers, exceptions and/or Exceptions to Policy (ETPs)  
2 (a) between January 1, 2016 and April 11, 2019 and (b) since April 12, 2019 with respect to  
3 military accession or service by transgender persons—the topic itself seems to be a request for  
4 production. But Defendants have already answered this very request and provided (or are in the  
5 process of providing) the actual requests for waivers and exceptions to policy that Plaintiffs seek.  
6 Dkt. 469 at 1, 10. In response to this request, Defendants have agreed to answer any technical  
7 questions regarding ETPs under its current policy such as the meaning of acronyms, military  
8 phrases and jargon that appear in the waivers, the ETPs themselves, and action on those ETPs,  
9 all of which may not be readily understandable by individuals without a military background.  
10 But beyond this purpose, it is unclear what purpose a Rule 30(b)(6) deposition on this topic could  
11 serve.

12 Finally, for several other topics, Defendants do not object to providing the requested  
13 information (despite the fact that much of it goes beyond the scope of the litigation). However,  
14 Defendants do object to providing the information multiple times through various discovery  
15 methods and multiple depositions of DoD personnel.

16 For topic 2—pertaining to the drafting of Panel meeting minutes—Plaintiffs already plan  
17 to depose Mr. Lernes Hebert, who DoD previously identified in its response to Interrogatory 18  
18 as one of the individuals responsible for reviewing, finalizing, and approving such minutes.  
19 Carmichael Decl. ¶ 6, Ex 5.

20 For topic 3—pertaining to the Transgender Service Policy Working Group—Plaintiffs  
21 already plan to depose Ms. Stephanie Miller, who the Government previously identified as the  
22 chair of that committee. Carmichael Decl. ¶ 6, Ex 5; ¶ 7, Ex. 6.

23 For topic 4—pertaining to DoD’s Medical and Personnel Executive Steering Committee  
24 (MEDPERS)—Plaintiffs plan to depose both Dr. Terry Adirim and Mr. Lernes Hebert, who the  
25 Government previously identified as the co-chairs of that committee during the time period of  
26 the Panel. Carmichael Decl. ¶ 6, Ex 5; ¶ 6, Ex. 6.

27 For topic 5—pertaining to a briefing given to the Deputy Secretary of Defense and Vice  
28 Chair of the Joint Chiefs of Staff on December 15, 2017—Plaintiffs plan to depose Mr. Anthony

1 Kurta and Mr. Lernes Hebert, who the Government identified as the individuals who provided  
2 the briefing and directly supported the briefer during the meeting, respectively. Carmichael Decl.  
3 ¶ 6, Ex 5.

4 There is no reason why Plaintiffs cannot pursue the same lines of inquiry (where they do  
5 not seek privileged information) during these forthcoming depositions. As explained by the  
6 Advisory Committee Notes, Rule 30(b)(6) has three purposes: “reducing the difficulties . . .  
7 encountered in determining, prior to the deposition, whether a particular employee or agent is a  
8 ‘managing agent’. . . . ; curbing the ‘bandying by which officers or managing agents of a  
9 corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to  
10 persons in the organization . . . . ; [and] assisting organizations which find that an unnecessarily  
11 large number of their officers and agents are being deposed by a party uncertain of who in the  
12 organization has knowledge.” *See also Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 623 (5th  
13 Cir. 1973) (citing Advisory Committee Notes); *Federal Deposit Insurance Corp. v. Butcher*, 116  
14 F.R.D. 196, 199 (E.D. Tenn. 1986) (Murrian, Mag. J.) (Rule 30(b)(6) is intended “to curb any  
15 temptation a [litigant] might have to shunt a discovering party from ‘pillar to post.’”), *aff’d*, 116  
16 F.R.D. 203, 205 (E.D. Tenn. 1987). Here, none of these authorized purposes of the rule are  
17 served. Instead, Plaintiffs’ proposed Rule 30(b)(6) topics appear only to serve the purpose of  
18 obtaining an additional deposition testimony on the same topics that can be addressed by DoD  
19 employees (or former employees) in upcoming individual depositions. Accordingly, an  
20 additional Rule 30(b)(6) deposition would not only be wasteful and an undue burden, it would  
21 work against the purpose of the rule itself. Therefore, Defendants request an order from this  
22 Court limiting Plaintiffs to one 7-hour deposition of DoD officials (or former officials) currently  
23 scheduled for deposition where the Government has indicated that they have sufficient  
24 knowledge to answer non-privileged questions regarding Plaintiffs’ proposed topics. *See*  
25 *Dongguk Univ. v. Yale Univ.*, 270 F.R.D. 70, 74 (D. Conn. 2010) (“Where the notice seeks  
26 information which could more easily be obtained from another source, the court may refuse to  
27 allow that topic to be the subject of a 30(b)(6) deposition.”)

1           **C. Topics 6 and 7 and Portions of Topics 3 and 4 Seek Privileged Information.**

2           Further, through much of Plaintiffs’ topics 6 and 7 (seeking information pertaining to the  
3 drafting of DoD’s Report and Secretary Mattis’ Memorandum) and topics 3 and 4 (seeking  
4 deliberations of two of DoD’s working groups), specifically seek the mental impressions of  
5 senior military decision-makers, including then-Secretary of Defense Mattis himself. Such areas  
6 of inquiry are properly subject to the deliberative process privilege and Plaintiffs may not use a  
7 Rule 30(b)(6) deposition to delve into such matters. *Doe v. Shanahan*, 917 F.3d 694, 737 (D.C.  
8 Cir. 2019) (Williams, J., concurring in result) (“[J]udicial inquires...into executive motivation  
9 represent a substantial intrusion into the workings of [a coordinate] branch [] of government.”)  
10 (quoting *Vill. Of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 (1977));  
11 *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2573–74 (2019) (“In reviewing agency action,  
12 a court is ordinarily limited to evaluating the agency’s contemporaneous explanation in light of  
13 the existing administrative record. That principle reflects the recognition that further judicial  
14 inquiry into executive motivation represents a substantial intrusion into the workings of another  
15 branch of Government and should normally be avoided.”) (internal quotations and citations  
16 omitted); *see also J.P. Morgan Chase Bank v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 363  
17 (S.D.N.Y. 2002) (disallowing 30(b)(6) deposition topic that, “[u]nder the guise of requesting  
18 ‘facts,’” in fact sought “defendants’ mental impressions, conclusions, opinions, and legal  
19 theory”).

20           If a Rule 30(b)(6) deposition were to proceed on these topics, the Government expects to  
21 object and instruct its witness not to answer questions where the information sought would be  
22 protected by the deliberative process privilege. *See* Rule 30(c)(2) (“A person may instruct a  
23 deponent not to answer . . . when necessary to preserve a privilege . . . .”); *SEC v. Nacchio*, Civil  
24 Action No. 05-cv-00480-MSK-CBS, 2009 U.S. Dist. LEXIS 8365, at \*8–9 (D. Colo. Jan. 29,  
25 2009) (denying motion to compel Government Rule 30(b)(6) witness to answer questions the  
26 witness was instructed not to answer on the grounds of deliberative process privilege). And  
27 although there may be some meaningful inquiry as to the functioning of the Panel’s working  
28 groups (topics 3 and 4), including any factual information those groups considered and presented

1 to the Panel without delving into the working groups' deliberations, the same cannot be said for  
2 Plaintiffs' topics 6 and 7. Topics 6 and 7 seek either information Plaintiffs have obtained through  
3 other discovery, *see* Dkt. 454 (ordering the disclosure of third party communications with DoD)  
4 and Dkt. 458 (ordering the disclosure of the identity of the "principal authors" of DoD's Report  
5 and Secretary Mattis' Memorandum in addition to the identity of all persons who "reviewed,  
6 revised, or commented on any drafts"), or information protected by the deliberative process  
7 privilege (including deliberations of Secretary Mattis himself). Accordingly, because there can  
8 be no meaningful inquiry as to topics 6 and 7, it is entirely too burdensome and disproportionate  
9 to the needs of the case for DoD to prepare a witness to sit for a deposition where that witness  
10 will be instructed not to answer the majority of questions within that topic. Therefore, this Court  
11 should issue a protective order prohibiting a Rule 30(b)(6) deposition as to topics 6 and 7.

12 Plaintiffs' letter of March 18, 2020, argues that this Court's February 3, 2020 oral order  
13 permits them to seek a deposition on topics 6 and 7 and the deliberative portions of 3 and 4. Yet  
14 Plaintiffs acknowledged that the Ninth Circuit stayed "the district court's December 18, 2019,  
15 February 3, 2020, and February 7, 2020 orders," Carmichael Decl. ¶ 5, Ex 4. *See id.* (citing one  
16 of the district court's orders from February 3, 2020). Plaintiffs cannot evade this stay through a  
17 Rule 30(b)(6) deposition. Nor may Plaintiffs seek to have this Court adjudicate the boundaries  
18 of the Ninth Circuit's stay.

19 Next, Plaintiffs seem to suggest that this Court could simply enter a new order finding  
20 that the deliberative process privilege is overcome as to their topics 3, 4, 6, and 7. However, the  
21 deliberations of the working groups and the drafting process for both DoD's Report and Secretary  
22 Mattis Memorandum are squarely at issue in the Government's mandamus petition, as Plaintiffs  
23 themselves have recognized. Carmichael Decl. ¶ 3 and 5, Ex's 2 and 4. Allowing for the very  
24 deliberations at issue in the documents before the Ninth Circuit to be disclosed through testimony  
25 would be an impermissible circumvention of the Ninth Circuit's stay order.<sup>2</sup> At a minimum, this

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26  
27 <sup>2</sup>As far as Plaintiffs' argue that the drafting of Secretary Mattis' Memorandum is not at issue in  
28 the Government's mandamus petition, that is certainly not the case as the Memorandum both  
relates and refers to DoD's Report. *See* Dkt. 413 (clarifying that DoD must produce all

1 Court should require Plaintiffs to defer a Rule 30(b)(6) deposition as to any of the topics  
 2 implicated in the Government’s pending mandamus petition until the Ninth Circuit has ruled on  
 3 that petition.

4 **PLAINTIFFS’ INTRODUCTORY STATEMENT**

5 The Government’s motion seeks to thwart Plaintiffs’ legal right under the Federal Rules  
 6 to use a basic and common discovery device—the deposition of a party’s designated  
 7 representative(s)—concerning subject matters that are not only indisputably relevant, but address  
 8 central issues and evidence in this dispute. The Government’s motion is grounded on three  
 9 objections for which it offers no support and that are contrary to settled law:

- 10 • The Government’s first objection—that “many of Plaintiffs’ topics fall outside of the scope  
 11 of the litigation”—is premised on an argument both the Ninth Circuit and this Court have  
 12 already rejected: that military deference forecloses any discovery beyond “factual questions  
 13 regarding the reasons and justifications” the Government *claims* prompted the “Mattis  
 14 policy” and/or the time period in which it *claims* that policy was formed. *See supra* at 8–9.
- 15 • The Government does not cite any support for its second objection—that Plaintiffs’  
 16 Rule 30(b)(6) notice should be limited or denied because it is “duplicative of other  
 17 discovery,” *supra* at 10—because there is none. The law is well-settled that other discovery  
 18 concerning the same subject matter—whether by deposition of the same or other witnesses  
 19 in their individual capacity, document production, or interrogatories—is *not* grounds for  
 20 objecting to Rule 30(b)(6) testimony on the exact same topic and by the same exact witness.
- 21 • Finally, neither the Government’s pending mandamus petition nor the administrative stay  
 22 relating to it purport to stay Rule 30(b)(6) depositions or other discovery. Moreover, to the  
 23 extent the Government thinks testimony by Rule 30(b)(6) witnesses is subject to the  
 24 deliberative process privilege, this Court has already ordered a process that avoids any  
 25 prejudice to the Government or use of privileged testimony: that testimony will be sealed and  
 26

27 \_\_\_\_\_  
 28 deliberative documents responsive to Plaintiffs’ RFP 29 which is all documents relating or  
 referring to its Report and Recommendations).

1 reviewed by the Court *in camera* to determine whether the privilege applies. (*See* 2/3/2020  
2 Hr’g Tr.)

3 The Government’s motion should be denied.

#### 4 **PLAINTIFFS’ ARGUMENT**

5 To obtain a protective order, the Government must show it will suffer “specific prejudice  
6 or harm” absent the order. *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206,  
7 1210–11 (9th Cir. 2002); *LVB-Ogden Mktg., LLC v. Bingham*, 2018 WL 6830319, at \*4 (W.D.  
8 Wash. Dec. 28, 2018). This burden “cannot be met by conclusory statements.” *Braun v. Primary*  
9 *Distrib. Doe No. 1*, 2012 WL 12895845, at \*2 (N.D. Cal. Nov. 19, 2012). Even when good cause  
10 is established, a court must weigh the interests in allowing discovery against the relative burden  
11 of the discovery. *Hard Drive Prods., Inc. v. Does 1–118*, 2011 WL 5416193, at \*2 (N.D. Cal.  
12 Nov. 8, 2011). Here, the Government has not demonstrated it will suffer *any* prejudice or harm  
13 if Plaintiffs are permitted to proceed with a Rule 30(b)(6) deposition on the noticed topics, let  
14 alone the type of specific harm that would outweigh Plaintiffs’ legal right to discovery pursuant  
15 to Rule 30(b)(6) on these clearly relevant subject matters.

#### 16 **A. Plaintiffs’ Rule 30(b)(6) Topics Are Clearly Relevant.**

17 The Government first argues that “many of Plaintiffs’ topics fall outside of the scope of  
18 the litigation.” *Supra* at 8–9. This argument is wrong as a matter of both law and fact.

19 Legally, the Government’s relevancy objections are premised on an argument the Ninth  
20 Circuit has rejected—that due to military deference, discovery must be limited to “factual  
21 questions regarding the reasons and justifications for the challenged policy or at least ... the  
22 relevant time period [of] the actual formation of the challenged policy.” *Id.* at 9. In the  
23 Government’s view, questioning would be limited only to: identifying and clarifying the reasons  
24 and justifications the Government *claims* prompted the Mattis policy, such as “the meaning of  
25 acronyms, military phrases, and jargon that appear in the Administrative Record that may not be  
26 readily understandable by individuals without a military background,” and to the time period  
27 covered by the “Administrative Record,” beginning with the Panel of Experts and excluding both  
28 the events leading up to and immediately following the President’s August 25, 2018

1 Memorandum and the specific directives that led to the formation of the Panel and the Mattis  
2 policy. *See supra* at 4, 6–7.

3 In “support” of this limitation, the Government offers an inaccurate and selective reading  
4 of the Ninth Circuit’s holding in *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019), which leaves  
5 out two critical points. **First**, far from requiring blind deference, the Ninth Circuit instructed that  
6 the Government’s justifications for its discriminatory classification must be closely examined to  
7 ensure they are “exceedingly persuasive ... genuine, not hypothesized or invented *post hoc* in  
8 response to litigation.” *Id.* at 1200. **Second**, the Ninth Circuit found that discovery need *not* be  
9 narrowly limited to the “administrative record” the Government later created to support the  
10 Mattis policy or to the time period in which the Government claims that policy was formulated.  
11 *Id.* at 1204. To the contrary, the Court explicitly acknowledged that Plaintiffs may discover and  
12 “present additional evidence” showing that the Ban was “not an exercise of independent military  
13 judgment.” This includes evidence that the military was constrained by President Trump’s prior  
14 directives when it developed the “Mattis policy.” *Id.* at 1201–02; *accord* Dkt. 235 at 2 (finding  
15 “no reason for discovery to be confined to the administrative record” because Plaintiffs “do not  
16 challenge the policy under the APA, but instead raise direct constitutional claims”).

17 As the Ninth Circuit recognized, this Court cannot subject the Ban to the requisite  
18 heightened scrutiny without knowing whether the Panel’s decision-making process and the  
19 Mattis policy were preordained or influenced by the President’s directives in his August 25, 2017  
20 Memorandum or motivated by animus. Nor is it appropriate to force Plaintiffs, when challenging  
21 the Government’s decision-making process and result, to rely exclusively on the information the  
22 Government chose to present to the Panel of Experts (and produce to Plaintiffs) and the February  
23 2018 DoD Report, and ignore all other evidence. To determine whether the Ban was indeed  
24 created and adopted independent from the President’s directives, and based solely on the  
25 military’s judgment and compelling government interests, discovery into the Government’s  
26 decision-making process and actual reasons and justifications for the Ban, including testimony  
27 from a Government representative about these core issues, is required. (Dkt. 235 at 2.)

1 In short, the only “relevance” standard and limitation that applies here is the usual, liberal  
2 definition that applies to all discovery under the Federal Rules of Civil Procedure. *See, e.g.,*  
3 *Olberg v. Allstate Ins. Co.*, 2019 WL 6033699, at \*2 (W.D. Wash. Nov. 14, 2019) (finding  
4 relevance “construed broadly to encompass any matter that bears on, or that reasonably could  
5 lead to other matter that could bear on, any issue that is or may be in the case”). The Government  
6 does not (and cannot) argue that Plaintiffs’ proposed topics violate this standard, nor does it  
7 articulate *any* burden from producing a witness to testify about these topics, let alone one that  
8 outweighs the need for discovery. Nor could it. Each of the eight topics to which the Government  
9 objects goes to core issues in this case. (The Government does not object to the ninth and final  
10 topic in Plaintiffs’ Notice.) The Government’s responses to these topics border on the ridiculous.

11 **Topic 1.** Panel of Experts, including: its formation; its mission, purpose, assignment(s), and  
12 deliverables; the potential courses of action and/or policy options it considered; the issues it  
13 addressed; the information it requested and/or considered; its deliberations, conclusions, and  
14 recommendations, including to whom those recommendations were made; and the Panel’s Final  
Report and Recommendation.

15 Other than its general “military deference” objection, which both the Ninth Circuit and  
16 this Court have rejected, the Government has no response to the relevance of, and Plaintiffs’ need  
17 for, this information. Nevertheless, it objects to any examination beyond “the reasons and  
18 justifications of the challenged policy, including the meaning of acronyms, military phrases, and  
19 jargon that appear in the administrative record and the Panel’s meeting minutes that may not be  
20 readily understandable by individuals without a military background.” There is no basis for such  
21 a limitation, and the Court should overrule the Government’s objections.

22 **Topic 2.** The preparation, review, and approval of Panel meeting minutes, including: the identity  
23 of any individuals who were responsible for documenting Panel meetings and drafting,  
24 reviewing, finalizing and approving minutes before they were submitted to the Panel; the  
25 process(es) these individuals followed for documenting Panel meetings; why minutes were  
26 prepared for some, but not all, Panel meetings, including the Panel’s last four meetings; and the  
27 identity of any individuals who decided whether minutes would or would not be prepared and  
28 the reasons why minutes were or were not prepared.

The Government does not make any relevance objections to this topic. Nor could it, given  
its heavy reliance on the minutes the Government has produced as a record of what the Panel

1 considered and what transpired at those meetings.<sup>3</sup> Plaintiffs are entitled to discovery into  
2 whether the minutes are accurate and complete, particularly because documents recently  
3 produced pursuant to court order in the *Doe* case raise questions about the minutes' accuracy and  
4 completeness. For example, at one meeting, the Panel heard from 10 commanders of units with  
5 transgender persons serving openly. After reviewing the minutes for that meeting, at least one  
6 Panel member complained that they did "not provide a balanced recording." (Dkt. 425.)  
7 Although 9 of the 10 commanders did not identify "any unit cohesion or morale issues," "[o]nly  
8 the negative comments were cited" in the minutes. (*Id.*)

9 **Topic 3.** 'Transgender Service Policy Working Group' or 'Transgender Personnel Policy  
10 Working Group,' including: the identity of any individuals who served as chairperson, members,  
11 or presented at or participated in the Group's meetings; the Group's mission, purpose, and  
12 assignment(s); the potential courses of action the Group considered; the issues addressed by the  
13 Group; any information the Group requested and/or considered; the Group's deliberations,  
14 conclusions, and recommendations; any reports, presentations, recommendations, or other  
15 communications the Group had or shared with the Panel; and any records or other documents  
16 that reflect the Group's work, deliberations, conclusions, and/or recommendations.

17 **Topic 4.** Any discussion, consideration, conclusions or recommendations relating to gender  
18 dysphoria, gender transition or accession into the military or military service by transgender  
19 persons by the Department of Defense's Medical and Personnel Executive Steering Committee  
20 (MEDPERS) during the period July 1, 2015 to the present.

21 The Government likewise does not contest the relevance and need for this testimony. The  
22 Panel relied heavily on "working groups" to support its work, including determining what data,  
23 evidence, and policy considerations the Panel would and would not receive. One of the few  
24 working-group documents produced, a "Kickoff Meeting" presentation for the Transgender  
25 Personnel Policy Working Group, amply demonstrates the relevance of this discovery.  
26 Describing the "guidance" that would guide the group's deliberations, the presentation cited both  
27 President Trump's July 26, 2017 tweets and August 25, 2017 Memorandum. (Dkt. 422 at 4, 11.)  
28

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<sup>3</sup> The Government claims there are no minutes concerning the Panel's last four meetings, where its  
"recommendations" were apparently discussed and voted on. (*See* Dkt. 435-17.) This includes the three meetings  
held after the Panel issued its "Final Report" and presented its recommendations to the Vice Chairman of the Joint  
Chiefs of Staff (VCJCS) and the Deputy Secretary of Defense (DSD), who rejected these recommendations. (Dkt.  
429.)

1 The presentation further stated that the premise for the committee’s work would be that all  
2 “[p]roposed [courses of actions] address POTUS expressed end state.” (*Id.* at 13.)

3 **Topic 5.** The meeting on or around December 15, 2017 at which the Panel presented its  
4 recommendations to the Deputy Secretary of Defense (“DSD”) and the Vice Chair of the Joint  
5 Chiefs of Staff (“VCJCS”), including: the identity of all individuals present at the meeting; the  
6 content of all presentations or written materials provided at the meeting; the reactions and/or  
7 response(s) of the DSD and the VCJCS to the Panel’s recommendations; any directions by or  
8 requests from the DSD and the VCJCS as to additional or further work the Panel should perform;  
9 any documents that reflect what was said, presented, discussed, or decided at the meeting; any  
10 follow-up or further work performed by the Panel or others in response to any concerns, reactions  
11 or other views or directions of the DSD and/or the VCJCS as a result of the meeting; and any  
12 subsequent meetings or communications with or between the Panel and the DSD and/or VCJCS.

13 The Government does not even attempt to explain its bare, unsupported assertion that this  
14 topic is “irrelevant.” For good reason. Secretary Mattis directed the DSD and VCJCS “to lead”  
15 “in developing an Implementation Plan on military service by transgender individuals, to effect  
16 the policy and directives” in the President’s August 25, 2017 Memorandum, and directed that the  
17 Panel of Experts would report to and “support” them in recommending to Mattis a policy that  
18 would effect the President’s directives. (Dkt. 255-2.) A lone email recently produced in response  
19 to the *Doe* order shows that the Panel presented its “Final Report” and recommendations to the  
20 DSD and VCJCS on December 15, 2017, but that they rejected those recommendations:

21 VCJCS doesn’t believe SECDEF can defend the recommendations on the Hill or  
22 before the press. DSD believes that given the competitive economy we need to  
23 compete for all people who can do the job and we need to be clear on the standards  
24 we expect - if you can meet them, regardless of what class of person you identify  
25 with, then you should be acceptable for military service.

26 (Dkt. 429.) This is the sole document the Government has produced concerning the VCJCS and  
27 DSD’s review and rejection or what actions were taken in response.

28 **Topic 6.** The February 2018 Department of Defense “Report and Recommendations on Military  
Service by Transgender Persons” (the “Report”), including the identity of any individuals who  
approved the Report before it was submitted to Secretary Mattis; the role, if any, of Secretary  
Mattis in drafting, preparing, reviewing, revising and/or finalizing the Report before it was  
presented to him; the process that was followed and the information and alternatives that were  
considered in drafting, revising, finalizing, and approving the Report; the identity and role of any  
persons who were not current employees of the Department of Defense or one of the branches of  
the military who were involved in any way in providing information that was considered or used  
in preparing the Report or in drafting, reviewing, revising, finalizing and approving the Report.”

1 **Topic 7.** The February 22, 2018 Memorandum for the President from Secretary Mattis  
2 concerning Military Service by Transgender Individuals (“Memorandum”), including: the  
3 principal author(s) of the Memorandum; the identity of any individuals who were involved in  
4 drafting and preparing, reviewing and revising, finalizing and/or approving the Memorandum  
5 before it was submitted to Secretary Mattis; the role, if any, of Secretary Mattis in drafting,  
6 preparing, reviewing, revising and/or finalizing the Memorandum; the process that was  
7 followed and the information and alternatives that were considered in drafting, revising,  
8 finalizing, and approving the Memorandum; and the identity and role of any persons who were  
9 not current employees of the Department of Defense or one of the branches of the military who  
10 were involved in any way in drafting, reviewing, revising, finalizing and/or approving the  
11 Memorandum.

12 The Government also does not explain why it objects to these requests as “irrelevant.” In  
13 fact, the Government previously told this Court that the February 2018 DoD Report sets forth its  
14 complete justification for and defense of the discriminatory “Mattis policy.” (7/17/2018 Hr’g  
15 Tr.) Secretary Mattis said the same thing when he forwarded the Report to President Trump,  
16 along with his February 2018 Memorandum setting forth the Mattis policy. (Dkt. 405-6 at 3  
17 (Report sets forth “the factors and considerations forming the basis of the Department’s policy  
18 proposals.”).)

19 Despite its critical role in its defense, the Government has refused to produce any  
20 documents related to the DoD Report, or the period from January 11, 2018 through February 22,  
21 2018 during which it was prepared, including how it was prepared or what sources, information,  
22 or alternatives were considered in its preparation. This is so notwithstanding: (1) it is undisputed  
23 the Report was prepared after the Panel completed its deliberations, issued its final  
24 recommendations, and was disbanded; (2) the Report itself shows it was based on sources that  
25 were *not* presented to or considered by the Panel; and (3) third-party discovery, which the  
26 Government unsuccessfully sought to quash, confirmed that in early February 2018 a special  
27 assistant for Secretary Mattis, who was working on the DoD Report, solicited and received  
28 information and published sources cited in the Report from several leading third party opponents  
of transgender service. For example, on February 5, 2018, Dr. Paul McHugh provided DoD a  
list of sources he believed support the Ban, (Dkt. 435-23), including a May 2014 Hayes Directory  
article, which the DoD Report cites five times as support for the “Mattis policy.” *Compare* Dkt.  
435-25 *with* Dkt. 405-5 at nn. 26, 67, 72, 88–89; *see also* Dkts. 435-24, 435-26, 435-27, and 435-

1 28; Dkts. 430, 431, 432, and 433 (other correspondence with anti-transgender advocates and  
2 sources collected). Despite the indisputable relevance of the February 2018 DoD Report and the  
3 Mattis February 22, 2018 Memorandum, the Government has refused to produce any information  
4 concerning how these documents were prepared, information and alternatives considered, and  
5 whether third parties were involved and their role. Now, without any legal basis, the Government  
6 seeks to limit any Rule 30(b)(6) deposition to “technical questions such as to the meaning of  
7 acronyms, military phrases, and jargon that appears in [the report or the memorandum] that may  
8 not be readily understandable to individuals without a military background.”

9 **Topic 8.** Any requests for waivers, exceptions and/or Exceptions to Policy (ETPs) (a) between  
10 January 1, 2016 and April 11, 2019 and (b) since April 12, 2019 with respect to military  
11 accession or service by transgender persons, persons who have been diagnosed with or have  
12 gender dysphoria, and/or persons who have transitioned or need or seek to transition to a  
13 gender other than their birth-assigned gender, including: the number of such requests; the stated  
14 reasons for and in support of, and the facts and circumstances concerning, each such request;  
15 and the disposition of each such request, including whether it was granted or denied and the  
16 reasons provided for each such disposition.

17 The Government does not object to the relevance of this topic. Nor could it. In the past,  
18 it has taken the position that, in practice, the effects of the Ban can be, and have been, tempered  
19 by the grant of waivers and/or “Exceptions to Policy” for transgender individuals who seek to  
20 join (access) the military or who are currently serving. This request seeks information concerning  
21 the accuracy of that contention and whether any such waivers and/or exceptions have been  
22 granted, and if so, their frequency and the circumstances. Once again, however, Defendants seek  
23 to limit Rule 30(b)(6) testimony on this topic to “any technical questions regarding ETPs under  
24 [DoD’s] current policy such as the meaning of acronyms, military phrases, and jargon that appear  
25 in the ETPs themselves and action on those ETPs that may not be readily understandable by  
26 individuals without a military background.”

27 In sum, each of the objected-to topics is not only relevant, but also concerns a core issue  
28 as to which Plaintiffs’ need for discovery is clear. The Government’s relevance objections to  
these topics are baseless.

**B. Existing Discovery Does Not Substitute For A Rule 30(b)(6) Deposition.**

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The Court should also reject the Government’s argument that a Rule 30(b)(6) deposition is unnecessary because it would “duplicate” other discovery, including “documents and interrogatory responses” and deposition testimony of Government witnesses in their individual capacities. *See supra* at 10, 12. The Government does not provide any support for this objection, because there is none.

To start, the fact that Plaintiffs are taking depositions of fact witnesses who may have personal knowledge of the topics does not render a Rule 30(b)(6) deposition duplicative, nor does it justify limiting Plaintiffs to one seven-hour deposition of DoD officials who are testifying in their individual capacity and are also designated as Rule 30(b)(6) corporate representatives. “A party is entitled to depose someone in both their individual and their corporate capacity.” *YGM S.A. v. Hanger 221 Santa Monica Inc.*, 2015 WL 12660401, at \*1 (C.D. Cal. July 24, 2015). This is because a Rule 30(b)(6) deposition provides evidence unique from that gained via other forms of discovery. Unlike other depositions, a Rule 30(b)(6) deposition allows a party to obtain an “entity’s interpretation of events and documents” and provides that party with “binding testimony from the ... entity.” *Id.* Rule 30(b)(6) depositions also avoid the issue of multiple witnesses disclaiming knowledge on given topics: they curb the “bandying’ by which officers [] of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization.” FED. R. CIV. P. 30(b)(6) Advisory Committee’s Note; *supra* at 13.

Accordingly, courts have “rejected the argument that a Rule 30(b)(6) deposition is unnecessary or cumulative simply because individual deponents ... have already testified about the topics noticed in the Rule 30(b)(6) deposition notice.” *La. Pac. Corp.*, 285 F.R.D. at 486–87; *see also Appleton Papers Inc. v. George A. Whiting Paper Co.*, 2009 WL 2870622, at \*2 (E.D. Wis. Sept. 2, 2009) (“Corporate designees are commonly produced, and no doubt some of their testimony may be a re-hash of what’s been covered elsewhere, but their testimony is the testimony of the corporation itself, and for that reason alone it may not be duplicative.”). Simply put, “any testimony provided by employees as individuals does not satisfy the need for Plaintiff

1 to obtain binding testimony from the corporate entity.” *Kelly v. Provident Life & Acc. Ins. Co.*,  
2 No. 04cv807-AJB (BGS), 2011 WL 2448276, at \*4 (S.D. Cal. June 20, 2011).

3 The Government likewise may not avoid producing a Rule 30(b)(6) witness because it  
4 has produced documents that are relevant to the deposition topics. “Producing documents and  
5 responding to written discovery is not a substitute for providing a thoroughly educated Rule  
6 30(b)(6) deponent.” *Great Am. Ins. Co. of N.Y. v. Vegas Constr. Co.*, 251 F.R.D. 534, 541 (D.  
7 Nev. 2008). “[T]he two forms of discovery are not equivalent”; “depositions provide a more  
8 complete means to obtain information and are, therefore, favored.” *Id.*; *accord Kelly*, 2011 WL  
9 2448276, at \*3 (similar); *FDIC v. 26 Flamingo, LLC*, 2013 WL 3975006, at \*5 (D. Nev. Aug.  
10 1, 2013) (“[A] corporation may not take the position that its documents state the company’s  
11 position.”). Indeed, one purpose of a Rule 30(b)(6) deposition is to secure the “entity’s  
12 interpretation of ... documents”—which may not be apparent from the face of the documents  
13 themselves. *La. Pac. Corp.*, 285 F.R.D. at 486–87.

14 Finally, the same is true of interrogatory answers. Courts uniformly reject the  
15 Government’s argument that parties may avoid Rule 30(b)(6) testimony “by providing written  
16 answers” or “supply[ing] the answers in a written response to an interrogatory.” *26 Flamingo,*  
17 *LLC*, 2013 WL 3975006, at \*5; *Kelly*, 2011 WL 2448276, at \*3. That is particularly true where,  
18 as here, many of the Government’s interrogatory responses are neither clear nor complete.  
19 Moreover, with respect to information that is provided, Plaintiffs are not required to simply “take  
20 Defendants’ word for it” and rely solely on interrogatory answers crafted by opposing counsel.  
21 Plaintiffs have a right to test the accuracy and completeness of that information by questioning  
22 witnesses with direct knowledge and the authority to speak on behalf of the Government. *See*  
23 *Kelly*, 2011 WL 2448276, at \*3 (finding that written answers to interrogatories cannot serve as  
24 substitutes for Rule 30(b)(6) deposition testimony); *La. Pac. Corp.*, 285 F.R.D. at 486–87 (same).

25 In short, the law is settled that other discovery is no substitute for, or basis for objecting  
26 to, a Rule 30(b)(6) deposition. Under Rule 30(b)(6), Plaintiffs have a clear legal right to depose  
27 knowledgeable witnesses designated by the Government and to obtain testimony from those  
28 witnesses as representatives of, and that is binding on, the Defendants as entities.

1           **C. Deliberative Process Privilege Is No Basis to Preclude Plaintiffs’ Topics.**

2           Finally, the Court should reject the Government’s backstop claim that the deliberative  
3 process privilege allows it to refuse to produce a Rule 30(b)(6) witness for Topics 3, 4, 6, and 7.  
4 (The Government concedes its deliberative process arguments do not apply to the other five  
5 noticed topics, nor is there any basis to suggest otherwise. *Supra* at 14–15.)

6           **First**, the Ninth Circuit’s administrative stay regarding the Government’s mandamus  
7 petition does not require this Court to prohibit a Rule 30(b)(6) deposition. Both the Government’s  
8 petition and the administrative stay relate only to this Court’s orders that Plaintiffs overcame the  
9 deliberative process privilege for, and the Government must produce, documents responsive to  
10 two of Plaintiffs’ document requests. They do not seek or purport to halt any other discovery.

11           **Second**, the Government’s deliberative process argument fares no better on the merits.  
12 Its primary argument—that “mental impressions” of military decision-makers are categorically  
13 privileged—lacks any support. Indeed, none of the three cases it cites even mentions deliberative  
14 process privilege. *Supra* at 14. The one case that addresses “mental impressions” is addressing  
15 Rule 30(b)(6) topics that seek *attorney* work product. *J.P. Morgan Chase Bank v. Liberty Mut.*  
16 *Ins. Co.*, 209 F.R.D. 361, 363 (S.D.N.Y. 2002). The others are even further afield. One discusses  
17 the proper scope of review in cases limited to an administrative record, a contention this Court  
18 has repeatedly rejected for this case. *Dep’t of Commerce v. N.Y.*, 139 S. Ct. 2551, 2573–74  
19 (2019); *see* Dkt. 235, at 2; *Karnoski*, 926 F.3d at 1203, 1206–07. And the other is a concurrence  
20 in the D.C. Circuit’s *Doe* decision, which is irreconcilable with the law of this case. *See Doe 2*  
21 *v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring). There simply is no  
22 support for the Government’s claim that “mental impressions” are off limits under Rule 30(b)(6),  
23 much less in a case that turns on the genuineness of the Government’s proffered justifications for  
24 a discriminatory policy subject to heightened scrutiny. *See Karnoski*, 926 F.3d at 1206.

25           **Third**, even if the Government were correct that government witnesses’ “mental  
26 impressions” are somehow privileged (and it is not), the Government’s argument that “there can  
27 be no meaningful inquiry as to Topics 6 and 7” because those topics exclusively “seek the mental  
28 impressions of senior military decision-makers” is demonstrably wrong. *See supra* at 15. The

1 challenged topics seek far more than “mental impressions.” Topic 6, for example, seeks (among  
2 other things) testimony about “the identity of any individuals who approved the [February 2018]  
3 Report before it was submitted to Secretary Mattis and the role, if any, of Secretary Mattis in  
4 drafting, preparing, reviewing, revising and/or finalizing the Report before it was presented to  
5 him”—factual information that does not remotely implicate “opinions, recommendations, or  
6 advice about agency policies.” *Warner*, 742 F.2d at 1161. So too Topic 7, which seeks (among  
7 other things) testimony about “the principal author(s) of the [February 2018 Memorandum; the  
8 identity of any individuals who were involved in drafting and preparing, reviewing and revising,  
9 finalizing and/or approving the Memorandum before it was submitted to Secretary Mattis; the  
10 role, if any, of Secretary Mattis in drafting, preparing, reviewing, revising and/or finalizing the  
11 Memorandum,” and “the identity and role of any persons who were not current employees of the  
12 Department of Defense or one of the branches of the military who were involved in any way in  
13 drafting, reviewing, revising, finalizing and/or approving the Memorandum.” The Government’s  
14 attempt to foreclose entire subjects wholesale is both legally baseless and factually wrong.

15 Finally, this Court has already instructed the Government on the proper procedure if it  
16 wishes to raise a deliberative process objection to deposition testimony: “[I]f there is an objection  
17 based upon deliberative process, the objection is made, then the question is answered, and you  
18 seal the deposition. And if we have to, we will go over line-by-line as to what comes in and what  
19 doesn’t in terms of public testimony.” (2/3/2020 Hr’g Tr. at 64:14–24.) This process is all the  
20 protection the Government needs, ensuring no privileged information will be used, or even seen  
21 by anyone beyond attorneys in this case, unless and until every objection is fully vetted and only  
22 if the Court rejects the Government’s privilege claim. This process also addresses the  
23 Government’s past argument with respect to protective orders—that they do not completely  
24 eliminate the harm of disclosure because opposing counsel can still “use the [information] in  
25 litigation.” (Dkt. 414-1 at 5.) Under the Court’s order, if the Government’s privilege claim is  
26 sustained, the testimony in question may not be used by Plaintiffs or their counsel. In short, the  
27 Government faces no conceivable harm from proceeding with a Rule 30(b)(6) deposition.

28 \* \* \*

1 The Government has failed to show good cause for a protective order. Plaintiffs therefore  
2 respectfully request the Court deny the motion and order the Government to promptly designate  
3 a witness for each topic in Plaintiffs' Rule 30(b)(6) notice and produce them for deposition.

#### 4 DEFENDANTS' REPLY

5 Apart from ignoring the unique aspects of litigating in the arena of military affairs, Defs.'  
6 Statement 8–10, Plaintiffs fail to acknowledge that Rule 26 requires an inquiry *beyond* just  
7 relevance. The Court, in addition to determining relevance, “must limit the frequency or extent  
8 of discovery otherwise allowed” if, *inter alia*, such discovery is “unreasonably cumulative or  
9 duplicative, or can be obtained from some other source that is more convenient, less burdensome,  
10 and less expensive[.]” Rule 26(b)(2)(C). It is wholly unreasonable to have government officials  
11 sit for multiple depositions on the same topics when one deposition would be sufficient, or to use  
12 Rule 30(b)(6) depositions simply to seek the same information that Plaintiffs already have  
13 obtained through other methods of discovery. Worse, a host of Plaintiffs' topics (3–4, 6–7) baldly  
14 attempt to circumvent the Ninth Circuit's stay order by requesting the exact same information at  
15 issue in the mandamus petition—made obvious by the fact that Plaintiffs recycle much of their  
16 arguments from their responses to that petition. *See* Dkt. 459-1 at 15-18 (addressing Plaintiffs'  
17 arguments). Defendants' motion for protective order should be granted.

#### 18 **CONCLUSION**

19 For the foregoing reasons, Defendants respectfully move this Court for a protective order  
20 limiting Plaintiffs' Rule 30(b)(6) topics to non-duplicative and non-privileged information  
21 regarding DoD's reasons and justifications for the challenged policy. In the alternative,  
22 Defendants seek a protective order (a) limiting Plaintiffs to one 7-hour deposition of DoD  
23 officials (or former officials) currently scheduled for deposition where the Government has  
24 indicated that they have sufficient knowledge to answer non-privileged questions regarding  
25 Plaintiffs' proposed topics, and (b) deferring any Rule 30(b)(6) deposition as to Plaintiffs' topics  
26 6 and 7 and the portions of topics 3 and 4 seeking deliberations of the Department of Defense's  
27 Transgender Service Policy Working Group or the Department of Defense's Department of

1 Defense's Medical and Personnel Executive Steering Committee (MEDPERS) pending the  
2 adjudication of the Government's pending mandamus petition.

3  
4 Respectfully submitted, May 8, 2020

5  
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7  
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**UNITED STATES**  
**DEPARTMENT OF JUSTICE**

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The Honorable Marsha J. Pechman

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

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

**[PROPOSED] ORDER GRANTING  
PROTECTIVE ORDER REGARDING  
PLAINTIFFS' FRCP 30(B)(6) TOPICS**

**NOTE ON MOTION CALENDAR:  
[SAME DAY MOTION]**

This matter comes before the Court on the foregoing LCR 37 Joint Submission Regarding Plaintiffs' Federal Rule of Civil Procedure 30(b)(6) topics. The Court, having considered the parties' arguments and finding good cause therefore, GRANTS Defendants' portion of the Joint Submission.

IT IS HEREBY ORDERED:

That Plaintiffs' Rule 30(b)(6) topics will be limited to non-duplicative and non-privileged information regarding DoD's reasons and justifications for the challenged policy;

OR

Plaintiffs shall be limited to one 7 hour deposition of the DoD officials (or former

1 officials) currently scheduled for deposition where the Government has indicated that they have  
2 sufficient knowledge to answer non-privileged questions regarding Plaintiffs' proposed topics.  
3 It is further ORDERED that any deposition as to Plaintiffs' topics 6 and 7 and the portions of  
4 topics 3 and 4 seeking deliberations of the Department of Defense's Transgender Service  
5 Policy Working Group or the Department of Defense's Department of Defense's Medical and  
6 Personnel Executive Steering Committee (MEDPERS) shall be deferred pending the  
7 adjudication of the Government's pending mandamus petition.  
8

9 Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

10 \_\_\_\_\_  
11 The Honorable Marsha J. Pechman  
12 United States District Court Judge  
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