

The Honorable Marsha J. Pechman

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**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

**DECLARATION OF ANDREW E.  
CARMICHAEL IN SUPPORT OF  
LCR 37 JOINT SUBMISSION  
REGARDING PLAINTIFFS' FRCP  
30(B)(6) DEPOSITION TOPICS**

1 I, Andrew E. Carmichael, swear under penalty of perjury under the laws of the United  
2 States to the following:

3 1. I am a Trial Attorney at the United States Department of Justice and counsel of  
4 record for Defendants in this action. I submit this declaration in support of the LCR 37 Joint  
5 Submission Regarding Plaintiffs' FRCP 30(b)(6) topics. I base this declaration on my personal  
6 knowledge, as well as on information acquired by me or made available to me in the course of  
7 performing my official duties.

8 2. Attached to this declaration as Exhibit 1 is a true and correct copy of Plaintiffs'  
9 Rule 30(b)(6) notice to the Department of Defense dated March 9, 2020.

10 3. Attached to this declaration as Exhibit 2 is a true and correct copy of a letter  
11 from Plaintiffs' counsel Jordan Heinz sent to Government counsel dated March 9, 2020.

12 4. Attached to this declaration as Exhibit 3 is a true and correct copy of a letter  
13 from the Government's counsel Andrew Carmichael to Plaintiffs' counsel dated March 12,  
14 2020.

15 5. Attached to this declaration as Exhibit 4 is a true and correct copy of a letter  
16 from Plaintiffs' counsel Jordan Heinz sent to Government counsel dated March 18, 2020.

17 6. Attached to this declaration as Exhibit 5 is a true and correct copy of a letter  
18 from the Government's counsel Andrew Carmichael to Plaintiffs' counsel dated April 17, 2020.

19 7. Attached to this declaration as Exhibit 6 is a true and correct copy of a letter  
20 from the Government's counsel Andrew Carmichael to Plaintiffs' counsel date November 15,  
21 2019.

22  
23 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is  
24 true and correct.

25  
26 EXECUTED this 8th day of May, 2020.

27 /s/ Andrew E. Carmichael  
28 Andrew E. Carmichael

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Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch  
1100 L Street, N.W.  
Washington, DC 20530  
Tel: (202) 514-3346  
Email: andrew.e.carmichael@usdoj.gov

*Counsel for Defendants*

The Honorable Marsha J. Pechman

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

RYAN KARNOSKI, et al.,

*Plaintiffs, and*

STATE OF WASHINGTON,

*Plaintiff-Intervenor,*

v.

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

*Defendants.*

Case No. 2:17-cv-01297-MJP

**NOTICE OF RULE 30(b)(6)  
DEPOSITION**



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**LAMDBA LEGAL DEFENSE AND  
EDUCATION FUND, INC.**

Tara Borelli, WSBA No. 36759

*tborelli@lambdalegal.org*

Camilla B. Taylor (admitted pro hac vice)

Peter C. Renn (admitted pro hac vice)

Sasha Buchert (admitted pro hac vice)

Kara Ingelhart (admitted pro hac vice)

Carl Charles (admitted pro hac vice)

**OUTSERVE-SLDN, INC.**

Peter Perkowski (admitted pro hac vice)

**KIRKLAND & ELLIS LLP**

James F. Hurst, P.C. (admitted pro hac vice)

Jordan M. Heinz (admitted pro hac vice)

Vanessa Barsanti (admitted pro hac vice)

Daniel I. Siegfried (admitted pro hac vice)

Steve Patton (admitted pro hac vice)

Sam Ikard (admitted pro hac vice)

Attorneys for Plaintiffs

**EXHIBIT A**

**SUBJECTS OF EXAMINATION**

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3 1. The Panel of Experts, including: its formation; its mission, purpose, assignment(s),  
4 and deliverables; the potential courses of action and/or policy options it considered; the issues it  
5 addressed; the information it requested and/or considered; its deliberations, conclusions, and  
6 recommendations, including to whom those recommendations were made; and the Panel’s Final  
7 Report and Recommendation.

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

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

23 4. Any discussion, consideration, conclusions or recommendations relating to gender  
24 dysphoria, gender transition or accession into the military or military service by transgender  
25 persons by the Department of Defense’s Medical and Personnel Executive Steering Committee  
26 (MEDPERS) during the period July 1, 2015 to the present.

27 5. The meeting on or around December 15, 2017 at which the Panel presented its  
28 recommendations to the Deputy Secretary of Defense (“DSD”) and the Vice Chair of the Joint

1 Chiefs of Staff (“VCJCS”), including: the identity of all individuals present at the meeting; the  
2 content of all presentations or written materials provided at the meeting; the reactions and/or  
3 response(s) of the DSD and the VCJCS to the Panel’s recommendations; any directions by or  
4 requests from the DSD and the VCJCS as to additional or further work the Panel should perform;  
5 any documents that reflect what was said, presented, discussed, or decided at the meeting; any  
6 follow-up or further work performed by the Panel or others in response to any concerns,  
7 reactions or other views or directions of the DSD and/or the VCJCS or as a result of the meeting;  
8 and any subsequent meetings or communications with or between the Panel and the DSD and/or  
9 VCJCS.

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

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

1 involved in any way in drafting, reviewing, revising, finalizing and/or approving the  
2 Memorandum.

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

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

#### 18 **DEFINITIONS AND INSTRUCTIONS**

19 1. The “Department of Defense,” “You,” “your,” and “yours,” whether or not  
20 capitalized, shall mean the Department of Defense and all officers and employees thereof,  
21 including, but not limited to, the Secretary of Defense, the Deputy Secretary of Defense, any  
22 Undersecretary of Defense, any Assistant Secretary of Defense, any Deputy Assistant Secretary  
23 of Defense, the Chairman and Vice Chairman of the Joint Chiefs of Staff, and all employees and  
24 officers of the Office of the Secretary of Defense, the Department of the Navy, the Department  
25 of the Army, and Department of the Air Force.

26 2. The “Report” shall refer to the February 2018 Department of Defense “Report and  
27 Recommendations on Military Service by Transgender Persons,” which was provided to  
28 Secretary Mattis on February 22, 2018.

1           3.     The “Panel’s Final Report and Recommendation” shall refer to the Final Report and  
2 Recommendations of the Transgender Panel dated October 13 - December 13, 2017 that was  
3 produced as USDOE00088638\_0001.  
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**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that the foregoing was served via email on March 9, 2020.

/s/Jordan M. Heinz

Jordan M. Heinz

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# KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

Jordan Heinz  
To Call Writer Directly:  
+1 312 862 7027  
jordan.heinz@kirkland.com

300 North LaSalle  
Chicago, IL 60654  
United States

+1 312 862 2000

www.kirkland.com

Facsimile:  
+1 312 862 2200

March 9, 2020

## By E-mail

Andrew E. Carmichael  
United States Department of Justice  
Civil Division, Federal Programs Branch  
(202) 353-0889

Re: *Karnoski et al. v. Trump et al.*, 2:17-cv-01297-MJP

Dear Drew:

Enclosed please find Plaintiffs' Rule 30(b)(6) Deposition Notice to the United States Department of Defense. We recognize that this notice may implicate deliberative process privilege issues that may be impacted by Defendants' pending mandamus petition. Plaintiffs are willing to discuss postponing the deposition(s) for these topics until the Ninth Circuit rules on Defendants' petition, but we would like to proceed with the others in the meantime. If necessary, please let me know when you are available to meet and confer.

Sincerely,

Jordan Heinz



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

---

Andrew E. Carmichael  
Trial Attorney  
Andrew.E.Carmichael@usdoj.gov

Tel: (202) 514-3346  
Email:

March 12, 2020

By Email

Jordan M. Heinz  
Kirkland & Ellis LLP  
300 North LaSalle  
Chicago, IL 60654

*Counsel for Plaintiffs*

Re: Plaintiffs' Rule 30(b)(6) Deposition Notice to the United States Department of Defense of March 9, 2020 in *Karnoski v. Trump*, No. 17-1297

Counsel,

I write concerning Plaintiffs' Rule 30(b)(6) Deposition Notice to the United States Department of Defense ("DoD") of March 9, 2020. Of the nine subjects of examination you have identified in Exhibit A to your notice, at least six of those subjects implicate the deliberative process privilege issues currently pending before the Ninth Circuit (Subjects 2–7). As you are aware, there is currently an administrative stay in place regarding these issues and therefore Plaintiffs may not inquire into these areas nor may the DoD provide responses until or unless that stay is lifted.

Of the remaining three subjects of examination (Subjects 1, 8, and 9) it is likely, given the differing nature of the subjects, that a separate individual will need to be designated to respond to each subject of inquiry.

However, Plaintiffs have previously indicated that they plan to depose several of the individuals whom DoD would likely designate to respond to these lines of inquiry, and DoD has provided dates for those depositions. Accordingly, we suggest that DoD go through Plaintiffs' present list of individuals they intend to depose and where that same individual can answer a subject of inquiry in Exhibit A to Plaintiffs Rule 30(b)(6) Notice, Defendants will so indicate. Defendants then propose that the indicated Rule 30(b)(6) line of inquiry (if permissible pursuant to any forthcoming Ninth Circuit order) be pursued during the deposition previously scheduled for that individual.

In any event, because DoD requires additional time to determine whom to designate to answer the lines of inquiry in Plaintiffs' Rule 30(b)(6) Deposition Notice and to prepare that person to answer those questions, the Government proposes that March 24, 2020 be used for

the deposition of Mr. Thomas Dee in Washington, D.C. (as Defendants have previously indicated that Mr. Dee is available on that date) and the Rule 30(b)(6) Deposition be scheduled for a later date that the parties can mutually agree upon. Please notify Defendants by March 16, 2020, if Plaintiffs agree to this proposal and if they intent to go forward with the deposition of Mr. Dee on March 24, 2020.

Sincerely,

/s/

Andrew E. Carmichael

# KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

Jordan M. Heinz  
To Call Writer Directly:  
+1 312 862 7027  
jordan.heinz@kirkland.com

300 North LaSalle  
Chicago, IL 60654  
United States

+1 312 862 2000

www.kirkland.com

Facsimile:  
+1 312 862 2200

March 18, 2020

## By E-mail

Andrew Carmichael  
Trial Attorney  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
andrew.e.carmichael@usdoj.gov

Re: Rule 30(b)(6) Deposition – *Karnoski v. Trump*, 2:17-cv-01297-MJP (W.D. Wash.)

Dear Drew:

I write in response to your March 12, 2020 letter regarding Plaintiffs' Rule 30(b)(6) Notice. **First**, as I confirmed to you on March 16, Plaintiffs agree to take the March 24, 2020 date off calendar and will work with the Government to reschedule the deposition on a mutually agreeable date(s).

**Second**, Plaintiffs disagree that the administrative stay entered by the Ninth Circuit applies in any way to the topics in Plaintiffs' Notice. The Ninth Circuit only temporarily stayed "the district court's December 18, 2019, February 3, 2020, and February 7, 2020 orders" (9th Cir. Dkt. No. 3), none of which relate to Plaintiffs' Rule 30(b)(6) Notice. Indeed, Judge Pechman ruled that deponents should answer questions over any deliberative process objection, and the deposition will be sealed until a determination can be made on the Government's purported objection. (*See* 2/3/20 Hrg. Tr. at 64.) In my cover letter accompanying the Notice, Plaintiffs indicated that certain topics could be deferred because relevant documents are subject to the mandamus petition, but Plaintiffs disagree that the administrative stay applies to Plaintiffs' Notice.

**Third**, Plaintiffs only agree to defer Topics 3, 4, and 6 to a later date in the discovery period to provide additional time for the Ninth Circuit to rule on the Government's mandamus petition. Topics 3 and 4 relate to the Panel's working groups, and Topic 6 relates to the drafting of the February 2018 Report & Recommendations, both of which categories of documents are encompassed within the Government's petition regarding Request for Production No. 29. Please promptly identify witnesses and dates for the other noticed topics.

KIRKLAND & ELLIS LLP

Andrew Carmichael  
March 18, 2020  
Page 2

*Finally*, the Government is free to designate as representatives witnesses who are already being deposed in their individual capacity; however, these witnesses will need to sit for up to seven hours of questioning in their individual capacity and for up to seven hours in their Rule 30(b)(6) capacity. See *Wesley v. Gates*, No. C 08-2719 SI, 2009 WL 1955997, at \*1 (N.D. Cal. July 2, 2009) (quoting *Sabre v. First Dominion Capital, LLC*, 2001 WL 1590544, at \*1 (S.D.N.Y. Dec. 12, 2001)) (“The depositions of an individual who is noticed as an individual witness pursuant to Fed. R. Civ. P. 30(b)(1) and who is also produced as a corporate representative pursuant to Fed. R. Civ. P. 30(b)(6) are presumptively subject to independent seven-hour time limits.”); *Doe v. Trump*, 329 F.R.D. 262, 273-74 (W.D. Wash. 2018) (“The deposition of an individual and the deposition of the same person as a representative of the organization are two distinct matters and can be utilized as distinct forms of evidence,” even where the same government official “is being deposed in both instances.”). Plaintiffs will, of course, conduct our examinations efficiently and only use the amount of time necessary to cover the subject matter in question.

\* \* \*

Should the Government disagree with any of the aforementioned positions, please identify times the Government can meet and confer.

Sincerely,

/s/ *Jordan M. Heinz*

Jordan M. Heinz



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

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Andrew E. Carmichael  
Trial Attorney

Tel: (202) 514-3346  
Email: Andrew.E.Carmichael@usdoj.gov

April 17, 2020

By Email

Jordan Heinz  
Kirkland & Ellis LLP  
300 North LaSalle  
Chicago, IL 60654

*Counsel for Plaintiffs*

Re: FRCP 30(b)(6) Deposition in *Karnoski v. Trump*, No. 17-1297

Dear Jordan,

I write in furtherance of our discussions regarding Plaintiffs' proposed Rule 30(b)(6) deposition. As an initial matter, the Government maintains its position that any Rule 30(b)(6) deposition is inappropriate in this litigation. As the Ninth Circuit has previously ruled in this case, the district court must decide in the first instance if the Department of Defense ("DoD") "reasonably determined [its] policy 'significantly furthers' the government's important interests," *Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019), and that determination should be made on the Administrative Record providing DoD's justifications for the policy. *See also id.* at 1206 n.22 (noting that in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), a 12-page Proclamation was sufficient for judicial review). "In short the district court must apply appropriate military deference to its evaluation of the 2018 policy." *Id.*

Without waiving this objection, Defendants would be willing to designate a witness to answer Plaintiffs' proposed topics of inquiry as far as they seek relevant and non-duplicative factual information regarding the challenged policy.

However, many of Plaintiffs' areas of inquiry specifically seek the mental impressions of senior military decision-makers, including then-Secretary of Defense Mattis himself. Such

areas of inquiry are properly subject to the deliberative process privilege and Plaintiffs may not use a Rule 30(b)(6) deposition to delve into such matters under any view of the law. *See Doe v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (“[J]udicial inquiries...into executive motivation represent a substantial intrusion into the workings of [a coordinate] branch [] of government.”) (quoting *Vill. Of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 (1977)); *see also J.P. Morgan Chase Bank v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 363 (S.D.N.Y. 2002) (disallowing 30(b)(6) deposition topic that, “[u]nder the guise of requesting ‘facts,’” in fact sought “defendants’ mental impressions, conclusions, opinions, and legal theory”).

Moreover, as I previously noted in my letter of March 12, 2020, several of Plaintiffs’ topics (subjects 3–7)<sup>1</sup> specifically seek, through testimony, the same or similar deliberative information as is encompassed in the deliberative documents at issue in the Government’s mandamus petition currently pending before the Ninth Circuit. Accordingly, any attempt to inquire into these areas would be an impermissible circumvention of the Ninth Circuit’s administrative stay. Indeed, Plaintiffs served their Rule 30(b)(6) deposition notice only after the Ninth Circuit issued its administrative stay, and never mentioned the possibility of such a deposition prior to the notice being served. If a Rule 30(b)(6) deposition were to proceed on topics 3 through 7 while the Ninth Circuit’s administrative stay is pending, which also stays Judge Pechman’s order regarding depositions issued at the February 3, 2020 hearing, the Government expects to instruct its witness not to answer such questions pursuant to the deliberative process privilege (except where noted in Defendants’ scope of response to each topic below). *See* Dkt. 415 (staying “[t]he district court’s December 18, 2019, February 3, 2020, and February 7, 2020 orders challenged in [the mandamus] petition”); *see also* Rule 30(c)(2) (“A person may instruct a deponent not to answer . . . when necessary to preserve a privilege . . . .”); *SEC v. Nacchio*, Civil Action No. 05-cv-00480-MSK-CBS, 2009 U.S. Dist. LEXIS 8365, at \*8–9 (D. Colo. Jan. 29, 2009) (denying motion to compel Government Rule 30(b)(6) witness

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<sup>1</sup> My prior letter included topic 2 in this subset. However, following Defendants’ supplemental production and responses to Plaintiffs’ Interrogatory 18, Defendants are not aware of any additional documents that are still being withheld pursuant to the deliberative process privilege that fall within this topic.

to answer questions the witness was instructed not to answer on the grounds of deliberative process privilege).

Further, several of Plaintiffs' proposed topics of inquiry are duplicative of information previously provided in discovery. Under Rule 26(b)(2)(C), the Court "must limit the frequency or extent of discovery otherwise allowed" if, *inter alia*, such discovery is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, and less expensive," or "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case." Fed. R. Civ. P. 26(b)(2)(C)(i), (iii). Here, because in many instances Plaintiffs have the exact same information they currently request through a Rule 30(b)(6) deposition in the form of documents and interrogatory responses, preparing an individual to provide the same information Plaintiffs would be inefficient, a waste of resources, and an unreasonable burden on Defendants.

Below please find Defendants' specific objections to Plaintiffs' definitions and topics.

*Definitions.* Defendants object to Plaintiffs' definition "You," "your," and "yours" as substantially overbroad, ambiguous, and disproportionate to the needs of the case. Plaintiffs have defined "You," "your," and "yours" to encompass "all officers and employees thereof, including, but not limited to, the Secretary of Defense, the Deputy Secretary of Defense, any Undersecretary of Defense, any Assistant Secretary of Defense, any Deputy Assistant Secretary of Defense, the Chairman and Vice Chairman of the Joint Chiefs of Staff, and all employees and officers of the Office of the Secretary of Defense, the Department of the Navy, the Department of the Army, and Department of the Air Force[.]" thus covering more than a million people.

Defendants object to Plaintiffs' definition of the "Panel's Final Report and Recommendation" as "the Final Report and Recommendations of the Transgender Panel dated October 13 - December 13, 2017" as this was not the Final Report and

Recommendations of the Panel of Experts but rather a draft product that does not constitute the Department of Defense's final report and justifications for its policies.

**Topic 1.** This topic seeks information regarding the Department of Defense's "Panel of Experts, including: its formation; its mission, purpose, assignment(s), and deliverables; the potential courses of action and/or policy options it considered; the issues it addressed; the information it requested and/or considered; its deliberations, conclusions, and recommendations, including to whom those recommendations were made; and the Panel's Final Report and Recommendation."

**Defendants' Objection.** Defendants object to Plaintiffs' request for testimony regarding the Panel of Experts as unduly burdensome and disproportionate to the needs of the case because it is entirely duplicative of the thousands of pages of material previously sought and provided through document productions and interrogatory responses that answer these same questions.

"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). The task of making "a good faith effort to prepare . . . [one or more] 30(b)(6) witness[es] to 'fully and unequivocally answer questions about the designated [topics] . . . becomes less realistic and increasingly impossible as the number and breadth of noticed subject areas expand.'" *Id.* (citations omitted); see also 8A Charles Alan Wright et. al., *Federal Practice and Procedure* § 2103 (3d ed.) ("[T]he burdens faced by the responding party [served with a 30(b)(6) notice] are considerably more challenging than with an ordinary deposition.").

Here, the Terms of Reference contained in the Administrative Record at 000330–000331 describe the formation, mission, purpose, assignment, deliverables and to whom the recommendations of the Panel of Experts would be made. The Panel's unredacted meeting minutes provided to Plaintiffs on November 1, 2019 provide the potential courses of action and policy options it considered, as well as the issues it addressed and its deliberations. The 3,075-page Administrative Record provides the materials the Panel considered. The

Administrative Record also contains the Panel's conclusions and recommendations. *See* AR 3059–3067. DoD has also provided all deliberative communications of Panel members regarding their work on the Panel from their time on the Panel. Moreover, in its answer to Interrogatory 18, DoD described in detail the information, statements, advice, opinions, or other inputs each current DoD employee who attended Panel meetings provided to the Panel. To obtain this information, DoD interviewed all current employees who attended Panel meetings including several very senior military officials (*e.g.*, the current Chief of Staff of the Army, the Army's highest ranking military official). If Defendants were required to prepare Rule 30(b)(6) witness(es) to address topic 1, they would rely on these exact same documents and interrogatory responses. Simply put, through other discovery tools, Plaintiffs have already obtained the most fulsome answer to this topic that DoD can provide and any further testimony would be entirely duplicative and therefore an unnecessary and undue burden on Defendants. *See E.E.O.C. v. Boeing Co.*, 2007 WL 1146446, at \*3 (D. Ariz. Apr. 18, 2007) (finding topic duplicative where it requested information already provided).

**Scope of those Responding.** Notwithstanding the above objections, the Department of Defense will identify an individual to answer any technical questions such as the meaning of acronyms, military phrases, and jargon that appear in the Administrative Record and the Panel's meeting minutes that may not be readily understandable by individuals without a military background.

**Topic 2.** This topic seeks information regarding “the preparation, review, and approval of Panel meeting minutes, including: the identity of any individuals who were responsible for documenting Panel meetings and drafting, reviewing, finalizing and approving minutes before they were submitted to the Panel; the process(es) these individuals followed for documenting Panel meetings; why minutes were prepared for some, but not all, Panel meetings, including the Panel's last four meetings; and the identity of any individuals who decided whether minutes would or would not be prepared and the reasons why minutes were or were not prepared.”

**Defendants’ Objection.** Defendants objects to a Rule 30(b)(6) deposition on this topic because it is not relevant to any party’s claim or defense. *See E.E.O.C. v. Boeing Co.*, 2007 WL 1146446, at \*2 (D. Ariz. Apr. 18, 2007) (denying motion to compel discovery related to defendant’s efforts to locate documents on ground of irrelevance). As the Ninth Circuit has previously ruled in this case, the district court must determine in the first instance if DoD “reasonably determined [its] policy ‘significantly furthers’ the government’s important interests,” *Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019), and the method of preparation, review, and approval of Panel meeting minutes, as well as the identity of individuals who assisted in the preparation of those meeting minutes are entirely irrelevant to the Court’s inquiry into this question. The Department of Defense has provided its justifications for the challenged policies in the form of its 44-page report and its 3,075-page Administrative Record. These justifications either pass constitutional muster or they do not. A fishing expedition into the preparation of meeting minutes and the deliberative process used in the creation of the Panel’s meeting minutes is an impermissible use of Rule 30(b)(6). *Heller v. HRB Tax Grp., Inc.*, 287 F.R.D. 483, 485 (E.D. Mo. 2012) (“[A]though the standard of relevance in the context of discovery may be broader than in the context of admissibility, ‘this often intoned legal tenet should not be misapplied so as to allow fishing expeditions in discovery.’”) (quoting *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1993)).

Further, much of Plaintiffs’ proposed topic of examination is duplicative of information Plaintiffs have sought and received through other discovery tools. For example, DoD’s response to Plaintiffs’ Interrogatory 18 provides the answer to many, if not all, of Plaintiffs’ inquiries regarding the identity of individuals responsible for documenting Panel meeting minutes, as well as the drafting, reviewing, finalizing and approving such minutes. For example, DoD’s response to Interrogatory 18 already identified Major Matt Hoffman as one of the primary individuals responsible for drafting the Panel’s meeting minutes and Mr. Lernes Hebert as one of the individuals responsible for reviewing, finalizing, and approving such minutes. Further, in DoD’s response to Plaintiffs’ Interrogatory 18, several other members of the Panel discussed their ability to review and provide edits to meeting minutes before they were finalized. Accordingly, designating a 30(b)(6) witness to review these

materials and provide the same information to Plaintiffs would be wasteful and an undue burden.

Further, Plaintiffs have already sought the deposition of Mr. Hebert, and Defendants are in the process of providing Mr. Hebert's availability for that deposition. There is no reason why Plaintiffs cannot ask these same questions of Mr. Hebert during that deposition. As explained by the Advisory Committee Notes, Rule 30(b)(6) has three purposes: "reducing the difficulties . . . encountered in determining, prior to the deposition, whether a particular employee or agent is a 'managing agent'. . . . ; curbing the 'bandying by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization . . . . ; [and] assisting organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge." *See also Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 623 (5th Cir. 1973) (citing Advisory Committee Notes); *Federal Deposit Insurance Corp. v. Butcher*, 116 F.R.D. 196, 199 (E.D. Tenn. 1986) (Murrian, Mag. J.) (Rule 30(b)(6) intended "to curb any temptation a [litigant] might have to shunt a discovering party from 'pillar to post.'"), *aff'd*, 116 F.R.D. 203, 205 (E.D. Tenn. 1987). Here, Plaintiffs' proposed 30(b)(6) topics appear only to serve the purpose of obtaining an additional deposition on the same topics that Mr. Hebert would be able to speak to in his own deposition. Accordingly, a Rule 30(b)(6) deposition on this topic would not only be wasteful and an undue burden, it would work against the purpose of the rule itself. Moreover, much of Plaintiffs' topic 2 requests information protected by the deliberative process privilege. Specifically, inquiry pertaining to the processes followed for documenting Panel meetings, why minutes were prepared for some, but not all, Panel meetings, and the reasons why minutes were or were not prepared seeks information protected by the deliberative process privilege. Accordingly, the Government expects to instruct any witness not to answer questions that would reveal privileged information within this topic. Further, as explained above, because there is currently an administrative stay over the district court's order to produce all deliberative documents "related" to the Department's February 2018 Report and Recommendations and this topic involves an inquiry into deliberations related to that Report because multiple Panel

meeting minutes were cited in the Report itself, any line of inquiry on this topic risks circumvention of the Ninth Circuit's administrative stay order.

**Scope of those Responding.** Notwithstanding the above objections, the Department of Defense will identify an individual to answer questions regarding the identity of any individuals who were responsible for documenting Panel meetings and the drafting, reviewing, finalizing and approving minutes before they were submitted to the Panel, the identity of any individuals who decided whether minutes would or would not be prepared for a particular meeting, and the process undertaken to prepare Panel meeting minutes.

**Topic 3.** This topic seeks information pertaining to “‘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.** Defendants object to Plaintiffs’ request for testimony regarding the Transgender Personnel Policy Working Group because it is unduly burdensome and disproportionate to the needs of the case as it is largely duplicative of discovery previously sought and provided through document productions and interrogatory responses that answer these same questions. Plaintiffs previously sought the identities of individuals on this working group through their Interrogatory 19 and Defendants answered that interrogatory in full. Accordingly, having an official from DoD review and provide the same information to Plaintiffs in a deposition would be entirely wasteful and an undue burden.

Moreover, “any reports, presentations, recommendations, or other communications the Group had or shared with the Panel” were previously provided to Plaintiffs as a result of the *Doe* Court’s deliberative process privilege ruling and seeking the same information again through testimony is likewise wasteful and an undue burden.

Further, in my November 15, 2019 letter to Plaintiffs, I identified the Chair of the Transgender Service Policy Working Group as Ms. Stephanie Miller. Plaintiffs have already requested to depose Ms. Miller, and Defendants have provided dates for her deposition. Therefore, Ms. Miller is already available to answer questions regarding “the Group’s mission, purpose, and assignment(s)” along with any factual questions pertaining to “the issues addressed by the Group” and “any information the Group requested and/or considered[.]” As explained by the Advisory Committee Notes, Rule 30(b)(6) has three purposes: “reducing the difficulties . . . encountered in determining, prior to the deposition, whether a particular employee or agent is a ‘managing agent’. . . . ; curbing the ‘bandying by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization . . . . ; [and] assisting organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge.” *See also Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 623 (5th Cir. 1973) (citing Advisory Committee Notes); *Federal Deposit Insurance Corp. v. Butcher*, 116 F.R.D. 196, 199 (E.D. Tenn. 1986) (Murrian, Mag. J.) (Rule 30(b)(6) intended “to curb any temptation a [litigant] might have to shunt a discovering party from ‘pillar to post.’”), *aff’d*, 116 F.R.D. 203, 205 (E.D. Tenn. 1987). Here, Plaintiffs’ proposed 30(b)(6) topics appear only to serve the purpose of obtaining an additional deposition on the same topics that Ms. Miller would be able to speak to in her own deposition. Accordingly, a Rule 30(b)(6) deposition on this topic would not only be wasteful and an undue burden, it would work against the purpose of the rule itself.

Finally, as to the deliberations of the Transgender Personnel Policy Working Group itself, such deliberations are protected by the deliberative process privilege and are squarely encompassed within the Ninth Circuit’s administrative stay. Accordingly, Plaintiffs may not inquire into such deliberations. If a Rule 30(b)(6) deposition were to proceed on this topic

while the Ninth Circuit’s administrative stay is pending, which also stays Judge Pechman’s order regarding depositions issued at the February 3, 2020 hearing, the Government expects to instruct its witness not to answer questions where the information sought would be protected by the deliberative process privilege. *See* Dkt. 415 (staying “[t]he district court’s December 18, 2019, February 3, 2020, and February 7, 2020 orders challenged in [the mandamus] petition”); *see also* Rule 30(c)(2) (“A person may instruct a deponent not to answer . . . when necessary to preserve a privilege . . . .”); *SEC v. Nacchio*, Civil Action No. 05-cv-00480-MSK-CBS, 2009 U.S. Dist. LEXIS 8365, at \*8–9 (D. Colo. Jan. 29, 2009) (denying motion to compel Government Rule 30(b)(6) witness to answer questions the witness was instructed not to answer on the grounds of deliberative process privilege).

**Scope of those Responding.** Notwithstanding the above objections, Defendants will make a witness available to answer questions pertaining to “the Group’s mission, purpose, and assignment(s)” along with any factual questions pertaining to “the issues addressed by the Group.”

**Topic 4.** This topic seeks information pertaining to “[a]ny discussion, consideration, conclusions or recommendations relating to gender dysphoria, gender transition or accession into the military or military service by transgender persons by the Department of Defense’s Medical and Personnel Executive Steering Committee (MEDPERS) during the period July 1, 2015 to the present.”

**Defendants’ Objection.** Defendants object to Plaintiffs’ request for testimony regarding MEDPERS because it is unduly burdensome and disproportionate to the needs of the case. Specifically, the majority of the temporal scope of the topic is outside of the scope of this litigation, and the remaining portion of the topic is duplicative of materials previously provided in discovery. As an initial matter, the temporal scope of Plaintiffs’ topic is well beyond the scope of the lawsuit as it extends more than two years before and two years after the relevant time period of the formation of the challenged policy. *See Karnoski v. Trump*, 926 F.3d at 1202

(questioning the relevance of the Presidential Memorandum because it was issued prior to the formation of the Panel of Experts); *see Banks v. Office of Senate Sergeant-at-Arms*, 222 F.R.D. 7, 18 (D.D.C. 2004) (ordering parties to redefine “absurdly overbroad” topics that were ill-suited to a deposition).

Moreover, any deliberative materials MEDPERS provided to the Panel of Experts was previously provided to Plaintiffs as a result of the *Doe* Court’s deliberative process privilege ruling. Seeking the same information again through testimony is therefore wasteful and an undue burden.

Finally, as to deliberations of MEDPERS that were not shared with the Panel, such deliberations are protected by the deliberative process privilege and are squarely encompassed within the Ninth Circuit’s administrative stay. Accordingly, Plaintiffs may not inquire into such deliberations. If a Rule 30(b)(6) deposition were to proceed on this topic while the Ninth Circuit’s administrative stay is pending, which also stays Judge Pechman’s order regarding depositions issued at the February 3, 2020 hearing, the Government expects to instruct its witness not to answer questions where the information sought would be protected by the deliberative process privilege. *See* Dkt. 415 (staying “[t]he district court’s December 18, 2019, February 3, 2020, and February 7, 2020 orders challenged in [the mandamus] petition”); *see also* Rule 30(c)(2) (“A person may instruct a deponent not to answer . . . when necessary to preserve a privilege . . . .”); *SEC v. Nacchio*, Civil Action No. 05-cv-00480-MSK-CBS, 2009 U.S. Dist. LEXIS 8365, at \*8–9 (D. Colo. Jan. 29, 2009) (denying motion to compel Government Rule 30(b)(6) witness to answer questions the witness was instructed not to answer on the grounds of deliberative process privilege).

**Scope of those Responding.** Notwithstanding the above objections, Defendants will make a witness available to explain the function and operation of MEDPERS generally and to answer technical questions such as the meaning of acronyms, military phrases, and jargon that appear in MEDPERS documents that may not be readily understandable by individuals without a military background.

**Topic 5.** This topic seeks information pertaining to “[t]he meeting on or around December 15, 2017 at which the Panel presented its recommendations to the Deputy Secretary of Defense (“DSD”) and the Vice Chair of the Joint Chiefs of Staff (“VCJCS”), including: the identity of all individuals present at the meeting; the content of all presentations or written materials provided at the meeting; the reactions and/or 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 or 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.** Defendants object to Plaintiffs’ request for testimony regarding the content of all presentations or written materials provided at the meeting December 15, 2017 at which the Panel presented its recommendations to the DSD and VCJCS, documents that reflect what was said or presented at the meeting, and follow-up work provided by the Panel as it is largely duplicative of discovery previously sought and provided through documents produced that answer these same questions. For, example Defendants previously provided Plaintiffs with the presentation the Panel provided to the DSD and VCJCS, *see* USDOE00088635\_0001, along with emails identifying the briefer (Mr. Tony Kurta), the individual in direct support of the briefer (Mr. Lernes Hebert), the agenda from the meeting and Panel materials from before, during, and after the meeting as a result of the *Doe* Court’s deliberative process privilege ruling. *See* Def.’s Production 38 and 39. Accordingly, having the Department designate a 30(b)(6) witness to review these materials and read them back to Plaintiffs would be wasteful and an undue burden.

Further, Plaintiffs have already sought the deposition of both Mr. Kurta and Mr. Hebert, and Defendants are in the process of providing Mr. Kurta’s and Mr. Hebert’s availability for that deposition. Plaintiffs can ask these same questions of either Mr. Kurta or Mr. Hebert during that deposition. As explained by the Advisory Committee Notes, Rule

30(b)(6) has three purposes: “reducing the difficulties . . . encountered in determining, prior to the deposition, whether a particular employee or agent is a ‘managing agent’. . . . ; curbing the ‘bandying by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization . . . . ; [and] assisting organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge.” *See also Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 623 (5th Cir. 1973) (citing Advisory Committee Notes); *Federal Deposit Insurance Corp. v. Butcher*, 116 F.R.D. 196, 199 (E.D. Tenn. 1986) (Murrian, Mag. J.) (Rule 30(b)(6) intended “to curb any temptation a [litigant] might have to shunt a discovering party from ‘pillar to post.’”), *aff’d*, 116 F.R.D. 203, 205 (E.D. Tenn. 1987). Here, Plaintiffs’ proposed 30(b)(6) topics appear only to serve the purpose of obtaining an additional deposition on the same topics that both Mr. Kurta and Mr. Hebert would be able to speak to in their own depositions. Accordingly, a Rule 30(b)(6) deposition on this topic would not only be wasteful and an undue burden, it would work against the purpose of the rule itself.

Defendants also object to a Rule 30(b)(6) deposition as far as it seeks any “reactions and/or response(s) of the DSD and the VCJCS to the Panel’s recommendations” because this area of inquiry specifically seeks the mental impressions of senior military decisions-makers. Such areas of inquiry are properly subject to the deliberative process privilege and Plaintiffs may not use a Rule 30(b)(6) deposition to delve into such matters under any view of the law. *Doe v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (“[J]udicial inquires . . . into executive motivation represent a substantial intrusion into the workings of [a coordinate] branch [] of government.”) (quoting *Vill. Of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 (1977)); *see also J.P. Morgan Chase Bank v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 363 (S.D.N.Y. 2002) (disallowing 30(b)(6) deposition topic that, “[u]nder the guise of requesting ‘facts,’” in fact sought “defendants’ mental impressions, conclusions, opinions, and legal theory). And, as far the “reactions and/or response(s) of the DSD and the VCJCS to the Panel’s recommendations” were not conveyed to the Panel, they are squarely encompassed within the Ninth Circuit’s administrative stay. Accordingly, Plaintiffs may not

inquire into such deliberations. If a Rule 30(b)(6) deposition were to proceed on this topic while the Ninth Circuit's administrative stay is pending, which also stays Judge Pechman's order regarding depositions issued at the February 3, 2020 hearing, the Government expects to instruct its witness not to answer questions where the information sought would be protected by the deliberative process privilege. *See* Dkt. 415 (staying "[t]he district court's December 18, 2019, February 3, 2020, and February 7, 2020 orders challenged in [the mandamus] petition"); *see also* Rule 30(c)(2) ("A person may instruct a deponent not to answer . . . when necessary to preserve a privilege . . ."); *SEC v. Nacchio*, Civil Action No. 05-cv-00480-MSK-CBS, 2009 U.S. Dist. LEXIS 8365, at \*8–9 (D. Colo. Jan. 29, 2009) (denying motion to compel Government Rule 30(b)(6) witness to answer questions the witness was instructed not to answer on the grounds of deliberative process privilege).

Further, Defendants object to a Rule 30(b)(6) deposition as far as it seeks any "reactions and/or response(s) of the DSD and the VCJCS to the Panel's recommendations" because it is not relevant to any party's claim or defense. *See E.E.O.C. v. Boeing Co.*, 2007 WL 1146446, at \*2 (D. Ariz. Apr. 18, 2007) (denying motion to compel discovery related to defendant's efforts to locate documents on ground of irrelevance). As the Ninth Circuit has previously ruled in this case, the district court must determine in the first instance if DoD "reasonably determined [its] policy 'significantly furthers' the government's important interests," *Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019), and the reaction and or response by the DSD and VCJCS to the Panel's recommendations is entirely irrelevant to the Court's inquiry into this question. The Department of Defense has provided its justifications for the challenged policies in the form of its 44-page report and its 3,075-page Administrative Record; these justifications either pass constitutional muster or they do not. A fishing expedition into the "reactions and / or response of the DSD and the VCJCS to the Panel's recommendations" is an impermissible use of Rule 30(b)(6) particularly because the "reaction" of a particular individual is entirely subjective and not something the Department can testify to as a definitive fact. *Heller v. HRB Tax Grp., Inc.*, 287 F.R.D. 483, 485 (E.D. Mo. 2012) ("[A]lthough the standard of relevance in the context of discovery may be broader than in the context of admissibility, 'this often intoned legal tenet should not be misapplied so as to allow fishing

expeditions in discovery.”) (quoting *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1993)).

**Scope of those Responding.** Notwithstanding the above objections, the Department of Defense will identify an individual to answer questions regarding the identity of any individuals who were at the December 15, 2017 meeting, at which the Panel presented its recommendations to the DSD and the VCJCS, generally what occurred at that meeting and any subsequent meetings between the DSD/VCJCS and the Panel, any direction DSD/VCJCS gave the Panel regarding any follow-up work, and to answer any technical questions such as the meaning of acronyms, military phrases, and jargon that appear in the Panel’s presentation to the DSD/VCJCS that may not be readily understandable by individuals without a military background.

**Topic 6.** This topic seeking information pertaining to “[t]he 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.”

**Defendants’ Objections:** Defendants object to this topic of inquiry as it specifically seeks the mental impressions of senior military decisions-makers, including then-Secretary of Defense Mattis himself. Such areas of inquiry are properly subject to the deliberative process privilege and Plaintiffs may not use a Rule 30(b)(6) deposition to delve into such matters under any view of the law. *Doe v. Shanaban*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J.,

concurring) (“[J]udicial inquires...into executive motivation represent a substantial intrusion into the workings of [a coordinate] branch [] of government.”) (quoting *Vill. Of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 (1977)); see also *J.P. Morgan Chase Bank v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 363 (S.D.N.Y. 2002) (disallowing 30(b)(6) deposition topic that, “[u]nder the guise of requesting ‘facts,’” in fact sought “defendants’ mental impressions, conclusions, opinions, and legal theory”). Moreover, this topic specifically seeks the same or similar deliberative information through testimony that is encompassed in the deliberative documents at issue in the Government’s mandamus petition currently pending before the Ninth Circuit. Accordingly, any attempt to inquire into these areas would be an impermissible circumvention of the Ninth Circuit’s administrative stay. Indeed, Plaintiffs served their Rule 30(b)(6) deposition notice only after the Ninth Circuit issued its administrative stay and never mentioned the possibility of such a deposition prior to the notice being served. If a Rule 30(b)(6) deposition were to proceed on this topic while the Ninth Circuit’s administrative stay is pending, which also stays Judge Pechman’s order regarding depositions issued at the February 3, 2020 hearing, the Government expects to instruct its witness not to answer questions where the information sought would be protected by the deliberative process privilege. See Dkt. 415 (staying “[t]he district court’s December 18, 2019, February 3, 2020, and February 7, 2020 orders challenged in [the mandamus] petition”); see also Rule 30(c)(2) (“A person may instruct a deponent not to answer . . . when necessary to preserve a privilege . . . .”); *SEC v. Nacchio*, Civil Action No. 05-cv-00480-MSK-CBS, 2009 U.S. Dist. LEXIS 8365, at \*8–9 (D. Colo. Jan. 29, 2009) (denying motion to compel Government Rule 30(b)(6) witness to answer questions the witness was instructed not to answer on the grounds of deliberative process privilege).

Further, Defendants object to a Rule 30(b)(6) deposition on this topic because it is not relevant to any party’s claim or defense. See *E.E.O.C. v. Boeing Co.*, 2007 WL 1146446, at \*2 (D. Ariz. Apr. 18, 2007) (denying motion to compel discovery related to defendant’s efforts to locate documents on ground of irrelevance). As the Ninth Circuit has previously ruled in this case, the district court must determine in the first instance if DoD “reasonably determined [its] policy ‘significantly furthers’ the government’s important interests,” *Karnoski v. Trump*, 926

F.3d 1180, 1202 (9th Cir. 2019), and the method of preparation, review, and approval, of the Department's Report is entirely irrelevant to the Court's inquiry into this question. The Report itself provides the justifications for the challenged policies along with the accompanying 3,075-page Administrative Record. These justifications either pass constitutional muster or they do not. A fishing expedition into the creation of the Department's Report and the deliberative process used in the preparation of the Report is an impermissible use of Rule 30(b)(6). *Heller v. HRB Tax Grp., Inc.*, 287 F.R.D. 483, 485 (E.D. Mo. 2012) (“[A]though the standard of relevance in the context of discovery may be broader than in the context of admissibility, ‘this often intoned legal tenet should not be misapplied so as to allow fishing expeditions in discovery.’”) (quoting *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1993)).

Moreover, much of Plaintiffs' topic 6 requests information that is duplicative of information Plaintiffs have sought and received through other discovery tools. In particular, the identity of individuals who reviewed or commented on the Report, the primary staff members assigned to draft the Report, and the ultimate approver of the Report were previously provided to Plaintiffs in DoD's response to Interrogatory 16. Accordingly, having DoD designate a 30(b)(6) witness to review that interrogatory response and provide the same information to Plaintiffs would be wasteful and an undue burden.

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

**Topic 7.** This topic seeks information pertaining to “[t]he February 22, 2018 Memorandum for the President from Secretary Mattis concerning Military Service by Transgender Individuals (“Memorandum”), including: the principal author(s) of the Memorandum; the identity of any individuals who were involved in drafting and preparing, reviewing and revising, finalizing and/or approving the Memorandum before it was submitted to Secretary Mattis; the role, if any, of Secretary Mattis in drafting, preparing, reviewing, revising and/or

finalizing the Memorandum; the process that was followed and the information and alternatives that were considered in drafting, revising, finalizing, and approving the Memorandum; and 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 drafting, reviewing, revising, finalizing and/or approving the Memorandum.”

**Defendants’ Objections:** Defendants object to this topic of inquiry as it specifically seeks the mental impressions of senior military decisions-makers, including then-Secretary of Defense Mattis himself. Such areas of inquiry are properly subject to the deliberative process privilege and Plaintiffs may not use a Rule 30(b)(6) deposition to delve into such matters under any view of the law. *Doe v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring) (“[J]udicial inquiries...into executive motivation represent a substantial intrusion into the workings of [a coordinate] branch [] of government.”) (quoting *Vill. Of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 (1977)); *see also J.P. Morgan Chase Bank v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 363 (S.D.N.Y. 2002) (disallowing 30(b)(6) deposition topic that, “[u]nder the guise of requesting ‘facts,’” in fact sought “defendants’ mental impressions, conclusions, opinions, and legal theory”). Moreover, this topic specifically seeks the same or similar deliberative information through testimony that is encompassed in the deliberative documents at issue in the Government’s mandamus petition currently pending before the Ninth Circuit. Accordingly, any attempt to inquire into these areas would be an impermissible circumvention of the Ninth Circuit’s administrative stay. Indeed, Plaintiffs served their Rule 30(b)(6) deposition notice only after the Ninth Circuit issued its administrative stay and never mentioned the possibility of such a deposition prior to the notice being served. If a Rule 30(b)(6) deposition were to proceed on this topic while the Ninth Circuit’s administrative stay is pending, which also stays Judge Pechman’s order regarding depositions issued at the February 3, 2020 hearing, the Government expects to instruct its witness not to answer questions where the information sought would be protected by the deliberative process privilege. *See* Dkt. 415 (staying “[t]he district court’s December 18, 2019, February 3, 2020, and February 7, 2020 orders challenged in [the mandamus] petition”); *see*

*also* Rule 30(c)(2) (“A person may instruct a deponent not to answer . . . when necessary to preserve a privilege . . .”); *SEC v. Nacchio*, Civil Action No. 05-cv-00480-MSK-CBS, 2009 U.S. Dist. LEXIS 8365, at \*8–9 (D. Colo. Jan. 29, 2009) (denying motion to compel Government Rule 30(b)(6) witness to answer questions the witness was instructed not to answer on the grounds of deliberative process privilege).

Further, Defendants object to a Rule 30(b)(6) deposition on this topic because it is not relevant to any party’s claim or defense. *See E.E.O.C. v. Boeing Co.*, 2007 WL 1146446, at \*2 (D. Ariz. Apr. 18, 2007) (denying motion to compel discovery related to defendant’s efforts to locate documents on ground of irrelevance). As the Ninth Circuit has previously ruled in this case, the district court must determine in the first instance if DoD “reasonably determined [its] policy ‘significantly furthers’ the government’s important interests,” *Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019), and the method of preparation, review, approval, of then-Secretary Mattis’ Memorandum is entirely irrelevant to the Court’s inquiry into this question. The Department of Defense has provided its justifications for the challenged policies in the form of its 44-page report and its 3,075-page Administrative Record. These justifications either pass constitutional muster or they do not. A fishing expedition into the creation of Secretary Mattis’ Memorandum and the deliberative process used in preparation of that Memorandum is an impermissible use of Rule 30(b)(6). *Heller v. HRB Tax Grp., Inc.*, 287 F.R.D. 483, 485 (E.D. Mo. 2012) (“[A]though the standard of relevance in the context of discovery may be broader than in the context of admissibility, ‘this often intoned legal tenet should not be misapplied so as to allow fishing expeditions in discovery.’”) (quoting *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1993)).

Moreover, much of Plaintiffs’ topic 7 requests information that is duplicative of information Plaintiffs have sought and received through other discovery tools. In particular, the identity of individuals who reviewed or commented on the Memorandum, the primary staffmembers assigned to draft the Memorandum and the ultimate approver of the Memorandum were previously provided to Plaintiffs in DoD’s response to Interrogatory 17. Accordingly, having the Department designate a 30(b)(6) witness to review that interrogatory

response and provide the same information to Plaintiffs would be wasteful and an undue burden.

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

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

**Defendants’ Objections:** Defendants object to this topic of inquiry because Plaintiffs’ request for testimony regarding the “waivers, exceptions and/or Exceptions to Policy (ETPs) (a) between January 1, 2016 and April 11, 2019 and (b) since April 12, 2019” is unduly burdensome and disproportionate to the needs of the case as it is entirely duplicative of material previously sought and provided (or that Defendants are in the process of providing) through document productions. Here, Defendants have specifically searched for, located, and either have provided (or will provide) the actual ETP requests and action on those requests in the course of document discovery. Simply put, Plaintiffs have already obtained through other discovery tools the most fulsome answer to this topic that the Department of Defense can provide and any further testimony would be entirely duplicative and therefore an unnecessary and undue burden to Defendants. *See E.E.O.C. v. Boeing Co.*, 2007 WL 1146446, at \*3 (D.

Ariz. Apr. 18, 2007) (finding topic duplicative where it requested information already provided).

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

**Topics 9.** This topic seeks information pertaining to “[t]he statement, at page 33 of the Report, that “currently available in-service data already show that, cumulatively, transitioning Service members in the Army and Air Force have averaged 167 and 159 days of limited duty, respectively, over a one-year period,” including: any data or other information on which this statement was based; how these averages were calculated and by whom; how “limited duty” was defined and determined for purposes of these calculations; and why such calculations were provided with respect to the Army and Air Force, but not the Navy and the Marine Corps.”

**Defendants’ Objection.** Defendants object to this topic because it requests testimony that is largely duplicative of discovery previously sought and provided through documents and therefore is unduly burdensome and disproportionate to the needs of the case. The majority of the information sought through this topic is in the Administrative Record itself. Further, as far as that information was not already contained in the Administrative Record, Plaintiffs previously sought and Defendants provided in its December 20, 2019 production, the underlying information supporting this statement in DoD’s Report. Accordingly, having an officer from DoD review these documents and provide the same information to Plaintiffs in a deposition would be entirely wasteful and an undue burden.

**Scope of those Responding.** Notwithstanding the above objections Defendants will make a witness available to answer questions pertaining to the meaning of the statement, how the

averages were calculated and by whom, how limited duty was defined and determined for purposes of the calculations and why the calculations were provided with respect to the Army and Air Force, but not the Navy and the Marine Corps.

Please let me know if you would like to meet and confer further on this issue.

Sincerely,

/s/

Andrew E. Carmichael



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

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Andrew E. Carmichael  
Trial Attorney

Tel: (202) 514-3346  
Email: Andrew.E.Carmichael@usdoj.gov

November 15, 2019

By Email

Jordan M. Heinz  
Vanessa Barsanti  
Kirkland & Ellis LLP  
300 North LaSalle  
Chicago, IL 60654

*Counsel for Plaintiffs*

Re: Department of Defense and Military Service Custodians and Your Letter of September 27, 2019 in *Karnoski v. Trump*, No. 17-1297

Dear Jordan and Vanessa,

As discussed after the hearing on November 12, 2019, I am providing spreadsheets identifying the custodians from the Department of Defense and the Military Services. Further, in response to your letter of September 27, 2019, and as agreed to during our meet and confer on October 29, 2019, we provide the following additional information.

**Questions pertaining to Department of Defense and Military Service custodians.**

Did DoD collect from members of the Panel of Experts (“POE”)? Yes, DoD confirms that it collected from the DoD POE Chair (Mr. Kurta). See ECF 371-1 (Easton Decl. of Aug. 29, 2019), ¶ 6. Except where noted below, the Military Services confirm they collected from their respective members of the POE.<sup>1</sup>

Did DoD collect from chair(s) of various working groups identified in response to ROG 19? Yes, details below.

- a. Senior Implementation Group. Co-chaired by Deputy Secretary of Defense Work and Vice Chairman of the Joint Chiefs of Staff, General Selva. DoD confirms

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<sup>1</sup> The Air Force only collected documents from one of its POE members Vice Chief Stephen Wilson. However, documents from all three of the Air Force’s POE members (General Wilson, Chief Master Sergeant Kaleth Wright, and Under Secretary of the Air Force Matthew Donovan) appear in the collection. The Air Force is currently in the process of supplementing its collection to include materials from Chief Master Sergeant Kaleth Wright and Under Secretary of the Air Force Matthew Donovan.

that it collected from DSD Work (*see* Easton Decl., ¶ 6). CJCS confirms it collected from General Selva.

- b. Transgender Action Officer Working Group. Co-chaired by Stephanie Barna and Stephanie Miller. DoD confirms that it collected from both Ms. Barna and Ms. Miller (*see* Easton Decl., ¶ 6).
- c. Accession Medical Standards Working Group. Co-chaired by LTC Gary Brown and Ed Chan. DoD confirms that it collected from both LTC Brown and Mr. Chan (*see* Easton Decl., ¶ 6).
- d. Medical Personnel Executive Steering Committee (MEDPERS). Co-chaired by Dr. Terry Adirim and Lernes Hebert. DoD confirms that it collected from both Dr. Adirim and Mr. Hebert (*see* Easton Decl., ¶ 6).
- e. MEDPERS Accession Modernization Working Group. Chaired by Chris Arendt. DoD confirms that it collected from Mr. Arendt (*see* Easton Decl., ¶ 6).
- f. Transgender Personnel Policy Working Group. Chaired by Stephanie Miller. DoD confirms that it collected from Ms. Miller (*see* Easton Decl., ¶ 6).

In a supplemental response to ROG 18, DoD identified the members of the Retention and Nondeployable Working Group. That group worked independently of the POE process although it did brief the POE at one of their later meetings (Nov. 16) on their recommended universal standard for retention and deployability. The chair of this working group was designated as the Director, Officer and Enlisted Personnel Management (OEPM), *see* DoD00000073. However, that position was vacant for almost all of the time the POE was functioning. Because neither the former Director, Juliet Beyler, nor the eventual Director, Patricia Mulcahy, were in place during key periods, neither was identified in DoD's supplemental ROG response as having been a member of this working group, and neither was identified as a key custodian when targeting specific individuals for searches.

**Questions pertaining to the Departments Responses to Plaintiffs RFPs Nos. 11, 12, 16-17, 26, 36, and 47-54.**

**RFP No 11:** All Documents reflecting visits to the White House on July 10, 2017 by President Trump's Evangelical Advisory Board members or his campaign's Evangelical Advisors, including but not limited to, visitor logs.

**Response:** The Department of Defense believes that the collection and search methodology it employed captured material reasonably related to the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018. As far as President Trump's Evangelical Advisory

Board members, his campaign's Evangelical Advisors, or a meeting at the White House with these individuals which allegedly occurred on July 10, 2017 had any involvement in that process DoD believes its collection and searches were reasonably calculated to capture documents in its custody and control. The Department will not conduct any additional searches or collections related to this RFP.

**RFP No 12:** All Documents related to, and Communications with, President Trump's Evangelical Advisory Board members or his campaign's Evangelical Advisors related to transgender military service or healthcare for current or prospective transgender service members.

**Response:** The Department of Defense believes that the collection and search methodology it employed captured material reasonably related to the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018. As far as President Trump's Evangelical Advisory Board members or his campaign's Evangelical Advisors had any involvement in that process DoD believes its collection and searches were reasonably calculated to capture documents in its custody and control. The Department will not conduct any additional searches or collections related to this RFP.

**RFP 16:** All Documents or Communications relating to any application (including any action taken on such application) by a transgender person for a waiver sought for the purpose of accessing into the U.S. military.

**Response:** The Department of Defense believes that the collection and search methodology it employed captured material reasonably related to the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018. As far as documents or communications relating to an application (including any action taken on such application) by a transgender person for a waiver sought for the purpose of accessing into the U.S. military had any involvement in that process, DoD believes its collection and searches were reasonably calculated to capture documents in its custody and control. DoD did not search for or collect individual waiver applications by transgender individuals or individuals with gender dysphoria or actions taken on those applications where those applications were not reasonably related to DoD's formation of its policy on military service by transgender individuals and individuals with gender dysphoria. The Department will not conduct any additional searches or collections related to this RFP.

**RFP 17:** With respect to waivers sought by transgender people for the purpose of accessing into the U.S. military, Documents sufficient to show the number of such waivers requested, the number of such waivers granted, and the number of such waivers denied.

**Response:** DoD has produced documents sufficient to show the number of applicants known to have accessed into the military with the condition of gender dysphoria between January 1, 2018 and April 12, 2019. Further, the Department has previously provided Plaintiffs with a link to its

annual reports containing descriptive statistics on medical accessions waivers. *See, e.g.*, Department of Defense response to RFP 54 (citing to <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>). Moreover, as far as documents sufficient to show the number of waivers sought by transgender people for the purpose of accessing into the U.S. military, the number of such waivers granted, and the number of such waivers denied had any involvement in the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018 DoD believes its collection and searches were reasonably calculated to capture documents in its custody and control. The Department will not conduct any additional searches or collections related to this RFP.

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

**Response:** The Department of Defense believes that the collection and search methodology it employed captured material reasonably related to the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018. As far as documents "sufficient to show the total annual amount spent and average, actual, or estimated annual per-person cost of hormone therapy provided to service members for each of fiscal years 2015, 2016, and 2017, and for the year to date of fiscal year 2018, including without limitation hormone therapy for the treatment of hypogonadism, hypothyroidism, hyperthyroidism, prostate cancer, breast cancer, growth hormone deficiency, menopause, osteoporosis, and transgender hormone therapy" had any involvement in the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018 DoD believes its collection and searches were reasonably calculated to capture documents in its custody and control. Further, the Department of Defense publishes an annual report to Congress containing an evaluation of the Military Health System including a review of overall costs. That annual report is publically available online at:

<https://www.health.mil/Military-Health-Topics/Access-Cost-Quality-and-Safety/Health-Care-Program-Evaluation/Annual-Evaluation-of-the-TRICARE-Program>. The Department will not conduct any additional searches or collections related to this RFP.

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

**Response:** The Department of Defense believes that the collection and search methodology it employed captured material reasonably related to the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018. As far as documents "reflecting, referring, or relating to any complaints arising from or attributed to open service by transgender service members, accessions by transgender individuals, or the Carter Policy" had any involvement in the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018 DoD believes its collection and searches were reasonably calculated to capture documents in its custody and control. The Department will agree to conduct an additional search for the underlying EO report(s) cited at n. 143 of the Mattis Report and referred to in the Panel Minutes produced as Administrative\_Record\_002821.

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

**Response:** The Department of Defense believes that the collection and search methodology it employed captured material reasonably related to the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018. As far as documents "sufficient to show, for each service branch, the considerations the branch takes into account, and the process(es) it utilizes, both as to accession into military service and with respect to retention in service of current service members, when determining whether to grant applications for waivers of disqualifying mental or medical conditions including: hypogonadism; chest surgery; genital repair and/or reconstruction surgery; adrenal dysfunction; hyperparathyroidism; hypoparathyroidism; pituitary dysfunction; hormone treatment; conditions or medical histories described by DODI 6130.03 §§ 5.13-5.14; anxiety; depression; body dysmorphia; suicidal ideation; past suicide attempts; history of self-harm; post-traumatic stress disorder; and history of malignancy, including prostate, testicular, ovarian and breast malignancies" had any involvement in the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018 DoD believes its collection and searches were reasonably calculated to capture documents in its custody and control.

Further, the Department of Defense previously provided Plaintiffs with a link to the Department of Defense Disability Evaluation System (DES) Manual (DoDM 1332.18) which sets DoD policy and provides procedures for the referral, evaluation, return to duty, separation, or retirement of service members for disability. *See* Department of Defense Response to RFP 47 (citing to <https://www.esd.whs.mil/directives/issuances/dodm/>).

Further, the Department of Defense previously provided Plaintiffs with a link to Department of Defense Instruction (DODI) 6130.03 which sets for considerations for Accession into the military with pre-existing medical conditions. *See id.* (citing to <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003p.pdf?ver=2018-05-04-113917-883>).

Moreover, the Department of Defense previously provided Plaintiffs with a link to the annual report of the Accessions Medical Standards and Research Activity (AMSARA) which contains an evidence-based evaluation of accessions medical standards annually to assist the Accessions Medical Standards Working Group in making these determinations. *See id.* (citing to <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>.)

The Department will conduct a reasonable search for official guidance pertaining to the considerations taken into account when determining whether to revise DoDI 6130.03.

**RFP 48:** Documents sufficient to show the total number of applications granted, and number of applications denied, for waiver of disqualifying conditions listed in DODI 6130.03, since June 30, 2016.

**Response:** The Department of Defense believes that the collection and search methodology it employed captured material reasonably related to the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018. As far as documents "sufficient to show the total number of applications granted, and number of applications denied, for waiver of disqualifying conditions listed in DODI 6130.03, since June 30, 2016" had any involvement in the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018 DoD believes its collection and searches were reasonably calculated to capture documents in its custody and control. Further, the Department has previously provided Plaintiffs with a link to its annual reports containing descriptive statistics on medical accessions waivers. *See* Department of Defense response to RFP 48 (citing to <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>). The Department will not conduct any additional searches or collections related to this RFP.

**RFP 49:** Documents sufficient to show the number of waivers granted upon accession, and number of waivers denied upon accession, for each of the following conditions: hypogonadism; chest surgery; genital repair and/or reconstruction surgery; adrenal dysfunction; hyperparathyroidism; hypoparathyroidism; pituitary dysfunction; and hormone treatment; conditions or medical histories described by DODI 6130.03 §§ 5.13-5.14; anxiety; depression;

body dysmorphia; suicidal ideation; past suicide attempts; history of self-harm; and post-traumatic stress disorder; history of malignancy, including without limitation history of prostate, testicular, ovarian or breast malignancies; since June 30, 2016.

**Response:** The Department of Defense believes that the collection and search methodology it employed captured material reasonably related to the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018. As far as documents "sufficient to show the number of waivers granted upon accession, and number of waivers denied upon accession, for each of the following conditions: hypogonadism; chest surgery; genital repair and/or reconstruction surgery; adrenal dysfunction; hyperparathyroidism; hypoparathyroidism; pituitary dysfunction; and hormone treatment; conditions or medical histories described by DODI 6130.03 §§ 5.13-5.14; anxiety; depression; body dysmorphia; suicidal ideation; past suicide attempts; history of self-harm; and post-traumatic stress disorder; history of malignancy, including without limitation history of prostate, testicular, ovarian or breast malignancies; since June 30, 2016" had any involvement in the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018 DoD believes its collection and searches were reasonably calculated to capture documents in its custody and control. Further, the Department has previously provided Plaintiffs with a link to its annual reports containing descriptive statistics on medical accessions waivers. See Department of Defense response to RFP 49 (citing to <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>). The Department will not conduct any additional searches or collections related to this RFP.

**RFP 50:** Documents sufficient to show the number of waivers granted for service members seeking retention, and number of waivers denied for service members seeking retention, for each of the following conditions: hypogonadism; chest surgery; genital repair and/or reconstruction surgery; adrenal dysfunction; hyperparathyroidism; hypoparathyroidism; pituitary dysfunction; and hormone treatment; conditions or medical histories described by DODI 6130.03 §§ 5.13-5.14; anxiety; depression; body dysmorphia; suicidal ideation; past suicide attempts; history of self-harm; and post-traumatic stress disorder; history of malignancy, including without limitation history of prostate, testicular, ovarian or breast malignancies; since June 30, 2016.

**Response:** The Department of Defense believes that the collection and search methodology it employed captured material reasonably related to the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018. As far as documents "sufficient to show the number of waivers granted for service members seeking retention, and number of waivers denied for service members seeking retention, for each of the following conditions: hypogonadism; chest surgery; genital repair and/or reconstruction surgery; adrenal dysfunction; hyperparathyroidism; hypoparathyroidism; pituitary dysfunction; and hormone treatment; conditions or medical histories described by DODI 6130.03 §§ 5.13-5.14; anxiety; depression; body dysmorphia;

suicidal ideation; past suicide attempts; history of self-harm; and post-traumatic stress disorder; history of malignancy, including without limitation history of prostate, testicular, ovarian or breast malignancies; since June 30, 2016” had any involvement in the formation and implementation of DoD’s policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018 DoD believes its collection and searches were reasonably calculated to capture documents in its custody and control. Further, the Department has previously provided Plaintiffs with a link to its annual reports containing descriptive statistics on medical accessions waivers. *See* Department of Defense response to RFP 49 (citing to <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>).

Moreover, the Department of Defense previously provided Plaintiffs with a link to the the Department of Defense Disability Evaluation System (DES) Manual (DoDM 1332.18). *See* Department of Defense response to RFP 50 (citing <https://www.esd.whs.mil/directives/issuances/dodm/>). This instruction sets DoD policy and provides procedures for the referral, evaluation, return to duty, separation, or retirement of Service members for disability. The Department will not conduct any additional searches or collections related to this RFP.

**RFP 51:** Documents sufficient to show the number of openly transgender individuals granted waivers for non-gender-dysphoria conditions or histories, and allowed to be accessed or retained pursuant to those waivers, since June 30, 2016.

**Response:** DoD has produced documents sufficient to show the number of applicants known to have accessed into the military with the condition of gender dysphoria between January 1, 2018 and April 12, 2019. Further, the Department has previously provided Plaintiffs with a link to its annual reports containing descriptive statistics on medical accessions waivers. *See* Department of Defense response to RFP 51 (citing to <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>). Moreover, as far as documents “sufficient to show the number of openly transgender individuals granted waivers for non-gender-dysphoria conditions or histories, and allowed to be accessed or retained pursuant to those waivers, since June 30, 2016” had any involvement in the formation and implementation of DoD’s policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018 DoD believes its collection and searches were reasonably calculated to capture documents in its custody and control. The Department will not conduct any additional searches or collections related to this RFP.

**RFP 52:** Documents sufficient to show the number of openly transgender individuals denied waivers for non-gender-dysphoria conditions or histories, and denied accession or retention absent those waivers, since June 30, 2016.

**Response:** DoD has produced documents sufficient to show the number of applicants known to have accessed into the military with the condition of gender dysphoria between January 1, 2018 and April 12, 2019. Further, the Department has previously provided Plaintiffs with a link to its

annual reports containing descriptive statistics on medical accessions waivers. *See* Department of Defense response to RFP 52 (citing to <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>). Moreover, as far as documents “sufficient to show the number of openly transgender individuals denied waivers for non-gender-dysphoria conditions or histories, and denied accession or retention absent those waivers, since June 30, 2016” had any involvement in the formation and implementation of DoD’s policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018 DoD believes its collection and searches were reasonably calculated to capture documents in its custody and control. The Department will not conduct any additional searches or collections related to this RFP.

**RFP 53:** All documents reflecting, referring or relating to any request by transgender persons for medical and/or mental health waivers of conditions disqualifying them from accession to or retention in the military, including without limitation all documents reflecting the date of and grounds for such request, whether the request was for accession or retention, whether the request was granted or denied, and the basis for such decision.

**Response:** The Department of Defense previously provided Plaintiffs with a link to its annual reports containing descriptive statistics on medical accessions waivers. *See* Department of Defense response to RFP 53 (citing to <https://www.amsara.amedd.army.mil/AMSARAAR.aspx>). Further, the Department of Defense previously provided Plaintiffs with a link to the the Department of Defense Disability Evaluation System (DES) Manual (DoDM 1332.18). *See* Department of Defense response to RFP 50 (citing <https://www.esd.whs.mil/directives/issuances/dodm/>). This instruction sets DoD policy and provides procedures for the referral, evaluation, return to duty, separation, or retirement of Service members for disability. Retention is based on a physical evaluation process and is not based on a waiver process.

Moreover, as far as documents “reflecting, referring or relating to any request by transgender persons for medical and/or mental health waivers of conditions disqualifying them from accession to or retention in the military, including without limitation all documents reflecting the date of and grounds for such request, whether the request was for accession or retention, whether the request was granted or denied, and the basis for such decision” had any involvement in the formation and implementation of DoD’s policy on military service by transgender individuals and individuals with gender dysphoria between June 30, 2016 and March 23, 2018 DoD believes its collection and searches were reasonably calculated to capture documents in its custody and control. The Department will not conduct any additional searches or collections related to this RFP.

**RFP 54:** All documents reflecting, referring, contemplating, or relating to requests made on or after April 12, 2019 to waive the disqualifying condition of gender dysphoria, including without limitation documents reflecting criteria that will inform decisions upon those waiver requests, documents reflecting the date of and grounds for each such request, documents showing whether each request was granted or denied and the basis for such decision, and documents showing

whether those decisions were made upon the subject individual's attempted accession into, or instead retention by, the military.

**Response:** The Department previously conducted a reasonable search for official guidance from the Department of Defense and the Military Services pertaining to accession waivers for the medical condition of gender dysphoria in accordance with Directive-type Memorandum (DTM) 19-004 and produce responsive documents. The Department will not conduct any additional searches or collections related to this RFP.

Sincerely,

/s/

Andrew E. Carmichael