

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

RYAN KARNOSKI, <i>et al.</i> ,	)	
	)	
Plaintiffs, and	)	
	)	
STATE OF WASHINGTON,	)	Misc. No. 1:20mc16
	)	
Plaintiff-Intervenor,	)	Underlying Action: Case No. 2:17-cv-
	)	01297-MJP (W.D. Wash.)
<b>v.</b>	)	
	)	REDACTED
DONALD J. TRUMP, in his official capacity	)	
as President of the United States, <i>et al.</i> ,	)	
	)	
Defendants.	)	

**PLAINTIFFS’ OPPOSITION TO DEFENDANTS’ MOTION TO QUASH  
THIRD-PARTY SUBPOENA ISSUED TO ROBERT WILKIE JR.**

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## INTRODUCTION

*After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow . . .*

*Transgender individuals to serve in any capacity in the U.S. Military. . . .*

(Ex. 1, President Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 8:55 & 9:04 a.m.).)

As the Ninth Circuit has recognized, one of the central factual issues in this litigation, which challenges the Department of Defense’s 2018 policy precluding open transgender military service, is whether that so-called “Mattis Policy” is “an exercise of independent military judgment” or “nothing more than an implementation of” President Donald Trump’s 2017 Tweet-announced ban on transgender service. *Karnoski v. Trump*, 926 F.3d 1180, 1201–02 (9th Cir. 2019). The answer will determine whether the Policy, which “discriminates on the basis of transgender status on its face,” *id.* at 1201 n.18, deserves what Defendants have contended is a “presumption of deference” as “a product of independent military judgment,” *id.* at 1202.

Contemporaneous correspondence demonstrates that Secretary of Veterans Affairs Robert Wilkie, Jr., who from November 30, 2017 until July 30, 2018 served as Under Secretary of Defense for Personnel and Readiness (“USDP&R”), was *the* senior political appointee responsible for ensuring that the “Mattis Policy” faithfully implemented the President’s prior directives against transgender service. And the documentary evidence shows that is exactly what Mr. Wilkie did—by re-convening the so-called “Panel of Experts” (“Panel”) then-Secretary Mattis had created to assist in developing the “Mattis Policy” after its initial recommendations implementing the Ban were rejected by the Vice Chairman of the Joint Chiefs of Staff and the Deputy Secretary of Defense; by drafting a memorandum to Secretary Mattis (the “Wilkie Memorandum”) purporting

to report on the Panel’s renewed (and identical) recommendations; and by personally working with Secretary Mattis’s “special assistant” to draft the “Mattis Policy” and the February 2018 DoD Report setting forth Defendants’ *post-hoc* justifications for President Trump’s Ban. The “apex doctrine” does not immunize from deposition high-ranking government officials who, like Mr. Wilkie, “have personal involvement in a material aspect of the claim presented.” *United States v. Wal-Mart Stores*, No. 01-CV-152, 2002 WL 562301, at \*2 (D. Md. Mar. 29, 2002). Mr. Wilkie is uniquely positioned to provide key testimony about the development of the “Mattis Policy,” and Defendants themselves have made his testimony central to this litigation.

Plaintiffs’ need for, and the importance of, Mr. Wilkie’s deposition is heightened by Defendants’ efforts to stonewall discovery concerning the development of the “Mattis Policy.” Defendants have withheld approximately 30,000 documents concerning the “Mattis Policy” under the guise of “deliberative process” privilege, and are even now seeking mandamus in the Ninth Circuit to overturn the order of the District Court for the Western District of Washington (the “District Court”), compelling release of some of those documents. Just two weeks ago, after a Special Master appointed by the District Court evaluated, *in camera*, Defendants’ assertions that documents originally designated as “non-responsive” were in fact responsive but privileged, the District Court found “the Government has been overbroad in its privilege assertions, *straying far outside the bounds of the deliberative process privilege and asserting the attorney-client privilege without care.*”<sup>1</sup>

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<sup>1</sup> Ex. 3, May 29, 2020 Order, *Karnoski et al. v. Trump et al.*, 2:17-cv-01297-MJP, Dkt. No. 522, at 5 and attachment (emphasis added) (finding that of 115 documents and attachments subject to claims of deliberative process privilege, Defendants had improperly invoked the privilege on 96—or 83 percent of those documents).

Besides invoking the “apex doctrine,” Defendants assert vaguely that Mr. Wilkie’s testimony would be “protected or privileged.” (Memo., Dkt. 3, at 25–27.) But if Defendants object to specific questions as invading privilege, the time to make those objections is at Mr. Wilkie’s deposition, not before. And if, as Defendants suggest, their privilege objections are bound up in the Ninth Circuit’s review of the District Court’s order compelling production of documents (*see id.* at 27), that is not a reason to quash the subpoena, but to transfer this motion to the District Court, which is well acquainted with Defendants’ privilege claims and has already implemented a process to address them. Defendants should not be permitted to collaterally attack that court’s rulings through a motion to quash in this one.<sup>2</sup>

As explained in greater detail below, Mr. Wilkie was instrumental in developing the “Mattis Policy,” and his testimony is essential to rebut Defendants’ assertion that the Policy is an exercise of “independent military judgment.” Defendants’ motion would foreclose Plaintiffs’ ability to question the senior DoD political appointee who ensured the “Mattis Policy” implemented the President’s ban on transgender service and who led Defendants’ *post hoc* effort to create the “administrative record” and February 2018 DoD Report that Defendants cite in support of the Policy. Doing so would give Defendants free rein to present that same “record”—as they do in their motion—as the sole and unassailable basis for the Policy. There is no precedent for such an extraordinary request. Defendants’ motion should be denied.

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<sup>2</sup> Plaintiffs have filed a motion to transfer Defendants’ motion to the District Court on the grounds it is best positioned to determine Mr. Wilkie’s role and its implications for his deposition. This is especially the case given Defendants’ reliance on privilege claims that are the subject of prior rulings and ongoing proceedings before both the District Court and the Ninth Circuit.

## BACKGROUND

### I. The President Orders DoD To Ban Transgender Military Service.

Plaintiffs challenge the constitutionality of the President's policy barring open military service by transgender individuals (the "Ban"), as implemented by the DoD (the "Mattis Policy"). President Trump first announced the Ban through a series of Tweets on July 26, 2017, abruptly reversing the military's existing policy permitting transgender people to serve openly, provided they satisfy all of the physical and other requirements that apply to all Service Members. *Karnoski*, 926 F.3d at 1188. While the President claimed he made his announcement "[a]fter consultation with my Generals and military experts," it caught the Chairman of the Joint Chiefs and the rest of the military's top brass by complete surprise.<sup>3</sup> Indeed, just a year earlier, in June 2016, the DoD had adopted an open service policy under Secretary Carter ("Carter Policy"), after an intensive year-long review that included consultation with the independent RAND National Defense Research Institute. (Ex. 5, June 30, 2016 Carter Memorandum.) This comprehensive military review addressed each of the "governmental interests" Defendants now rely on in support of the "Mattis Policy," including deployability and military readiness, unit cohesion, and medical costs, and concluded that those interests *supported* allowing the estimated 10,000 current transgender Service Members, and future transgender enlistees, to serve their country openly. (See, e.g., Ex. 6, Expert Report of former Under-Secretary of Defense Brad Carson at 8–12, 40–46; Ex. 7, RAND

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<sup>3</sup> See Ex. 4, DoD Final Release re Tweet FOIA (Chairman of Joint Chiefs: "I know yesterday's announcement was unexpected"; "I was not consulted."); *id.* at 4 (USAF Director for Manpower & Personnel: "Everyone was caught flat-footed."); *id.* at 6 (Kurta, leading the DoD's military personnel policy, was on vacation, stating that "we don't have any further info at this point.").

Report (June 2016).) So far as the record shows, no deliberation or studies led to President Trump's Tweets.

The President formalized his Tweets in an August 25, 2017 "Presidential Memorandum" ordering DoD to submit a "plan for implementing" three policy directives: (1) returning to the pre-Carter policy of banning transgender Service Members from serving openly, with a possible exception for those who came out during the Carter Policy; (2) a bar on enlistment ("accession") of transgender applicants who seek to serve openly; and (3) a bar on transition-related surgical treatment for Service Members, except as necessary to protect the health of those who began treatment under the Carter Policy. (Ex. 8 at 87a.) The President ordered DoD to submit the "Implementation Plan" by February 21, 2018, and the accessions and medical-treatment bans to take effect on March 23, 2018. (*Id.* at 88a.) On August 29, 2017, Secretary Mattis announced DoD would "carry out the president's policy direction." (Ex. 9.)

## **II. DoD Implements The Ban.**

On September 14, 2017, Secretary Mattis began doing just that, issuing two memoranda confirming that "DoD will carry out the President's policy and directives" and setting forth a process to do so. (Ex. 10 at 1.) In the first, Secretary Mattis stated that he would "present the President *with a plan to implement [his] policy* and directives in the Presidential Memorandum" by February 21, 2018. (*Id.* (emphasis added).) In the second, Secretary Mattis directed General Paul Selva, the Vice Chairman of the Joint Chiefs of Staff ("VCJCS"), along with Deputy Secretary of Defense ("DSD") Patrick Shanahan, to lead DoD "in developing an Implementation Plan on military service by transgender individuals, to effect the policy and directives in" the President's August 25, 2017 Memorandum. (Ex. 11 at 1.)

As ordered, Secretary Mattis provided the implementation plan to the President on February 22, 2018. The implementation plan consisted of a memorandum in which he set forth for the President's approval a policy that effected each of the President's three directives (the "Mattis Memorandum") (*see* Memo. at Ex. C), and a 44-page "Report and Recommendations" ("DoD Report") (*id.* at Ex. D), which purports to set forth "the factors and considerations forming the basis of the Department's policy proposals." (Memo., Ex. C at 3.) The DoD Report was unsigned, dated only "February 2018," and anonymous, omitting any official, unit, or group responsible for its preparation.

Although Defendants claim the Mattis Memorandum set forth a "new" policy (Memo. at 5), in fact, it faithfully implements each of the President's directives. First, it bans from service anyone with a history of gender dysphoria—a medical condition that is almost exclusively limited to transgender persons and is resolved by transition—unless "they have been stable for 36 consecutive months *in their biological sex* prior to accession." (Memo., Ex. C at 2 (emphasis added).) Second, it *categorically* bans any "persons who require or have undergone gender transition"—even though a need to transition is what defines a person as transgender, and does so even if they have never been diagnosed with gender dysphoria or have completely resolved it through transitioning. (*Id.*) Third, to the extent that any transgender individuals do not fall under the first two categories, they may only serve if they suppress their gender identities—the very characteristic that makes them transgender—and serve "in their biological sex." (*Id.* at 3.) The only exception is a limited grandfather clause for Service Members who came out in reliance on the Carter Policy. President Trump approved the implementation plan on March 23, 2018, the date specified in his August 25, 2017 Memorandum. (Ex. 12.)

### **III. Defendants' After-The-Fact Justifications For The Ban.**

During the period DoD was developing a formal written policy to implement the President's August 25, 2017 directives, four suits were filed challenging the Ban, and each of those courts held the Ban was likely unconstitutional and preliminarily enjoined it. *See Karnoski*, Dkt. 103 (Dec. 11, 2017); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 177 (D.D.C. 2017); *Stone v. Trump*, 280 F. Supp. 3d 747, 769 (D. Md. 2017); *Stockman v. Trump*, No. EDCV 17-1799 JGB (KKx), 2017 WL 9732572, at \*16 (C.D. Cal. Dec. 22, 2017).

In response to these suits, Defendants, [REDACTED]

[REDACTED] attempted to create a record that supports their litigation-driven characterizations of the Ban as: (1) turning on "a medical condition," gender dysphoria, and not transgender status; and (2) a supposedly "new" policy conceived by Secretary Mattis and the military in "the exercise of their independent judgment" unrelated to the President's directives. Even though both of these assertions are belied by the contemporaneous documents Plaintiffs have been able to obtain to date, Defendants repeat them in their motion.

#### **A. The Gender Dysphoria Excuse**

First, Defendants claim the "Mattis Policy" discriminates based not on transgender status, but rather "on the medical condition of gender dysphoria." (*See, e.g.*, Memo. at 6.) The Ninth Circuit has already rejected this argument, instructing that heightened constitutional scrutiny applies because the "Mattis Policy" "regulates on the basis of transgender status ... on its face." *Karnoski*, 926 F.3d at 1201. This is also clear from the policy's effect. A transgender person who

has completed gender transition, whose gender dysphoria has been resolved, and who otherwise meets every physical and other qualification to serve is nonetheless categorically barred.<sup>4</sup>

## **B. The Military Deference Rationalization**

Second, Defendants argue the “Mattis Policy” is a “new” policy, unrelated to the President’s directives. (*See* Memo. at 5.) This claim, too, is belied by the record.

### **1. The “Panel of Experts”**

The primary basis for Defendants’ argument is the so-called “Panel of Experts” (the “Panel”) Secretary Mattis established to assist in implementing the Ban. Defendants claim the Panel conducted a *de novo* review, unconstrained by the President’s directives, and “developed a new policy, which then-Secretary Mattis adopted in full and is now in effect.” (Memo. at 5.) At the same time, Defendants have steadfastly opposed Plaintiffs’ efforts to test those claims through discovery, asserting the deliberative process privilege as to more than 30,000 relevant documents. The limited relevant documents Defendants *have* produced—almost all of them pursuant to court order rejecting their privilege claims—contradict their story of independent military judgment by a disinterested panel of experts.

Secretary Mattis’s September 14, 2017 Memorandum, which ordered the Panel’s creation, made clear the Panel lacked authority to second-guess the Presidential policy it was tasked with

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<sup>4</sup> Defendants assert, inaccurately, that the Carter Policy also turned on a diagnosis of gender dysphoria and required transgender individuals to “meet the standards associated with their biological sex.” (*See* Memo. at 6.) In fact, under the Carter Policy, Service Members who underwent sex reassignment surgery or received other medical treatment for gender dysphoria were allowed to serve openly *in their “preferred gender”* after 18 months of stability. (Ex. 5, Attachment at 1–2.) And, unlike the “Mattis Policy,” the Carter Policy contained no ban on gender transition and no requirement of service in accordance with one’s biological sex. (*See id.*)



[REDACTED]

[REDACTED]

[REDACTED]

As described in its “Final Report,” [REDACTED]

[REDACTED]

These working groups were crucial to the Panel process; [REDACTED]

[REDACTED] But Defendants

have withheld all documents and communications from these working groups except for a handful of documents that were provided to Panel members.

What is clear is that both the Panel and its working groups viewed their mandates as constrained by the President’s Tweets and August 2017 Memorandum. One of the few working-group documents produced [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Panel issued its Final Report on December 13, 2017. The very first sentence made clear [REDACTED]

[REDACTED] Accordingly, its

recommendations effected each of the three directives in the President’s August 2017 Memorandum: (1) transgender persons could serve only based on the standards associated with

“their biological sex,” with the exception of those who had come out during the Carter Policy; (2) transgender persons could access into the military only “in their biological sex”; and (3) there could be no transition-related surgical care because anyone who needed or sought to transition would be separated (except for those who came out during the Carter Policy). (Ex. 20.)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Panel presented its Final Report to VCJCS Selva and DSD Shanahan on December 15, 2017—four days after the District Court in *Karnoski* found the Ban was likely unconstitutional and issued its preliminary injunction. (Ex. 22.) [REDACTED]

[REDACTED]

[REDACTED]

( [REDACTED] Other than this lone email—produced under court order—Defendants have not produced any documents concerning [REDACTED], or what actions Secretary Mattis, Mr. Wilkie, or others took in response.

The Panel then reconvened three more times in late December 2017 and early January 2018, in the shadow of two further court orders finding the Ban likely unconstitutional. Defendants have represented there are no documents reflecting what occurred at these meetings. (*See* Ex. 14.) Nor have Defendants provided any documents regarding the time between when the Panel's recommendations were rejected on December 15, 2017 and its disbandment on January 11, 2018.

The day of the Panel's last (undocumented) meeting, January 11, 2018, then-USDP&R Wilkie sent a one- and-one-half page memorandum (the "Wilkie Memorandum") to Secretary Mattis purporting to report on the Panel's recommendations. The Wilkie Memorandum began by reiterating the Panel's understanding that its task was to recommend policies that would implement the directives in the President's August 2017 Memorandum:

On September 14, 2017, you directed the establishment of a Panel of Experts to review and recommend changes to Department of Defense policies regarding the service of transgender individuals (Tab A), in accordance with direction from the President on August 25, 2017 (Tab B).

(Ex. 20 at 1.) Mr. Wilkie did not attach the Panel's "Final Report" or any other document purporting to reflect its work. Instead, he attached only the President's August 2017 Memorandum and Secretary Mattis's September 14, 2017 Memorandum confirming that DoD would implement the President's directives and the Panel would advise how to do so. Mr. Wilkie then repeated the *same* recommendations the Panel made a month earlier to General Selva and Mr. Shanahan, [REDACTED]

[REDACTED] (*Compare* Ex. 20 at 1 *with* Ex. 16 at 4.)

## **2. The "DoD Report"**

Although Defendants repeatedly invoke the Panel's military expertise, Defendants do not contend the Panel's Final Report contains the official justifications for the "Mattis Policy." Indeed, Secretary Mattis did not even send the Panel's Final Report to the President when he submitted

the required implementation plan. Rather, Defendants rely *exclusively* on the 44-page, anonymous, *post-hoc* DoD Report as representing the justifications for the “Mattis Policy” and their arguments that it passes constitutional scrutiny. (Ex. 23 at 15–16.)

The Panel had no role in writing, reviewing, or editing the DoD Report, which was prepared *after* the Panel was disbanded. Rather, the DoD Report represents the *post-hoc* justifications for the “Mattis Policy” [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Defendants have refused to produce any information related to the DoD Report, or the period from January 11, 2018 through February 22, 2018, during which it was prepared by Mr. Wilkie and others. This includes any documents concerning how it was prepared or what sources, information, or alternatives were considered in its preparation. This is so notwithstanding that the report itself shows it relied on sources that were *not* considered by the Panel. For example, third-party discovery, which Defendants unsuccessfully sought to quash, confirmed that in early February 2018 (after the Panel had disbanded) Secretary Mattis’s “special assistant,” who appears to be the principal author of the DoD Report, reached out to several leading opponents of transgender rights and solicited—and received—information and published sources that the Report cited. For example, on February 5, 2018, one of those anti-transgender advocates, Dr. Paul McHugh, provided DoD a list of additional sources he believed support the Ban (Ex. 24), including

a May 2014 Hayes Directory article, which the DoD Report cites five times as support for the “Mattis Policy.” (See Memo. Ex. D at nn. 26, 67, 72, 88–89; [REDACTED]

[REDACTED]

#### **IV. Defendants Stonewall Discovery Into The Ban And The “Mattis Policy.”**

Throughout this proceeding, Defendants have taken the position that Plaintiffs are not entitled to *any* discovery concerning the “Mattis Policy” beyond a so-called “administrative record” that Defendants’ lawyers prepared after the Panel was disbanded, comprised of documents they rely on in support of the Policy. (E.g., Memo. at 8–9, 12–13, 22.) However, this is not an administrative proceeding, and Plaintiffs challenge the Mattis Policy on constitutional and not Administrative Procedure Act grounds. Accordingly, the Ninth Circuit (and every other court to consider this argument) has rejected Defendants’ argument. See, e.g., *Karnoski*, 926 F.3d at 1194 (noting Defendants’ argument that “further litigation should be confined to the administrative record,” *id.*, and instead ordering further discovery, *id.* at 1202).

Defendants then sought to achieve the same result by broadly asserting that nearly every responsive document concerning the “Mattis Policy” (approximately 30,000 documents in total) is subject to the deliberative process privilege. The District Court rejected those claims. (Ex. 26.) It held that the privilege does not apply where, as here, the government’s decision-making and intent are the basis for the Plaintiffs’ claims and the central issues in dispute, and that, even if the privilege did apply, it was overcome based on a balancing of the four factors recognized by the Ninth Circuit in *FTC v. Warner Communications Inc.*, 742 F.2d 1156 (9th Cir. 1984).

Defendants then filed their first petition for mandamus with the Ninth Circuit. See *Karnoski*, 926 F.3d at 1187. Far from “reject[ing]” Plaintiffs’ argument that the “Mattis Policy”

implements the Ban (Memo. at 20), the Ninth Circuit did just the opposite. It found that “Plaintiffs raise non-frivolous arguments that the 2018 Policy did not independently analyze the impact of transgender individuals serving in the armed services,” and that “the litigation may require the district court to consider the basis of the President’s initial decision, as well as the 2018 Policy.” *Karnoski*, 926 F.3d at 1204.<sup>5</sup> However, the Court remanded for a more granular analysis of whether Defendants’ privilege claims had been overcome, including by “class” or “category” of document. *See id.* at 1206.

On remand, the District Court undertook just such an analysis, ordering a review of Defendants’ privilege claims on a document request-by-document request basis, followed by in-person conferences with counsel to review Defendants’ claims as to five requests at a time. (Ex. 27, Nov. 12, 2019 Mot. Hr’g Tr. at 59:14-64:20; Ex. 28, Order, Nov. 19, 2019, *Karnoski*, Dkt. 394; Ex. 29, Dec. 10, 2019 Status Hr’g Tr.) After the first such conference resulted in an order requiring that Defendants produce three categories of documents to which they objected (Ex. 30, Dec. 18, 2019 Order, at 5-6; Ex. 17, Feb. 3, 2020 Hr’g Tr. at 14:17-24:16), Defendants filed a second petition for mandamus on February 8, 2020, which has been fully briefed and is awaiting the Ninth Circuit’s decision. At the Ninth Circuit’s invitation, the District Court also responded to the petition, describing its detailed review of Defendants’ privilege claims and, more generally,

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<sup>5</sup> Defendants also mischaracterize the Ninth Circuit’s decision on their separate appeal from the District Court’s denial of their motion to dissolve the preliminary injunction. The Ninth Circuit did not “vacate[] the preliminary injunction,” as Defendants claim. (Memo. at 8.) It expressly declined to do so. *Karnoski*, 926 F.3d at 1207–08. The Ninth Circuit also rejected Defendants’ argument that, due to “military deference,” the Ban and Mattis Policy were subject to only rational basis review. The Court held that Defendants must satisfy heightened scrutiny to justify their discrimination, “and that is not a trivial burden.” *Id.* at 1202.

Defendants' repeated "fail[ure] to comply with Court orders," "inconsistent positions," and inability "to respond to the Court's basic inquiries" about documents in their possession. (Ex. 31, District Court's Requested Resp. to Pet., No. 20-70365, at 11–12.)

Defendants' disputed claims of deliberative process privilege also extend to deposition testimony concerning the development of the Mattis Policy, and are likewise the subject of ongoing proceedings before the District Court and the Ninth Circuit. In the only depositions of Panel attendees to date (in the parallel *Doe* case), Defendants objected on grounds of deliberative process privilege and instructed the witness not to answer virtually every substantive question concerning the development of the Mattis Policy. (*See, e.g.*, Ex. 32, Dep. Tr. of Martie Soper at 90–91, 160, 222; Ex. 33, Dep. Tr. of Mary Krueger at 64, 77, 88, 95–97, 105–08, 157.) Anticipating similar objections in upcoming depositions in this case, and seeking to avoid the inconvenience to both the witness and the parties of re-deposing witnesses as to whom Defendants' privilege claims were subsequently overruled, the District Court ordered that where there is an objection based upon the deliberative process privilege, the witness should answer and the testimony sealed pending a subsequent *in camera* review and determination by the Court whether the privilege applies and/or has been overcome. (Ex. 17, Feb. 3, 2020 Hr'g. Tr. at 63–65.) Even though Defendants did not challenge that order in their current petition for mandamus, Defendants have taken the position that it is nevertheless subject to the administrative stay entered by the Ninth Circuit. (Ex. 34, May 6, 2020, Joint Status Report at 9–10.) Moreover, Defendants' counsel recently advised Plaintiffs that "during the upcoming depositions Defendants expect to assert the deliberative process privilege and instruct our witnesses not to answer questions that call for privileged information except where the deliberative process privilege has been set aside by court orders which have not

been stayed or vacated . . . .” (Ex. 35, May 28, 2020 Email from D. Carmichael to J. Heinz, *et al.*) Although this email concerned depositions of Rule 30(b)(6) witnesses, Plaintiffs expect that Defendants will take the same position with respect to other depositions, including Mr. Wilkie’s.

### ARGUMENT

Federal Rules 26(b) and 30(a) allow a party to depose any person “regarding any nonprivileged matter that is relevant to any party’s claim or defense.” FED. R. CIV. P. 26(b)(1); FED. R. CIV. P. 30(a). Courts have long recognized that depositions are an essential part of the discovery process: “Only by examining a witness live can a lawyer use the skills of his trade to plumb the depths of a witness’ recollection, using to advantage not only what a witness may have admitted in answering interrogatories, but also any new tidbits that usually come out in the course of answering carefully framed and pin-pointed deposition questions.” *Shoen v. Shoen*, 5 F.3d 1289, 1297 (9th Cir. 1993). For that reason, “it is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error.” *Big Ernie’s, Inc. v. United States*, No. 1:09-cv-00122, 2009 WL 3166839 (E.D. Va. Aug. 13, 2009) (quoting *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979)).

Defendants’ motion in no way justifies this extraordinary relief here. According to Defendants’ contemporaneous documents, Mr. Wilkie was *the* senior political appointee selected to ensure the implementation of President Trump’s directives in the “Mattis Policy,” and is uniquely positioned to provide insight on those efforts. Neither the (limited) documents nor the (hand-picked) alternative witnesses Defendants proffer can adequately substitute for Mr. Wilkie’s first-hand testimony on numerous, critical points. Furthermore, Defendants’ generic and overbroad claims of “privilege” are no reason to preclude Mr. Wilkie’s deposition.

**I. “Exceptional Circumstances” Require Mr. Wilkie’s Deposition.**

**A. Mr. Wilkie Was Personally Involved In Crafting The Challenged “Mattis Policy.”**

“Exceptional circumstances” for deposing a government official exist where the official “ha[s] personal involvement in a material aspect of the claim presented.” *Wal-Mart Stores*, 2002 WL 562301, at \*2; *see also United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 322 (D.N.J. 2009) (“Courts have time and again allowed the deposition of current and former high-ranking government officials upon a showing that the official has personal involvement or knowledge relevant to the case.”).<sup>6</sup> There can be no doubt that Mr. Wilkie—who as USDP&R chaired the

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<sup>6</sup> *See, e.g., NRA v. Cuomo*, No. 1:18-CV-566, 2019 WL 2918045, at \*5 (N.D.N.Y. Mar. 20, 2019) (allowing deposition of New York’s former Superintendent of Financial Services where her “specific rationale for her alleged actions is at issue”); *Greater Birmingham Ministries v. Merrill*, 321 F.R.D. 406, 413 (N.D. Ala. 2017) (permitting deposition of Alabama’s Secretary of State where “Secretary Merrill’s role with respect to implementation of the challenged Photo ID Law has been ongoing since he assumed office,” and “Plaintiffs have sufficiently established that . . . he has been personally involved in implementing the law”); *Fish v. Kobach*, 320 F.R.D. 566, 579 (D. Kan. 2017) (allowing deposition of Kansas Secretary of State where “the official [was] shown to have exclusive first-hand knowledge directly relevant to the claims being litigated”); *Libertarian Party v. Husted*, 33 F. Supp. 3d 914, 920 (S.D. Ohio 2014) (permitting deposition of Hearing Officer and General Counsel for the Ohio Secretary of State); *United States v. City of New York*, No. 07-cv-2067, 2009 WL 2423307, at \*2–3 (E.D.N.Y. Aug. 5, 2009) (authorizing the deposition of the Mayor of New York City where the Mayor’s congressional testimony “suggest[ed] his direct involvement in the events at issue in the case”); *Bagley v. Blagojevich*, 486 F. Supp. 2d 786, 789 (C.D. Ill. 2007) (allowing the deposition of the Governor of Illinois where evidence suggested “the Governor was either the ultimate decision maker or at least personally involved” in the decision at issue); *Energy Capital Corp. v. United States*, 60 Fed. Cl. 315, 318 (Fed. Cl. 2004) (authorizing depositions of the former Secretary of Housing and Urban Development, and HUD’s former General Counsel, holding “it is also clear in the context of deposing former high-ranking government officials is that depositions are allowed if the party has personal knowledge of the facts in issue”); *Martin v. Valley Nat’l Bank of Ariz.*, 140 F.R.D. 291, 314–15 (S.D.N.Y. 1991) (authorizing the deposition of the Director of Enforcement for the Department of Labor who “was apparently involved” personally in the challenged government decisions); *Am. Broad. Cos. v. U.S. Info. Agency*, 599 F. Supp. 765, 769 (D.D.C. 1984) (permitting deposition of agency chief where he was “the sole person responsible for the creation of the documents in

“Panel of Experts” and personally directed the Panel’s final, undocumented meetings, led subsequent efforts to justify the Panel’s recommendations, personally drafted the Wilkie Memorandum, and was the senior of a handful of persons who drafted the DoD Report—was uniquely and personally involved in the factual issues at the heart of this case.

*First*, Defendants’ own description of Mr. Wilkie’s involvement only underscores his critical role in this litigation. Defendants concede then-USDP&R Wilkie “*chaired* the [last] six meetings of the Panel” (Memo. at 5 (emphasis added)), which include the four undocumented meetings shortly before and after the Panel issued its Final Report on December 13, 2017. (*See* Ex. 14.) Defendants further admit Mr. Wilkie was the senior of three officials who “present[ed] the Panel’s recommendations to then-Secretary Mattis” (Memo. at 5); that he “signed the two-page formal memorandum to then-Secretary Mattis [the Wilkie Memorandum] memorializing the Panel’s agreed-upon recommendations” (*id.* at 5–6); and that he was the senior member of the three-person team that was formed “at the conclusion of the Panel process” to prepare the DoD Report (*id.* at 7). And, after the District Court granted Plaintiffs’ motion to compel a response to Plaintiffs’ interrogatory requesting the authors of the DoD Report, Defendants disclosed that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Mr. Wilkie’s actions in each of these roles are critical to

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question”); *Union Sav. Bank of Patchogue v. Saxon*, 209 F. Supp. 319, 320 (D.D.C. 1962) (permitting deposition of senior Treasury official where “Plaintiffs allege actions personal to the Defendant”).

determining the accuracy of Defendants' assertion that the "Mattis Policy" deserves deference as a product of "independent military judgment."

In an attempt to downplay Mr. Wilkie's importance, Defendants attach a declaration from Mr. Hebert, who asserts vaguely that Mr. Wilkie "played a limited role *during the Panel's discussions and deliberations*." (Memo. at Ex. E, Decl. ¶ 11 (emphasis added).) That statement is contradicted by Defendants' prior representations regarding Mr. Wilkie's role.<sup>7</sup> More fundamentally, Plaintiffs do not seek Mr. Wilkie's testimony simply to discover what Panel members said or did not say during the Panel's discussions. Mr. Wilkie has unique and irreplaceable knowledge about what happened *outside* the Panel's official, documented meetings—most importantly during the critical time period between General Selva and Mr. Shanahan's rejection of the Panel's Final Report on December 15, 2017, the preparation of the Wilkie Memorandum on January 11, 2018 (*see* Ex. 20), and the development of the February 2018 DoD Report and Mattis Memorandum. Defendants' own admissions make clear Mr. Wilkie had a unique and central role throughout that time period, with knowledge none of the other witnesses they cite can provide.

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<sup>7</sup> For example, in opposing document discovery, Defendants represented to the District Court that producing Mr. Wilkie's documents would "mark a significant intrusion into the Department of Defense's decisionmaking." (*E.g.*, Ex. 36, Defs.' Notice of Filing Petition for Writ of Mandamus, Dkt. No. 414 at 15; *see also* Ex. 37, Defs.' Response to Mot. to Compel, 1:17-cv-01597-CKK, Dkt. No. 218 at 9 ("This particular email is the end of an email chain initiated by Secretary Wilkie wherein the Secretary expresses his opinions on the importance of a particular stage of the Panel's proceedings, along with his direction and explanation for why the Panel's membership should be constituted in a particular fashion.")) These (and similar) arguments belie any suggestion that Mr. Wilkie was merely a figurehead who had no substantive role in the formation of the "Mattis Policy."





*Mattis*] to make his required recommendation to POTUS [no later than] 21 Feb.,” and reported that he “had a lengthy discussion with the Secretary last Friday on the TG Panel recommendations, the ongoing legal challenges, and the court-ordered” preliminary injunction requiring “accession of transgender applicants.” (Ex. 41, USDOE00191680, Jan. 25, 2018 Email from R. Wilkie to Gen. J. McConville, et al. (emphasis added).) Mr. Wilkie’s email then reports on questions the Secretary had asked (which are redacted) and the “concern” that had been expressed (also redacted). (*Id.*)

*Third*, the record makes clear Mr. Wilkie was personally involved in Defendants’ *post hoc* efforts to obtain “evidence” justifying the “Mattis Policy.” For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] indicating that

Bushman and Wilkie were—on their own and without Panel involvement—personally attempting to cobble together support for the Policy that the Panel did not consider when making its recommendations.

*Fourth*, Mr. Wilkie appears to have played the central role in a coordinated political effort, driven by third-party anti-transgender advocates working with and through the White House, to ensure that the President’s Ban was implemented by DoD. One of those anti-transgender advocacy groups was the Center for Military Readiness (“CMR”), whose executive director, Elaine Donnelly, appeared on television shortly after the President’s Tweets offering support for the

President’s Ban and who wrote numerous op-eds thereafter urging DoD to implement the Ban.<sup>9</sup> Documents subpoenaed from CMR show that, starting in August 2017, CMR and Ms. Donnelly repeatedly pressured executive officials to remove Mr. Kurta—who, according to Donnelly, was an “LGBT-friend” “obviously incapable of implementing President Trump’s intent”—and to replace him with Mr. Wilkie and to “*do whatever can be done to get Bob Wilkie ‘in the room’ where he belongs.*” (emphasis added).<sup>10</sup> That effort was successful, as Mr. Wilkie—a lifelong

<sup>9</sup> See <https://www.c-span.org/video/?431876-3/washington-journal-elaine-donnelly-discusses-proposed-transgender-military-ban>; Elaine Donnelly, “Commentary: Transgender mandates would impede efforts to strengthen military,” *Military Times* (June 25, 2017), <https://www.militarytimes.com/opinion/2017/06/25/commentary-transgender-mandates-would-impede-efforts-to-strengthen-military/>; Elaine Donnelly, “President Trump’s Transgender Announcement Supports the Troops,” *CMR* (July 27, 2017); <https://www.cmrlink.org/data/Sites/85/CMRDocuments/NewsRelease072717.pdf>; Elaine Donnelly, “President Trump to Take Official Steps to Deliver on Promises to the Troops,” *CMR* (Aug. 24, 2017), <https://www.cmrlink.org/data/Sites/85/CMRDocuments/NewsRelease082417.pdf>; Elaine Donnelly, “Department of Defense and Justice Letting Down President Trump on Military Transgender Policies,” *CMR* (Jan. 2, 2018), <https://www.cmrlink.org/data/Sites/85/CMRDocuments/NewsRelease010218.pdf>; Elaine Donnelly, “Mattis Transgender Trial Balloon Won’t Fly,” *CMR* (Feb. 23, 2018), [https://www.cmrlink.org/data/Sites/85/CMRDocuments/CMR\\_NewsRelease022318.pdf](https://www.cmrlink.org/data/Sites/85/CMRDocuments/CMR_NewsRelease022318.pdf).

<sup>10</sup> See Ex. 43, CMR-0000982 (Aug. 15, 2017 E-mail from E. Donnelly to P. Teller) (“Right now the head of that team, according to his title and yet-to-be confirmed nomination to be Principle Deputy for P & R, is Anthony Kurta -- a guy who defied President Trump on an ‘LGBT Pride’ event in June, and is obviously incapable of implementing President Trump’s intent. In general times, what options are there for re-assigning SES employees who are not suited for an important job? Can’t his nomination be withdrawn? I would like to know what to ask for, and do whatever can be done to get Bob Wilke ‘in the room’ where he belongs.”); see also Ex. 44, CMR-0001229 (Nov. 15, 2017 E-mail from E. Donnelly to P. Teller) (“Kurta is all-for transgender surgeries, at DoD expense . . . . Are President Trump or Secretary Mattis aware that this Obama holdover has been chairing the ‘Panel of Experts’ who may already have written recommendations on how to continue Obama’s transgender policies?”);

Ex. 46, CMR-0000357 (Aug. 17, 2017 E-mail from E. Donnelly to P. Teller) (“Robert Wilkie’s nomination

conservative political appointee<sup>11</sup>—took over for Mr. Kurta on November 30, 2017. His testimony is therefore critical and irreplaceable in challenging Defendants’ assertions that the “Mattis Policy” was unrelated to the Ban and the President’s directives and the result of an independent military decision based solely on military concerns, as opposed to a political and litigation driven effort to implement the President’s directives.

Mr. Wilkie’s direct, personal involvement during the critical period and in the dispositive events and core issues in this litigation also distinguishes the cases on which Defendants principally rely. This is not a case where the senior official Plaintiffs seek to depose was not directly involved, or only tangentially involved, in the decision in dispute.<sup>12</sup> Rather, Mr. Wilkie’s

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also is among the unconfirmed - a situation made even more risky because holdover Anthony Kurta probably is busy writing an equivocal report that will be prematurely leaked to the Washington Post, in order to advance the LGBT cause.”).

<sup>11</sup> The Washington Post has described Mr. Wilkie as a “culture warrior” whose career was spent as a Congressional staffer and political appointee “working shoulder to shoulder with polarizing figures in U.S. politics and often defending their most divisive views,” starting as a young aide and “acolyte” of Sen. Jesse Helms, and “show[ing] a willingness to fight on the front lines of his bosses’ culture wars,” including “le[ading] efforts to justify Trump’s near wholesale ban on transgender troops.” See Ex. 47, Paul Sonne and Lisa Rein, “Trump’s VA pick, once a defender of Confederate symbols, built his career serving polarizing figures,” The Washington Post (June 26, 2018).

<sup>12</sup> Compare *Lederman v. N.Y. City Dep’t of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013) (blocking depositions of former Mayor and Deputy Mayor of New York City where plaintiffs “did [not] contend that [the deponents] had first-hand knowledge about the litigated claims”); *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (quashing deposition of the Vice President’s Chief of Staff, where he “had no apparent involvement in this litigation”); *Bogan v. City of Boston*, 489 F.3d 417, 424 (1st Cir. 2007) (prohibiting deposition of Mayor of Boston where there was no direct evidence of his personal involvement in the decision in question and the requesting party “failed to purs[u]e discovery from other City employees who could have shed light on the Mayor’s involvement”); *In re United States*, 197 F.3d 310, 314 (8th Cir. 1999) (disallowing deposition of the U.S. Attorney General and Deputy Attorney General where there was no dispute that “[Attorney General] Reno did not participate in or approve the decision” at issue); *In re FDIC*, 58 F.3d 1055, 1062 (5th Cir. 1995) (finding no extraordinary

involvement in the development of the “Mattis Policy” was direct, personal, and critical to Defendants’ own contentions that the Policy was not the actualization of President Trump’s July 2017 Tweets but an exercise of “independent military judgment.” Having made the factual assertion that the “Mattis Policy” was the result of “independent military judgment,” Defendants should not be permitted to now foreclose Plaintiffs’ ability to test Defendants’ claims.

**B. Mr. Wilkie Has Unique Factual Knowledge At Issue In This Litigation.**

This case is also readily distinguishable from *United States v. Morgan* and its progeny, which limit questions which would “probe [the officials’] mental processes.” 313 U.S. 409, 421–

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circumstances requiring the deposition of three FDIC officials where “the August 24 decision [in question] was in fact made by Director Stein of the FDIC’s Division of Resolutions, whom [plaintiff] has already deposed”); *In re United States*, 985 F.2d 510, 513 (11th Cir. 1993) (blocking the deposition of the FDA Commissioner where the Commissioner “did not assume office until four years after the initial investigation and over two years after the case was sent to the Justice Department for further action; accordingly, he could not have been responsible for selectively prosecuting the defendants”); *Simplex Time Recorder Co. v. Sec’y of Labor*, 766 F.2d 575, 586–87 (D.C. Cir. 1985) (preventing depositions of Department of Labor officials where the officials “had no first-hand knowledge of the facts of this case” and they had no information “that [the requesting party] could not obtain from published reports and available agency documents”); *Raymond v. City of New York*, No. 15 Civ. 6885, 2020 WL 1067482, at \*5 (S.D.N.Y. Mar. 5, 2020) (quashing depositions of former police commissioners where plaintiffs “have not shown that [the commissioners] had any first-hand knowledge of the alleged retaliation”); *FDIC v. Galan-Alvarez*, No. 1:15-mc-00752, 2015 WL 5602342, at \*5 (D.D.C. Sept. 4, 2015) (prohibiting deposition of former FDIC Chairperson and current FDIC Deputy Director where deponents, at best, “*may* have attended meetings and requested briefings” on the policy at issue (emphasis added)); *Sensient Colors, Inc.*, 649 F. Supp. 2d at 318 (denying deposition of official where requesting party “submitted no evidence suggesting [the official] had any personal involvement in or knowledge relevant to” the factual issues in question); *Croddy v. FBI*, Civ. Action No. 00-0651, 2005 WL 8168910, at \*1 (D.D.C. Mar. 30, 2005) (quashing deposition of former FBI director where plaintiffs “have not shown that former director, Louis Freeh, possesses unique personal knowledge of the circumstances that led to the rescission of plaintiffs’ employment offers”); *Wal-Mart Stores*, 2002 WL 562301, at \*5 (prohibiting deposition of former Consumer Product Safety Commission where requesting party “failed to make a *prima facie* showing of . . . personal involvement”).

22 (1941). Here, Plaintiffs seek essential, factual testimony that Mr. Wilkie can uniquely provide. In *Franklin Savings Association v. Ryan*, for example, the Fourth Circuit considered the propriety of a deposition of the Director of the Office of Thrift Savings. 922 F.2d 209 (4th Cir. 1991). Neither the Fourth Circuit nor the parties challenged the Director’s deposition as a whole—indeed, the court noted the Director “responded to the subpoena and answered all questions directed at him with the exception of five.” *Id.* at 210. Instead, the court held the district court erred by requiring the Director to answer five questions that “clearly went to the mental processes by which [the Director] arrived at his decision,” where there was no “misconduct or wrongdoing” justifying an exception from *Morgan*. *Id.* at 211.

As a threshold matter, here Plaintiffs are claiming, and have made a showing, of “misconduct or wrongdoing”—intentional discrimination and animus against transgender persons based on their gender. Indeed, it appears this animus was one of the primary reasons that Mr. Wilkie was appointed to replace “LGBT friend” Mr. Kurta and chair the Panel of Experts. (*See supra* at 24–25.) Moreover, Plaintiffs are not seeking discovery of Mr. Wilkie’s “mental processes,” let alone of “mental processes” that are irrelevant or unnecessary to their claims of intentional discrimination, as in *Morgan* and the other cases Defendants cite. Instead, and as discussed above, Mr. Wilkie’s testimony is required to address essential factual questions regarding key events and decisions in which Mr. Wilkie was personally and directly involved, and documents Mr. Wilkie personally drafted or was instrumental in drafting.

None of the various documents or two witnesses Defendants proffer as alternatives adequately substitute for Mr. Wilkie’s first-hand testimony on these and other issues. As previously noted, the purported “Administrative Record” is nothing of the sort—it is a collection

of documents Defendants’ lawyers assembled after the fact to justify their positions in this litigation. (*See supra* at 14.) And even then, the “Administrative Record” is full of holes: Defendants have produced no “minutes” for the last four, critical meetings of the “Panel of Experts”; the discovery they have produced suggests that the “minutes” are inaccurate or at the least, highly slanted retellings of what actually occurred at the Panel’s meetings; and Defendants have categorically refused to produce any documents regarding the critical time period after the Panel disbanded and during the period Mr. Wilkie composed the Wilkie Memorandum and helped to draft the DoD Report. (*See supra* at 11–14.) As such, Defendants’ contention that Plaintiffs “already have access to all of the relevant documents,” (Memo. at 23), is demonstrably false—and even if it were true (which it is not), documents are no substitute for live testimony.<sup>13</sup>

Likewise, neither Mr. Kurta nor Mr. Hebert can provide the testimony Plaintiffs seek. Even where Mr. Kurta or Mr. Hebert may have personal knowledge relevant to these questions, it will not include communications, events, and other information they were not party or privy to. More fundamentally, neither Mr. Kurta nor Mr. Hebert was the decision-maker here, and neither can address the role the President’s order and directives played in Mr. Wilkie’s efforts, following his appointment as USDP&R on November 30, 2017, to implement the President’s directives through the re-convening of the Panel, the Wilkie Memorandum, and the DoD Report.

Indeed, Defendants’ assertion that Mr. Wilkie’s testimony is unnecessary because they have agreed to allow Mr. Kurta to be deposed is exactly backwards. Mr. Kurta, as a former acting

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<sup>13</sup> Because Mr. Wilkie currently resides outside of the trial subpoena power of the District Court, the noticed deposition will likely be the only chance for Plaintiffs to obtain Mr. Wilkie’s testimony for trial.

USDP&R, is just as much a “high-ranking government official” as former USDP&R and now-Secretary Wilkie, for whom Defendants could have proffered the same arguments to quash. (*See* Memo. at 17 (“[T]he Under Secretary of Defense for Personnel and Readiness independently qualifies as a former high-ranking Government official whose deposition should only be allowed upon a showing of extraordinary circumstances.”).) Thus, Defendants are using the “apex doctrine” as both a sword and a shield, allowing one of the two USDP&Rs involved to testify, while moving to block the deposition of the other (who, not coincidentally, had primary involvement in the critical latter stages of the development of the “Mattis Policy”). This strategic assertion of the “apex doctrine” undermines its purpose entirely.<sup>14</sup>

## **II. Defendants’ Unspecified Claims Of “Privilege” Do Not Support Their Motion.**

“Given that the [deliberative process] privilege is not absolute and that discovery might reveal reasons why it should not be applied, it is fairly standard practice to permit a person who may be able to claim the privilege to be deposed, and to require that the claim of privilege be made in response to specific questions.” *Libertarian Party of Ohio*, 33 F. Supp. 3d at 920 (citing *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974) (“A general refusal to cooperate is not enough.”)); *see also Fla. Ass’n of Rehab. Facilities, Inc. v. State of Fla. Dep’t of Health & Rehab. Servs.*, 164 F.R.D. 257, 268 (N.D. Fla. 1995) (holding that any “deliberative process privilege” objection could not confer “immunity from attendance at a deposition”); *Scovill Mfg. Co. v.*

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<sup>14</sup> To be sure, Plaintiffs understand that as the sitting Secretary of Veterans Affairs, Mr. Wilkie has numerous, important demands on his time. But that is no reason to quash his deposition entirely. Plaintiffs are available to conduct the deposition at whatever time and place is most convenient to Mr. Wilkie and are willing to meet and confer with Defendants regarding any logistical challenges that may arise given Mr. Wilkie’s responsibilities and work-related demands.

*Sunbeam Corp.*, 61 F.R.D. 598, 603 (D. Del. 1973) (“The circumstances are rare which justify an order that a deposition not be taken at all, and the existence of privilege is not one of those circumstances.”). This standard process is particularly applicable here, where the court presiding over the underlying litigation has already rejected Defendants’ repeated attempts to invoke “deliberative process” to immunize relevant documents and information from discovery.

Likewise, Defendants’ assertion that the Ninth Circuit is currently reviewing Defendants’ attempt to overturn one of the District Court’s privilege rulings is no basis to quash Mr. Wilkie’s deposition. Instead, to the extent Defendants argue that proceeding with the deposition here would “circumvent the Ninth Circuit’s administrative stay,” the proper solution is to transfer this Motion to the District Court, who is best positioned to decide the scope of the stay and any related privilege issues, with guidance from the Ninth Circuit. *See* Mot. to Transfer at 9–11. It is Defendants, not Plaintiffs, who are attempting to “circumvent” the Ninth Circuit’s and the District Court’s rulings by moving to quash Mr. Wilkie’s deposition on the basis of what the District Court has ruled are “overbroad” objections.

### **CONCLUSION**

Plaintiffs respectfully request that the Court deny Defendants’ Motion and permit the deposition of Mr. Wilkie pursuant to the Federal Rules.

Dated: June 10, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on June 10, 2020.

/s/ K. Ross Powell \_\_\_\_\_

K. Ross Powell