EXHIBIT 22

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al. Plaintiffs, v. DONALD J. TRUMP, et al. Defendants.	CASE NO. C17-1297-MJP ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

THIS MATTER comes before the Court on Plaintiffs Ryan Karnoski, et al.'s Motion for Preliminary Injunction (Dkt. No. 32) and Defendants Donald J. Trump, et al.'s Motion to Dismiss (Dkt. No. 69). Plaintiffs challenge the constitutionality of Defendant President Donald J. Trump's Presidential Memorandum excluding transgender individuals from the military. Defendants respond that Plaintiffs lack standing, that their claims are neither properly plead nor ripe for review, and that they are not entitled to injunctive relief. Having reviewed the Motions (Dkt. Nos. 32, 69), the Responses (Dkt. Nos. 69, 84), the Replies (Dkt. Nos. 84, 90), and all related papers, and having considered the arguments made in proceedings before the Court, the

Court GRANTS in part and DENIES in part Defendants' Motion to Dismiss and GRANTS Plaintiffs' Motion for Preliminary Injunction.

ORDER SUMMARY

On July 26, 2017, President Donald J. Trump announced on Twitter that "the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military." A Presidential Memorandum followed, directing the Secretaries of Defense and Homeland Security to "return" to the military's policy authorizing the discharge of openly transgender service members (the "Retention Directive"); to prohibit the accession (bringing into service) of openly transgender individuals (the "Accession Directive"); and to prohibit the funding of certain surgical procedures for transgender service members (the "Medical Care Directive"). Plaintiffs filed this action challenging the constitutionality of the policy prohibiting military service by openly transgender individuals. Plaintiffs contend the policy violates their equal protection and due process rights and their rights under the First Amendment. Plaintiffs include transgender individuals currently serving in the military and seeking to join the military; the Human Rights Campaign, the Gender Justice League, and the American Military Partner Association; and the State of Washington. Plaintiffs have moved for a preliminary injunction to prevent implementation of the policy set forth in the Presidential Memorandum, and Defendants have moved to dismiss.

The Court finds that Plaintiffs have standing to bring this action, and that their claims for violation of equal protection, substantive due process, and the First Amendment are properly plead and ripe for resolution. The Court finds that Plaintiffs' claim for violation of procedural due process is defective. The Court finds that the policy prohibiting openly transgender individuals from serving in the military is likely unconstitutional. Accordingly, the Court

GRANTS in part and DENIES in part Defendants' Motion to Dismiss and GRANTS Plaintiffs' Motion for Preliminary Injunction.

BACKGROUND

I. Presidential Memorandum and Interim Guidance

On July 26, 2017, President Donald J. Trump announced on Twitter that the United States government will no longer allow transgender individuals to serve in any capacity in the military. (Dkt. No. 34, Ex. 6.) President Trump's announcement read as follows:

Thereafter, President Trump issued a memorandum (the "Presidential Memorandum") directing the Secretaries of Defense and Homeland Security to "return" to the military's policy authorizing the discharge of openly transgender service members (the "Retention Directive"); to prohibit the accession (bringing into service) of openly transgender individuals (the "Accession Directive"); and to prohibit the funding of certain surgical procedures for transgender service members (the "Medical Care Directive"). (Id. at §§ 1-3.) The Accession Directive takes effect on January 1, 2018; the Retention and Medical Care Directives take effect on March 23, 2018. (Id. at § 3.)

On September 14, 2017, Secretary of Defense James N. Mattis issued a memorandum providing interim guidance to the military (the "Interim Guidance"). (Dkt. No. 69, Ex. 1.) The Interim Guidance identified the intent of the Department of Defense ("DoD") to "carry out the President's policy and directives" and to identify "a plan to implement the policy and directives in the Presidential Memorandum." (Id. at 2.) The Interim Guidance explained that transgender individuals would be prohibited from accession effective immediately. (Id. at 3.)

II. Policy on Transgender Service Members Prior to July 26, 2017

Prior to President Trump's announcement, the military concluded that transgender individuals should be permitted to serve openly and was in the process of implementing a policy to this effect (the "June 2016 Policy"). (Dkt. Nos. 32 at 9-10; 46 at ¶¶ 8-27; 48 at ¶¶ 8-36, Ex. C.) The June 2016 Policy was preceded by extensive research, including an independent study to evaluate the implications of military service by transgender individuals. (Dkt. Nos. 30 at ¶¶ 159-162; 32 at 9-10; 46 at ¶ 11.) This study concluded that allowing transgender individuals to serve would not negatively impact military effectiveness, readiness, or unit cohesion, and that the costs of providing transgender service members with transition-related healthcare would be "exceedingly small" compared with DoD's overall healthcare expenditures. (Dkt. No. 32 at 30; 46 at ¶¶ 15-20.) After consulting with medical experts, personnel experts, readiness experts, commanders whose units included transgender service members, and others, the working group concluded that transgender individuals should be allowed to serve openly. (Dkt. Nos. 30 at ¶ 161; 46 at ¶ 10.) The Secretary of Defense issued a directive-type memorandum on June 30, 2016 affirming that "service in the United States military should be open to all who can meet the rigorous standards for military service and readiness," including transgender individuals. (Dkt. No. 48, Ex. C.) The memorandum established procedures for accession, retention, in-service

transition, and medical coverage, and provided that "[e]ffective immediately, no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity." (Id.) Relying upon the June 2016 Policy, transgender service members disclosed their transgender status to the military and were serving openly at the time of President Trump's announcement. (See Dkt. Nos. 30 at ¶¶ 101-102, 112-114; 48 at ¶ 37.)

III. Plaintiffs Challenge to the Presidential Memorandum

Plaintiffs challenge the constitutionality of the policy prohibiting military service by openly transgender individuals and seek declaratory and injunctive relief.[1] (Dkt. No. 30 at 39.) Plaintiffs contend the policy violates their equal protection and due process rights, and their rights under the First Amendment. (Id. at ¶¶ 214-238.)

Plaintiffs include nine individuals (the "Individual Plaintiffs"), three organizations (the "Organizational Plaintiffs"), and Washington State. (See id. at ¶¶ 7-18; Dkt. No. 101.) Plaintiffs Ryan Karnoski, D.L., and Connor Callahan seek to pursue a military career, and contend that the policy set forth in the Presidential Memorandum forecloses this opportunity. (Dkt. No. 30 at ¶¶ 38-49, 64-73, 130-139.) Plaintiffs Staff Sergeant Cathrine Schmid, Chief Warrant Officer Lindsey Muller, Petty Officer First Class Terece Lewis, Petty Officer Second Class Phillip Stephens, and Petty Officer Second Class Megan Winters currently serve openly in the military. (Id. at ¶¶ 50-63, 74-120.) Plaintiff Jane Doe currently serves in the military, but

[1] Plaintiffs' suit is one of four lawsuits filed in response to President Trump's policy prohibiting transgender individuals from serving openly. See Doe 1 v. Trump, No. 17-1597 (CKK) (D.D.C. filed Aug. 9, 2017); Stone v. Trump, No. MJG-17-2459 (D. Md. filed Aug. 8, 2017); Stockman v. Trump, No. 17-cv-1799-JGB-KK (C.D. Cal. filed Sept. 5, 2017). The District Courts for the Districts of Columbia and Maryland have issued preliminary injunctions suspending enforcement of the policy. See Doe 1, 2017 WL 4873042 (D.D.C. Oct. 30, 2017); Stone, 2017 WL 5589122 (D. Md. Nov. 21, 2017).

does not serve openly. (Id. at ¶¶ 121-129.) The Human Rights Campaign ("HRC"), the Gender Justice League ("GJL"), and the American Military Partner Association ("AMPA") join as Organizational Plaintiffs. (Id. at ¶¶ 140-145.) After the Individual and Organization Plaintiffs filed this action, Washington State moved to intervene to protect its sovereign and quasi-sovereign interests, which it alleged were harmed by the policy set forth in the Presidential Memorandum. (Dkt. No. 55; see also Dkt. No. 97.) On November 27, 2017, the Court granted Washington State's motion. (Dkt. No. 101.) Washington State now joins in Plaintiffs' Motion for Preliminary Injunction based upon its interests in protecting "the health, and physical and economic well-being of its residents" and "securing residents from the harmful effects of discrimination." (Id. at 4.) Defendants include President Donald J. Trump, Secretary James N. Mattis, the United States, and the DoD. (Dkt. No. 30 at ¶¶ 19-22.)

DISCUSSION

I. Motion to Dismiss

Defendants move to dismiss Plaintiffs' Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (See Dkt. No. 69 at 16-22.) The Court finds that Plaintiffs have standing to challenge the Presidential Memorandum and have stated valid claims upon which relief may be granted. However, Plaintiffs have failed to state a valid claim for violation of procedural due process. The Court therefore DENIES Defendants' Motion to Dismiss as to Plaintiffs' equal protection, substantive due process, and First Amendment claims; and GRANTS Defendants' Motion to Dismiss as to Plaintiffs' procedural due process claim.

A. Rule 12(b)(1)

Defendants move to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Defendants contend the Court lacks subject matter jurisdiction for two

reasons: First, they contend Plaintiffs lack standing because they have not suffered injuries in fact. (Id. at 18-20.) Second, they contend Plaintiffs' claims are not ripe for resolution. (Id. at 20-22.) Plaintiffs respond that the Presidential Memorandum gives rise to current harm and credible threats of impending harm sufficient for both standing and ripeness. (See Dkt. No. 84 at 11-27.)

i. *Individual Plaintiffs*

The Court finds that the Individual Plaintiffs have standing to challenge the Presidential Memorandum. To establish standing, Individual Plaintiffs must demonstrate: (1) an "injury in fact"; (2) a causal connection between the injury and the conduct complained of; and (3) that it is likely their injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). "At the preliminary injunction stage, a plaintiff must make a 'clear showing' of his injury in fact." Lopez v. Candaele, 630 F.3d 775, 785 (9th Cir. 2010) (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 22 (2008)). An "injury in fact" exists where there is an invasion of a legally protected interest that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560 (internal quotation marks and citations omitted).

Each of the Individual Plaintiffs satisfies these requirements: As a result of the Retention Directive, Plaintiffs Schmid, Muller, Lewis, Stephens, Winters, and Doe face a credible threat of discharge. (See Dkt. No. 84 at 14-15.) As a result of the Accession Directive, Plaintiff Schmid has been refused consideration for appointment as a warrant officer and faces a credible threat of being denied opportunities for career advancement. (See Dkt. Nos. 36 at ¶¶ 28-30; 70 at ¶ 3.) Plaintiffs Karnoski, D.L., and Callahan also face a credible threat of being denied opportunities to compete for accession on equal footing with non-

transgender individuals. (See Dkt. Nos. 35 at ¶¶ 16-22; 37 at ¶¶ 3-16; 42 at ¶¶ 3-5, 10-21; see also Doe 1, 2017 WL 4873042, at *18-19 (finding the Accession and Retention Directives impose competitive barriers on transgender individuals who intend to accede). As a result of the Medical Care Directive, Plaintiff Stephens faces a credible threat of being denied surgical treatment, as he is currently ineligible for surgery until after March 23, 2018, the date upon which DoD is to cease funding of transition-related surgical procedures.[2] (Dkt. Nos. 30 at ¶ 102; 34, Ex. 7 at § 3; 40 at ¶ 14.)

In addition to these threatened harms, the Individual Plaintiffs face current harms in the form of stigmatization and impairment of free expression. The policy set forth in the Presidential Memorandum currently denies Individual Plaintiffs the opportunity to serve in the military on the same terms as other service members, deprives them of dignity, and subjects them to stigmatization. (Dkt. No. 30 at ¶¶ 217, 222, 238.) Policies that "stigmatiz[e] members of the disfavored group as 'innately inferior' . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." Heckler v. Mathews, 465 U.S. 728, 737-740 (1984). The Presidential Memorandum currently impairs Plaintiff Jane Doe's rights to express her authentic gender identity, as she fears discharge from the military as a result. (Dkt. No. 33 at ¶¶ 3-15.) Plaintiff Doe's self-censorship is a "constitutionally sufficient injury," as it is based on her "actual and well-founded fear" that the Retention Directive will take effect. See Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1093 (9th Cir. 2003) ("an actual and well-founded fear that [a] law

[2] While the Medical Care Directive includes an exception where necessary "to protect the health of an individual who has already begun a course of treatment to reassign his or her sex" (Dkt. No. 34, Ex. 7 at § 2), the exception does not apply to Plaintiff Stephens and does not diminish the threat of harm he faces. (Dkt. No. 40 at ¶ 14.)

will be enforced against [him or her]" may create standing to bring pre-enforcement claims based on the First Amendment) (quoting Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 393 (1988)).

Each of Defendants' arguments to the contrary is unavailing. First, Defendants claim the harms facing Plaintiffs are not certain, as the Presidential Memorandum directs "further study before the military changes its longstanding policies regarding service by transgender individuals." (See Dkt. No. 69 at 18.) However, the Accession Directive is already in place, and the restrictions set forth in the Medical Care Directive are final and will be implemented on March 23, 2018. (See Dkt. No. 34, Ex. 7 at § 3.) The Court finds that "[t]he directives of the Presidential Memorandum, to the extent they are definitive, are the operative policy toward military service by transgender service members." Doe 1, 2017 WL 4873042, at *17. Similarly, the Court reads the Interim Guidance "as implementing the directives of the Presidential Memorandum," and concludes that "any protections afforded by the Interim Guidance are necessarily limited to the extent they conflict with the express directives of the memorandum." Id.

Second, Defendants claim Plaintiffs Karnoski, D.L., and Callahan have not suffered injury in fact as they have yet to enlist in the military. (Dkt. No. 69 at 19.) However, as a result of the Accession Directive, Plaintiffs Karnoski, D.L., and Callahan cannot compete for accession on equal footing with non-transgender individuals. Denial of this opportunity constitutes injury in fact. See Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 365-66 (1977) ("When a person's desire for a job is not translated into a formal application solely because of his

unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.").[3]

Third, Defendants rely on Allen v. Wright, 468 U.S. 737 (1984) to claim that Plaintiffs have not suffered stigmatic injury. (Dkt. No. 69 at 18.) But unlike the claimants in Allen, who raised abstract instances of stigmatic injury only, the Individual Plaintiffs have identified concrete interests in accession, career advancement, and medical treatment, and have demonstrated that they are "'personally denied equal treatment' by the challenged discriminatory conduct." Allen, 468 U.S. at 755 (quoting Heckler, 465 U.S. at 739-40). Such stigmatic injury is "one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing." Id.[4]

ii. *Organizational Plaintiffs*

The Court finds that Organizational Plaintiffs HRC, GJL, and AMPA have standing to challenge the Presidential Memorandum. An organization has standing where "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). Each of the Organizational Plaintiffs satisfies these requirements. Individual Plaintiffs Karnoski and Schmid are members of HRC, GJL, and

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[3] Defendants' claim that Plaintiffs Karnoski and D.L. would not be able to accede under the June 2016 Policy because they have recently taken steps to transition does not compel a different finding. Plaintiffs' injury "lies in the denial of an equal *opportunity* to compete, not the denial of the job itself," and thus the Court does not "inquire into the plaintiffs' qualifications (or lack thereof) when assessing standing." Shea v. Kerry, 796 F.3d 42, 50 (D.C. Cir. 2015) (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 280-81 & n.14 (1978) (emphasis in original)).

[4] Allen addressed racial discrimination specifically. However, the Supreme Court has also acknowledged stigmatic injury arising from gender-based discrimination. See Heckler, 465 U.S. at 737-40.

AMPA, and Individual Plaintiffs Muller, Stephens, and Winters are also members of AMPA. (See Dkt. No. 30 at ¶¶ 141-145.) The interests each Organizational Plaintiff seeks to protect are germane to their organizational purposes, which include ending discrimination against LGBTQ individuals (HRC and GJL) and supporting families and allies of LGBT service members and veterans (AMPA). (Id. at ¶¶ 16-18.) As Plaintiffs seek injunctive and declaratory relief, participation by the organizations' individual members is not required. See Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity, 950 F.2d 1401, 1408 (9th Cir. 1991) (participation of individual members not required where "the claims proffered and relief requested [by an organization] do not demand individualized proof on the part of its members").

iii. *Washington State*

The Court finds that Washington State has standing to challenge the Presidential Memorandum. A state has standing to sue the federal government to vindicate its sovereign and quasi-sovereign interests. See Massachusetts v. E.P.A., 549 U.S. 497, 518-520 (2007). Sovereign interests include a state's interest in protecting the natural resources within its boundaries. Id. at 518-519. Quasi-sovereign interests include a state's interest in the health and physical and economic well-being of its residents, and in "securing residents from the harmful effects of discrimination." Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 607, 609 (1982). Washington State is home to approximately 45,000 active duty service members and approximately 32,850 transgender adults. (Dkt. No. 97 at 6.) The Washington National Guard is comprised of service members who assist with emergency preparedness and disaster recovery planning, including protecting Washington State's natural resources from wildfires, landslides, flooding, and earthquakes. (Id. at 8.) Washington State contends that prohibiting transgender individuals from serving openly adversely impacts its ability to recruit

and retain members of the Washington National Guard, and thereby impairs its ability to protect its territory and natural resources. (Id.) Additionally, Washington State contends that the prohibition implicates its interest in maintaining and enforcing its anti-discrimination laws, protecting its residents from discrimination, and ensuring that employment and advancement opportunities are not unlawfully restricted based on transgender status. (Id. at 8-9.) The Court agrees.

The injuries to the Individual Plaintiffs, the Organizational Plaintiffs, and to Washington State are indisputably traceable to the policy set forth in the Presidential Memorandum, and may be redressed by a favorable ruling from this Court. Therefore, the Court DENIES Defendants' Motion to Dismiss for lack of standing.

iv. *Ripeness*

The Court finds that Plaintiffs' claims are ripe for review. Ripeness "ensure[s] that courts adjudicate live cases or controversies" and do not "issue advisory opinions [or] declare rights in hypothetical cases." Bishop Paiute Tribe v. Inyo Cnty., 863 F.3d 1144, 1153 (9th Cir. 2017) (citation omitted). "A proper ripeness inquiry contains a constitutional and a prudential component." Id. (citation omitted). Because Plaintiffs have standing to challenge the Presidential Memorandum, their claims satisfy the requirement for constitutional ripeness. See id. (constitutional ripeness "is often treated under the rubric of standing"). Because they raise purely legal issues (i.e., whether the Presidential Memorandum violates their constitutional rights), and because withholding consideration of these issues will subject Plaintiffs to hardships (i.e., denial of career opportunities and transition-related medical care, stigmatic injury, and impairment of self-expression), they also satisfy the requirement for prudential ripeness. See id. at 1154 (prudential ripeness is "guided by two overarching considerations: the fitness of the

issues for judicial decision and the hardship to the parties of withholding court consideration.") (citation and internal quotation marks omitted).

Defendants claim this case is not ripe for resolution because the policy on military service by transgender individuals is "still being studied, developed, and implemented." (Dkt. No. 69 at 20.) However, President Trump's announcement on Twitter and his Presidential Memorandum did not order a study, but instead unilaterally proclaimed a prohibition on transgender service members. See Stone, 2017 WL 5589122, at *10 ("The Court cannot interpret the plain text of the President's Memorandum as being a request for a study to determine whether or not the directives should be implemented. Rather, it orders the directives to be implemented by specified dates."). Defendants' contention that Plaintiffs must first exhaust administrative remedies before the Court can consider their claims is also unavailing, as the Ninth Circuit has explained that "[r]esolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board." Downen v. Warner, 481 F.2d 642, 643 (9th Cir. 1973).

Therefore, the Court DENIES Defendants' Motion to Dismiss for lack of subject matter jurisdiction.

B. Rule 12(b)(6)

To survive a motion to dismiss for failure to state a claim upon which relief can be granted, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). This requirement is met where the complaint "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. The complaint need not include detailed

allegations, but it must have "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. In evaluating a motion under Rule 12(b)(6), the Court accepts all facts alleged in the complaint as true, and makes all inferences in the light most favorable to the non-movant. Barker v. Riverside Cnty. Office of Educ., 584 F.3d 821, 824 (9th Cir. 2009) (internal citations omitted).

The Court finds that Plaintiffs' Amended Complaint states valid claims for violation of equal protection, substantive due process, and the First Amendment. Plaintiffs have established a likelihood of success on the merits with regard to each of these claims (see discussion of Plaintiffs' Motion for Preliminary Injunction, infra), and for the same reasons, these claims survive under Rule 12(b)(6). However, the Court finds that Plaintiffs' Amended Complaint fails to state a valid claim for violation of procedural due process. Plaintiffs' Amended Complaint alleges neither a "protectible liberty or property interest" nor a "denial of adequate procedural protections" as required for a procedural due process claim. (See Dkt. No. 30 at ¶¶ 225-230; Sanchez v. City of Fresno, 914 F. Supp. 2d 1079, 1103 (9th Cir. 2012).) [5]

Therefore, the Court DENIES Defendants' Motion to Dismiss with respect to Plaintiffs' equal protection, substantive due process and First Amendment claims, and GRANTS Defendants' Motion to Dismiss with respect to Plaintiffs' procedural due process claim.

II. Motion for Preliminary Injunction

The Court finds that Plaintiffs are entitled to a preliminary injunction to preserve the status quo that existed prior to the change in policy announced by President Trump on Twitter and in his Presidential Memorandum. The Court considers four factors in evaluating Plaintiffs'

[5] The Court notes that the procedural due process claim is elaborated upon in detail in Plaintiffs' Motion for Preliminary Injunction and Reply. (See Dkt. Nos. 32 at 22-23; 84 at 39-40.)

request for a preliminary injunction: (1) the likelihood of success on the merits; (2) the likelihood of irreparable harm in the absence of an injunction; (3) the balance of equities; and (4) the public interest. Winter, 555 U.S. at 20. "When the government is a party, these last two factors merge." Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing Nken v. Holder, 556 U.S. 418, 435 (2009)).

A. Likelihood of Success on the Merits

The Court finds that Plaintiffs have established a likelihood of success on the merits of their equal protection, substantive due process, and First Amendment claims.

i. *Equal Protection*

Plaintiffs have established a likelihood of success on the merits of their equal protection challenge. The Equal Protection Clause prohibits government action "denying to any person the equal protection of the laws." United States v. Windsor, 133 S. Ct. 2675, 2695 (2013). Plaintiffs contend the policy set forth in the Presidential Memorandum denies them equal protection in that it impermissibly classifies individuals based on transgender status and gender identity and is not substantially related to an important government interest. (Dkt. No. 30 at ¶¶ 217-224.)

The Court must first determine whether the policy burdens "a 'suspect' or 'quasi-suspect' class." See Ball v. Massanari, 254 F.3d 817, 823 (9th Cir. 2001). The Court concludes that the policy distinguishes on the basis of transgender status, a quasi-suspect classification, and is therefore subject to intermediate scrutiny. See id. (noting that gender is a quasi-suspect classification); Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (noting that discrimination based on a person's failure "to conform to socially-constructed

gender expectations" is a form of gender discrimination) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989)).[6]

Next, the Court must determine whether the policy satisfies intermediate scrutiny. Id. A policy subject to intermediate scrutiny must be supported by an "exceedingly persuasive justification." United States v. Virginia, 518 U.S. 515, 531 (1996). The policy must serve important governmental objectives, and the government must show "that the discriminatory means employed are substantially related to the achievement of those objectives." Id. at 533 (citation omitted). While Defendants identify important governmental interests including military effectiveness, unit cohesion, and preservation of military resources, they fail to show that the policy prohibiting transgender individuals from serving openly is related to the achievement of those interests. (See Dkt. No. 69 at 33-35.) Indeed, "all of the reasons proffered by the President for excluding transgender individuals from the military [are] not merely unsupported, but [are] actually *contradicted* by the studies, conclusions, and judgment of the military itself." Doe 1, 2017 WL 4873042, at *30 (emphasis in original). Not only did the DoD previously conclude that allowing transgender individuals to serve openly would not impact military effectiveness and readiness, the working group tasked to evaluate the issue also concluded that *prohibiting* open service would have negative impacts including loss of qualified personnel, erosion of unit cohesion, and erosion of trust in command. (See Dkt. Nos. 46 at ¶¶ 25-26; 48 at ¶¶ 45-47.)

Defendants' arguments to the contrary are unavailing. While Defendants raise concerns about transition-related medical conditions and costs, their concerns "appear to be hypothetical

[6] The June 2016 Policy also stated it was DoD's position "consistent with the U.S. Attorney General's opinion, that discrimination based on gender identity is a form of sex discrimination." (See Dkt. No. 48, Ex. C at 6.)

and extremely overbroad." Doe 1, 2017 WL 4873042, at *29. For instance, Defendants claim that "at least some transgender individuals suffer from medical conditions that could impede the performance of their duties," including gender dysphoria, and complications from hormone therapy and sex reassignment surgery. (See Dkt. No. 69 at 33-34.) But *all* service members might suffer from medical conditions that could impede performance, and indeed the working group found that it is common for service members to be non-deployable for periods of time due to an array of such conditions. (Dkt. No. 46 at ¶ 22.) Defendants claim that accommodating transgender service members would "impose costs on the military." (Dkt. No. 69 at 34.) But the study preceding the June 2016 Policy indicates that these costs are exceedingly minimal. (Dkt. Nos. 48, Ex. B at 57 ("[E]ven in the most extreme scenario . . . we expect only a 0.13-percent ($8.4 million out of $6.2 billion) increase in [active component] health care spending."); 48 at ¶ 41 ("[T]he maximum financial impact . . . is an amount so small it was considered to be 'budget dust,' hardly even a rounding error, by military leadership.'").) Indeed, the cost to discharge transgender service members is estimated to be *more than 100 times greater* than the cost to provide transition-related healthcare. (See Dkt. Nos. 32 at 20; 46 at ¶ 32; 48 at ¶ 18.)

Defendants' claim that the policy prohibiting transgender individuals from serving openly is entitled to substantial deference is also unavailing. (See Dkt. No. 69 at 29.) Defendants rely on Rostker v. Goldberg, 453 U.S. 57 (1981). In Rostker the Supreme Court considered whether the Military Selective Service Act ("MSSA"), which compelled draft registration for men only, was unconstitutional. Id. at 59. Finding that the MSSA was enacted after extensive review of legislative testimony, floor debates, and committee reports, the Supreme Court held that Congress was entitled to deference when, in "exercising the

congressional authority to raise and support armies and make rules for their governance," it does not act "unthinkingly" or "reflexively and not for any considered reason." See id. at 71-72. In contrast, the prohibition on military service by transgender individuals was announced by President Trump on Twitter, abruptly and without any evidence of considered reason or deliberation. (See Dkt. No. 30 at ¶¶ 172-184.) The policy is therefore not entitled to Rostker deference.[7]

Because Defendants have failed to demonstrate that the policy prohibiting transgender individuals from serving openly is substantially related to important government interests, it does not survive intermediate scrutiny.[8] Plaintiffs are therefore likely to succeed on the merits of their equal protection claim.

ii. *Substantive Due Process*[9]

The Court finds that Plaintiffs have established a likelihood of success on the merits of their substantive due process challenge. Substantive due process protects fundamental liberty interests in individual dignity, autonomy, and privacy from unwarranted government intrusion. See U.S. Const., amend. V. These fundamental interests include the right to make decisions concerning bodily integrity and self-definition central to an individual's identity. See Obergefell v. Hodges, 135 S. Ct. 2584, 2584 (2015) ("The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons . . . to define and express

[7] Defendants' reliance on Goldman v. Weinberger, 475 U.S. 503 (1986), is also misplaced. See Doe 1, 2017 WL 4873042, at *30 n.11 (distinguishing the policy at issue in Weinberger as having been "based on the 'considered professional judgment" of the military).

[8] For the same reasons, the policy is also unlikely to survive rational basis review.

[9] Having granted Defendants' Motion to Dismiss with regard to Plaintiffs' procedural due process challenge, the Court does not reach the merits of that claim at this time.

their identity."); see also Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984) (due process "safeguards the ability independently to define one's identity that is central to any concept of liberty"). To succeed on their substantive due process challenge, Plaintiffs must establish a governmental intrusion upon a fundamental liberty interest. The Court concludes that the policy set forth in the Presidential Memorandum constitutes such an intrusion. The policy directly interferes with Plaintiffs' ability to define and express their gender identity, and penalizes Plaintiffs for exercising their fundamental right to do so openly by depriving them of employment and career opportunities. As discussed in the context of Plaintiffs' equal protection challenge, supra, Defendants have not demonstrated that this intrusion is necessary to further an important government interest. Plaintiffs are therefore likely to succeed on the merits of their substantive due process challenge.

iii. *First Amendment*

The Court finds that Plaintiffs have established a likelihood of success on the merits of their First Amendment challenge. In general, laws that regulate speech based on its content (i.e., because of "the topic discussed or the idea or message expressed") are presumptively unconstitutional and subject to strict scrutiny. Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2226-27 (2015). Military regulations on speech are permitted so long as they "restrict speech no more than is reasonably necessary to protect the substantial governmental interest." Brown v. Glines, 444 U.S. 348, 355 (1980).

Plaintiffs contend the policy set forth in the Presidential Memorandum impermissibly burdens "speech or conduct that 'openly' discloses a transgender individual's identity or transgender status" by subjecting openly transgender individuals to discharge and other adverse actions. (See Dkt. No. 30 at ¶¶ 196-197, 234-236.) The Court agrees. The policy penalizes

transgender service members—but not others—for disclosing their gender identity, and is therefore a content-based restriction. Even giving the government the benefit of a more deferential standard of review under Brown, 444 U.S. at 355, the policy does not survive. As discussed in the context of Plaintiffs' equal protection challenge, supra, Defendants have not demonstrated that the intrusion upon protected expression furthers an important government interest.

B. Irreparable Harm

The Court finds that Plaintiffs are likely to suffer irreparable harm if an injunction does not issue. The Individual and Organizational Plaintiffs have demonstrated a likelihood of irreparable harm in the form of current and threatened injuries in fact, including denial of career opportunities and transition-related medical care, stigmatic injury, and impairment of self-expression. While Defendants claim these harms can be remedied with money damages (Dkt. No. 69 at 23-24), they are incorrect. Unlike the plaintiffs in Anderson v. United States, 612 F.2d 1112 (9th Cir. 1979) and Hartikka v. United States, 754 F.2d 1516 (9th Cir. 1985), who alleged harms "common to most discharged employees" (e.g., loss of income, loss of retirement, loss of relocation pay, and damage to reputation) and not "attributable to any unusual actions relating to the discharge itself," Hartikka, 754 F.2d at 1518, the harms facing the Individual Plaintiffs are directly attributable to the policy set forth in the Presidential Memorandum. Back pay and other monetary damages proposed by Defendants will not remedy the stigmatic injury caused by the policy, reverse the disruption of trust between service members, nor cure the medical harms caused by the denial of timely health care. (See Dkt. No. 84 at 28.) Moreover, to the extent Plaintiffs are likely to succeed on the merits of their constitutional claims, these violations are yet another form of irreparable harm. See

Associated Gen. Contractors, 950 F.2d at 1412 ("alleged constitutional infringement will often alone constitute irreparable harm.") (citation omitted); see also Klein v. City of San Clemente, 584 F.3d 1196, 1207-08 (9th Cir. 2009) ("loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)).

Plaintiff Washington State has demonstrated a likelihood of irreparable harm to its sovereign and quasi-sovereign interests if it is "forced to continue to expend its scarce resources to support a discriminatory policy when it provides funding or deploys its National Guard." (See Dkt. No. 97 at 8-9.) Washington State has also demonstrated that its ability to recruit and retain service personnel for the Washington National Guard may be irreparably harmed. See Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d 597, 603 (9th Cir. 1991) ("intangible injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable harm.").

C. Balance of Equities and Public Interest

The Court finds that the balance of equities and the public interest are in Plaintiffs' favor. If a preliminary injunction does not issue, Plaintiffs will continue to suffer injuries as a result of the Presidential Memorandum, including deprivation of their constitutional rights. On the other hand, Defendants will face no serious injustice in maintaining the June 2016 Policy pending resolution of this action on the merits. Defendants claim they are in the process of "gathering a panel of experts" to study the military's policy on transgender service members and assert, without explanation, that an injunction will "directly interfere with the panel's work and the military's ability to thoroughly study a complex and important issue regarding the composition of the armed forces." (Dkt. No. 69 at 40.) The Court is not convinced that

reverting to the June 2016 Policy, which was voluntarily adopted by DoD after extensive study and review, and which has been in place for over a year without documented negative effects, will harm Defendants. See Doe 1, 2017 WL 4873042, at *33 (recognizing "considerable evidence that it is the *discharge* and *banning* of [transgender] individuals that would have such [negative] effects . . . .") (emphasis in original).

Injunctive relief furthers the public interest as it "is always in the public interest to prevent the violation of a party's constitutional rights." Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) (citations omitted). Defendants' contention that the public has a strong interest in national defense does not change this analysis, as "[a] bare invocation of 'national defense' simply cannot defeat every motion for preliminary injunction that touches on the military." Doe 1, 2017 WL 4873042, at *33; Stone, 2017 WL 5589122, at *16.

CONCLUSION

Plaintiffs have standing to bring this lawsuit challenging Defendants' policy of prohibiting transgender individuals from serving openly in the military. Plaintiffs' claims for violations of equal protection, substantive due process, and the First Amendment are properly plead and ripe for resolution, and Plaintiffs are entitled to a preliminary injunction to protect the status quo with regard to each of these claims. Plaintiffs have not properly plead a claim for violation of procedural due process. Therefore, the Court rules as follows:

1. The Court GRANTS Defendants' Motion to Dismiss with respect to Plaintiffs' procedural due process claim;

2. The Court DENIES Defendants' Motion to Dismiss with respect to Plaintiffs' equal protection, substantive due process, and First Amendment claims;

3. The Court GRANTS Plaintiffs' Motion for a Preliminary Injunction, and hereby enjoins Defendants and their officers, agents, servants, employees, and attorneys, and any other person or entity subject to their control or acting directly or indirectly in concert or participation with Defendants from taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement. This Preliminary Injunction shall take effect immediately and shall remain in effect pending resolution of this action on the merits or further order of this Court.

The clerk is ordered to provide copies of this order to all counsel.

Dated December 11, 2017.

Marsha J. Pechman
United States District Judge

EXHIBIT 23

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

RYAN KARNOSKI, et al.,	)	
	)	
Plaintiffs,	)	No. 2:17-cv-01297-MJP
	)	
vs.	)	Seattle, WA
	)	
DONALD J. TRUMP, et al.,	)	
	)	Motion Hearing
Defendants.	)	July 17, 2018

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE JUDGE MARSHA J. PECHMAN
UNITED STATES DISTRICT COURT

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to take both of your questions, though, if I could.

THE COURT: Okay.

MR. GARDNER: There is a very big difference between an African-American outright ban and restricting those that have a particular medical condition from enlisting. The fact is that African-Americans and non-African-Americans are similarly situated in all respects. And that's why that kind of ban, on its face, would violate the Constitution. But by definition, those that have a medical condition are not similarly situated from those that don't have that medical condition. And, therefore, it is a completely different constitutional analysis.

Now, I want to get back to the question of deference, and what does deference do. Deference does a few things, Your Honor.

One -- and I don't even think this is really challenged in this case. The first thing we have are, the Department of Defense has articulated four objectives that this medical policy is intended to cover, so military readiness -- and I know the Court knows all these things. The courts have recognized, routinely, that those are legitimate government objectives. And so the question now is, does this policy relate to those objectives? And that's one of the ways deference comes into play, is that we give the benefit of the doubt to the military because the military is the one that is

exercising the professional judgment. And here, we have a 44-page report from the Secretary of Defense, Mattis, who has reached conclusions, supported by an extensive administrative record.

You asked the question, Your Honor, what would the government put on at trial? What the government would put on at trial is essentially the administrative record. That may seem unusual, Your Honor, but, frankly, this case is unusual. Because when a DOD policy is typically challenged, it is done so under the APA. And, therefore, we typically don't have trials in APA cases. But accepting the hypothetical, or the reality, that this would go to trial, we would present that administrative record.

THE COURT: And only that administrative record.

MR. GARDNER: Yes, Your Honor. I should back up. There is -- I know that plaintiffs will be disclosing expert witnesses. We'll have to make a decision as to whether it's appropriate to counter those with our experts, or just cross-examine them. But in the main, yes, we would be relying almost exclusively on the administrative record in this case.

THE COURT: You intend to call no witnesses.

MR. GARDNER: Your Honor, we've already made available for deposition Tony Kurta, who is the head of the panel of experts. And it is entirely likely we would call Tony Kurta to present, you know, the administrative record.

But we do think this case could and should go off on summary judgment, because what this Court would be looking at is whether or not that administrative record supports the 44-page decision. If the Court concludes it doesn't, it doesn't. Or if it does, it does. But that's how we would see this case proceeding, and that the Court would apply deference, both in terms of giving credit, if you will, to the Department's means-ends conclusions, but deference also goes to the ultimate level of scrutiny.

And one thing that *Trump vs. Hawaii* also does, that I think is important here, is, it notes that where you might have a gender-based classification that is otherwise subject to greater scrutiny in a different context, in certain contexts, immigration, national security, and, yes, in the military, those decisions, when you apply deference, a lesser standard of scrutiny would apply. That's, in fact, what *Rostker* did, Your Honor. And so our view is that deference, how it applies, is in those two fashions.

THE COURT: All right. Well, you keep calling it a medical diagnosis. And, in fact, the tweet didn't call it a medical diagnosis, nor does the heading of the other report call it a medical diagnosis. And you also have people who may not have the medical diagnosis, but still are required to present themselves in their birth gender.

MR. GARDNER: Your Honor, with all due respect, if

someone has never had gender dysphoria, then there are no restrictions upon their service. That's not right. And the fact that there may be a heading that says "transgender" tells you nothing about the substance of the policy. And the substance of the policy is clearly directed to a medical condition.

And with respect to the tweet, Your Honor, and the 2017 memorandum, remember, Secretary Mattis had to expressly request that the President revoke those things to put its 44-page plan into effect. And that's exactly what the President did in revoking the 2017 memorandum. So, again, just like the travel ban, even though there was a logical nexus between the first executive order and the third executive order, the Supreme Court analyzed the executive order that was in effect. The 2017 memo, the tweet, certainly, are not in effect now. The 2018 memo that the President issued expressly revoked those. So not only are those prior statements not relevant, they certainly don't satisfy plaintiff's need for a higher burden in order to successfully challenge the privilege.

I do want to mention one other thing about one of the questions this Court had, if I could, and that's about whether we are in compliance with this Court's order.

This Court, in the context of a broad motion for a protective order to stay all discovery, ordered the government to submit a privilege log under 26(b)(5). And that privilege

EXHIBIT 24

Subject: FW: [EXT] Fwd: FW: attachments
Attachments: witches mpd.pdf; Hayes Directory.pdf; 20170619_TNA52HruzMayerMcHugh.pdf; Long-Term Follow-Up of Transsexual Persons - Sweden.pdf

From: Paul McHugh
Sent: Monday, February 5, 2018 2:51 PM
To: 'william.bushman@sd.mil' <william.bushman@sd.mil>
Subject: attachments

Mr. Bushman, I mentioned these several articles in our conversation The Hayes Directory on evidence for sex reassignment surgery and other medical treatments , The long term follow-up from Sweden for transgender surgery, My article in Nature Medicine in 1995, and our recent article in the New Atlantis. I've attached them all here . Do tell me if they get through. Paul McHugh

6/27/14
Law 1
Produced Material
Cluster

May 15, 2014

Sex Reassignment Surgery for the Treatment of Gender Dysphoria

PURPOSE OF TECHNOLOGY:

Sex reassignment surgery (SRS), which involves genital reconstruction surgery and chest surgery, is part of the treatment approach for persons with gender dysphoria (GD). Individuals with GD have persistent feelings of gender discomfort and inappropriateness of their anatomical sex, strong and ongoing cross-gender identification, and a desire to live and be accepted as a member of the opposite sex. SRS includes the surgical procedures by which the physical appearance and function of a person's existing sexual characteristics are changed to those of the other sex in an effort to resolve or minimize GD and improve quality of life.

EXECUTIVE SUMMARY:

Health Problem: People with gender dysphoria (GD) feel a severe incongruity between anatomical sex and gender identity. The prevalence of GD is 1 in 11,900 to 1 in 45,000 persons for male-to-female (MtF) and 1 in 30,400 to 1 in 200,000 persons for female-to-male (FtM) transgender persons.

The earlier term, *gender identity disorder* (GID), has given way to *gender dysphoria* (GD). This change was intended to reflect a consensus that gender nonconformity is not a psychiatric disorder, as it was previously categorized. However, since the condition may cause clinically significant distress and since a diagnosis is necessary for access to medical treatment, the new term was proposed. The diagnostic criteria for GD outlined in the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5), as well as the criteria for GID in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), require that the individual believes there is a marked difference between the gender assigned to him or her by others and the gender he or she experiences or wishes to express. Additional criteria must also be met for a diagnosis of GD.

Determinants: The determinants of GD are poorly understood. Experts believe that gender identity develops as the result of a combination of biological factors, possibly including genetic and/or prenatal and perinatal hormonal influences, and environmental influences that have psychological effects.

Treatment: Individuals with GD seeking professional help begin with psychotherapy. An American Psychiatric Association Task Force recommends 2 goals for psychotherapy: (1) to explore issues related to the individual's commitment to living in the cross-gender role; and (2) to fully explore other options for the patient including whether to live as a homosexual person without medical and surgical treatments for gender transition.

The full therapeutic approach to GD consists of 3 elements or phases, typically in the following order: (1) hormones of the desired gender, (2) real-life experience for 12 months in the desired role; and (3) surgery to change the genitalia and other sex characteristics (e.g., breast reconstruction or mastectomy). However, not everyone with GD needs or wants all elements of this triadic approach.

Technology: Sex reassignment surgery SRS involves modification of the genitalia and/or breast/chest to resemble that of the opposite sex.

For the FtM patient, surgical procedures may include mastectomy, hysterectomy, salpingo-oophorectomy, vaginectomy, metoidioplasty, scrotoplasty, urethroplasty, placement of testicular prostheses, and phalloplasty.

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For the MtF patient, surgical procedures may include breast augmentation, penectomy, orchiectomy, vaginoplasty, clitoroplasty, and labiaplasty.

Rationale: The goal of SRS is to feminize or masculinize the body to facilitate an individual's desire to live in the gender role opposite from the biological sex.

Controversy: The medical necessity of SRS for the treatment of GD is under debate. The condition does not readily fit traditional concepts of medical necessity since research to date has not established anatomical or physiological anomalies associated with GD. An evidence-based assessment of the effectiveness of SRS procedures for alleviation of symptoms associated with GD and improvement of recipients' well-being can make a helpful contribution to this controversy.

Relevant Questions:

- Has SRS been shown to be effective in improving patient-important outcomes such as relief of symptoms of GD, quality of life (QOL), satisfaction with sex characteristics, psychological well being, or sexual function?
- Does SRS confer additional benefits to hormone therapy alone?
- Do outcomes vary according to which components of SRS are performed?
- Is SRS safe?
- Have definitive patient selection criteria been established for SRS as treatment for GD?

Evidence Base: Nineteen peer-reviewed studies, primarily case series, cross-sectional studies or pretest-posttest studies assessing the effectiveness of SRS were analyzed in this report. In addition, 6 case series evaluating safety outcomes in ≥ 300 MtF patients or ≥ 200 FtM patients following SRS were analyzed.

Search Dates: November 2004 to April 2014.

Sample Sizes: 35 to 376 patients for main evidence review, 202-390 patients for safety evidence.

Patients: MtF patients (6 studies), FtM patients (6 studies), both MtF and FtM patients (7 studies).

Interventions: Chest surgery only (5 studies), genital surgery only (5 studies), both chest and genital surgery (4 studies), unspecified (5 studies).

Comparisons: Transgendered patients that had undergone SRS vs. those that had not undergone SRS (5 studies) and outcomes in SRS patients that were MtF vs. FtM (1 study).

Outcome Measures: GD, QOL, sexual experience, patient satisfaction, psychological outcomes, and safety outcomes.

Follow-Up: 1 month to 7 years.

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Findings: Following SRS, patients reported decreased GD, depression and anxiety, and increased QOL. The majority of SRS patients were sexually active, but the ability to orgasm varied across studies. The majority of patients were satisfied with their aesthetic results following SRS.

Gender Dysphoria: GD was decreased following SRS relative to baseline (2 studies).

Quality of Life: Transgendered patients who underwent SRS had improved QOL relative to patients that had not undergone SRS (1 study), improved QOL relative to before SRS (2 of 3 studies), and had QOL scores similar to those of the general population (2 studies).

Sexual Function: The majority of patients were sexually active following SRS (4 studies), and the ability to orgasm varied across studies (5 studies).

Patient Satisfaction: The majority of patients were satisfied with aesthetic results following SRS (10 studies).

Psychological Outcomes: Depression (3 studies) and anxiety (2 studies) decreased following SRS.

Other Outcomes: Following SRS, almost all FtM patients were able to micturate while standing (1 study), and rates of employment were high (3 studies).

Comparative Effectiveness of Hormone Therapy Alone and SRS: The evidence was too sparse to allow any conclusion regarding the comparative benefits of SRS and hormone therapy alone.

Comparative Effectiveness of Different Types of SRS: The evidence was too sparse to allow any conclusion regarding the comparative benefits of different SRS procedures.

Safety: Following SRS, there were very low rates of regret of surgery (0% to 6%) (5 studies) and suicide (2 to 3%) (3 studies). Only 6 of the 19 studies reported on complications following SRS, and the most common complications were urinary tract complications (4% to 33%) (3 studies), necrosis of tissue (1% to 10%) (6 studies), vaginal stenosis or prolapse (2% to 14%) (3 studies), and need for revision surgery (4% to 29%) (3 studies). The most common complications reported in the 6 safety studies were need for revision surgery (22% to 40%) (5 studies), urinary tract complications (40% to 41%) (2 studies), and wound healing difficulties (11% to 33%) (2 studies). The majority of studies reported a length of follow-up of at least 1 year following surgery (12 studies).

Patient Selection Criteria: There is insufficient evidence to establish patient selection criteria for SRS to treat GD. Professional groups recommend that SRS be restricted to individuals who are referred for sex reassignment services by a qualified mental health professional, and that while 1 referral is sufficient for breast or chest surgery, 2 independent referrals should be required for genital SRS. Individuals who have medical contraindications to surgery should not undergo SRS.

Quality of Evidence: Very low.

Overall, the quality of the evidence was very low due to limitations of individual studies, including small sample sizes, few studies evaluating any 1 outcome, retrospective data, lack of randomization of patients to treatment groups, failure to blind outcome assessors to group assignment, lack of a control or comparator group or

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minimal adjustment for confounders, lack of baseline assessments to assess change over time, a possible procedural learning curve, and a lack of objective and validated outcome measures.

Conclusions: The evidence suggests positive benefits but because of serious limitations permit only weak conclusions regarding sex reassignment surgery (SRS) for gender dysphoria (GD). No conclusions can be made about the comparative benefits of hormone therapy alone and SRS, or about different components of SRS.

- Patients who underwent chest/breast or genital surgery were generally pleased with the aesthetic results.
- Following SRS, patients reported decreased GD, depression and anxiety, and increased quality of life.
- The majority of SRS patients were sexually active, but the ability to orgasm varied across studies.
- Complications of surgery following SRS were common and could be serious.
- Rates of regret of surgery and suicide were very low following SRS.
- Data were too sparse to draw conclusions regarding whether SRS conferred additional benefits to hormone therapy alone.
- Data were too sparse to draw conclusions regarding whether outcomes vary according to which surgeries were performed.

Hayes Rating:

C - For sex reassignment surgery (SRS) to treat gender dysphoria (GD) in adults for whom a qualified mental health professional has made a formal diagnosis of GD, have undergone hormone therapy and psychotherapy, and have undergone a "real-life" test (i.e., in which they lived as the desired gender role). This Rating reflects the reporting of some positive evidence but serious limitations in the evidence of both effectiveness and safety.

D2 - For SRS to treat GD in adolescents. This rating reflects the paucity of data of SRS in adolescents.

INSIGHTS:

- Since part of the reason for the psychopathology experienced by transgender persons has to do with the reactions or expected reactions of family and society, evolving social norms theoretically could diminish the perceived need to undergo physical changes in order to live in the desired gender role.
- The majority of the studies selected for this report reflect the diagnostic criteria of *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition*, rather than the somewhat expanded criteria published in 2013 in the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*.

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May 19, 2014

Hormone Therapy for the Treatment of Gender Dysphoria

PURPOSE OF TECHNOLOGY:

Continuous feminizing or masculinizing hormone therapy is administered to some adolescents and adults who have a diagnosis of gender identity disorder (GID) or gender dysphoria (GD). The purpose of this therapy is to facilitate a transgender individual's desire to transition to a sexual identity other than his or her biological (natal) sex. Some individuals undergo hormone therapy as a prelude to sex reassignment surgery; other individuals seeking gender transition undergo hormone therapy without ever undergoing any type of surgery.

EXECUTIVE SUMMARY:

Health Problem: Individuals with gender dysphoria (GD) experience a severe incongruity between their biological sex and gender identity.

The prevalence of transsexualism is estimated to be 1 in 11,900 to 1 in 45,000 persons for male-to-female (MtF) prevalence and 1 in 30,400 to 1 in 200,000 for female-to-male (FtM) prevalence. The prevalence of gender dysphoria within the transsexual population is unknown. The earlier term, *gender identity disorder* (GID), has given way to *gender dysphoria* (GD). This change was intended to reflect a consensus that gender nonconformity is not a psychiatric disorder, as it was previously categorized. However, since the condition may cause clinically significant distress and since a diagnosis is necessary for access to medical treatment, the new term was proposed. The diagnostic criteria for GD outlined in the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5), as well as the criteria for GID in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (DSM-IV), require that the individual believes there is a marked difference between the gender assigned to him or her by others and the gender he or she experiences or wishes to express. Additional criteria must also be met for a diagnosis of GD.

Determinants: The determinants of gender dysphoria are poorly understood. Experts believe that gender identity develops as the result of a combination of biological factors, possibly including genetic and/or prenatal and perinatal hormonal influences, and environmental influences that have psychological effects.

Treatment: Individuals with GD seeking professional help begin with psychotherapy. An American Psychiatric Association Task Force recommends 2 goals for psychotherapy: (1) to explore issues related to the individual's commitment to living in the cross-gender role; and (2) to fully explore other options for the patient, including whether to live as a homosexual person without medical and surgical treatments for gender transition. The full therapeutic approach to GD consists of 3 elements or phases, typically in the following order: (1) hormones of the desired gender; (2) real-life experience for 12 months in the desired role; and (3) surgery to change the genitalia and other sex characteristics (e.g., breast reconstruction or mastectomy). However, not everyone with GD needs or wants all elements of this triadic approach.

Technology: The goal of cross-sex hormone therapy for GD is to alter secondary sex characteristics, including such features as fat distribution, hair growth, voice pitch, and muscle strength.

Cross-sex hormone therapy includes estrogens and testosterone-blocking agents administered to natal (biologic) males and androgens (usually testosterone) administered to natal females. Adolescents with a

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diagnosis of GD may be eligible for puberty-delaying hormones as soon as pubertal changes begin; the effects of this treatment are fully reversible.

Rationale: Hormone therapy serves to feminize or masculinize the body to facilitate an individual's desire to live in the gender role opposite from biological sex.

Controversy: Numerous professional groups have advocated for third-party payers to cover all medically necessary treatments to alleviate GD. However, the condition does not readily fit traditional concepts of medical necessity since research to date has not established anatomical or physiological anomalies associated with GD.

An evidence-based assessment of the effectiveness of hormone therapy for alleviation of symptoms associated with GD and improvement of recipients' well being can make a helpful contribution to this controversy.

Relevant Questions:

- Has feminizing or masculinizing hormone therapy in adolescents and adults been shown to be effective in improving patient-important outcomes such as relief of symptoms of GD, psychological well-being, sex-specific function, quality of life (QOL), functional status, or employment status?
- How does hormone therapy alone as a treatment for GD compare with sex reassignment surgery (SRS)?
- Is feminizing or masculinizing hormone therapy safe?
- Have definitive patient selection criteria been established for feminizing or masculinizing hormone therapy as a treatment for GD?

Evidence Base: Ten peer-reviewed studies, primarily of a cross-sectional or pretest-posttest design, assessing the effectiveness of hormone therapy plus 11 other studies with safety data for ≥ 100 adult patients or any safety data for adolescent patients.

Search Dates: Inception of databases to April 2014.

Sample Sizes: 50 to 376 pts (effectiveness); 1 to 2307 (safety).

Patients: Adult or adolescent patients with a diagnosis of GD. Mean age in effectiveness studies of adults, 29 to 45 years. Mean age in safety studies of adults, 41 to 52 years. Typical patients had not undergone either chest or genital SRS.

Interventions: Cross-sex hormone therapy or pubertal suppression therapy.

Comparisons: No medical treatment, SRS (chest and/or genital).

Outcome Measures: QOL, functional status, or employment status; psychological well-being (e.g., depression, self-esteem, reduced incidence of suicide); sexual function and satisfaction; and complications of hormone therapy, regret, or any other adverse event attributable to treatment.

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Follow-Up: 3 months to 1 year (effectiveness studies, usually not reported); 2 to 23 years (safety studies).

Findings: Studies that evaluated hormone therapy in adults suggested the possibility of a small effect on QOL and function, specific psychological symptoms, social support, and alcoholism. The findings were inconsistent with respect to a relationship between hormone therapy and general psychological health, substance abuse, suicide attempts, and sexual function and satisfaction (9 studies).

QOL/Functional Status (Adults): 5 studies (≥ 812 participants; ≥ 796 FtM) reported positive findings on ≥ 1 scale, but usually not on all scales used in the study. Differences between treated and untreated study participants were very small or of unknown magnitude in cross-sectional analyses that adjusted for potential confounders but were substantial in 1 pretest-posttest study.

Psychological Symptoms (Adults): In 6 studies, the results for a variety of specific psychological states (e.g., depression, anxiety) were positive, but overall measures of change in psychological symptomatology were mixed. In the studies that provided information on the magnitude of scales and/or cutoff points for normal ranges, the differences, if observed, were generally very small and scores for patients representing the control condition were typically already in the normal or mild range.

Other Outcomes (Adults): Improved social support and reduced alcoholism were suggested but the results regarding substance abuse were conflicting (2 studies). The prevalence of suicide attempts was not affected by hormone therapy (2 studies). Findings regarding the association of hormone therapy with sexual function and satisfaction were mixed (3 studies).

Comparative Effectiveness of Hormone Therapy Alone Versus Surgery (Adults): The evidence was too sparse to allow any conclusion regarding the comparative benefits of SRS and hormone therapy alone.

Adolescents (Pubertal Suppression): Evidence from a single small study was insufficient to suggest conclusions regarding the value of pubertal suppression therapy.

Safety (Adults): Hormone therapy has the potential to alter patients' risk of cardiovascular disease, cerebrovascular and thromboembolic events, osteoporosis, and cancer. The risk of no benefit must also be considered. There was an increased risk of cerebrovascular and thromboembolic events in MtF patients. There was *no* elevated risk of cancer in FtM patients. Hormone therapy and subsequent SRS failed to bring overall mortality, suicide rates, or death from illicit drug use in MtF patients close to rates observed in the general male population. It is possible that mortality is nevertheless reduced by these treatments, but that cannot be determined from the available evidence. Mortality data for FtM patients is less clear than for MtF patients. For safety issues other than the specific findings described here, the evidence was insufficient to suggest conclusions. There was no evidence concerning the prevalence of regret after hormone therapy.

Safety (Adolescents): The chief risks cited for pubertal suppression therapy are related to the possibility the GD could worsen because of the delay in definitive treatment. No serious side effects during pubertal suppression were reported. Older adolescents may begin cross-sex hormone therapy, but only a single case report provided long-term data for individuals who began therapy as adolescents. The body of evidence

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concerning the safety of pubertal suppression and cross-sex hormone therapy in adolescents was too sparse and the studies too limited to suggest conclusions.

Patient Selection Criteria: The evidence is insufficient to support patient selection criteria for hormone therapy to treat GD. Professional associations recommend that hormone therapy be restricted to patients who have been referred for such treatment by a health professional who is qualified to assess GD. In adults, medical conditions that can be exacerbated by endocrine treatment must be evaluated and addressed prior to initiation of treatment. Practice guidelines advise that pubertal suppression therapy should not be initiated until adolescents have at least reached Tanner stage 2.

Quality of Evidence: Very low.

Most studies were considered to be of very poor quality due to the nature of the study designs, failure to control for confounders, possible recall bias and selection bias, lack of blinded outcomes assessment, and/or unknown or short follow-up intervals. Not all positive results were statistically significant. For other outcomes, the findings were conflicting. For QOL and function, almost all of the available data were collected from FtM individuals for whom a diagnosis of GD could not be verified. For outcomes other than QOL and function, the quantity of evidence was very small. In safety studies, the relatively young age of study participants at the time of outcomes assessment and the lack of adjustment for risk factors in comparisons of study participants with age-matched general populations seriously diminishes the reliability of the available adverse event rates. No studies analyzed safety outcomes according to whether patients had undergone SRS, which is significant since hormone doses are lowered after SRS. The safety evidence described for adults in the **EXECUTIVE SUMMARY** is considered to be of low quality, but all other adult safety evidence was considered to be of very low quality.

Conclusions: A substantial number of studies of cross-sex hormone therapy each show some positive findings suggesting improvement in well-being after cross-sex hormone therapy. However, there are several serious limitations to the evidence.

Statistically significant improvements have not been consistently demonstrated by multiple studies for most outcomes. Five studies representing primarily female-to-male (FtM) adults reported modestly positive findings on ≥ 1 of the multiple quality of life (QOL) or functional scales for individuals who had undergone cross-sex hormone therapy, but for most of these individuals, a diagnosis of gender dysphoria (GD) was not confirmed. Evidence regarding QOL and function in male-to-female (MtF) adults was very sparse. Evidence for less comprehensive measures of well-being in adult recipients of cross-sex hormone therapy was directly applicable to GD patients but was sparse and/or conflicting. The study designs do not permit conclusions of causality and studies generally had weaknesses associated with study execution as well. There are potentially long-term safety risks associated with hormone therapy but none have been proven or conclusively ruled out. The evidence for adolescent populations was too sparse to suggest any conclusions.

Hayes Rating:

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Hormone-GD

C - For hormone therapy to treat GD in adults for whom a qualified mental health professional has made a formal diagnosis of GD and a recommendation for hormone therapy and who do not have any medical contraindications to endocrine therapy.
This Rating reflects the reporting of some positive evidence but serious limitations in the evidence of both effectiveness and safety. Also of concern is the fact that the magnitude of suggested benefit was typically small, which diminishes confidence in a true treatment effect.

D2 - For pubertal suppression therapy or cross-sex hormone therapy in adolescents.
This Rating is based on a paucity of data.

INSIGHTS:

- Since part of the reason for the psychopathology experienced by transgender persons has to do with the reactions or expected reactions of family and society, evolving social norms theoretically could diminish the perceived need to undergo physical changes in order to live in the desired gender role.
- The benefits of hormone therapy appear to be of very small magnitude in the studies published to date. The literature does not provide guidance for assessing the clinical relevance of improvements in this population. One factor that may prevent the observation of large improvements is that individuals with a better social support and a better baseline psychological profile are probably seen to be better candidates by the mental health professionals who make recommendations for treatment.
- As the population of recipients of hormone therapy ages, better data concerning long-term safety risks should become available.
- Most studies have been performed in Europe. The results may not be generalizable to the United States.
- The studies selected for this report reflect the diagnostic criteria of DSM-IV, rather than the somewhat expanded criteria published in 2013 in the DSM-5.

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Hayes directory

May 9, 2014

Ancillary Procedures and Services for the Treatment of Gender Dysphoria

PURPOSE OF TECHNOLOGY:

Some persons with gender dysphoria (GD) may seek hormone therapy and /or sex reassignment surgery (SRS) to resolve their incongruity between biological sex and gender identity. Additional ancillary surgeries or services, such as facial modifications, vocal cord surgery, or voice training, may be desired by transgender persons to further feminize or masculinize the body and/or perception of gender. In some cases, ancillary procedures are performed without SRS.

EXECUTIVE SUMMARY:

Health Problem: Individuals with gender dysphoria (GD) feel a severe incongruity between their biological sex and their gender identity. The prevalence of GD is 1 in 11,900 to 1 in 45,000 persons for male-to-female (MtF) and 1 in 30,400 to 1 in 200,000 persons for female-to-male (FtM) transgender persons.

The earlier term, *gender identity disorder* (GID), has given way to *gender dysphoria* (GD). This change was intended to reflect a consensus that gender nonconformity is not a psychiatric disorder, as it had been previously categorized. However, since the condition may cause clinically significant distress and since a diagnosis is necessary for access to medical treatment, the new term was proposed. The diagnostic criteria for GD outlined in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), Fifth Edition (DSM-V), as well as the criteria for GID in the DSM, Fourth Edition (DSM-IV), require that the individual believes there is a marked difference between the gender assigned to him or her by others and the gender he or she experiences or wishes to express. Additional criteria must also be met for a diagnosis of GD.

Determinants: The determinants of GD are poorly understood. Experts believe that gender identity develops as the result of a combination of biological factors, possibly including genetic and/or prenatal and perinatal hormonal influences, and environmental influences that have psychological effects.

Treatment: The treatment of GD is multifaceted. Psychotherapy helps the individual explore roles and expression and adopt various coping mechanisms to deal with societal and internal conflicts. Some transgender persons may seek hormone therapy to change their secondary sex characteristics and/or apply for sex reassignment surgery (SRS), which may include mastectomy/chest reconstruction or genital reconstruction. Additional ancillary surgeries or services, such as facial modifications, vocal cord surgery, or voice training, may be desired by transgender persons to further feminize or masculinize the body and/or perception of gender.

Technology: Ancillary procedures and services other than cross-sex hormone therapy or SRS for GD.

Some transgender persons desire procedures to feminize or masculinize their body and/or face. Also, some MtF transgender persons may desire voice therapy or vocal cord surgery to feminize their voice. Ancillary procedures include facial modifications, voice modification, reduction of the Adam's apple, enhancement of the buttocks, and permanent hair removal.

Rationale: Additional procedures may enhance the benefits of hormone therapy or SRS for GD, and for some individuals with GD, less comprehensive treatments may be sufficient for assuming the desired gender identity.

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A transgender person who is readily accepted as their chosen gender may have a better quality of life and a reduction in the symptoms of GD.

Controversy: The medical necessity of treatments for GD is under debate. However, the condition does not readily fit traditional concepts of medical necessity since research to date has not established anatomical or physiological anomalies associated with GD. An evidence-based assessment of the effectiveness of ancillary procedures for alleviation of symptoms associated with GD and improvement of recipients' well-being can be a helpful contribution to this issue.

Relevant Questions:

- Have ancillary procedures and services been shown to be effective in improving patient-important outcomes such as relief of symptoms of GD or quality of life?
- Are ancillary procedures and services safe?
- Have definitive patient selection criteria been established for ancillary procedures and services as treatments for GD?

Evidence Base: Thirteen case series studies and chart reviews.

Search Dates: Inception of database to April 2014.

Sample Sizes: 10 to 76 patients; 1 study had 247 patients.

Patients: MtF (n=533) or FtM (n=3) adult transgender patients. It was not specified whether or not patients had a formal diagnosis of GD. The status of cross-sex hormone therapy or SRS among the study population was not reported by 4 of the studies. The remaining studies had variability regarding other GD treatments; however, none had inclusion criteria that specified these characteristics.

Interventions: Vocal cord surgery (5 studies), voice training (3 studies), rhinoplasty (2 studies), facial feminization surgery (2 studies), hair removal (1 study).

Comparisons: Twelve of the studies had no comparison group. One study of facial feminization surgery compared surgery recipients with patients who had not had facial surgery.

Outcome Measures: Patient satisfaction; voice characteristics; Voice Handicap Index; SF-36 Health Survey (QualityMetric Inc.) (1 study); grade, roughness, breathiness, asthenia, strain (GRBAS) Hirano scale.

Follow-Up: Mean of 6 to 30 months (5 studies did not report follow-up).

Findings: Patients were satisfied with the results of facial feminization and rhinoplasty; however, the results of vocal cord procedures and voice training were mixed.

Vocal Cord Procedures: Of the 5 reviewed studies of vocal cord surgery, 2 evaluated cricothyroid approximation, 2 evaluated laser vaporization, and 1 evaluated laryngoplasty. Cricothyroid approximation significantly raised the fundamental frequency of MtF transgender patients by a mean of 74 hertz (Hz). Laser vaporization significantly raised the fundamental frequency of MtF transgender patients by a mean of 48 Hz.

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Feminization laryngoplasty significantly increased the fundamental frequency by 57 Hz. Patient satisfaction with the vocal cord surgery was variable, but the results suggest that patients were more satisfied following cricothyroid approximation than laser vaporization.

Voice Training: Three studies evaluated voice training as a method to increase the fundamental frequency of MtF transgender patients. The fundamental frequency increased by 14 to 28 Hz after voice training sessions and approximately half of the patients were satisfied with the outcome. One study evaluated voice training to decrease the fundamental frequency of 3 FtM patients; however, results of only 1 patient were available and his fundamental frequency decreased by 35 Hz after vocal training.

Rhinoplasty: Two studies evaluated feminization rhinoplasty on MtF transgender patients. All but 1 of the patients felt that their face had become more feminine in appearance and were satisfied with the results.

Facial Feminization Surgery: Two studies of facial feminization surgery were reviewed. In a retrospective case series study, MtF transgender patients who had various facial modification procedures felt that their faces had become more feminine in appearance. In a large retrospective cross-sectional study, quality of life was measured in MtF transgender patients who did or did not have facial feminization surgery. Patients who had facial feminization surgery were significantly more satisfied with their appearance than those who did not have facial surgery.

Permanent Hair Removal: One study of intense pulsed light epilation for permanent hair removal on MtF transgender patients was reviewed. After a mean of 9 epilation sessions, 90% of the patients achieved treatment success.

Safety: Most of the studies did not report complications; however, complications that were reported included bone nonunion following facial surgery (2% of patients); and dysphagia (34% of patients) or throat pain (29% of patients) following cricothyroid approximation.

Patient Selection Criteria: There is insufficient evidence to establish definitive patient selection criteria for ancillary procedures and services for the treatment of GD.

Quality of Evidence: Very low.

The individual study quality was generally very poor. The quality of the evidence was low because of study limitations, including small sample size and few studies evaluating each procedure category, lack of a control or comparator group, variable follow-up duration, inconsistent availability of results for all outcome measures, lack of baseline data for self-rated outcome measures, and lack of statistical analysis of results. Outcome measures were focused on technical success and patient satisfaction; only 1 study evaluated an overall measure of well-being using a validated instrument.

Conclusions: There is some evidence that transgender patients are satisfied with the results of rhinoplasty and facial feminization surgery, but patient satisfaction with vocal cord surgery and voice training was mixed. The evidence has serious limitations, and the effect of these procedures on overall individual well-being is unknown.

- Patients who had rhinoplasty or facial feminization surgery were generally pleased with the results.

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- Vocal cord procedures and voice training had variable outcomes. Although the fundamental frequency was reduced by all treatment methods, patient satisfaction with the outcome was mixed.
- Most of the studies did not report complications; however, there was a low rate of bone nonunion following facial surgery, and moderate rates of dysphagia or throat pain following cricothyroid approximation.

Hayes Rating:

D2 - For vocal cord surgery for voice feminization in patients with GD.
This Rating reflects the positive but limited evidence of this technology for transgender patients.

D2 - For voice training for voice feminization in patients with GD.
This Rating reflects the limited evidence of this technology for transgender patients, and conflicting results.

D2 - For feminization rhinoplasty for patients with GD.
This Rating reflects the limited evidence of this technology for transgender patients, and conflicting results.

D2 - For facial feminization surgery in patients with GD.
This Rating reflects the positive but limited evidence of this technology for transgender patients.

D2 - For permanent hair removal technologies for patients with GD.
This Rating reflects the positive but limited evidence of this technology for transgender patients.

INSIGHTS:

- Since part of the reason for the psychopathology experienced by transgender persons has to do with the reactions or expected reactions of family and society, evolving social norms theoretically could diminish the perceived need to undergo physical changes in order to live in the desired gender role.
- As the population of recipients of ancillary procedures ages, better understanding concerning long-term safety risks should become available.

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EXHIBIT 25

Subject: FW: [EXT] Fwd: FW: attachments
Attachments: j.1365-2265.2009.03625.x.pdf

From: Paul McHugh
Sent: Tuesday, February 13, 2018 12:34 PM
To: 'Bushman, William CIV SD' <William.Bushman@sd.mil>
Subject: RE: attachments

Mr. Bushman I've attached a copy of the study you wanted. Also I realize that I sited Tom Wise in Fairfield. I of course meant Fairfax Virginia. Sorry Paul McHugh

From: Bushman, William CIV SD [mailto:William.Bushman@sd.mil]
Sent: Monday, February 12, 2018 6:00 PM
To: Paul McHugh <pmchugh1@jhmi.edu>
Subject: RE: attachments

Thank you, sir. This is most helpful.

One additional question: do you have access to a copy of the following study?

- Mohammad Hassan Murad et al., "Hormonal therapy and sex reassignment: a systematic review and meta-analysis of qualify of life and psychosocial outcomes," Clinical Endocrinology 72 (2010): 214-231.

Thank you again for your help.

Best,
Will

William G. Bushman

Office of the Secretary of Defense

Office: 703.571.8935

Cell: 703.216.5782

NIPR: william.bushman@sd.mil

SIPR: william.bushman@sd.smil.mil

JWICS: william.bushman@sd.ic.gov

From: Paul McHugh [mailto:pmchugh1@jhmi.edu]
Sent: Monday, February 12, 2018 2:12 PM
To: Bushman, William CIV SD <William.Bushman@sd.mil>
Subject: RE: attachments

Mr. Bushman, You might contact Dr. Chester Schmidt here at Hokins and Dr. Thomas Wise at Fairfield. PM

From: Bushman, William CIV SD [mailto:William.Bushman@sd.mil]
Sent: Sunday, February 11, 2018 3:30 PM
To: Paul McHugh <pmchugh1@jhmi.edu>
Subject: RE: attachments

Dr. McHugh,

Thank you again for speaking to us and providing additional information. During our call, I believe you mentioned there were other individuals who could also serve as resources for our policy review. Do you know of any other persons we should consider reaching out to?

Thanks,

Will Bushman

William G. Bushman

Office of the Secretary of Defense

Office: 703.571.8935

Cell: 703.216.5782

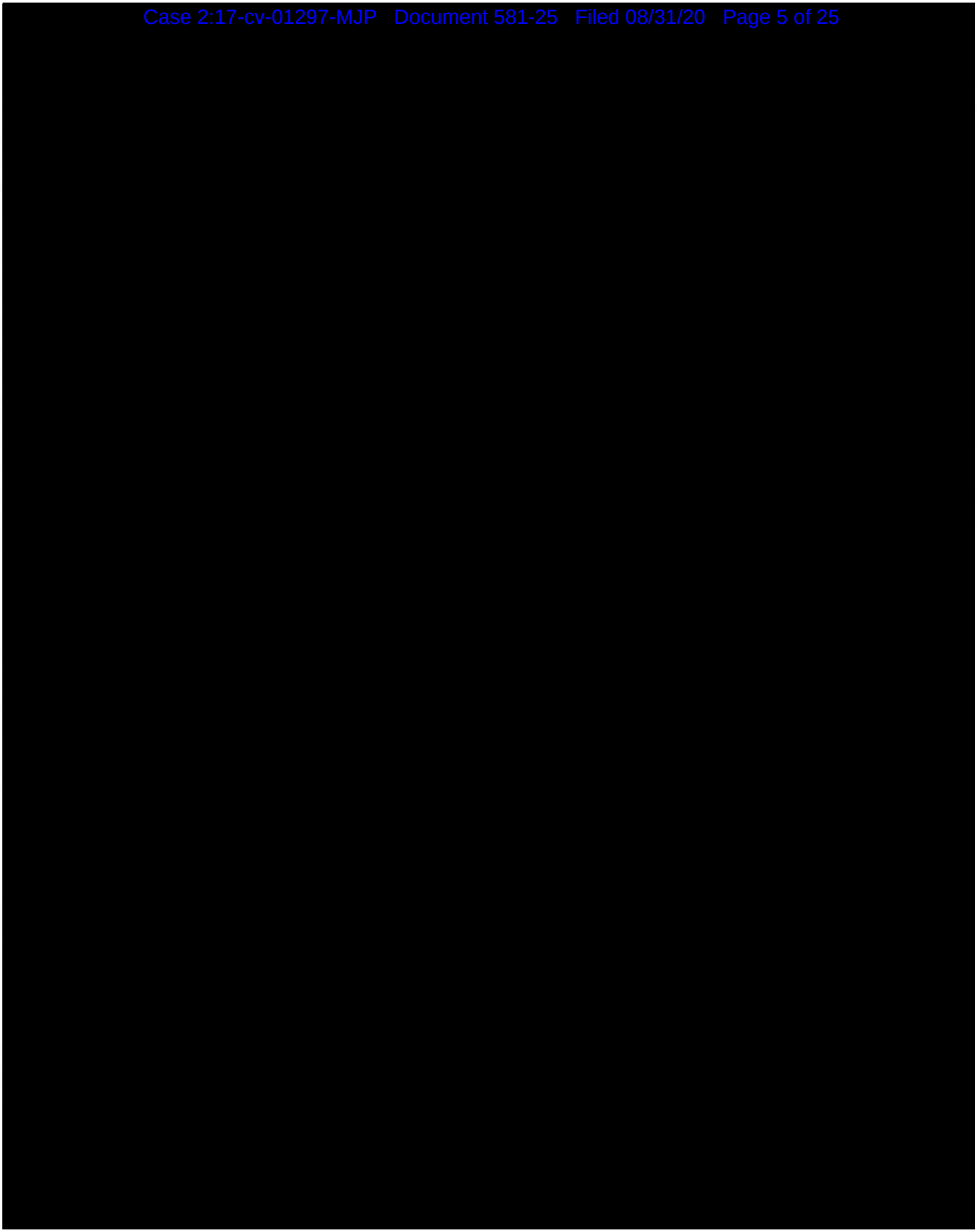
NIPR: william.bushman@sd.mil

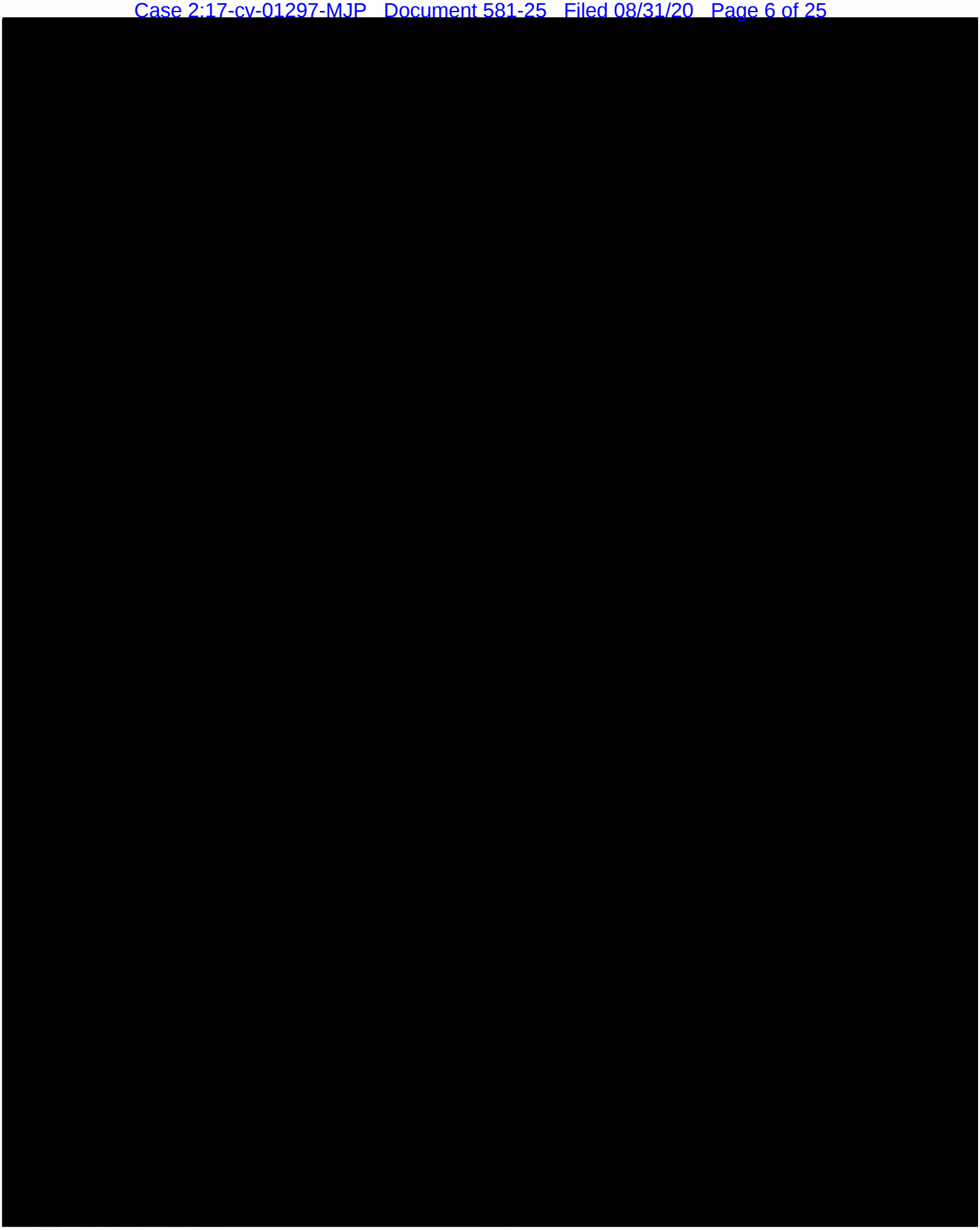
SIPR: william.bushman@sd.smil.mil

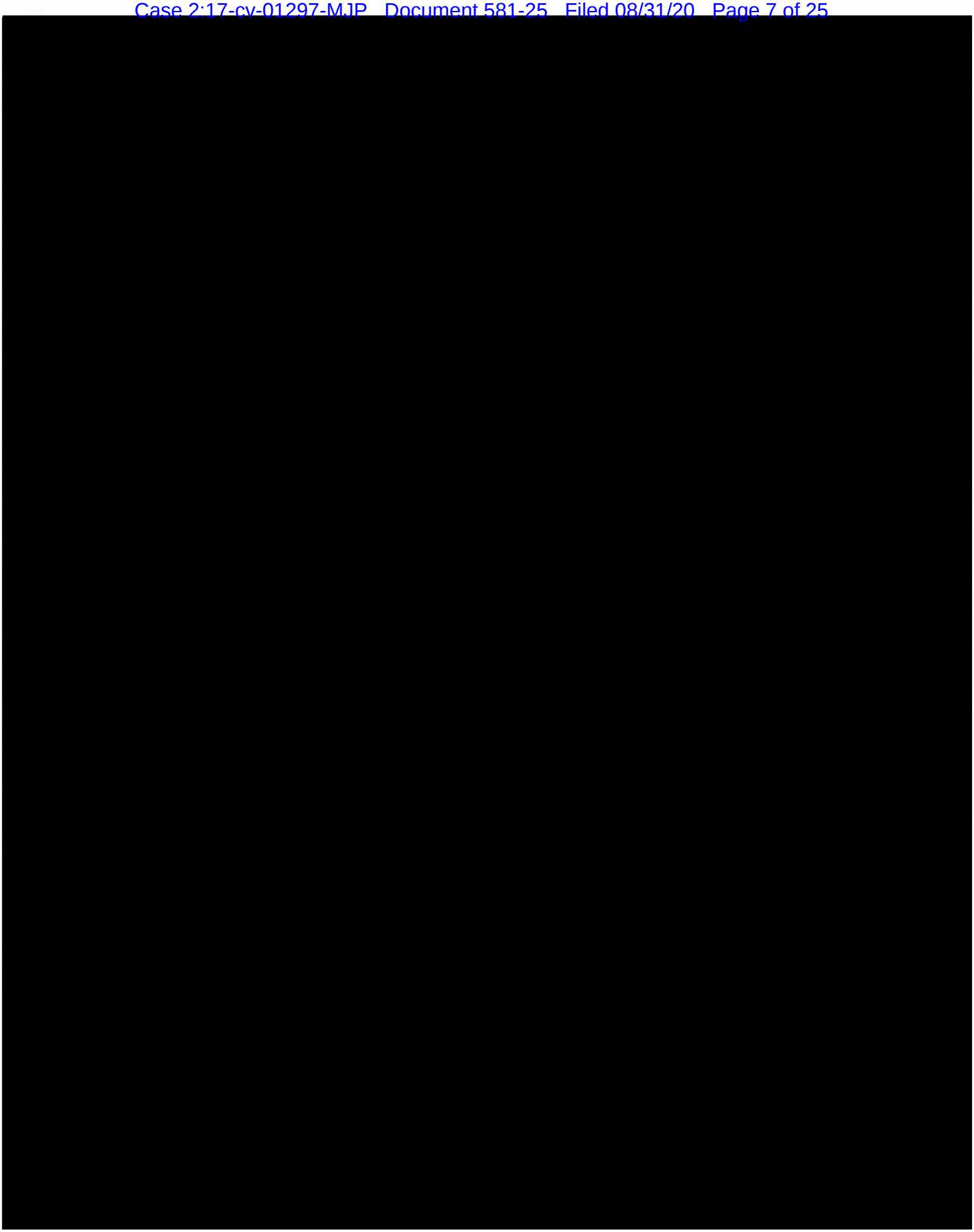
JWICS: william.bushman@sd.ic.gov

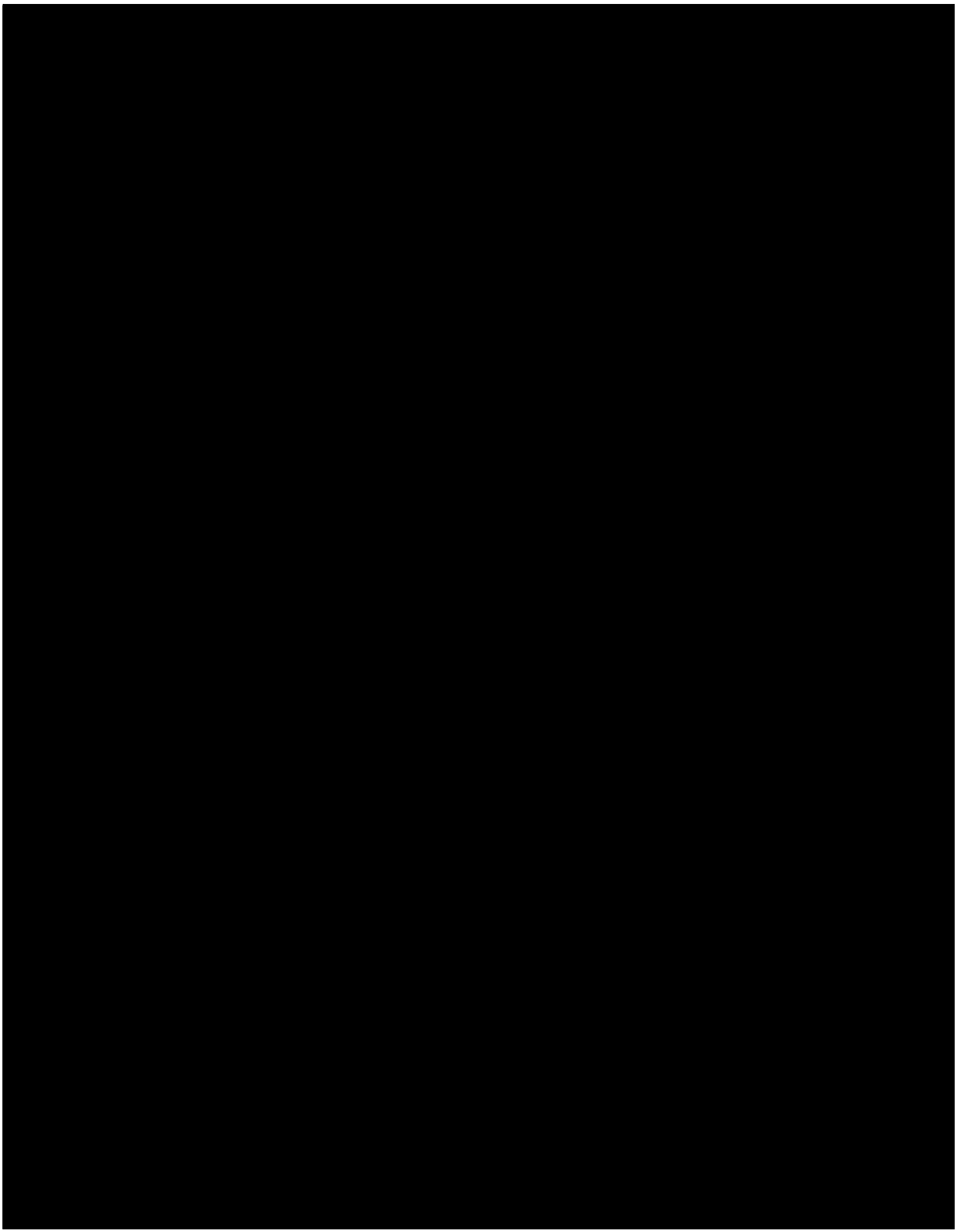
From: Paul McHugh [mailto:pmchugh1@jhmi.edu]
Sent: Monday, February 5, 2018 2:51 PM
To: Bushman, William CIV SD <William.Bushman@sd.mil>
Subject: attachments

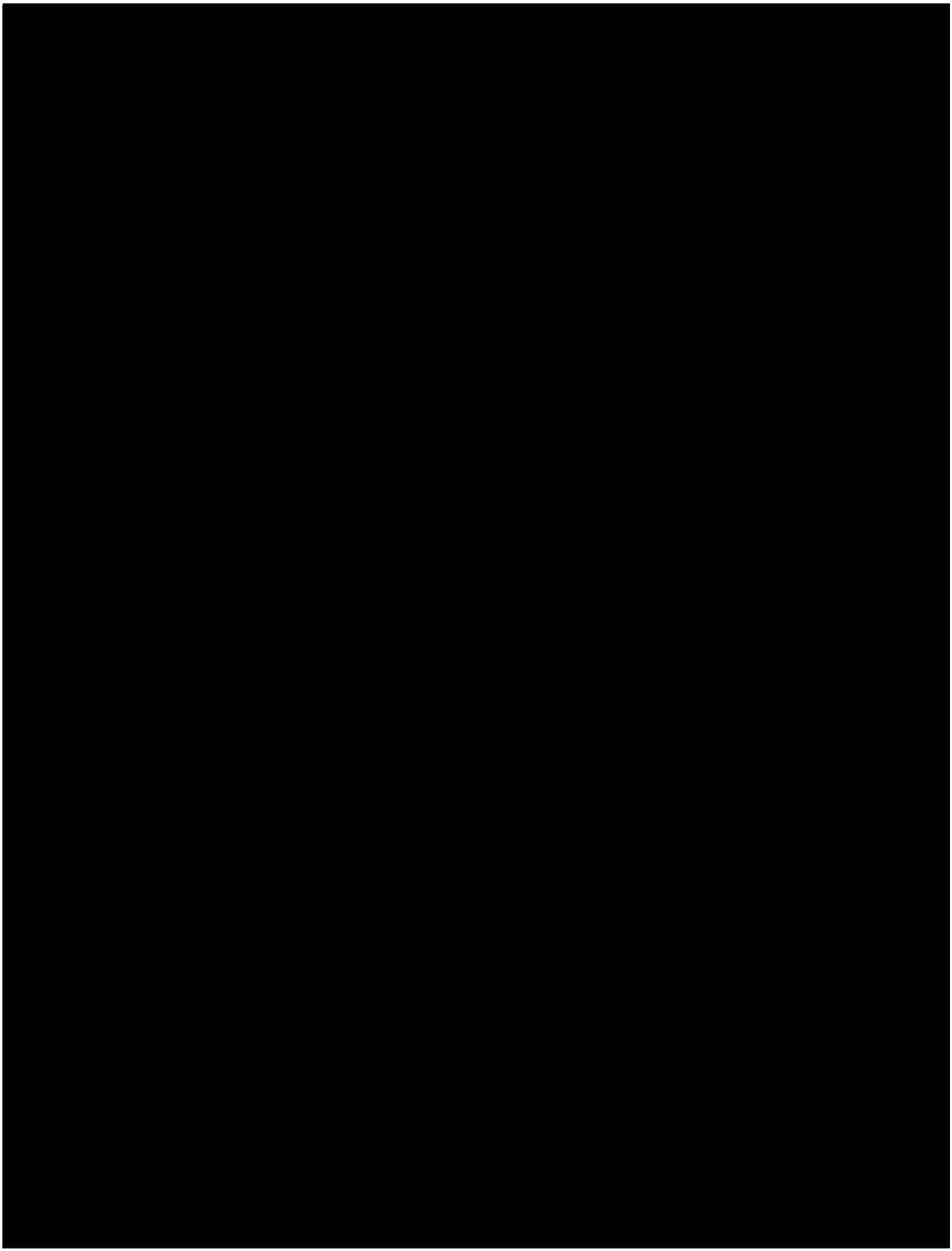
Mr. Bushman, I mentioned these several articles in our conversation The Hayes Directory on evidence for sex reassignment surgery and other medical treatments , The long term follow-up from Sweden for transgender surgery, My article in Nature Medicine in 1995, and our recent article in the New Atlantis. I've attached them all here . Do tell me if they get through. Paul McHugh

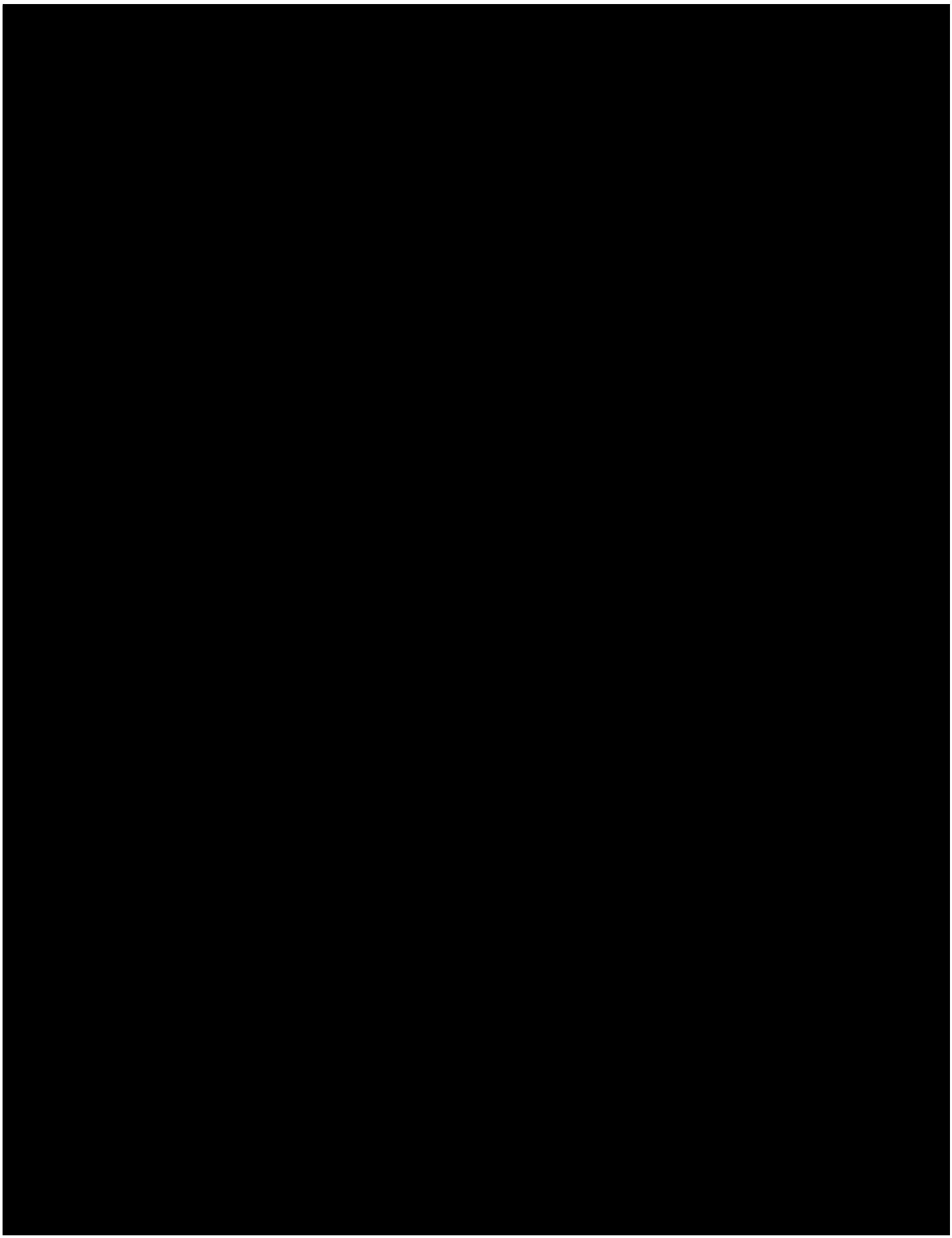


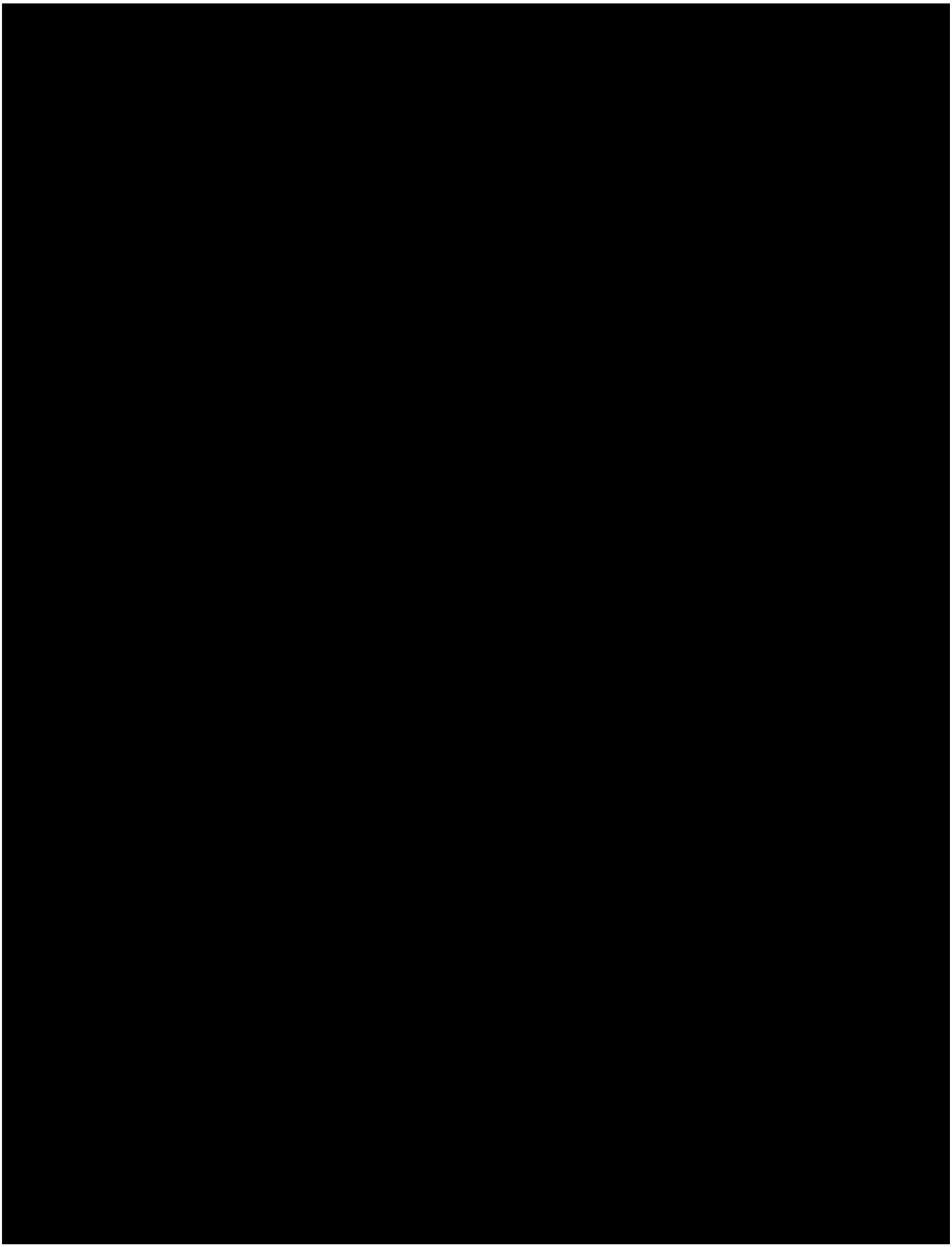


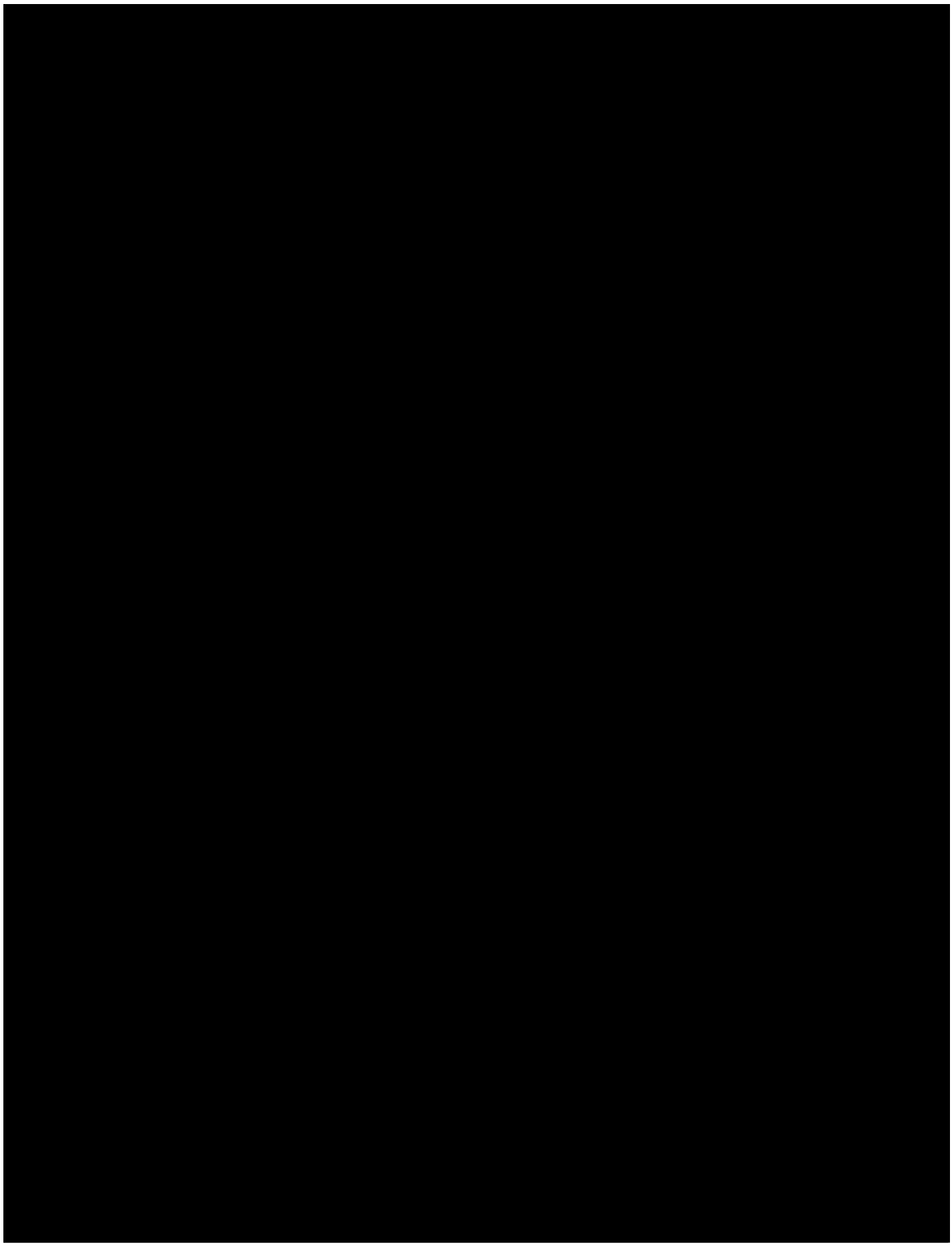


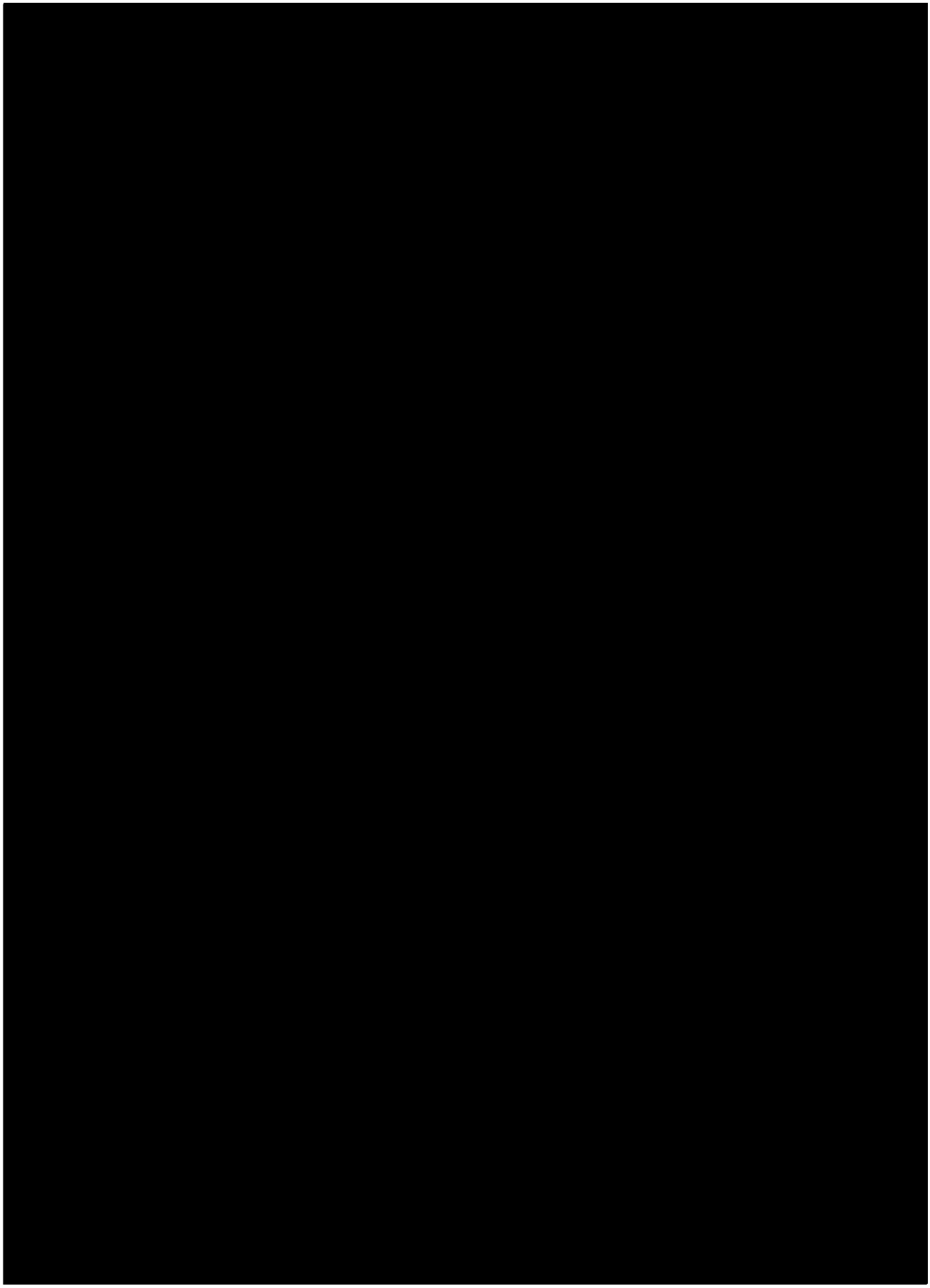


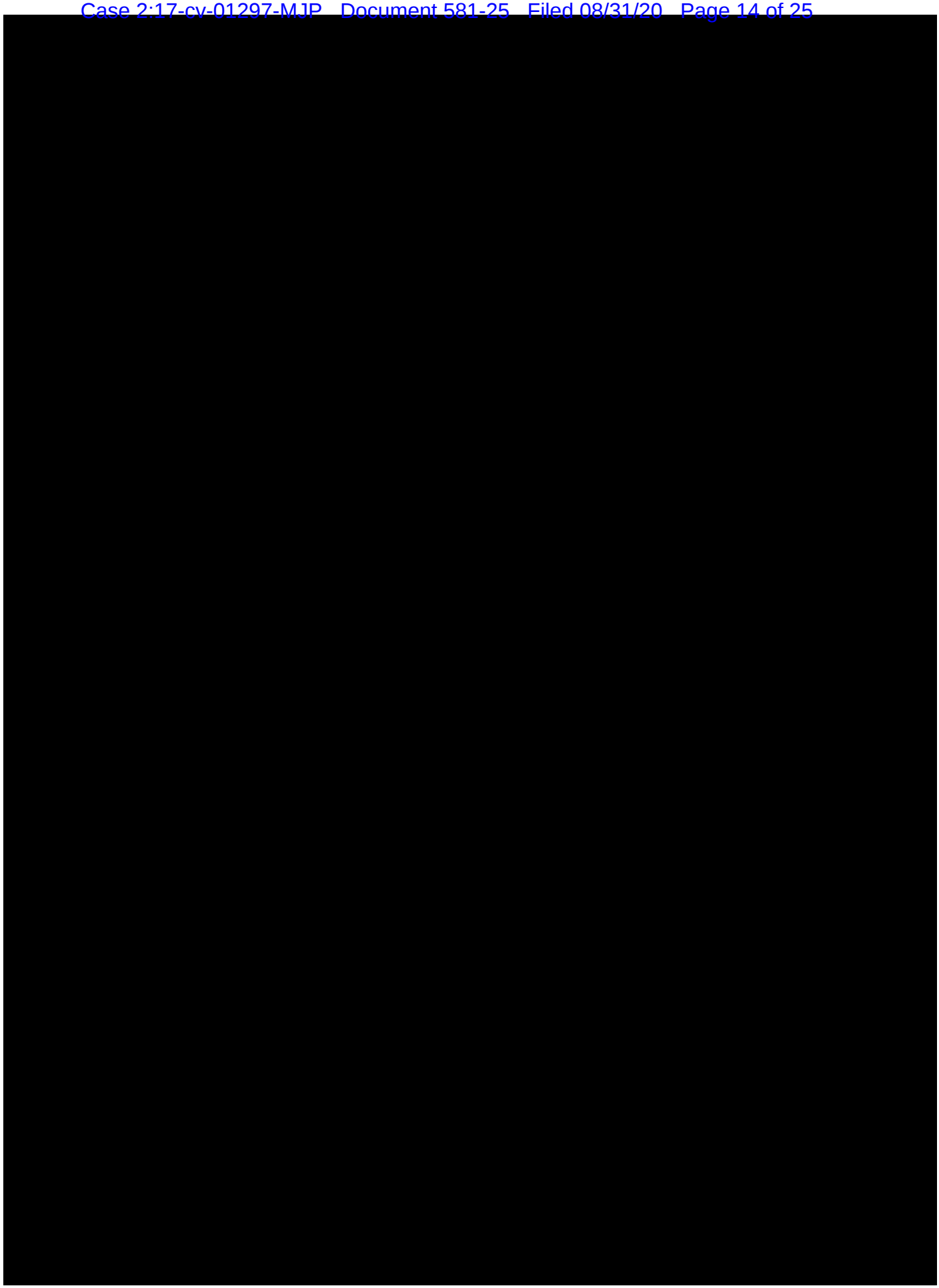


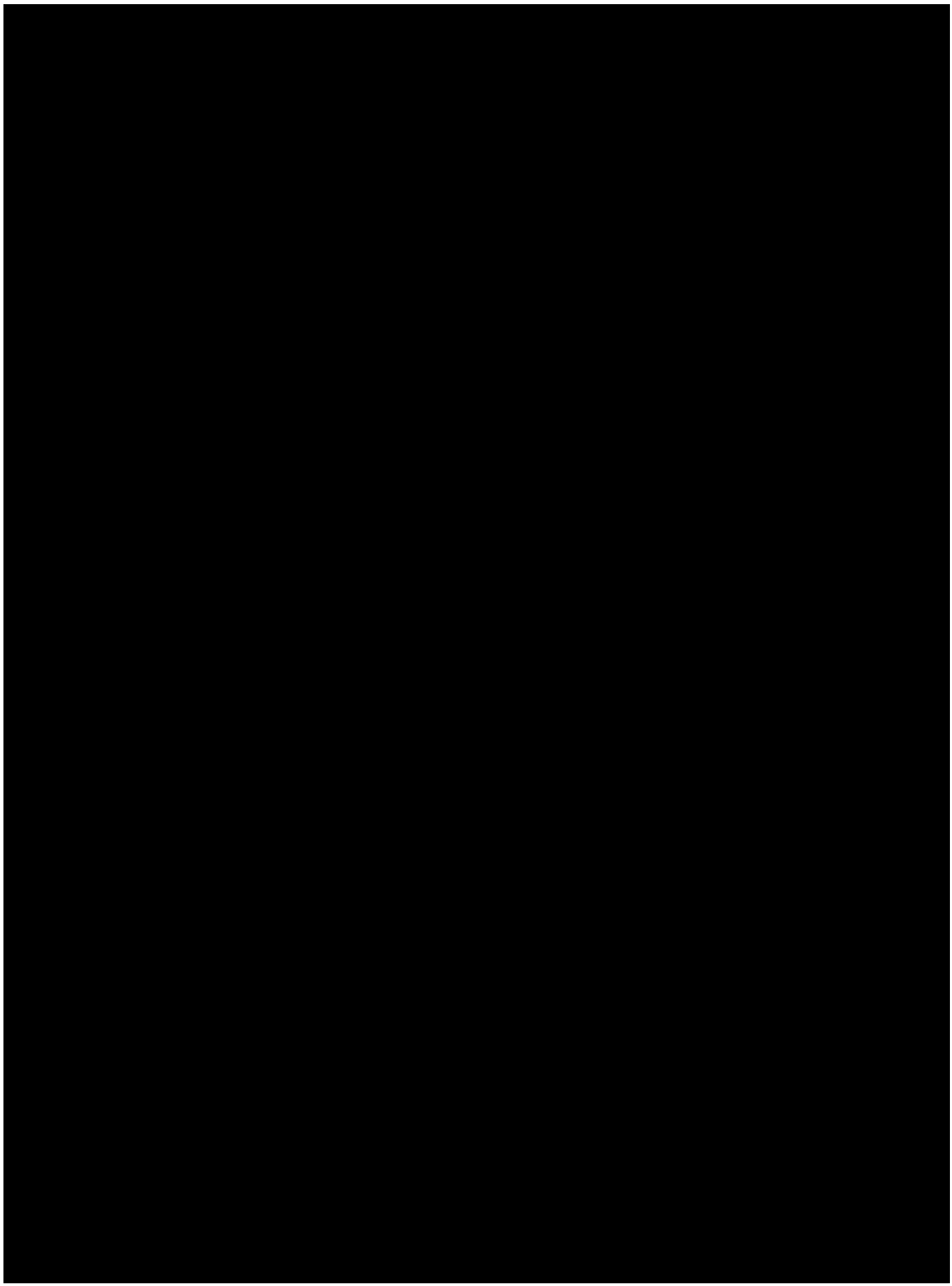


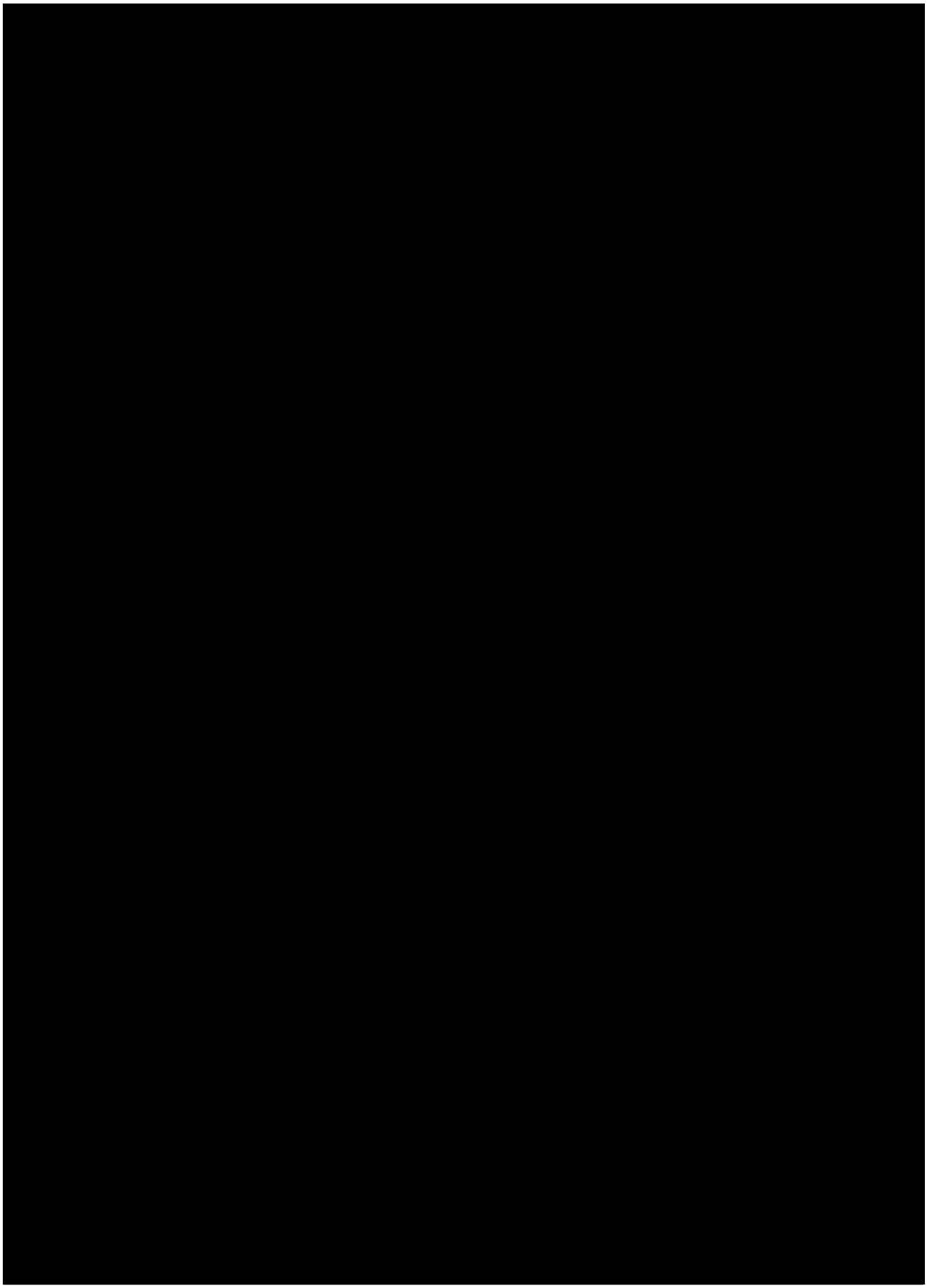


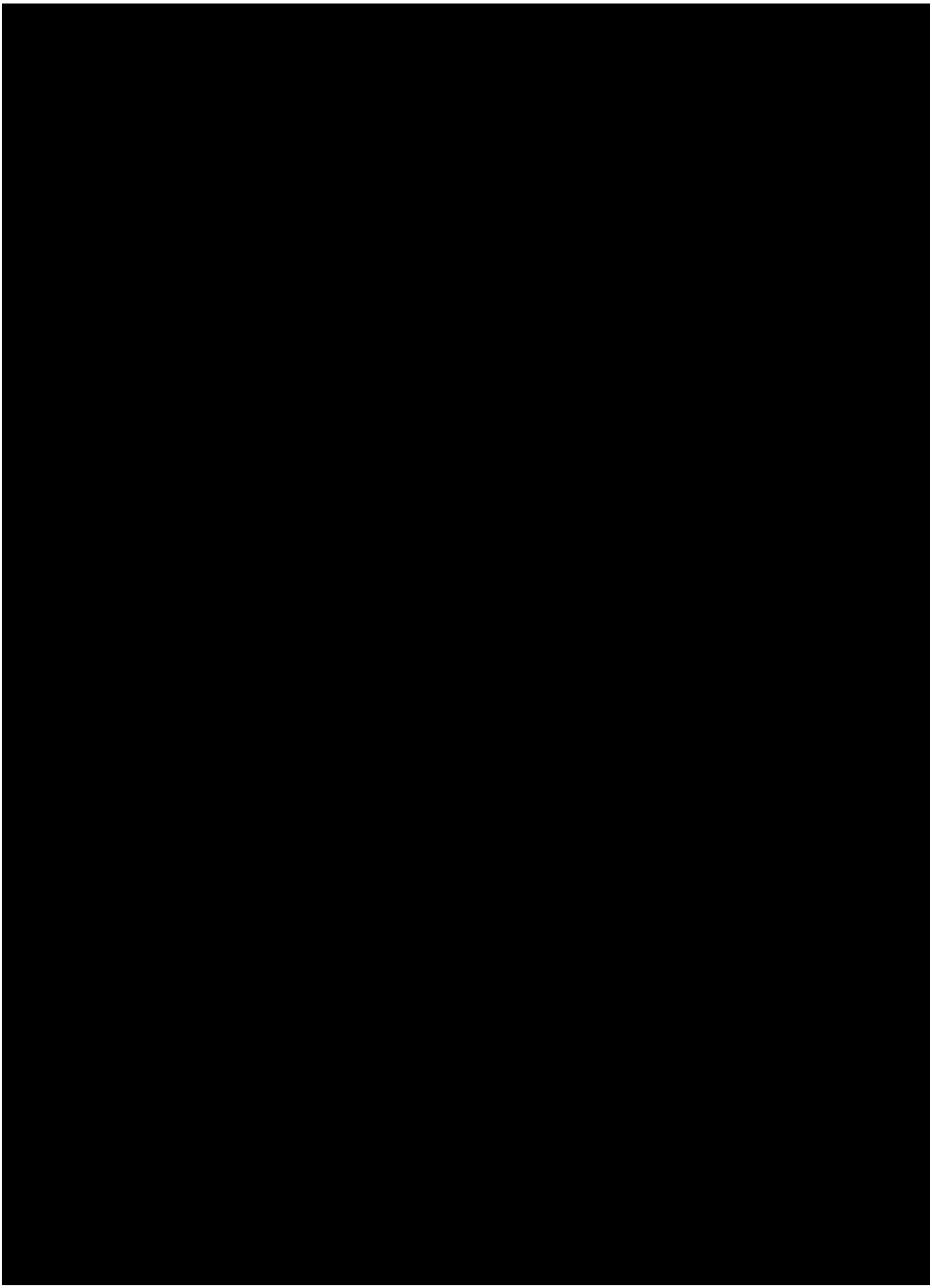


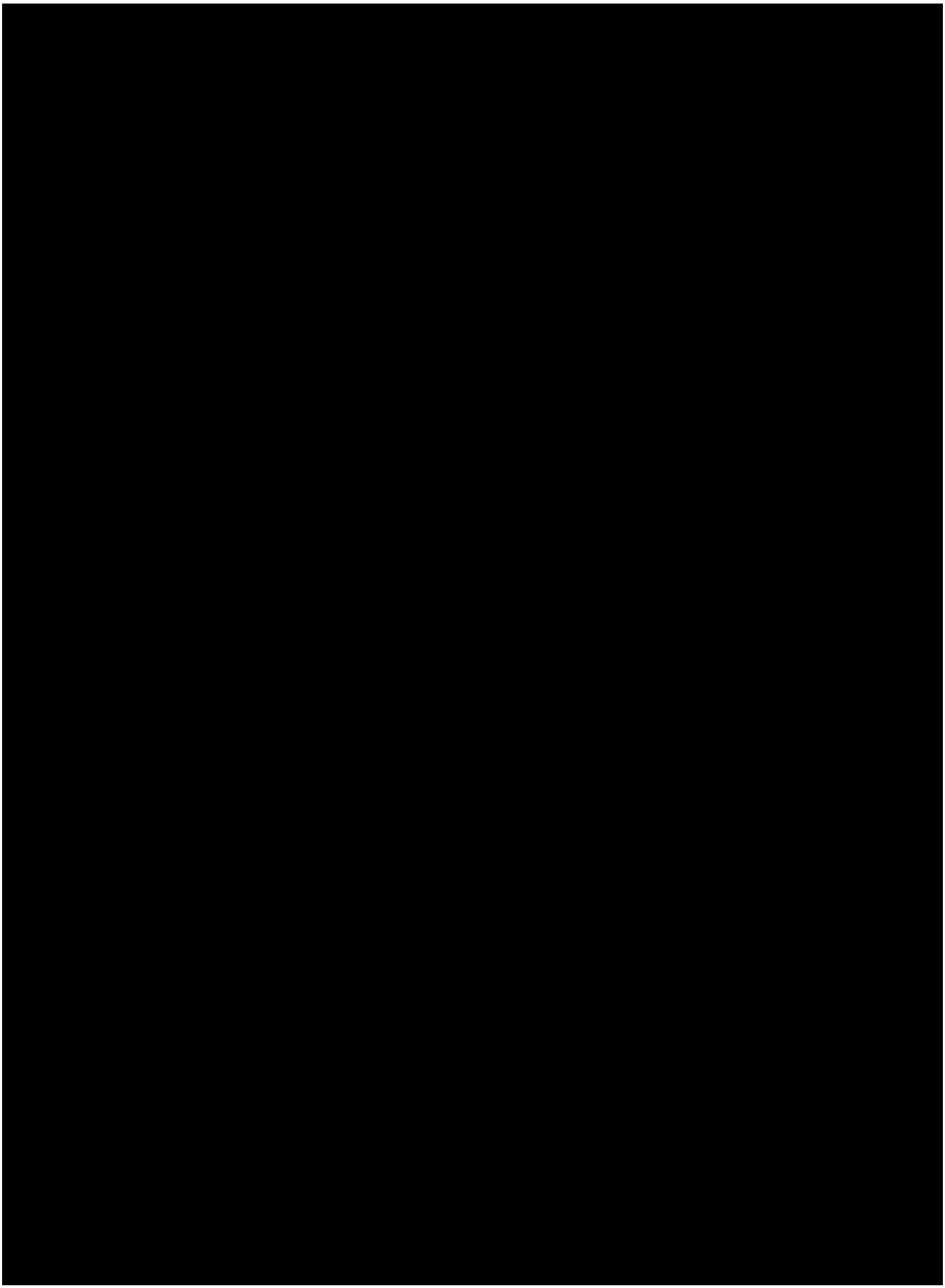


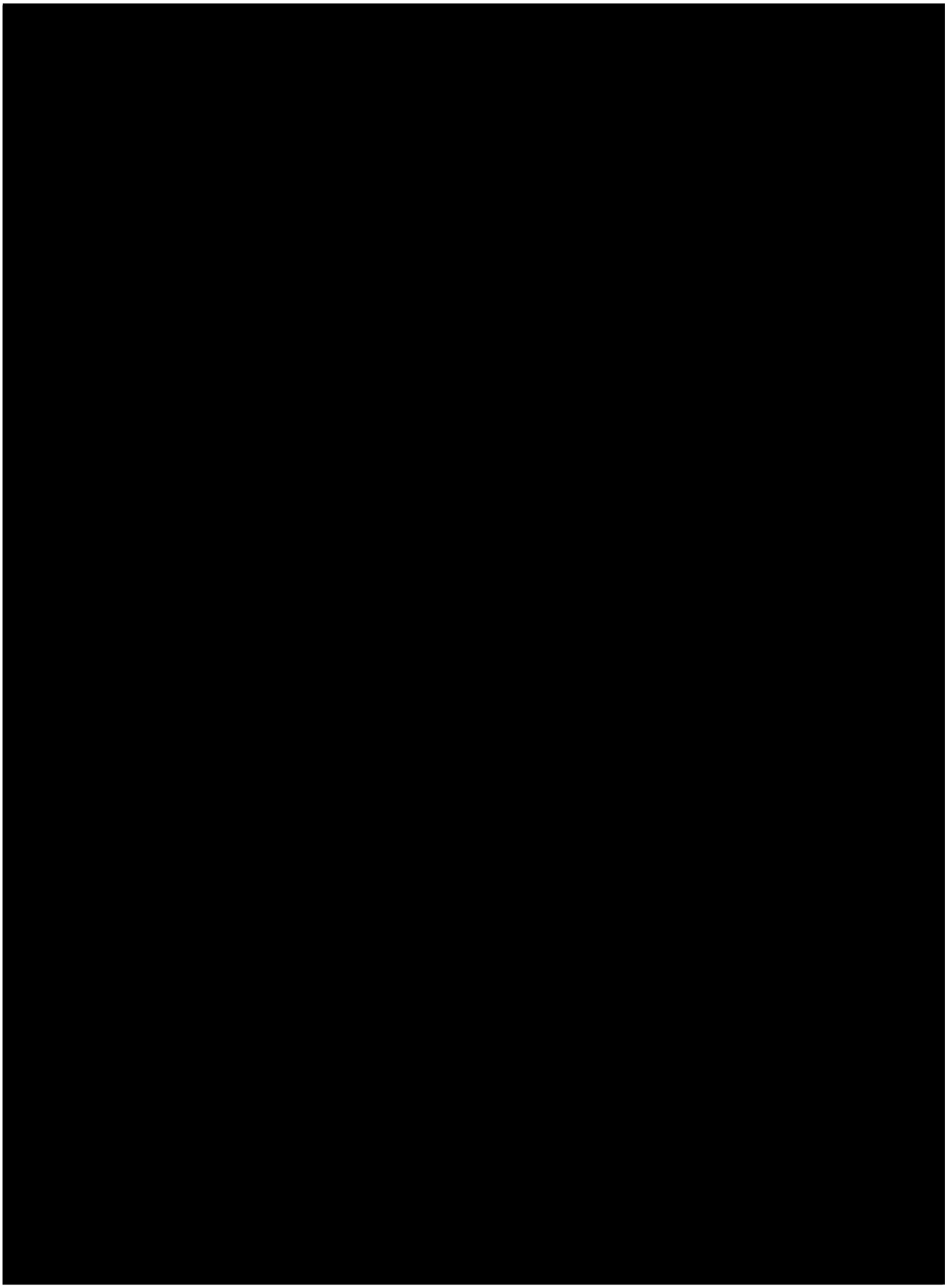


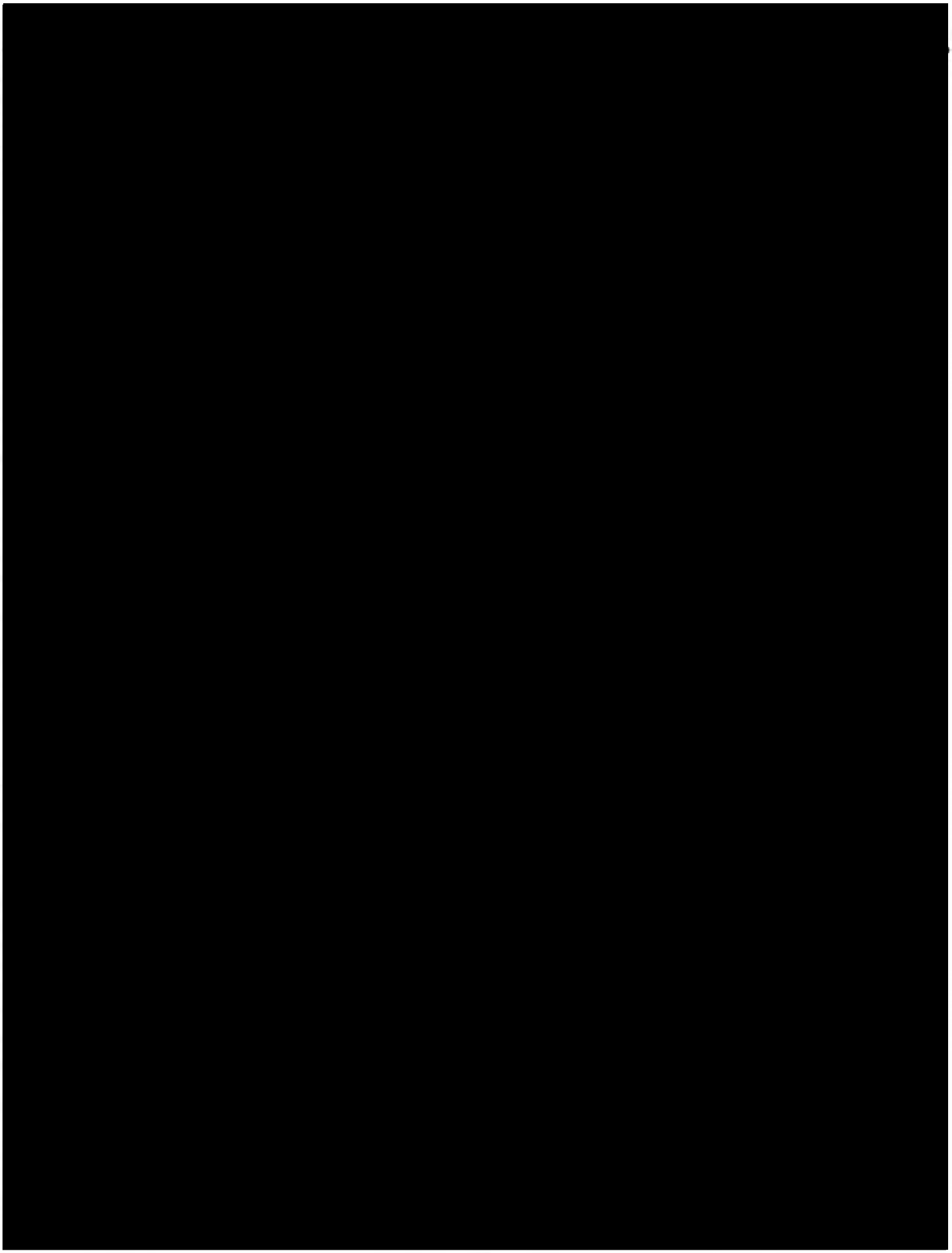


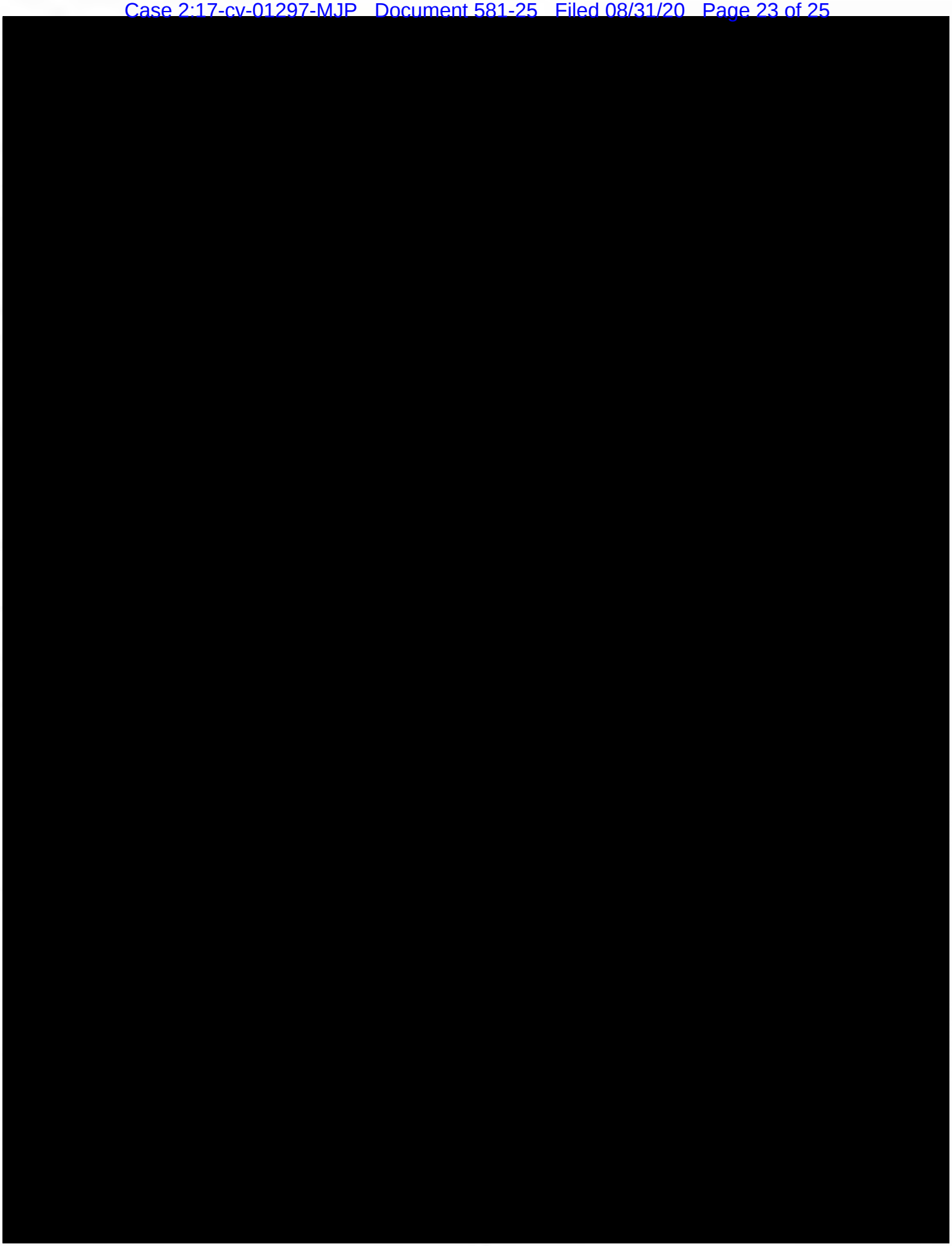












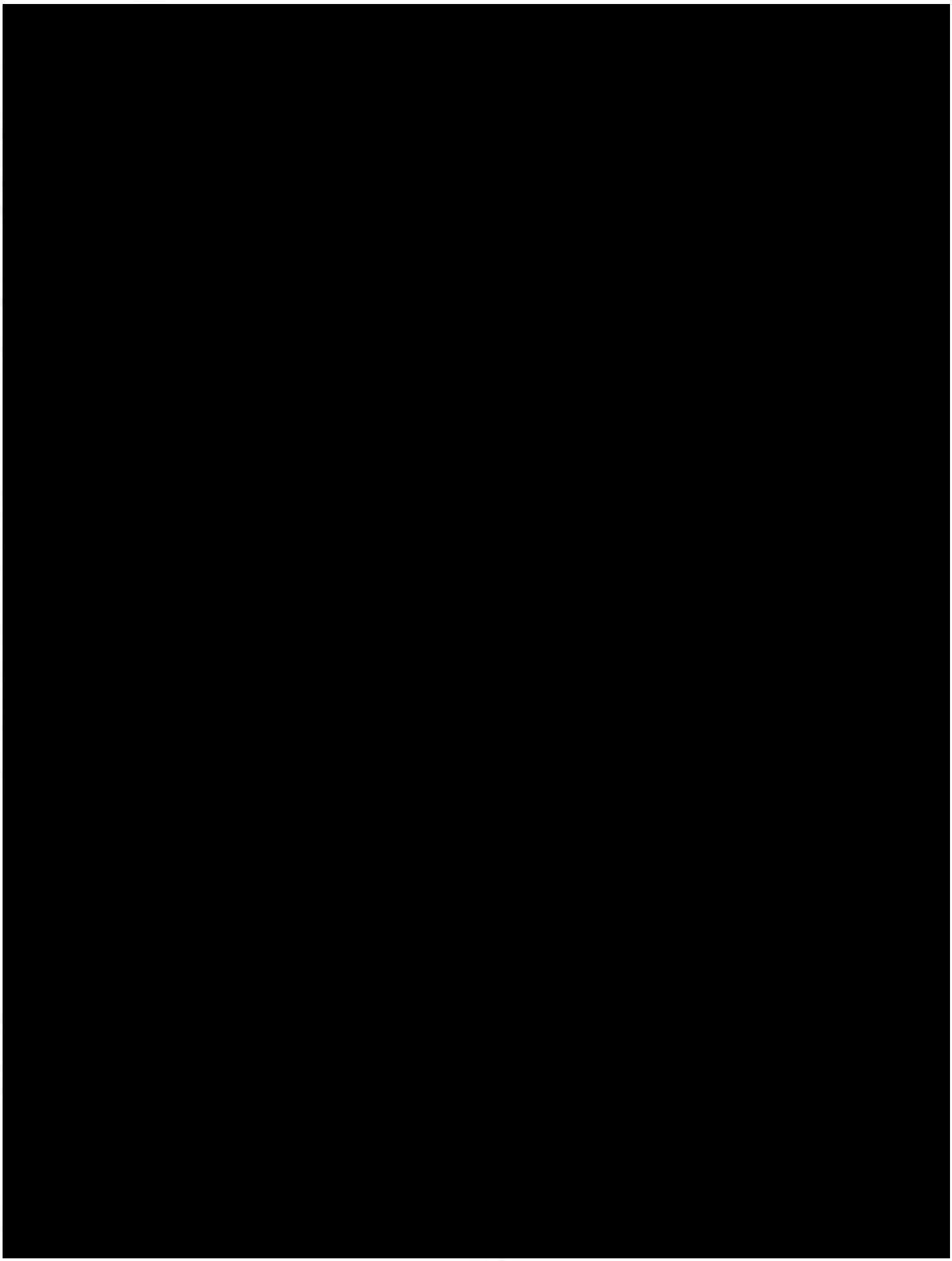


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EXHIBIT 26

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	CASE NO. C17-1297-MJP ORDER GRANTING MOTION TO COMPEL; DENYING MOTION FOR PROTECTIVE ORDER

THIS MATTER comes before the Court on Plaintiffs' Motion to Compel Defendants' Discovery Withheld Under the Deliberative Process Privilege (Dkt. No. 245) and Defendants' Motion for Protective Order (Dkt. No. 268). Having reviewed the Motions, the Responses (Dkt. Nos. 266, 278), the Replies (Dkt. Nos. 273, 281), the Supplemental Briefs (Dkt. Nos. 289, 292, 293) and the related record, and having considered the submissions of the parties at oral argument, the Court GRANTS Plaintiffs' Motion to Compel and DENIES Defendants' Motion for Protective Order.

Background

I. Procedural History

On July 26, 2017, President Donald J. Trump announced a ban on military service by openly transgender people (the "Ban"). On March 23, 2018, following the Court's entry of a preliminary injunction, the President issued a Presidential Memorandum (the "2018 Memorandum") directing the Department of Defense ("DoD") to implement the Ban. (Dkt. No. 224, Ex. 3.) That same day, Defendants moved to dissolve the preliminary injunction. (Dkt. No. 215.) On March 29, 2018, Defendants requested to preclude discovery pending resolution of their motion to dissolve the preliminary injunction. (Dkt. No. 225.) The Court denied that request and ordered discovery in the case to proceed. (Dkt. No. 235.) The Court explained:

> To the extent that Defendants intend to claim executive privilege, they must "expressly make the claim" and provide a privilege log "describ[ing] the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."

(Id. at 3 (quoting Fed. R. Civ. P. 26(b)(5)(i)-(ii)).)

On April 13, 2018, the Court ordered the preliminary injunction to remain in effect and granted partial summary judgment against the Ban. (See Dkt. No. 233.) The Court held that the Ban would be subject to strict scrutiny, but declined to rule on its constitutional adequacy. (Id.) The Court observed that "[w]hether Defendants have satisfied their burden of showing that the Ban is constitutionally adequate (i.e., that it was sincerely motivated by compelling state interests, rather than by prejudice or stereotype) necessarily turns on facts related to Defendants' deliberative process." (Id. at 28.) Because those facts were not yet before it, the Court directed the parties "to proceed with discovery and prepare for trial on the issues of whether, and to what

extent, deference is owed to the Ban and whether the Ban violates equal protection, substantive due process, and the First Amendment." (Id. at 31.) Defendants filed a notice of appeal and requested that the Ninth Circuit stay the preliminary injunction pending its review. (Dkt. No. 236); see also Karnoski v. Trump, No. 18-35347, Dkt. No. 3 (9th Cir. May 4, 2018). On July 18, 2018, the Ninth Circuit denied the request, holding that "a stay of the preliminary injunction would upend, rather than preserve, the status quo." (Dkt. No. 295.) The appeal is set to be heard in October 2018. (Dkt. No. 296.)

II. The Requested Discovery

Throughout this litigation, Plaintiffs have sought discovery regarding:

- The identity of the individuals with whom President Trump discussed or corresponded regarding policies on military service by transgender people;
- The date on which President Trump decided that transgender people should be banned from military service;
- The process by which President Trump formulated the Ban, including identification of "all sources of fact or opinion" he "consulted, considered, or otherwise referred to" in formulating the Ban;
- Documents and communications related to President Trump's consultation with employees, agents, contractors, or consultants of the United States Armed Forces regarding military service by transgender people;
- Documents and communications relating to, and including all drafts of, the 2017 Memorandum;
- Communications between President Trump and Congress concerning military service by transgender people prior to August 26, 2017; and
- Documents relating to visits and communications between President Trump and his Evangelical Advisory Board.

(Dkt. No. 278 at 3-4; Dkt. No. 268 at 4-5.)

To date, Defendants have objected to each of these requests and have withheld or redacted tens of thousands of documents based on the deliberative process privilege. President

Trump has refused to substantively respond at all based on the presidential communications privilege. (Dkt. No. 245 at 8-9; Dkt. No. 246, Ex. 28; Dkt. No. 278 at 4-5.)

On May 10, 2018, Plaintiffs moved to compel responses withheld under the deliberative process privilege. (Dkt. No. 245.) On May 21, 2018, Defendants moved to preclude discovery directed at President Trump. (Dkt. No. 268.) These motions are now before the Court.

Discussion

I. Trump v. Hawaii

Before turning to the merits of the pending discovery motions, the Court addresses the impact of the Supreme Court's recent ruling in Trump v. Hawaii, 138 S.Ct. 2392 (2018). In Hawaii, the Supreme Court held that President Trump's policy restricting the entry of certain foreign nationals did not violate the Immigration and Nationality Act or the Establishment Clause. The majority found the policy to be "facially neutral toward religion" and plausibly related to the government's stated national security objectives. Id. at 2418-24. While Defendants claim that the same reasoning precludes discovery directed to President Trump in this case, the Court disagrees for the following reasons:

First, Hawaii involved an entirely different standard of scrutiny. The Court already ruled that the Ban is subject to strict scrutiny (Dkt. No. 233 at 20-24) and rejects Defendants' suggestion that it "turns on a medical condition—gender dysphoria—and its treatment, not on any protected status." (Dkt. No. 289 at 5.) Unlike the policy in Hawaii, the Court need not "look behind the face" of the Ban, as the Ban is facially discriminatory. 138 S.Ct. at 2420. President Trump's announcement explains that "the United States Government will not accept or allow . . . Transgender individuals to serve in any capacity in the U.S. Military" (Dkt. No. 149, Ex. 1); the 2017 Memorandum, 2018 Memorandum, and Implementation Plan are titled "Military Service

by Transgender Individuals." (Dkt. No. 149, Ex. 2; Dkt. No. 224, Exs. 1, 3.) That the Ban turns on transgender identity—and not on any medical condition—could not be clearer.[1]

Second, the majority in Hawaii repeatedly emphasized that the exclusion policy was formulated following a "worldwide, multi-agency review." See, e.g., 138 S.Ct. at 2404-06, 2408, 2421. This review considered risks "identified by Congress or prior administrations" and involved the Department of Homeland Security (DHS), the State Department, "several intelligence agencies," and "multiple Cabinet members and other officials." Id. at 2403-05. The majority considered this process "persuasive evidence" that the policy had "a legitimate grounding in national security concerns, quite apart from any religious hostility." Id. at 2421. In contrast, Defendants in this case have provided no information whatsoever concerning the process by which the Ban was formulated.

Finally, Hawaii does not purport to address the scope of discovery or the application of any privilege. For these reasons, the Court finds that Hawaii does not impact its consideration of either of the pending motions.

II. Plaintiffs' Motion to Compel

Plaintiffs move to compel documents withheld under the deliberative process privilege. (Dkt. No. 245.)

The deliberative process privilege protects documents and materials which would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which

[1] The Implementation Plan prohibits transgender people who have *never* been diagnosed with gender dysphoria from serving unless they are "willing and able to adhere to all standards associated with their biological sex." (Dkt. No. 224, Ex. 1 at 4, Ex. 2 at 7.) As the Court previously noted, "[r]equiring transgender people to serve in their 'biological sex' . . . would force [them] to suppress the very characteristic that defines them as transgender in the first place." (Dkt. No. 233 at 13.)

governmental decisions and policies are formulated." N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975). For the privilege to apply, a document must be (1) "predecisional," meaning that it was "generated before the adoption of an agency's policy or decision," and (2) "deliberative," meaning that it contains "opinions, recommendations, or advice about agency policies."[2] FTC v. Warner Commc'ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984). "Purely factual material that does not reflect deliberative processes is not protected." Id.

The deliberative process privilege is not absolute. Several courts have recognized that the privilege does not apply in cases involving claims of governmental misconduct or where the government's intent is at issue. See, e.g., In re Sealed Case, 121 F.3d 729, 738, 746 (D.C. Cir. 1997); In re Subpoena Duces Tecum, 145 F.3d 1422, 1424-25 (D.C. Cir. 1998). However, "[t]his appears to be an open question in the Ninth Circuit," Vietnam Veterans of Am. v. CIA, 2011 WL 4635139, at *10 (N.D. Cal. Oct. 5, 2011), and even where there are claims of governmental misconduct, courts in this district and circuit have applied a balancing test. See, e.g., Wagafe v. Trump, No. 17-094RAJ, Dkt. No. 189 (W.D. Wash. May 21, 2018); All. for the Wild Rockies v. Pena, No. 16-294RMP, 2017 WL 8778579, at *6-8 (E.D. Wash. Dec. 12, 2017); Thomas v. Cate, 715 F. Supp. 2d 1012, 1021 (E.D. Cal. 2010). For purposes of this motion, the Court assumes, without deciding, that applying the balancing test set forth in Warner, 742 F.2d at 1161, is appropriate.

In Warner, the Ninth Circuit instructed courts to consider whether "[Plaintiffs'] need for the materials and the need for accurate fact-finding override the government's interest in

[2] Plaintiffs contend that Defendants have improperly asserted the deliberative process privilege over categories of documents that are facially outside its scope (i.e., post-decisional documents generated after President Trump's July 26, 2017 announcement and non-deliberative documents containing purely factual information). (Dkt. No. 245 at 15-17.) Because the Court finds that the deliberative process privilege does not apply at all, it need not address its scope.

nondisclosure." Id. In making this determination, relevant factors include: "(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." Id.

As with all evidentiary privileges, "the deliberative process privilege is narrowly construed" and Defendants bear the burden of establishing its applicability. Greenpeace v. Nat'l Marine Fisheries Serv., 198 F.R.D. 540, 543 (W.D. Wash. 2000) (citations omitted). In addition to showing that withheld documents are privileged, Defendants must comply with formal procedures necessary to invoke the privilege. Id. "Blanket assertions of the privilege are insufficient. Rather [Defendants] must provide 'precise and certain' reasons for preserving the confidentiality of designated material." Id.

A. Relevance of the Evidence

The evidence Plaintiffs seek is undoubtedly relevant. The Court has already found that the Ban's constitutionality "necessarily turns on facts related to Defendants' deliberative process." (Dkt. No. 233 at 28.) Defendants may not simultaneously claim that deference is owed to the Ban because it is the product of "considered reason [and] deliberation," "exhaustive study," and "comprehensive review" by the military (Dkt. No. 194 at 17; Dkt. No. 226 at 9) while also withholding access to information concerning these deliberations, including whether the military was even involved.[3] This information is central to the litigation and should not be withheld from the searching judicial inquiry that strict scrutiny requires. See In re Subpoena, 145 F.3d at 1424; see also Johnson v. California, 543 U.S. 499, 506 (2005) (observing that strict scrutiny is intended to assure that the government "is pursuing a goal important enough to

[3] The Court notes that Defendants have steadfastly refused to identify even one general or military official President Trump consulted before announcing the Ban.

warrant use of a highly suspect tool."); Arizona Dream Act Coalition v. Brewer, 2014 WL 171923, at *3 (D. Ariz. Jan. 15, 2014) (holding that withheld communications were "highly relevant" because the "Court must consider the actual intent behind Arizona's driver's license policy when it considers the merits of this case."). This factor weighs in favor of disclosure.

B. Availability of Other Evidence

Defendants possess all of the evidence concerning their deliberations over the Ban, and there is no suggestion that this evidence can be obtained from other sources. Defendants' production of non-privileged documents and an administrative record do not obviate Plaintiffs' need for responsive documents concerning the deliberative process. (See Dkt. No. 235 at 2.) This factor weighs in favor of disclosure.

C. Government's Role in the Litigation

There is no dispute that the government is a party to this litigation. This factor weighs in favor of disclosure.

D. Extent to Which Disclosure Would Hinder Independent Discussion

While Defendants claim that disclosure "risks chilling future policy discussions on sensitive personnel and security matters" and could "potentially lead[] to a direct negative impact to national security" (Dkt. No. 266 at 12-13), they cannot avoid disclosure based on mere speculation. Instead, Defendants must identify specific, credible risks which cannot be mitigated by the existing protective order in this case (Dkt. No. 183), and must explain why these risks outweigh the Court's need to perform the "searching judicial inquiry" that strict scrutiny requires. Johnson, 543 U.S. at 506. Because they have failed to do so, this factor weighs in favor of disclosure.

Having found that the deliberative process privilege does not apply in this case, the Court GRANTS Plaintiffs' Motion to Compel.

III. Defendants' Motion for Protective Order

Defendants move for a protective order precluding discovery directed at President Trump. (Dkt. No. 268.) Defendants concede that the President has not provided substantive responses or produced a privilege log, but contend that because the requested discovery raises "separation-of-powers concerns," Plaintiffs must exhaust discovery "from sources other than the President and his immediate White House advisors and staff" before he is required to do formally invoke the privilege. (Id. at 8, 10-11.)

The Supreme Court has recognized that discovery directed at the President involves "special considerations," and that his "constitutional responsibilities and status are factors counseling judicial deference and restraint in the conduct of litigation" against him. Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 385, 387 (2004) (citation omitted). Nevertheless, the President is not immune from civil discovery. Courts have permitted discovery directed at the President where, as in this case, he is a party or has information relevant to the issues in dispute. See, e.g., United States v. Nixon, 418 U.S. 683, 706 (1974) (rejecting "an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances"); Clinton v. Jones, 520 U.S. 681, 704 (1997) (noting that "[s]itting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty.").

The President may invoke the privilege "when asked to produce documents or other materials that reflect presidential decisionmaking and deliberations that [he] believes should

remain confidential." In re Sealed Case, 121 F.3d at 744. Once he does so, those documents and materials are presumed to be privileged. Id. However, "the privilege is qualified, not absolute, and can be overcome by an adequate showing of need." Id. at 745. If the Court finds that an adequate showing has been demonstrated (i.e., that the materials contain evidence "directly relevant to issues that are expected to be central to the trial" and "not available with due diligence elsewhere"), it may then proceed to review the documents in camera to excise non-relevant material. Id. at 754, 759.

To date, President Trump and his advisors have failed to invoke the presidential communications privilege, to respond to a single discovery request, or to produce a privilege log identifying the documents, communications, and other materials they have withheld. While Defendants claim they need not do so until Plaintiffs "exhaust other sources of non-privileged discovery, meet a heavy, initial burden of establishing a heightened, particularized need for the specific information or documents sought, and at a minimum substantially narrow any requests directed at presidential deliberations" (Dkt. No. 268 at 3), the Court finds no support for this claim. To the extent the President intends to invoke the privilege, the Court already ordered that he "'expressly make the claim' and provide a privilege log 'describ[ing] the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.'" (Dkt. No. 235 at 3 (quoting Fed. R. Civ. P. 25(b)(5)(i)-(ii).) Only then can the Court evaluate whether the privilege applies and if so, whether Plaintiffs have established a showing of need sufficient to overcome it.

Having found that President Trump has failed to demonstrate that he need not invoke the presidential communications privilege, the Court DENIES Defendants' Motion for a Protective Order.

Conclusion

The Court ORDERS as follows:

1. The Court GRANTS Plaintiffs' Motion to Compel and ORDERS Defendants to turn over those documents that have been withheld solely under the deliberative process privilege within 10 days of the date of this Order;
2. The Court DENIES Defendants' Motion for a Protective Order and ORDERS Defendants to produce a privilege log identifying the documents, communications, and other materials they have withheld under the presidential communications privilege within 10 days of the date of this Order;
3. The Court notes that the government privilege logs it has reviewed to date are deficient and do not comply with Federal Rule of Civil Procedure 26(b)(5)(A)(i)-(ii). (See Dkt. No. 246, Exs. 11-27.) Privilege logs must provide sufficient information to assess the claimed privilege and to this end must (a) identify individual author(s) and recipient(s); and (b) include *specific*, *non-boilerplate* privilege descriptions *on a document-by-document basis*. To the extent they have not already done so, the Court ORDERS Defendants to produce revised privilege logs within 10 days of the date of this Order;
4. Should any discovery disputes remain following Defendants' compliance with the above directives, the parties shall bring them before the Court jointly using the procedure set forth in LCR 37.

The clerk is ordered to provide copies of this order to all counsel.

Dated July 27, 2018.

Marsha J. Pechman
United States District Judge

EXHIBIT 27

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,	C17-01297-JMP
Plaintiffs, and	SEATTLE, WASHINGTON
STATE OF WASHINGTON,	November 12, 2019
Plaintiff-Intervenor,	
v.	Motion Hearing
DONALD J. TRUMP, in his official capacity as President of the United States, et al.,	
Defendants.	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE MARSHA J. PECHMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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process where you go -- I mean, I'm somewhat sympathetic to the government. He says four cases is just too much to handle. I'll give him that. So why don't you basically collaborate and say: This is what we want. This is the order we want it in.

MR. HEINZ: As I said earlier, we're happy to prioritize Requests for Production. And we'd be happy to coordinate that across the other four cases. Because across the four cases, although there are 200-some requests, they all overlap, right?

THE COURT: I would assume, unless you really are creative.

MR. HEINZ: We're not that coordinated, Your Honor. So the requests all ask for the same stuff. And we would be happy to prioritize those.

But going back to the requests themselves, so many of the requests the privilege just doesn't apply. And it can't apply. And the few where the privilege could plausibly apply, that's where the analysis and the *Warner* factors come into play. But for all of those, regardless of what's in the document, the government's intent is always at issue.

That granular analysis, RFP-by-RFP, is certainly much more detailed and grasps the issues in a much more detailed way than the prior order.

THE COURT: Okay. So is there any other judge that

suggested that you coordinate across all four in terms of your discovery?

MR. HEINZ: I'm not aware of a judge doing that. We do speak to the other teams so that we kind of know what's going on, but we do not coordinate in terms of how we are approaching the government. And we don't get on joint conference calls with the government. It's a separate process. Because we're all asking -- we're all -- three of the four courts are all dealing with this same issue. And all of the plaintiffs do not believe that this privilege is being properly asserted here.

THE COURT: Okay. Thank you.

MR. HEINZ: Thank you, Your Honor.

THE COURT: I'm going to write an opinion for you and you should see it in a week. But before that I'm going to give you some homework. Okay?

This is the homework. First of all, you've got to take a look at what you are being given under the *Doe* case. Second, you have to take your Requests for Production, group the Requests for Production and put them in order of priority. The government has to turn over all of its custodians. Why you haven't done it, I don't know. But you've got to get it done and I suggest you get it done in a week.

Plaintiffs need to look at that list of custodians to see if there's anybody else they want. If they are doing as

broad a sweep, in other words, if the government is doing as broad a sweep as they say they are, probably everybody you want is already on the list and we can set that one aside.

For the government. I'm sorry you didn't pay attention to looking at Requests for Production, because you're going to have to now. You did an analysis of this. You had a team that went through it. You had a team that coded it. You used software. And I don't know why you didn't, at the time, pick out the Request for Production and decide which documents or which logs would go to which Request for Production. But that's what you're going to have to do.

So they're going to give you their list of priorities and then you're going to start working through them to respond to the Requests for Production.

It's not good enough to throw a stack of documents over or even a group of logs and say: There's your answers, go find them. I interpret the Rules For Civil Procedure is that you have to respond to each Request for Production with such particularity that they can go find exactly what you're talking about. And I don't mean saying, oh, it's in the public record. I mean, if you think it's in the public record, you either produce it for them or you say: It's in the Record of Congress on such and such a day, this was the speaker, and you can find it at page 92. It's usually easier just to give it to them.

So we're going to work our way through those Requests for Production. If you believe that the Mattis ruling that you got from the court in DC applies to what it is you want on the *Carter* cases, we need to go through that analysis. And so if those are the Requests for Production that you want to tee up first, then that's it.

But you're going to see an order coming out from me where I want your plan put together so that both sides know what the order of priorities are. You get to pick the order of when they turn it over. They have to respond to the Requests for Production. I'm not going to go into what I call the smoke-and-fire analysis until I decide whether or not, in each response to the Request for Production, the deliberative process applies. Okay? But we're going to go through it.

We're also going to sit down and do it. You're going to come back and see me in December, and we're going to sit down and go through, line-by-line, your Requests for Production, what you've got, what the deficiencies are, and you're going to have to explain to me what's being withheld and why you think you're due it or what's being withheld and why it's appropriate to withhold it.

Obviously you're having some problems in organizing yourselves. So for plaintiffs, if you've got -- make it easier for counsel to give you what it is that he's got. Don't make him respond to 200. If you can get it down to 50

requests and you all agree on the same ones, cut his work by 75 percent. Because I also don't believe you're not also duplicating everything. You are. You've got to be. There's only so many questions you can ask. And, you know, we've got dozens and dozens of lawyers here. You can figure out what's most important and the priority that it's in. Okay?

So I'm trying to make it easier for both of you in saying, you know, they need to be more specific, you need to be more specific. And I don't buy: We didn't give it to them because they didn't specifically ask. If there's something you know is going to be necessary for them to find the documents that they're looking for, by all means tell them where to go find it. Because this is part of the discovery process is the defense saying: Look, we did a good job here. Show them that you did a good job, or at least show them where they can look to see where you did a good job.

All right? Everybody understand? You're going to get a written order out of me in about a week. But you might as well start. And I don't see any reason why some of this can't be done while you're all sitting in the room. I don't know where you're going or when you're going, but, you know, I've got little rooms back here that you might take advantage of everybody being in the same place, because it certainly appears to me you're spending too much time writing and not enough time actually talking face-to-face. By the way it's

face-to-face or voice-to-voice. It's not e-mail-to-e-mail, it's not letter-to-letter. That's what the rule is here in this jurisdiction. All right. Any questions about what I've just said?

MR. CARMICHAEL: Your Honor, just for the Requests for Production, so you're aware, to organize those by Request for Production is going to take months. There's no way we could possibly have that by December.

THE COURT: You're not going to have to order all 200. I'm going to tell them they get five or six, okay? You don't -- I'm trying to make it easier for you to go through this batch-by-batch. Because just as you say, you're hoping they're going to stop when they get what they need. They're going to put it in order of priority, you're going to work your way through it. I'm sorry you didn't do that before, but you decided on your own method and I don't find it acceptable.

You're not going to have to do 50. You're not going to have to do 100. You're not going to have to do 200. You're probably going to have to do three, four or five. Okay?

MR. CARMICHAEL: All right.

THE COURT: Okay, you'll be back. Ms. Miller is going to work out another date when you're going to sit down and talk to me and we'll see how much progress we've made.

MR. HEINZ: Just one follow-up question.

THE COURT: Yeah.

MR. HEINZ: Your Honor's request that we sit down and prioritize, that was across the cases, correct?

THE COURT: I'm going to be looking to you to say what are you doing in this case? If you want to bring the other folks along, I'm going to be asking you -- I'm trying to make it easier for them to comply.

MR. HEINZ: Okay.

THE COURT: Okay?

The easier you can make it for them to comply, the faster you're going to get this material.

MR. HEINZ: Next week we actually have our first deposition of an expert, one of our experts, so all of the cases will be there for that. And we, I'm sure, can chat early next week in person.

THE COURT: Okay. We're not talking about chatting. We're talking true negotiation here, okay? Everybody puts on their cooperation hat and you see how narrow you can make these. And you're going to see just how cooperative the government can be. Because I've just told them the faster they show you that this was a good process, the faster we're going to work through these materials. Okay?

MR. HEINZ: Understood.

THE COURT: All right. Okay. Look for the written order. But otherwise please start on the process. Okay?

We'll be at recess.

(Recess.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Debbie Zurn

DEBBIE ZURN
COURT REPORTER

EXHIBIT 28

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 et al.,

Defendants.

CASE NO. C17-1297 MJP

ORDER ON PLAINTIFF'S MOTION TO COMPEL DOCUMENTS WITHHELD UNDER THE DELIBERATIVE PROCESS PRIVILEGE

THIS MATTER comes before the Court on Plaintiffs' Renewed Motion to Compel Documents Withheld Under the Deliberative Process Privilege. (Dkt. No. 364.) Having reviewed the Motion, the Response (Dkt. No. 380), the Reply (Dkt. No. 385), and all related papers, the Court GRANTS in part and DENIES in part Plaintiffs' Motion.

Background

I. Requested Discovery

Plaintiffs allege that the creation and implementation of Defendants' ban on transgender military service (the "Ban") is unconstitutional. (See Dkt. No. 347, Second Amended Complaint ("SAC").) The Ban began with the July 26, 2017 Twitter announcement by President Donald J. Trump of a prohibition against military service by openly transgender people, which reversed the (former) Secretary of Defense Ashton Carter's Directive-type Memorandum 16-005 (the "Carter Policy") providing that transgender people would be allowed to accede into the military not later than July 1, 2017. (Dkt. No. 144, Ex. C at 5; Dkt. No. 145 at ¶ 12; Dkt. No. 146 at ¶ 8.) The announcement of the Ban was followed by the "Mattis Plan"—then-Secretary of Defense James Mattis's strategy for implementing the President's new policy—and the President's March 23, 2018 Presidential Memorandum directing the Department of Defense ("DoD") to implement the Ban. (Dkt. No. 224, Ex. 3.)

Plaintiffs seek discovery to substantiate their allegations that the Ban was not animated by independent military judgment but was instead the product of impermissible discriminatory intent. (Dkt. No. 364 at 6.) To this end, Plaintiffs have served 68 Requests for Production, which seek, among other things, documents related to the Government's justifications for the Ban; communications and materials considered by the "Panel of Experts" (the "Panel"), and statistics and data regarding transgender military service. (Dkt. No. 364.) Defendants have produced documents without responding to individual Requests for Production, producing documents as stored in the ordinary course of business by creating and searching lists of terms and custodians—without input from Plaintiffs—and then reviewing the collections for privilege. (Dkt. No. 381, Ex. 1, Declaration of Robert E. Easton ("Easton Decl."), ¶ 5.)

II. Procedural History

On July 27, 2019, this Court granted Plaintiffs' previous Motion to Compel Discovery Withheld Under the Deliberative Process Privilege. (Dkt. No. 245; Dkt. No. 299). In reaching its conclusion, the Court found that Plaintiffs' interest in the documents prevailed under the balancing test set forth in FTC v. Warner Commc'ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984), which weighs: "(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." Id.

Defendants appealed, and on June 14, 2019 the Ninth Circuit issued a writ of mandamus, vacating this Court's Order. Karnoski v. Trump, 926 F.3d 1180 (9th Cir. 2019). The Ninth Circuit approved of the Court's reliance on Warner, 742 F.2d at 1161, and found that the second and third Warner factors—the availability of other evidence and the government's role in the litigation—favor Plaintiffs. Karnoski, 926 F.3d at 1206. Regarding the first and fourth Warner factors, however, the Ninth Circuit concluded that "the current record is insufficient to establish relevance" and the fourth factor in particular "deserves careful consideration, because the military's interest in full and frank communication about policymaking raises serious—although not insurmountable—national defense interests." Id. The Ninth Circuit suggested that on remand this Court should "consider classes of documents separately when appropriate" and, "[i]f Defendants persuasively argue that a more granular analysis would be proper, [the Court] should undertake it." Id.

To date, Defendants have asserted the deliberative process privilege as a basis for withholding or redacting more than 50,000 responsive documents, and as the sole basis for withholding or redacting approximately 35,000 responsive documents. (Dkt. No. 364 at 6.) In

the instant motion, Plaintiffs again seek to compel documents withheld under the deliberative process privilege, suggesting nine broad categories, meant to encompass the 68 Requests for Production, through which the Court can evaluate the withheld documents. (Dkt. No. 364 at 10-12; Dkt. No. 365, Exs. 1-3.)

III. Doe Opinion

On September 13, 2019, in a related case, Doe 2 v. Esper, No. CV 17-1597 (CKK), 2019 WL 4394842, at *8 (D.D.C. Sept. 13, 2019), the United States District Court for the District of Columbia concluded that the deliberative process privilege does not apply to documents that were used or considered in the development of the Mattis Plan. The Doe court found that "the deliberative process privilege should not be used to shield discovery into Defendants' decision-making process and intent when the extent and scope of that decision-making process is a central issue in this lawsuit." Id. at *7. The court further found that the plaintiffs' need for the requested documents outweighed the deliberative process privilege, using a balancing test not unlike the one described in Warner, 742 F.2d at 1161. Id. at *8 (citing In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997)). Pursuant to the Doe court's ruling, Defendants will produce documents from three of the categories Plaintiffs seek to compel in this case: Panel Communications; Testimony, Documents, and Data the Panel Received; and Panel Deliberations and Decisions. (Dkt. No. 389 at 2 (citing Dkt. No. 364 at 7).)

Discussion

I. Legal Standards

The Federal Rules of Civil Procedure authorize parties to conduct discovery into "any nonprivileged matter that is relevant to any party's claim or defense." FRCP 26(b)(1). The Rules authorize parties to discover material which is likely to be inadmissible at trial, so long as

the requested information "appears reasonably calculated to lead to the discovery of admissible evidence." Id. "[V]irtually any document not privileged may be discovered by the appropriate litigant, if it is relevant to his litigation . . . ." N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). The party resisting discovery has a heavy burden of showing why discovery should be denied. Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir.1975).

The deliberative process privilege protects documents and materials which would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." N.L.R.B., 421 U.S. at 150. For the privilege to apply, a document must be (1) "predecisional," meaning that it was "generated before the adoption of an agency's policy or decision," and (2) "deliberative," meaning that it contains "opinions, recommendations, or advice about agency policies." Warner, 742 F.2d at 1161. "Purely factual material that does not reflect deliberative processes is not protected." Id.

II. Privilege Assessment

On the current record, the Court finds no avenue for evaluating Defendants' privilege assertions within the framework of the Ninth Circuit's guidance. Defendants have asserted the deliberative process privilege over 35,000 responsive documents, a volume that prevents the Court from evaluating documents on an individual basis. (Dkt. No. 364 at 6.) Further, the Court cannot evaluate Defendants' privilege assertions by individual Requests for Production because Defendants produced documents as kept in the ordinary course of business, without responding to individual Requests. (Easton Decl., ¶ 5.) Finally, Plaintiffs suggest the Court should evaluate privilege assertions based on nine overarching categories of documents meant to encompass all 68 Requests for Production, but, as Defendants note, these proposed categories are too broad to be meaningful. (Dkt. No. 364 at 10-12; Dkt. No. 380 at 6-7.)

Defendants' current production is therefore insufficient, as it does not allow Plaintiffs or the Court to assess Defendants' privilege claims, FRCP 26(b)(5)(ii), or conduct the type of "granular analysis" suggested by the Ninth Circuit, Karnoski, 926 F.3d at 1206. Thus, the Parties must take several actions before the Court can review Defendants' privilege assertions:

1) Defendants must produce their complete list of custodians and search terms within seven (7) days of the date of this Order;
2) Plaintiffs shall provide Defendants with a list of Requests for Production, sorted by order of priority, within ten (10) days of the date of this Order. Plaintiffs may also provide Defendants with a list of additional custodians and search terms. Plaintiffs are encouraged to coordinate with counsel in the other active cases concerning the Ban, in order to consolidate and prioritize the Requests for Production;
3) Once the Plaintiffs have provided their list of Requests for Production by order of priority, the Government must begin responding to each Request, consulting with Plaintiff to apply additional search terms or search additional custodians.

This Court will adopt the reasoning and conclusions of the Doe court concerning documents related to the Mattis plan. Doe, 2019 WL 4394842, at *5-10. Whether Defendants may assert the privilege over documents related to the Carter Policy remains an open question that the Court will address upon a motion by the Plaintiffs. In December, the Parties and the Court will begin reviewing Defendants' privilege assertions by individual Requests for Production, beginning with the first five prioritized Requests.

Conclusion

Because the Defendants' current production does not permit Plaintiffs or the Court to assess Defendants' privilege claims, after Plaintiffs have provided Defendants with a list of

Requests for Production ordered by priority, Defendants are ORDERED to begin responding to each Request. On December 10, 2019 at 4 p.m., the Parties will meet with the Court to begin assessing Defendants' privilege claims by individual Requests for Production.

The clerk is ordered to provide copies of this order to all counsel.

Dated November 19, 2019.

Marsha J. Pechman
United States District Judge

EXHIBIT 29

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,	C17-01297-MJP
Plaintiffs, and	SEATTLE, WASHINGTON
STATE OF WASHINGTON,	December 10, 2019
Plaintiff-Intervenor,	
v.	Status Hearing
DONALD J. TRUMP, in his official capacity as President of the United States, et al.,	
Defendants.	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE MARSHA J. PECHMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff Karnoski:

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For the Defendants:	Andrew Carmichael Matthew Skurnik US Department of Justice 1100 L. Street NW Suite 12108 Washington, DC 20530

THE CLERK: This is in the matter of Ryan Karnoski versus Donald Trump, C17-1297. Counsel, please make your appearance for the record.

MR. HEINZ: Jordan Heinz for the plaintiffs.

MR. SIEGFRIED: Dan Siegfried for the plaintiffs.

MR. IKARD: Sam Ikard for the plaintiffs.

THE COURT: Can you speak up, please?

MR. IKARD: Sam Ikard for the plaintiffs.

MR. SYKES: This is my colleague, Rachel Horvitz, for the plaintiffs. She is battling a cold and has lost her voice.

THE COURT: So she's way at the other end.

MR. SYKES: And I'm Jason Sykes for the plaintiffs.

MS. ALA'ILIMA: I'm Chalia Stallings Ala'ilima for plaintiff intervenors, Washington State.

MR. SKURNIK: Matthew Skurnik for the defendants.

MR. CARMICHAEL: Drew Carmichael, Department of Justice, for the defendants.

THE COURT: Counsel, thank you very much for the materials you sent me on your joint status report. And I've taken a look at them and gone back through what you told me and tried to review, in my mind, where we were the last time we were here. So what I would like to do is go through each of the items that were identified by the plaintiff as their priority. And I intend this to be an informational session

to help me understand what the problems might be that hold up or where it is you have sticking points.

And so I'd like to start out, please, if we could, I want to start with the Request for Production No. 29. And I think what I need here -- I think what I need is some understanding about how these meetings work. Because there were issues concerning those people who had a vote. That now has been resolved with the materials being turned over. Now, as I understand it, plaintiff wants those people who were at the table but who did not vote.

And so can anybody explain to me how these things work? If the people are at the table but do not vote, do they engage in dialogue? Do they offer their opinion? Do they write documents for others to absorb? Or are they simply there to absorb and report back to their various agencies? Does anybody know?

MR. CARMICHAEL: I do, Your Honor.

THE COURT: Okay.

MR. CARMICHAEL: From the defendants.

And I guess the answer is various, depending on who they are. So there is a few people that presented and we identified them specifically who presented to the panel. A few that -- I think there was one or two that sat in the final deliberations. And that's why we presented the meeting minutes ahead of time, so they could see who was there during

the most important meetings.

So you can see who was there. And if plaintiffs want to know who these individuals are, I'm happy to explain who they are and what their role was. But they have varying roles. That's why we did voting panel members and non-voting panel members, because voting members all have the same role, the same exact one. And it varies depending on whether you showed up or didn't show up.

THE COURT: Well, I'm assuming you can tell from the transcript who spoke or who presented.

MR. CARMICHAEL: Yes. You can tell who presented.

THE COURT: Okay. And presumably, since you've been through all of this data, you know who was communicating by writing back and forth.

MR. CARMICHAEL: We would know the primary people that did, yes.

THE COURT: So if the primary people were writing back and forth offering opinions, why wouldn't this fall into the same category and under the same analysis as the analysis done in *Doe*? In other words, why make this distinction if they were speaking or if they were writing and if they were offering up their counsel, why isn't this the same as those who were voting?

MR. CARMICHAEL: So I think the problem is that it's such a large swath of individuals. Like if they wanted -- I

identified three specific people that I thought could be on that level. And if plaintiffs wanted to narrow it to those three individuals, I think I can probably go back to the client and get them to agree to waive it for those three individuals.

THE COURT: How many people are we talking about?

MR. CARMICHAEL: There's 156 custodians.

THE COURT: I'm not talking about custodians, I'm talking about how many people were at the table?

MR. CARMICHAEL: For the final deliberations? So the final deliberations, there's only one extra person that was there.

THE COURT: Okay. And how about for the non-final negotiations?

MR. CARMICHAEL: It depends on which particular meeting. There's nine meetings. So that's why we need the meeting minutes. So it depends. That's why we gave the meeting minutes so you can see --

THE COURT: If there's nine meetings and there's a finite number of people in the room for each meeting, what are we talking about? Fifty people? Forty people? Thirty people?

MR. CARMICHAEL: This is actually the negotiations we're having in the *Doe* case. I believe it was 41. And then they agreed to narrow down to 13 extra. And then we

presented that to the *Doe* court to say: What did you mean by that? Did you mean that you -- we took it because we only made these Vaughan indexes for voting panel members, if that's all you wanted. However, we're not in the best position to explain to you what your order meant. So, you know, could we have a call in and discuss that? And the court asked us for additional information on November 22nd but hasn't responded yet.

THE COURT: So in the *Doe* court, you've turned over these documents?

MR. CARMICHAEL: No. We've turned over information from the -- all the voting panel members. But we identified it. We narrowed the dispute down to 13 additional custodians.

THE COURT: Okay. We're not communicating here. You're talking custodians, I'm talking people in the room.

MR. CARMICHAEL: But 13 individual people -- 13 new people that they wanted information from.

THE COURT: Okay. So when you say "custodian," you're talking about an individual who may have information who either spoke, wrote about something, or had some form of input into the committee?

MR. CARMICHAEL: Yes. Yes, Your Honor.

THE COURT: So you have not turned that over to the *Doe* court --

MR. CARMICHAEL: No, we haven't.
THE COURT: -- litigants?
MR. CARMICHAEL: No.
THE COURT: Why not?
MR. CARMICHAEL: Because they all have varying different levels of involvement.
THE COURT: And what makes a difference as to what level of involvement you think you should have to turn over?
MR. CARMICHAEL: I think it's a different analysis for each one.
THE COURT: Explain that to me. In other words, explain to me the types of people that were there and why it would make a difference as to whether you turned it over.
MR. CARMICHAEL: I think one they had was -- you know, just an example of two separate ones. One was the sort of the number two person behind the -- so Mr. Curtin (phonetic), who I think we've discussed before, was sort of the lead for the DoD portion of the panel. His documents are in there. His deputy was in there for most of the meetings as well. So he's maybe the very next tier down.
And then the other end of those 13 individuals, I think there was a doctor that presented on endocrinology. And his presentation is on there. But his documents wouldn't have any importance. His deliberative documents on his own wouldn't have the same level of involvement as maybe the

Deputy Undersecretary.

THE COURT: How do you know? I'm assuming he used his documents to make his presentation.

MR. CARMICHAEL: So, we've already turned over all the documents. This would just be communications of things that weren't protected.

THE COURT: All right. So apparently there was some presenters and there was somebody who was a point person for one of the agencies. What distinguishes the other people as to why it is you couldn't turn the material over?

MR. CARMICHAEL: They're just people in the room, you know, other people that they -- so -- and if you're just in the room for one particular meeting, it doesn't have the same level of involvement.

THE COURT: Well, then, why not? If they're just in the room, why don't you satisfy their inquiry and give it to them?

MR. CARMICHAEL: One, I would say that they haven't ever -- they haven't come back and said -- they haven't done what the *Doe* plaintiffs have done and said: Okay, now we're only interested in these people. So that's never come back to us.

THE COURT: Well, guess what? I'm asking you now. Whether or not they ask you, I'm asking you, why don't you just give it to them? Because you're telling me these are

people who are merely observers. Why don't -- if it doesn't hurt you, why don't you turn it over?

MR. CARMICHAEL: You have to tell us who you want, that's the thing.

THE COURT: They can't tell you who they want until they know who's there.

MR. CARMICHAEL: We gave that on November 1st. We gave them, on November 1st, who was there at what meeting. So first, you have to tell us who you want from --

THE COURT: What if they say, "We want it all"?

MR. CARMICHAEL: Then I think it's not a granular analysis. It's very broad. If you want it all, it's about 15,000 documents.

THE COURT: Okay.

MR. CARMICHAEL: Which is different than the 800 or so.

THE COURT: But the people still fall into the same category, don't they? That they were in the room, some of them had roles to play in presenting material. Presumably some of them had roles to play in communicating with people who were voting or amongst each other. And some were there simply as perhaps scribes or people carrying back the information, correct?

MR. CARMICHAEL: Of --

THE COURT: Is there any other category?

MR. CARMICHAEL: There are some people that didn't attend any meetings at all.

THE COURT: Okay. Well, I'm not worried about the ones who didn't attend any meetings, unless they wrote documents that were used at the meetings. But if you look at what the analysis is, is that the only way you're going to get this information is through you. And the other point to analyze is, if that information is turned over, how does it chill the deliberative dialogue? And if you're telling me they're nobodies, it doesn't chill the dialogue. So why not turn it over?

MR. CARMICHAEL: I think it does -- it would chill the dialogue if they are -- I also think it's less relevant if they're nobodies.

THE COURT: Relevance is not something that we're debating now.

MR. CARMICHAEL: Well, when you're looking at the four factors, relevance was one of those.

THE COURT: Right. And the Ninth Circuit has already told me that the relevance is not one of the issues.

MR. CARMICHAEL: Well, they specifically had the line that the relevance would be different depending on the person that was involved.

THE COURT: Okay.

MR. CARMICHAEL: And that it would be more relevant

if it's a senior person, less relevant if it was a non-senior person. But the chilling effect may be higher.

THE COURT: So maybe we ought to start this way. Why don't you tell them if there are 41 people that are in and out of this room, why don't you tell them who they are, what their role is, so that they can then say: We want one, three, five, seven.

MR. CARMICHAEL: I'd be happy to explain the roles of the individuals.

THE COURT: Okay. My question is, why haven't you done that already?

MR. CARMICHAEL: We've been trying. I've been -- I suggested individual people at the last one. I think at the end of the day, they just want everything.

THE COURT: Yeah.

MR. CARMICHAEL: And we're willing to narrow to individual people.

THE COURT: How can they narrow unless they know what the scope of what you've got is? In other words, how can they ask: I want Admiral so-and-so if they don't know that Admiral so-and-so is there. They don't know what role Admiral so-and-so played.

MR. CARMICHAEL: Well, they do, because of the meeting minutes. That's why we made sure we got the meeting minutes.

THE COURT: But they don't know about the non-speakers.

MR. CARMICHAEL: At the end of the meeting minutes, it says who attended each meeting.

THE COURT: Okay. And do they know who attended, by the list of who attended each meeting, what their respective roles are?

MR. CARMICHAEL: It has their title at the end.

THE COURT: I'm assuming that these people have all sorts of alphabet titles. How are they supposed to know what role they played, unless somebody identifies for them: This was an aide to so-and-so who provided documentation and did the research on X, Y and Z?

MR. CARMICHAEL: It does sort of have that. I don't have the meeting minutes with me, but one of them has at the end, looking at the last one, I just remember it, so it would have -- you know, one of them is Special Assistant to the Secretary, Deputy Undersecretary of Personnel and Readiness, documentarian, historian. So I think there was a couple additional people. And that's the last meeting minute. So it does tell you a little bit of what their role was.

THE COURT: Tell me why the obligation on them is to identify. As opposed to the obligation on you to identify? Because if you're at an impasse as to what categories of material here, the only option I have is to order it all.

But if they don't know what you've got, it's your obligation to lay out what it is. So I can see, yes, those people are important and those people aren't. You need to lay that out for me, if not for them.

And I'm wondering why that hasn't been done.

MR. CARMICHAEL: Well, we don't want to lose sight of what actually -- what the Ninth Circuit -- what actually we're looking at is, is the -- was the -- was DoD's determination of the policy reasonable, that it significantly furthers the military goals? So that -- we think we've already identified that with the voting members of the panel. There may be some other voting members.

But they have a theory that there was -- that this whole thing is a sham and that there was really, I think, that there is -- it was written up by some Evangelical counsel. This theory. I can't help them identify those documents because they don't exist.

THE COURT: No, you don't have to identify the documents. But they ask questions and you have to answer questions. And if one of the ways that you answer their question is to give them the information -- you keep saying, "Cut it down," but I don't know how they're supposed to do that unless you lay it out. You told me the same thing the last time when you said, "Oh, we can't give them who all the custodians are." And I found that pretty incredible that you

couldn't do that, because I think you can do that with the press of a button, if you've got the right program.

So let me turn to the other side. And am I understanding what it is you're looking for? Or am I off track here?

MR. HEINZ: I think we're on the right track for sure, Your Honor. I think what we struggle with is, as I look at RFP 29, it asks for documents related to the development of the Mattis plan, of the current policy. All of that falls within Your Honor's order, which adopted the *Doe* holding, that the deliberative-process privilege does not apply to documents that were used or considered in the development of the Mattis plan. That's co-extensive with 29.

So what I'm hesitant to get into with counsel is a debate over which custodians we're kind of picking and choosing, because we don't know who has the most relevant documents here. And I have an example for Your Honor.

A recently produced document was this PowerPoint presentation titled, "Transgender personnel policy working group." So this is a working group. It's not the panel of experts. This is one of the working groups that fed into the panel of experts, I think, based on the limited information that we have. And so this wouldn't be encompassed within the panel documents.

But on here, buried within this document, is an incredibly important piece of information which says that, "Proposed

courses of action, or options to pursue, address POTUS's expressed end-state." Well, we know what the President's expressed end-state was here. And this shows that the assumption here of the panel was to address his expressed end-state. This is a really important document, but it's not a panel of experts' document, it's from one of these working groups.

But this is just an example of what -- we don't know what we don't have. And that's why we believe that we're entitled to all of the documents responsive to 29, because asking us to pick and choose from what we don't have is an unfair game.

THE COURT: Okay. Well, as I understand my role, you're supposed to sort through this concept of granular. We're going to have to pick out a discrete grouping of documents that I can say: These are just like the voting members and that's why you get them. So if I tell them that -- it's a very long Request for Production. Honestly, it's got many, many moving parts. So let's concentrate on what the most important is. Do you want the people in the room for these meetings? Do you want to have whatever presentations they made? Do you want to know what documents they passed out or distributed to the voting members?

MR. HEINZ: Yes.

THE COURT: Okay.

MR. HEINZ: We do want that. But what I'm hesitant

to agree to is limiting this request to, for example, just the panel of experts' material, when we know that after the panel of experts completed their work, that the Department of Defense did additional work in creating the report.

THE COURT: Okay. Let's take this a slice at a time. Okay? Because I have to be able to do that analysis on each grouping, as I understand that the court wants me to do.

Now, have I identified a group that you want and you think the documents would be important to you?

MR. HEINZ: You have.

THE COURT: Okay. So if I'm looking at this and saying: The folks, the non-voting members in the room, their material is very much the same as the voting members who were there, and I order them to give it to you, am I within what you believe is the proper analysis that the *Doe* court did?

MR. HEINZ: Yes. We believe that there is no difference between those two.

THE COURT: Okay.

This is what you have to do. For each person that you identified that you just told me, I think it was 41, of people who attended meetings, you have to identify them, you have to give them what -- any presentations that they made. You have to give them any documents that they generated that were put forward to the voting members of the group.

MR. CARMICHAEL: We've already done that. That's in

the November 22nd production. So anything that was actually presented to the panel should be there. I would assume that that was something that was presented to the panel at some point, and that's why you have it. So we've already given everything that was presented to the panel.

What we haven't given is things that would be communications between non-panel members that a panel member never saw, except for the fact that right now in response to 44, and with negotiations with the *Doe* plaintiffs, we're going back and getting the presentations on the medical data, the employability, limited duty, work-related, so we're going back and getting that.

THE COURT: So did you get everything that I just outlined?

MR. HEINZ: Well, we don't have communications between the non-voting members.

MR. CARMICHAEL: Yes, between non-voting members. If a voting member is not on the communication, they don't have that. It would be voting-member communications.

THE COURT: Okay. But you're looking for non-voting to non-voting communication.

MR. HEINZ: Correct. Because a significant amount of work was done in these working groups that were comprised of non-voting members. Maybe there was a voting member also on the working group, I don't know. But there was a lot of work

done in these working groups.

THE COURT: Are these non-voting people the people who are doing the work group, or you don't know?

MR. HEINZ: We're going off of very limited information here. But from what we can tell, there was a lot of work done in these working groups. And then these working groups, like just in this presentation, reported up to the panel.

THE COURT: So you don't know who was on the working groups?

MR. HEINZ: I think we actually do know who was on the working groups. That's in an interrogatory response.

THE COURT: Okay. But you haven't received what the working groups produced?

MR. HEINZ: Correct. Only their presentations made to the final panel.

THE COURT: Okay. But not the data and not the information that they synthesized in order to make their final recommendation.

MR. HEINZ: Correct. We don't have the work.

THE COURT: Okay. So what's the problem with that grouping of materials?

MR. CARMICHAEL: So, I think that they'd have to -- so, for medical deployability and limited duty, we're actually producing the work. We're working on it right now.

THE COURT: Now, you just laid out multiple categories. You have to explain to me, are those the working groups?

MR. CARMICHAEL: This is when the panel -- they sent out certain data calls. They asked questions for analyzing gender dysphoria, they asked a particular office.

THE COURT: Who is "they" when you say "they" sent out?

MR. CARMICHAEL: The panel members in general. It would be the panel members, in general, requested information.

THE COURT: Okay.

MR. CARMICHAEL: So they requested information from a particular health office regarding costs of -- costs and usage rate of medical services. And that was one particular request. That was presented to the panel on, I think, two of the meetings. So we're actually going back and verifying that we have all of the work done. And we found a few extra things, and we're going to produce that on the 20th.

THE COURT: Have you produced the information when somebody who is on the panel calls for information, have you produced that call that they made?

MR. CARMICHAEL: We have produced what they presented on November 22nd. We're going back and producing the work that they did not present right now. So I've seen that in

the dataset, it's already in there. We're coding it right now for production on December 20th.

THE COURT: So you're intending to turn that over?

MR. CARMICHAEL: Yes.

That's for one category. The other category is deployability and limited duty. And that was a data call they sent out to the military services. And the same thing, like how they came up with that and the work on that.

MR. HEINZ: So I think, Your Honor, you're talking about the data, correct? You're not talking about, you're actually producing the communications within those working groups?

MR. CARMICHAEL: It's the data and how they came up with the data. And there's e-mails that explain the data and presentations that explain the data.

MR. HEINZ: What we'd be interested in are the communications and the work that was actually done. Like, for instance, what if the deployability working group were communicating and saying, you know, well, deployability sure isn't a reason to keep transgender people out of the military. Well, that would be very relevant evidence. And so those communications could be highly relevant and we want to see them.

THE COURT: All right. So here's another category of documents: What the working group did. Who is on the

working group? And the data that they produced. And the communications between those people on each working group. What's the problem with that?

MR. CARMICHAEL: We'd have to look at each specific one. So -- and I don't -- these ones, particularly, because the *Doe* plaintiffs brought them up and they overlapped them a little bit with 44, we're going ahead and doing it. But if there was another specific one, again, we'd have to figure out a way to identify just those specific documents. Like if there was the head of a particular working group and we have that person as a custodian, we may be able to isolate documents in the system.

THE COURT: So just for the record, how many working groups were there?

MR. CARMICHAEL: I don't know that off the top of my head. I think it's in the report, the ones that worked with -- the primary one is the panel of experts.

THE COURT: But I'm assuming that if you looked, you would be able to tell me what these various working groups are.

MR. CARMICHAEL: Yes. And their involvement on the panel.

THE COURT: And they're a discrete number, four or five?

MR. CARMICHAEL: Yes.

THE COURT: So those are people in the working groups who gathered data, put it together, communicated amongst themselves, and passed their reports on to those who were voting, correct?

MR. CARMICHAEL: In some instances; I mean, I think the deployability one didn't do it as much. I think they didn't overlap exactly. But that's information that we can provide as well, like when they started.

THE COURT: Okay. So if you go through the analysis, all of this material is pre-decisional. All right?

MR. CARMICHAEL: Yes.

THE COURT: And it's also something that you have complete control over. They can't get it without you, correct?

MR. CARMICHAEL: Yes.

THE COURT: And these folks are so far down the line that they're not deliberating at all. They are simply providing data, offering material up to those who are actually deliberating and making the decision.

MR. CARMICHAEL: Yeah, they wouldn't be involved in the actual deliberations. I guess they deliberate amongst themselves as to how they're going to provide the data.

THE COURT: So how does the deliberative privilege apply at all?

MR. CARMICHAEL: Our intent is to provide everything

that is -- all the data that they presented and how they got that. So that's our intent as we're going back and making sure that we provided all of that.

THE COURT: Okay. Well, intent is one thing, production is another. And as you reminded me, you have very little time left to do this. All right. So this is the next grouping that we're going to look at. You're going to supply them with the working group names, who's on the working group, the dialogue in e-mail or any other communication within those working groups, and the data that they produced.

I don't think the privilege applies at all there, because these folks aren't deliberating, they are researchers providing information and having discussions amongst themselves, as I understand the way you just described it to me.

MR. CARMICHAEL: They addressed other questions as well. And they're all not exactly the same. So I think for -- I mean, certainly it's something we'd be willing to consider, but communications, everything besides communications we're already presenting. But if there was some deliberations --

THE COURT: Well, we're past "willing to consider," I'm telling you you're going to produce it.

MR. CARMICHAEL: We'd have to identify -- from specific working groups?

THE COURT: Yes. I mean, if you really did organize all this data, you should be able to call it up. And apparently at some point you labeled it having a deliberative privilege. And I'm now identifying a group of things that I don't think fall into that. So you have to turn it over. It's not a matter of, we're considering, it's not a matter of, we'll go back and look. You have to turn it over.

MR. CARMICHAEL: Okay.

THE COURT: Now, what other category can we discretely find within this interrogatory?

MR. HEINZ: I think another category would be the post-panel-of-expert work that went into the report. So the panel of experts did their work and handed that off to, I believe, the Office of the Secretary of Defense. And then his office, from what we can tell, did additional work. They reached out to other researchers, other doctors.

THE COURT: Was this after the vote was taken or before?

MR. HEINZ: This is after the panel of experts had voted and deliberated, or perhaps it was around the same time. And there were two independent work streams. But it's not as if the panel of experts drafted this report that was sent over to the President. It was done by the Department of Defense and I believe the Secretary of Defense's office. So we would want that additional material that went into the

development of the report.

THE COURT: So let me understand the steps of this, so that I get it clear.

Explain to me these two lines that you just referenced.

MR. HEINZ: Drew or Matt could do this better than me. So the panel of experts did their work from October through January. October 2017 through January 2018. And the deliberations of the panel began in December 2017 and went through January of 2018. And then around that time, then they sent over their recommendation to the Office of the Secretary of Defense. And then there was work done there, then, to create and draft the report, the 44-page report that the government points to, as its justification for the policy.

So what we would want, then, are the documents and the communications that went into the drafting of that report.

THE COURT: Okay. And this is post-decision making, or no?

MR. HEINZ: Well, it's post-panel-of-expert decision, but the decision -- it's pre-decision by the Secretary of Defense, I suppose.

THE COURT: Okay.

MR. HEINZ: And, Drew, correct me if I'm misstating how that operated.

MR. CARMICHAEL: Yeah, that's pretty accurate. There

was a meeting -- there were, I think, two meetings of January -- around January 11th, around January 17th, in which they briefed Secretary Mattis. And the briefings we've given over to plaintiffs.

And then he accepted the decision and asked for a report to be made by the Undersecretary of Defense's office. And they wrote the report and presented that to him. And there's drafts and communications from the report, you know, from the making of that report.

THE COURT: Okay. So what's the problem with turning that over?

MR. CARMICHAEL: It's drafts -- generally drafts of reports, particularly something that was made for using to send to the President, and for something that was, you know, -- I think there is a little -- there's an issue there with the report is also used for litigation, too. But I think there's ones that were just deliberative process.

THE COURT: You told me that somehow you don't turn over drafts. Where's the rule that says you don't turn over drafts?

MR. CARMICHAEL: Drafts aren't deliberative process. It's not necessarily even the actual decision. But like, you know, little subparts of the decision, tweaking how you're going to do a particular sentence or how you're going to write a particular paragraph.

THE COURT: Okay.

MR. CARMICHAEL: There's deliberations that go into that. It's just as you're writing something, you want it to read well.

THE COURT: Who are the people who are doing this?

MR. CARMICHAEL: This is the Undersecretary's office for the Secretary of Defense.

THE COURT: Yeah, well, that tells me who the office is. But do you know who the people are?

MR. CARMICHAEL: We know the people that were the staff members, yes. We know the staff members.

THE COURT: So you know who was working on drafting this report?

MR. CARMICHAEL: Yes.

THE COURT: And you're saying that it's a deliberative process. Is it really? Or has a decision been made and all this is doing is memorializing it?

MR. CARMICHAEL: When you're writing versions of a report and you're doing -- the final decision was made. But when you're talking about how you're going to phrase a certain paragraph, one way or another, there's still deliberations there involved.

THE COURT: Okay. And you're the only ones who have that information?

MR. CARMICHAEL: We are the only ones that have that.

THE COURT: They can't get it. And once the decision is made, the people who are exchanging information to write this report wouldn't have a chilling effect because they're not the decision maker or not the debater.

MR. CARMICHAEL: I think it still has a chilling effect. If you, you know, if you write a sentence a certain way or write a paragraph a certain way, then your boss says: I don't like the way that reads, rewrite it. I think that has a chilling effect to have that go out in the public.

MR. SKURNIK: Your Honor, if I could sort of jump off on that a little bit. I think the idea is, and this is the concern that our clients have in this process is, this is clearly, you know, a controversial issue. And what the Department of Defense is concerned about, the next time there's a controversial issue on which they need to develop a policy, whether it's a personnel issue or some other issue, something relating to North Korea or Afghanistan or something else, if internal communications and drafts and comments on drafts, if they're disclosed, people within the Department of Defense and the military services are going to be much less willing to lend their candid views, in light of the fact that the things they say may be turned over in litigation in the future.

And I think that is the core of the chilling effect.

THE COURT: Well, I get that. If we're talking about

world peace, you know, blowing up Korea. But this is a discrete policy concerning one issue. Now, if people are afraid that somebody is going to come after them because they hold certain views about transgender individuals, we can handle that with a protective order. I don't necessarily think, at the level you're talking about, people need to be identified to the public by name.

But what they're after is looking for the process that you went through, and if the document that was produced is consistent with the data that was debated. So when you say that there's a chilling effect, just as the judge in *Doe* says, there are ways to handle that. You can have a protective order.

But at this point, you're talking about four or five people who are pretty far down the line, as I would assume that they are, and they're taking direction of how to write the report. Am I correct?

MR. CARMICHAEL: Yes. Yes. It also shows there's not a lot of relevance to that, too, if they're drafts.

THE COURT: But relevance -- it may lead to -- it doesn't have to have extraordinary relevance. It only has to have some relevance, particularly in discovery, if it leads to another inquiry that may have relevance.

MR. CARMICHAEL: That's for production. But for actually for overcoming the privilege, it has to have enough

relevance to overcome -- you know, the need needs to overcome the chilling effect. And we don't think there's a need for early drafts that weren't accepted.

THE COURT: Well, that's just your opinion. Tell me -- I don't understand --

MR. CARMICHAEL: Of course it is. I'm advocating for my client.

THE COURT: I understand that you have that responsibility. But I'm trying to decide whether -- the Ninth Circuit says that relevance at this point, you know, you hold the documents, and we're looking to try and find how this was produced. So I'm trying to take each stage and say -- did the report, which is key, you told me that that's the only thing you're going to be introducing at trial, if that is the only thing that you've got on the table, then probing whether or not it is consistent with the other data and with the other opinions might seem pretty important.

MR. CARMICHAEL: Well, that's the final, obviously, the final version of it. But these are drafts that we're talking about.

THE COURT: Where do you get that drafts aren't important? People ask, all the time, for the metadata underneath their electronics. That's a given. So isn't this the metadata on what it is that you produced?

MR. CARMICHAEL: But how does the need for drafts

that staffers -- first drafts that staffers wrote to the Secretary that the Secretary ultimately did not accept those drafts, how does that overcome the chilling effect? I think that's the --

THE COURT: Because you don't identify the people who are doing it. They can't be chilled if people don't know who they are, if they only see their work.

MR. CARMICHAEL: I think that would essentially mean that in any case, you could just do a protective order and it would be overcome.

THE COURT: I do them all the time. I might sign five or six a day. It's not unusual.

MR. CARMICHAEL: I understand. I just think that there's still more of a chilling effect in this litigation.

THE COURT: Well, with a protective order, I don't see that there's a chilling effect. So you're going to have to turn over the drafts for attorneys' eyes only, the names of the people who are involved, and identify how many people there are.

MR. HEINZ: And I think we'd be interested in those communications within the Undersecretary's office as to how those reports were created. You know, based on what they have disclosed to us, there was additional fact finding going on by that office, separate and apart from what the panel did. This office, these individuals were reaching out to

scientists, which we will submit have questionable backgrounds, to get articles and data from them. And so --

THE COURT: So these are the folks that are drafting the materials?

MR. HEINZ: Drafting the report.

THE COURT: Well, you'll get the dialogue and what it is that they asked for and any data that they received during the course of their drafting of the materials.

All right. We are -- it's taking longer than I anticipated, but let's -- can we leave this particular category yet, or not?

MR. HEINZ: I was going to say I think that's the hardest one. So the steepest hill is behind us. Anything else on 29 that you wanted to discuss?

The other one should be fairly quick, I think.

THE COURT: Okay. Tell me about 15.

MR. HEINZ: So 15 is another request that the defendants believe is too broad. And for 15, we're just wanting to understand how, under the Carter Defense Department, how they came to the opposite conclusion two years before. So we're not necessarily, at least initially, interested in the back and the forth and the detail that we just went through with the panel of experts and the current policy, but what did the Carter working group consider and how they came to their final conclusion, which was that

transgender individuals could serve.

THE COURT: So would you be satisfied with the same categories of documents that they already turned over to you pursuant to the *Doe* order for the Mattis decision? In other words, assuming that it was a similar process, you know, they've turned over to you the transcripts, they've turned over to you the custodians. So if they did exactly the same thing in exactly the same scope, presumably it would be exactly the same decision concerning the deliberative privilege, because these are the same types of documents. Would that satisfy your inquiry?

MR. SIEGFRIED: Your Honor, I think, yes, without prejudice to, if there's something in there that we think we need to probe further.

THE COURT: Okay. All right. Can you do that?

MR. CARMICHAEL: We can. I don't think there is as much as a need for the actual deliberations. So what we're producing -- right now what we're producing there, after our conversation, we went back and we isolated a few documents that we think would answer the questions for them. And they're going to come in the December 20th production.

So the equivalent of the report, like the final report that actually wasn't public, that the transgender working group did, the meeting minutes which describe what they heard, and the briefing slides from Rand when they briefed

the transgender working group, we're putting all that in the December 20th production.

The only thing that we wouldn't that is the same equivalent is e-mail communications from members on the transgender working group. Because that's in the panel of expert's production. But that's not in the production that we're doing December 20th. We could isolate it. We don't think, again, the need is that high for that level of detail into that one.

THE COURT: Let's do this: They're going to give you this on the 20th. You take a look at it. You don't like it, you want more, you come back and we have another talk about it.

MR. SIEGFRIED: Thank you.

THE COURT: Okay? So you're promising that on the 20th, 15 will be responded to?

MR. CARMICHAEL: As far as -- yes, we're going to -- a lot more information on 15.

MR. SIEGFRIED: Your Honor, can I ask a question?

THE COURT: Sure.

MR. SIEGFRIED: Drew, you mentioned the Rand briefing slides. Is that the only presentation to the working group that you're intending to produce?

MR. CARMICHAEL: There's a full summary of all of the presentations they got in the transgender, it's like a

50-page report with meeting minutes that go after it. I didn't find any other briefing slides in the collection. I'll look again and make sure that we do. But if there are any other briefing slides, we'll put them in.

THE COURT: Okay. What's next?

MR. HEINZ: How about Request for Production 36, which asks for complaints related to the *Carter* policy of open service. And here, I believe that the defendants have agreed to produce the one or two complaints that they're aware of, and that they would look through their production to see if there were any others. And then, wasn't sure if you found any others or what your position was after our meet-and-confer.

MR. CARMICHAEL: Still doing it.

And we did an isolation of the searches, and we -- I think they found one other mention of a complaint, which we can do as well. But it was really just those two.

So there were two complaints that were mentioned in the Mattis report that we're releasing in response to that. If there are any other in the production, we'll look at those.

THE COURT: So two in all of the military -- all those serving, there were only two complaints?

MR. CARMICHAEL: There were two complaints that the panel of experts considered. We didn't go back and look through any other complaints.

THE COURT: Well, that's a different thing, because I'm assuming that if they plucked out two complaints, you probably want to know the full range, don't you; or no? Because if they plucked out two complaints, it seems to me that that might prove your point.

MR. HEINZ: Your Honor, that's why we issued the request, to see how many complaints there really were. Whether people had an issue with transgender people serving.

And so we want the defendants, the government, to agree to produce all complaints. And there may only be the two. And that would sure be helpful to our case. But certainly the deliberative-process privilege doesn't apply to complaints. That's factual information.

MR. CARMICHAEL: In the production, we'll go back and make sure we don't have any.

THE COURT: So if there's two, you give them the two. That's all there is. You won't be arguing that there are 5,000.

MR. CARMICHAEL: Well, I think the Uniformed Service Chiefs testified before Congress that they weren't aware of any other complaints. So I think that probably is enough for them to --

MR. SIEGFRIED: We're just trying to avoid ambush at trial with all of these other complaints that we don't know about.

THE COURT: Well, as far as I'm concerned with this is if they don't give it, they don't use it. That's the rule in federal court. If you don't turn it over, you don't give people notice, and this seems to me fairly significant data, if there are only two, we're not going to find out that there's others because they will have done a complete search and see what they can find. And when will you do that by?

MR. CARMICHAEL: So, we'll search in our database. We're not agreeing to go to, like, the actual ID complaint database, which is really not searchable that way, to go through and see if there's any other complaints filed.

THE COURT: Well, if you're intending to justify what is done, based upon complaints about transgender individuals, we're trying to find out just exactly what you're going to put up.

MR. CARMICHAEL: There really hasn't been a lot of, as the service chiefs have testified, like bullying and harassment. That hasn't been -- that was not one of the major problems. That was not one of the problems with the policy.

THE COURT: Well, then, if you have two, you only have two. But I think the point is, you have to answer that specific interrogatory. Because if they, at trial, they want to read your interrogatory, you say there's only two.

MR. CARMICHAEL: We may be able to agree with the

plaintiffs that we're not aware of any other complaints and leave it at that.

THE COURT: Okay. Moving right along.

MR. HEINZ: Request for Production 33, which asks for documents related to alternatives to the Mattis policy. So other options or courses of action that the Department of Defense was considering an alternative to what they ended up adopting. And here, I believe that the defendants have agreed to go back and look for any other courses of action.

THE COURT: Well, if you get all the other things that I told them to give you, isn't that going to be in there?

MR. HEINZ: I would think so, yeah.

THE COURT: So let's see what that produces. And if you feel that it's not adequate, then you can come back. But it should be there.

MR. HEINZ: I agree. It should be within the panel of experts. And then also the Undersecretary documents, I would think.

THE COURT: Or if they didn't entertain anything else, then that should be obvious by what they produce as well. If there was only one course of action, if that's all that there is, then nobody is going to argue that they entertained other options.

MR. HEINZ: Okay. Then I think there's one last one,

Your Honor. Request for Production 44, which requests data sufficient to show the number of service members non-deployable due to gender dysphoria or transition-related medical care.

And here, the defendants did agree to look for that data and documents. And I'm not quite sure where they ended up with that search.

MR. CARMICHAEL: Yes. We're producing this in the -- anything that was withheld for deliberative process, we're going to produce that in the December 20th. And what this was is, we went back -- this is what I was explaining earlier -- that there was, the services specifically came up with these, searched their records for information about deployability, and presented this to the panel. So we're taking a step back and saying, all the stuff the services did on that. And that's what we're producing.

THE COURT: Okay. So you're agreeing that you're doing the search and that the material will be in the December 20th?

MR. CARMICHAEL: Yes, Your Honor.

THE COURT: Okay. All right. Anything else?

MR. HEINZ: No, Your Honor.

THE COURT: Okay. You're going to come back and see me again. And I believe the only day I probably have is January the 25th, Friday.

THE CLERK: January 24th is a Friday.

THE COURT: January 24th. And you're going to come back and here's the next issue. Are you satisfied with what it is that I've outlined that they have to give you, or do you -- are you intending to ask for your next grouping of interrogatories?

MR. HEINZ: I think that based on what we've discussed today, it would be helpful for us to sit down and chat again with the defendants and look at some other Requests for Production -- we've kind of identified our next five that we would propose -- and see if we can come to an agreement on those. And perhaps with Your Honor's permission, we could submit another joint status report a week before the next hearing.

THE COURT: Okay. Well, this is what you need to do: Five more, okay? Five more interrogatories that you put together in order of priority. Then you examine what you're going to get. And it would seem to me that you can do that relatively quickly, if you've already got that. Give it to them as soon as you can. I'm going to probably issue an order that -- what is today? Today is Tuesday. Give it to them by the end of the week.

Then you're going to look at what you get back. Then you're going to confer to make sure that you've got everything that they promised you, and whether that data

answers some of your next five, and to see if you can get an understanding of which of those five you can dispense with.

Now, one of the things that I did not see that you did, maybe you did -- because I know the State of Washington is at the table -- but I think I asked you, because counsel stood up and said, I've got 200 interrogatories. And I said: No, you don't, you've probably got about 50. Are you coordinating with the other cases around the country?

MR. HEINZ: We are, Your Honor. So three other cases. And we conferred with them about the five RFPs that we prioritized that we just went over, and asked for feedback, received some feedback, to ensure that we were representing kind of what the priorities were across all of the cases. And before we send over the new five Requests for Production, we'll do the same.

THE COURT: Okay. Is there any problem with them, that you just send this out to the other four?

MR. CARMICHAEL: That's what we're doing. If we send it out to one, we send it out to all.

THE COURT: Now, I talked about a protective order. If you decide you're going to do a protective order, you need to decide, if it's going to be attorneys' eyes only, how many of those attorneys are there. I can only control the attorneys that are right here.

MR. HEINZ: And I think we have protective orders

across the cases, yeah, that have an attorneys' eyes only provision.

THE COURT: Okay. All right. So we've got our plan. You have to, by Friday, get your next five. You have to take a look at what they give you on the 20th. After you've had an opportunity to review those materials, you meet and confer to see if those materials that you got you believe are complete, or whether you need to put them back into a joint status report for when you come back to see me again. Then you start working on the next five.

MR. HEINZ: Understood.

MR. SYKES: Your Honor, one housekeeping note. The motions cutoff regarding discovery dispute, the motions due on 1/20, and I just want to make sure that with us coming back on the 24th --

THE COURT: Remind me what your trial date is.

MR. SYKES: What is our trial date?

MS. ALA'ILIMA: June 22nd, Your Honor.

THE COURT: We'll push the deadline back 30 days and see how we do on the 24th, and how many more rounds we have to go through this. Okay? Any questions?

MR. CARMICHAEL: No, Your Honor. I'll wait and see those. I think we've already sort of hit the core on what the Ninth Circuit is asking us to review, so I do think at some point there's a bit of a diminishing returns. And once

you get the core things, then get the side core things, there's sort of a diminishing returns in continuing.

THE COURT: Well, I will meet as many times as necessary to get as minute as necessary. Okay? I think that's what I've been told I have to do. So we'll continue to meet until we reach the point where everybody understands what the background of this is, that we have the evidence that's going to be appropriate, so that both sides can present their case.

Now, yours is easy because you told me you only had one document, or somebody did, I don't know if it was you. So your case will be simple.

MR. HEINZ: Your Honor, I do want to flag just one thing. We haven't taken any depositions in this case yet. So we still have that phase, once we get the documents. I'm just flagging that for scheduling purposes, that this -- that defendants withholding so many documents is delaying the depositions in the case. So just flagging that.

THE COURT: Well, I get that. But if you're not going to note depositions until after you get the documents, then we're kind of stuck. I suggest that you basically set up some dates so that when you get these documents on December 20th, you can start deciding who it is you're going to depose.

I'm assuming you're not going to depose 41 people in the

room. But you're going to be discrete about who it is you're going to depose. But you might as well get your dates set now. And if there are people you know that you want, then set them up. If you don't have the documents you want, you can always cancel it. But be a little proactive on this.

MR. HEINZ: And after today's discussion, I think that we can -- now we have a little bit more certainty to move forward.

THE COURT: Okay. Do you have agreements with the other cases to -- if you're going to coordinate lawyers from four different cases, with four different judges, that's going to take some skill, not necessarily in your wheelhouse, but some judicial assistant -- not judicial assistant, but paralegal or secretary has a lot of work ahead of them. Although I think, you know, Doodle has made things a little easier.

MR. HEINZ: It sure does.

MR. SKURNIK: Your Honor, just to clarify. The government has started taking depositions of plaintiffs' experts and other witnesses. And we've been scheduling those. And the parties from the plaintiffs in all four cases so far have been present at those depositions.

THE COURT: Okay. Well, that's great. Anything else I can help you with?

MR. SIEGFRIED: No, Your Honor.

THE COURT: Are you coming from DC?

MR. HEINZ: Chicago.

MR. SIEGFRIED: Chicago.

MR. CARMICHAEL: We're DC.

MR. SKURNIK: We're DC.

THE COURT: Well, I hope you get out tonight on a good flight. And I'll see you on January the 24th. And you are going to need to file a report for me.

Now, so that you know, I am flying in from South America on the 23rd. So it needs to be here on time. And it needs to be here in a format that I can read it to get ready to talk with you. Okay?

MR. HEINZ: Understood.

THE COURT: Okay. Have a nice holiday.

(Recess.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Debbie Zurn

DEBBIE ZURN
COURT REPORTER

EXHIBIT 30

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI et al., Plaintiffs, v. DONALD J TRUMP et al., Defendants.	CASE NO. C17-1297 MJP ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL DOCUMENTS WITHHELD UNDER THE DELIBERATIVE PROCESS PRIVILEGE; REQUEST NOS. 15, 29, 33, 36, AND 44

THIS MATTER comes before the Court on Plaintiffs' Renewed Motion to Compel Documents Withheld Under the Deliberative Process Privilege (Dkt. No. 364), and upon the Parties' Joint Status Report (Dkt. No. 398). Having reviewed the Motion, the Joint Status Report, the Response (Dkt. No. 380), the Reply (Dkt. No. 385), and all related papers, and having met with the Parties (Dkt. No. 399), the Court GRANTS Plaintiffs' Motion.

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Background

I. Requested Discovery

The Parties are engaged in a protracted discovery battle regarding the Defendants' assertion of the deliberative process privilege over 35,000 responsive documents. (Dkt. No. 364 at 6.) Plaintiffs seek discovery to substantiate their allegations that Defendants' ban on transgender military service (the "Ban") was not animated by independent military judgment but was instead the product of impermissible discriminatory intent. (See Dkt. No. 347, Second Amended Complaint ("SAC"); Dkt. No. 364 at 6.)

Defendants argue the Ban is consistent with the recommendations of a "Panel of Experts" convened by then-Secretary of Defense James Mattis and tasked with "conduct[ing] an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." (See Dkt. No. 226 at 9-10; Dkt. No. 224, Ex. 2 at 19.) Defendants contend that in reaching its conclusions, the Panel considered "input from transgender Service members, commanders of transgender Service members, military medical professionals, and civilian medical professionals with experience in the care and treatment of individuals with gender dysphoria" and its analysis was "informed by the [DoD]'s own data obtained since the new policy began to take effect last year." (Dkt. No. 224, Ex. 1 at 3, Ex. 2 at 20.) The Panel's findings are set forth in a 44-page "Report and Recommendations on Military Service by Transgender Persons," which concludes that service by transgender individuals "would impede readiness, limit deployability, and burden the military with additional costs." (Dkt. No. 224, Ex. 2 at 46.)

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II. Procedural History

The Court previously granted in part and denied in part Plaintiffs' Motion to Compel Discovery Withheld Under the Deliberative Process Privilege. (Dkt. No. 364; Dkt. No. 394) Finding that the Defendants failed to respond to Plaintiffs' Requests for Production in a manner that would allow the Court to assess Defendants' privilege claims as required under Federal Rule of Civil Procedure 26(b)(5)(ii) or conduct the type of "granular analysis" mandated by the Ninth Circuit in Karnoski v. Trump, 926 F.3d 1180, 1206 (9th Cir. 2019), the Court ordered the Defendants to respond to Plaintiffs' first five Requests for Production, as provided by Plaintiffs in order of priority. (Dkt. No. 394.) The Court also adopted the reasoning and conclusions of the court in Doe 2 v. Esper, No. CV 17-1597 (CKK), 2019 WL 4394842, at *7 (D.D.C. Sept. 13, 2019), which found that the deliberative process privilege could "not be used to shield discovery into Defendants' decision-making process and intent when the extent and scope of that decision-making process is a central issue in this lawsuit." Id. at *7. The Doe court also found that the plaintiffs' need for the requested documents outweighed the deliberative process privilege. Id. at *8 (citing In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997)).

The Parties have now filed a Joint Status Report, which includes Plaintiffs' first five Requests for Production ordered by priority: Request Nos. 15, 29, 33, 36, and 44. (Dkt. No. 398.) On December 10, 2019, the Court met with the Parties to discuss the remaining disputes regarding these five Requests; Defendants informed the Court that they will produce responsive documents on December 20, 2019. (Dkt. No. 399.)

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Discussion

I. Legal Standard

The deliberative process privilege protects documents and materials which would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." N.L.R.B., 421 U.S. at 150. For the privilege to apply, a document must be (1) "predecisional," meaning that it was "generated before the adoption of an agency's policy or decision," and (2) "deliberative," meaning that it contains "opinions, recommendations, or advice about agency policies." FTC v. Warner Commc'ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984).

The deliberative process privilege is not absolute and can be overcome where Plaintiffs' "need for the materials and the need for accurate fact-finding override the government's interest in nondisclosure." Id. In making this determination, the Court weighs: "(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." Id. The Ninth Circuit found that the second and third factors—the availability of other evidence and the government's role in the litigation—favor Plaintiffs here. Karnoski, 926 F.3d at 1206.

As with all evidentiary privileges, "the deliberative process privilege is narrowly construed" and Defendants bear the burden of establishing its applicability. Greenpeace v. Nat'l Marine Fisheries Serv., 198 F.R.D. 540, 543 (W.D. Wash. 2000) (citations omitted). In addition to showing that withheld documents are privileged, Defendants must comply with formal procedures necessary to invoke the privilege. Id. "Blanket assertions of the privilege are

insufficient. Rather [Defendants] must provide 'precise and certain' reasons for preserving the confidentiality of designated material." Id.

II. Requests for Production

A. Request No. 29

The Parties primarily dispute two categories of documents responsive to Request for Production No. 29: (1) the work and communications of non-voting members of the Panel and (2) drafts created by officials in the Office of the Under Secretary of Defense, who were tasked with writing the Report and Recommendations after the Panel concluded its work. (Dkt. No. 399.) Request for Production No. 29 seeks:

> All Documents or Communications relating or referring to the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons (the "Report and Recommendations"), including without limitation: (a) all documents received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (b) all Communications to, from, or copying the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (c) all Documents reflecting, containing, or setting forth any information or data received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (d) all Documents relating, reflecting, or referring to matters discussed at any meeting of the Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (e) all drafts of the Report and Recommendations.
>
> (Dkt. No. 398 at 2-3.)

In response to this Request, Defendants have resisted producing responsive documents created by non-voting members of the Panel, arguing that these documents are not relevant because they involve people with a limited role in the Panel's work. (Dkt. No. 398 at 5.) The Court disagrees. In arguing that the Ban is the product of the reasoned, independent judgment of

the Panel, Defendants have described a broad range of sources and input the Panel relied on in its analysis, including new data that previous reviews of military service by transgender individuals did not consider. (Dkt. No. 224, Ex. 1 at 3, Ex. 2 at 20.) The nature and scope of the input from non-voting members of the Panel is relevant to assessing Defendants' claims.

Further, the Court also finds that any chilling effect of disclosure can be "somewhat assuaged" by the actions discussed in Doe:

> For example, the Court can issue a protective order, Defendants can redact certain information, documents can be restricted to attorneys' eyes only, and the Court can conduct *in camera* review over any particularly sensitive documents.

2019 WL 4394842, at *9.

Plaintiffs also seek drafts, communications, and documents relied upon by officials in the Undersecretary of Defense's Office, who were tasked with drafting the Report and Recommendations after the Panel concluded its work. (Dkt. No. 399.) Defendants argue that these documents are not relevant because the officials were solely engaged in editing the Report for grammatical clarity and exposing this process would hinder future frank discussions between such low-level officials and their superiors. (Id.) But drafts solely focused on grammatical changes do not reflect "opinions, recommendations, or advice about agency policies," Warner, 742 F.2d at 1161, and therefore would not be protected by the deliberative process privilege. Alternatively, if officials in the Undersecretary of Defense's Office made substantive changes to the Report or engaged in additional fact-finding as Plaintiffs contend (Dkt. No. 399), documents created by or relied upon by these officials are relevant to assessing whether the Ban was implemented in reliance on the independent recommendations of the Panel. (See Dkt. No. 226 at 9-10; Dkt. No. 224, Ex. 2 at 19.) And while the Court is sensitive to the Defendants' argument

that producing these documents may inhibit future deliberations, these risks can be mitigated with a protective order, as discussed above.

B. Requests for Production No. 15, 33, 36, and 44

There are few disputes regarding the remaining Requests. The Parties agree that Defendants' response to Request for Production No. 29, discussed above, encompasses Request for Production No. 33, which seeks documents reflecting "any policies that were considered as alternatives, modifications, or refinements to the policies set forth in the March 23, 2018, Memorandum." (Dkt. No. 398 at 3.) Defendants have also agreed to respond to Request No. 36, which seeks all "complaints arising from or attributed to open service by transgender service members, accessions by transgender individuals, or the Carter Policy." (Id.) Defendants will either produce the complaints or inform the Plaintiffs that there are no remaining complaints to produce. (Dkt. No. 399.) And finally, Defendants informed the Court that responses to Request Nos. 15 and 44 will be included in their upcoming production on December 20, 2019. (Dkt. No. 399.)

Conclusion

Finding that Defendants' assertion of the deliberative process privilege is overcome by Plaintiffs' need for the materials and the need for accurate fact-finding, the Court ORDERS the Defendants to produce:

1) All documents responsive to Request for Production No. 29, including the names, communications, and deliberative documents of non-voting members of the Panel; and
2) Drafts, communications, and documents created or relied upon by officials in the Undersecretary of Defense's Office in drafting the Report and Recommendations.

To mitigate any potential chilling effect upon the future deliberations of government actors, these documents shall be produced for attorneys' eyes only. On February 3, 2020 the Parties will meet with the Court to assess Defendants' privilege claims regarding Plaintiffs' next five prioritized Requests for production.

The clerk is ordered to provide copies of this order to all counsel.

Dated December 18, 2019.

Marsha J. Pechman
United States District Judge

EXHIBIT 31

No. 20-70365

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re DONALD J. TRUMP, *et al.*,
Petitioners,

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES OF AMERICA; MARK T. ESPER, in his official capacity as Secretary of Defense; U.S. DEPARTMENT OF DEFENSE; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security,

Petitioners–Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,

Respondent,

RYAN KARNOSKI; CATHRINE SCHMID; D.L.; LAURA GARZA; HUMAN RIGHTS CAMPAIGN; GENDER JUSTICE LEAGUE; LINDSEY MULLER; TERECE LEWIS; PHILLIP STEPHENS; MEGAN WINTERS; JANE DOE; CONNER CALLAHAN; AMERICAN MILITARY PARTNER ASSOCIATION;

Real-Parties-in-Interest–Plaintiffs,

STATE OF WASHINGTON,

Real-Party-in-Interest–Intervenor-Plaintiff.

THE DISTRICT COURT'S REQUESTED RESPONSE TO THE PETITION FOR A WRIT OF MANDAMUS

INTRODUCTION

At the invitation of the Court of Appeals, the Court takes this opportunity to respond to the Defendants' Petition for a Writ of Mandamus. Having reviewed the Petition, the Motion for a Stay, Plaintiffs' Answer to the Petition, and Plaintiffs' Response to the Motion for a Stay, the Court finds it can best add to the record by describing the discovery review process the Court has conducted since this matter was remanded in June 2019. The Court will therefore address the discovery dispute on remand, the various processes considered by the Parties and the Court for reviewing Defendants' privilege assertions, the review process undertaken thus far, ongoing issues with the Parties' positions, and will conclude with a request for guidance from the Circuit. The Court will not address the substance of the Parties' arguments except as necessary to describe the status of the Parties' dispute.

BACKGROUND

A. Relevant Facts

On July 27, 2018, this Court granted Plaintiffs' previous Motion to Compel Discovery Withheld Under the Deliberative Process Privilege. (Dkt. Nos. 245, 299.) In reaching its conclusion, the Court found that Plaintiffs' interest in the documents prevailed under the balancing test set forth in FTC v. Warner Commc'ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984), which weighs: "(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." (Dkt. No. 299 at 6.)

On June 14, 2019 the Ninth Circuit issued a writ of mandamus, vacating this Court's discovery Order. Karnoski v. Trump, 926 F.3d 1180 (9th Cir. 2019). The Circuit approved of the Court's reliance on Warner and found that the second and third Warner factors—the

availability of other evidence and the government's role in the litigation—favor Plaintiffs. Id. at 1206. Regarding the first and fourth Warner factors, however, the Circuit concluded that "the current record is insufficient to establish relevance" and the fourth factor in particular "deserves careful consideration, because the military's interest in full and frank communication about policymaking raises serious—although not insurmountable—national defense interests." Id. The Circuit suggested that on remand this Court should "consider classes of documents separately when appropriate" and, "[i]f Defendants persuasively argue that a more granular analysis would be proper, [the Court] should undertake it." Id.

Following the Circuit's decision, on July 17, 2019 the Parties held a telephonic conference regarding the documents withheld under the deliberative process privilege. (Dkt. No. 365, ¶ 9.) During the conference, Plaintiffs noted that Defendants had asserted the privilege in response to all 68 of Plaintiffs' Requests, including Requests seeking purely factual, statistical, or other non-deliberative material. (Id., ¶¶ 10-11.) Plaintiffs therefore asked Defendants to withdraw unnecessary assertions of the privilege so the Parties could begin to assess the scope of Defendants' genuine privilege claims and the contours of the Parties' dispute. (Id.)

In response, Defendants explained that they had completed their search and review before receiving the final 33 of Plaintiffs' 68 Requests; Defendants had searched lists of terms and custodians, assembled a set of documents from those lists, and then reviewed their collection for privilege without regard to Plaintiffs' Requests. (Dkt. No. 365, ¶¶ 2-4, 15; Ex. 56 at 3; Dkt. No. 381, Ex. 1, ¶ 5.) Defendants then organized their documents "as they would appear in the ordinary course of business—by DoD or Military Service component and custodian." (Dkt. No. 371, Ex. 1, ¶ 10.) The Court would later rule that this method was insufficient to meet the requirements of the Federal Rules of Civil Procedure. Fed.R.Civ.P. 26(b)(5)(A)(ii) (requiring a

party to make its privilege assertions in a manner that will enable other parties to assess the claim); see also Fed.R.Civ.P. 34(b)(2)(C).

In response to Plaintiffs' request that Defendants withdraw unnecessary assertions of the privilege, Defendants explained that they analyzed the privilege on a document-by-document basis, and not in response to any Request from Plaintiffs. (Dkt. No. 365, Ex. 56 at 2.) Defendants therefore would not withdraw their privilege assertions as to any of the 68 Requests. (Id.) Defendants also would not run additional search terms proposed by Plaintiffs or search additional custodians. (Dkt. No. 397 at 17:20-19:4.)

It was also clear that the Parties have a fundamental disagreement regarding who bears the burden of establishing whether the privilege applies. Defendants take the position that Plaintiffs have the burden of establishing that they are entitled to specific withheld documents in Defendants' collection (Dkt. No. 402 at 9:18-22; Dkt. No. 397 at 44:21-22, 48:22-49:20), and if Defendants' original collection is inadequate, Plaintiffs must move to compel production of documents outside of Defendants' collection. (Dkt. No. 412 at 47:17-21.) Plaintiffs disagree: "That's not how discovery works. You don't let the defendant pick a few documents . . . and shift the burden to the plaintiffs to try to use those to get more documents." (Dkt. No. 397 at 52:10-13.)

Unable to resolve these disputes, on August 22, 2019, Plaintiffs filed a renewed Motion to Compel Documents Withheld Under the Deliberative Process Privilege. (Dkt. No. 364.)

B. Review Process

In their renewed Motion, Plaintiffs proposed that the Court evaluate Defendants' privilege claims through the lens of nine broad categories of documents and devoted their Motion to arguments supporting the relevance of each category. (Dkt. No. 364 at 9-12.) In

opposition, Defendants argued that the categories were "far too broadly defined for the Court to properly apply the Warner balancing test" (Dkt. No. 380 at 7) and instead suggested that the Plaintiffs choose specific custodians from the list Defendants created and determine "why [the Plaintiffs] think there's a deficiency in what we already gave them." (Dkt. No. 397 at 34:24-35:2.) Faced with the task of evaluating the 35,000 to 50,000 documents over which the Defendants asserted the deliberative process privilege (Dkt. No. 364 at 6), the Court held oral argument with the goal of crafting a process for evaluating Defendants' privilege claims in keeping with the Circuit Court's instruction to engage in a "granular" process where appropriate. Karnoski, 926 F.3d at 1206; (Dkt. No. 393.)

1. Processes Considered

During oral argument on Plaintiffs' Motion, the Parties and the Court considered various options for reviewing Defendants' privilege assertions. The Court began by asking whether it was possible to review Defendants' assertions on a document-by-document basis as the court did with the two memoranda in Warner, 742 F.2d at 1161. The Parties acknowledged the impossibility of reviewing 35,000 documents for privilege in addition to privilege logs so voluminous they could not be filed on the docket. (Dkt. No. 397 at 19:7-12; 41:4-5; Dkt. No. 366.)

Plaintiffs argued in support of evaluating the documents pursuant to the nine broad categories proposed in their Motion. (Dkt. No. 397 at 5:18-6:13; Dkt. No. 364 at 9-12.) When the Court expressed skepticism that the categories allowed for precise review, Plaintiffs proposed an alternative process where the Plaintiffs would group Requests by narrower topics and then begin by explaining (1) why the privilege does not apply to these topics and (2) if the privilege does apply, why the privilege is overcome. (Dkt. No. 397 at 26:24-27:6.) Plaintiffs also agreed

to limit the inquiry to those documents withheld by the DoD, leaving aside documents withheld by the President. (Id. at 28:4-12.) Defendants argued that Plaintiffs' proposal was not reasonable because it would not require Plaintiffs to identify documents by custodian, timeframe, and category. (Id. at 40:11-13.)

In turn, Defendants argued in favor of their proposal that the Plaintiffs review the Panel deliberations that were already produced to determine "what else they reveal." (Id. at 37:9-12.) If the documents show that someone at a Panel meeting made a comment demonstrating animus, Defendants proposed that Plaintiffs could then request the deliberative documents from that person and if the Government declined to produce the documents, then and only then could the Plaintiffs bring the documents to the Court for an *in camera* review. (Id. at 37:20-38:2; 39:23-40:5.) Plaintiffs argued that the Defendants' proposal impermissibly shifted the burden to the Plaintiffs to argue for more documents based on the few hand-picked documents Defendants decided to produce. (Id. at 52:2-55:10.) Plaintiffs also noted that animus is unlikely to be apparent "in the sanitized documents that the [G]overnment will choose to give us that then we have to use as a basis to ask for more documents." (Id. at 53:19-21.)

The Court then proposed another alternative, called "smoke-and-fire," where each side chooses a selection of documents from the privilege logs for the Court to evaluate, and if the Court determines the privilege was asserted correctly, Plaintiffs' Motion to Compel documents from that Request would be denied. (Id. at 23:18-24:11.) Plaintiffs argued this method would give Defendants an advantage because it is premised on the assumption that the privilege applies at all. (Id. at 26:13-17.)

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2. The Selected Process

After weighing each of these approaches and the Parties' briefing, the Court concluded that Defendants' privilege assertions would be evaluated through individual Requests for Production, setting a schedule for review where every six to eight weeks the Parties would have two hours to present arguments on five Requests, as prioritized by Plaintiffs. (Dkt. No. 394 at 6-7.)

This process was based on the Court's findings that the volume of withheld documents prevented document-by-document review and the nine categories Plaintiffs proposed for organizing the Court's review were, as Defendants suggested, "far too broadly defined for the Court to properly apply the Warner balancing test." (Dkt. No. 380 at 7; Dkt. No. 394 at 5.) The Court also found that Defendants' method of production—assembling a set of documents as though kept in the ordinary course of business—was insufficient, as it did not allow Plaintiffs or the Court to assess Defendants' privilege claims as required by Federal Rule of Civil Procedure 26(b)(5)(A)(ii) or to conduct the type of "granular analysis" suggested by the Ninth Circuit. (Dkt. No. 394 at 6.) In this case, Defendants' method of collecting and producing documents meant the Court could neither review Defendants' privilege assertions through individual documents nor through individual Requests for Production.

The Court therefore ordered the Defendants to begin responding to individual Requests, consulting with the Plaintiffs to apply additional search terms or search additional custodians. Dkt. No. 394 at 6; Dkt. No. 397 at 60:4-11.) Plaintiffs were ordered to provide the Defendants with a list of Requests, sorted by order of priority. (Dkt. No. 394 at 6.) The Parties were ordered to return three weeks later to begin reviewing the first five prioritized Requests. (Dkt. No. 394 at 6-7.)

3. December Hearing

The next hearing was held on December 10, 2019. (Dkt. No. 399.) The Parties submitted a Status Report ahead of the hearing in which they stated their positions and arguments in regard to each Request. (Dkt. No. 398.) During the hearing, the Court reviewed Plaintiffs' first five prioritized Requests, (Nos. 15, 29, 33, 36, and 44), and it quickly became apparent that three of these Requests were no longer contested. (Dkt. No. 402 at 36:6-25, 39:4-19, 39:25-40:10.) Defendants also asserted that their upcoming production would include their response to a fourth Request, Request No. 15, which seeks "[a]ll documents or communications relating to Secretary of Defense Ash Carter's Directive Type Memo 16-005." (Dkt. No. 398 at 3; Dkt. No. 402 at 34:19-20.) In reliance on the Defendants' statements, the Court advised the Plaintiffs to review the Defendants' upcoming production and to raise any remaining issues concerning Request No. 15 at the next status conference. (Dkt. No. 402 at 35:10-13.) Defendants would eventually produce only 12 documents responsive to Request No. 15, while continuing to withhold 15,000. (Dkt. No. 412 at 32:3-4, 38:4-6.)

The remainder of the December hearing involved arguments concerning Request for Production No. 29, which seeks "Documents or Communications relating or referring to the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons." (Dkt. No. 398 at 2-3.) For more than an hour the Parties contested two categories of documents responsive to Request for Production No. 29: (1) the data and communications of any group within the DoD that reviewed or considered transgender issues; and (2) drafts created by officials in the Office of the Undersecretary of Defense, who were tasked with writing the Report and Recommendations after the Panel concluded its work. (Dkt. No. 402 at 4:3-33:15.) Throughout the hearing, the Court urged Defendants to support their

privilege assertions with greater detail when they failed to make category or custodian-specific arguments against producing the documents:

> [I]f [Plaintiffs] don't know what you've got, it's your obligation to lay out what it is. So I can see, yes, those people are important and those people aren't. You need to lay that out for me, if not for them. And I'm wondering why that hasn't been done.

(Dkt. No. 402 at 14:1-14:4; see also id. at 8:11-13.)

After hearing from the Parties, the Court ordered Defendants to produce "[a]ll documents responsive to Request for Production No. 29," which would necessarily include "non-voting members of the Panel" and documents explicitly described by the Court during the hearing: "the working group names, who's on the working group, the dialogue in e-mail, or any other communication within those working groups, and the data that they produced." (Dkt. No. 401 at 7; Dkt. No. 402 at 24:8-10.) The Court also ordered Defendants to produce "[d]rafts, communications, and documents created or relied upon by officials in the Undersecretary of Defense's Office in drafting the Report and Recommendations." (Dkt. No. 401 at 7; Dkt. No. 402 at 32:16-19.) The Court further ordered that these documents be produced for attorneys' eyes only. (Dkt. No. 401 at 8.)

4. Motion for Clarification

Five weeks later, the Defendants filed a Motion for Clarification of the Court's December Order regarding Request for Production No. 29, asking the Court to explain whether its Order compels disclosure only of documents pertaining to "non-voting members of the Panel" or all documents "relating or referring" to the Department of Defense's (DoD's) Report and Recommendation. (Dkt. No. 405 at 3.) Defendants did not move to clarify the Court's ruling requiring Defendants to produce drafts created by officials in the Undersecretary of Defense's Office, but nevertheless argued for the first time that Plaintiffs could obtain the same information

through Defendants' amended Interrogatory responses so Defendants should not be required to produce those documents. (Id. at 9.) Defendants also moved for a stay of compliance as to both parts of the Court's ruling with respect to Request No. 29. (Id. at 8-11.)

The Court granted Defendants' Motion for Clarification, explaining that its Order required Defendants to produce all documents responsive to Request No. 29, including the dialogue in e-mail or any other communication within those working groups, the data that they produced, and responsive communications among members of the services. (Dkt. No. 413 at 4.) The Court denied Defendants' Motion for a Stay, noting that this dispute has been pending for nearly two years and to the extent Defendants simply disagreed with the second part of the Court's Order, they had missed their deadline for reconsideration under the Local Rules. (Dkt. No. 413 at 5 (citing LCR 7(h).)

5. February Hearing

The Court held its next hearing on February 3, 2020. (Dkt. Nos. 410, 412.) The Court learned through the Parties' Status Report submitted ahead of the hearing and during the hearing itself that Defendants had not complied with several of the Court's orders. (Dkt. No. 408, 412.) In addition to Defendants' ongoing refusal to produce documents responsive to Request No. 29, as ordered by the Court in December, it also became clear that Defendants had produced only 12 documents responsive to Request No. 15—while withholding 15,000—although Defendants had asserted in December that their upcoming production would answer this Request. (Dkt. No. 402 at 34:2-11, 34:15-16, 34:19-21.) Plaintiffs also asserted that the Defendants' response to several of the Requests elides their obligations under the Court's previous orders:

> Defendants are not aware of any other complaints or documents reflecting, referring, or relating to such complaints within Defendants' collection that Defendants are withholding on the basis of the deliberative process privilege.

(See, e.g., Dkt. No. 408 at 18, 20, 21.) Plaintiffs contend that although Defendants were ordered to respond to individual Requests, search additional custodians, and use additional search terms suggested by Plaintiffs, the "collection" Defendants refer to is Defendants' original set of documents, collected before Plaintiffs served 33 of their 68 Requests. (Dkt. No. 394 at 6; Dkt. No. 397 at17:20-19:4; Dkt. No. 412 at 60:17-20 (as explained by the Court: "In order to be responsive to the requests, [Defendants are] going to have to look at not just what they gathered, but where they might find documents that might be responsive.").) A week after the February hearing, Defendants filed their Petition for a Writ of Mandamus. The Court had not yet issued its order on the Requests discussed during the hearing, including Request No. 15, which is at issue in the Petition.

6. Ongoing Problems

An orderly and productive discovery process depends on the Parties' adherence to the Court's orders, maintaining clear and consistent positions, and the Court's ability to count on the the Parties' representations. Throughout this process, Defendants have failed to comply with Court orders, changed their arguments, retracted previous statements, and have often been unable to respond to questions about their own documents.

As an example, at the first hearing on Plaintiffs' Motion to Compel in November, the Court found that Defendants' production of documents as kept in the ordinary course of business was inadequate and ordered Defendants to respond to individual Requests for Production. (Dkt. No. 397 at 60:4-11; see also Dkt. No. 394 at 5-7.) Three months later, Defendants informed the Court that they were not required to respond to individual Requests because they "reviewed and produced documents as they were kept in the ordinary course of business." (Dkt. No. 408 at 23.)

As an example of Defendants' changing arguments, when arguing against producing drafts of the Report and Recommendations in December, Defendants explained:

> [The] [d]rafts aren't deliberative process. [These documents are] little subparts of the decision, tweaking how you're going to do a particular sentence or how you're going to write a particular paragraph . . . [and] there's not a lot of relevance to that, too, if they're drafts.

(Dkt. No. 402 at 27:24-25, 30:18-19.) But in their Motion for Clarification the following month, Defendants disputed their own representation, informing the Court that "Defendants did not 'argue that these documents are not relevant because the officials were solely engaged in editing the Report for grammatical clarity.' Indeed, many edits were focused on the substance of the Report, and such edits clearly reflect opinions, recommendations, and advice." (Dkt. No. 405 at 11 n.4 (citation omitted).) Defendants then offered an entirely new argument—raised for the first time more than a month after the Court's ruling—that Plaintiffs should obtain the information contained in the drafts through other, more limited avenues of discovery, namely Defendants' amended Interrogatory responses. (Dkt. No. 405 at 9-11.)

Perhaps most representative of Defendants' inconsistent positions is the assertion in their Petition that the Court concluded "the privilege has been overcome as to documents from the highest levels of the Department" including "Secretary Mattis's handwritten comments on a draft Report [and] also his personal notes on a draft letter to the President." Pet. 4, 25. In nearly six hours of oral argument and in dozens of pages of briefing, Defendants never raised this issue or described these documents to the Court. (See Dkt. Nos. 370, 397, 398, 402, 408, 412.) Instead, their prior position was that these documents were created by "four or five people who are pretty far down the line . . . taking direction of how to write the report." (Dkt. No. 402 at 30:14-19.)

A final factor in the efficient administration of this discovery process requires the Parties to have a thorough understanding of the evidence. Defendants have been unable at times to

respond to the Court's basic inquiries about the facts of their case. For example, during oral argument, Defendants could not answer simple questions about the logistics of the Panel's decision-making process, such as how many working groups were convened in support of the Panel's deliberations or the number of meetings held by the Panel. (Dkt. No. 402 at 22:13-17, 6:15-18; Dkt. No. 435, Ex. 17 at 2.)

These problems have created delays that have derailed the Court's case schedule in this matter.

C. Request for Guidance

The Court conducts this lengthy and detailed ongoing review in furtherance of the Circuit's guidance in Karnoski v. Trump, 926 F.3d 1180. The Court has allowed the parties dozens of pages of briefing and nearly six hours of oral argument with the goal of carefully evaluating Defendants' privilege assertions in response to Plaintiffs' first ten Requests for Production. (See Dkt. Nos. 397, 398, 402, 408, 412.) Nevertheless, the discovery review process has been undermined by the issues described above. The Court therefore concludes with a request for guidance from the Circuit about the nature of the review process the Court should undertake in light of the Court's obligation to conduct a fair evaluation of the weighty constitutional issues at stake. In particular, the Court requests more direction as to how a "granular" review should be conducted in this matter.

The clerk is ordered to provide copies of this order to all counsel.

Dated March 5, 2020.

Marsha J. Pechman
United States District Judge

EXHIBIT 32

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, JANE DOE 2, JANE DOE 3, JANE DOE 4, JANE DOE 5, JOHN DOE 1, REGAN V. KIBBY, and DYLAN KOHERE, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States; et al., Defendants.	Civil Action No. 17-cv-1597 (CKK)

Complete caption on Page 2.

- - -

Thursday, February 1, 2018

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Deposition of MARTIE SOPER, taken at the offices of Foley Hoag LLP, 1717 K Street NW, Washington, D.C., beginning at 9:13 a.m., before Nancy J. Martin, a Registered Merit Reporter, Certified Shorthand Reporter.

identification.)

BY MS. LAPORTE:

Q. All right. Ms. Soper, can you identify Exhibit 5?

A. Yes, ma'am. This is the "Directive-type Memorandum 16-005, 'Military Service of Transgender Service Members.'"

Q. And this, I think, is what you referred to earlier in your testimony as the announcement by Secretary Carter?

A. This is the product result of his announcement in June of 2015 for the development policy. So this is an end product.

Q. Okay. And so this end product, Exhibit 5, is the announcement of the Open Service policy?

A. Correct.

Q. Okay. And was the working group pretty much finished with its work by the time this came out, or were you still trying to get things done?

A. We had submitted our documents to ODS on the draft policy that we felt -- again, this establishes what the services will do, and it talks about accessions, the personnel policy about this. This is not the policy that we developed. The DoDI was a policy we developed.

So this is a directive-type memorandum stating to the services, "Go forth and do and develop your additional policies." So this is not the product of our working group.

Q. Okay. Was any -- do you know what the process was by which the product of your working group affected, for example, the timing of this announcement?

MR. PARKER: I'm going to object to the extent it calls for deliberative material that's protected by the deliberative process privilege.

MS. LAPORTE: Okay. Are you instructing her not to answer that question?

MR. PARKER: I'm instructing her not to answer to the extent you are asking about recommendations that came to the group from the deliberative process that was undertaken by the panel in making recommendations regarding both the DTM and the DoDI that have been discussed in the deposition.

BY MS. LAPORTE:

Q. So for the moment all I'm trying to understand is how procedurally the work of the working group fed into this announcement that is Exhibit 5. In other words, I'm not trying to understand all the details of what you recommended. I'm just trying to

understand whether Exhibit 5 reflects the Secretary of Defense taking into account recommendations of the working group or whether these were not -- whether your recommendations were not feeding into the development of this announcement.

MR. PARKER: Objection. To the extent you're asking the witness whether this reflects the work product or the recommendations of the working group, the answer to that question would be protected by the deliberative process privilege.

MS. LAPORTE: And that's not what I'm asking. I'm just trying to understand the work flow here.

Q. So can you explain that in terms of how the work that the working group did fed into Exhibit 5 without getting into the detail of the policies that you recommended?

A. I don't know the work flow, ma'am. I don't know the part that we submitted and how it got approved by the Secretary of Defense.

Q. Were you aware that Secretary Carter was going to make that announcement on June 30 before it happened?

A. No, ma'am.

Q. Okay. What -- so you mentioned that you were involved in a working group relating to accessions. I

think you referred to it specifically as an accessions group within the working group. Do you recall that?

A. It's the accessions medical standards working group, yes, ma'am.

Q. Yes. Okay. And did that actually relate to the specifics of the accessions policy?

MR. PARKER: I'm going to object. The term "relate to" is a little vague. Can you specify so that I can decide whether there's a privilege objection? What do you mean by "relate to"?

BY MS. LAPORTE:

Q. When you were on the accessions medical standards working group, were you working on the standards or procedures that would be required in order for transgender people to accede to the military? And you can answer that "yes" or "no."

A. Yes.

Q. What process did you follow to determine what kind of standards and practices would be needed to permit transgender applicants to accede to the military?

MR. PARKER: I'm going to object to the extent this calls for information related to the types of discussions or the substantive recommendations that would come out of the panel or the subcommittee that

identification.)

BY MS. LAPORTE:

Q. Ms. Soper, you should have Exhibit 13 before you now, which has a number at the bottom reading 1705250200. Do you see that?

A. Yes, ma'am.

Q. Can you identify this document?

A. This is a memorandum for secretaries of the military departments, chiefs of the military department. The subject is "Readiness of Military Department to Implement Accession of Transgender Applicants into Military Service."

Q. Okay. And who's the person who issued this memo?

A. I can't read the writing, ma'am.

Q. Mr. Work?

A. Okay.

Q. So is that the effort that was in place to try to determine the readiness to begin accessing transgender applicants into military service on July 1?

A. Yes, ma'am.

Q. And the meetings that you recall doing some support work for, did they follow the issuance of this memo?

(The witness reviewed Exhibit 13.)

THE WITNESS: Yes, ma'am.

BY MS. LAPORTE:

Q. And this memo is dated May 8, 2017?

A. Correct.

Q. Okay. In the -- so during the discussions that you've just referenced, the high-level discussions that you supported relating to accessions, what kind of information and support did you supply?

MR. PARKER: I'm going to object just to the extent that the question could call for you to share recommendations that you made regarding information.

To the extent you're asking about factual information that was provided to the panel, I don't think that is -- implicates the privilege. But to the extent that question could go to her recommendations to the panel regarding specific subjects, that would be protected by the deliberative process privilege.

I would direct you not to answer that portion.

BY MS. LAPORTE:

Q. For the moment, I'm really just asking a work flow question.

What kinds of support did you provide?

A. Again, there were several meetings that

occurred during this time with Mr. Work's signature, and I'm trying to recall the meetings. One of them was a senior-level meeting with the service secretaries and chiefs, with Mr. Work -- Secretary Work and the vice chairman of the joint chiefs of staff where the services expressed concern over the lack of knowledge and understanding and policy gaps for transgender -- for the service of transgender service members.

The services submitted many questions to OSD to respond to the questions, and these questions were presented to Secretary Work, and the answers were provided by OSD, and the outcome revealed the fact that we need to do some more work to answer questions for the services.

So I was a participant in some -- in that specific meeting.

Q. And did you help provide answers to the questions?

A. No. No, ma'am. OSD provided the answers to all the questions for the working group that I'm referencing.

Q. Okay. So this is a working group that relates to accessions policy following the May 8 request from Mr. Work?

were referring?

A. It's in reference to his position, and with the redacted information, I don't recall.

Q. So just to return to the question of what is the grace period, can you explain what that means?

A. No, ma'am, I can't.

Q. Is that because you don't know?

A. It was never really defined.

Q. Did you understand the concept when you were reading about it?

A. I did.

Q. And what was it?

MR. PARKER: Objection to the extent, again, that you're asking about a recommendation, even if it was in its earliest stages, that related to a final -- or could have related to a recommendation related to a final policy.

MS. LAPORTE: I just asked if she understood the concept and what it was. So I'm not asking about a recommendation. I'm just asking for what a particular concept was.

MR. PARKER: Okay. I don't have the question in front of me. I thought you asked her if she understood it. She said, "yes," and then you asked her for the substantive content of what a grace period

meant.

MS. LAPORTE: Yes. That's right. I'm just asking what it is, not who recommended it, whether it was recommended or anything else like that. I just want to know what it means.

MR. PARKER: To the extent it's a recommendation, I'll object on deliberative process, privileged grounds. If it's not a recommendation that she made regarding a policy, then she's free to answer the question.

I won't instruct her not to answer.

THE WITNESS: It was a topic discussed as a part of recommendation for policy.

BY MS. LAPORTE:

Q. A recommendation by you?

A. No, ma'am.

(Deposition Exhibit 34 was marked for identification.)

BY MS. LAPORTE:

Q. Ms. Soper, you should have before you Exhibit 34, which should be USDOE8711 through -8729. Does your exhibit match that?

A. Yes, ma'am.

Q. Okay. Great.

This document is entitled "Data Extracts,

"Key information used by the Panel to make recommendations." Do you see that?

A. Yes, ma'am.

Q. Do you know who provided this data?

A. No, ma'am.

Q. Did you help put it together?

A. No, ma'am.

Q. Have you ever seen this document before?

A. I'd have to go through and look at it all. Yes, ma'am.

Q. You have seen it before?

A. Yes, ma'am.

Q. Okay. But you had no involvement in putting it together?

A. No, ma'am.

Q. Did you supply any of the data?

A. No, ma'am.

Q. Do you know who did put it together?

A. Yes, ma'am.

Q. Who?

A. Dr. Adirim and Dr. Findley.

Q. So is this one of the deliverables that we talked about earlier?

A. This is -- yes. This was the deliverable they identified in the study cohort and data

EXHIBIT 33

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 1, JANE DOE 2, JANE DOE 3, JANE DOE 4, JANE DOE 5, JOHN DOE 1, REGAN V. KIBBY, and DYLAN KOHERE, Plaintiffs, v. DONALD J. TRUMP, in his official capacity as President of the United States; et al., Defendants.	) Civil Action) No. 17-cv-1597 (CKK)

Complete caption on Page 2.

Tuesday, April 17, 2018

Deposition of COL. MARY KRUEGER, M.D., taken at the offices of Foley Hoag LLP, 1717 K Street NW, Washington, D.C., beginning at 9:11 a.m., before Nancy J. Martin, a Registered Merit Reporter, Certified Shorthand Reporter.

A. The OSD lead of the group may have with all of our input.

Q. Do you know what form the deliverables took?

A. Yeah, I don't know what his final submission would have -- what form his final submission would have been in. So during -- actually, so that was in 2017. So I was there for most of it. I didn't attend all of the meetings, and I think in some of the last meetings I may have missed some. So that may be where I have a gap.

Q. So what was your understanding about how what that working group was doing was going to feed into setting or revising a policy?

A. It was giving a working level -- again, staff processes. So we are not the decision makers, but we are the staff workers to take information and translate that as best we can so that the decision makers would have information.

So my understanding is that we would talk from our service perspective on these different issues and bring up the service considerations and equities.

Q. When you brought up all those things and assembled that information, how, if at all, did you have an understanding that it would be used by people who were higher up in the process?

A. I don't know what their final use would be. I think it would be an additional data point for them.

Q. Okay. So let me just -- do you know what group at OSD this was even going to after --

A. So I believe it was going to P&R. So that would be personnel and readiness. Colonel Wellman works in accessions policy. They also call it "AP," and I believe that falls under USD P&R, personnel and readiness.

Q. And what did you understand their role in the process to be?

A. So my understanding is that personnel policy at the OSD level falls under them.

Q. Right. So how did it relate to the panel of experts' process, if at all?

A. I don't know. I don't know.

Q. What were the issues that that group that you were attending, the working group, considered?

MS. ENLOW: So I'm just going to object to the extent that your answer would involve any kind of recommendations or any of the policies or things like that.

Factual information you can answer, but nothing deliberative.

THE WITNESS: Okay. All right.

So I'd say that the general questions we were asked to consider would be questions of -- because this was after -- you're talking about after the July tweet. So questions of grandfathering, questions of continued service, questions of stability, the time line for stability came up. Those are the main ones that I recall.

BY MS. LAPORTE:

Q. Okay. And so what do you mean by "grandfathering"?

A. So grandfathering, so those persons who had identified as transgender subsequent to the Carter policy and were currently serving, how would -- what would the consideration -- what would the policy look like for those individuals if the policy changed subsequently.

So would the policy that applied to them be any different than individuals who accessed subsequent to any new policy.

Q. Were there any other aspects of grandfathering that your group considered?

MS. ENLOW: Again, only factual -- I'm just objecting to the extent it calls for facts that were considered by the group.

THE WITNESS: Yeah, I think it was just that.

A. Right.

Q. -- Exhibit 48.

So that one is "Medical data and information from the Transgender Care IPT to inform findings and recommendations regarding surgical procedures that should not be resourced from DoD or DHS funding." Do you see that?

A. I do see it.

Q. Did you have any role in performing that task?

A. So that is from the transgender IPT. So that would be pulled from their TRICARE data, I believe. So that would be an HA level versus a service level.

Q. Did you have any role in helping to support decisions about what surgeries should and should not be allowed?

A. No. That's HA level.

Q. Were you asked to provide any information or support for people who were making those decisions?

A. No, I don't -- I wouldn't characterize it as that. Again, I believe all those decisions were made internal to HA. You know, I think, if anything, during the IPT it usually came down to whether it was deemed medically necessary.

Q. Were you involved in any meetings where that

topic was discussed?

A. Yes. I'm sure it was discussed during the IPT.

Q. When you were involved in those discussions, were there any particular sort of -- was there a menu of options that was provided in terms of what kinds of care might be covered in the future?

MS. ENLOW: I'm going to object to that as calling for deliberative process.

MS. LAPORTE: Well, I'll say I'm just asking for a "yes" or "no." So I'm not asking for the content of any deliberation.

MS. ENLOW: To the extent "yes" or "no" is --

THE WITNESS: Yes.

BY MS. LAPORTE:

Q. Do you recall when the meeting where you were presented with possible options occurred?

A. I don't.

Q. Do you remember exactly what it was a meeting of?

A. I'd say it was one of the IPT meetings.

Q. Okay. As I said, I'm going to come back to these later, but just to keep going through the Kurta memo here, there is a Task (2), which has the header here "Retention & Non-Deployability Working Group."

Do you see that?

A. Right.

Q. Did you have any role in that?

A. No. There's another section in NPQ that has been supporting that work group.

Q. Okay. And then the last one is "Transgender Personnel Policy Working Group." Do you see that?

A. Yes.

Q. And is that the group that we've been talking about?

A. Yeah, the current level working group. Uh-huh.

Q. Okay. And so I assume that you did work -- the task that Mr. Kurta is referencing here is something you did work on during that period?

A. Yes. Uh-huh.

Q. Okay. So going back to the -- to these different tasks, were there any deliverables relating to the accessions task that you worked on?

A. I don't recall a deliverable required of me for that task.

Q. Do you recall a deliverable of any of the groups that you were working with on it?

A. Again, the group that was meeting prior to the tweet, that was an accessions policy review

gender marker change, they got to know which commanders, you know, had reached out a couple times or what have you. So the SCCC also made available and reached out to those folks who might consider participating.

Q. So the way that the commanders were selected were because they had worked with the SCCC?

A. They were known somehow to the senior leadership. And, again, I don't know how my fellow SCCC members might have, but we put forth teams of folks who may be interested and available.

Q. So just a question about the SCCC. Was there a requirement that people report on what was happening with their transgender service members to the SCCC, or was that a resource only for people who needed it?

A. So the requirements for the SCCC is that so medical treatment plans need to be submitted to the SCCC for review, mainly, again, to provide that level of expertise because you don't at every level have a legal person, a personnel person, and a medical person that has had any experience with that, with the transgender policy.

We don't have authority, but it is advisory. But as part of the policy, medical treatment plans must be submitted to the SCCC. Same with gender

marker change. Again, mainly as a support to make sure that the policy is being followed.

Q. So I'm pretty sure I know what your answer is going to be to this, but do you have any knowledge or information about a briefing of the Secretary of Defense by the panel of experts?

MS. ENLOW: I'm just going to object on that for deliberative.

If you have knowledge, you can say, "yes" or "no."

THE WITNESS: So I don't know if it was the whole panel of experts. I mean with most things there's a time line. So there's a mark on the time line where the SECDEF was going to receive a brief on it. I don't know who participated in that brief.

BY MS. LAPORTE:

Q. Did you hear any feedback about that brief, "yes" or "no"?

A. No.

Q. Do you know when it occurred?

A. No.

MS. LAPORTE: All right. I'm going to show you a document previously marked as Exhibit 30.

THE WITNESS: Okay.

(Previously marked Exhibit 30 was handed to

the witness.)
BY MS. LAPORTE:
Q. Do you recognize the second E-mail in the chain, the one that is -- that begins halfway down the front page?
(The witness reviewed Exhibit 30.)
THE WITNESS: Yes. This is from Aaron Wellman. I see I'm on it. I'm sure I received it. Yep. So this is the -- from the OSD Transgender Personnel Policy Working Group. Got it. So yes.
BY MS. LAPORTE:
Q. Okay. So this is the -- this is the group that you testified about earlier that was working on that last issue that Mr. Kurta identified in his memo; correct?
A. Uh-huh. Yep. That was the reviewing current policies and practices pertaining to transgender individuals. So this looks like the implementation of that piece of it (indicating).
Q. Okay. And so Colonel Wellman is saying that, you know, the group is supposed to meet and revise the current DoDI 1300.28. Do you see that?
A. Yes.
Q. And so did you attend this first meeting on October 2 that, you know, related to this task?

putting this here was to understand what the guidance was from above.

Q. So in other words, it sets out the constraints within which you can figure out what the policy is going to be?

A. That's usually how it works. Certainly, as a staff officer you come back and you'd see something that the senior would need to consider. As a staff officer, one of our duties is to bring that up as well. But good senior leaders give guidance ahead to start -- to kind of give officers a framework to work in.

Q. Okay. So just to get back to the question, though, did you understand this as setting out the constraints within which the group could figure out how to implement that policy that's set forth?

A. I don't know if "constraint" is the word I would use. I would use "guidance."

Q. Okay. So did you understand this guidance as guiding the development of the future policy for transgender people in the military?

A. Yeah. I mean this was the guidance given to our group and the task. So, yes, we would have to take that into consideration.

Q. What were the working assumptions that you

and the rest of your group had going into this task?

A. I don't recall.

Q. So you pointed earlier to one of the various pages that lists courses of action here, and I don't know what any of them are, but just to look at those, did any of the courses of action that you saw on this slide deck include the option of keeping the open service policy in effect as it was before the tweets?

MS. ENLOW: Objection. That calls for deliberative process.

MS. LAPORTE: No, I don't think it does at all. I'm not asking for what anybody said. I'm merely asking for a benchmark of what the subject matter was and how open things were.

MS. ENLOW: That question asked for whether or not the group was considering keeping the Carter policy in effect. That's deliberative.

MS. LAPORTE: Well, I'm not asking what they ultimately deliberated about that or what they decided, but I am interested and I think we're entitled to understand the contours of what the decision was of what they were being asked to make.

MS. ENLOW: The different courses of action or policies that they considered are predecisional and

deliberative, and therefore, squarely covered by the deliberative process privilege.

MS. LAPORTE: Well, the ones that they did consider, yes, but I'm asking about whether they did not consider certain policies.

MS. ENLOW: That's also deliberative. What they considered necessarily tells you what they didn't consider.

MS. LAPORTE: Okay. So I hear what you're saying and certainly disagree with it. I would also say that I'm concerned about this assertion of deliberative process privilege in the context of a situation where the government is now relying on this process as a justification for the new policy. And so it seems to me that there is either a waiver or we have a need to understand this deliberative process, at least to the very general extent that I am asking in this deposition.

Will you maintain your objection even given the fact that you are relying on the process?

MS. ENLOW: Yes. I maintain the objection that it is deliberative what the panel of experts considered before they got to their final recommendation, yes.

MS. LAPORTE: Well, right now I'm not asking

about the panel of experts. I'm asking about the Transgender Personnel Policy Working Group.

MS. ENLOW: Personnel Policy Working Group fed into the panel of experts. So their work of the subordinates that ultimately lead to the decision is predecisional and deliberative. So yes.

MS. LAPORTE: Okay. So you object to the question.

And can you just read the question again, please.

(Record read.)

MS. ENLOW: I'm instructing you not to answer that question.

THE WITNESS: Okay.

BY MS. LAPORTE:

Q. Are you going to follow that instruction?

A. Yes. Sure. You would want your client to follow your advice too.

Q. Yes. We typically ask that too.

MS. LAPORTE: Okay. Let me figure out what my options are, then, my courses of action in view of that instruction.

Why don't we take five.

(A recess was taken from 11:47 a.m. to 12:16 p.m.)

(Deposition Exhibit 51 was marked for identification.)

BY MS. LAPORTE:

Q. All right. Colonel Krueger, you should have before you Exhibit 51, which should be Bates stamped USDOE109419 through -453.

Is that what you've got?

A. -419 through -453.

Q. And is that a differently redacted version of the document we talked about before?

A. Yes.

Q. Okay. All right. So getting back, then, to the task, so I think that you mentioned that -- or in the Kurta memo it says that this group, the one that we've been talking about, is tasked with coming up with a new version of the DoDI. So what kinds of information did this working group consider in reaching whatever conclusions or work product it did about that?

A. Can you be more specific, what information we considered?

Q. Yes. Yeah. So when you were going through this process, trying to figure out what you were going to do to revise the DoDI, what were your inputs in terms of information?

Q. So as of the time that this -- so did the work of this working group come to a halt at some point?

A. So this working group -- so in reference specifically to the Mr. Kurta's memo --

Q. Yes.

A. -- so yes, there was an end to that, and then from there, I don't know what the process was for the group lead submitting that product. But that would have been the end of it is the submission of whatever he submitted in support of the panel of experts as outlined in Mr. Kurta's memo.

Q. What product did the group come up with at the end of that process to feed into what Mr. Kurta wanted?

A. I don't know what their final product was. I don't know if what they were drafting as we worked was their final product.

Q. Okay. Was there a completed product, whether final or not, that the group finished at some point and then after that it went off to be an input in another process?

A. Yeah. I don't recall that being distributed back to us. And sometimes that's how the processes go. You give your input, and then that is passed on

for whatever use it's intended by the seniors.

Q. Okay. Did the new proposed DoDI that you all were working on, understanding that it wasn't complete -- oh, I'm going to ask you some "yes" or "no" questions here. So no detail, just "yes" or "no."

Did the document, as it was at the time that you all stopped working on it, did it continue to address in-service transition?

MS. ENLOW: I object to any yes-or-no answer. This is still a draft document as Colonel Krueger -- or as far as she knows, she's already testified. It would call for deliberations, at least a recommendation, if nothing else.

MS. LAPORTE: No. I'm just asking whether it addresses a particular topic. I'm not asking for what the recommendation is. And this is just a subject matter topic. It's not even a constraint. It's just sort of does it talk about this subject, that subject, or the other subject.

MS. ENLOW: You're asking whether a draft document addresses a certain subject that may or may not have ended up in a final policy or may still be at issue.

MS. LAPORTE: Right. But that's not

deliberative. It's not complete, but it's also not deliberative. I'm just asking for the fact of whether it addresses a particular thing.

MS. ENLOW: It was -- what she referred to is a draft document. What a draft contained or didn't contain when she was aware is deliberative.

MS. LAPORTE: No, I don't think it's deliberative. I mean if the draft contains facts, then that's not deliberative; right?

So all I'm trying to understand is just the facts of the general topic areas of what it covers. I'm not trying to ask what it says about those subjects, and I won't ask that for now.

MS. ENLOW: Do you mind if we go off the record for a moment?

MS. LAPORTE: No. That's fine.

MS. ENLOW: All right. We'll just take a minute.

MS. LAPORTE: Sure.

(A recess was taken from 12:29 p.m. to 12:31 p.m.)

MS. ENLOW: So I just want to be clear what you're asking Colonel Krueger. Are you asking whether the draft DoDI that she worked on includes a certain topic, or are you asking what the name of the draft

document is? I'm sorry. I'm a little confused with the --

MS. LAPORTE: I'm asking if it discusses certain topics.

MS. ENLOW: Okay. Then, yes, since it's a draft document still, it's not final, then, yes, we're going to object to that on deliberative process grounds.

MS. LAPORTE: Okay. So can I have that question read back, please.

(Record read.)

MS. ENLOW: Yes. I'm going to keep that objection.

BY MS. LAPORTE:

Q. Okay.

MS. ENLOW: I'm going to instruct Colonel Krueger not to answer.

BY MS. LAPORTE:

Q. You're going to follow that instruction, I take it?

A. Yes.

Q. Okay. Let me zoom out, then, to a different focus on this, which is did the revised draft DoDI that you all were working on, did it -- was it essentially a draft of what that DoDI would look like

if the tweets sustained legal challenge?

MS. ENLOW: Well, objection as to speculation.

MS. LAPORTE: Well, let me rephrase it then.

Q. Was the draft DoDI that you were working on reflective of what the policies would be if President Trump's tweets were fully implemented?

MS. ENLOW: Objection again as to speculation. That's also deliberative in that it calls for information that is included in the draft agency document.

I instruct you not to answer.

BY MS. LAPORTE:

Q. And are you following that instruction?

A. Yes.

Q. Okay. Have you had any information about what the current status is of the revision that your group worked on?

A. No.

Q. Are you aware whether any other group was working on a similar project in parallel? In other words, to work on the DoDI.

A. No.

Q. Okay. So let's move onto another thing that you raised earlier, that you mentioned earlier that

you worked on, which was accessions medical standards. So that was one of the things that Mr. Kurta laid out in the memo that needed to be worked on; right?

A. So my reference to the accession medical standards that we were talking about in regards to transgender policy was prior to this memo.

Q. Right.

A. That was all prior to July of '17.

Q. Okay. So in the post September 2017 world, you had some role also in working through the task that Mr. Kurta said about accessions; correct?

A. So I was not -- the MEDPERS was the one that had the task, and that was one that the primary was the PDASA MNRA. So the Primary Deputy Assistant Secretary of the Army for Manpower and Reserve Affairs, and I back-seated her at some of those meetings.

Q. How many meetings did you attend in that capacity?

A. I don't know how many. Several of them. It was certainly more than one.

Q. What were the general topics that were being addressed in those meetings?

A. Oh, so generally, if recollection serves me well, the topics would sometimes be looking at the

numbers.

Q. Did MEDPERS ultimately come up with a recommendation about surgical procedures that should not be resourced from DoD or DHS funding?

A. I don't recall a specific recommendation on that.

Q. Did you -- do you recall considering different alternative options for that? And that's just a "yes" or "no" question.

A. Can you clarify? Different options for as far as forms of funding types of surgeries.

Q. Well, specifically, different possible answers to the issue of what specific surgical procedures should not be resourced from DoD or DHS funding.

A. Yes, I recall consideration of that.

Q. And was that in a MEDPERS meeting?

A. I can't recall.

Q. Who was present when that was under consideration?

A. I don't recall. I mean I know that there's been discussions of what would be funded and what wouldn't be funded. I don't recall the specific setting.

Q. Do you recall a decision being made about a

recommendation?

A. I don't recall a final decision.

Q. Do you recall what the different possibilities were in terms of the answer to this question that's in Mr. Kurta's memo?

MS. ENLOW: That's just the facts again.

THE WITNESS: I can say, "yes" or "no"?

MS. ENLOW: Uh-huh.

THE WITNESS: Yes, I do recall there being different possibilities.

BY MS. LAPORTE:

Q. Right. And do you recall one of them ultimately being settled upon as a recommendation?

A. I don't recall a final.

Q. Okay. What were the different options that were under consideration?

MS. ENLOW: I would object on deliberative process. I'm going to instruct her not to answer.

BY MS. LAPORTE:

Q. Are you going to follow that instruction?

A. Yes.

MS. LAPORTE: We continue to object as before to all these deliberative process objections.

Okay.

(Deposition Exhibit 57 was marked for

identification.)
BY MS. LAPORTE:
Q. All right. Colonel Krueger, you should have Exhibit 57, which should be USDOE5147 through -5177.
Is that what you've got?
A. -47 through -77, yes.
Q. All right. Do you recognize this document? Please look through it before you answer that question because it's actually a collection.
(The witness reviewed Exhibit 57.)
THE WITNESS: So I recognize the attachment to the document. I don't recognize the E-mails leading up to it. Again, I'm not saying I hadn't seen it. They are just not really distinctive, and I don't know whether I saw this attachment as one of those preps, like I told you about. They would post documents on MAX.GOV, or whether I was in attendance when it was discussed, but I do remember seeing the document.
BY MS. LAPORTE:
Q. So by "the document" you're referring to the slide deck that is near the back of this exhibit?
A. Exactly. So starting on USDOE5151.
Q. Okay. So the agenda that's right before that is an agenda for a MEDPERS meeting on November 6;

EXHIBIT 34

The Honorable Marsha J. Pechman

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

JOINT STATUS REPORT FOR MAY 13, 2020 STATUS CONFERENCE

In advance of the May 13, 2020 status hearing, the parties respectfully submit the following Joint Status Report.

PLAINTIFFS AND PLAINTIFF-INTERVENOR'S STATEMENT

In this Joint Status Report, Plaintiffs provide the Court an update regarding the following issues:

1. Proposed adjustments to the current May 29 fact discovery cutoff necessitated by delays in completing fact discovery;
2. Deposition scheduling;
3. Scheduling issues arising from the depositions of Plaintiffs' hybrid fact and expert witnesses, former Secretary of the Air Force, Deborah James, and former Secretary of the Navy, Ray Mabus; and
4. Overview of pending discovery motions.

A. Fact Discovery Deadline and Case Schedule

Plaintiffs continue to face roadblocks in completing fact discovery by the current May 29, 2020 deadline. Most of those roadblocks are of the Government's making—filing a mandamus petition and refusing to produce tens of thousands of documents on grounds of deliberative process privilege; extensive objections to Plaintiffs' Rule 30(b)(6) Notice; threatened motions to quash subpoenas directed to military decision-makers at the center of this dispute; and preemptively stating it will refuse to permit witnesses to answer questions at depositions over deliberative process privilege objections. Other roadblocks and delays have resulted from the COVID-19 pandemic. Plaintiffs respectfully request that the Court lift the May 29 fact discovery deadline and order the parties to report on the progress of discovery at the next status conference in June. The reasons for this request are as follows.

First, the Government continues to withhold tens of thousands of documents concerning the decision to impose the Ban, and the circumstances that led to that decision, pursuant to the deliberative process privilege. While the parties await a ruling by the Ninth Circuit on the Government's mandamus petition and motion to stay, Plaintiffs recently filed a LCR 37 motion proposing a framework by which the Special Master would review a random sample of

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documents withheld by the Government pursuant to the deliberative process privilege in order to determine whether the Government has been properly invoking the privilege in the first place, and if not, recommend guidance to the Government as to the types and/or categories of documents to which the privilege does not apply. (*See* Dkt. 497.) The Plaintiffs proposed that the Court would then review the documents and the Special Master's recommendations and, as to any documents it deems the privilege was properly invoked, determine whether the privilege has been overcome, applying the *Warner* factors. If this review confirms that the Government has been improperly invoking the privilege as to documents to which the privilege does not apply, the Court's orders could provide a basis for a further motion (and order) that the Government promptly review its privilege claims as to the remaining documents withheld on the grounds of deliberative process privilege in light of the Court's rulings and, on a rolling basis, produce any documents as to which the privilege is no longer claimed, with the Special Master to conduct an *in camera* review, again on a rolling basis, of any documents as to which the Government continues to claim the privilege. Should the Court decide this process is beneficial in resolving the parties' long-standing dispute over the Government's deliberative process privilege assertions, such further reviews and rolling productions will take time to complete. However, Plaintiffs believe that such a review is likely to result in the production of documents that are highly relevant to their constitutional challenge to the Ban, including the Government's claims that the Ban was unrelated to the ban announced by the President via Twitter on July 27, 2017 and formalized in the August 25, 2017 Presidential Memorandum.

Second, the Government recently informed Plaintiffs that it intends to move to quash Plaintiffs' deposition subpoenas directed to four critical witnesses: former Secretary of Defense James Mattis; former Vice Chairman of the Joint Chiefs of Staff Paul Selva; former Under Secretary of Defense for Personnel and Readiness Robert Wilkie; and former Admiral William Moran. These witnesses are critically important to Plaintiffs' case. The proposed Ban was sent to President Trump under Secretary Mattis' signature, and Defendants maintain that Mattis was personally involved in and responsible for the Ban (which they call the "Mattis policy"), and that it represents his personal and independent military judgment. (*See, e.g.*, Defs.' Pet. to S. Ct. for

Cert. Before Judgment, *Trump v. Karnoski*, No. 18-676, 2018 WL 6169245, at *8–9 (Nov. 23, 2018) (Ban "reflected 'the exercise of Secretary Mattis's independent judgment"); *18 (seeking "a prompt resolution of the validity of Secretary Mattis's proposed policy"); *24–25 (Ban "reflects the exercise of Secretary Mattis's 'independent judgment'").) Former Vice Chairman of the Joint Chiefs of Staff, Paul Selva, in turn was one of two senior DoD officials that Mattis directed "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, and, supported by the "Panel of Experts," to recommend to Mattis the policy that would effect the President's directives (what Defendants call the "Mattis policy"). (*See* 9/14/2017 Terms of Reference, Ex. 1.) Wilkie was one of two military officials who chaired the Panel, and according to Defendants, one of the lead authors of the February 2018 Report. And, Moran was a very senior and active member of the Panel who was an author or recipient of a number of the more relevant communications concerning the Panel produced by Defendants. Although Plaintiffs informed the Government on March 2, 2020 that they intended to depose Mattis, Selva, and Wilkie, and on March 27, 2020 requested the deposition of Moran, the Government did not inform Plaintiffs until April 10, 2020 that it will move to quash the subpoenas directed to these four witnesses, all of whom are former Department of Defense officials. Since that time, Plaintiffs determined where these witnesses currently live and work in order to ascertain where the depositions can take place, and identified locations near those localities at which the depositions can be taken. Plaintiffs recently served these subpoenas, but do not expect motion practice concerning the subpoenas to conclude until July at the earliest, given that motion practice will necessarily occur in at least two different jurisdictions (E.D. Va. and M.D.N.C.).

Third, the Government has lodged extensive objections to Plaintiffs' Rule 30(b)(6) Notice, causing delay in scheduling this deposition, which Plaintiffs had noticed as their first deposition in order to obtain information concerning a number of key subject matters that would help them develop and focus their examination of subsequent deponents. While Plaintiffs served the Government with their Rule 30(b)(6) Notice on March 9, 2020, it was not until nearly six weeks

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later, on April 17, 2020, that the Government served a 22-page letter of objections, which are now the subject of Defendants' forthcoming LCR 37 motion for protective order. One common objection across many of the Rule 30(b)(6) topics, which is raised by Defendants' motion, is the Government's intention to instruct witnesses not to answer questions that it believes call for information subject to the deliberative process privilege. This is notwithstanding that the Court already ruled at the February 3, 2020 status conference that "if there is an objection based upon deliberative process, the objection is made, then the question is answered, and you seal the deposition. And if we have to, we will go over line-by-line as to what comes in and what doesn't in terms of public testimony." (2/3/2020 Hr'g Tr., Dkt. No. 412, at 64:14–24.) The Government contends this Order was somehow stayed by the Ninth Circuit's subsequent administrative stay, despite the fact that the Order is nowhere referenced in the Government's mandamus petition. The Government has also asserted numerous other objections that likewise have no basis in law—such as the bizarre proposition that a party cannot take a Rule 30(b)(6) deposition on issues that are also the subject of interrogatories and document requests—all of which must be resolved by this Court and have delayed the Rule 30(b)(6) deposition.

Finally, the COVID-19 pandemic has caused certain depositions of Government witnesses to be delayed into the summer. Plaintiffs had at least five depositions scheduled in March and April that had to be canceled due to the pandemic. Even after the Court urged the parties to use teleconferencing resources to conduct depositions, scheduling depositions in April and May became untenable, in part because of the witnesses' own duties to respond to COVID-19. The parties have confirmed dates for depositions to take place in June should the Court approve extension of the discovery deadline, but some key witnesses may be unavailable for longer than that. For example, the Government has notified Plaintiffs that Colonel Mary Krueger is the Hospital Commander of the Tripler Army Medical Center, which is tasked with leading the military medicine response to COVID-19 in Hawaii. Due to these responsibilities, the Government has advised that it is unable to provide dates for her deposition until the pandemic has stabilized. At the same time, Plaintiff-Intervenor's state agencies are overloaded with requirements in response to the pandemic while other programs are closed or significantly

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inaccessible at this time.

In sum, due to the above delays in completing discovery, Plaintiffs request the May 29, 2020 fact discovery deadline be lifted, and that the parties be ordered to update the Court on the status of discovery at another status conference in early June. Plaintiffs believe these issues are so integral to this case that a further delay of fact discovery is worth the likely impact to the October 2020 trial setting. Plaintiffs are committed to ensuring ensuring that the Court and any reviewing court have the benefit of a full record at trial, even if it requires a later trial date.

B. Deposition Scheduling

The parties have confirmed the following depositions:

- **June 3: Dr. Terry Adirim**, former Principal Deputy Assistant Secretary of Defense Health Affairs
- **June 4: Stephanie Miller**, Director of Military Accession Policy
- **June 10: Kevin Cron**, Defendants' hybrid fact/expert witness, Preventive Medicine Officer for United States Central Command
- **June 11: Thomas Dee**, Panel member and Undersecretary of the Navy
- **June 12: Martha Soper**, Assistant Deputy for Health Policy Office of the Deputy Assistant Secretary of the Air Force, Reserve Affairs & Airman Readiness
- **June 17: Christopher Meyering**, Defendants' hybrid fact/expert witness, Command Surgeon and the Waiver Surgeon, U.S. Army Recruiting Command
- **June 23: Dr. George Brown**, Plaintiffs' expert witness
- **June 24: Stephen Pflanz**, Defendants' hybrid fact/expert witness, Director of Psychological Health, Air Force Medical Support Agency

Plaintiffs have also requested the depositions of former Secretary of Defense James Mattis, former Vice Chair of the Joint Chiefs Paul Selva, former Undersecretary Robert Wilkie, Admiral William Moran, former Undersecretary Anthony Kurta, Commander Mary Krueger, William Bushman, and Assistant Secretary Lernes Hebert. As described above, the Government is moving to quash the subpoenas issued to Mattis, Selva, Wilkie, and Moran, and is deferring setting a date for Krueger given her pandemic response duties. The parties had previously set

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dates for Kurta and Hebert, but given the above delays, Plaintiffs wish to defer those depositions until later in the summer, along with the Bushman deposition, to permit the Ninth Circuit additional time to rule on the pending mandamus petition and the Special Master to review withheld documents, if so ordered.

C. Depositions of Plaintiffs' Expert Witnesses Mabus AND James

In their Joint Status Report and during the February 3, 2020 hearing, Plaintiffs flagged that one issue resulting from the Government's refusal to produce Carter Working Group documents was the Government's attempt to impugn the conclusions of, and the process used by, the Carter Working Group during the depositions of Plaintiffs' experts General Margaret Wilmoth and former Acting Under Secretary of Defense Brad Carson, without having first provided all relevant Carter Working Group documents. (*See, e.g.*, Dkt. No. 408 at 4–5; 2/3/2020 Hr'g Tr., Dkt. No. 412, at 27:2–41:25.) Plaintiffs expressed concern that the Government would again attempt to undermine the Carter Working Group during the depositions of former Secretary of the U.S. Navy Raymond Mabus and former Secretary of the U.S. Air Force Deborah James, both of whom have submitted expert reports on behalf of Plaintiffs. (2/3/2020 Hr'g Tr., Dkt. No. 412, at 28:3–7 ("Your Honor, it's just fairness. We can't respond to these arguments attacking the credibility of the Carter working group that came to the opposite conclusion than the panel did just two years before, unless they give us the documents.").) After hearing the parties' arguments regarding whether these depositions may proceed before all ordered Carter Working Group documents are produced, the Court stated:

> [Defendants] can decide that you're not going to take the deposition. But if you're going to take the deposition and talk to them about what they remember, or say that's not what this document says, you've got to give them a full set of documents so that they can prepare.

(*Id*. at 36:15–19.) On February 5, 2020, counsel for the Government sent an email memorializing the Government's understanding of the Court's order:

> During a hearing this past Monday in Karnoski, the court stated that Defendants would not be permitted to take further depositions of Plaintiffs' witnesses in that case until Defendants had produced certain additional deliberative materials related to the development of the Carter policy. As a result, and to avoid having to depose Mr. Mabus more than once, we will need

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> to reschedule his deposition . . . .

Thereafter, the Government sought mandamus review by the Ninth Circuit of this Court's orders to produce Carter Working Group documents, and also requested an administrative stay of the Court's Order, which the Ninth Circuit granted. By requesting a stay of the production of Carter Working Group documents, and in turn having its request for an administrative stay granted, the Government necessarily delayed its ability to take the depositions of Secretaries Mabus and James until the Ninth Circuit has ruled, and, if the Government's mandamus petition is denied, the Carter Working Group documents are produced.

Undeterred, on April 20, 2020, counsel for the Government requested that Plaintiffs make Secretaries Mabus and James available for a deposition prior to the Ninth Circuit's decision on the mandamus petition:

> [P]lease let us know Plaintiffs' position on whether Defendants can take the depositions of Secretary Mabus and Secretary James without disclosing the Carter policy documents that are currently subject to the mandamus petition pending with the Ninth Circuit. Defendants' position is that the Ninth Circuit has stayed the district court's February 3, 2020 Order in its entirety, including the order that Defendants may not take further depositions prior to production of additional Carter policy deliberative documents. *See* ECF No. 415. If Plaintiffs disagree, please let us know so we can raise this issue with the district court and then possibly with the Ninth Circuit.

The Government therefore appears to be arguing that although its mandamus petition and motion to stay only requested relief with respect to the Court's Orders to produce certain documents (RFP Nos. 15 and 29), the Ninth Circuit administratively stayed ***all*** orders and directives made by this Court at the February 3, 2020 status conference, including the Order regarding the depositions of Plaintiffs' experts Mabus and James. Plaintiffs respectfully disagree, and contend that the depositions of Secretaries Mabus and James should be deferred until the Ninth Circuit decides Defendants' mandamus petition, and if that petition is denied, the Government produces the Carter Working Group documents.

D. Pending Discovery Motions

For the Court's convenience, Plaintiffs provide the following summary of pending discovery motions:

a. the Government's motion to extend time to respond to this Court's Order regarding Plaintiffs' RFP 44 (Dkt. No. 485);

b. Plaintiffs and Plaintiff-Intervenor's LCR 37 motion to extend the deadline to file discovery-related motions (Dkt. No. 490);

c. Plaintiffs' LCR 37 motion requesting review of the Government's deliberative process privilege claims (Dkt. No. 497); and

d. the Government's forthcoming LCR 37 motion for protective order regarding Plaintiffs' 30(b)(6) Notice.

DEFENDANTS' STATEMENT

I. Discovery Motions

As Plaintiffs point out, there are several discovery motions currently pending before the Court. *See* Dkts. 485, 490, 497. Defendants also anticipate filing this week an LCR 37 motion for protective order related to Plaintiffs' proposed Rule 30(b)(6) deposition of the Department of Defense. Defendants respectfully refer the Court to Defendants' briefing on these motions for statements of Defendants' positions and arguments.

In addition, Defendants anticipate filing motions to quash the depositions of current Secretary of Veterans Affairs Robert Wilkie,[1] former Secretary of Defense James Mattis, former Vice Chief of Naval Operations William Moran, and former Vice Chairman of the Joint Chiefs of Staff Paul Selva. Defendants disagree with Plaintiffs' assertion that these individuals are "critical witnesses" or that it is proper to depose such high-ranking current and former government officials. However, because these witnesses are not located in the Western District of Washington, Defendants anticipate filing motions to quash in other districts and this Court need not address these issues. *See* Fed. R. Civ. P. 45 (d)(3)(A) (authorizing "the court for the district where compliance is required" to "quash or modify a subpoena").

II. Currently Scheduled Depositions

Many of Plaintiffs' and Defendants' witnesses in this case are also witnesses in the related

[1] Plaintiffs describe Mr. Wilkie as the "former Under Secretary of Defense for Personnel and Readiness," Pls.' Statement 2, but that is not his current position. He is now a Cabinet Secretary.

cases around the country. Accordingly, in an effort to prevent witnesses from unnecessarily facing multiple depositions, Defendants have coordinated with the Plaintiffs across all four related cases in scheduling depositions.[2] Using this process, Defendants have scheduled the following depositions.

- **June 3: Dr. Terry Adirim**, former Principal Deputy Assistant Secretary of Defense Health Affairs
- **June 4: Stephanie Miller**, Director of Military Accession Policy
- **June 10: Kevin Cron**, Defendants' hybrid fact/expert witness
- **June 11: Thomas Dee**, Panel member and Undersecretary of the Navy
- **June 12: Martha Soper**, Assistant Deputy for Health Policy Office of the Deputy Assistant Secretary of the Air Force, Reserve Affairs & Airman Readiness
- **June 17: Christopher Meyering**, Defendants' hybrid fact/expert witness,
- **June 23: Dr. George Brown**, Plaintiffs' expert witness
- **June 24: Stephen Pflanz**, Defendants' hybrid fact/expert witness

In addition, within the past few weeks the parties in the various cases scheduled depositions of Anthony Kurta, formerly performing the duties of Deputy Under Secretary of Defense (Personnel & Readiness), and Lernes Hebert, Deputy Assistant Secretary of Defense for Military Personnel Policy, to take place on June 5 and June 8, respectively. However, Plaintiffs now state that they do not intend to proceed with these scheduled depositions. It is unclear what has changed. Plaintiffs state that they would like to first see whether they can obtain further deliberative documents in light of the mandamus petition and the special master's appointment. But Plaintiffs were aware of both the mandamus petition and the special master when they scheduled these depositions just a few weeks ago. Moreover, Plaintiffs have already received every deliberative document in the possession of Panel of Experts members that relate to the Panel's deliberations, including Mr. Kurta's documents. It is unclear why Plaintiffs now think they cannot proceed with Mr. Kurta's deposition at least.

[2] Defendants have not coordinated depositions with the Plaintiff in the newly filed case in the District of Massachusetts, *Doe v. Esper*, No. 20-cv-10530 (D. Mass.), because that case is not in discovery.

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Finally, as Defendants stated during the April 2, 2020 hearing, Colonel Mary Krueger is unable to provide dates for a deposition during the current COVID-19 crisis. (4/2/2020 Hr'g Tr. 31:5–13.) Colonel Krueger is Hospital Commander of the Tripler Army Medical Center, and is tasked with leading the military medicine response to COVID-19 in the state of Hawaii. Colonel Krueger has in fact already been deposed in these cases, in April 2018. However, Defendants have agreed that she may sit for an additional deposition, once she is available.

III. Depositions of Plaintiffs' Witnesses

During the February 3, 2020 status conference, the Court issued an oral ruling that Defendants were required to produce certain deliberative material responsive to Plaintiffs' RFP 15 related to the development of the Carter policy. (2/3/2020 Hr'g Tr. 40:8–11.) The Court then ruled further: "And I suggest that they [Defendants] don't get to take anybody's deposition further until they do turn over the material." (*Id.* at 40:8–10.)

Defendants subsequently filed a petition for a writ of mandamus with the Ninth Circuit, and the Ninth Circuit issued an order staying the "[t]he district court's December 18, 2019, February 3, 2020, and February 7, 2020 orders challenged in this petition." Order, Dkt. 415. Plaintiffs now split hairs by arguing that the mandamus petition challenged only the Court's February 3 order to produce Carter-era deliberative documents, and not the February 3 order to refrain from further depositions until those documents are produced. But those oral rulings are inextricably linked: a ruling to refrain from taking depositions until Defendants complete a production makes little sense unless Defendants are also required to complete the production. Moreover, under Plaintiffs' interpretation, Defendants would not be permitted to take *any* depositions until the mandamus petition is resolved—seemingly at odds with the Court's recent instruction to proceed with depositions "right away" and by videoconference if necessary. (4/2/2020 Hr'g Tr. 30:12–13.)

As a way forward, Defendants propose the following: If Plaintiffs wish to defer depositions of certain witnesses who served as government officials during the development of the Carter policy—such as the depositions of former Secretaries Mabus and James—until after the Ninth Circuit rules on the mandamus petition, Plaintiffs should be permitted to do so. In the

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meantime, however, Defendants should be permitted to move forward with depositions of other witnesses who were not involved in the development of the Carter policy, such as Plaintiffs' experts Dr. George Brown and Dr. Jody Herman. Dr. Brown's deposition is already scheduled for June 24. And on April 10, 2020, Defendants requested that Washington provide dates when Dr. Herman is available for deposition, but Washington has not done so.[3]

IV. Case Schedule

Plaintiffs' request for an indefinite extension of all fact discovery should be rejected. While Defendants would consent to a limited extension of time to complete currently scheduled depositions (including motion practice related to those depositions), Plaintiffs provide no compelling reason why additional time to serve written discovery is required, nor have they identified any further written discovery they intend to propound.

Since Plaintiffs filed their complaint in August 2017, Plaintiffs and Washington have served over 100 requests for production and dozens of interrogatories. Defendants have produced tens of thousands of documents and timely served detailed interrogatory objections and responses.[4] Plaintiffs have not explained why these many written discovery requests are insufficient, nor have they identified what additional discovery requests they contend they still need to serve.

Plaintiffs also fail to explain why they could not have served any additional written discovery requests during the more than two and a half years this lawsuit has been pending. The individual Plaintiffs sporadically served discovery requests during these years, and Washington did not serve any discovery at all until July 2019, nearly two years after this case was filed. *See*

[3] It is possible that, due to case schedules in the related cases, Defendants may have to move forward with depositions of former Secretaries Mabus and James in the related cases prior to the Ninth Circuit's ruling on the mandamus petition. In that circumstance, Defendants would notice the depositions in the related cases, but not in this case, and may subsequently have to notice additional depositions of Secretaries Mabus and James in this case once the Ninth Circuit has ruled.

[4] In addition, because of the cross-use agreement, Defendants have produced to Plaintiffs and Washington documents responsive to the numerous discovery requests that have been served by plaintiffs in the related cases, as well as documents responsive to court orders issued in other cases. See Dkt. 183. Most notably, in response to an order issued by the court in the related Doe v. Esper case in the District of Columbia, Defendants produced to all of the plaintiffs in the related cases a complete, unredacted Administrative Record of the documents, testimony, and data relied on or considered by the Panel of Experts charged with developing the challenged policy, along with the Panel's deliberations on those materials, as well as communications to or from members of the Panel relating to their development of the policy. See Decl. of Robert Easton ¶¶ 4–6 (Jan. 24, 2020), Dkt. 405-2.

ECF Nos. 483-1, 483-2. Notably, when Plaintiffs moved for summary judgment in February 2018, and Defendants requested an opportunity to take discovery pursuant to Rule 56(d), Dkt. 178, Plaintiffs opposed Defendants' request, arguing that Defendants "have failed to exercise reasonable diligence to pursue any of the discovery they suddenly claim they need." Dkt. 185 at 1. The Court agreed and denied Defendants' request to take discovery, noting that "[t]his case has been pending for nearly six months," and finding that Defendants "have failed to show that they were diligent in seeking the discovery they now claim to need." Dkt. 189 at 4. More than two years after the Court found the Defendants "failed to show that they were diligent," Plaintiffs are now moving for more time, the very position they opposed initially. Plaintiffs cannot have it both ways.

Moreover, Plaintiffs' argument that the Government is to blame for delays in this case is unpersuasive. If permitted, Defendants are prepared now to have this case proceed to summary judgment so that their policy may be "evaluated on the record supporting that decision and with the appropriate deference due to a proffered military decision." *Karnoski v. Trump*, 926 F.3d 1180, 1207 (9th Cir. 2019). Discovery is only still proceeding due to Plaintiffs' strategic decisions to delay for years taking any depositions and their refusal to grapple with the Ninth Circuit's prior holdings in this case.

For more than two and a half years, Plaintiffs and Washington steadfastly refused to take even a single deposition until the deliberative process privilege was set aside as to all documents in the Government's production. This position had no merit to begin with, and certainly has not had merit for the nearly one year since the Ninth Circuit granted the Government's initial petition for a writ of mandamus. In the face of that ruling, it was misguided for Plaintiffs again to insist on an order overruling all of Defendants' deliberative process privilege assertions *en masse*, *see* Dkt. 365 at 5, or an order overruling the deliberative process privilege as to all documents "related" to the formation of DoD's 2018 policy and the Carter policy. *See* Dkt 408 at 2-6. Yet Plaintiffs sought just that, and the Government, accordingly, was forced to file a second petition for writ of mandamus. Dkt. 414-1. Thereafter, the Ninth Circuit recognized that the Government's second petition "raises issues that warrant an answer[,]" *see* Dkt. 416, and granted

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the Government's request for a "temporary administrative stay[,]" Dkt. 415, which is still in place. Plaintiffs' actual grievance is with the Ninth Circuit—both for granting the original writ of mandamus and for issuing the current administrative stay. But both Defendants and Plaintiffs are bound by these decisions even if Plaintiffs find them incompatible with their chosen case strategy.

Similarly, Plaintiffs cannot seriously hold Defendants responsible for not acquiescing to their attempt to circumvent the Ninth Circuit's review of Defendants' mandamus petition, as well as the Ninth Circuit's administrative stay, through a Rule 30(b)(6) deposition seeking the same privileged information through testimony that is currently at issue before the Ninth Circuit. The weakness of Plaintiffs' position is highlighted by their request to have the district court—rather than the Ninth Circuit—adjudicate the bounds of the Ninth Circuit's own stay order.

Perhaps most fundamentally, Plaintiffs have delayed this case because they refuse to accept that the role of this Court is not to "substitute its 'own evaluation of evidence for a reasonable evaluation' by the military," but to test whether the decision the military made, in light of the evidence that it actually considered, is justifiable, *Karnoski*, 926 F.3d at 1202 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981)). Instead, Plaintiffs have repeatedly insisted on overbroad and intrusive discovery that has no precedent in a case involving the military, and little, if any, relation to the core questions before the Court. Indeed, discovery recently has been sidetracked into such far-flung topics as outlook "delivery notifications" and "journaling reports," Dkt. 455, and confidential service member medical information that was never even considered by Government decisionmakers, Dkt. 485. And Plaintiffs now insist that even the October 2020 trial date may have to be moved in service of their improper approach to discovery, even though that trial date was set just a few months ago. These are delays of Plaintiffs' making, not Defendants'.

In short, while Defendants would consent to a limited extension of time to conduct currently scheduled depositions (including motions related to those depositions), Plaintiffs' request for an indefinite extension of all discovery should be rejected.

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Respectfully submitted, May 6, 2020

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on May 6, 2020.

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EXHIBIT 35

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From: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>
Sent: Thursday, May 28, 2020 8:59 AM
To: Heinz, Jordan M.; Barsanti, Vanessa; Stallings-Ala'ilima, Chalia (ATG); Enlow, Courtney D. (CIV); Powers, James R. (CIV); Gerardi, Michael J. (CIV)
Cc: Skurnik, Matthew (CIV); *prenn@lambdalegal.org; *tborelli@lambdalegal.org; *Rachel@newmanlaw.com; Siegfried, Daniel I.; *colleen.melody@atg.wa.gov; *jason@newmanlaw.com; Ikard, Sam
Subject: RE: Karnoski v. Trump, et al. -- Rule 30(b)(6) Designees

> This message is from an EXTERNAL SENDER - be cautious, particularly with links and attachments.

Jordan,

Below is some additional information to further our discussion on the possibility of combining 30(b)(6) topics with depositions of other DoD witnesses.

Ms. Miller will not be prepared to addresses any of the 30(b)(6) topics during her deposition currently scheduled for June 4, 2020, but she may end up being DoD's designee for Plaintiffs' topic 3. We propose an additional 3 hour period on topic 3 at a later date.

Mr. Dee will not be addressing any of Plaintiffs' 30(b)(6) topics.

LTC Cron will not be addressing any of Plaintiffs' 30(b)(6) topics.

We are looking into whether COL Meyering may be able to address Plaintiffs' 30(b)(6) topic 8. We will follow up with you on that.

COL Pflanz will not be addressing any of Plaintiffs' 30(b)(6) topics.

DoD expects that Mr. Hebert will address Plaintiffs' 30(b)(6) topics 1, 2, 4, 5. We propose two 5 hour deposition days for Mr. Hebert.

DoD expects that Mr. Bushman will address Plaintiffs' 30(b)(6) topics 6 and 7. Given that these particular topics are so intertwined in the pending mandamus petition we propose not setting a deposition date for Mr. Bushman at this time.

DoD is still determining who will address topic 9 and we will follow up with you on that.

Further, 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. (e.g. the Doe Court's Order and the Karnoski Court's November 19, 2019 Order).

Best regards,

Drew

Drew Carmichael
Trial Attorney | United States Department of Justice
Civil Division | Federal Programs Branch
Tel: (202) 514-3346

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Subject: RE: Karnoski v. Trump, et al. -- Rule 30(b)(6) Designees

Jordan,

I will coordinate with DoD to confirm the individuals they would use for the various 30(b)(6) topics and get back to you soon.

Best regards,

Drew

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From: Heinz, Jordan M. <jheinz@kirkland.com>
Sent: Friday, May 15, 2020 2:29 PM
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Subject: Karnoski v. Trump, et al. -- Rule 30(b)(6) Designees

Drew, Matt, Jim -

Following up on the status conference on Wednesday and the Court's suggestion that the parties meet and confer to see if we can come an agreement on Rule 30(b)(6) deposition time, could you please advise as to the Government's designees for Plaintiffs' nine topics? We can then see if there is overlap with Rule 30(b)(1) deponents.

Thanks

Jordan

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EXHIBIT 36

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

DEFENDANTS' NOTICE OF FILING PETITION FOR WRIT OF MANDAMUS

U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20530
Tel: (202) 514-4336

Pursuant to Federal Rule of Appellate Procedure 21(a)(1), Defendants respectfully provide to this Court the petition for writ of mandamus that Defendants filed in the United States Court of Appeals for the Ninth Circuit on February 11, 2020. A copy of the petition and accompanying addendum is attached.

Dated: February 11, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

DAVID M. MORRELL
Deputy Assistant Attorney General

ALEXANDER K. HAAS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Andrew E. Carmichael
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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2020, I electronically filed Defendants' Notice of Filing Petition for Writ of Mandamus using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: February 11, 2020

/s/ Andrew E. Carmichael
ANDREW E. CARMICHAEL
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Counsel for Defendants

No. 20-_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re DONALD J. TRUMP, *et al.*,

Petitioners.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES OF AMERICA; MARK T. ESPER, in his official capacity as Secretary of Defense; U.S. DEPARTMENT OF DEFENSE; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security,

Petitioners–Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,

Respondent,

RYAN KARNOSKI; CATHRINE SCHMID; D.L.; LAURA GARZA; HUMAN RIGHTS CAMPAIGN; GENDER JUSTICE LEAGUE; LINDSEY MULLER; TERECE LEWIS; PHILLIP STEPHENS; MEGAN WINTERS; JANE DOE; CONNER CALLAHAN; AMERICAN MILITARY PARTNER ASSOCIATION;

Real-Parties-in-Interest–Plaintiffs,

STATE OF WASHINGTON,

Real-Party-in-Interest–Intervenor-Plaintiff.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AND EMERGENCY MOTION FOR STAY PENDING CONSIDERATION OF THE PETITION

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CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

(1) Telephone numbers and addresses of the attorneys for the parties

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(2) Facts showing the existence and nature of the emergency

As set forth more fully in the petition, the district court on Friday, February 7, 2020, ordered the government defendants to produce by Friday, February 14, 2020, tens of thousands documents withheld under the deliberative process privilege that would reveal the military's internal deliberations regarding military service by transgender individuals and individuals with gender dysphoria. In so doing, the district court flouted a prior order of this Court that granted a writ of mandamus and vacated a previous discovery order encompassing many of the same documents, and again intruded on the government's decisionmaking process regarding military policies. And the district court has done all of this without even considering the fact that the government has already produced nearly 40,000 documents in discovery, including a complete, unredacted Administrative Record of the documents relied on by the panel of experts charged with developing the challenged policy, as well as all deliberative documents of the panel. The government produced the majority of these deliberative documents pursuant to an order by the U.S. District Court for the District of Columbia, in another challenge to the Mattis policy—even though the

government disagrees with that order—after that court concluded that the plaintiffs there had overcome the deliberative process privilege for documents that were used or considered by the panel of experts in the development of the Mattis policy. *Doe 2 v. Esper*, 2019 WL 4394842, at *8-10 (D.D.C. Sept. 13, 2019). In addition, the government has produced the deliberative documents of the sole non-voting member of the panel of experts pursuant to the district court's December 18, 2019 order, despite disagreeing with the court's conclusion.

This Court's immediate correction is required. This Court should grant a stay pending consideration of the petition for a writ of mandamus as expeditiously as possible. The government also requests an administrative stay by the close of business on Wednesday, February 12, 2020 to permit this Court's full consideration of the stay motion or at the very least for a reasonable period to allow the Solicitor General to seek relief from the Supreme Court if necessary.

(3) When and how counsel notified

Government counsel notified plaintiffs' counsel by email on Monday, February 10, 2020 of the government's intent to file this petition and stay motion. Service on plaintiffs will be effected by email. Counsel Jordan M. Heinz, on behalf of plaintiffs and plaintiff-intervenor, has indicated that they take no position on the government's request for an administrative stay but intend to file an opposition to the request for a stay pending disposition of the mandamus petition.

(4) Submissions to the district court

The district court granted plaintiffs' renewed motion to compel discovery of documents withheld under the deliberative process privilege, which the government opposed. Add. 1-6, 46, 78-85, 132-38. The court ordered the government to turn over nearly every document withheld solely under the deliberative process privilege. *Id.* On January 24, 2020, the government moved for a stay in district court. Doc. 405. Additionally, the government orally requested a stay of the court's orders while it considered whether to file this petition. The court denied the stay motions from the bench at a hearing on February 3, 2020 and in its February 7, 2020 order. Add. 5-6; *see* Add. 25:10, 30:11.

Counsel for Petitioners–Defendants

JOSEPH H. HUNT
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HASHIM M. MOOPPAN
Deputy Assistant Attorney General

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INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to the All Writs Act, 28 U.S.C. § 1651, and Federal Rule of Appellate Procedure 21, the federal government respectfully petitions this Court to issue a writ of mandamus directing the district court to reverse or to vacate its orders of December 18, 2019, February 3, 2020, and February 7, 2020, which conclude that the deliberative process privilege has been overcome as to tens of thousands of deliberative documents related to the military's consideration of policies regarding service by transgender individuals and individuals with gender dysphoria. *See* Add. 1-6, 46, 78-85. The district court has denied a stay of its orders and has required production of documents within just one week—that is, by this Friday, February 14. Add. 5-6, 25:10, 30:11. Accordingly, we ask for a stay pending consideration of this mandamus petition and we also request an immediate administrative stay by the close of business on Wednesday, February 12, 2020, pending this Court's full consideration of the stay motion, or at the very least for a reasonable period to allow the Solicitor General to seek relief from the Supreme Court if necessary. Opposing counsel has indicated that they take no position on the government's request for an administrative stay but intend to file an opposition to the request for a stay.

The district court's orders flout a prior order of this Court that granted a writ of mandamus and vacated a previous discovery order encompassing many of the same documents. *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019) (per curiam). As in its prior ruling, the district court has ordered disclosure of deliberative process privileged

documents for which plaintiffs have demonstrated no material need, and without giving any meaningful weight to the impact of its intrusion on the military's significant confidentiality interests.

1. Plaintiffs challenge the constitutionality of the military's current policy regarding service by transgender individuals and individuals with gender dysphoria. That policy resulted from the recommendations of a panel of experts (Panel) charged with conducting "an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." Add. 180 (quotation omitted). The Panel's recommendations were adopted in their entirety by then-Secretary of Defense James Mattis for reasons laid out in a detailed report, and the military implemented the present Mattis policy. *See* Add. 145-59, 160-62.

In 2018, the district court issued a sweeping discovery order overruling all claims of deliberative process privilege as to any aspect of the military's consideration of its policies concerning service by transgender individuals and individuals with gender dysphoria. Doc. 299. This Court blocked that order, however, issuing a writ of mandamus vacating the district court's discovery ruling, and it also vacated on appeal the preliminary injunction the district court had issued against the Mattis policy. *Karnoski*, 926 F.3d at 1187. The Court stressed the district court's error in conducting "a single deliberative process privilege analysis covering all withheld documents, rather than considering whether the analysis should apply differently to certain categories." *Id.* at 1206. The Court "direct[ed] the district court to reconsider

discovery by giving careful consideration to executive branch privileges," *id.* at 1187, emphasizing that "the military's interest in full and frank communication about policymaking raises serious . . . national defense interests," *id.* at 1206.

2. At the time of this Court's opinion, plaintiffs had obtained no documents revealing the deliberations of the Panel. Since that time, the government has produced every deliberative document sent from, received by, generated by, presented to, or considered by the Panel that formulated the Mattis policy. The government produced the deliberative documents of the voting members of the Panel pursuant to an order by the U.S. District Court for the District of Columbia, in another challenge to the Mattis policy. Even though the government disagrees with that order, that court concluded that the plaintiffs there had overcome the deliberative process privilege for documents that were used or considered by the Panel in the development of the Mattis policy. *Doe 2 v. Esper*, 2019 WL 4394842, at *8-10 (D.D.C. Sept. 13, 2019). The government also produced the deliberative documents of the sole non-voting member of the Panel pursuant to this district court's December 18, 2019 order, despite disagreeing with the court's conclusion.

Whatever the asserted need for privileged documents may have been in 2018, it has been radically diminished by the disclosure of every aspect of the Panel's deliberations. Under this Court's opinion, which reflects settled law, it was, at a minimum, incumbent on the district court to evaluate the current record and determine whether there is any aspect of it that fails to furnish an adequate basis for

judicial review. Even then, if the record were found deficient in some respect, discovery would be properly tailored to that identified need.

Instead, the district court made no attempt to evaluate the new disclosures, and instead largely reinstated the discovery order vacated by this Court. The extent to which the district court abdicated its responsibilities is illustrated by its order to disclose even deliberative documents "never seen or reviewed by" and never "shared with the Panel," Add. 5-6, as well as the deliberations involved in the development of an Obama administration policy not challenged in this litigation. And the court underscored its disregard of the fundamental protections of the deliberative process privilege by concluding that it had been overcome without any showing of need for the iterative drafts of the Department of Defense's report conveying the Panel's recommendation. The documents already produced demonstrate that the Panel's recommendations were the same policy adopted in the report, in Secretary Mattis's memorandum presenting the policy to the President, and in the Department of Defense's eventual directive implementing the Mattis policy. Accordingly, plaintiffs have no need for the drafts of the report, which would divulge core deliberations without in any way providing plaintiffs with material evidence. The order also necessarily concludes that the privilege has been overcome as to documents from the highest levels of the Department, including Secretary Mattis's personal notes on a draft of the Department's report.

The district court likewise erred in entirely discounting the chilling effect of its order on the ground that "any chilling effect of disclosure can be somewhat assuaged by" a protective order and other limitations on public disclosure. Add. 83 (quotation omitted). But there was a protective order in place at the time of this Court's prior ruling, *see* Doc. 183, and this Court recognized that the district court had relied on the protective order in concluding that the harms could "be mitigated by the existing protective order in this case." *Karnoski*, 926 F.3d at 1197. This Court did not find that sufficient, and the interest in protecting frank exchanges of views is not protected by ordering their disclosure to opposing counsel who may, of course, use the documents in litigation. Assuming that a protective order "assuage[s]" a chilling effect at all, it does not avert the harm that the privilege is designed to prevent.

This Court's review is plainly warranted. This Court should reverse the district court's orders of December 18, 2019, February 3, 2020, and February 7, 2020, and order that plaintiffs are not entitled to any further deliberative documents from the two requests for production (RFPs) at issue in these orders—RFP 29 and RFP 15—given plaintiffs' inadequate showing of need under the proper standard for overcoming the deliberative process privilege. In the alternative, this Court should vacate the district court's orders and order the district court to conduct a more granular analysis that properly considers plaintiffs' purported need for the deliberative documents and the government's interest in confidentiality.

STATEMENT

The factual and legal background of this litigation is set out in detail in this Court's prior opinion. We summarize that background below as it relates to the district court's December 18, 2019, February 3, 2020, and February 7, 2020 discovery orders.

A. Background

1. At this point in the litigation, plaintiffs challenge the constitutionality of the military's policy regarding military service by transgender individuals and individuals with gender dysphoria adopted by Secretary Mattis in February 2018. *See* Add. 145-59, 160-62. The Secretary issued the current Mattis policy after two prior developments regarding the military's longstanding "categorical ban on retention of transgender service members" and their accession into the military. *Karnoski v. Trump*, 926 F.3d 1180, 1187-88 (9th Cir. 2019) (per curiam).

First, in June 2016, then-Secretary of Defense Ashton Carter ordered the armed forces to revise their standards to permit military service by transgender individuals under certain circumstances, depending on whether the individual had been diagnosed with "gender dysphoria," a condition involving "clinically significant distress or impairment in social, occupational, or other important areas of functioning." Doc. 224-2, at 12-13, 21; *see Doe 2 v. Shanahan*, 917 F.3d 694, 710-11 (D.C. Cir. 2019) (Williams, J., concurring) (describing Carter policy).

Second, in July 2017, the President stated on Twitter that "[a]fter 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." *Karnoski*, 926 F.3d at 1188 (quotation omitted). The President then issued a memorandum calling for further study of this issue and directing the military to "return to the longstanding policy" barring service by transgender individuals in the meantime. *Id.* at 1189 (quotation omitted). The President also made clear, however, that the Secretary of Defense could "advise me at any time, in writing, that a change to this policy is warranted." *Id.* at 1189 n.5 (quotation omitted).

2. To determine whether and to what extent policy changes were appropriate, Secretary Mattis established a panel of experts to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." Add. 180 (quotation omitted). The Panel consisted of voting members drawn from senior military leadership and one non-voting member, then-Under Secretary of Defense for Personnel and Readiness Robert Wilkie. Add. 143, 181. Through thirteen meetings over ninety days, the Panel met with commanders of transgender servicemembers, military medical professionals, civilian medical professionals, and transgender servicemembers themselves. *See Karnoski*, 926 F.3d at 1191. The Panel reviewed information regarding gender dysphoria and its treatment, as well as data collected after the announcement of the Carter policy. *Id.*

The Panel also received briefings from three "working groups" dedicated to issues involving personnel, medical treatment, and military lethality. Add. 181. The Transgender Service Policy Working Group was comprised of medical and personnel experts from across the Department of Defense. *Id.* The Medical and Personnel Executive Steering Committee was comprised of the Service Surgeons General and Service Personnel Chiefs. *Id.* A third working group focused on the lethality of the armed forces. *Id.*

The Panel provided Secretary Mattis with a recommended new policy, *see* Add. 208-09, which the Secretary adopted in full. *See* Add. 181 (confirming that the Department's "policy [is] consistent with [the Panel's] recommendations"). As this Court observed, the Mattis policy differed from both the Carter policy and the longstanding policy announced in the President's 2017 memorandum. *See Karnoski*, 926 F.3d at 1192, 1199. The Mattis policy does not prohibit transgender persons from serving in the military and permits those accessed under the Carter policy to remain in the military. *See* Add. 182 (providing "[t]ransgender persons should not be disqualified from service solely on account of their transgender status" and "honor[ing] its commitment to current Service members" under the Carter policy"). It differs from the Carter policy in requiring a longer period of "stability" for individuals with a history of gender dysphoria before they may access into the military and in making ineligible for accession individuals who require or have undergone gender transition. *See Doe 2*, 917 F.3d at 711-12 (Williams, J., concurring). The Mattis

policy also "reinstated the prior military practice of requiring that 'all' individuals serve in their 'biological sex,'" with an exception for those "'diagnosed with gender dysphoria' under the Carter policy." *Id.*

Secretary Mattis conveyed his proposed policy to the President in a memorandum accompanied by the Department of Defense's Report and Recommendations on Military Service by Transgender Persons (Report), which detailed the bases for the Department's recommended new policy. *See* Add. 160-62 (memorandum from Secretary Mattis to President conveying Department of Defense's recommendation). The Secretary requested that the President "revoke" his 2017 memorandum to permit the military to adopt the new policy. Add. 162. On March 23, 2018, the President revoked the 2017 memorandum, permitting the military to adopt the Mattis policy, and that policy is now in effect, after the Supreme Court stayed the preliminary injunction entered by the district court. *See Karnoski*, 926 F.3d at 1187; Add. 145-59.

B. Prior Proceedings

1. Plaintiffs filed this action in August 2017 to challenge the July 2017 Twitter announcement and the 2017 presidential memorandum. Doc. 1, 30. The district court preliminarily enjoined the implementation of those directives in December 2017. Doc. 103. In April 2018, the court extended the injunction to the Mattis policy, stating that the Mattis policy "do[es] not substantively rescind or revoke the

Ban [announced in the President's 2017 memorandum], but instead threaten[s] the very same violations." Doc. 233, at 12.

Plaintiffs served broad discovery requests that sought, *inter alia*, "all documents and communications" relating to the military's deliberations on service by transgender individuals. *See* Doc. 246-2, at 1, 4; Doc. 269-2, at 2-3 (capitalization omitted); *see also* Doc. 381-9. The government initially produced approximately 30,000 non-privileged documents and a partially redacted Administrative Record. *See* Doc. 370, at 11 (currently, 38,000 non-privileged documents). It withheld thousands of documents protected by the deliberative process privilege. In May 2018, plaintiffs moved to compel discovery of all documents withheld under the deliberative process privilege. If produced, those documents could have been disclosed under a protective order that limited public access and restricted the use of the documents to litigation. *See* Doc. 183, at 2-3.

On July 27, 2018, without evaluating the applicability of the privilege to any particular document or category of documents, the district court granted plaintiffs' motion to compel and ordered the government to produce all "documents that have been withheld solely under the deliberative process privilege." Doc. 299, at 11. The government appealed from the preliminary injunction enjoining the Mattis policy and sought a writ of mandamus directing the district court to vacate its discovery order.

2. This Court vacated the injunction, holding that the Mattis policy "is significantly different from the" President's 2017 memorandum barring transgender

individuals from serving "in both its creation and its specific provision." *Karnoski*, 926 F.3d at 1199. It also issued a writ of mandamus vacating the district court's discovery order. *Id.* at 1203-08.

The Court directed the district court to "reconsider discovery by giving careful consideration to executive branch privileges as set forth in" *Federal Trade Commission v. Warner Communications Inc.*, 742 F.2d 1156 (9th Cir. 1984) (per curiam). *Karnoski*, 926 F.3d at 1187. The Court explained that in determining whether plaintiffs' need for the deliberative materials overrides the government's interest in non-disclosure, the district court should balance the four *Warner* factors: "1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussions regarding contemplated policies and decisions." *Id.* at 1206 (quoting *Warner*, 742 F.2d at 1161).

The Court faulted the district court for "conduct[ing] a single deliberative process privilege analysis covering all withheld documents, rather than considering whether the analysis should apply differently to certain categories." *Karnoski*, 926 F.3d at 1206. Relatedly, the Court made clear that "in balancing the *Warner* factors, the district should consider classes of documents separately when appropriate." *Id.* For example, the Court explained that "[d]ocuments involving the most senior executive branch officials . . . may require greater deference." *Id.* The Court also emphasized that the potential chilling effect of disclosure "deserves careful consideration, because

the military's interest in full and frank communication about policymaking raises serious—although not insurmountable—national defense interests." *Id.* The Court recognized that there was a protective order in place. *Id.* at 1197. But the Court nonetheless found "the existing record" inadequate "to evaluate the relevance of all of the requested information, at least in terms of balancing production of materials against the military's countervailing confidentiality interest." *Id.* at 1206.

C. Proceedings on Remand

1. At the time of this Court's decision, plaintiffs had received no discovery regarding the deliberations of the Panel that formulated the Mattis policy. That situation has since altered radically.

In September 2019, the U.S. District Court for the District of Columbia, in another challenge to the Mattis policy, concluded that the plaintiffs there had overcome the deliberative process privilege for documents that were used or considered by the Panel in the development of the Mattis policy. *Doe 2 v. Esper*, 2019 WL 4394842, at *8-10 (D.D.C. Sept. 13, 2019). Although the government disagrees with the *Doe* court's order, that order was narrower and more tailored than the sweeping district court orders at issue here, and thus the government complied rather than seek mandamus review. Pursuant to the cross-use agreement among the plaintiffs in the related cases challenging the Mattis policy, *see* Doc. 183, the government informed the district court and plaintiffs here that it would produce an unredacted version of the Administrative Record, unredacted meeting minutes from

the Panel, and deliberative documents and communications to, from, generated by, presented to, or reviewed by voting members of the Panel. Doc. 389, at 1. The government explained that, with the disclosure of these documents, plaintiffs now have "all documents actually considered by these Panel members in the development of the Mattis Plan and their deliberations concerning these documents." *Id.* at 2.

While this production was in progress, the district court, on November 19, 2019, ordered plaintiffs to provide a list of prioritized requests for production (RFPs) for the disclosure of additional deliberative materials. Add. 137-38. Two of plaintiffs' prioritized requests—RFP 29 and RFP 15—comprise nearly all the deliberative documents still withheld in this case. RFP 29 requests:

> All Documents or Communications relating or referring to the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons (the "Report and Recommendations"), including without limitation: (a) all documents received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (b) all Communications to, from, or copying the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (c) all Documents reflecting, containing, or setting forth any information or data received, reviewed, or considered by the Department of Defense, Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (d) all Documents relating, reflecting, or referring to matters discussed at any meeting of the Panel of Experts, Transgender Service Policy Working Group, and/or any other group or committee within the Department of Defense that reviewed or considered transgender issues; (e) all drafts of the Report and Recommendations.

Doc. 269-2, at 2. RFP 29 thus encompasses all deliberative documents from September 14, 2017 (the date the Panel was established) to February 22, 2018 (the date of the Department's Report). Add. 143.

RFP 15 does not purport to bear on the deliberations of the Panel at all. Instead it asks for:

> All documents or communications relating to Secretary of Defense Ash Carter's Directive Type Memo 16-005, issued on June 30, 2016, regarding transgender military service and related healthcare.

Doc. 246-2, at 3 (referencing the Carter policy).

Given their broad framing, the RFPs encompass privileged, deliberative documents from "officials at varying levels in [the Department of Defense], Department of Homeland Security, Army, Navy, Air Force, Coast Guard, Defense Health Agency, the National Guard Bureau, and the Office of the Chairman of the Joint Chiefs of Staff, both uniformed and civilian, career employees and political appointees from two administrations, across numerous ranks, positions, and areas of professional expertise over a period of four years." Doc. 398, at 3-4.

2. On December 18, 2019, the district court granted plaintiffs' motion to compel production of *all* deliberative documents responsive to RFP 29. Add. 84. Although the government had been producing all deliberative materials considered by the Panel in response to the *Doe* order (and was set to complete production on December 20), *see* Add. 139, and although the court noted that it "adopted the reasoning and conclusions" of the *Doe* order, Add. 80, the court did not consider that

production in assessing plaintiffs' purported need for additional deliberative materials. *See* Add. 81-84.

Instead, the district court addressed only two subsets of the roughly 22,000 deliberative documents responsive to RFP 29. Add. 82. First, the court concluded that the privilege had been overcome as to "the work and communications of" Under Secretary Wilkie, the sole non-voting member of the Panel. Add. 82-83. These documents have since been produced and are no longer at issue. *See* Add. 143 (setting production no later than January 31, 2020).

Second, the district court concluded that the privilege had been overcome for "drafts created by officials in the Office of the Under Secretary of Defense, who were tasked with writing the Report and Recommendation after the Panel concluded its work." Add. 82. The court believed that drafts of the Report are "relevant to assessing whether the Ban was implemented in reliance on the independent recommendations of the Panel." Add. 82-83. The court addressed the chilling effect resulting from the disclosure by stating that any risk to "future deliberations" could "be mitigated with a protective order." Add. 83-84.

3. The government initially understood the district court's order to encompass only the Wilkie documents and the drafts of the Report addressed in the court's order, which alone would mark a significant intrusion into the Department of Defense's decisionmaking. But plaintiffs, on January 10 and 17, 2020, indicated that they interpreted the court's order to have overcome the deliberative process privilege as to

over 22,000 documents spanning a period of five months, encompassing all deliberative documents broadly "relating or referring" to the Report—including documents never sent from, received by, generated by, presented to, or considered by any member of the Panel. Add. 144; *see* Doc. 405, at 5.

The government moved for clarification and, in the alternative, a stay of the order as applied to documents other than those related to the Panel's sole non-voting member. *See* Doc. 405. The government further explained that prior discovery demonstrated that the Panel's recommendations were adopted in full under the Mattis policy, that the Report adopted the Panel's recommendations, that Secretary Mattis conveyed those recommendations in the Report to the President, and that the Department of Defense implemented those recommendations. *Id.* at 8-10. Thus, the deliberative drafts of the Report could not be relevant to understanding whether the Mattis policy "was implemented in reliance on the independent recommendations of the Panel." Add. 83.

On February 3, 2020, the district court held a hearing on the government's motion for clarification. *See* Add. 7-77. In that hearing, the court indicated that the government's understanding of the order was incorrect. *See* Add. 20:17-19. The written order that followed requires the government to produce within seven days (by February 14, 2020) "all documents responsive to Request for Production 29," including: "[a]ll responsive working group communications, including communications that were never seen or reviewed by the Panel"; "all responsive data

reviewed by members of the working groups or members of the services, including data that was never seen or reviewed by the Panel"; and "all responsive communications among members of the [military] services, regardless of whether those communications were shared with the Panel." Add. 5-6. The court asserted, without explanation, that plaintiffs had shown a need for deliberative material never seen by the Panel because "understanding the decision-making regarding what information the working groups or anyone within the services chose to withhold from the Panel is relevant to evaluating Defendants' argument that the Panel's decision was based on the 'study of relevant data and information.'" Add. 4; *see* Add. 15:17-16:2. And the district court concluded that "the relevance of these documents outweighs any deference owed to members of the working groups or services, who were not 'the most senior executive branch officials.'" Add. 4 (quoting *Karnoski*, 926 F.3d at 1206).

During the February 3 hearing, the district court also ordered the government to produce thousands of privileged documents responsive to RFP 15, which encompasses all deliberative documents considered or reviewed by the advisory group that developed the Carter policy, along with all communications of the members of that advisory group. Add. 46:3-17. Although the Carter policy is no longer in effect and is not challenged in this litigation, the court declared these documents were "relevant" to permit plaintiffs "to compare and contrast" the decisionmaking processes that led to the Carter policy and the Mattis policy, respectively. Add. 46:1-2, 46:6-7, 46:15-17.

At the February 3 hearing, the district court preemptively denied a stay of its forthcoming order, and it confirmed that denial in its February 7 written order. Add. 5-6; *see* Add. 25:10 ("You're not going to get a stay."); Add. 30:11 ("The motion for the stay is being denied.").

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS MANDAMUS AUTHORITY TO CORRECT ORDERS THAT REQUIRE WHOLESALE DISCLOSURE OF MILITARY DELIBERATIONS.

A. Mandamus Review Is Appropriate.

In 2018, this Court issued a writ of mandamus in this case to vacate the district court's order that had abrogated, *en masse,* the government's deliberative process privilege with respect to tens of thousands of documents—many of the same documents at issue here. The Court explained that relief is warranted in a case of this kind where a petitioner has "no other adequate means to attain the relief desired," where the petitioner shows "that the right to the writ is clear and indisputable," and where "'the writ is appropriate under the circumstances.'" *Karnoski v. Trump*, 926 F.3d 1180, 1203 (9th Cir. 2019) (per curiam) (quoting *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 381 (2004)). In making that determination, the Court considered "(1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated

error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression." *Id.* These factors "serve as guidelines," and "[n]ot every factor need be present at once" or even "point in the same direction." *Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010).

The government has no alternative means of relief for the same reasons recognized by this Court in granting the government's prior petition for mandamus. As this Court previously recognized, mandamus relief is warranted because the "unique features" of "the deliberative process privilege . . . suggest that there is no other adequate means of relief." *Karnoski*, 926 F.3d at 1203. The damage resulting from the mass disclosure of deliberative materials from the district court's present orders—in particular, the chilling effect on future Department of Defense decisionmaking from that disclosure in litigation—cannot be undone.

Additionally, the district court committed clear and indisputable error by flouting this Court's prior mandamus opinion. The court spurned multiple opportunities to heed this Court's instructions to engage in a careful weighing of the "deliberative process privilege with Plaintiffs' need for certain information." *Karnoski*, 926 F.3d at 1206. There is "no doubt" that the district court had "a 'clear duty' to respond to [this Court's] remand," and it is appropriate "to issue a writ of mandamus to 'prevent the frustration of orders previously issued.'" *In re Core Commc'ns, Inc.*, 531

F.3d 849, 855-56 (D.C. Cir. 2008) (quoting *PEPCO v. ICC*, 702 F.2d 1026, 1032 (D.C. Cir. 1983)).

B. The District Court's Orders Requiring Wholesale Disclosure Of Military Documents Subject To The Deliberative Process Privilege Ignore Settled Law And Disregard This Court's Instructions.

1. In 2018, the district court issued a discovery order that required disclosure of virtually all deliberative documents pertaining to the 2018 Mattis policy as well as all deliberative documents related to the already-superseded 2016 Carter policy. *See* Doc. 299. This Court vacated that order and directed the district court to closely consider plaintiffs' asserted need for any class of requested documents and the impact of their disclosure. *Karnoski*, 926 F.3d at 1206.

When this Court issued the writ of mandamus, plaintiffs had obtained no privileged documents relating to the deliberations of the Panel that developed the policy, which was adopted in its entirety by Secretary Mattis. Since then, the government has since produced—pursuant to orders of this district court and the *Doe* district court for which the government has not sought mandamus relief—every deliberative document sent from, received by, generated by, presented to, or considered by the Panel that formulated the Mattis policy. These include:

- An unredacted version of the Administrative Record;
- Unredacted meeting minutes from the Panel;
- All documents, testimony, and data reviewed by voting members of the Panel and the Panel's deliberations about these materials;
- All documents, testimony, and data reviewed by the non-voting member of the Panel and the Panel's deliberations about these materials;
- All documents and communications related to the Panel's work that were sent from, received by, generated by, presented to, or considered by the voting members of the Panel; and
- All documents and communications related to the Panel's work that were sent from, received by, generated by, presented to, or considered by the non-voting member of the Panel.

See Doc. 389, at 2; *see also Doe 2 v. Esper*, 2019 WL 4394842, at *8-10 (D.D.C. Sept. 13, 2019).

By any calculus, the disclosure of those documents radically alters plaintiffs' purported need for yet more privileged discovery. Plaintiffs do not need more to litigate the lawfulness of the Mattis policy. Federal courts routinely adjudicate the lawfulness of federal policies on far less extensive a record. Before proceeding further, it was incumbent on the district court to review these materials and determine whether there is any sound basis for permitting further discovery into the military's deliberations, and, if so, to tailor any such discovery to the particular identified need.

This Court's prior ruling makes clear that the district court could not properly order sweeping additional discovery without evaluating whether, in light of these disclosures, plaintiffs could demonstrate any specific need for any specific categories

of documents. The Court emphasized that to establish the availability of an "exception" to the deliberative process privilege, plaintiffs must demonstrate that their "need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *Karnoski*, 926 F.3d at 1206 (quoting *Federal Trade Commission v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (per curiam)). The district court had manifestly failed to respect this requirement by conducting "a single deliberative process privilege analysis covering all withheld documents, rather than considering whether the analysis should apply differently to certain categories." *Id.* The Court also made clear that the district court had failed to appreciate the strength of the government's interests in confidentiality, and it "direct[ed] the district court to reconsider discovery by giving careful consideration to executive branch privileges," *id.* at 1187, emphasizing that "the military's interest in full and frank communication about policymaking raises serious . . . national defense interests," *id.* at 1206; *accord id.* at 1207.

The Court's decision did not suggest that any additional discovery would necessarily be appropriate. To the contrary, this Court observed that in *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018), the Supreme Court had "held that '[t]he 12-page Proclamation—which thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions'—was sufficient to allow for judicial review." *Karnoski*, 926 F.3d at 1206 n.22. It is enough that military policy has been "decided by the appropriate military officials" in an exercise of "their

considered professional judgment." *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986). Indeed, for related reasons, the government maintains that the entire premise of discovery in this military case is incorrect. *See Doe 2 v. Shanahan*, 917 F.3d 694, 737 (D.C. Cir. 2019) (Williams, J., concurring). In reviewing military policy, it is "quite wrong" for courts to "undertak[e] an independent evaluation of this evidence, rather than adopting an appropriately deferential examination" of the military's own "evaluation of that evidence." *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981). The Mattis policy is subject to the most deferential review, and as such, courts must assess the lawfulness of that policy on its own terms. *See Winter v. NRDC*, 555 U.S. 7, 24 (2008) (making clear that "great deference" is owed to "the professional judgment of military authorities"); *Hawaii*, 138 S. Ct. at 2419-20 (observing that judicial "inquiry into matters of . . . national security is highly constrained").

But even if discovery were appropriate in the military context, the district court's cavalier abrogation of the government's deliberative process privilege in these circumstances is indefensible. And the court's indiscriminate approach cannot be squared with this Court's prior ruling. *See Karnoski*, 926 F.3d at 1206. At this point, plaintiffs here have received not only the detailed Report setting forth the bases for the Mattis policy but also the full record of the Panel's deliberations. Nothing in this Court's decision suggests that any additional disclosures, much less the vast additional disclosures ordered by the district court, would be permissible.

2. In ordering disclosure of additional deliberative documents, the district court paid no heed to any of this Court's admonitions. It held the privilege had been overcome for tens of thousands of documents without a careful assessment of need and mistakenly believed that its order would have no chilling effect because the documents would be produced under a protective order. The district court seriously erred in both respects.

a. The district court misapprehended the showing of need required to overcome a valid claim of deliberative process privilege, and, instead, conflated the standard of need with the general standard for determining whether a document satisfies minimal standards of relevance. It is not enough that documents merely "relate" to the challenged policy. That is the baseline requirement for requesting *non*-privileged discovery. *See* Fed. R. Civ. P. 26(b) (permitting discovery of "any nonprivileged matter that is relevant to any party's claim or defense"). To overcome the deliberative process privilege, plaintiffs must instead establish a further "need for the materials." *Karnoski*, 926 F.3d at 1206. But the court's limited analysis, which covers only some of the documents at issue, identifies no need *at all* for the documents, much less a need sufficiently great to overcome the important interests protected by the privilege.

First, the district court identified no legitimate need for drafts of the Report and deliberative documents relating to the Mattis memorandum conveying the Report to the President. These are privileged deliberative drafts generated at the highest

levels of the Department of Defense. They include not only iterative drafts of the Report, including Secretary Mattis's handwritten comments on a draft Report, but also his personal notes on a draft letter to the President.

The district court cited nothing in the Report or in the discovery already obtained that would justify an extraordinary order requiring disclosure of such draft documents. The court asserted that the drafts were "relevant to assessing whether the Ban"—the court's intransigent label for the Mattis policy despite this Court's rejection of that characterization, *Karnoski*, 926 F.3d at 1199—"was implemented in reliance on the independent recommendations of the Panel." Add. 83. But as the government explained—and as the court did not question—the documents produced in discovery had already demonstrated that the Panel's recommendations were the same policy adopted in the Report to Secretary Mattis, in Secretary Mattis's memorandum presenting the policy to the President, and in the Department of Defense's eventual directive implementing the policy. *Compare* Add. 224-25 (memorandum to Secretary Mattis with the Panel's Recommendations), *with* Add. 179 (Department of Defense's Report "propos[ing] policy consistent with [the Panel's] recommendations"), Add. 177 (Secretary Mattis's memorandum providing that the new policy is "[b]ased on the work of the Panel"), *and* Add. 161 (Department of Defense's Directive implementing the Panel's recommendation). That the ultimate Mattis policy in fact reflects the Panel's original recommendations is not a point of dispute. *Compare* Add. 224, *with* Add. 161. Accordingly, plaintiffs have no need for drafts of the Report, which are

core deliberative materials, to understand whether the Mattis policy reflects the independent recommendations of the Panel. And if for any reason the district court had questions in this regard, they should have been resolved by consulting the documents already produced.

Second, the district court offered no plausible basis for ordering disclosure of all communications within the working groups and among all members of the armed services "relating or referring" to the Report, "regardless of whether those communications were shared with the Panel." Add. 6. Communications that were not provided to the Panel plainly had no role in its deliberations. And the court's explanation for ordering disclosure again encapsulates its misunderstanding of the standard for overcoming a proper claim of privilege. The court declared that "understanding the decision-making regarding what information the working groups or anyone within the services chose to withhold from the Panel is relevant to evaluating Defendants' argument that the Panel's decision was based on the 'study of relevant data and information.'" Add. 4; *see* Add. 15-16. The apparent premise of this ruling is that a broad conspiracy existed to ensure that the Panel did not receive relevant information. That assumption, which calls into question the integrity of dozens of military professionals, is wholly without basis and turns the presumption of regularity on its head. *See U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001). As the *Doe* district court in related litigation explained, the request for deliberative documents without any connection to Panel members amounts to an improper "fishing"

expedition. Doc. 405, at 7; *see Goldman*, 475 U.S. at 509 (holding that studies, experts, and evidence not actually before the military decisionmakers are "quite beside the point"). The court's ruling is particularly anomalous because it fails to appreciate that data collected and reviewed by the working groups and presented to the Panel have already been disclosed.[1]

Third, compounding its errors, the district court compelled the disclosure of thousands of additional deliberative documents responsive to RFP 15, which seeks all documents related to the formation of the Carter policy in 2016. Add. 45-46. The court declared that the deliberations concerning the Carter policy were "relevant" to the plaintiffs' comparison of the decisionmaking process for the Carter policy and that of the Mattis policy. *Id.* Even assuming that they were "relevant," the court identified no respect in which they are needed. The deliberations of the Panel that formulated the Mattis policy have been fully disclosed, and there is no basis for concluding that deliberations from the development of the Carter policy in 2016 that were not reviewed by the Panel would provide insight into the validity of plaintiffs' claim that the Mattis policy was the result of unconstitutional bias. *See Doe 2*, 917 F.3d at 729

[1] The government has represented that the military has "already produced all data, including cost data, that was presented to the Panel of Experts, as well as the underlying data utilized by the Military Services to formulate the data presented to the Panel of Experts," Doc. 408, at 21, and plaintiffs have never identified in the government's privilege logs other responsive and relevant working-group data that had been improperly withheld under the deliberative process privilege.

(Williams, J., concurring) (finding no need existed to obtain development of a previous policy simply for comparison purposes).

b. Just as the district court failed to examine plaintiffs' need for the documents, it similarly failed to consider the impact of the disclosures on the military's interests in protecting the confidentiality of its policy deliberations. As the Supreme Court has explained, disclosure of deliberative documents chills the willingness of government officials to engage in "open, frank discussion between subordinate and chief concerning administrative action." *EPA v. Mink*, 410 U.S. 73, 87 (1973). Indeed, the existence of the privilege rests on "the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery." *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001). In providing direction to the district court, this Court stressed that "the military's interest in full and frank communication about policymaking raises serious . . . national defense interests." *Karnoski*, 926 F.3d at 1206.

The government's declaration therefore explained that "[m]atters of national security frequently present multiple courses of action that require careful and delicate balancing of equities and priorities against the need to serve national defense interests," and "[o]pinions identifying risks or areas of concern are critical to the integrity and viability of the military decision-making process." Add. 157. "If [Department of Defense] personnel knew that their thoughts, impressions, and opinions . . . would be open to scrutiny, they may hesitate to provide their true

positions on potential courses of action, not just related to military personnel decisions but as to any politically sensitive decision that [the Department] faces in the future." Add. 159. That is especially so in the context of such controversial topics as military service by transgender individuals that require "delicate and candid communications." Add. 159.

These concerns apply with particular force to drafts of final decisions and reports. Were it otherwise, the threat of disclosure would severely inhibit the process of constructing the final document to be presented to the public. *See, e.g.*, *Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 983 (9th Cir. 2009) (draft report was protected by the deliberative process privilege as its release "would expose the agency's internal deliberations in such a way that would discourage candid discussion and effective decisionmaking"); *National Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1120-22 (9th Cir. 1988) (holding that disclosure of draft documents was "inimical to [the privilege]'s goal of encouraging uninhibited decisionmaking"); *Dudman Commc'ns Corp. v. Department of Air Force*, 815 F.2d 1565, 1568-69 (D.C. Cir. 1987) (explaining that "[t]he danger of 'chilling' arises from disclosure that the Air Force as an institution made changes in a draft at some point").

Despite this Court's instruction that the potential chilling effect of disclosure "deserves careful consideration," *Karnoski*, 926 F.3d at 1206, the district court apparently believed that it need not engage in any analysis because "any chilling effect of disclosure can be 'somewhat assuaged' by" a protective order and other limitations

on public disclosure. Add. 6; *accord* Add. 7 ("[T]hese risks can be mitigated with a protective order."). But there was a protective order in place at the time of this Court's prior mandamus ruling, *see* Doc. 183, at 2-3, and this Court considered the district court's contention that the harms from disclosure could therefore "be mitigated by the existing protective order in this case." *Karnoski*, 926 F.3d at 1197. The district court's assumption, once again, that a protective order is sufficient to defeat the military's confidentiality interests only underscores that the court has repeatedly flouted this Court's guidance.

As this Court explained in granting mandamus in other litigation, moreover, "[a] protective order limiting dissemination" may "ameliorate but cannot eliminate" the chilling effects of disclosure. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1164 (9th Cir. 2009). It is cold comfort to those participating in the deliberative process to know that their candid advice will be disclosed to adversaries in litigation. *See Klamath Water Users*, 532 U.S. at 8-9. As the Department of Defense explained, "entry of a judicial protective order" does not prevent the use of such material in the litigation, and the knowledge that internal deliberations will be aired in litigation may well "influence the decision to abstain or provide less than complete candor during policy development." Add. 159. The district court did not explain why these concerns were unfounded, and, indeed, conflated its belief that a protective order would "somewhat assuage" the impact of disclosure with the clearly mistaken conclusion that a protective order

eliminated a chilling effect. *See* Add. 117:15-16 ("Well, with a protective order, I don't see that there's a chilling effect.").

The district court's passing suggestion in its February 7 order that any chilling effect is minimal because "members of the working groups or services" are "not 'the most senior executive branch officials'" misses the point. Add. 4 (quoting *Karnoski*, 926 F.3d at 1206). The deliberative process suffers profoundly when junior-level officials are chilled in giving candid advice. The court disregarded "the obvious realization" that there is a special concern that those who are not in chief policy roles "will not communicate candidly among themselves if each remark is a potential item of discovery." *Klamath Water Users*, 532 U.S. at 8-9. In any event, the court's orders *do* encompass documents from "senior executive branch officials" covered by RFP 29, including Secretary Mattis himself. *See supra* pp. 24-25.

3. In sum, the district court disregarded this Court's guidance and improperly ordered disclosure of documents protected by the deliberative process privilege for which plaintiffs have demonstrated no need. Mandamus is warranted because there is no imaginable need for documents not before the relevant military decisionmakers for the military policy at issue, let alone a need that could overcome the military's interests in confidentiality. This Court accordingly should reverse the district court's orders of December 18, 2019, February 3, 2020, and February 7, 2020, and order that plaintiffs are not entitled to any further deliberative documents from the two RFPs at issue in these orders—RFP 29 and RFP 15—given plaintiffs' inadequate showing of need

under the proper standard for overcoming the deliberative process privilege. In the alternative, this Court should vacate those orders and direct the district court to conduct a more granular analysis that properly considers plaintiffs' purported need for the deliberative documents and the government's interest in confidentiality.

II. THIS COURT SHOULD GRANT A STAY PENDING REVIEW OF THE PETITION AND AN IMMEDIATE ADMINISTRATIVE STAY.

This Court should stay the district court's order pending its consideration of this petition and grant an immediate administrative stay pending its consideration of the stay motion, as it did in considering the government's prior stay request and mandamus petition in this case. *See* Order, *In re Trump*, No. 18-72159 (9th Cir. Sept. 17, 2018). The Court commonly grants stays pending disposition of a writ of mandamus, including in cases involving challenges to discovery orders. *See, e.g.*, Order, *In re United States of America*, No. 17-72917 (9th Cir. Oct. 24, 2017) (staying discovery and record supplementation); *Barton v. U.S. Dist. Court for Cent. Dist. of Cal.*, 410 F.3d 1104, 1106 (9th Cir. 2005) (similar); *Calderon v. U.S. Dist. Court for the N. Dist. of Cal.*, 98 F.3d 1102, 1104 (9th Cir. 1996) (similar).

A stay is necessary here to prevent disclosure of thousands of privileged communications regarding the military's deliberative process. Add. 5-6, 45-46, 84. No countervailing harm will result from granting a stay while this Court considers the government's petition. Plaintiffs already have a trove of discovery, and, as discussed,

they have demonstrated no need for the documents at issue here, much less urgent need that would be affected by a stay, let alone an administrative stay.

The government accordingly asks that the Court issue, as expeditiously as possible, a stay of the district court's order pending its consideration of the mandamus petition. The government also requests an administrative stay by the close of business on Wednesday, February 12, 2020 to permit this Court's full consideration of the stay motion, or at the very least for a reasonable period to allow the Solicitor General to seek relief from the Supreme Court if necessary.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of mandamus and reverse or vacate the orders of December 18, 2019, February 3, 2020, and February 7, 2020. In addition, the Court should grant a stay pending resolution of this petition, and the Court should also grant an immediate administrative stay—on which opposing counsel has indicated that they take no position—either pending consideration of the stay motion or at the very least for a reasonable period to permit relief from the Supreme Court if necessary.

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STATEMENT OF RELATED CASES

Petitioners are aware of the prior mandamus proceedings in *In re Trump*, No. 18-72159 (9th Cir) *consolidated with Karnoski v. Trump*, No. 18-35347 (9th Cir.). Those proceedings arose from the same district court case as this petition for a writ of mandamus, and this Court's prior ruling is at issue with respect to the discovery orders challenged in this petition. *See Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019) (per curiam).

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the limit of Ninth Circuit Rule 21-2(c) and 32-3(2) because it totals 8,059, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this petition complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2016 in a proportionally spaced typeface, 14-point Garamond font.

s/ Ashley A. Cheung
ASHLEY A. CHEUNG

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2020, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service has been accomplished via email to the following counsel:

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The district court has been provided with a copy of this petition for writ of mandamus pursuant Federal Rule of Appellate Procedure 21(a).

s/ Ashley A. Cheung
ASHLEY A. CHEUNG

EXHIBIT 37

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*, Plaintiffs, v. MARK T. ESPER, in his official capacity as Acting Secretary of Defense, *et al.*, Defendants.	Civil Action No. 17-cv-1597 (CKK)

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL

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INTRODUCTION

Plaintiffs' effort to compel production of thousands of documents from the Department of Defense and the Services should be rejected on all facets. Plaintiffs barely acknowledge the D.C. Circuit's January 4, 2019 judgment or concurring opinions. The issue of whether this Court must apply military deference in its review of the Mattis policy has been settled—it must. The D.C. Circuit held that this Court's review must "be 'appropriately deferential' in recognition of the fact that the Mattis [policy] concerned the composition and internal administration of the military." *Doe v. Shanahan*, 755 F. App'x 19, 24 (D.C. Cir. 2019) (per curiam) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981)). Properly applying the D.C. Circuit's judgment, as well as binding Supreme Court precedent pertaining to such appropriately deferential review of a military decision, Plaintiffs' motion fails.

First, Plaintiffs' request for "raw data, personnel files that include performance evaluations and assessments . . . and reports from the field," Pls.' Mot. to Compel ("Pls.' Mot.") 8, Dkt. 216, is an extremely inappropriate and intrusive request for tens of thousands of medical records from third-party service members that is disproportionate to the needs of the case, and clearly runs afoul of military deference principles. Neither Plaintiffs, Plaintiffs' experts, nor the Court are permitted to examine the underlying data and substitute their opinions for those of Defendants as to a more effective way to compose the fighting force. Defendants have provided their justification for the challenged policy, and those justifications either pass constitutional muster or they do not. Any opinions Plaintiffs have to offer after their own review of the "raw data" are "quite beside the point." *Doe v. Shanahan*, 917 F.3d 694 (D.C. Cir. 2019) (Williams, J., concurring in result).

Second, Plaintiffs' request for "all documents relating to the decision to delay implementation of the Carter accession policy and the pre-tweet review process," Pls.' Mot. at 10, likewise fails to acknowledge the D.C. Circuit's decision. Plaintiffs argue that these materials are necessary to determine whether then-Secretary Mattis' decision to delay the Carter accessions policy in June 2017

"was based on independent military judgment," and thus whether the Court should apply military deference. *Id.* But this is merely an expansion of the argument that the D.C. Circuit has already rejected. Again, the D.C. Circuit was clear: this Court must apply military deference. *See Doe*, 755 F. App'x at 24–25.

Third, Plaintiffs' argument that the deliberative process privilege does not apply as a matter of law relies on the misplaced assumption that military deference is a "defense" to be applied only upon a thorough examination of the quality of the military's deliberations. But, as the D.C. Circuit emphasized, military deference is a constitutionally mandated standard of review based on the subject matter of the challenged policy. *See id.* Here, because the subject matter involves the composition of the fighting force, deference is applied and no further inquiry into agency deliberations is warranted.

For these reasons, among others, both Judge Williams and Judge Wilkins wrote to address discovery going forward. Judge Williams explained in his concurring opinion that he would have precluded any further discovery and that "[a]ny further proceedings—including a highly intrusive examination of the President's mental processes—would [ ] be idle, or worse." *Doe*, 917 F.3d at 736 (Williams, J., concurring in result) (citations omitted). And while Judge Wilkins opined that there may still be some leeway for the district court to compel "military or executive officials to explain the operation and purpose of [a military] requirement[,]" *id.* at 705 (Wilkins, J., concurring), both concurring opinions rejected the type of "intrusions into executive decision making[,]" *id.* at 736 (Williams, J., concurring in result), that Plaintiffs contemplate with the present motion. *Compare id.* at 705 (Wilkins, J., concurring) (explaining that "[c]ompelling military or executive officials to explain the operation and purpose of [the policy] would not improperly intrude upon [the Executive Branch's] mental processes" because "[i]t is the decision-making process that requires shielding from public scrutiny, not the decision itself once it has been acted on") *with id.* at 736–737 (Williams, J., concurring in result).

While Defendants agree with Judge Williams that "the record and the law require dismissal of plaintiffs' claims," *id.* at 77 (Williams, J., concurring in result), and therefore, any further discovery is inappropriate, under the approach of either Judge Williams or Judge Wilkins, Plaintiffs' motion fails. Here, Defendants have already provided documents setting forth the terms of and rationale for the Mattis Policy, plan to supplement those productions with further implementing guidance, and have offered to make available for deposition the Chair of the Panel of Experts, who can "explain the operation and purpose" of the Mattis policy. *Id.* at 705 (Wilkins, J., concurring). Accordingly, none of the discovery Plaintiffs seek to compel through the instant motion comes within the bounds of what the D.C. Circuit would permit. On that basis alone, Plaintiffs' motion should be denied.[1]

BACKGROUND

Plaintiffs filed this action on August 9, 2017, raising constitutional challenges to the President's statements on Twitter concerning military service by transgender individuals. Compl., Dkt. 1. Plaintiffs also filed a motion for a preliminary injunction, Dkt. 13, which the Court granted in part, Dkt. 60. Following the Court's entry of a preliminary injunction, Defendants sought a stay pending the forthcoming policy recommendation from the Panel of Experts for the Transgender Policy Review (the "Panel"),[2] convened by then-Secretary of Defense Mattis on September 14, 2017. Dkt. 62. The

[1] Although Plaintiffs have provided examples of several documents that they are seeking to compel, Plaintiffs have not made clear whether they are seeking to compel only these specific documents, or whether they are seeking to compel *all* of the documents on Defendants' five *Vaughn* Indices, which encompass over a thousand documents from DoD and the Services, as well as all of the documents on Defendants' clawback log, or a narrower subset of those documents. *See infra* pp. 30–31.

[2] The Panel consisted of members of senior military leadership who had "the statutory responsibility to organize, train, and equip military forces" and were "uniquely qualified to evaluate the impact of policy changes on the combat effectiveness and lethality of the force." DoD Report and Recommendations at 18, Dkt. 96-2. The Panel's task was to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members." *Id.* at 17. The Panel was supported by working groups, which were assigned areas of focus and expertise. *See id.* Additional details of the work of the Panel and its working groups are set forth in Defendants' Motion to Dissolve the Preliminary Injunction. *See* Defs.' Mot. 5–7, Dkt. 96.

Court declined to stay the case, and the parties commenced discovery. Dkt. 63.

On December 15, 2017, Plaintiffs issued broad discovery requests specifically targeting Defendants' decision-making processes. Plaintiffs' requests primarily sought information and documents related to: (i) a decision by then-Secretary Mattis to defer the start of accessions by transgender individuals under the Carter policy; (ii) the President's statements on Twitter in July 2017; (iii) the 2017 Presidential Memorandum; and (iv) the Interim Guidance issued by then-Secretary Mattis in September 2017. *See, e.g.*, Exh. 1 (Pls.' First Set of Interrogs., Interrogatories 1–22, 25); Exh. 2 (Pls.' First Set of Reqs. for Prod. ("RFP"), RFP 1–9, 16–19, 22). Only two of Plaintiffs' discovery requests specifically sought information related to the Panel of Experts. *See* Exh. 2, RFPs 20, 21.

In response to Plaintiffs' discovery requests, Defendants objected to discovery requests and withheld documents protected by the deliberative process privilege (among others), but otherwise responded. *See, e.g.*, Defs.' Objs. to Pls.' First Set of Interrogs., Dkts. 86-4, 86-5, 91-4–91-8. Defendants conducted an extensive search and produced tens of thousands of non-privileged, responsive documents. Defendants also produced an administrative record in excess of 3,000 pages to Plaintiffs, which contains meeting minutes from the Panel, as well as the materials considered by the Panel before the formulation of its recommendation to the Secretary of Defense.

In addition to producing the administrative record, tens of thousands of responsive documents, and responding to written discovery, Defendants made witnesses available for depositions. Plaintiffs requested to depose officials in DoD and the armed forces who served on or supported the Panel. In particular, Plaintiffs requested that Defendants schedule the deposition of Anthony Kurta, Deputy Assistant Secretary of Defense for Military Personnel Policy, Office of the Under Secretary of Defense for Personnel and Readiness. Mr. Kurta served as chair of the Panel through late November 2017. *See* USDOE00032824, Dkt. 128-25. Plaintiffs also requested to depose Lernes Hebert, Principal Director, Military Personnel Policy, Office of the Under Secretary of Defense

for Personnel and Readiness. Defendants scheduled the depositions of Mr. Kurta and Mr. Hebert, but Plaintiffs chose not to depose them last spring and have not requested to reschedule those depositions. Plaintiffs did depose five Government officials, including Colonel Mary Krueger and Martha Soper, who served on working groups supporting the Panel. During these depositions, counsel for Defendants objected to questions calling for the disclosure of privileged information.

On March 23, 2018, while the parties were engaging in discovery, the Department of Defense announced its new policy pertaining to military service by transgender individuals ("the Mattis Plan") along with the Department's report and the administrative record supporting that policy. Defendants then moved to dissolve the Court's preliminary injunction. Dkt. 116.[3] The Court denied Defendants' motion to dissolve, finding, *inter alia*, that "the Mattis Implementation Plan effectively implements the policy directives that were already at issue when the Court's preliminary injunction was ordered[]" and therefore, its prior decision declining to apply military deference based on "the unusual factors associated with the issuance of the 2017 directives" extended to its review of the Mattis Plan. Memorandum and Opinion, Dkt 157 at 31-32. Defendants appealed to the D.C. Circuit, Dkt. 162.

Shortly after the Department issued its new policy, Plaintiffs filed their second amended complaint, Dkt. 106, challenging the constitutionality of what they continued to characterize as a "ban on military service by transgender individuals," Second Am. Compl. ¶ 1, Dkt. 106, as allegedly "announced in . . . tweets [by the President on July 26, 2017,] promulgated to the Department of Defense in [the Presidential] Memorandum" issued on August 25, 2017 and finalized in DoD's new policy dated February 22, 2018, *id.* ¶ 83; *see also id.* ¶¶ 37, 38, 74, 75, 79, 80, 85.

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[3] Also, on March 23, 2018, Defendants' moved for a protective order seeking to apply the discovery limitations of the Administrative Procedure Act. Dkt. 97. The Court denied Defendants' motion finding that because Plaintiffs assert constitutional claims the APA's limitations on discovery do not apply. Dkt. 114; *but see, e.g.*, *Bellion Spirits LLC v. United States*, 335 F. Supp. 3d 32, 44 (D.D.C. 2018); *Chiayu Chang v. U.S. Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160, 161 (D.D.C. 2017).

On April 13, 2018, Plaintiffs sought a teleconference with the Court to resolve several discovery disputes. *See* Dkt. 113-1 at 3–5. Included in Plaintiffs' email to the Court was a request "to set a date certain for the completion of Defendants' production, preferably by early May [2018]." *Id.* at 5. The Court granted Plaintiffs' request and ordered Defendants to produce non-privileged documents to Plaintiffs by May 15, 2018. The Court noted that "[t]here are several substantive motions that are either pending or will be filed soon, the resolution of which may affect the scope of discovery[]" and therefore "[t]he Court will resolve the parties' disputes about privileges—if they are still relevant—after the Court resolves [the parties] substantive motions." Dkt. 113 at 1.

On April 20, 2018, Defendants filed a motion to dismiss the second amended complaint, or, in the alternative, for summary judgment. Dkt. 115. Plaintiffs filed a cross-motion for summary judgment, Dkt. 132; however, citing Federal Rule of Civil Procedure 56(d), Plaintiffs also asked the Court to defer ruling on the parties' motions "[i]f the Court determines that resolution of the parties' cross-motions for summary judgment turns on whether or not the process that resulted in the Mattis Plan and the Panel Report reflected independent military judgment." *Id.* at 18 n.5. The Court denied Defendants' motion to dismiss the second amended complaint, Order, Dkt. 156, and the Court denied both parties' motions for summary judgment based on a finding that "genuine disputes of material fact remain" because "[t]he parties dispute the facts related to the process used by Defendants to prepare the current proposed policy on transgender military service." Mem. Op. 9, Dkt. 160. Citing to the related case, *Karnoski v. Trump*, 328 F. Supp. 3d 1156, 1161–62 (W.D. Wash. 2018), *vacated and remanded by Karnoski v. Trump*, Nos. 18-35347, 18-72159, 2019 WL 2479442 (9th Cir. June 14, 2019), the Court found that such facts were material because they were necessary to determine if the deferential standard pertaining to judicial review of military decisions articulated in *Rostker* applied to the present case. *See* Mem. Op. 11–15, Dkt. 160.

Upon resolution of the dispositive motions, the Court directed the parties to "meet and confer

and file a Joint Status Report" that proposes a "protocol for the efficient resolution of the parties' outstanding discovery disputes." Minute Order, Aug. 27, 2018. The parties proposed a briefing schedule to resolve the remaining discovery disputes, Joint Status Report 1, Dkt. 167, the Court approved and entered that schedule, Minute Order, Sep. 10, 2018, and the parties submitted briefs in accordance with that schedule. Dkt. 169, 170, 171, 174, 175, 176, 180, 181, 182.

On January 4, 2019, the D.C. Circuit reversed the Court's denial of Defendants' motion to dissolve the preliminary injunction. *Doe*, 755 F. App'x at 19–25. The D.C. Circuit held that "the District Court made an erroneous finding that the Mattis Plan was not a new policy but rather an implementation of the policy directives enjoined in October 2017[,]" noting that the "government took substantial steps to cure the procedural deficiencies the court identified in the enjoined 2017 Presidential Memorandum." *Id.* at 23. The D.C. Circuit also concluded that this Court "made an erroneous finding that the Mattis Plan was the equivalent of a blanket ban on transgender service." *Id.* Finally, the D.C. Circuit held that "any review must be 'appropriately deferential' in recognition of the fact that the Mattis Plan concerned the composition and internal administration of the military." *Id.* at 25 (citing *Rostker*, 453 U.S. at 67 and *Goldman v. Weinberger*, 475 U.S. 503, 507–508 (1986)).

Subsequently, on January 22, 2019, the Supreme Court issued an Order staying the preliminary injunctions in two related cases—*Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. filed Aug. 28, 2017), and *Stockman* v. *Trump*, No. 17-cv-1799 (C.D. Cal. filed Sep. 5, 2017)— "pending disposition of the Government's appeal in the United States Court of Appeal for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is sought." *Trump v. Karnoski*, No. 18A625 (U.S. Jan. 22, 2019); *Trump v. Stockman*, No. 18A627 (U.S. Jan. 22, 2019). The district court in the related case *Stone v. Trump*, No. 17-cv-2459 (D. Md.), subsequently stayed the preliminary injunction in that case. *Stone v. Trump*, No. 17-cv-2459 (D. Md.), Dkt. 249.

On January 30, 2019, "[b]ased on recent decisions by the D.C. Circuit and the Supreme Court"

this Court denied without prejudice all pending discovery motions. Order 2, Dkt 188. The Court then ordered the parties to meet and confer regarding the scope and breadth of discovery and instructed the parties to "particularly focus on how the scope and breadth of permissible discovery is affected by the D.C. Circuit's determination that the Mattis Plan is not a continuation of the 2017 Presidential Memorandum but is instead a new plan." *Id.*

On March 8, 2019, two judges from the D.C. Circuit issued separate opinions concurring with the Panel's January 4, 2019 judgment. Judge Williams explained that he would have precluded any further discovery in this case, noting that the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point." *Doe*, 917 F.3d at 736 (Williams, J., concurring in result) (quoting *Goldman*, 475 U.S. at 509). Judge Wilkins explained that he would have carefully limited discovery to inquiring "about how military policies operated or what interests they served." *Id.* at 706 (Wilkins, J., concurring).

Between February 1, 2019 and March 28, 2019 the parties met and conferred on multiple occasions in an attempt to resolve the remaining discovery disputes. On March 28, 2019, the parties submitted a joint status report outlining the progress they had made. Dkt. 200. As noted in the joint status report, in response to Plaintiffs' request and in an effort to narrow the remaining discovery disputes, Defendants offered (1) to produce supplemental data involving military personnel diagnosed with gender dysphoria that was used to provide testimony to the House Armed Services Subcommittee on Military Personnel in February 2019, (2) to waive the deliberative process privilege over recommendations from the Services and the Surgeons General to then-Secretary Mattis related to the delay of the Carter accessions policy in June 2017, (3) to waive the deliberative process privilege over the emails between then-Secretary Mattis and third parties, and (4) to waive the deliberative process privilege over the final versions of the briefing presentations given by the Panel of Experts to the Deputy Secretary of Defense, the Vice Chairman of the Joint Chiefs of Staff, and the Secretary of

Defense. *Id.* at 4–5. On April 9, 2019, the Court held a telephone conference with the parties regarding the remaining discovery disputes. Dkt. 202. Following the telephone conference, the Court issued a Minute Order outlining the parties' agreements and the remaining disputes. Minute Order, Apr. 9, 2019. The Court ordered the parties to meet and confer by April 16, 2019 and propose a briefing schedule for the remaining discovery disputes. *Id.*

On April 16, 2019, the parties jointly proposed that Defendants would produce the documents that Defendants had offered to produce, *see* Dkt. 203, specifically Defendants would produce a "*Vaughn* Index" to Plaintiffs encompassing documents considered or generated by the Panel of Experts as well as communications to or from members of the Panel regarding their work, drafts of the Panel's report communicated to any third parties and communications that followed the submission of the Panel's report but predated the publication of the implementation plan, and that Plaintiffs would file a motion to compel documents still in dispute, to include any remaining dispute as to Defendants' clawback of certain documents. *See id;* Dkt. 200 at 4–6. On April 16, 2019, the Court entered the parties' proposed schedule. Minute Order, Apr. 16. 2019.

Defendants complied with the deadlines set in the Court's April 16, 2019 Minute Order and produced the aforementioned documents and *Vaughn* indices. On June 4, 2019, Plaintiffs filed the instant motion to compel, seeking documents "showing the raw data, personnel files, and field reports that underlie the statistical summaries and conclusions contained in Secretary Mattis' report," "documents that relate to the decision to delay the date of implementation of the accessions component of the Carter Policy to January 1, 2018," and documents withheld pursuant to the deliberative process privilege. *See* Pls.' Mot. 1.

On June 14, 2019, while the parties were briefing the instant dispute, the Ninth Circuit ruled on a similar discovery dispute involving the deliberative process privilege in the related *Karnoski* case. *See Karnoski v. Trump*, Nos. 18-35347, 18-72159, 2019 WL 2479442 (9th Cir. June 14, 2019). The Ninth

Circuit granted Defendants' petition for a writ of mandamus and vacated the district court's discovery order "so that the district court may reconsider Plaintiffs' discovery requests giving full consideration to the Executive's Article II prerogatives." *Id.* at *20. The Ninth Circuit cautioned that the "deliberative process privilege[,] although not absolute, require[s] careful consideration by the judiciary." *Id.* The Ninth Circuit instructed the district court to "consider classes of documents separately when appropriate[,]" explaining that conducting a single deliberative process privilege analysis for multiple categories of documents was improper. *Id.* at *19.

The Ninth Circuit also concluded that the district court erred in striking Defendants' motion to dissolve the preliminary injunction and explained that "the reasonableness of the 2018 Policy must be evaluated on the record supporting that decision and with the appropriate deference due to a proffered military decision." *Id.* Even though the Ninth Circuit incorrectly concluded that "the 2018 Policy discriminates on the basis of transgender status on its face," *id.* at *14 n.18, the Ninth Circuit unequivocally stated that "the district court *must* apply appropriate military deference to its evaluation of the 2018 Policy," *id.* at *15 (emphasis added).

ARGUMENT

"Plaintiff as the moving party bears an initial burden of informing the Court which discovery requests are the subject of the motion to compel, which of the responding party's responses are disputed, why the responding party's responses are deficient, why the responding party's objections, if any, are not justified, and why the documents sought are relevant to the claims at issue in the action." *Ioane v. Spjute*, 2015 WL 1874789, at *2 (E.D. Cal. Apr. 23, 2015); *see also United States v. All Assets Held at Bank Julius Baer & Co.*, 202 F. Supp. 3d 1, 6 (D.D.C. 2016) ("The party seeking discovery must first demonstrate that the information sought is within the scope of discoverable information under Rule 26."). Plaintiffs have not met their burden, and thus their motion to compel should be denied.

I. The D.C. Circuit's Judgment and Concurring Opinions Indicate that the Discovery Plaintiffs Seek Is Inappropriate.

As an initial matter, the D.C. Circuit's judgment and concurring opinions call into question this Court's prior conclusions concerning the scope of discovery in this case and indicate that the discovery Plaintiffs seek is inappropriate.

Prior to the D.C. Circuit's ruling, this Court denied Defendants' motion to dissolve the preliminary injunction and also denied the parties' cross-motions for summary judgment. Dkts. 156, 157, 159, 160. The Court concluded that "summary judgment is not appropriate at this stage" because "the facts about the process leading up to the development of the [new policy] are both material and in dispute." Mem. Op. 13, Dkt. 160. Citing to a now-vacated decision in the related case, *Karnoski v. Trump*, the Court explained that "the constitutionality of the challenged policy 'necessarily turns on facts related to Defendants' deliberative process.'" Mem. Op. 13, Dkt. 160 (quoting *Karnoski*, 328 F. Supp. 3d at 1161–62, *vacated and remanded by Karnoski*, 2019 WL 2479442). The Court further opined that the facts about the process leading up to the development of the new policy "go to the heart of the degree of deference owed, and the level of scrutiny to be applied, in this case." *Id.*

In reversing this Court's denial of Defendants' motion to dissolve the preliminary injunction, the D.C. Circuit emphasized that in a constitutional challenge "to decisions by the executive and legislative branches regarding the composition and internal administration of combat-ready military forces" "courts must give great deference to the professional judgment of military authorities." *Doe*, 755 F. App'x at 24 (citing *Rostker*, 453 U.S. at 67; *Goldman*, 475 U.S. at 507); *see also Karnoski*, 2019 WL 2479442 at *20 (concluding that "the reasonableness of the 2018 Policy must be evaluated on the record supporting that decision and with the appropriate deference due to a proffered military decision"). The D.C. Circuit reaffirmed that "[c]ourts 'must be particularly careful not to substitute [their] own judgment of what is desirable . . . or [their] own evaluation of the evidence'" for that of the executive-branch decision maker "because [i]t is difficult to conceive of an area of governmental

activity in which the courts have less competence." *Doe*, 755 F. App'x at 24 (quoting *Rostker*, 453 U.S. at 68); *see also id.* at 24–25 (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2421–22, (2018) (upholding an executive order in part because it "reflect[ed] the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies," and explaining that "we of course do not defer to the Government's reading of the" Constitution, but "the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving sensitive and weighty interests of national security and foreign affairs" (internal quotation marks omitted))); *Karnoski*, 2019 WL 2479442, at *19 n.22 ("We note that in *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018), the Court held that 'the 12-page Proclamation—which thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions'—was sufficient to allow for judicial review." (brackets omitted)).

Applying these principles to this case, the D.C. Circuit stated that "as in *Rostker* and *Goldman*, any review must be 'appropriately deferential' in recognition of the fact that the Mattis Plan concerned the composition and internal administrative of the military." *Doe*, 755 F. App'x at 25. The D.C. Circuit "acknowledge[d] that the military has substantial arguments for why the Mattis Plan complies with the equal protection principles of the Fifth Amendment" and "recognize[d] that the Mattis Plan plausibly relies upon the 'considered professional judgment' of 'appropriate military officials.'" *Id.* (quoting *Goldman*, 475 U.S. at 509). Accordingly, the D.C. Circuit made clear that this Court *must* apply military deference in reviewing the new policy and that discovery about the process behind the development of the new policy is irrelevant to determining whether military deference applies.

Moreover, as noted above, Judge Williams would have precluded any further discovery in this case. *Doe*, 917 F.3d at 736 (Williams, J., concurring in result). As Judge Williams explained, the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point." *Id.* (quoting *Goldman*, 475 U.S. at 509). Because the military deference "standard

of review reflects [ ] separation of powers principles," "it is 'quite wrong' and 'palpably exceed[s]' [the court's] authority to 'undertak[e] an independent evaluation of [ ] evidence, rather than adopting an appropriately deferential examination of the *political branches*' 'evaluation of that evidence.'" *Id.* at 719–20 (quoting *Rostker*, 453 U.S. at 81, 82–83) (alterations in original); *see also id.* (citing *Hawaii*, 138 S. Ct. at 2421–22 (declining in matters of national security to "substitute" the Court's own "predictive judgments," or its own "evaluation of the underlying facts," for those of the [decisionmaker])); *Karnoski*, 2019 WL 2479442 at *14 n.18, *15 (unequivocally stating that "the district court must apply appropriate military deference to its evaluation of the 2018 Policy," even after incorrectly concluding that "the 2018 Policy discriminates on the basis of transgender status on its face").

Additionally, Judge Williams explained that this Court's contemplation of "a highly intrusive examination of the mental processes of the civilian and military leadership of a coordinate branch of government" reflects "wholly mistaken assumptions about the nature of constitutional review of military personnel policy." *Doe*, 917 F.3d at 707 (Williams, J., concurring in result). Squarely rejecting "plaintiffs' contention, accepted by the district court, that '[d]eference to military decisionmaking . . . depends on the actual exercise of independent military judgment[,]'" *id.* at 729, Judge Williams emphasized that "'[t]he "Constitution itself requires"' deference to the military choices of the political branches[,]" *id.* at 730 (citing *Rostker*, 453 U.S. at 67; U.S. Const. art. II, § 1, cl. 1).

For these reasons, "facts—about the process leading up to the development of the Mattis [policy]—are irrelevant to the judicial analysis of military personnel policy dictated by Supreme Court authority," *id.* at 736 (citations omitted), and Plaintiffs' argument that military policies are suspect unless they demonstrate independence "verges on weird," *id.* at 730. "Where, as here, plaintiffs cannot save their claims with *any* further discovery because the law so clearly forecloses their demands—both on the current record and with any additions that can plausibly be imagined—the court should not bless (or invite) a futile fishing expedition into the executive's decisionmaking—especially of the

intrusive sort contemplated by the district court." *Id.* at 737. This is especially true because "'judicial inquiries into . . . executive motivation represent a substantial intrusion into the workings of [a coordinate] branch[ ] of government.'" *Id.* (quoting *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 n.18, (1977); *see also id.* at 736 (explaining that "[a]ny further proceedings—including a highly intrusive examination of the President's mental processes—would thus be idle, or worse" (citations omitted)).

Judge Wilkins disagreed with his colleague's categorical bar on further discovery but explained that any discovery should be carefully limited to inquiring "about how military policies operated or what interests they served." *Id.* at 706 (Wilkins, J., concurring). Judge Wilkins explained that "[e]ven in a facial challenge, discovery may be necessary where the impact of the regulation is unclear and disputed." *Id.* (citing *Turner Broad. Sys., Inc. v. FCC.*, 512 U.S. 622, 667–68, (1994)). In his view, "[c]ompelling military or executive officials to explain the operation and purpose of [parts of the new policy] would not improperly intrude upon [the Executive Branch's] mental processes," because "'[i]t is the decision-making process that requires shielding from public scrutiny, not the decision itself once it has been acted on.'" *Id.* at 705 (quoting 3 Weinstein's Federal Evidence § 509.23 (2019)). The type of "intrusions into executive decision making" that Plaintiffs seek has thus been squarely rejected by both judges, and there is no basis now to demand such intrusive discovery. *Compare id.* at 736–37 (Williams, J. concurring in result) *with id.* at 705–06 (Wilkins, J. concurring).

In keeping with these principles, Defendants have produced an approximately 3,000-page administrative record providing the military justification for the policy at issue. Defendants have also produced tens of thousands of documents, Plaintiffs have deposed several military officials, and Defendants have made available for deposition the Chair of the Panel of Experts to explain the operation of the policy and the interests it serves. Further, in an effort to narrow discovery disputes, Defendants agreed to waive the deliberative process privilege over certain documents to accommodate

Plaintiffs' requests. *See supra* pp. 8–9. If Plaintiffs continue to have questions about the "operation and purpose" of the policy notwithstanding DoD's thorough report and the copious record explaining the operation and purpose of the Mattis policy, *Doe*, 917 F.3d at 705 (Wilkins, J. concurring), Defendants stand ready to explain it—including in sworn testimony. But the intrusive discovery into the agency's deliberations that Plaintiffs seek is neither necessary nor appropriate in this case.

II. Plaintiffs Have Not Met Their Burden to Compel Additional Documents.

A. Plaintiffs Cannot Compel Raw Data, Non-Party Medical Records, or Personnel Files.

Plaintiffs' motion first seeks to compel "documents showing the raw data, personnel files, and field reports that underlie the statistical summaries and conclusions contained in Secretary Mattis' report and other prepared documents, including summary presentations provided to the review panel and the House Armed Services Committee, as well as any other data relating to the readiness and ongoing service of active duty service members diagnosed with gender dysphoria[.]" Pls.' Mot. at 1, 8–10. Plaintiffs' motion to compel these documents should be denied.

As a procedural matter, Plaintiffs have not served a proper discovery request for such documents, and thus Defendants have not yet had the opportunity to respond with formal objections in accordance with the Federal Rules of Civil Procedure.[4] *See* Fed. R. Civ. P. 34(b). To date, Plaintiffs

[4] Plaintiffs' motion to compel these documents is also premature because Plaintiffs did not meet and confer with Defendants after reviewing Defendants' production, as was contemplated by the parties and the Court. *See* Minute Order of April 9, 2019 ("First, Defendant has agreed to produce data generated after the development of the Mattis policy concerning service members who had been diagnosed with gender dysphoria. And, Plaintiffs have agreed to review the supplemental data prior to determining if a dispute remains."). This alone is enough to deny Plaintiffs' motion to compel. *See All Assets Held at Bank Julius Baer & Co., Ltd.*, 202 F. Supp. 3d 6 ("Failure to fulfill the [meet-and-confer] requirements of Local Rule 7(m) is grounds for denial of a discovery motion."). Moreover, a proper meet and confer would have narrowed the issues before the Court, as Defendants would have informed Plaintiffs that Defendants have already produced some of the documents Plaintiffs are seeking to compel. *See* Exh. 3, Declaration of Colonel Andreas Thum, USA ("Thum Decl."), ¶ 14; Exh. 4, Declaration of Martha Soper ("Soper Decl."), ¶ 2 n.1 (noting that some of the data Plaintiffs seek to compel was previously produced to Plaintiffs).

have only served one set of interrogatories and one set of requests for production, which were both served on December 15, 2017. *See* Exh. 1, Pls.' First Set of Interrogs.; Exh. 2, Pls.' First Set of RFPs). And only two of Plaintiffs' discovery requests specifically sought information related to the Panel of Experts. *See* Exh. 2, RFP 20 (seeking "documents constituting, reflecting, or evidencing communications on or after September 14, 2017 between any Defendant and any member of the 'panel of experts' or among the 'panel of experts' concerning service, inclusion, or exclusion of transgender people from military service, including, without limitation, any emails, meeting agendas, or meeting minutes"), RFP 21 (seeking "documents provided to, considered by, or generated by the 'panel of experts' referenced in the Interim Guidance"). Notably, neither of these requests encompasses the raw data, personnel files, and medical records that Plaintiffs now seek to compel.[5]

But even assuming, *arguendo*, that Plaintiffs' motion to compel such documents is procedurally proper, it should be denied. Plaintiffs' request seeks the disclosure of thousands of medical records and personnel files of non-party service members that are protected from disclosure by federal law. *See, e.g.,* Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320d *et seq*., and the Privacy Act, 5 U.S.C. § 552a, *et seq*. This includes disclosure of over a thousand medical records of non-party service members diagnosed with gender dysphoria. *See* Pls.' Mot. 9. Plaintiffs themselves recognized the importance of the privacy issues at stake in this litigation in seeking to

[5] Plaintiffs' assertion that the Court directed Defendants to produce "raw data, personnel files that include performance evaluations and assessments . . . and reports from the field" as well as "updated data regarding the readiness and performance of active duty service members diagnosed with gender dysphoria" in its Ap. 9, 2019 Minute Order is incorrect. *See* Pls.' Mot. at 8. As explained in the March 28, 2019 Joint Status Report, Defendants agreed to produce "supplemental data that was used to provide testimony to the House Armed Services Subcommittee on Military Personnel in February 2019." Dkt. 200 at 5. Defendants produced this supplemental data but declined to "generate new documents with updated versions of the data considered by the Panel of Experts." *Id.* Plaintiffs never indicated that they were also seeking medical records, service records, evaluations, and reports from the field pertaining to individual service members, and Defendants would have objected in any event.

proceed under pseudonyms, Dkt. 2, and these privacy considerations should also be taken into account for much more intrusive materials from non-party service members. Although an invasion of privacy can be mitigated by providing the material under a protective order and redacting the names of the service members, there is still a substantial risk of an unintentional disclosure of private medical information. Exh. 5, Declaration of Terry Adirim, M.D., M.P.H., ("Adirim Decl."), ¶ 11. DoD itself chose not to incur this risk by using extracted data from its Military Health System Data Depository ("MDR"), rather than the underlying service member medical records, when conducting its own evaluation. *Id.*

Further, the discovery Plaintiffs seek runs afoul of military deference principles and is disproportionate to the needs of the case and thus outside the proper scope of discovery under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(b)(1). In particular, the documents Plaintiffs seek are irrelevant and would be unduly burdensome for Defendants to collect and produce. Plaintiffs have not explained why these medical records, service records, evaluations, and field reports pertaining to individual service members are relevant to their facial challenge to the Mattis policy. In their motion, Plaintiffs describe in detail what they believe is missing from Defendants' production but only make cursory statements as to why such highly intrusive discovery is relevant to their case. *See, e.g.,* Pls.' Mot. 9–10 ("Without the underlying data and information on which the government relies, Plaintiffs are restricted in being able to assess Defendants' asserted justifications for the Mattis [policy].").

Indeed, service member medical and personnel records would not assist the Court in analyzing the official objectives of the Mattis policy, *see Hawaii*, 138 S. Ct. at 2420–23, nor would these documents shed light on the "operation and purpose" of the policy. *See Doe*, 917 F.3d at 705–06 (Wilkins, J., concurring in result) (explaining that the only additional discovery that should be permitted should be testimony "about how the policy operates and what military purposes it serves").

In fact, Plaintiffs appear to seek such discovery for reasons that both Judge Williams and Judge Wilkins of the D.C. Circuit agreed were in conflict with Supreme Court precedent—to have their own experts attempt to recreate the study of military experts and offer a contradicting viewpoint. *Id.* at 706 ("[T]he Court noted that it was improper for lower courts to consider plaintiff expert testimony that contradicted the military experts about whether the policies at issue were justified under the circumstances." (citing *Rostker*, 453 U.S. at 80–81; *Goldman*, 475 U.S. at 509–10); *id.* at 728 (Williams, J., concurring in result) ("But when the Supreme Court instructed that we in the judiciary 'must be particularly careful not to substitute . . . our own evaluation of evidence for a reasonable evaluation by' the political branches, it meant it." (quoting *Rostker*, 453 U.S. at 68)).

Moreover, producing such material would be unduly burdensome and time consuming for the Department of Defense. To create the summaries, charts, and documents presented to the Panel, DoD ran searches and extracted data from its MDR. Adirim Decl. ¶ 5. This system is a centralized data repository that receives data from more than 260 healthcare facilities and from the TRICARE Purchase Care program. *Id.* The MDR does not contain the actual medical records of service members but can be used to extract certain data points from medical records as was done in this instance for the Panel. *Id.* at ¶¶ 6-10. To meet Plaintiffs' demands for the actual medical records of service members, documents DoD did not even collect because it would have constituted an undue burden and unwarranted cost, particularly given that the data is already collected in its MDR, "DoD would have to hire a third-party contractor at a cost of likely hundreds of thousands of dollars" and the process could take months or even a year to complete. *Id.* at ¶ 12. And because Plaintiffs' review of medical records, service records, evaluations, and field reports cannot even be considered by the Court because it is "quite beside the point," *Doe*, 917 F.3d at 728 (Williams, J., concurring in result) (quoting *Goldman*, 475 U.S. at 509), Plaintiffs' request for the production of such material is grossly overbroad and disproportionate to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1).

B. Plaintiffs Cannot Compel Deliberations Regarding the June 2017 Accessions Delay.

Next, Plaintiffs seek deliberative documents related to then-Secretary Mattis' decision to delay implementation of the Carter Accessions Policy in June 2017. *See* Pls.' Mot. at 10–12. Plaintiffs argue that Defendants' assertion of the deliberative process privilege is overcome because they need this information to determine if that process "was based on independent military judgment." *Id* at 10.[6] The D.C. Circuit rejected this argument when it was advanced as to the Mattis policy, and its expansion to the earlier Carter accessions delay fares no better. As the D.C. Circuit emphasized, in constitutional challenges "to decisions by the executive and legislative branches regarding the composition and internal administration of combat-ready military forces" "courts must give great deference to the professional judgment of military authorities." *Doe*, 755 F. App'x at 24 (citing *Rostker*, 453 U.S. at 67; *Goldman*, 475 U.S. at 507). Accordingly, military deference applies to the Carter accessions delay just as it applies to the Mattis policy, and discovery into the deliberations behind the Carter accessions delay is irrelevant. *See supra* pp. 11–15.

Additionally, Defendants have already provided Plaintiffs with documents related to the Carter accessions delay. *See supra* pp. 8–9 (explaining that in response to Plaintiffs' request and in an effort to narrow discovery disputes, Defendants agreed to provide Plaintiff with the recommendations from the Services and the Surgeons General to then-Secretary Mattis related to the delay of the Carter accessions policy); Exh. 6, Decl. of Robert Easton ("Easton Decl."), ¶ 15. During the April 9, 2019 status conference with the Court, the Court noted that Plaintiffs should review these documents to "see whether [they] support[] a further request on [Plaintiffs'] part." Tr. of Telephonic Status Conference, April 9, 2019, 9:8–11; *see also id.* at 14:10–12 (explaining that Plaintiffs should review the

[6] Plaintiffs make no attempt to apply the proper balancing test to this category of documents. *See infra* pp. 30–37; *Hinckley v. United States*, 140 F.3d 277, 286 (D.C. Cir. 1998).

provided documents to see if they "give[ ] [Plaintiff] a grounds to ask for something additional").

Notably, Plaintiffs have not explained how the documents they have already received give them any ground for additional discovery into the Carter accessions delay. Plaintiffs cite to one Air Force document to support their argument that they have a "specific basis" for seeking additional deliberative documents to show that the decision to delay the implementation of the Carter accessions policy was not independent.[7] *See* Pls.' Mot. 1—11, 11 n.5; *see also* Pls. Exh. N. However, this document does not support their motion to compel additional documents related to the accessions delay. Plaintiffs note that then-Secretary of the Air Force Wilson raised questions as to whether a delay or revision of the Carter policy was needed due to the "small numbers" of transgender service members, but Plaintiffs do not mention the two preceding lines from that email where the Secretary "accept[s] that deployability is an issue" and "accept[s] that stability is an issue." *See* Pls.' Mot. 11 n.5; Rosenbaum Decl., Exh. N at 5. Moreover, Defendants have already provided Plaintiffs the Air Force's formal recommendation to then-Secretary Mattis regarding the accessions delay. *See* Exh. 7, Department of the Air Force Response to Memorandum for the Secretaries of the Military Departments and Chiefs of the Military Services dated May 8, 2017. Plaintiffs have not demonstrated any reason to compel additional deliberative documents regarding this military decision.

III. Plaintiffs Have Not Overcome the Deliberative Process Privilege.

Even assuming that some discovery is permissible in this case, Plaintiffs have already received all of the discovery that is proportional to the needs of the case, *see* Fed. R. Civ. P. 26(b)(1), *see also Doe*, 917 F.3d at 737 (Williams, J. concurring in result) (warning against intrusions into Executive Branch decisionmaking); *id.* at 705 (Wilkins, J. concurring) (recognizing Judge Williams' concern to be legitimate and suggesting as further discovery only explanations of the operation and purpose of the

[7] Plaintiffs also rely on Exhibit M. However, as explained below, *see infra* pp. 42–43, Plaintiffs' Exhibit M should not be considered by the Court.

new policy), and Plaintiffs have not overcome the deliberative process privilege.

A. The Deliberative Process Privilege

The deliberative process privilege protects the Government's decision-making process by shielding from disclosure documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). The privilege "reflects the commonsense notion that agencies craft better rules when their employees can spell out in writing the pitfalls as well as strengths of policy options, coupled with the understanding that employees would be chilled from such rigorous deliberation if they feared it might become public." *Judicial Watch, Inc. v. United States Dep't of Def.*, 847 F.3d 735, 739 (D.C. Cir. 2017) (citing *Sears*, 421 U.S. at 150); *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001) ("The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government." (citation omitted)); *Nat'l Sec. Archive v. C.I.A.*, 752 F.3d 460, 462 (D.C. Cir. 2014) ("If agencies were 'to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.'" (quoting *Dudman Commc'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1567 (D.C. Cir. 1987))). The privilege's "'ultimate purpose'" is to "'prevent injury to the quality of agency decisions' by allowing government officials freedom to debate alternative approaches in private." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (quoting *Sears*, 421 U.S. at 151). "In other words, agency officials 'should be judged by what they decided, not for matters they considered before making up their minds.'" *Nat'l Sec. Archive*, 752 F.3d at 462–63 (quoting *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982)).

The deliberative process privilege covers documents and communications that are "pre-

decisional and deliberative." *Id.* at 463 (citing *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006)). Pre-decisional documents are "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975)). "'[D]eliberative' . . . means, in essence, that the communication is intended to facilitate or assist development of the agency's final position on the relevant issue." *Nat'l Sec. Archive*, 752 F.3d at 463 (citing *Russell*, 682 F.2d at 1048). Deliberative material "reflects the give-and-take of the consultative process," by revealing the manner in which the agency evaluates possible alternative policies or outcomes. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

"The deliberative process privilege is a qualified privilege and can be overcome by a sufficient showing of need." *In re Sealed Case*, 121 F.3d at 737. "This need determination is to be made flexibly on a case-by-case, ad hoc basis." *Id.* "[A]djudicating such an assertion of need requires a 'balancing of the competing interests, taking into account factors such as the relevance of the evidence, the availability of other evidence, the seriousness of the litigation, the role of the government, and the possibility of future timidity by government employees.'" *Hinckley v. United States*, 140 F.3d 277, 286 (D.C. Cir. 1998) (quoting *In re Sealed Case,* 121 F.3d at 737–38). The burden is on the "party opposing the privilege to establish that its need for the information outweighs the interest of the government in preventing disclosure of the information." *Cobell v. Norton*, 213 F.R.D. 1, 5 (D.D.C. 2003); *Breiterman v. U.S. Capitol Police*, 323 F.R.D. 36, 46 (D.D.C. 2017) ("The party seeking the document bears the burden of demonstrating the balance of interest tips in his or her favor." (citation omitted)); *see also Marriott Int'l Resorts, L.P. v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006) (stating that a plaintiff must show a "compelling need" to overcome the privilege); *Redland Soccer Club, Inc. v. Dep't of Army*, 55 F.3d 827, 854 (3d Cir. 1995) ("The party seeking discovery bears the burden of showing that its need for the documents outweighs the government's interest."); *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) (stating that the plaintiff had to show a "particularized need" for specific documents

to overcome the privilege).

B. Plaintiffs' Contention that the Deliberative Process Privilege Does Not Apply as a Matter of Law Is Meritless.

1. Plaintiffs' Contention that the Deliberative Process Privilege Is Unavailable Due to Defendants' Reliance on Deference to Military Judgment Is Meritless.

Plaintiffs contend that Defendants are relying on the "defense" that deference is owed to military personnel decisions and thus, that Defendants cannot shield any deliberative information, whether from the process of developing the new policy or the process related to then-Secretary Mattis' decision to delay the Carter accessions policy. *See* Pls.' Mot. 13–15. However, this argument misapprehends the constitutional basis for judicial deference to Executive Branch decisions involving the military. The D.C. Circuit decided this issue, holding that in constitutional challenges "to decisions by the executive and legislative branches regarding the composition and internal administration of combat-ready military forces" "courts must give great deference to the professional judgment of military authorities." *Doe*, 755 F. App'x at 24 (citing *Rostker*, 453 U.S. at 67; *Goldman*, 475 U.S. at 507). Accordingly, the D.C. Circuit made clear that this Court must apply military deference in reviewing the new policy and that discovery about the process behind the development of the new policy is inappropriate and irrelevant to determining whether military deference applies. *See supra* pp. 11–15.

This is because deference to military policy judgments stems from the Supreme Court's recognition that the Constitution vests decisions as to the organization of the armed forces in the Executive and Legislative branches, *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), and that the "military constitutes a specialized community governed by a separate discipline from that of the civilian," *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953). Judicial deference is thus applied whenever the challenged decision involves "the composition, training, equipping, and control of a military force." *Morgan*, 413 U.S. at 10.

Judicial deference to military decisions is not a "defense," as Plaintiffs claim, but a

constitutionally mandated standard of review. *Rostker*, 453 U.S. at 67 ("[T]he Constitution itself requires such deference . . . ."). The application of military deference does not mean that the Government must automatically prevail in any litigation challenging a military policy, but it does mean "that constitutional challenges to military personnel policies and decisions face heavy burdens." *Thomasson v. Perry*, 80 F.3d 915, 927–28 (4th Cir. 1996) (en banc) (citing *Chappell v. Wallace*, 462 U.S. 296, 303–04 (1983)). Thus, "the special status of the military has required, the Constitution has contemplated, Congress has created, and the Supreme Court has long recognized" that litigation involving a challenge to a military policy must be conducted differently than ordinary civil litigation. *Id.* at 928 (citation and alterations omitted). Military deference is one way the Supreme Court has mandated such differing treatment.

And as the Supreme Court made clear in *Rostker*, the decision to apply military deference is based on the constitutional role in national defense and military affairs, not the quality of the policymaker's decision. *See Rostker*, 453 U.S. at 64–65 ("This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises *in the context of Congress' authority over national defense and military affairs*, and perhaps in no other area has the Court accorded Congress greater deference.") (emphasis added)).

Supreme Court cases since *Rostker* have similarly found that application of military deference requires a subject matter inquiry, not a factual inquiry into the decision-making process. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–35 (2010) ("It is vital in this context 'not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.'") (quoting *Rostker*, 453 U.S. at 68, and referring to cases brought in the national security and foreign relations context); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 58–59 (2006) (Roberts, C. J.) ("[A]s we recognized in *Rostker*, 'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies.") (quoting *Rostker*, 453 U.S. at 70)); *Solorio v. United States*, 483

U.S. 435, 447–48 (1987) ("As we recently reiterated, [j]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.") (quoting *Goldman*, 475 U.S. at 508 and *Rostker*, 453 U.S. at 70) (internal quotations omitted)); *Goldman*, 475 U.S. at 508 ("[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." (quoting *Rostker*, 453 U.S. at 70)); *Chappell*, 462 U.S. at 301–02 (in a case decided two years after *Rostker*, reiterating that when a "case arises *in the context of* Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference" (quoting *Rostker*, 453 U.S. at 64–65) (emphasis added)); *see also Winter v. NRDC*, 555 U.S. 7, 24 (2008) (holding that military deference is applied in cases involving the "composition, training, equipping, and control of a military force") (quoting *Morgan*, 413 U.S. at 10); *Boumediene v. Bush*, 553 U.S. 723, 832 (2008) (Roberts, C. J., dissenting) ("We have frequently stated that we owe great deference to Congress's view that a law it has passed is constitutional. That is especially so in the area of foreign and military affairs; 'perhaps in no other area has the Court accorded Congress greater deference.'") (quoting *Rostker*, 453 U.S. at 64–65) (citations omitted)); *Hawaii*, 138 S. Ct. at 2420 & n.5 (holding the "inquiry into matters of entry and national security is highly constrained[,]" and listing cases involving "immigration policies, diplomatic sanctions, and military actions" as examples when a rational basis review is applied.). Plaintiffs' contention that the deliberative process may be probed to test whether deference is due would stand the very doctrine of military deference on its head. At the core of Plaintiffs' flawed argument is an attempt to conflate the deference due to policies that *result* from the policy process with "deliberations" that led to the policy outcome. The fact that deference is owed to a final military policy, which resulted from deliberations, does not negate protection of those internal deliberations. Plaintiffs' contention that Defendants are using the deliberative process privilege "as a sword and as a shield," Pls.' Mot. 13,

is thus plainly wrong. The "sword/shield" concept applies where a party seeks to *use* privileged information to support its claims while simultaneously attempting to protect that very information from discovery. But in relying on established law recognizing judicial deference to military judgments, Defendants are not relying on deliberative process information and thus not waiving privilege over that information. Rather, Defendants are relying on the *outcome* of the deliberative process: DoD's new policy and the accompanying 44-page report, which provides a detailed explanation for why, in the professional judgment of DoD, this policy is necessary to further military interests. It is Plaintiffs who seek to turn reliance on the deference owed to military judgments into a sword that would eliminate deliberative process protections *per se*. There is no support in the law for this sweeping proposition.[8]

2. Plaintiffs' Contention that the Deliberative Process Privilege Does Not Apply When Intent Is at Issue Is Meritless.

Plaintiffs also argue that the deliberative process privilege does not apply in this case because "Plaintiffs' [*sic*] allege that the process was discriminatory" and thus intent is at issue. *See* Pls.' Mot. 15–16. But the Supreme Court's decision in *Trump v. Hawaii* strongly supports Defendants' position

[8] To the extent Plaintiffs are seeking *all* deliberative documents under this theory, *see* Pls.' Mot. 27 n.16, their argument not only goes beyond the scope of the Court's orders to narrow discovery, it is also meritless. Even if the application of military deference turned on factual issues, that would not mean that the deliberative process privilege should fall as to *all* deliberative documents. Even under Plaintiffs' theory, deliberative documents prior to the first meeting of the Panel of Experts, during the week of October 2, 2017, Dkt. 128-25, would be of no help to determine if the Panel acted "unthinkingly or reflexively and not for any considered reason" or whether the Panel "extensively considered" and made a "studied choice of one alternative in preference to another." Mem. Op. 12, Dkt. 160 (quoting *Rostker*, 453 U.S. at 72). Nor would low-level deliberations among military staff who were not members of the Panel help Plaintiffs answer such factual questions. Accordingly, an attempt to ascertain the answer to such questions does not justify the deliberative process privilege being overcome wholesale across thousands of documents over the course of multiple years. *Cf. Karnoski*, 2019 WL 2479442, at *19 ("[T]he district court should consider classes of documents separately when appropriate. It is not clear the district court did so in this case. The district court appears to have conducted a single deliberative process privilege analysis covering all withheld documents, rather than considering whether the analysis should apply differently to certain categories.").

that the intent of the government decisionmakers is not at issue and that the Court should instead analyze the official objectives of the current policy. *See* 138 S. Ct. at 2420–23. In *Hawaii*, the Supreme Court assessed the challenged policy on its own terms and rejected the theory that prior statements forever "contaminated" the proclamation with "impermissible discriminatory animus." *Compare id.* at 2420–21, *with id.* at 2440 (Sotomayor, J., dissenting). While recognizing that it "may consider plaintiffs' extrinsic evidence," the Court stated that it would "uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.* at 2420 (majority op.). In analyzing whether such a justification existed, the Court focused on the proclamation itself and the "multi-agency review" that supported it. *See id.* at 2417, 2421; *see also Doe*, 755 F. App'x at 24–25 (citing *Hawaii*, 138 S. Ct. at 2421–22 (upholding an executive order in part because it "reflect[ed] the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies," and explaining that "we of course do not defer to the Government's reading of the" Constitution, but "the Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving sensitive and weighty interests of national security and foreign affairs" (internal quotation marks omitted))).

In arguing that "[t]he deliberative process privilege is [ ] inapplicable" because Plaintiffs allege that the process was discriminatory, Plaintiffs rely on *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (*partial reh'g*, 156 F.3d 1279 (D.C. Cir. 1998). Pls.' Mot. 15. But the Ninth Circuit implicitly rejected relying on that decision in this context by explaining that the district court should conduct the balancing test, even though the plaintiffs there made the same allegations. *Karnoski*, 2019 WL 2479442 at *9 (noting the plaintiffs' reliance on *In re Subpoena)*, at *19 (implicitly rejecting it). That makes sense, as *In re Subpoena* did not involve a military policy concerning the composition of the fighting force, and thus the court did not apply the deferential standard required to review challenges to military policies. *See Hawaii*, 138 S. Ct. at 2420

n.5; *Doe*, 755 F. App'x at 24 (emphasizing that in a challenge to military decisions, "courts must give great deference to the professional judgment of military authorities" (citing *Rostker*, 453 U.S. at 67; *Goldman*, 475 U.S. at 507). And *In re Subpoena* did not state a categorical rule that in every circumstance where a plaintiff questions an agency's motives, the plaintiff automatically overcomes the deliberative process privilege.[9] Indeed, "[t]he privilege would be meaningless if all a litigant had to do was raise a question of intent to warrant disclosure." *In re United States*, 678 F. App'x 981, 990 (Fed. Cir. 2017); *see also Utah Med. Prods. v. McClellan*, No. 2:03-cv-525, 2004 WL 988877, *8 (D. Utah Mar. 31, 2004) (finding that a *per se* rule that the deliberative process privilege is inapplicable when a party challenges the decision-making process would lead plaintiffs to "recast [their] complaint as a challenge to the decision-making 'process'").

Plaintiffs' reliance on other cases that do not involve military policies is similarly misplaced. In four of the cases Plaintiffs cite for the proposition that the privilege does not apply when plaintiffs allege discrimination, the courts declined to apply the deliberative process privilege to "routine personnel decisions," such as the decision to terminate a single employee, observing that the deliberative process privilege is intended to protect deliberations behind broad policy decisions—precisely the kind of decision at issue here. *See United States v. Lake Cty. Bd. of Comm'rs*, 233 F.R.D. 523, 528 (N.D. Ind. 2005); *Waters v. U.S. Capitol Police Bd.*, 218 F.R.D. 323, 324 (D.D.C. 2003) (finding that the deliberative process privilege did not apply to a document that "speaks to a particular

[9] *In re Subpoena*, which involved a bankruptcy proceeding, held that the deliberative process privilege did not apply in a fraudulent transfer action in which the plaintiff was required to show that the transfers were made "with actual intent to hinder, delay, or defraud." 145 F.3d at 1423 (citation omitted). On rehearing, the D.C. Circuit clarified that its "holding that the deliberative process privilege is unavailable is limited to those circumstances in which the cause of action is directed at the agency's subjective motivation." *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1280 (D.C. Cir. 1998); *see also In re Subpoena*, 145 F.3d at 1424 (holding privilege inapplicable where "Congress creates a cause of action that deliberatively exposes government decisionmaking to the light").

investigation," and contrasting that situation with "the adoption of a policy that applies to all cases of a particular nature or type," where the privilege would apply); *McPeek v. Ashcroft*, 202 F.R.D. 332, 335 (D.D.C. 2001) (in a retaliation case, holding that the plaintiff was "simply wrong in asserting that the deliberative process privilege should yield in [that] case because of his claim of governmental misconduct" and repeating *In re Subpoena's* holding in dicta); *Jones v. City of Coll. Park, Ga.*, 237 F.R.D. 517, 521 (N.D. Ga. 2006). Further, the court in *Jones* applied a balancing test before ordering disclosure despite finding that "government intent is at the heart of the issue in this case"—contrary to Plaintiffs' own position. 237 F.R.D. at 521. In sum, none of the cases cited by Plaintiffs provides any basis for deviating from the Supreme Court's instruction in *Hawaii* that a policy of this sort be assessed based on its own stated justifications, not the purported intent behind it. 138 S. Ct. at 2417–23.

Finally, Plaintiffs rely on discovery orders in two related cases, *Stone v. Trump*, 356 F. Supp. 3d 505, 510, 514 (D. Md. 2018), and *Karnoski v. Trump*, 328 F. Supp. 3d 1156, 1161–62 (W.D. Wash. 2018). *See* Pls.' Mot. 15–16. However, on June 17, 2019, the Ninth Circuit issued a writ of mandamus and "vacate[d] the district court's discovery order [that directed, among other things, disclosure of all of Defendants' deliberative documents], so that the district court may reconsider Plaintiffs' discovery requests giving full consideration to the Executive's Article II prerogatives." *Karnoski*, 2019 WL 2479442, at *16–*19.[10]

Accordingly, the authority on which Plaintiffs rely to foreclose application of the privilege as a matter of law in this case is inapposite and distinguishable from the circumstances here, where deliberations on a military personnel policy are at issue.

[10] The *Stone* Court relied on the same flawed reasoning as the *Karnoski* district court, but stayed its ruling pending the Ninth Circuit's decision in *Karnoski*. In light of the Ninth Circuit's recent ruling, Defendants intend to seek reconsideration. *See Stone v. Trump*, No. 17-cv-2459 (D. Md.), Dkt. 255.

C. The Balancing Test Weighs in Favor of Upholding Defendants' Privilege Claims.

Next, Plaintiffs argue that the deliberative process privilege is overcome by their need for the information. Pls.' Mot. 16–19. However, Plaintiffs have a heavy burden of showing a compelling and particularized need for the documents and information they seek. *See Cobell*, 213 F.R.D. at 5; *Marriott Int'l Resorts*, 437 F.3d at 1307; *Farley*, 11 F.3d at 1389; *Viet. Veterans of Am. v. C.I.A.*, No. 09-cv-37, 2011 WL 4635139, at *10 (N.D. Cal. Oct. 5, 2011). They cannot meet that burden here. As an initial matter, Plaintiffs have not applied the balancing test to any specific documents, nor have they made clear whether they are seeking to compel *all* of the documents on Defendants' five *Vaughn* Indices, which encompass over a thousand documents from DoD and the Services, as well as all of the documents on Defendants' clawback log, or a narrower subset of those documents.[11] Instead, Plaintiffs make generic arguments about the balancing of the applicable factors. However, these generic arguments, which do not specifically identify or address particular documents and instead apply the balancing test *en masse*, are insufficient to overcome Defendants' claims of deliberative process privilege. *See Karnoski*, 2019 WL 2479442 at *19–*20 (granting Defendants' petition for a writ of mandamus and vacating the district court's discovery order, which erroneously conducted the balancing test *en masse* to determine that the deliberative process privilege had been overcome for thousands of Defendants' deliberative documents); *In re United States*, 678 F. App'x at 987 (finding that a "document-by-document" analysis is required in assessing claims that the deliberative process

[11] Indeed, during the April 9, 2019 teleconference, the Court indicated that the parties "should both go back and take a look at [the clawback material] and see if there are issues that can be narrowed." Tr. of Teleconference, 24:10-12. Both parties agreed during the teleconference that there was likely room for compromise on the clawback documents. However, Plaintiffs did not reach out to Defendants to meet and confer about which clawback documents they were challenging. In any event, the documents on Defendants' clawback log are pre-decisional and deliberative, and their release would "have a chilling effect on the Army's personnel when developing forthcoming policies, and thus an adverse effect on the quality and integrity of the Army's future decision making processes." Exh. 3, Thum Decl. ¶ 13; *see also id.* ¶¶ 4–8, 12–13.

privilege has been overcome).

Instead of applying the balancing test to specific documents, Plaintiffs argue that they are "entitled" to broad categories of documents, such as "documents that show the options considered by the [Panel of Experts]." Pls.' Mot. 12-13. However, Plaintiffs do not even attempt to apply the balancing test to this category of documents. Instead, Plaintiffs argue that because they "seek to show that the Mattis [policy] was not based on independent military judgment," they are "entitled" to these documents. *Id.* at 12. However, this argument has been squarely rejected by the D.C. Circuit and is contrary to Supreme Court precedent governing judicial review of military policies. *See supra* pp. 11–15, 23–26.

In any event, even if the Court were to consider Plaintiffs' generic arguments, any balancing of the applicable factors would not justify the disclosure of all of the documents on Defendants' five *Vaughn* Indices and all of the documents on Defendants' clawback log.

Relevance of the evidence. Relying on this Court's opinion denying summary judgment to both parties, Plaintiffs argue that the information they seek goes "to the heart of the degree of deference owed, and the level of scrutiny to be applied." Pls.' Mot. 16 (quoting Mem. Op. at 13, Dkt. 160). This argument merely reiterates Plaintiffs' argument that the deliberative process privilege does not apply in this case because the degree of military deference is a factual question. As demonstrated above, this argument has been squarely rejected by the D.C. Circuit and is contrary to Supreme Court precedent governing judicial review of military policies. *See supra* pp. 11–15, 23–26.

In any event, Plaintiffs' generalized assertion of need for "[i]nformation concerning the delay of the open accessions policy, the work of the [Panel of Experts], and the development of the Mattis [policy]," Pls.' Mot. 16, is far from the "strong showing of relevance" and particularized need required to overcome the privilege for each and every document on Defendants' five *Vaughn* Indices, *Viet. Veterans of Am.*, 2011 WL 4635139, at *10; *see also Marriott Int'l Resorts, L.P.*, 437 F.3d at 1307; *Farley*,

11 F.3d at 1389. "Information concerning the delay of the open accessions policy, the work of the [Panel of Experts], and the development of the Mattis [policy]," Pls.' Mot. 16, would encompass thousands of deliberative documents created over the course of nearly two years and spanning two different administrations. It would include documents from across the Department of Defense and the Services involving communications among officials at different levels at different times with respect to different decisions. And the documents include not only communications involving the Secretary of Defense and his closest aides, but a host of lower-level communications throughout the Department. These documents are not susceptible to a one-size-fits-all analysis. *See Karnoski*, 2019 WL 2479442, at *19 (explaining that the district court "should consider classes of documents separately when appropriate" and that conducting a single deliberative process privilege analysis for multiple categories of documents was improper); *Coastal States Gas Corp.*, 617 F.2d at 867 ("[T]he deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process."); *In re United States*, 678 F. App'x at 987 (noting "document-by-document" analysis required in assessing claims that the deliberative process privilege has been overcome).

In sum, Plaintiffs have not proper applied the balancing test to specific documents or to discrete groups of documents, let alone provided any specific information regarding why their need for such documents outweighs Defendants' interest in non-disclosure. Their failure to do so should preclude disclosure of any of Defendants' deliberative documents.

The availability of other evidence. Aside from failing to demonstrate a particularized need for any specific document or information, Plaintiffs have available to them ample discovery, including over 30,000 non-privileged documents and responses to Plaintiffs' discovery requests. Plaintiffs have also had ample opportunity to take depositions, but have taken only five depositions in this case and have chosen thus far not to depose the chair of the Panel of Experts, Mr. Anthony Kurta. *See Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 328 (D.D.C. 1966) ("Necessity for production is

sharply reduced where an available alternative for obtaining the desired evidence has not been explored.").

Plaintiffs argue that they "have no reason to expect that the evidence concerning the deliberations that resulted in the Mattis [policy] exist anywhere other than in Defendants' possession." Pls.' Mot. 17. They further argue that they cannot proceed with additional depositions because Defendants will instruct their witnesses not to answer Plaintiffs' questions that seek information subject to the deliberative process privilege. However, these arguments miss the point. When evaluating this factor, the focus is on the availability of other non-privileged evidence to which Plaintiffs have access, not whether Plaintiffs can obtain precisely the same privileged deliberative information from another source. *See Hinckley*, 140 F.3d at 286 (declining to find that the deliberative process privilege was overcome upon noting that "the Hospital has already given Hinckley access to a tremendous amount of information, including all of the evidence that was before the Review Board as well as the Review Board's final decision and explanation for it").

Nor is there any merit to Plaintiffs' assertion that depositions would not be productive at this stage in the litigation. Consistent with Judge Wilkins's view of how discovery should proceed in this case, Plaintiffs could depose agency officials and ask them "to explain the operation and purpose" of the new policy without "improperly intrud[ing] upon [the Executive Branch's] mental processes." *Doe*, 917 F.3d at 705 (explaining that "'[i]t is the decision-making process that requires shielding from public scrutiny, not the decision itself once it has been acted on'" (quoting 3 Weinstein's Federal Evidence § 509.23 (2019))). For example, Plaintiffs could avoid seeking information subject to the deliberative process privilege (such as whether the Panel considered certain options) by asking whether the Panel of Experts' review process was constrained or predetermined.

Most importantly, the reasoning and evidence behind the Department's new policy is set forth in the Department's Report and Recommendations, and Defendants have produced an administrative

record to Plaintiffs that comprises over 3,000 pages of supporting documentation for that policy. That administrative record contains the Panel's meeting minutes as well as the materials considered by the Panel prior to the formulation of its recommendation to the Secretary of Defense. *See Doe*, 917 F.3d at 737 (Williams, J., concurring in result) (explaining that the court's role in evaluating military policy is so circumscribed that extra-record evidence and discovery is "quite beside the point" (quoting *Goldman*, 475 U.S. at 509)); *Steffan v. Cheney*, 920 F.2d 74, 76 (D.C. Cir. 1990) (per curiam) (finding that judicial review of military policies should be "confined to '[t]he grounds . . . upon which the record discloses that [the] action was based'" (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)); *see also Hawaii*, 138 S. Ct. at 2420 (upholding presidential proclamation based solely on its text); *Steffan v. Perry*, 41 F.3d 677, 699–700 (D.C. Cir. 1994) (Randolph, J., concurring) (finding that review should be limited to the agency record and that the mental processes of military decision-makers should not be probed); *Pruitt v. Cheney*, 963 F.2d 1160, 1166–67 (9th Cir. 1992) ("Finally, the Army urges that we should defer to the military judgment. We readily acknowledge, as we must, that military decisions by the Army are not lightly to be overruled by the judiciary. That admonition, however, is best applied in the process of judging whether the reasons put forth on the record for the Army's discrimination against Pruitt are rationally related to any of the Army's permissible goals." (citing *Rostker*, 453 U.S. at 64–69; *Goldman*, 475 U.S. at 507)). Taken together, the availability of other evidence strongly undercuts Plaintiffs' demand to probe the mental processes of agency officials. *See Hinckley*, 140 F.3d at 286 (declining to find that the deliberative process privilege was overcome upon noting that "the Hospital has already given Hinckley access to a tremendous amount of information, including all of the evidence that was before the Review Board as well as the Review Board's final decision and explanation for it"); *Utah Med. Prods.*, 2004 WL 988877 at *5 (finding that even though the requested document was relevant to plaintiff's claims, the production of a "fifteen-volume administrative record" and other documents "all provided [the plaintiff] with a clear explanation" as to why the

agency took an enforcement action).[12]

The extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions. This factor strongly weighs against wholesale waiver of the deliberative process privilege for over a thousand documents, especially since Plaintiffs have not made any effort to identify or show any particular need for any specific documents.

Disclosure of over a thousand deliberative documents from the Department of Defense and the Services covering multiple policies plainly risks chilling future policy discussions on sensitive personnel and security matters that require free and frank communication within the highest ranks of the Department and the military. *See* Exh. 6, Easton Decl. ¶ 24–28; Exh. 3, Thum Decl., ¶¶ 12–13 ("Disclosure would . . . have a chilling effect on the Army's personnel when developing forthcoming policies, and thus an adverse effect on the quality and integrity of the Army's future decision making processes."); Exh. 8, Declaration of Grant E. Lattin ("Lattin Decl."), ¶¶ 5–7 ("Compelled disclosure of the preliminary analysis demanded by Plaintiffs would inhibit the candor and effectiveness of subject matter experts assigned to make recommendations and develop military personnel policies."); Exh. 4, Soper Decl., ¶¶ 4–6 ("Without assurance that their opinions on aspects of transgender policy would be protected from disclosure, individuals will be much more likely to withhold their participation and honest views in the future."). Indeed, the

[12] The next factors in the balancing test are the role of the Government in the litigation and the seriousness of the litigation. *See Hinckley*, 140 F.3d at 286 (quoting *In re Sealed Case*, 121 F.3d at 737–38). There is no dispute that the Government's policy is at issue or that this case, which involves a military policy that affects national security, is a serious one. But these factors do not outweigh the Government's strong interests in non-disclosure, especially given the availability of other evidence and Plaintiffs' failure to articulate a need for any particular document. *See Hinckley*, 140 F.3d at 286 ("[T]he balance weighs strongly against granting . . . access to the [agency's] internal deliberations, notwithstanding the seriousness of the present litigation."); *Agility Pub. Warehousing Co. v. Dep't of Def.*, 110 F. Supp. 3d 215, 222 (D.D.C. 2015) (finding that although the case was serious, "this single factor cannot outweigh the others stacked against it").

Ninth Circuit vacated the *Karnoski* district court's discovery order granting plaintiffs' motion to compel and directed that district court to give "careful consideration" of the "military's interest in full and frank communication about policy-making," which "raises serious—although not insurmountable—national defense interests." *Karnoski* 2019 WL 2479442 at *19.

The chilling effect would be especially severe in this case given the breadth of Plaintiffs' request. Plaintiffs are seeking "all documents considered or generated both during the panel review process and between the conclusion of the review process and the adoption of Secretary Mattis' plan, including documents considered or generated by the [] Panel, communications to or from members of the [] Panel regarding their work, drafts of the [] Panel's report communicated to any third parties, and communications that post-date the [] Panel's report but pre-date the Mattis [policy]." Pls.' Mot. 27. This would encompass, for example, candid advice given to then-Secretary Mattis by the Deputy Secretary of Defense on the topic of the transgender military service—the kind of sensitive advice that, if disclosed, could diminish his subordinates' willingness to present their candid views to the Secretary in the future. *See Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979) (documents "shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice"); *Coastal States Gas Corp.*, 617 F.2d at 866 (one purpose of the deliberative process privilege is "to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism"). If subordinates are chilled from providing their candid views on future policy matters to the Secretary of Defense and military leaders, the overall quality of the decision-making process will be affected, potentially leading to a direct negative impact to national security. *See* Exh. 6, Easton Decl. ¶ 27 ("The lack of essential input would degrade DoD's decision-making process and could expose the nation to greater overall risk."); Exh. 3, Thum Decl. ¶¶ 12–13 ("Without this full and frank

discourse, the integrity of the Army's decision making processes suffers."); Exh. 8, Lattin Decl. ¶¶ 5–7 ("Without such discourse, the Navy's ability to implement high quality, mission-enabling policies will suffer."); Exh. 4, Soper Decl. ¶ 4 ("Disclosure of these documents . . . would have a negative effect on the quality of the Air Force's policymaking process."). Such harm to the core Government responsibility to protect its citizens should carry overwhelming weight.

D. Defendants Properly Withheld Pre-decisional and Deliberative Materials Subject to the Deliberative Process Privilege.

1. The Materials Withheld by Defendants Are Pre-Decisional.

Plaintiffs next assert that the Government has "improperly withheld post-decisional communications." Pls.' Mot. 19. They point out that some of the Government's withholdings concern "implementation," and contend that such documents are, "by definition, post-decisional and thus not deliberative." *Id.* at 21. But this argument misunderstands the law governing the deliberative process privilege. First, it fails to recognize that documents generated after a decision has been made can be predecisional for *subsequent* decisions. *See Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006) ("[D]ocuments dated after [a decision was made] may still be predecisional and deliberative with respect to other, nonfinal agency policies."); *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 841 F. Supp. 2d 142, 162 (D.D.C. 2012) (Kollar-Kotelly, J.) ("[E]ven documents dated after a decision has been made may still be eligible for protection under the deliberative process privilege."). Second, it ignores that deliberations concerning policy "implementation" can relate to later decisions about how to execute a particular policy, and thus can be protected by the deliberative process privilege. *See Bloche v. Dep't of Defense*, 279 F. Supp. 3d 68, 83 (D.D.C. 2017) (finding that DoD's discussion of "how [a] current policy is implemented and potential recommendations for changes are properly characterized as predecisional and deliberative"). Indeed, "[e]ven after a path has been cut by an agency, it is the very process of debating, shaping, and changing a . . . policy that needs candor, vigorous to-and-fro, and freedom of expression." *Judicial Watch*, 841 F.

Supp. 2d at 162 (Kollar-Kotelly, J.) (quotation omitted).

Here, Plaintiffs cite documents relating to the Services' efforts to implement the Carter accessions policy by January 1, 2018—as required by the preliminary injunctions in this and the related cases—and argue that such documents are post-decisional because, in broad strokes, the accessions policy already had been decided. Pls.' Mot. 20–21. Again, this argument finds no support in the law; deliberations related to the implementation of the Carter accessions policy still reflect the give and take of agency policymaking and qualify as pre-decisional.

Plaintiffs' argument is also contrary to the facts. Once the district courts ruled that the accessions policy had to be implemented by January 1, 2018, the Services "had to rapidly develop a plan to effectively and efficiently begin accessing transgender applicants in a standardized manner." Exh. 3, Thum Decl. ¶ 7. This required staff officials to issue "recommendations and proposed courses of action for how to implement the court orders"—content that is indisputably deliberative and pre-decisional. *Id.*; *see also* Exh. 8, Lattin Decl. ¶ 12 ("[W]hen DoD or a federal court directs the Navy to implement a policy, the Navy then undertakes a deliberative process to decide how to best implement that policy."); Exh. 6, Easton Decl. ¶ 21 ("[T]he decision-making process for any major policy decision, such as a recommended policy on military service by transgender individuals, includes numerous ancillary considerations about how and when the policy would be implemented, and each of those additional decisions and accompanying processes are also deliberative in nature."); Exh. 4, Soper Decl. ¶ 8–10.

Consider Plaintiffs' own examples. They point to documents labeled "Deliberative email conversation regarding clarifying guidance to USMEPCOM[13] on processing applicants who are applying to the military under the DoD's transgender policy." Rosenbaum Decl., Exh. A at 7

[13] United States Military Entrance Processing Command.

(entries for USDOE00083070; USDOE00083071); Pls.' Mot. 20. These documents are clearly pre-decisional to later decisions about what guidance should be developed and provided to USMEPCOM. *See* Exh. 6, Easton Decl. ¶ 20 (explaining that the documents "contain[] underlying reasoning used by DoD personnel in the development and eventual publication of guidance to US Military Entrance Processing Command"). Likewise, documents labeled as "Deliberative email conversation between DoD personnel regarding products that were developed in conjunction with the transgender policy for senior leader briefings," Rosenbaum Decl., Exh. A at 5; Pls.' Mot. 20, similarly "reflect the real-time thoughts and deliberations of senior DoD personnel as they worked to develop and refine the Department's policy."[14] Exh. 6, Easton Decl. ¶ 21; *see also Judicial Watch*, 841 F. Supp. 2d at 162 (Kollar-Kotelly, J.) (finding documents were part of a "continuing process of examining [agency] policies" and therefore privileged).

Accordingly, contrary to Plaintiffs' characterization, the documents they seek do not reflect an agency "simply stat[ing] or explain[ing] a decision the government has already made." Pls.' Mot. 21 (quoting *In re Sealed Case*, 121 F.3d at 737). Nor do they merely show the agency's "formal or informal policy on how it carries out its responsibilities." *Id.* at 20–21 (quoting *Public Citizen, Inc. v. Off. of Mgmt. and Budget*, 598 F.3d 865, 875-76 (D.C. Cir. 2010)). Rather, they reflect that the agency is engaged in a continual process of implementing and evaluating its policies—a process plainly protected by the deliberative process privilege.

Finally, Plaintiffs contend that certain documents cannot be privileged because they

[14] The same is true of documents concerning the "rescission" of transgender policy, Pls.' Mot. 21, which reflect ongoing agency evaluation of previous decisions, *see, e.g.*, Exh. 3, Thum Decl. ¶ 9 ("[E]ven once a final policy is announced, the Army continually engages in a process of assessing the policy's effectiveness in order to determine whether the policy should be modified in any way or *rescinded*." (emphasis added)).

postdate either the Panel of Experts' final vote or the date of then-Secretary Mattis' 44-page report. Pls.' Mot. 21–22. Setting aside the fact that such documents may nonetheless relate to later decisions about policy implementation or reevaluation, "even post-decisional documents properly fall under the deliberative process privilege when they recount or reflect pre-decisional deliberations." *Judicial Watch*, 841 F. Supp. 2d at 163 (Kollar-Kotelly, J.). Here, the example Plaintiffs cite of January 10, 2018 communications between high-level officials from the Navy and DoD, *see* Pls.' Mot. 21–22, reflect prior deliberations because, among other things, they include a prior dissenting opinion from the review panel's majority recommendation. *See* Rosenbaum Decl., Exh. C at 2 (entry for document titled "TG Dissenting opinion (Dee 14 Dec 2017).pdf").

2. The Materials Withheld by Defendants Are Deliberative.

Plaintiffs' argument that Defendants have improperly withheld certain factual information fares no better. Pls.' Mot. 22–23. Although purely factual material is not ordinarily protected from disclosure, where factual material is "so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations," the government may permissibly withhold such material. *In re Sealed Case*, 121 F.3d at 737; *see, e.g.*, *Citizens for Responsibility & Ethics v. DHS*, 514 F. Supp. 2d 36, 46 (D.D.C. 2007) (finding factual reports and timelines of events were privileged because they were inextricably intertwined with DHS's policy for its ongoing response to Hurricane Katrina). Applying this standard, Defendants properly determined that any factual information contained within the documents they withheld was closely and inextricably intertwined with Defendants' deliberations. *See* Exh. 6, Easton Decl. ¶ 23 (referring to documents "contain[ing] deliberative information that is closely and inextricably intertwined with factual information such it that renders the entire document deliberative."); Exh. 3, Thum Decl. ¶ 11 ("[N]one of the documents contain purely factual information. Instead, any factual material in the documents is intertwined with deliberations."); Exh. 8, Lattin Decl. ¶ 13 (explaining

that the documents Plaintiffs claim contain factual material instead "contain deliberative material that is not purely factual"); Exh. 4, Soper Decl. ¶ 16 (similar).

Nevertheless, Plaintiffs point to descriptors like "information briefing" to argue that documents so labeled must contain standalone factual information. Pls.' Mot. 22. But Plaintiffs offer no support for their speculation, and, indeed, the examples they present only demonstrate why Defendants' withholdings were proper. Plaintiffs cite, for instance, a PowerPoint presentation titled "Non-deployable working group information briefing to the Review Panel of experts." Pls.' Mot. 22. But as explained in DoD's declaration, this presentation conveyed the progress of a working group and "provid[ed] policy recommendations on the non-deployable population." Exh. 6, Easton Decl. ¶ 13. Accordingly, any factual information in the briefing was so "closely and inextricably intertwined" with deliberative information that "the entire document [was] deliberative." *Id.* at ¶ 23.

Plaintiffs also cite two emails with the subject line "Transgender framework questions" and a description that includes "development of requests for information for transgender accessions." Pls.' Mot. 23. However, as the Navy's declaration explains, the responses in the email are to questions relating to topics including "how the [transgender] policy fits into the military's broader goals such as deployability, the extent to which transgender identity can be separated [from] gender dysphoria, how treatment for gender dysphoria should compare to treatment for other psychiatric conditions, and how to address the practical logistics of gender transition when it comes to berthing, showers, and bathrooms." Exh. 8, Lattin Decl. ¶ 13. Answers to such questions regarding "how" to proceed as a matter of military policy would indisputably reveal the underlying opinions of the person responding and the deliberations of those involved in the conversation. This is a classic example of factual material inextricably intertwined with deliberations and subject to the deliberative process privilege.

IV. Defendants Did Not Waive Privilege by Inadvertently Producing Plaintiffs' Exhibit M.

Plaintiffs argue that Defendants have intentionally waived privilege over the litigation risk memorandum attached to Plaintiffs' motion as Exhibit M and that Defendants must now produce documents related to the subject matter of this memorandum. Pls.' Mot. 23. However, this document—which is quintessential attorney work product and also protected from disclosure under the deliberative process privilege and the attorney-client privilege—was inadvertently produced and is now subject to separate clawback litigation.[15] Indeed, numerous versions of this document were processed for production and were withheld for privilege. Promptly after learning that this document was inadvertently disclosed, Defendants sent Plaintiffs a notice of recall to claw back the document on June 7, 2019. *See* Exh. 9, Defendants' Notice of Recall for Inadvertently Disclosed Privileged Document. Accordingly, Defendants did not waive privilege over this document, much less over related documents.

Additionally, the vast majority of documents that Plaintiffs seek to compel under the subject matter waiver doctrine were withheld based on multiple privileges.[16] *See* Rosenbaum Decl., Exh. O. Accordingly, even if Defendants had waived the attorney-client privilege over the litigation risk memorandum, this would not waive separate privileges, such as the deliberative process privilege or the presidential communications privilege, for related documents. *Cf. In re Sealed Case*, 121 F.3d at 741 (explaining that there is no subject matter waiver for "executive privileges generally, or . . . the deliberative process privilege in particular"); *Trustees of Elec. Workers Local No. 26 Pension Tr. Fund v. Tr. Fund Advisors, Inc.*, 266 F.R.D. 1, 16 (D.D.C. 2010) ("[T]here is not now, and there has never been, the

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[15] Plaintiffs challenge Defendants' clawback of this document, and the Court has set a briefing schedule for this separate clawback dispute. Minute Order, June 24, 2019.

[16] For example, Plaintiffs seek to compel DoD00143328, but this document was withheld pursuant to the deliberative process privilege, executive privilege, and personal privacy interests. Rosenbaum Decl., Exh. O at 1.

absolute subject-matter waiver that supposedly flows from the disclosure of work-product.").

V. Defendants' *Vaughn* Indices and Claw-Back Logs Are Sufficient.

Finally, Plaintiffs complain that certain of the entries on Defendants' *Vaughn* indices and claw-back logs are insufficiently specific, and ask the Court to order Defendants to supplement those entries. However, any dispute over the entries on the indices and logs has not yet ripened for this Court's consideration. Plaintiffs did not meet and confer with Defendants about the sufficiency of Defendants' entries before filing this motion, and thus failed to comply with the rules of this Court. *See* Local Civil Rule 7(m) (requiring counsel to "discuss the anticipated motion with opposing counsel in a good-faith effort to determine whether there is any opposition to the relief sought and, if there is, to narrow the areas of disagreement"); Order Establishing Procedures For Cases Assigned To Judge Colleen Kollar-Kotelly § 8 (requiring counsel to "confer in good faith in an effort to resolve any discovery dispute before bringing it to the Court's attention"); *All Assets Held at Bank Julius Baer & Co., Ltd.*, 202 F. Supp. 3d at 6 ("Failure to fulfill the requirements of Local Rule 7(m) is grounds for denial of a discovery motion."). Nor did the Court's minute orders on April 9, 2019 and April 16, 2019—which ordered the filing of the instant motion—contain any mention of a challenge to privilege log entries. *See, e.g.*, Minute Order, April 16, 2019 (ordering Plaintiffs "to file a motion to compel *documents* still in dispute . . . including any remaining dispute as to Defendants' clawback of certain *documents*" (emphases added)).

Indeed, if Plaintiffs had conferred with Defendants about challenges to particular entries before filing this motion, Defendants could have reviewed those entries and potentially resolved any dispute between the parties. But having not done so, Plaintiffs should not now be permitted to enlist the Court in resolving this potentially avoidable issue. *See Alexander v. FBI*, 186 F.R.D. 197, 199 (D.D.C. 1999) ("The entire purpose of the meet-and-confer rule is to force litigants to attempt to resolve, or at least narrow, the disputed issues to prevent the unnecessary waste of time and effort on

any given motion.").

At any rate, Plaintiffs' contention that certain of Defendants' privilege entries are deficient is meritless. Plaintiffs cite to pages 9 and 22 of DoD's *Vaughn* index, asserting that "some entries are missing a document title or description." Pls.' Mot. 26. That is simply incorrect. In fact, every document listed on pages 9 and 22 (and on every other page of DoD's index) includes an entry in the "TITLE/DESCRIPTION" column.[17] And while Plaintiffs complain that descriptions like "deliberations regarding the formulation of the transgender policy" or "deliberations regarding the implementation of the transgender policy" are insufficiently detailed, in nearly every instance in which either of those phrases are used, they are coupled with additional descriptions of the document. *See, e.g.*, Rosenbaum Decl., Exh. D at 52 (description for USDOE00237924–USDOE00237924 includes both "Deliberations regarding the implementation of the transgender policy" and "Email dated 1/4/18 between OUSD Health Affairs and service SG offices providing comments and suggestions on a draft white paper addressing Cross-sex Hormone therapy").

There is thus no basis for finding that Defendants' entries are deficient. For example, one of the entries Plaintiffs challenge is a December 5, 2017 email sent by Laura Ochoa, a public affairs official in the Office of the Secretary of Defense, to numerous senior DoD officials with the subject line "DoD Communications Playbook for December." Rosenbaum Decl., Exh. A at 22. The entry describes the document as an "[e]mail conversation between DoD personnel on possible questions

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[17] Indeed, the only documents that appear to be missing entries in either the "TITLE/DESCRIPTION" or "PRIVILEGE BASIS" fields are two documents listed on Plaintiffs' exhibit containing the Air Force *Vaughn* Index. *See* Rosenbaum Decl., Exh. D at 25 (entries for USDOE00005901–USDOE00005904 and USDOE00005928–USDOE00005930). However, the missing fields in this exhibit appear to be due to a formatting error by Plaintiffs, not missing descriptions by Defendants, as the *Vaughn* index Defendants served on Plaintiffs in fact included descriptions in all fields for those two documents. *See* Exh. 10, Excerpt of As-Served Air Force Vaughn Index.

from the media and answers on the transgender policy and its implementation," and explains that it was withheld based on the deliberative process privilege. *Id.* This entry is plainly sufficient for Plaintiffs to determine that the document contains internal recommendations relating to future press inquiries and is thus protected by the deliberative process privilege. *See, e.g.*, *Am. Ctr. for Law & Justice v. Dep't of State*, 330 F. Supp. 3d 293, 304 (D.D.C. 2018) (holding press guidance developed to address future press inquiries is pre-decisional and deliberative). As this example shows, Defendants have satisfied their obligation to describe withheld documents "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A).

Perhaps in recognition of the sufficiency of Defendants' entries, Plaintiffs attempt to introduce an inapplicable and erroneous standard. They cite case law from the Freedom of Information Act context and argue that the indices themselves must "indicate whether the documents have been reviewed to identify reasonably segregable information, such as data." Pls.' Mot. 26–27. But Defendants have provided precisely those assurances in their declarations, s*ee, e.g.*, Exh. 6, Easton Decl. ¶ 23 (explaining that certain documents Plaintiffs challenge "contain deliberative information that is closely and inextricably intertwined with factual information such that it renders the entire document deliberative"), and Plaintiffs point to no authority suggesting that a civil discovery privilege log must state the same.

As explained above, Defendants are willing to review any document descriptions that Plaintiffs believe are inadequate. But at this time, their request for an order compelling Defendants to supplement their *Vaughn* indices should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Compel should be denied. Defendants respectfully request that the Court schedule oral argument on Plaintiffs' motion.

June 25, 2019

Respectfully Submitted,

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

JAMES BURNHAM
Deputy Assistant Attorney General

JOHN R. GRIFFITHS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

/s/ Andrew E. Carmichael
ANDREW E. CARMICHAEL
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Tel: (202) 514-3346
Email: andrew.e.carmichael@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2019, I electronically filed the foregoing Response to Plaintiffs' Motion to Compel using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: June 25, 2019

/s/ *Andrew E. Carmichael*
ANDREW E. CARMICHAEL
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
Telephone: (202) 514-3346
Email: andrew.e.carmichael@usdoj.gov

Counsel for Defendants

EXHIBIT 38

FILED UNDER SEAL

EXHIBIT 39

FILED UNDER SEAL

EXHIBIT 40

FILED UNDER SEAL

EXHIBIT 41

Message

From: Moran, William F ADM, OPNAV, VCNO [william.moran@navy.mil]
Sent: 1/26/2018 10:08:32 PM
To: Wilkie, Robert L Jr HON OSD OUSD P-R (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Robert.l.wilkie4.civ086]; McConville, James C GEN USARMY HQDA VCSA (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=James.c.mcconville3.MIL]; Wilson, Stephen W Gen USAF AF-CV (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Stephen.w.wilson18.MIL]; Walters, Glenn M Gen USMC PANDR (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Glenn.m.walters.MIL]; 'Michel, Charles D ADM' [Charles.D.Michel@uscg.mil]; Hokanson, Daniel R LTG USARMY NG NGB (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Daniel.r.hokanson.MIL]; Donovan, Matthew P HON (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Matthew.p.donovan.civ589]; Modly, Thomas HON Under Secretary of the Navy [thomas.modly@navy.mil]
CC: Kurta, Anthony M SES OSD OUSD P-R (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Anthony.m.kurta.civ2be]; Hebert, Lernes J SES OSD OUSD P-R (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Lernes.j.hebert.CIV]; Burke, Robert P VADM USN CNO (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Robert.p.burke1.MIL]
Subject: RE: TG Policy

Robert, we think [redacted]
[redacted] VR, Bill

From: Wilkie, Robert L Jr HON OSD OUSD P-R (US)
Sent: Thursday, January 25, 2018 5:32:57 PM
To: McConville, James C GEN USARMY HQDA VCSA (US); Moran, William F ADM, OPNAV, VCNO; Wilson, Stephen W Gen USAF AF-CV (US); Walters, Glenn M LtGen, ACMC; 'Michel, Charles D ADM'; Hokanson, Daniel R LTG USARMY NG NGB (US); Donovan, Matthew P HON (US); Modly, Thomas HON Under Secretary of the Navy
Cc: Kurta, Anthony M SES OSD OUSD P-R (US); Hebert, Lernes J SES OSD OUSD P-R (US)
Subject: TG Policy

Gentlemen

As you know, we are in the final stages of developing a DoD position on transgender service in order for the Secretary to make his required recommendation to POTUS NLT 21 Feb. The TG Panel has reported their recommendations to the DSD/VCJCS, and to Service Secretaries and Service Chiefs.

We also had a lengthy discussion with the Secretary last Friday on the TG Panel recommendations, the ongoing legal challenges, and the court-ordered accession of transgender applicants we are now operating under. While discussions with the Secretary continue as to his ultimate policy recommendation to POTUS, he asked [redacted]

The Secretary asked [redacted]

Additionally, there seems to be some concern [redacted]

[redacted]

I thank you in advance for your cooperation.

Robert Wilkie

EXHIBIT 42

FILED UNDER SEAL

EXHIBIT 43

Message

From: Elaine Donnelly [elaine@cmrlink.org]
Sent: 8/15/2017 12:35:37 PM
To: 'Teller, Paul S. EOP/WHO' [Paul.S.Teller@who.eop.gov]
BCC: terry@cmrlink.org
Subject: RE: Anthony Kurta

Paul, I understand the situation's sensitivity. But here's the problem, which you can see in this Military Times article. Secretary Mattis is quoted as saying, " 'I've got my people there in the room to give them any military background that they might need to inform them,' Mattis said. 'They write the policy — we are in a supportive role, of course.' "

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.

Best,
Elaine

From: Teller, Paul S. EOP/WHO [mailto:Paul.S.Teller@who.eop.gov]
Sent: Tuesday, August 15, 2017 7:03 AM
To: Elaine Donnelly <elaine@cmrlink.org>
Subject: RE: Anthony Kurta

I just have to be real careful here.....

Paul Teller
Special Assistant to the President for Legislative Affairs
The White House
Paul.S.Teller@who.eop.gov

From: Elaine Donnelly [mailto:elaine@cmrlink.org]
Sent: Monday, August 14, 2017 10:16 PM
To: Teller, Paul S. EOP/WHO <Paul.S.Teller@who.eop.gov>
Subject: RE: Anthony Kurta

I don't understand – please tell me what the problem is before I go public with this.

Military folks who are counting on President Trump to deliver on his promises to end PC in the military did not vote for a committed, insubordinate Obama holdover to stay in a key DoD office that puts Kurta in a position to continue Obama's most radical policies. People are policy, and Kurta is not acceptable.

Again, what is the problem?

Elaine

From: Teller, Paul S. EOP/WHO [mailto:Paul.S.Teller@who.eop.gov]
Sent: Monday, August 14, 2017 8:08 PM

To: Elaine Donnelly <elaine@cmrlink.org>
Subject: RE: Anthony Kurta

Will keep poking around, but it looks like this could be a steep uphill battle….

Paul Teller
Special Assistant to the President for Legislative Affairs
The White House
Paul.S.Teller@who.eop.gov

From: Elaine Donnelly [mailto:elaine@cmrlink.org]
Sent: Monday, August 14, 2017 5:41 PM
To: Teller, Paul S. EOP/WHO <Paul.S.Teller@who.eop.gov>
Subject: RE: Anthony Kurta

Hi Paul,

I don't understand -- Was Kurta a political or "career reserved" SES appointee in 2014? If he was a political appointee under Carter he has no right to stay there, right? And if he is a career guy, why can't he be assigned elsewhere, to something other than LGBT or WIC issues?

Kurta defied Trump on the LGBT Pride Day controversy – his nomination needs to be withdrawn and someone else reliable – meaning without a record at odds with Trump – needs to take his place.

If not you, who can do something to accomplish this?

Elaine

From: Teller, Paul S. EOP/WHO [mailto:Paul.S.Teller@who.eop.gov]
Sent: Monday, August 14, 2017 4:05 PM
To: Elaine Donnelly <elaine@cmrlink.org>
Subject: RE: Anthony Kurta

Well, I hear ya, but there's not much I can do from here, since he is indeed on staff….

Paul Teller
Special Assistant to the President for Legislative Affairs
The White House
Paul.S.Teller@who.eop.gov

From: Elaine Donnelly [mailto:elaine@cmrlink.org]
Sent: Monday, August 14, 2017 3:51 PM
To: Teller, Paul S. EOP/WHO <Paul.S.Teller@who.eop.gov>
Subject: RE: Anthony Kurta

Thanks Paul,

Unless something has changed, Obama holdover Anthony Kurta probably is heading the working group that is deciding what President Trump's or Secretary Mattis' positions will be when he gives new orders re transgenders. The review taks is assigned to the Under Secretary P & R position where Kurta is right now. RAND praised Kurta's work with them on their 2016 pro-transgender report, which had been prepared

months before Carter announced his mandate to recruit transgenders. It was not a "for study" – it was another tax-funded pro-LGBT RAND polemic.

Even if Bob Wilke is confirmed for the top position in September, he might get into the office too late. And since Kurta was nominated for the Principal Deputy position, where he can play the "Lawrence Korb" (Reagan appointee) role, he could get confirmed while Wilke is blocked – a scenario similar to what we have at the DoJ with Sessions recused.

What would you suggest we do? Kurta is unacceptable – either he is withdrawn, in view of President Trump's stated position, or there will have to be a fight that everyone would rather avoid. I've been working on various ways to thank Trump for his position on the transition issue. But media and pro-LGBT forces continue to double-down and they have a key man in the Pentagon to do their work for them.

I look forward to hearing from you -- More in a minute –

Elaine

From: Teller, Paul S. EOP/WHO [mailto:Paul.S.Teller@who.eop.gov]
Sent: Sunday, August 13, 2017 6:35 PM
To: Elaine Donnelly <elaine@cmrlink.org>
Subject: RE: Anthony Kurta

Sorry for my delay—thanks for this….

Paul Teller
Special Assistant to the President for Legislative Affairs
The White House
Paul.S.Teller@who.eop.gov

From: Elaine Donnelly [mailto:elaine@cmrlink.org]
Sent: Friday, August 4, 2017 3:03 PM
To: Teller, Paul S. EOP/WHO <Paul.S.Teller@who.eop.gov>; Makin, Sarah E. EOP/OVP <Sarah.E.Makin@ovp.eop.gov>; MarcTShort@who.eop.gov; John.mashburn@who.eop.gov
Subject: Anthony Kurta

Hello Paul and Friends,

The AP article I just sent you in a separate email mentions a DoD "working group" on the military transgender issue. This renews concerns about Obama holdover Anthony Kurta, and like-minded contractors at RAND, running this show and sabotaging its results.

The SASC website indicates that the nomination of Robert Wilke to be Under Secretary of Defense for Personnel & Readiness has not been acted upon. It also indicates that Obama holdover Anthony Kurta is awaiting confirmation as the Principal Deputy Under Secretary of Defense for P & R. (I thought that principal deputies did not require confirmation, but a SASC staffer just informed me that P & R is different.)

Now that President Trump has announced his intentions regarding transgenders in the military, Mr. Kurta has a conflict of interest that disqualifies him for promotion to Principal Deputy in the office of the Under Secretary for P & R. Nor should he be allowed to control or participate in the defense Department transgender working group project.

Mr. Kurta is more than an Obama holdover. He organized and participated in an LGBT Pride event on June 12, without presidential authorization. Because Mr. Kurta has shown a willingness to be insubordinate to President Trump, it is obvious that he should not be in position to "prove" the value of transgender policies he himself helped to write during the Obama years.

In view of election results and President Trump's stated intent re persons with gender dysphoria, Anthony Kurta is not a suitable nominee. I and many others would appreciate anything you can do to persuade the administration to withdraw the nomination.

What can we do to support Wilke's nomination, while keeping the self-interested Mr. Kurta out of the policy-making process?

All the best,
Elaine

Elaine Donnelly
President, Center for Military Readiness
P. O. Box 51600
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EXHIBIT 44

Message

From: Elaine Donnelly [elaine@cmrlink.org]
Sent: 11/15/2017 9:37:05 PM
To: Teller, Paul S. EOP/WHO [Paul.S.Teller@who.eop.gov]
BCC: terry@cmrlink.org
Subject: Transgender Surgery and Anthony Kurta's Senate Statement
Attachments: AExcerptsofKuraTestimony.docx; Kurta_APQs_11-14-17.pdf
Importance: High

Hello Paul,

Thank you for your note about the military transgender surgery, which the DoD is paying for under Secretary Mattis' "Interim Policy." Several people have sent this to me and they are upset about it.

I am familiar with the litigation reasons behind what appears to be defiance of President Trump's order to end such surgeries, but the optics are demoralizing. Far worse than the surgery is the situation with Trump appointee Anthony Kurta, described below.

Kurta is all-for transgender surgeries, at DoD expense, in-house or farmed out, with extension of surgical options to dependents and children. And he's the key official who, in a few weeks, will tell President Trump what to do about transgenders in the military.

Are President Trump or Secretary Mattis aware that this Obama holdover has been chairing the "Panel of Experts" who may have already written recommendations on how to continue Obama's transgender policies?

President Trump did a great job during his trip to Asia, but he and Secretary Mattis need to pay attention to what the holdovers are doing in the Pentagon.

Some insight would be appreciated.

Best,
Elaine

From: Elaine Donnelly [mailto:elaine@cmrlink.org]
Sent: Tuesday, November 14, 2017 4:24 PM
To: Teller, Paul S. EOP/WHO <Paul.S.Teller@who.eop.gov>
Cc: Makin, Sarah E. EOP/OVP <Sarah.E.Makin@ovp.eop.gov>; MarcTShort@who.eop.gov; John.mashburn@who.eop.gov; 'Kellyanne.conway@WHO.EOP.GOV' <Kellyanne.conway@WHO.EOP.GOV>
Subject: Anthony Kurta's Senate Statement
Importance: High

Hello Paul,

Today I checked the SASC website to see what's been happening with DoD Under Secretary for P & R Robert Wilkie and his nominated Principle Deputy, Obama holdover Anthony Kurta. Wilkie had a hearing last week, and it looks like the committee will approve him, pending his answer on a question about being willing to testify before other committees.

I don't see any hold on Kurta, who seems to have said everything Sen. McCain wanted to hear, with his tru liberal record undisclosed and unexplored by the SASC.

I excerpted his PDF responses re transgenders, and my concerns are justified. (See attachment)

As you know, in the political world people are policy – it's a cardinal rule. Obama put the wrong people in the right places to promote his LGBT agenda, and Secretary Mattis has retained many of the same people at this key turning-point time, thereby ensuring that no permanent policy changes will be made. Civilians and military personnel will not get what they voted for, and President Trump will feel the political heat.

The most glaring problem is Kurta's identification of himself as the Chairman of the "Transgender Panel of Experts." As I've said before, this "Transgender Panel of Experts" probably has their recommendations already written, with the help of RAND, Obama holdovers like the ones who filed declarations in support of the transgender lawsuit against Trump, and outside LGBT activists who praised Kurta's work with RAND on their 2016 pro-transgenders in the military report.

I'm sure they have a perception management roll-out plan ready to go too – probably involving a leak to the Washington Post at a strategically advantageous time; e.g., Christmas or New Year's Eve.

With all due respect, it was a serious mistake to retain Kurta and former Deputy Bob Work, one or both of whom probably coordinated the DoD rumor campaign about Secretary Mattis' wishes, which worked to defeat the Hartzler amendment in June. Secretary Mattis will be responsible for everything his subordinates did or will do in letting President Trump down.

In Kurta's Q & A I see the not-so-fine hand of Obama ally John McCain. Note the question about an "in-house capability for transgender medical treatment and surgery." This is a preview of future distractions and diversions of valuable medical resources, including the time and loss of medical personnel who cannot, in conscience, participate in controversial hormone treatments and surgeries to remove healthy body parts.

Are we ready for the DoD to establish funding for LGBT-approved "doctors" who provide politicized medical treatments? Their services surely will draw the attention of gender-confused people who want the DoD to pay for their surgeries during extended non-deployments.

Kurta will see to all these "EO/diversity" concerns, in the name of his new boss, President Donald Trump.

I find it revealing that in the Q & A he is asked about the readiness impact of losing transgenders (under Trump's announced policies) but not about the readiness impact of retaining and expanding the number of transgenders in the military. His response is not genuine; it is disingenuous.

Also note the question about the extension of transgender surgeries to dependents and military children. Kurta's half-true, misleading answer acknowledges that right now, minors can get hormone puberty blockers, which can have irreversible effects on vulnerable children, but the National Center for Transgender Equality wants funding for all forms of what Kurta calls "necessary" medical care, including surgeries for minor military children.

The questions and answers in Kurta's statement are fluent in RAND/LGBT-speak, not even mentioning that President Trump called for revocation of Obama's transgender policies and an end to transgender surgeries. After years of transgender indoctrination, Kurta has no problem referring to "sex reassignment" surgeries, which do not change gender or reduce suicide risks, as "medically necessary care." This is an example of the universal deceit that George Orwell wrote about in *1984*.

Kurta keeps saying that all policies will comply with law and regulations, knowing that he and his colleagues, probably including RAND and outside LGBT activist groups who were mentioned in Secretary Mattis' memo, are in position to write the recommendations that Secretary Mattis will be expected to accept and refer to President Trump without question.

Even confirmation of Robert Wilkie will not be enough to slow this train; elsewhere in his statement Kurta says that "equal opportunity and diversity" matters will be among many issues overseen by his office. But we already knew this.

At a minimum, this means that even if President Trump finds a way to sign useful directives in March, Kurta's Pentagon LGBT Pride lobbying machine will emerge each year in June, wearing-down Trump with incrementally radical demands. He has defied the president's wishes before, when he instigated an LGBT Pride event at the Pentagon and was rewarded with a nice promotion.

We saw this coming months ago and I do not like being proven right. I would appreciate an explanation or comments, since the situation will be publicly known before long.

Best regards,
Elaine

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EXHIBIT 45

FILED UNDER SEAL

EXHIBIT 46

Message

From: Teller, Paul S. EOP/WHO [Paul.S.Teller@who.eop.gov]
Sent: 8/17/2017 3:52:56 PM
To: Elaine Donnelly [elaine@cmrlink.org]
Subject: RE: Ryan Newman

Thanks so much—that would be excellent. Not sure about Willkie, to be honest….

Paul Teller
Special Assistant to the President for Legislative Affairs
The White House
Paul.S.Teller@who.eop.gov

From: Elaine Donnelly [mailto:elaine@cmrlink.org]
Sent: Thursday, August 17, 2017 11:35 AM
To: Teller, Paul S. EOP/WHO <Paul.S.Teller@who.eop.gov>
Subject: RE: Ryan Newman

OK – We're doing a CMR E-Notes today and will go after McCain on two counts, Newman's nomination being one of them.

McCain is entitled to his own views on drafting our daughters, and he already misused his power to set up a $45 million/3-year commission loaded to promote his pet cause. But he is wrong in demanding that nominees swear allegiance to that cause as the price of confirmation to a DoD appointment that President Trump has every right to make. McCain also is wrong in criticizing Trump for calling for action on an important military/social issue that Chairman McCain has ignored, year after year.

Robert Wilkie's nomination also is among the uncomfirmed – 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. (This is what happened in November 2010).

Is McCain holding up Wilkie too?

Perhaps you saw this editorial and new article:

Washington Times, Analysis: Mr. Trump's LGBT Tweets
James Hasson, The Federalist: No, the Military Is Not Defying Trump's Transgender Ban; He Made No Ban

Elaine

From: Teller, Paul S. EOP/WHO [mailto:Paul.S.Teller@who.eop.gov]
Sent: Thursday, August 17, 2017 6:48 AM
To: Elaine Donnelly <elaine@cmrlink.org>
Subject: Ryan Newman

Just circling back on Ryan Newman. Whaddya think---dial that up a bit with an action alert or some social media?

Paul Teller
Special Assistant to the President for Legislative Affairs
The White House
Paul.S.Teller@who.eop.gov

From: Teller, Paul S. EOP/WHO
Sent: Monday, August 14, 2017 8:09 PM
To: 'Elaine Donnelly' <elaine@cmrlink.org>
Subject: RE: DoD Protocols & Bob Wilke

Sorry I missed this. McCain is still holding up Ryan Newman. Any chance you'd want to raise some public attention to this, especially now that the conservative world is angry at McCain because of healthcare?

Paul Teller
Special Assistant to the President for Legislative Affairs
The White House
Paul.S.Teller@who.eop.gov

From: Elaine Donnelly [mailto:elaine@cmrlink.org]
Sent: Sunday, July 30, 2017 5:08 PM
To: Teller, Paul S. EOP/WHO <Paul.S.Teller@who.eop.gov>
Subject: DoD Protocols & Bob Wilke

Hello Paul,

There has been a lot of media coverage on the President's announcement re transgenders last week, including several positive op-eds (Will send separately) We've also seen the usual spin and hysteria from media trying to separate Trump from the military.

I hope that the Communications Department people have received background on this issue – particularly the news release we sent out last Thursday. I mention this because the media is trying to make the administration appear defensive, even though there is nothing to be defensive about.

As I said on C-Span Saturday morning, there are protocols for one administration to revoke harmful policies from the previous administration, in an orderly fashion. The Secretary of Defense and other Pentagon officials have the list of at least fifteen problematic directives and instructions, which CMR updated in July. Under-Secretary of Defense for Personnel & Readiness nominee Robert Wilke needs to get confirmed so that he can direct this project promptly, without letting Obama holdover Anthony Kurta get within ten miles of it. (I would not want to see a replay of what has happened at DoJ occurring at the DoD.)

Officials may take steps on a case-by-case basis, to ensure that individuals are not adversely affected by Trump Administration policies as they are phased in, provided that the objective remains consistent: mission readiness, not political correctness. Expect litigation, but federal judges do not get to make policy. Legal defenses will need to be consistent and rooted in sound values: military readiness first.

Will Wilke be confirmed with others this week? And will Ryan Newman get confirmed while McCain is in Arizona?

Best. Elaine

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EXHIBIT 47

The Washington Post
Democracy Dies in Darkness

Trump's VA pick, once a defender of Confederate symbols, built his career serving polarizing figures

By **Paul Sonne** and **Lisa Rein**

June 26, 2018 at 7:58 a.m. CDT

Robert Wilkie, President Trump's choice to lead the Department of Veterans Affairs, is a conservative Washington insider who would bring three decades of military policymaking and a deep list of Capitol Hill connections to a Cabinet post responsible for serving one of the administration's most crucial constituencies.

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But when he appears Wednesday for his Senate confirmation hearing, Wilkie also will draw on a career spent working shoulder to shoulder with polarizing figures in U.S. politics and often defending their most divisive views.

Wilkie, 55, has impeccable credentials: three decades at the center of the country's most important military policies. The son of an Army artillery commander severely wounded in Vietnam — and a reserve officer in the Air Force himself. A trusted lieutenant of Defense Secretary Jim Mattis with contacts in Congress spanning at least five administrations.

AD

He started as a young aide to Jesse Helms (R-N.C.), the five-term Senate firebrand who denounced Martin Luther King Jr. and once called gay people "weak, morally sick wretches." He served as a top aide to Senate Majority Leader Trent Lott (R-Miss.), who lost his leadership post after defending a fellow senator's segregationist campaign for president decades earlier. And he joined the inner circle of former defense secretary and Iraq War architect Donald H. Rumsfeld before returning to the Pentagon last year to run military personnel policy for the Trump administration.

Throughout, Wilkie showed a willingness to fight on the front lines of his bosses' culture wars. This year, he led efforts to justify Trump's near wholesale ban on transgender troops. In 1997, he rebutted a Democratic proposal to ensure equal pay for working women. And in 1993, he publicly defended a failed push by Helms to support an organization whose logo included the Confederate flag.

Wilkie grew up visiting U.S. battlefields with his father and developed a lifelong fascination with military history, including that of his ancestors, who fought for the Confederacy. He was, as recently as 2005, a fixture at the annual memorial ceremonies in Washington held by descendants of Confederate veterans around the birthday of Jefferson Davis. Wilkie also was a member of the Sons of Confederate Veterans, a group that defends public displays of the Confederate

symbols.

AD

A Pentagon spokeswoman said Wilkie no longer attends the ceremonies or counts himself a member of the group. In a statement, Wilkie said the commemorations were once a means to memorialize soldiers but now have become “part of the politics that divide us.”

Paul Rieckhoff, founder of Iraq and Afghanistan Veterans of America, a leading advocacy group, said Wilkie must demonstrate that he doesn’t hold antiquated views and that he can serve all veterans. “He has to show he is loyal to veterans and not a partisan agenda,” Rieckhoff said.

Helms acolyte

In many ways, Wilkie’s career has been defined by the years he worked for Helms, the famous bête noire of liberals from Wilkie’s home state of North Carolina. Friends say Wilkie admires the late senator as a political exemplar with a strong view of U.S. sovereignty and defense.

AD

Wilkie declined to be interviewed for this story. Instead, the Pentagon provided a list of former colleagues and friends who could speak on his behalf. Those closest to Wilkie describe an intensely intellectual conservative policymaker who does not espouse Helms's racial politics. They praise Wilkie's commitment to public service and veterans, owing to a lifetime spent among the military.

Retired Marine Corps Maj. Gen. Arnold L. Punaro, a former Democratic staff director on the Senate Armed Services Committee, said that in more than 30 years of knowing Wilkie, he never saw "any of the leanings of Jesse Helms when it comes to the issues people were concerned about."

"If the implication is that because he is interested in [events that commemorate the Confederacy] he somehow doesn't treat everyone with dignity and respect — I would say that doesn't logically follow," Punaro said. "Because if you know the guy, that's just not who he is."

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Wilkie was not the president's first choice to lead VA after the dismissal this spring of his first veterans affairs secretary, David Shulkin. Rather, the president made him acting secretary as he considered other possible candidates following the failed nomination of Rear Adm. Ronny L. Jackson, Trump's White House physician, who stepped aside amid allegations of improper conduct.

Wilkie received strong recommendations from Mattis — whom Wilkie prepared for his confirmation hearing — and White House Chief of Staff John F. Kelly. He was seen as someone who could breeze through the confirmation process, having been approved by the Senate twice before for other posts.

Trump surprised Wilkie by announcing his nomination at a White House event in May. In conversations with friends, Wilkie has said he didn't want to leave the Pentagon, where he felt comfortable as Mattis's undersecretary of defense for personnel and readiness, but felt obliged to do so out of a sense of duty.

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Apart from navigating the transgender policy reversal for Mattis, Wilkie had introduced a new sexual harassment policy at the Pentagon and was crafting high-profile policies on suicide and sexual assault prevention. He also was partnering with retired Army Maj. Gen. Robert H. Scales, who served with Wilkie's father, on an effort to improve training for troops who experience violent close-quarters combat.

People who have worked with Wilkie say that while he lacks the executive résumé of his two immediate predecessors at VA, he has deep ties in Congress and a background that will help him succeed at the agency.

"It's a place for soldiers to go," Scales said. "Unless you have that close affinity with soldiers, that moral connection with soldiers, I just don't think a VA administrator can give it his all."

AD

'I do not live in the past'

Wilkie was 7 years old when his father, while serving in Vietnam, was hit by rounds of enemy fire during the invasion of Cambodia. The wounds nearly killed him, and the experience was formative for his son.

“It certainly makes me empathetic to anyone who has been wounded and what their families go through — all of that motivates me,” Wilkie said in a statement.

Wilkie came to call Fayetteville, N.C., his home while his father was stationed at Fort Bragg. He married his high school sweetheart and began a career in Washington politics after graduating from Wake Forest University and Loyola University School of Law.

Working for Helms in the late 1980s, Wilkie handled military issues, a matter of critical importance to the senator’s base in North Carolina. He quickly earned a reputation as a brainy legislative expert whose talent for floor tactics and Senate procedure made him an unflappable presence in the cloakroom as he scribbled proposed amendments on his yellow legal pad.

AD

Helms returned Wilkie's drafts with so few corrections that fellow staffers joked that if anyone wanted their work approved by the stickler senator, they should just put Wilkie's name on it, recalled former staffer Jimmy Broughton.

Wilkie periodically came out swinging for Helms at divisive moments. In 1993, for example, the only African American in the Senate, Democrat Carol Moseley Braun (Ill.), opposed Helms's amendment to renew the patent on the insignia used by the United Daughters of the Confederacy because the logo featured the Confederate flag.

Moseley Braun rallied the Senate behind her in blocking the amendment. Wilkie attacked her efforts in statements made to The Washington Post. "What we are seeing is an attempt in the name of political correctness to erase entire blocks of our history," the 30-year-old aide was quoted as saying at the time. "The question is whether we're going to wipe out the history of millions of Americans who trace their heritage to the losing side."

AD

Around that time, Wilkie was attending ceremonies honoring fallen Confederate fighters at Arlington National Cemetery and the U.S. Capitol. The Pentagon declined to provide the speeches Wilkie delivered at those events. Maj. Carla Gleason, a spokeswoman, said Wilkie was participating in government-sanctioned events recognizing Civil War veterans more than a decade ago in his official capacity as a Senate staffer and executive branch official alongside Republicans and Democrats. He stopped attending, Gleason said, when the events became more politically divisive.

“Today, there would be much more consideration taken into attending this type of memorial event,” Wilkie said in a statement. “While I honor the soldiers in my family, and I am a student of history, the past is the past, and I do not live in the past.”

Wilkie left Capitol Hill in the mid-1990s to mount a failed bid for Congress. He later and served as executive director of the North Carolina Republican Party as Helms was engaged in a contentious reelection campaign against Democrat Harvey Gantt, the former mayor of Charlotte.

Wilkie publicly defended a campaign flier the party issued showing Gantt, who is black, alongside the state’s incumbent congressional Democrats. Two of the three also were black, including Eva Clayton, the first African American woman to

represent North Carolina in Congress. "Eva's bad enough. Do you want Harvey too?" the fliers asked.

Democrats said the mailer was attempting to persuade white voters not to send another black representative to Congress. Wilkie told the New York Times the mailers also went to voters in a district represented by a white Democrat. "The racial charge has become so trite now that it's lost its meaning," he said at the time.

Gleason said that Wilkie maintains the flier was an attack against Gantt on the issues.

Wilkie also attacked Gantt for having "openly courted money from the homosexual community," according to a 1996 transcript from PBS's "NewsHour with Jim Lehrer." The Pentagon did not respond to a request for comment about the transcript.

Culture warrior

In the late 1990s, Wilkie returned to Washington as a top aide to Lott, the Mississippi senator who would later become majority leader. He was involved in critical national security matters, leading negotiations after the 9/11 attacks on legislation that authorized the use of military force against the perpetrators and helping defeat U.S. ratification of the Comprehensive Nuclear-Test-Ban Treaty.

But he continued to do battle in the culture wars. When the office of then-Senate Minority Leader Thomas A. Daschle (D-S.D.) promoted a resolution calling for equal pay for women and sent it to Wilkie in hopes of securing bipartisan support, Wilkie marked up the draft with edits that called on Congress to require young women to finish high school as a condition of receiving welfare, a Daschle staffer recalled.

recalled.

“I think he was trying to suggest that the whole endeavor was by itself ridiculous,” said Caroline Fredrickson, now president of the American Constitution Society. “I found it very insulting.”

Gleason, the Pentagon spokeswoman, said Wilkie’s “record on the way he treats his employees, on equal rights, equal opportunity and employment stands for itself on this matter.”

Wilkie defended Lott in 2003, shortly after the Senate majority leader lost his post for praising Strom Thurmond’s 1948 presidential campaign that opposed the intermingling of races. Speaking to the Associated Press, Wilkie said that Lott was simply trying to be “gracious to an American icon.”

Today, liberals find cause for alarm in Wilkie’s record of defending his past bosses.

“This toxic history is profoundly beneath the office Robert Wilkie has been nominated for,” said Andrew Bates, a spokesman for the liberal opposition research group American Bridge. Bates said Wilkie “championed the disgraceful, painful legacy of Jesse Helms.”

Conservative former colleagues of Wilkie see it otherwise, viewing Wilkie as one of Helms’s smartest acolytes. “He’s probably the most brilliant person I worked with,” said Broughton, the former staffer. “Probably as high a level of integrity as anybody.”

Wilkie joined the George W. Bush administration after his many years on Capitol Hill, first working for Condoleezza Rice at the White House National Security Council and later at the Pentagon, where he rose to become Rumsfeld’s point person with Congress. Later, while working for former defense secretary Robert M. Gates, Wilkie helped the Pentagon usher in an armored vehicle that saved

American soldiers from being maimed by explosive devices in Iraq.

As he testifies before the Senate Veterans' Affairs Committee this week, Wilkie is likely to emphasize his record of policy achievements, such as bipartisan legislation on sexual assault prevention. Bob Carey, who was a Senate staffer with Wilkie and now works at a conservative veterans group, said what veterans care about is whether VA can properly deliver health care and benefits.

"You look at this guy's career, and I don't think you'll find a person more prepared to do that than Robert Wilkie," Carey said.

Julie Tate contributed to this report.

Paul Sonne
Paul Sonne covers the U.S. military and national security. He previously reported for the Wall Street Journal from Moscow, London and Washington. Follow

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jims7 1 year ago

How does a Country HONOR It's Fallen, by Their Own 'Sacrifice' in Taking Care of the Brothers and Sisters They Served With!! Privatizing The VA For Corporate Profits, Wall Street Returns! Private Sector Health Care Already Make Hefty Profits When Integrating VA R&D Findings Into That Sector: Means Doctors, Health Care Employee's, Won't Look To Military Service For Possible Reasons Veterans Might Have Been Exposed!! Private Sector Doctors If Forced To Charge Less For Care Then They Do Health Ins. Co. Will Give Same Care, Or Phony Billings For Care Not Given, To Veterans, Less!! Many Private Care Doctors, In Recent Years, Already Have Come out Saying They're Not Qualified To Care For What Some Veterans May Be Suffering From!! The VA Is The Country Served 'Responsibility' They Have Never Fully 'Sacrificed' For!! 2 Aug 2015 - 'I fight like hell to pay as little as possible': Donald Trump * DeJa-Vu: “With * No Shared 'Sacrifice' * being asked of civilians after Sept. 11", especially at trump level, Decades and War From, All Over Again!! * And no one has demanded they should, Still!! Borrowed with Interest Added!! Mark Shields 02/09/2018 PBS NewHour: "So, now we have had 17 years {plus-js} of war financed by three tax cuts," Huge For Them Wealthy!! PBS NewsHour

4/27/2018 - Mark Shields: "to Ronny Jackson, for the failure of due diligence, but he did an increasing disservice to the 20.5 million American veterans, 9.5 million of whom depend personally and individually on Veterans Administration services." "But certainly veterans, for whom we pay great lip service in this country about thanking them for their service endlessly, it would be, rather, an improvement, a positive development if we did provide the services we pledged beginning with Abraham Lincoln to the widow and the orphan and the veteran." Keeping My Oath: USN All Shore '67-'71 GMG3 - Gunner's Mate (Guns) - Vietnam In Country '70-'71 - Independent**

Like Link Report

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lifelongdemocrat 1 year ago

Where does Trump find all these mother's basement dwellers? Is there a membership organization for such? Is this where Bannon and Miller came from?

Like 1 Link Report

Yvette Meowmeow 1 year ago

Yes, Miller was Session's aide when Jeffy was a senator.

Like Link Report

Witch-Hunter 1 year ago

Well, if he's not a practicing alcoholic and he's not Tom Cotton, I guess those are two points in his favor.

Like 3 Link Report

MaturinAubrey 1 year ago *(Edited)*

90% of vets have never seen a bullet or combat. But act like they have. And claim disability. They feel it is part of their employment benefits package.

Like 1 Link Report

Witch-Hunter 1 year ago

Source?

Like 1 Link Report

MaturinAubrey 1 year ago

the DOD.

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LeoMarius 1 year ago

More deplorable Confederates from the Trump brigade.

Like 10 Link Report

lifelongdemocrat 1 year ago

Cadet Bone Spurs will one day have his own army, led by Sarah of Swineville.

Like 1 Link Report

Boblingen 1 year ago

If he loves the military so much I'm surprised I didn't see anything about his military service, did he at any time serve on active duty. I would prefer someone who has actually served in a combat unit. I served two tours in Vietnam and have had treatment at VA hospitals in California and Virginia, no major problems and did receive the correct treatment. Hope he works out OK

Like 6 Link Report

ARindependent 1 year ago

I am a Veteran and of course there is concern about increasing the privatization of the VA. Will this guy do this as instructed by trump and the congress who are trying to do for the private healthcare industry who is hungry for the money provided for VA Care.

Tom Cotton, do you support this guy? You are a Veteran, do you have concern for your brothers, who served? Do you have concern about your constituents, many who are Veterans and cannot afford private care?
I know what the plans are, Veterans will be given a voucher to go out and find a private healthcare provider where there are waits longer than the VA.
Their voucher will have limits for the amount of care they can receive over time. The private providers will have no experience in the medical and mental health problems veterans need.

Like 9 Link Report

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myself3 1 year ago

Tom Cotton is a fascist, almost universally loathed by everyone who ever knew him, including many of those with whom he served.

Like 4 Link Report

GaryBonner 1 year ago

Unfortunately, the American people elected an out-loud, unapologetic RACIST, misogynist, LIAR, morally bankrupt man President of the United States. Securing a commitment to work in his wretched administration from a person like Robert Wilkie is probably the best Trump is going to be able to do.

Trump is not going to attract "A" listers, and highly qualified, honorable people who want to soil themselves by being in his presence.

Like 7 Link Report

JesuswichSonOfManwich 1 year ago

Question one: Mr Wilkie, Yes or No: Is it good that the Confederacy lost the war?

Like 7 Link Report

ad9inaz 1 year ago

The job of the VA is to spend money on veterans, and Trump seems eager to spend money on Veterans. If this guy knows how to administer a large organization, he should have a pretty easy time keeping veterans happy.

Like Link Report

JesuswichSonOfManwich 1 year ago

Too bad the Trump family has a long history of keeping money from veterans.

Like 6 Link Report