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

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.

Misc. No. 1:20mc16

Underlying Action: Case No. 2:17-cv-01297-MJP (W.D. Wash.)

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO QUASH THIRD-PARTY SUBPOENA ISSUED TO ROBERT WILKIE JR.

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INTRODUCTION

Plaintiffs do not contest that the sitting Secretary of Veterans Affairs, Robert Wilkie, Jr., is an official subject to the "apex" doctrine for purposes of securing his deposition testimony. Yet they contend that he should be deposed, as a matter of course, about his reasoning concerning the challenged military personnel policy, without any heightened showing of need or recognition of the separation of powers concerns his deposition would engender. Since the Supreme Court's decision in *United States v. Morgan*, 313 U.S. 409 (1941), "federal courts have consistently held that, absent 'extraordinary circumstances,' a government decision-maker will not be compelled to testify about his mental processes in reaching a decision, 'including the manner and extent of his study of the record and his consultations with subordinates.'" *Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991) (quoting *Morgan*, 313 U.S. at 422). The discovery that Plaintiffs seek from Secretary Wilkie, a third-party to the underlying action, is extraordinary and squarely conflicts with the apex doctrine.

ARGUMENT

Plaintiffs spend more than half of their opposition—referencing hundreds of pages of exhibits—discussing the merits of the underlying case and discovery disputes that are irrelevant to the question at hand. This is a mere distraction. Resolution of Defendants' motion to quash turns on a straightforward legal question distinct from the merits of the underlying case and one which the Eastern District of Virginia, in particular, is well-equipped to handle: whether the "apex doctrine" protects Secretary Wilkie, a sitting Cabinet Secretary and former Under Secretary of Defense, from testifying about his official decision-making while serving in the Department of Defense ("DoD"). This inquiry does not require the Court to delve into the procedural history of the underlying case or the parties' privilege disputes. Rather, the Court need only determine

whether Plaintiffs have presented sufficient evidence *before this Court* that exceptional circumstances require his deposition. *See* Mem. in Support of Defs.' Mot. to Quash Third-Party Subpoena Issued to Secretary of Veterans Affairs Robert Wilkie Jr. ("Mot.") at 10, ECF 3.

Plaintiffs contend that they intend to depose Secretary Wilkie both on factual issues, *see, e.g.*, Pls.' Opp. to Defs.' Mot. to Quash Third-Party Subpoena Issued to Robert Wilkie Jr. ("Pls.' Opp.") at 22 ECF 21 (the Panel of Experts' "standards-based policy"), and on his mental impressions, *see, e.g.*, *id.* at 22 ("Mr. Wilkie's . . . decision to 're-convene' the 'Panel of Experts'" (citation omitted)). Both are foreclosed by the apex doctrine. Plaintiffs cannot carry their burden of showing that Secretary Wilkie has unique, first-hand knowledge about the development of the challenged policy that cannot be obtained from any other discovery source. Defendants have made available eleven other senior DoD and Armed Forces officials with personal knowledge of the policy's development and recommendation process. Moreover, Defendants have produced over 50,000 documents spanning six years, a 3,075-page unredacted administrative record including minutes of the meetings of the Panel of Experts ("the Panel")[1] and the documents the Panel considered and relied upon in forming its recommendation, and all deliberative communications of Panel members related to their work on the Panel. And Defendants have not moved to quash any deposition for an individual below the level of a Presidential Cabinet official or four-star General or Admiral military rank. Plaintiffs cannot identify *any* factual testimony Secretary

[1] Plaintiffs imply that these Panel meeting minutes are somehow untrustworthy. *See* Pls.' Opp. at 9–10 ("After reviewing the minutes for that meeting, at least one Panel member complained that they did 'not provide a balanced recording.'"). However, they do not disclose to the Court that [redacted] *See* Email from R. Burke to W. Moran re TG Service Panel of Experts (Oct. 19, 2017), attached hereto as Ex. A. And Defendants have made Mr. Dee available to be deposed. *See infra* at 10–11. Secretary Wilkie did not even join the Panel until late November. Decl. of Lernes J. Hebert ("Hebert Decl.") ¶ 11, ECF 3-5, Mot. Ex. E.

Wilkie can provide about the development of the policy that cannot be obtained from these sources.

In any event, the bulk of Plaintiffs' apex argument—that Secretary Wilkie's deposition is necessary "to rebut Defendants' assertion that the Policy is an exercise of 'independent military judgment[,]'" Pls.' Opp. at 3—has no basis in law or fact. On the law, Plaintiffs argue that this issue is "essential" to the legal issues in the underlying dispute. *Id.* This is incorrect. The Ninth Circuit, in fact, found that "a presumption of deference is owed, because the 2018 Policy appears to have been the product of independent military judgment." *Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019) (per curiam). In a related challenge to the same DoD policy, the D.C. Circuit held the same. *Doe 2 v. Shanahan*, 755 F. App'x 19, 25 (D.C. Cir. 2019) ("[A]ny review must be 'appropriately deferential' [because] . . . the Mattis Plan plausibly relies upon the 'considered professional judgment' of 'appropriate military officials[.]'" (citations omitted)).

Plaintiffs also have failed to provide any basis to question Secretary Wilkie's independent judgment or his motives—particularly when the decision to recommend the policy to the President was that of then-Defense Secretary Mattis—not Secretary Wilkie (when he served as Under Secretary of Defense or otherwise). The law is clear that professional military judgments, especially those concerning the composition of the fighting force, are entitled to deference and protected from deposition questioning absent a strong showing of bad faith. Plaintiffs do not come close to meeting that bar. Plaintiffs' argument that the challenged policy is based on animus is founded on unsupported allegations against Secretary Wilkie, then-Secretary Mattis, and the seventeen senior civilian and military leaders Secretary Mattis tasked to review the issue of military service by transgender individuals and individuals diagnosed with gender dysphoria. Other courts have soundly rejected these allegations, and this Court should not give them any more credence. *See infra* at 15–17. That alone should be dispositive for granting this motion.

But Plaintiffs also do not address or acknowledge other key factors that should foreclose Secretary Wilkie's deposition. Most importantly, Plaintiffs do not acknowledge Secretary Wilkie's many time-consuming responsibilities as the Secretary of Veterans Affairs or that preparing for and sitting for a deposition would "substantially interfere" with the Secretary's "exercise of his official duties."[2] Decl. of Pamela J. Powers ("Powers Decl.") ¶ 13, ECF 3-7, Mot. Ex. G; *see* Mot. at 13–15. Such a deposition is particularly worrisome given that "the [Supreme] Court apparently thinks the deposition of a cabinet secretary especially burdensome." *In re Dep't of Commerce*, 139 S. Ct. 16, 18 (2018) (Gorsuch, J., concurring in part). Plaintiffs also do not address Defendants' separation of powers concerns that weigh against the deposition. And, ultimately, they do not engage with the apex analysis or identify even a single case in which a court permitted the deposition of a sitting Cabinet Secretary (or any high ranking military official) to probe his or her reasoning regarding a military policy.

Finally, although the Court need not reach the issue of whether the testimony Plaintiffs seek is privileged, the fact that Plaintiffs seek to probe into privileged matters is yet another reason to require alternative discovery first.

For these reasons, explained further below, the Court should preclude the deposition of Secretary Wilkie and grant Defendants' motion to quash Plaintiffs' subpoena.

I. Plaintiffs Cannot Establish that Exceptional Circumstances Require Secretary Wilkie's Deposition.

[2] Moreover, the "demands on Secretary Wilkie's time have increased even further since the start of the global COVID-19 pandemic" because, since March 2, 2020, Secretary Wilkie has served as a member of the White House Coronavirus Task Force, and, in that capacity, "has been occupied on a daily basis with a number of pressing tasks, such as participating in Task Force meetings, leading senior departmental leader meetings, conducting calls with governors to offer personnel and guidance to states in need, conducting weekly conference calls with Congress and Veterans Service Organizations on VA's current COVID-19 efforts, participating in multiple daily media interviews, [and] responding to requests from the White House[.]" Powers Decl. ¶ 12.

To overcome the apex doctrine's protections, Plaintiffs bear the burden to show with particularity both that (1) Secretary Wilkie has personal knowledge of non-privileged information relevant to their claims *and* that (2) Plaintiffs cannot obtain that information through any other source of discovery.[3] *See Lederman v. N.Y.C. Dep't of Parks & Rec.*, 731 F.3d 199, 203 (2d Cir. 2013); *Intelligent Verification Sys. LLC v. Microsoft Corp.*, No. 2:12cv525, 2014 WL 12544827, at *2 (E.D. Va. Jan. 9, 2014). They have failed to do so. Many of the cases Plaintiffs cite in support of their apex doctrine arguments arise in the corporate context or relate to state officials, for whom separation of powers concerns are irrelevant or insignificant.[4] Plaintiffs disregard the voluminous discovery already produced and multitude of witnesses Defendants have made available to testify which provide ample opportunities for Plaintiffs to obtain all of the information they claim they need from Secretary Wilkie.

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[3] Plaintiffs imply at times that *either* personal knowledge *or* unique discovery constitutes exceptional circumstances. *See, e.g.*, Pls.' Opp. at 18. That is wrong. As a case that Plaintiffs selectively quote multiple times actually explains in full,

> [a]lthough personal involvement in or knowledge of the subject events seems to be a necessary prerequisite for deposing a high-ranking government official, it is not sufficient. A party must still show that the information cannot be gleaned from other sources or achieved through less burdensome means. . . . Additionally, the information sought should form a key component of the party's claim or defense.

United States v. Sensient Colors, Inc., 649 F. Supp. 2d 309, 323 (D.N.J. 2009) (citations omitted).

[4] *See NRA v. Cuomo*, No. 1:18-CV-566, 2019 WL 2918045 (N.D.N.Y. Mar. 20, 2019) (New York Superintendent of Financial Services), *denying reconsideration*, 2020 WL 57296 (N.D.N.Y. Jan. 6, 2020); *Fish v. Kobach*, 320 F.R.D. 566 (D. Kan. 2017) (Kansas Secretary of State); *Greater Birmingham Ministries v. Merrill*, 321 F.R.D. 406 (N.D. Ala. 2017) (Alabama Secretary of State); *Libertarian Party v. Husted*, 33 F. Supp. 3d 914 (S.D. Ohio 2014) (hearing officer and general counsel to Ohio Secretary of State); *United States v. City of New York*, No. 07-cv-2067, 2009 WL 2423307 (E.D.N.Y. Aug. 5, 2009) (New York City mayor); *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118 (D. Md. 2009) (corporate Chairman and CEO); *Bagley v. Blagojevich*, 486 F. Supp. 2d 786 (C.D. Ill. 2007) (Illinois Governor); *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 164 F.R.D. 257 (N.D. Fla. 1995) (Florida state legislators); *Scovill Mfg. Co. v. Sunbeam Corp.*, 61 F.R.D. 598 (D. Del. 1973) (corporate in-house counsel).

A. Much of the Information Plaintiffs Seek to Obtain from Secretary Wilkie Which They Claim is "Factual" is Based on Mental Processes.

As an initial matter, Plaintiffs' argue that they "are not seeking discovery of Mr. Wilkie's 'mental processes,' . . . as in *Morgan* and the other cases Defendants cite." Pls.' Opp. at 27. But an examination of Plaintiffs' opposition reveals that they are almost exclusively seeking information that relates to the Secretary's mental impressions, which are clearly protected under *Morgan* and its progeny. *See, e.g.*, *id.* at 22 ("Mr. Wilkie's apparent decision to 're-conven[e]' the 'Panel of Experts'" (citation omitted)); *id.* at 20 (referencing e-mail in which "the Secretary expresses his opinions on the importance of a particular stage of the Panel's proceedings" (citation omitted)). As *Morgan* makes clear, "mental processes in reaching a decision" include the "manner and extent of [the decision-maker's] study of the record and his consultations with subordinates." *Franklin Sav. Ass'n*, 922 F.2d at 211 (quoting *Morgan*, 313 U.S. at 422). Plaintiffs have failed to identify what factual information they seek to elicit from Secretary Wilkie and why that testimony cannot be obtained through any other source of discovery. *See In re McCarthy*, 636 F. App'x 142, 143 (4th Cir. 2015); *Microsoft Corp.*, 2014 WL 12544827, at *2. And their effort to probe the Secretary's mental processes is foreclosed by *Morgan*. *See infra* at 13–19.

B. Plaintiffs Disregard the Voluminous Discovery Defendants Have Produced.

Plaintiffs also have not identified any information that they would seek from Secretary Wilkie to which they do not already have access through the myriad of documents Defendants have produced. In the absence of any specific showing on that point, Plaintiffs launch generalized and unsubstantiated attacks on the discovery process. The Court need not consider the discovery process in the underlying case to rule on the straightforward question of whether, under the apex doctrine, a sitting Secretary of Veterans Affairs should be compelled to testify concerning his oversight of a process designed to develop and recommend a military policy. In any event, to the

extent pertinent here, Plaintiffs' characterization of the discovery process is wrong.

To begin, Plaintiffs badly misstate the discovery that has occurred. Since Plaintiffs filed their complaint in August 2017, in response to over 100 requests for production and dozens of interrogatories, DoD collected and reviewed over 225,200 documents and has considered anything related to the policy, past or present, to be responsive to Plaintiffs' requests. *See* Decl. of Robert E. Easton ¶¶ 10, 13, *Karnoski v. Trump*, No. 17-cv-01297 (W.D. Wash.), ECF 371-1, attached hereto as Ex. B. Defendants have produced over 50,000 documents and timely served detailed interrogatory objections and responses. *See* Joint Status Report for May 13, 2020 Status Conference at 12 (hereinafter, "JSR"), ECF 3-8, Mot. Ex. H; *see also* Pet. for a Writ of Mandamus at iii, *Karnoski*, ECF 414-1 (noting that at the time the Government filed its second petition for a writ of mandamus, it had already produced nearly 40,000 documents). In addition, because the plaintiffs in the four underlying cases have a cross-use of discovery agreement, Defendants have produced to Plaintiffs here and the State of Washington documents responsive to the many discovery requests of plaintiffs in all of the related cases, as well as documents responsive to court orders issued in other cases.[5] *See* Stipulated Uniform Protective Order and Cross-Use Agreement, *Karnoski*, ECF 183.

Additionally, Defendants have produced a complete, unredacted Administrative Record of the documents, testimony, and all data relied on or considered by the Panel charged with developing the challenged policy, along with the Panel's deliberations on those materials, and communications to or from members of the Panel relating to their development of the policy. *See*

[5] When Defendants filed this motion to quash, there were five underlying cases. *See* Mot. at 2. While this motion was pending, the plaintiff in one of them voluntarily dismissed the action after Defendants filed their combined motion to dismiss or for summary judgment and opposition to the plaintiff's motion for a preliminary injunction. *See* Not. Of Voluntary Dismissal Without Prejudice, *Doe v. Esper*, 1:20-cv-10530-DFS (D. Mass. June 5, 2020), ECF 37.

Decl. of Robert Easton ¶¶ 4–6, *Karnoski*, ECF 405-2, attached hereto as Ex. C. And the 3,075-page Administrative Record was exhaustive—not "a collection of documents Defendants' lawyers assembled after the fact to justify their positions in this litigation" nor "full of holes," *see* Pls.' Opp. at 27–28—as even a cursory review of the administrative record index makes clear. *See* Index of the Administrative Record, attached hereto as Ex. D. Plaintiffs thus have ample sources of discovery to obtain the same information on which they seek to depose Secretary Wilkie and cannot show that extraordinary circumstances warrant his deposition.

In any event, this Court need not accept Plaintiffs' invitation to consider the many discovery disputes in the underlying *Karnoski* action and elsewhere.[6] Indeed, they have selectively presented these disputes.[7] The Court need only decide whether Plaintiffs have satisfied the requirements under the apex doctrine for Secretary Wilkie. The record is clear that they have not.

C. Plaintiffs Disregard the Many Senior Officials Defendants Have Made Available to Testify.

Plaintiffs also argue that they should not have to accept Defendants' "hand-picked"

[6] The Ninth Circuit has already issued one writ of mandamus limiting the District Court's discovery rulings and has also granted the Government's request for an administrative stay of the *Karnoski* Court's discovery order challenged in a second mandamus petition. Order, *Karnoski*, ECF 415. That administrative stay is still in place. The Ninth Circuit also recently indicated that Defendants' second discovery-related petition for a writ of mandamus "raises issues that warrant an answer." Order, *Karnoski*, ECF 416 at 1.

[7] For example, Plaintiffs fail to mention that in the related case *Doe v. Esper*, the district court rejected a request for the material related to the drafting of DoD's Report that Plaintiffs complain about not having access to here. In a telephonic hearing, the *Doe* Court stated that it was "not sure that getting a series of different drafts or what [the report's drafters] want to highlight or not highlight is going to go anywhere . . . as long as it didn't change from what originally was presented from the panel of experts and the briefings." *Doe* Hr'g Tr. at 28:3–7, *Karnoski*, ECF 405-3. The court thus declined to order production of the drafts and communications of those who worked on the Report. *Id.* at 28:8–9. The *Doe* court also rejected the *Doe* plaintiffs' request for deliberative materials that were never considered by the Panel, finding that seeking this material amounted to "fishing." *Id.* at 20:1–5.

witnesses.[8] Pls.' Opp. at 17. But *Plaintiffs* identified these witnesses for deposition—not Defendants. *See* JSR at 5. Of the fifteen witnesses Plaintiffs have identified, only four are either current or former Cabinet Secretaries or four-star Generals or Admirals. Defendants have moved to quash only those four deposition subpoenas, including that for Secretary Wilkie, pursuant to the apex doctrine. Defendants have indicated they will not challenge the other eleven depositions under the apex doctrine and have explained that these eleven possess the same or even superior information to the other four officials. Most notably, Anthony M. Kurta served as chair of the Panel until late November 2017 when Secretary Wilkie took over that role and then as Special Assistant to Mr. Wilkie and advisor to the Panel for the remainder of the Panel process. He presented the Panel's recommendations to the Vice Chairman of the Joint Chiefs of Staff and the Deputy Secretary of Defense in December 2017 and to Secretary Mattis in January 2018.[9]

Perplexingly, Plaintiffs argue that, by making Mr. Kurta available to testify but not Secretary Wilkie, "Defendants are using the 'apex doctrine' as both a sword and a shield, allowing one of the two USDP&Rs involved to testify, while moving to block the deposition of the other."

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[8] Plaintiffs misstate the number of witnesses Defendants have made available. In opposing the motion to quash, Plaintiffs claim Defendants have offered "two witnesses." Pls.' Opp. at 27. In a related motion to transfer the motion to quash, they state that the number is at least five. *See* Mem. of P. & A. in Supp. of Pls.' Rule 45(f) Mot. to Transfer at 9, ECF 16 (correctly noting that Defendants have offered "the depositions of Mr. Kurta, Mr. Hebert, Mr. Dee, Dr. Adirim, and Ms. Miller" (citation omitted)). Defendants have actually offered eleven witnesses, at least five of whom have specific knowledge of the policies at issue that surpasses that of Secretary Wilkie.

[9] A court in one of the underlying matters has already ordered that the plaintiffs in that case *must* depose Mr. Kurta *before* the Court would permit them to schedule a deposition of then-Vice Chairman of the Joint Chiefs of Staff Paul J. Selva, one of the four depositions that Defendants now move to quash. *See* Order in *Doe*, No. 17-cv-1597 (D.D.C.), ECF 112, attached hereto as Ex. E ("Plaintiffs shall first depose Mr. Kurta. If, after deposing Mr. Kurta, Plaintiffs still contend that they need to depose the Vice Chairman, they shall meet and confer with Defendants about the prospect of a targeted deposition of the Vice Chairman."). That court's reasoning applies with even greater force here to the sitting Secretary of Veterans Affairs.

Pls.' Opp. 29. This argument entirely misstates Defendants' position. Defendants are moving to quash the subpoena issued to Secretary Wilkie primarily because he is a currently sitting Cabinet Secretary leading the federal government's second largest department, and in any event, Mr. Kurta was never an Under Secretary of Defense.[10] Powers Decl. ¶ 13.

Defendants have also made Lernes Hebert, Acting Deputy Assistant Secretary of Defense for Military Personnel Policy and Principal Director, available for a deposition. Mr. Hebert facilitated the Panel meetings that Secretary Wilkie chaired from late November 2017 onward and supported Mr. Kurta in the December 2017 and January 2018 briefings. By Plaintiffs' own admission, both Mr. Kurta and Mr. Hebert "assisted in drafting and/or reviewing the DoD Report," Pls.' Opp. at 13, yet they ask this Court to permit a deposition of Secretary Wilkie on this same topic, *see id.* at 19–20. Finally, Defendants have made available for a deposition Thomas P. Dee, Director of the Office of Special Projects for the U.S. Navy, who drafted the sole dissenting opinion from the Panel's findings on which Plaintiffs propose to depose Secretary Wilkie. *See* Pls.' Opp. at 11, 21; *see also* Mot. at 24 n.5.

Nevertheless, Plaintiffs had not conducted depositions of *any* of these eleven individuals the Government has identified as having personal knowledge of the challenged policy's

[10] Secretary Wilkie also separately qualifies as an apex official based on his role as Under Secretary of Defense for Personnel and Readiness for part of the time during which the challenged policy was developed. Plaintiffs' argument demonstrates their lack of understanding of the basic facts of this case: Mr. Kurta was never the Under Secretary of Defense for Personnel and Readiness. *See* 10 U.S.C. § 136. Rather, he was a senior career DoD employee serving as Deputy Assistant Secretary of Defense for Military Personnel Policy who performed the duties of the Under Secretary of Defense for Personnel and Readiness from January 20, 2017 until November 21, 2017, pending Secretary Wilkie's confirmation. *See* Department of Defense Key Officials, Historical Office, Office of the Secretary of Defense at 45, available at https://history.defense.gov/Portals/70/Documents/key_officials/KeyOfficials-6-18-20.pdf?ver=2020-06-18-074118-007 (last accessed June 24, 2020); *see also* Minutes: Transgender Review Panel I (Oct. 13, 2017) at 1, attached hereto as Ex. F. Mr. Kurta was never presidentially appointed or Senate confirmed as the Under Secretary as was Secretary Wilkie.

development and the recommendation process before issuing the present subpoena to Secretary Wilkie, and to date they have only taken two depositions. In fact, in just the past few weeks, Plaintiffs asked Defendants to *delay* the depositions of three of the most relevant witnesses—Ms. Miller, Mr. Hebert, and Mr. Kurta, which had been scheduled to take place on June 4, 5, and 8, respectively, rather than proceed with the depositions remotely due to restrictions on in-person depositions related to the COVID-19 pandemic. *See* JSR at 9. Additionally, just last week, the *Doe* plaintiffs delayed the deposition of Mr. Dee, which had been scheduled to take place on June 11 and in which the *Karnoski* Plaintiffs expected to participate. *See* Email from M. Slachetka to M. Skurnik re Dee Deposition (June 1, 2020), attached hereto as Ex. G. Plaintiffs' insistence on the urgency of the depositions of the four highest-ranking officials they have subpoenaed is entirely incongruent with their scheduling of those other senior military and civilian officials who were actually involved in the day-to-day development of the challenged policy.

For these reasons, at a minimum, the Court should require Plaintiffs to complete their depositions of Mr. Kurta, Mr. Hebert, Mr. Dee, Dr. Adirim, and Ms. Miller before requesting to depose Secretary Wilkie. *See* Mot. at 24 n.5.

D. All of the Information Plaintiffs Seek from Secretary Wilkie is Available Through Testimony from the Senior Military Officials that They Will Depose.

Plaintiffs claim that they seek Secretary Wilkie's deposition testimony on four categories of information. *See* Pls.' Opp. at 19–26. They have failed to show why they cannot readily obtain each and every one of these categories of information from the other sources identified above:

- **Secretary Wilkie's Leadership of the Panel and Formulation of its Ultimate Recommendations** (Pls.' Opp. at 19–20): Plaintiffs propose to question Secretary Wilkie on the last six Panel meetings and the January 11, 2018 memorandum memorializing the Panel's recommendations to then-Secretary Mattis. But any of the Panel's many members can testify to what happened during those meetings and to the Panel's ultimate recommendations, including Mr. Hebert, who "facilitate[d] the Panel's discussions and deliberations" for those last six meetings, Hebert Decl. ¶ 11, and will be deposed. Plaintiffs also want Secretary Wilkie's testimony on the December 15, 2017 Panel presentation to

then-Secretary Mattis, but Secretary Wilkie, who had joined the Panel just weeks prior, was one of three senior DoD leaders who made that presentation. The other two, Mr. Kurta and Mr. Hebert, had been part of the Panel from the start and will be deposed. *Id.* ¶ 13. Plaintiffs also seek information on "documented meetings" outside the Panel process. Pls.' Opp. at 20. But they fail to identify any information suggesting that any such meeting ever occurred, and to the extent they were "documented," Plaintiffs already have their alternative source of discovery, though they fail to identify it.

- **Secretary Wilkie's Role Regarding the "[F]low of [I]nformation to and [F]rom the Panel"** (Pls.' Opp. at 21–23): Plaintiffs seek Secretary Wilkie's testimony on Mr. Dee's circulation of his dissenting opinion and on Mr. Kurta's request to share policy documents outside the Panel. But Plaintiffs can ask Mr. Dee and Mr. Kurta about these matters, as both will be deposed. And to the extent they seek information on the Panel's [redacted] *see* Pls.' Opp. Ex. 40, Plaintiffs may depose Mr. Hebert or another one of the other recipients copied on this thread about this matter.

- **Drafting of the Mattis Memorandum and DoD Report** (Pls.' Opp. at 19–20, 23): Although Secretary Wilkie was involved in drafting the Mattis Memorandum and DoD Report, Plaintiffs' statement that his knowledge is "unique and irreplaceable," Pls.' Opp. at 20, is belied by their own brief. Plaintiffs concede that there were "six 'principal authors' of the Report," Pls.' Opp. at 19, and that there were "43 persons who 'reviewed, revised or commented on drafts of' the Mattis Memorandum . . . and 53 persons who 'reviewed, revised or commented on drafts of' the DoD report." Pls.' Opp. to Defs.' Mot. to Quash Third-Party Subpoena Issued to General Paul J. Selva, No. 1:20cv15 (E.D. Va. June 4, 2020), ECF 32 at 24 (citation omitted), attached hereto as Ex. H. Moreover, Plaintiffs admit that Mr. Kurta and Mr. Hebert were two other senior DoD officials who participated in "drafting and/or reviewing the DoD report," Pls.' Opp. at 13, and both will be deposed.[11]

- **Coordinated Political Effort Driven by Anti-Transgender Advocates** (Pls.' Opp. at 23–25): Plaintiffs attempt to distract this Court from the narrow question of whether exceptional circumstances exist that warrant a sitting Cabinet member's deposition by fabricating a claim of political bias. *See infra* at 13-17. To the extent the Court gives any consideration to Plaintiffs' arguments in this regard, these arguments are based on a collection of publicly available news articles, editorials, and videos. None of these suggest that Secretary Wilkie even played a role in this alleged political scheme, and Plaintiffs have not attempted to justify why Secretary Wilkie would have any information about them.

[11] Plaintiffs also point to a single news article "claiming that a majority of U.S. Service Members supported" the policy circulated between Secretary Wilkie and William Bushman, "special assistant" to Secretary Mattis, as evidence of an article the Panel never considered. Pls.' Opp. at 23. But Secretary Wilkie had no obligation to present every conceivable article he encountered on the policy to the Panel, and to the extent Plaintiffs have any serious interest in this, they may take Mr. Bushman's deposition on the subject.

For all of the foregoing reasons, Plaintiffs have plainly not shown that Secretary Wilkie has unique knowledge of any of the topics on which they seek to depose him.

II. Plaintiffs May Not Depose Secretary Wilkie on His Mental Impressions.

The Supreme Court made clear in *Morgan* that there is a strong presumption against deposing apex officials on their mental impressions. *See* 313 U.S. at 422 ("[I]t was not the function of the court to probe the mental processes of the Secretary." (citation omitted)); *see also* Mot. at 13–15 (collecting cases). Plaintiffs bear the burden to demonstrate "a strong showing of bad faith or improper behavior" on the part of the individual they seek to depose. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573–74 (2019), *remanded*, 2019 WL 3213840 (S.D.N.Y. July 16, 2019); *see also Franklin Sav. Ass'n*, 922 F.2d at 211 ("Only where there is a clear showing of misconduct or wrongdoing is any departure from [the apex doctrine] permitted."). When requesting to depose apex officials on their mental processes, the burden is even higher when the deponent is a military official, and that official's decisions are entitled to deference and protected from unnecessary judicial intrusion.

A. Plaintiffs' Accusation that Secretary Wilkie Acted in Bad Faith or with Animus Toward Transgender Individuals Is Baseless.

In an apparent last-ditch attempt to justify deposing Secretary Wilkie on his mental impressions, Plaintiffs resort to the novel and spurious accusation that he engaged in "misconduct or wrongdoing [with] intentional discrimination and animus against transgender persons."[12] Pls.' Opp. at 27. This accusation is baseless, and comes nowhere close to the extraordinary showing of

[12] If Plaintiffs' bad faith argument is somehow premised not on Secretary Wilkie's actions, but on those of Secretary Mattis or the Government generally, that argument is even further afield. As the *Sensient Colors* court explained (a case which Plaintiffs cite multiple times), "personal involvement [of the official being deposed] or knowledge is key . . . 'when there are allegations that the official acted with improper motive *or* acted outside the scope of his official duty.'" *United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 322 (D.N.J. 2009) (citation omitted).

bad faith necessary to depose the sitting VA Secretary. *See In re Dep't of Commerce*, 139 S. Ct. at 16, 17 (Gorsuch, J., concurring in stay of district court's order authorizing the deposition of the Secretary of Commerce) ("Leveling an extraordinary claim of bad faith against a coordinate branch of government requires an extraordinary justification."); *In re United States (Holder)*, 197 F.3d 310, 314 (8th Cir.1999) ("Allegations that a high government official acted improperly are insufficient to justify the subpoena of that official unless the party seeking discovery provides compelling evidence of improper behavior and can show that he is entitled to relief as a result." (citation omitted)); *accord Klay v. Panetta*, 758 F.3d 369, 378 (D.C. Cir. 2014) ("It is no small thing to allege that the Secretary of Defense ignored an act of Congress, and I am troubled by the possibility that plaintiffs' counsel leveled this charge without first carefully reading the act in question."). Indeed, it is well-established that government officials are entitled to a presumption of good faith, especially in the military context.[13] *Prince v. Sec'y of Air Force*, 30 F.3d 130 (4th Cir. 1994) ("It is presumed that 'administrators of the military like other public officers discharge their duties correctly, lawfully, and in good faith.' More specifically, the Secretary of the Air Force is 'presumed to perform fairly and lawfully in absence of clear and persuasive evidence to the contrary.'" (citations omitted)).

Notably, Plaintiffs do not dispute that the Panel was assembled by former Secretary Mattis and consisted of senior military and civilian leaders. They do not dispute that those senior military

[13] *See, e.g.*, *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) ("[T]he Secretary [of Transportation]'s decision is entitled to a presumption of regularity."), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."); *Roberts v. Harvey*, 441 F. Supp. 2d 111, 118 (D.D.C. 2006) ("[Defendants] seeking review of a board decision bears the burden of overcoming 'the strong, but rebuttable, presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully and in good faith.'"(citation omitted)).

and civilian leaders met on at least thirteen different occasions, heard input from a plethora of sources with diverse views, and ultimately developed recommendations for Secretary Mattis. Moreover, Plaintiffs have every source of information considered by those senior leaders as well as their deliberations on that information, and Secretary Mattis ultimately adopted in full the policy recommended by the Panel and sent it to the President. There is no possible evidence of bad faith by Secretary Wilkie in any of these proceedings. Indeed, Plaintiffs acknowledge that Secretary Wilkie joined the Panel only in late November 2017—more than halfway through its review process, and that Mr. Kurta, who had chaired Panel meetings before Secretary Wilkie joined, remained an involved and voting member on the Panel after Secretary Wilkie assumed his duties.

For Plaintiffs to now claim that they need to depose Secretary Wilkie to probe alleged animus, even though he joined the Panel more than halfway through the process and all of the Panel members who were active in the first half remained actively engaged, is entirely baseless. The seventeen senior military officials who served on the Panel of Experts, and then-Secretary Mattis, developed the challenged policy, and nothing suggests that Secretary Wilkie had any unique knowledge or evidence of animus in the process.[14] *See Doe 2 v. Shanahan*, 917 F.3d 694, 731 (D.C. Cir. 2019) (Williams, J., concurring in result) ("Plaintiffs and the district court may, to

[14] Plaintiffs' spurious accusations against Secretary Wilkie mirror the similarly baseless and offensive allegations they leveled against former Secretary of Defense and four-star General James N. Mattis. *See* Pls.' Opp. to Defs.' Mot. to Quash Third-Party Subpoena Issued to James N. Mattis, No. 2:20-mc-00010-RAJ-RJK (E.D. Va. June 4, 2020) ECF 32 at 24, attached hereto as Ex. I (claiming that Secretary Mattis, too, engaged in "intentional discrimination and animus against transgender people"). Moreover, Plaintiffs' theory is entirely undercut by their own admission that the recommendations did not change from the Panel to the acceptance by Secretary Mattis. *See* Pls.' Opp. at 6. The fact that Secretary Mattis ordered his own report to submit to the President is entirely irrelevant. Secretary Mattis expressly stated in his memorandum recommending the policy that he was doing so "in [his] professional judgment," *see* Memorandum from Secretary Mattis to President Trump (Feb. 22, 2018) at 3, ECF 3-3, Mot. Ex. C, and reaffirmed this in his sworn testimony before the United States Senate, *see* U.S. Senate Testimony before Senate Comm. On Armed Services (Apr. 26, 2018) at 62:21, attached hereto as Ex. J.

be sure, regard the entire decisionmaking record as a Potemkin village, designed to pull the wool over the eyes of simple-minded observers (including reviewing courts). Of course, the plausibility of such a scheme tends to unravel as we try to imagine the dozens of participants—the 'Cabinet members and other officials,'—who would have been needed for its realization." (quoting *Trump v. Hawaii*, 138 S. Ct. at 2405)).

Neither the Ninth Circuit nor the D.C. Circuit, both of which considered Plaintiffs' animus argument, found it persuasive. *See Karnoski*, 926 F.3d at 1202 ("[T]he 2018 Policy appears to have been the product of independent military judgment."); *Doe 2*, 755 F. App'x at 25 ("Although today's decision is not a final determination on the merits, we must recognize that the Mattis Plan plausibly relies upon the 'considered professional judgment' of 'appropriate military officials [.]'") (citation omitted)).[15] At bottom, Plaintiffs' theory appears to rest on a notion that if any political appointee had any involvement in the process, then it is suspect. But Judge Williams of the D.C. Circuit has already found that Plaintiffs' argument that "military policies are suspect unless they are (somehow) 'independent' of the views of the Commander in Chief . . .

[15] Plaintiffs also point to emails in which Secretary Mattis appears to remind himself of additional sources to check and communications between DoD and Dr. Paul McHugh, a Johns Hopkins University Distinguished Service Professor of Psychiatry and Behavioral Sciences. *See* Pls.' Opp. at 13–14. This Harvard-trained doctor was the Psychiatrist-in-Chief at The Johns Hopkins Hospital for twenty-six years. *See* Paul R. McHugh, M.D., John Hopkins Medicine, https://www.hopkinsmedicine.org/profiles/results/directory/profile/0003340/paul-mchugh (last accessed June 24, 2020) (noting Dr. McHugh's expertise in adult psychiatry and neuropsychiatry). Plaintiffs imply that because senior DoD officials spoke with a psychiatrist with a different viewpoint from that of the Plaintiff advocacy groups, the Government must have been motivated by animus towards transgender individuals. But this allegation does not concern Secretary Wilkie. And DoD's communications with Dr. McHugh simply reflect an effort to consider input from medical professionals with a variety of views as part of the policy process; they offer no support for Plaintiffs' claims. *See, e.g.*, *Gibson v. Collier*, 920 F.3d 212, 220–22 (5th Cir. 2019) (citing Dr. McHugh among many medical experts in finding that "there is robust and substantial good faith disagreement dividing respected members of the expert medical community" about the necessity and efficacy of sex reassignment surgery).

verges on weird . . . [because] control of military force by elected representatives and Officials [] underlies our entire constitutional system." *Doe 2*, 917 F.3d 694, 730 (Williams, J., concurring in result) (citing *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)). This Court should therefore reject Plaintiffs' bald assertion of animus as a basis to depose Secretary Wilkie.

B. Mental Processes Concerning Military Decision-Making Are Entitled to a Higher Level of Deference.

Because Plaintiffs can show neither that exceptional circumstances warrant a sitting Cabinet member's deposition, nor that he acted in bad faith, they cannot justify his deposition, irrespective of the military context. But Plaintiffs' proposed discovery is even more improper because they seek to question a former senior DoD official about his decisions affecting military personnel policy. As one of the "'complex, subtle, and professional decisions as to the composition . . . of a military force,' which are 'essentially professional military judgments,'" DoD's current policy is subject to a highly deferential review. *Winter v. NRDC*, 555 U.S. 7, 24 (2008) (citation omitted). Numerous other cases have held the same.[16] Plaintiffs have not identified a single case in which a military official has been ordered to testify to explain his or her reasoning for a military policy decision, much less the former Under Secretary of Defense. And the one case they have identified involving a Cabinet member is inapt. *See Energy Capital Corp.*

[16] *See Goldman v. Weinberger*, 475 U.S. 503, 507–08 (1986) ("Judicial deference is at its apogee" in this area because "[n]ot only are courts ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have, but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy." (internal citations and alterations omitted)); *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981) (Choices about who should serve "are based on judgments concerning military operations and needs, and the deference unquestionably due the latter judgments is necessarily required in assessing the former as well." (citation omitted)); *Thomasson v. Perry*, 80 F.3d 915, 926 (4th Cir. 1996) (en banc) ("Parallel to the deference owed Congressional and Presidential policies is deference to the decision-making authority of military personnel who 'have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy.'" (quoting *Goldman*, 475 U.S. at 508)); *see also* Mot. at 17–19 (collecting cases).

v. United States, 60 Fed. Cl. 315, 318 (Fed. Cl. 2004) (authorizing depositions of the former Secretary and former General Counsel of the Department of Housing and Urban Development where they "had . . . knowledge *that no one else has*'" (emphasis added) (citation omitted)).

Moreover, as referenced above, in the underlying *Karnoski* case, the Ninth Circuit has already ruled that "a presumption of deference is owed, because the 2018 Policy appears to have been the product of independent military judgment." *Karnoski*, 926 F.3d at 1202. Plaintiffs suggest that this remains an open issue, warranting a deposition of Secretary Wilkie on whether the "so-called 'Mattis Policy' is 'an exercise of independent military judgment' or 'nothing more than an implementation of" President Donald Trump's 2017 Tweet-announced ban on transgender service.'" Pls.' Opp. at 1 (citing *Karnoski*, 926 F.3d at 1201–02). But that issue was resolved in *Karnoski*: "In short, the district court *must apply appropriate military deference* to its evaluation of the 2018 Policy." *Karnoski*, 926 F.3d at 1202 (emphasis added).[17]

Nor was the D.C. Circuit any more persuaded when the plaintiffs in the related *Doe 2* action raised that same theory. *See Doe 2*, 755 F. App'x at 25 ("Although today's decision is not a final determination on the merits, we must recognize that the Mattis Plan plausibly relies upon the 'considered professional judgment' of 'appropriate military officials,') (quoting *Goldman*, 475 U.S. at 509). The D.C. Circuit specifically found that

> [t]he government took substantial steps to cure the procedural deficiencies the court identified in the enjoined 2017 Presidential Memorandum. These included the creation of a panel of military and medical experts, the consideration of new evidence gleaned from the implementation of the Policy on the service of

[17] The Ninth Circuit did not mandate or suggest that a deposition of any high ranking DoD official would be appropriate here but rather suggested that the litigation could proceed without any depositions. *See Karnoski*, 926 F.3d at 1206 n.22 ("We note that in *Trump v. Hawaii*, ___U.S.___, 138 S. Ct. 2392, 2409, 201 L. Ed. 2d 775 (2018), the Court 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.").

> transgender individuals instituted by then-Secretary of Defense Ash Carter . . . , and a reassessment of the priorities of the group that produced the Carter Policy.

Id. at 23.

The reason for the reluctance of courts to intrude into the military decision-making of apex officials should be apparent: "[J]udicial inquiries into . . . executive motivation represent a substantial intrusion into the workings of other branches of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977); *see also In re United States ("Jackson")*, 624 F.3d 1368, 1373 (11th Cir. 2010) (noting that "[t]he threat to the separation of powers is more substantial" when the official is "higher-ranking"); Mot. at 12–13 (collecting cases). The Ninth Circuit has recognized that these separation of powers concerns are especially acute in this underlying case. *See Karnoski*, 926 F.3d at 1200 n.16 (recognizing that courts "should 'give appropriate weight to this separation of powers'" (citation omitted) and directing the district court to consider this concern on remand). Plaintiffs do not address any of these concerns.

III. Plaintiffs Seek to Probe Secretary Wilkie on Privileged Matters.

The Court should quash Plaintiffs' third-party deposition subpoena because it fails under the apex doctrine as set forth above. However, the Court may also consider that the testimony Plaintiffs seek clearly implicates both the presidential communications privilege and the deliberative process privilege. Plaintiffs do not dispute that they seek privileged information from Secretary Wilkie.[18] Rather, their only rejoinder is that, where a deposition subpoena seeks

[18] For example, Plaintiffs state that they will question Secretary Wilkie on the basis that he "appears to have played the central role in a coordinated political effort, driven by third-party anti-transgender advocates working with and through the White House, to ensure that the President's Ban was implemented by DoD." Pls.' Opp. at 17. Testimony regarding such White House communications, and other similar testimony, would be subject to the presidential communications privilege. *See United States v. Nixon*, 418 U.S. 683, 708 (1974) (privilege protects the President's ability to obtain candid and informed advice and to make decisions confidentially).

privileged testimony, the correct course of action is to permit the deposition anyway and leave it to counsel to repeatedly object to the questioning and instruct the witness not to answer for the duration of the deposition.[19] *See* Pls.' Opp. at 29. But where a party seeks to probe into matters of Executive privilege, the law firmly supports requiring a party to seek alternatives first. *See*, *e.g.*, *Cheney v. U.S. Dist. Court for the District of Columbia*, 542 U.S. 367, 388 (2004) (Where presidential communications are at issue, "precedent provides no support for the proposition that the Executive Branch 'shall bear the burden' of invoking executive privilege with sufficient specificity and of making particularized objections."); *Karnoski*, 926 F.3d at 1205 (holding that the district court should have "explor[ed] other avenues, short of forcing the Executive to invoke privilege" (citation omitted)); *see also* Mot. at 25–27. Accordingly, if more is necessary for the Court to decide whether to allow this deposition to proceed, it may also consider the broad array of potentially privileged subjects at issue, rather than requiring a process that will entail deposition objections and potential instructions not to disclose privileged communications, at least until Plaintiffs have exhausted alternatives to such a proceeding.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Quash should be granted, and Plaintiffs should be precluded from deposing the sitting Secretary of Veterans Affairs Robert Wilkie, Jr.

[19] The cases that Plaintiffs cite for this proposition do not concern the presidential communications privilege or even federal officials and are thus inapposite. *See Libertarian Party of Ohio v. Husted*, 33 F. Supp. 3d 914, 925 (S.D. Ohio 2014) (permitting the deposition of a local board of elections hearing officer only provided that "Plaintiffs . . . reconsider their intent to depose him unless they have process-related questions to ask, or unless they wish to preserve the record"); *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 164 F.R.D. 257, 268 (N.D. Fla. 1995) (ruling on a possible new legislative privilege); *Scovill Mfg. Co. v. Sunbeam Corp.*, 61 F.R.D. 598 (D. Del. 1973) (arising in the context of corporate in-house counsel).

Dated: June 24, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

G. ZACHARY TERWILLIGER
United States Attorney

ALEXANDER K. HAAS
Director, Federal Programs Branch

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

ANDREW E. CARMICHAEL
CHRISTOPHER D. EDELMAN
GRACE X. ZHOU
Trial Attorneys, Federal Programs Branch
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 305-8659
Email: christopher.edelman@usdoj.gov

/s/ *Dennis C. Barghaan*
DENNIS C. BARGHAAN, JR.
Deputy Chief, Civil Division
Assistant United States Attorney
2100 Jamieson Ave.,
Alexandria, VA 22314
Tel: (703) 299-3891
Fax: (703) 299-3983
Email: dennis.barghaan@usdoj.gov

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2020, I electronically filed the foregoing Defendants' Reply in Support of Their Motion to Quash Third-Party Subpoena Issued to Secretary Robert Wilkie Jr. using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

/s/ *Dennis C. Barghaan*
DENNIS C. BARGHAAN, JR.
Deputy Chief, Civil Division
Assistant United States Attorney

Exhibit A

FILED UNDER SEAL

Exhibit B

Declaration of Robert E. Easton in *Karnoski v. Trump*, No. 2:17-cv-01297-MJP (W.D. Wash. Aug. 29, 2019), ECF 371-1

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.

No. 17-cv-01297 (MJP)

DECLARATION OF ROBERT E. EASTON IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL (ECF 358)

DECLARATION OF ROBERT E. EASTON

I, Robert E. Easton, do hereby declare as follows:

1. I currently serve as Director, Office of Litigation Counsel, in the Department of Defense ("DoD") Office of General Counsel ("OGC"). I have held this position since 2006. In this capacity, I supervise the conduct and oversight of litigation of Departmental significance, including matters involving senior DoD leaders, and coordinate litigation among the Military Departments, Defense Agencies, and Field Activities.

2. In the exercise of my official duties, I have been made aware of this lawsuit and the three other cases involving the March 12, 2019 DoD Policy on Military Service by Transgender Persons and Persons with Gender Dysphoria.

3. I submit this declaration in support of Defendants' Response to Plaintiffs' Motion to Compel (ECF No. 358). I base this declaration on my personal knowledge and information made available to me in the performance of my official duties.

DoD Search and Review Process

4. In their motion, Plaintiffs seek to compel Defendants to "(1) provide individualized objections to each request rather than the boiler-plate objections that were initially provided, and (2) identify whether any documents are being withheld pursuant to an individualized objection and, if so, sufficiently identify the documents withheld pursuant to that objection."

5. In response to this and the three other lawsuits challenging DoD's policies regarding military service by transgender individuals and individuals with gender dysphoria, DoD conducted an expansive search, collection, and production of files and documents potentially relevant to the claims and defenses in the four cases. DoD's search and review efforts were focused on material reasonably related to the formation and implementation of DoD's policy on military service by transgender individuals and individuals with gender dysphoria.

6. DoD began this process by identifying the key individuals who were involved in this policy making process going back to former Secretary of Defense Ashton Carter's announcement. DoD OGC identified and searched the accounts of the following key personnel:[1]

Exec. Sec. Officials	Title
Bushman, William	Special Assistant to the Secretary of Defense
Walsh, Laurel	Special Assistant to the Chief of Staff
Verga, Peter	Special Assistant to Secretary of Defense
Faller, Craig	Senior Military Assistant to the Secretary of Defense
Carter, Ashton	25th Secretary of Defense
Work, Robert	Deputy Secretary of Defense
Mattis, James	26th Secretary of Defense
Mohler, Hallock	Executive Secretary
Sweeney, Kevin	Chief of Staff to the Secretary of Defense
DeMartino, Tony	Chief of Staff to the Deputy Secretary of Defense
DoD P-R	
Kurta, Anthony	Under Secretary of Defense for Personnel and Readiness
Barna, Stephanie	Acting Assistant Secretary of Defense for Manpower and Readiness
Hebert, Lernes	Acting Deputy Assistant Secretary of Defense for Military Personnel Policy and Principal Director
Miller, Stephanie	Director, Accessions Policy
Gearhart, Lee COL	Assistant Director, Reserve Accessions
Brown, Gary LTC	Assistant Director, Reserve and Medical Manpower
Adirim, Terry Dr.	Principal Deputy Assistant Secretary of Defense for Health Affairs
Findley, Andrew Dr.	Program Manager - Quality, Graduate Medical Education, and Medical Accession and Retention Incentives
Chan, Edmund	Health Affairs - Health Services Policy and Oversight
Ribeiro, Elizabeth	Contractor Employee Supporting the Office of Health Services Policy and Oversight
Arendt, Christopher	Director, Accessions Policy
DoD OGC	

[1] In addition to the DoD officials listed in the table *infra*, other individuals involved in the development of the DoD transgender policy were identified in our Response to Plaintiff's Second Set of Interrogatories Nos. 18 and 19, filed under seal on August 21, 2019 (ECF No. 363).

Koffsky, Paul	Acting General Counsel and Senior Deputy General Counsel, Personnel and Health Policy
Casciotti, John	Senior Associate Deputy General Counsel
Gruber, David	Associate Deputy General Counsel
Easton, Robert	Director, Office of Litigation Counsel
Hatch, Richard	Associate Deputy General Counsel
Hecker, Karen	Associate Deputy General Counsel
Newman, Ryan	Deputy General Counsel, Legal Counsel

7. While the key custodian list was being finalized, DoD OGC attorneys simultaneously developed broad search terms and determined the relevant date range based on the assumption that DoD needed to gather and process all data not only potentially relevant to this case, but to any future cases and Freedom of Information Act requests on this topic. To that end, comprehensive search terms were selected to gather data from DoD Exchange servers on three different DoD networks. The search terms that were used were:

Term	Operator
transgend*	June 30, 2016 to March 23, 2018
"trans gender"	June 30, 2016 to March 23, 2018
gender /4 stab*	June 30, 2016 to March 23, 2018
"genital reconstruction" OR "gender transition" OR "gender marker" OR "gender transition plan"	June 30, 2016 to March 23, 2018
"gender dysphoria"	June 30, 2016 to March 23, 2018
"TG" /3 ("service member" OR "care" OR "working group" OR "individual")	June 30, 2016 to March 23, 2018
"transition surgery"	June 30, 2016 to March 23, 2018
("sex change" OR "sex-change") /3 surgery OR "sex change surgery"	June 30, 2016 to March 23, 2018
reassignment AND ("surgery" OR "procedure")	June 30, 2016 to March 23, 2018

"sex reassignment" /2 surgery OR "sex reassignment surgery"	June 30, 2016 to March 23, 2018
("cross sex" OR "cross-sex") AND ("hormone treatment" OR "hormone therapy")	June 30, 2016 to March 23, 2018
gender AND confirm* AND surgery	June 30, 2016 to March 23, 2018
"Join" OR SERV* /3 gender	June 30, 2016 to March 23, 2018
"vaginoplasty"	June 30, 2016 to March 23, 2018
"Penile amputation"	June 30, 2016 to March 23, 2018
Department of Defense Instruction OR DODI /2 "1300.28"	June 30, 2016 to March 23, 2018
("Directive Type Memo" OR "DTM") AND "16-005"	June 30, 2016 to March 23, 2018

8. The DoD search terms and the relevant date range were then transmitted by Microsoft Excel spreadsheet to DoD Information Technology ("IT") personnel to begin the digital search.

9. DoD IT personnel applied the designated search parameters while conducting digital searches as directed by DoD OGC attorneys. The only parameters applied were date range, search term(s), and custodian email address. No additional filters were applied by DoD IT at the server collection stage, and servers that contained service member medical records were not searched. Once the relevant native data were gathered by DoD IT personnel, the data collection was provided by CD to DoD OGC attorneys who then transferred it to DOJ attorneys for processing in their eDiscovery software, Relativity.

10. After DOJ processed this native data set, DoD was informed that there were more than 138,900 unique DoD documents based on the custodian list, search terms, and date range. Including the additional data gathered by the Military Services, who separately identified their own key custodians, more than 225,200 documents were collected. Documents were then

maintained and organized within the eDiscovery database as they were collected and as they would appear in the ordinary course of business—by DoD or Military Service component and custodian.

11. Supplemental self-collections were also executed with assistance from DoD OGC attorneys for select key custodians as a result of expedited discovery deadlines set in this case. Military Service attorneys directed similar self-collections from their key personnel. The decision to conduct supplemental self-collections was based on: the need to produce documents quickly, an understanding that a digital search by DoD IT personnel would take time to complete, and the fact that the identified key custodians were the relevant DoD policy makers for the Secretary Carter transgender policy. To that end, DoD OGC attorneys instructed Stephanie Miller, Anthony Kurta, Lernes Hebert, Dr. Terry Adirim, and Dr. Andrew Findley to create a folder on each of their desktops, copy all potentially relevant documents from organizational shared drives and Outlook accounts using search terms similar to those used for the digital search, and place any results in the newly created desktop folder. Once this was complete, the key custodians were instructed to send these folders to DoD OGC so that they could be transferred to DOJ for processing, review, and production. These additional self-collections were also maintained and organized within the eDiscovery database as they were collected—by DoD or Military Service component and custodian—and as they would appear in the ordinary course of business.

12. Once the data were uploaded to Relativity, duplicate documents were segregated from the corpus of documents for review. Thereafter, DOJ divided the remaining documents into batches of 250, and DoD OGC counsel for this case assigned a reviewer to each batch. No

documents were excluded from batching due to the possibility that a document contained privileged information.

13. The DoD document review was conducted by a team of DoD OGC staff. Prior to the review, DoD OGC counsel provided the team detailed instructions on the mechanics and criteria for the review. Reviewers received training on how to determine whether a document was responsive, to note whether the document was a "key" document because it contained information especially relevant to the claims or defenses at issue in this and the related litigation, to review the document for any applicable privileges and code the document appropriately, and finally to provide a description of the privileged information for the privilege log. The review team was also instructed to mark a document as "responsive" if the document was remotely related to DoD's transgender policy, past or present, and further instructed to err on the side of finding responsiveness. In light of the 218 RFPs in this and the three related cases challenging DoD's transgender policy, DoD did not further review and categorize documents as responsive to particular RFPs. Rather, documents were categorized and produced as they were maintained and collected in the ordinary course of business—by DoD or Military Service component and custodian. Efforts to reorganize the documents by RFPs in this and the related litigation would have added substantial burdens to DoD's review efforts by requiring DoD attorneys to compare the content of each document reviewed to the list of the 218 RFPs across the four cases. This task would be further complicated by the fact that many responsive documents would be specifically responsive to numerous RFPs.

14. Beyond determining whether a document was responsive, as described above, DoD did not apply non-privilege objections to exclude reviewed documents from production.

15. The review team was also instructed on various privileges including the Deliberative Process Privilege, the Attorney-Client Privilege, Work Product privilege, and the Presidential Communications Privilege so that team members had a working knowledge of the applicable privileges they were likely to encounter as they reviewed the documents. They were further asked to code a document as "needs further review" if they were unsure about the content, had questions on whether a specific code was warranted, or encountered a document with a close privilege call so that an attorney could later locate and review the document to make the appropriate privilege determination. Finally, at the beginning of the review project DoD OGC hosted daily teleconferences among members of the review team to ensure uniformity across the review and to offer the team an opportunity to discuss any unique documents encountered as they worked through the batches.

16. Privilege determinations were generally made at the same time as responsiveness determinations. Reviewers would read an entire document and consider the content, the title, the author, the recipients, and the date of the document's creation as they contemplated whether the document was privileged. If a document contained privileged material, it was appropriately coded in Relativity, and the reviewer moved on to the next document. These privilege determinations were made only after a document was determined to be responsive, and there were no custodians, documents, or batches that were excluded from review because they contained privileged information.

17. Once the documents were coded as privileged, DoD OGC notified DOJ, and DOJ created and provided DoD OGC privilege logs for several batches of documents. These logs were generated from Relativity by the eDiscovery software and sent to my office in Microsoft Excel format. They were created using a combination of metadata from a document and the

reviewer's coding in Relativity. The logs included the following metadata: author of the email or creator of the document, recipient of any email, date of creation or date the email was sent, title of the document, a privilege determination, and basis for the privilege determination. This information was provided for every document that DoD withheld as privileged in this case. Accordingly, Defendants have long since provided Plaintiffs with the "individualized [privilege] objections" and a description of the documents "being withheld pursuant" to those individualized privilege objections that they seek through this motion. *See* ECF 358 at 2.

18. While Plaintiffs' motion is unclear on this point, it appears that in addition to seeking the individualized privilege objections that Defendants have already provided, Plaintiffs seek to have Defendants reorganize its productions and privilege objections by Plaintiffs' RFPs. Unsurprisingly, neither DoD nor the Military Services organize their files by Plaintiffs' RFPs. Therefore, to reorganize Defendant's production and privilege objections from how those documents were kept in the ordinary course of business to conform to Plaintiffs' desired organizational scheme, DoD and the Military Services would need to re-review the more than 42,000 privileged documents and simultaneously consult with Plaintiffs' RFPs to identify and re-categorize the information per Plaintiffs' specific request. In addition, because DoD and the Military Services conducted separate reviews of their documents and have differing command structures, reorganizing the data according to Plaintiffs' requests would require a coordinated, months-long re-review to group the privileged documents according to each of Plaintiffs' 68 RFPs.

19. Moreover, Plaintiffs' proposed organizational scheme would be unwieldy and virtually unusable as documents from primary custodians involved in the development of these polices for nearly three years could be simultaneously categorized into more than a dozen of

Plaintiffs' 68 RFPs. If required to reorganize the database this way, not only would DoD be providing Plaintiffs with the same information they currently possess (organized in a manner inconsistent with how it was collected or kept in the ordinary course of business), but the new database would be unmanageable due to the large number of duplicate entries Plaintiffs' proposed organization would create.

20. Finally, Plaintiffs' proposed reorganization will net them no new information. DoD OGC privilege logs already include the metadata needed to locate when a document was sent, created, or received by any particular custodian. Given that there are three related cases, and 218 total RFPs across the four cases, if DoD OGC had to reorganize the entire production and the privilege logs six separate times to accommodate each Plaintiffs' (including the State Plaintiffs) organizational preferences, the entire project could take a year to accomplish and in each instance the final product would be less manageable than what DoD and the Military Services have already provided.

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

EXECUTED this 29th day of August 2019, in Arlington, VA.

ROBERT E. EASTON
Director, Office of Litigation Counsel

Exhibit C

Declaration of Robert E. Easton in *Karnoski v. Trump*, No. 2:17-cv-01297-MJP (W.D. Wash. Jan 24, 2020), ECF 405-2

IN THE UNITED STATES DISTRICT COURT
FOR THE 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.

No. 17-cv-01297 (MJP)

DECLARATION OF ROBERT E. EASTON IN SUPPORT OF DEFENDANTS' MOTION FOR CLARIFICATION AND MOTION FOR STAY

DECLARATION OF ROBERT E. EASTON

I, Robert E. Easton, do hereby declare as follows:

1. I currently serve as Director, Office of Litigation Counsel, in the Department of Defense ("DoD") Office of General Counsel ("OGC"). I have held this position since 2006. In this capacity, I supervise the conduct and oversight of litigation of Departmental significance, including matters involving senior DoD leaders, and coordinate litigation among the Military Departments, Defense Agencies, and Field Activities.

2. In the exercise of my official duties, I have been made aware of this lawsuit and the three other cases involving the March 12, 2019 DoD Policy on Military Service by Transgender Persons and Persons with Gender Dysphoria.

3. I submit this declaration in support of Defendants' Motion for Clarification and Motion for Stay. I base this declaration on my personal knowledge and information made available to me in the performance of my official duties.

DoD Production in Response to *Doe* Order

4. Following the September 13, 2019 decision in *Doe v. Esper*, No. 17-cv-1597 (CKK) (D.D.C.), Dkt. 237, DoD has produced or committed to producing, under protective order as appropriate, the following categories of documents: (i) an unredacted version of the Administrative Record; (ii) unredacted meeting minutes of the Panel of Experts; (iii) all documents, testimony, and data reviewed by voting members of the Panel along with the deliberations on those materials; and (iv) all documents and communications that related to the work of the Panel and that were sent to or from voting members of the Panel dated from September 14, 2017, to March 23, 2018. In accord with the *Doe* order, DoD is no longer withholding documents within these categories under the deliberative process privilege. DoD continues to withhold certain materials on the basis of other privileges or because they contain personally identifying information.

5. In response to the *Doe* order, DoD has endeavored to produce any document or communication falling within the categories described in paragraph 4 even where generated by or sent to a person who is not a voting member of the Panel of Experts. Thus, for the date range of September 14, 2017 to March 23, 2018, DoD is only withholding documents under the

deliberative process privilege where the document is unrelated to the work of the Panel or was not provided to any voting member of the Panel of Experts.

6. DoD's and the Military Services' productions in response to the *Doe* order occurred on October 31, 2019; November 22, 2019; and December 19, 2019. Collectively, these productions consisted of 1,257 documents, comprising 9,584 pages.[1]

Compliance with and Interpretation of this Court's December 18, 2019 Order

7. Pursuant to this Court's Order of December 18, 2019, DoD is currently processing for release the documents of Secretary of Veterans Affairs (and former Under Secretary of Defense for Personnel and Readiness) Robert Wilkie. Mr. Wilkie was the only non-voting member of the Panel of Experts. A small number of documents fall within the date range of September 14, 2017, to February 22, 2018, and will be produced before January 31, 2020. In processing Mr. Wilkie's documents, DoD is determining whether they should be redacted or withheld pursuant to a privilege other than the deliberative process privilege, or whether they should be redacted or withheld as deliberative because they are not subject to the Court's Order.

8. If the Court's Order encompasses all documents responsive to RFP No. 29, DoD believes the only practicable method of compliance would be to re-review all documents previously withheld under the deliberative process and/or other privileges for the date range of September 14, 2017, to February 22, 2018. This would be necessary to determine whether documents should be released in full, whether they should be redacted or withheld pursuant to a privilege other than the deliberative process privilege, or whether they should be redacted or withheld as deliberative because they are not subject to the Court's Order.

[1]These totals also include certain documents unrelated to the deliberative process dispute in *Doe* that were reviewed and produced in the same productions.

9. Preliminary estimates indicate that approximately 10,869 DoD documents and approximately 5,256 Army documents generated between September 14, 2017, and February 22, 2018, were withheld as privileged under the deliberative process privilege. The Navy and Air Force withheld privileged documents as well, which will require re-review by those Services. At this time, I have been advised that the Navy estimates 4,209 documents will need to be re-reviewed, and the Air Force estimates it will need to re-review an additional 2,114 documents.

10. Accordingly, if the Court's Order is construed to require release of all deliberative documents responsive to RFP No. 29, this will require the re-review and potential release of at least 22,000 documents.

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

EXECUTED this 24th day of January 2020, in Arlington, VA.

ROBERT E. EASTON
Director, Office of Litigation Counsel

Exhibit D

Administrative Record Index in *Karnoski v. Trump*, No. 2:17-cv-01297-MJP (W.D. Wash.)

Index for Administrative Record

Page	Document
000001-000011	Under Secretary of Defense for Personnel and Readiness, "Fiscal Year 2016 Report to Congress on the Review of Enlistment of Individuals with Disabilities in the Armed Forces" (Apr. 2016)
000012-000022	*The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.*, p. 93 (Richard Posner, ed., Univ. of Chicago Press 1992)
000023-000031	Johnathan Shay, *Achilles in Vietnam*, p. 61, 198 (Atheneum 1994)
000032-000033	Under Secretary of Defense for Personnel and Readiness, "DoD Retention Policy for Non-Deployable Service Members" (Feb. 14, 2018)
000034-000092	The Lewin Group, Inc., "Qualified Military Available (QMA) and Interested Youth: Final Technical Report" (Sept. 2016)
000093-000192	RAND National Defense Research Institute, *Assessing the Implications of Allowing Transgender Personnel To Serve Openly* (RAND Corporation 2016), available at https://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf ("RAND Study")
000193-000198	Human Rights Campaign, "Understanding the Transgender Community," https://www.hrc.org/resources/understanding-the-transgender-community (last visited Feb. 14, 2018)
000199-000209	*Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), p. 453 (5th ed. 2013)
000210-000261	Department of Defense Instruction (DoDI) 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services* (Apr. 28, 2010), incorporating Change 1, (Sept. 13, 2011)
000262-000269	Department of Defense Instruction (DoDI) 6485.01, *Human Immunodeficiency Virus (HIV) in Military Service Members* (Jun. 7, 2013)
000270-000284	American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-III)*, pp. 261-264 (3rd ed. 1980)
000285-000298	American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)*, pp. 76-77 (3rd ed. Revised 1987)
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000310-000313	Hayes Directory, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria," p. 1 (May 15, 2014)
000314-000318	Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181 (2016)
000319	Memorandum from Ashton Carter, Secretary of Defense, "Transgender Service Members" (July 28, 2015)
000320-000325	Memorandum from Ashton Carter, Secretary of Defense, "Directive-type Memorandum (DTM) 16-005, 'Military Service of Transgender Service Members'" (June 30, 2016)

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000326	Memorandum from James N. Mattis, Secretary of Defense, "Accession of Transgender Individuals into the Military Services" (June 30, 2017)
000327-000329	Memorandum from Donald J. Trump, President of the United States, "Military Service by Transgender Individuals" (Aug. 25, 2017)
000330-000331	Memorandum from James N. Mattis, Secretary of Defense, "Terms of Reference -- Implementation of Presidential Memorandum on Military Service by Transgender Individuals" (Sept. 14, 2017)
000332-000351	Deployment Health Clinical Center, "Mental Health Disorder Prevalence Among Active Duty Service Members in the Military Health System, Fiscal Years 2005-2016" (Jan. 2017)
000352-000356	American Psychiatric Association, "Expert Q&A: Gender Dysphoria," available at https://www.psychiatry.org/patients-familites/gender-dysphoria/expert-qa (last visited Feb. 14, 2018)
000357-000378	M. Jocelyn Elders, George R. Brown, Eli Coleman, Thomas Kolditz & Alan Steinman, "Medical Aspects of Transgender Military Service, Armed Forces & Society (Mar. 2014)
000379-000393	Cecilia Dhejne, Roy Van Vlerken, Gunter Heylens & Jon Arcelus, "Mental health and gender dysphoria: A review of the literature," International Review of Psychiatry, Vol. 28 (2016)
000394-000405	George R. Brown & Kenneth T. Jones, "Mental Health and Medical Health Disparities in 5135 Transgender Veterans Receiving Healthcare in the Veterans Health Administration: A Case-Control Study," LGBT Health, Vol. 3 (Apr. 2016)
000406-000423	Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey* (American Foundation for Suicide Prevention and the Williams Institute, University of California, Los Angeles, School of Law 2014), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf
000424-000429	H.G. Virupaksha, Daliboyina Muralidhar, & Jayashree Ramakrishna, "Suicide and Suicidal Behavior Among Transgender Persons," *Indian Journal of Psychological Medicine*, Vol. 38 (2016)
000430-000437	Claire M. Peterson, Abigail Matthews, Emily Copps-Smith & Lee Ann Conard, "Suicidality, Self-Harm, and Body Dissatisfaction in Transgender Adolescents and Emerging Adults with Gender Dysphoria," *Suicide and Life Threatening Behavior*, Vol. 47, (Aug. 2017)
000438-000449	Raymond P. Tucker, Rylan J. Testa, Mark A. Reger, Tracy L. Simpson, Jillian C. Shipherd, & Keren Lehavot, "Current and Military-Specific Gender Minority Stress Factors and Their Relationship with Suicide Ideation in Transgender Veterans," *Suicide and Life Threatening Behavior* DOI: 10.1111/sltb.12432 (epub ahead of print) (2018)

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000450-000457	Craig J. Bryan, AnnaBelle O. Bryan, Bobbie N. Ray-Sannerud, Neysa Etienne & Chad E. Morrow, "Suicide attempts before joining the military increase risk for suicide attempts and severity of suicidal ideation among military personnel and veterans," *Comprehensive Psychiatry*, Vol. 55 (2014)
000458-000462	Hayes Directory, "Hormone Therapy for the Treatment of Gender Dysphoria," (May 19, 2014).
000463-000497	Wylie C. Hembree, Peggy Cohen-Kettenis, Louis Gooren, Sabine Hannema, Walter Meyer, M. Hassan Murad, Stephen Rosenthal, Joshua Safer, Vin Tangpricha, & Guy T'Sjoen, "Endocrine Treatment of Gender-Dysphoric/Gender Incongruent Persons: An Endocrine Society Clinical Practice Guideline," *The Journal of Clinical Endocrinology & Metabolism*, Vol. 102 (Nov 2017)
000498-000505	Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, "Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden," *PLoS One*, Vol. 6 (Feb. 2011)
000506-000520	Hayes Annual Review, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria" (Apr. 18, 2017; Apr. 12, 2016; May 11, 2015)
000521-000526	Memorandum from Defense Health Agency, "Information Memorandum: Interim Defense Health Agency Procedures for Reviewing Requests for Waivers to Allow Supplemental Health Care Program Coverage of Sex Reassignment Surgical Procedures" (Nov. 13, 2017)
000527-000725	University of California, San Francisco, Center of Excellence for Transgender Health, "Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People," available at http://transhealth.ucsf.edu/trans?page=guidelines-home (last visited Feb. 16, 2018)
000726-001027	Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey* (National Center for Transgender Equality 2016), available at https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF
001028-001177	Tamara Jensen, Joseph Chin, James Rollins, Elizabeth Koller, Linda Gousis & Katherine Szarama, "Final Decision Memorandum on Gender Reassignment Surgery for Medicare Beneficiaries with Gender Dysphoria," Centers for Medicare & Medicaid Services (Aug. 30, 2016) ("CMS Report")
001178-001195	Mohammad Hassan Murad, Mohamed B. Elamin, Magaly Zumaeta Garcia, Rebecca J. Mullan, Ayman Murad, Patricia J. Erwin & Victor M. Montori, "Hormonal therapy and sex reassignment: a systematic review and meta-analysis of quality of life and psychosocial outcomes," *Clinical Endocrinology*, Vol. 72 (2010)
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001284-001289	Department of the Air Force, Air Force Instruction 32-6005, "Unaccompanied Housing Management" (Jan. 29, 2016)
001290-001291	Department of the Army, Human Resources Command, AR 600-85, "Substance Abuse Program" (Dec. 28, 2012)
001292-001333	Department of the Army, Army Regulation 600-9, "The Army Body Composition Program" (June 28, 2013)
001334-001392	Department of the Navy, Office of the Chief of Navy Operations Instruction 6110.1J, "Physical Readiness Program" (July 11, 2011)
001393-001539	Department of the Air Force, Air Force Instruction 36-2905, "Fitness Program" (Aug. 27, 2015)
001540-001603	Department of the Navy, Marine Corps Order 6100.13, "Marine Corps Physical Fitness Program" (Aug. 1, 2008)
001604-001608	Department of the Navy, Marine Corps Order 6110.3A, "Marine Corps Body Composition and Military Appearance Program" (Oct. 12, 2017)
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001662-001693	United States Military Academy, Office of the Commandant of Cadets, "Physical Program Whitebook AY 16-17," p. 13
001694-002099	Headquarters, Department of the Army, TC 3-25.150, "Combatives" (Feb. 2017)
002100-002109	Major Alex Bedard, Major Robert Peterson & Ray Barone, "Punching Through Barriers: Female Cadets Integrated into Mandatory Boxing at West Point," Association of the United States Army (Nov. 16, 2017), https://www.ausa.rg/articles/punching-through-barriers-female-cadets-boxing-west-point
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002113-002150	NCAA Office of Inclusion, NCAA Inclusion of Transgender Student-Athletes (Aug. 2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf
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002222-002329	Department of the Air Force, Air Force Instruction 36-2903, "Dress and Personal Appearance of Air Force Personnel" (Feb. 9, 2017)
002330-002413	Department of the Navy, Marine Corps Order P1020.34G, "Marine Corps Uniform Regulations" (Mar. 31, 2003)
002414-002431	Department of Defense Instruction 1300.28, *In-Service Transition for Service Members Identifying as Transgender* (June 30, 2016)
002432-002583	Institute for Defense Analyses, "Force Impact of Expanding the Recruitment of Individuals with Auditory Impairment" Draft Final (January 2016)
002584-002614	Modification Thirteen to U.S. Central Command Individual Protection and Individual-Unit Deployment Policy, Tab A (Mar. 2017)
002615-002619	Memorandum from the Assistant Secretary of Defense for Health Affairs, "Clinical Practice Guidance for Deployment-Limiting Mental Disorders and Psychotropic Medications" (Oct. 7, 2013)
002620-002624	National Institute of Mental Health, "Bipolar Disorder" (Nov. 2017), https://www.nimh.nih.gov/health/statistics/bipolar-disorder.shtml
002625-002627	National Institute of Mental Health, "Schizophrenia" (Nov. 2017), https://www.nimh.nih.gov/health/statistics/schizophrenia.shtm
002628	Douglas MacAurthur, *Respectuflly Quoted: A Dictionary of Quotations* (1989), available at http://www.bartleby.com/73/1874.html
002629-002781	Nathaniel Frank, "Gays in Foreign Militaries 2010: A Global Primer" (*The Palm Center*, Feb. 2010), https://www.palmcenter.org/wpcontent/uploads/2017/12/FOREIGNMILITARIESPRIMER2010FINAL.pdf
002782-002802	Anne Speckhard & Reuven Paz, "Transgender Service in the Israeli Defense Forces: A Polar Opposite Stance to the U.S. Military Policy of Barring Transgender Soldiers from Service" (2014), http://www.researchgate.net/publication/280093066
002803-002816	Alan Okros & Denise Scott, "Gender Identity in the Canadian Forces," *Armed Forces and Society*, Vol. 41 (2014)
002817-002820	Leo Shane III, "Poll: Active-duty troops worry about military's transgender policies," *Military Times* (July 27, 2017), available at https://www.militarytimes.com/news/pentagon-congress/2017/07/27/poll-active-duty-troops-worry-about-militarys-transgender-policies/
002821-002824	Minutes, POE Meeting 1 (Oct. 13, 2017)
002825-002829	Minutes, POE Meeting 2 (Oct. 19, 2017)
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002849-002852	Office of People Analytics, 2016 Workplace and Gender Relations Survey of Active Duty Members: Transgender Service Members, Study Conclusions

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002857	Agenda, POE Meeting 2 (Oct. 19, 2017)
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002867-002880	DoD Transgender Service in the U.S. Military, Implementation Handbook (excerpts) (Sept. 30, 2016)
002881	Agenda, POE Meeting 3 (Oct. 26, 2017)
002882	Agenda, POE Meeting 4 (Nov. 2, 2017)
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002977	Agenda, POE Meeting 9 (Dec. 7, 2017)
002978-002981	The Federal Aviation Administration (FAA) and Gender Dysphoria (Dec. 4, 2017)
002982-002985	Time To Return to Full Duty After Transition Surgery in MTFs (slide deck)
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002998	Agenda, POE Meeting 10 (Dec. 13, 2017)
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003011-003042	Health Data on Active Duty Service Members with Gender Dysphoria (Dec. 13, 2017)
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003059-003067	Action Memo from Under Secretary of Defense (Personnel and Readiness) to the Secretary of Defense re: Recommendations by the Transgender Review Panel of Experts (Jan. 11, 2018)
003068-003075	Hormone Therapy White Paper

Exhibit E

Joint Status Report

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
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AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

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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

NEWMAN DU WORS LLP
2101 Fourth Avenue, Suite 1500
Seattle, Washington 98121
(206) 274-2800

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

NEWMAN DU WORS LLP
2101 Fourth Avenue, Suite 1500
Seattle, Washington 98121
(206) 274-2800

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

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

> 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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2101 Fourth Avenue, Suite 1500
Seattle, Washington 98121
(206) 274-2800

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.

NEWMAN DU WORS LLP
2101 Fourth Avenue, Suite 1500
Seattle, Washington 98121
(206) 274-2800

Respectfully submitted, May 6, 2020

NEWMAN DU WORS LLP

s/Jason B. Sykes

Derek A. Newman, WSBA No. 26967
dn@newmanlaw.com
Jason B. Sykes, WSBA No. 44369
jason@newmanlaw.com
Rachel Horvitz, WSBA No. 52987
rachel@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

LAMDBA LEGAL DEFENSE AND EDUCATION FUND, INC.

Tara Borelli, WSBA No. 36759
tborelli@lambdalegal.org
Camilla B. Taylor (admitted pro hac vice)
Peter C. Renn (admitted pro hac vice)
Sasha Buchert (admitted pro hac vice)
Kara Ingelhart (admitted pro hac vice)
Carl Charles (admitted pro hac vice)
Paul D. Castillo (admitted pro hac vice)

OUTSERVE-SLDN, INC. N/K/A MODERN MILITARY ASSOCIATION OF AMERICA

Peter Perkowski (admitted pro hac vice)

KIRKLAND & ELLIS LLP

James F. Hurst, P.C. (admitted pro hac vice)
Steve Patton (admitted pro hac vice)
Jordan M. Heinz (admitted pro hac vice)
Vanessa Barsanti (admitted pro hac vice)
Daniel I. Siegfried (admitted pro hac vice)
Sam Ikard (admitted pro hac vice)

Counsel for Plaintiffs

UNITED STATES DEPARTMENT OF JUSTICE

s/Matthew Skurnik

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

ALEXANDER K. HAAS
Branch Director

ANTHONY J. COPPOLINO
Deputy Director

ANDREW E. CARMICHAEL, VA Bar # 76578
andrew.e.carmichael@usdoj.gov
MATTHEW SKURNIK, NY Bar # 5553896
Matthew.Skurnik@usdoj.gov
JAMES R. POWERS, TX Bar #24092989
james.r.powers@usdoj.gov
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW, Suite 12108
Washington, DC 20530
(202) 514-3346

Counsel for Defendants

OFFICE OF THE WASHINGTON STATE ATTORNEY GENERAL

s/Chalia I. Stallings-Ala'ilima

Chalia I. Stallings-Ala'ilima, WSBA No. 40694
chalias@atg.wa.gov
Colleen M. Melody, WSBA No. 42275
colleenm1@atg.wa.gov
Assistant Attorney General
Wing Luke Civil Rights Division
Office of the WA Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744

Counsel for Intervenor-Plaintiff State of Washington

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.

s/Jason B. Sykes
Jason B. Sykes, WSBA No. 44369
jason@newmanlaw.com
2101 Fourth Ave., Ste. 1500
Seattle, WA 98121
(206) 274-2800

Exhibit F

Minutes: Transgender Review Panel I
(Oct. 13, 2017)

MINUTES: TRANSGENDER REVIEW PANEL
FRIDAY, OCTOBER 13, 2017 1500-1700
DECISION SUPPORT CENTER, 2E579
1400 DEFENSE PENTAGON WASHINGTON, DC 20301

Transgender Review Panel Attendees: *( ) – indicates authorized substitute*

Performing the Duties of the Undersecretary of Defense – P&R	Mr. Tony Kurta
Performing the Duties of the Under Secretary of the Army	Mr. Thomas Kelly III
Performing the Duties of the Under Secretary of the Navy	Mr. Thomas Dee
Under Secretary of the Air Force	HON. Matthew Donovan
Vice Commandant of the Coast Guard	( )
Vice Chief of Staff of the Army	( )
Vice Chief of Naval Operations	( )
Vice Chief of Staff of the Air Force	Gen Stephen Wilson
Assistant Commandant of the Marine Corps	Gen Glenn Walters
Vice Chief of Staff National Guard Bureau	LTG Daniel Hokanson
Sergeant Major of the United States Army	SGM Daniel Dailey
Master Chief Petty Officer of the Navy	MCPON Steven S. Giordano
Chief Master Sergeant of the Air Force	CMSAF Kaleth O. Wright
Sergeant Major of the Marine Corps	SgtMajMC Ronald L. Green
Senior Enlisted Advisor - National Guard Bureau	CSM Christopher Kepner

Agenda:

Topic	Briefing Name	POC
Opening Remarks	n/a	Mr. Tony Kurta
Survey Results	2016 Workplace and Gender Relations Survey of Active Duty Members: Transgender Service Members	
DoDI 6130.03	Proposed updates to *Medical Standards for Appointment, Enlistment, or Induction in the Military Services*", dated April 28, 2010	
Commander's Panel	n/a	n/a

Detailed Meeting Minutes:

Welcome:

MINUTES: TRANSGENDER REVIEW PANEL
FRIDAY, OCTOBER 13, 2017 1500-1700
DECISION SUPPORT CENTER, 2E579
1400 DEFENSE PENTAGON WASHINGTON, DC 20301

[redacted]

Survey Results: The [redacted] presented the results of the "2016 Workplace and Gender Relations Survey of Active Duty Members: Transgender Service Members." The survey concluded that between 8,227 and 9,732 Service Members (SM), representing approximately 1% of the active duty force consider themselves to be Trangender (TG). The prior RAND study indicates that between 2-12K currently serving SMs are TG based on an assessment of prior studies involving a wide range of ages and nationalities. [redacted]

DoDI 6130.03: [redacted] briefed the proposed updates to DoDI 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services*, dated April 28, 2010. [redacted]

Commander's Panel: The nine commanders, representing each of the five uniformed services, spoke about their experiences with a TG SM in their formation. Highlights of their discussion include:

- There was no consensus on whether or not to allow open TG service in the future (and have the military pay for transitions), and that seemed to be largely based on their experiences with their single Soldier. The amount of leadership energy required to navigate a SM through a TG transition plan are formidable and the current policy has gaps within it.
- While the Commanders remarked that TG SMs tended to take up a large amount of leadership's time (as compared to a non-TG), the more pro-active a SM was in working around operational requirements, the more supportive the Command was and the less time leadership had to spend on the SM. One Commander, who fully supported in-service transition, remarked that his transitioning SM worked closely with the chain of command to ensure that he did not miss any

operational requirements, to include two rotations at the National Training Center. Another commander remarked that his phenomenal transgender SM had decided to resign her commission and will be heavily recruited by Silicon Valley companies, a great loss to the Service.

- When informally queried, on a scale from 1 to 10 with one being minimal amount of leader time dedicated to TG SMs and 10 being the maximum, the Commanders were uniformly distributed, though many remarked that it was not due to the SMs, it was due to gaps in current policy.
- The vast majority of commanders agreed that from time of diagnosis to the completion of a transition plan, the SM would be non-deployable for 2-2.5 years (up to a year of hormones to achieve stability, then surgeries).
- Commanders almost uniformly voiced concerns that patients had too much control over which surgeries were included in their transition plans – something should either be medically necessary or not - personal desires or patient 'negotiation' should not override that medical opinion; several transgender medical treatment plans were changed after the medical treatment plan was approved based on individual desires.
- One commander spoke of his 'dueling' EO issues; his TG SM (a female with male genitalia), with an approved ETP for full-time real life experience that is authorized to use female shower facilities. This led to an EO complaint by the females assigned to the unit who believed their privacy was invaded by this. That led to an EO complaint claiming that the command was not supporting her rights.
- Several commanders indicated a budgetary impact as they received no additional monies to pay for the numerous TDY trips throughout CONUS for specialized medical care and had to pay out of O&M Funds.
- One commander remarked about how it would be extremely difficult for a TG SM to operate in a SOCOM world with austere living conditions and non-emergency medical support not readily available. He also raised the issue that some military specialties, like air traffic controllers, have their standards set by another agency – in that case the FAA. The FAA does not allow an individual to control air traffic until they have been hormonally stable for 5 years, effectively closing that specialty to TG SMs.

Conclusion: The meeting ended at 1700 at the conclusion of the Commander's Panel.

MINUTES: TRANSGENDER REVIEW PANEL
FRIDAY, OCTOBER 13, 2017 1500-1700
DECISION SUPPORT CENTER, 2E579
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Other attendees:

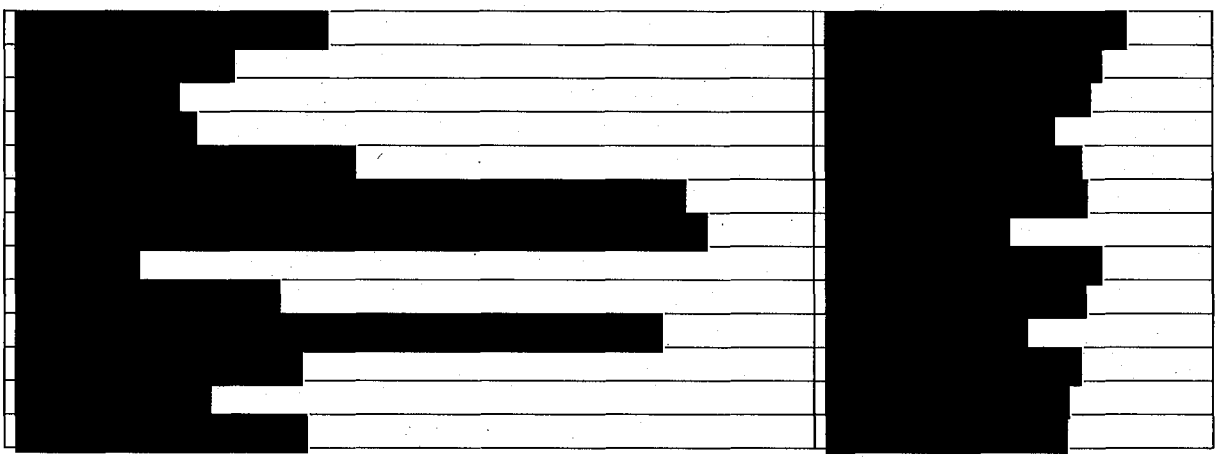

Exhibit G

E-mail from M. Slachetka to M. Skurnik
re Dee Deposition (June 1, 2020)

From: Slachetka, Meg
To: Skurnik, Matthew (CIV); Barsanti, Vanessa; Gerardi, Michael J. (CIV); Powers, James R. (CIV); Redburn Jr., Thomas E.; *jlevi@glad.org; *sminter@nclrights.org; Heinz, Jordan M.; Rosenberg, Michael E.; Buenviaje, Megan; *Dixie.Tauber@lw.com; *Chloe.Korban@lw.com; *nlampros@cov.com; *PKomorowski@cov.com; Kaplan, Sydney; "Stallings-Ala'ilima, Chalia (ATG)"; *Lara.Haddad@doj.ca.gov; Buenviaje, Megan; Ginsburg, Maya; Siegfried, Daniel I.
Cc: Enlow, Courtney D. (CIV); Carmichael, Andrew E. (CIV); Zhou, Grace X. (CIV); Edelman, Christopher (CIV); *Rachel@newmanlaw.com; *jason@newmanlaw.com
Subject: RE: Karnoski, Doe, Stockman, Stone - Stephanie Miller Deposition
Date: Monday, June 1, 2020 6:47:20 PM

Drew/Matt –

Thanks for the call earlier. Plaintiffs have conferred among themselves concerning the Miller and Dee depositions. Given that the Civil Division is currently subject to a teleworking restriction and you are unsure when such restriction will be lifted, but that Mayor Bowser lifted the "stay-at-home" order on May 29th such that D.C. has now entered "Phase One" of reopening, we are optimistic that in-person depositions will be possible in D.C. later this month. Accordingly, Plaintiffs request Ms. Miller's availability to be deposed later this month and next month. As to Mr. Dee, we wish to keep his deposition on for now in case the June 11th date is feasible for an in-person deposition. If circumstances are unchanged next week, we will similarly ask for his availability to be deposed later this month and next month.

Although we recognize it may take you more time to obtain dates from these witnesses, we would appreciate a response tomorrow with your position.

Best,
Meg

Meg Slachetka
Counsel
Lowenstein Sandler LLP

T: 212.419.5856
F: 973.422.6783

Bio

From: Skurnik, Matthew (CIV) <Matthew.Skurnik@usdoj.gov>
Sent: Friday, May 29, 2020 2:38 PM
To: Slachetka, Meg <MSlachetka@lowenstein.com>; Barsanti, Vanessa <vanessa.barsanti@kirkland.com>; Gerardi, Michael J. (CIV) <Michael.J.Gerardi@usdoj.gov>; Powers, James R. (CIV) <James.R.Powers@usdoj.gov>; Redburn Jr., Thomas E. <tredburn@lowenstein.com>; *jlevi@glad.org <jlevi@glad.org>; *sminter@nclrights.org <sminter@nclrights.org>; Heinz, Jordan M. <jheinz@kirkland.com>; Rosenberg, Michael E. <michael.rosenberg@kirkland.com>; Buenviaje, Megan <megan.buenviaje@kirkland.com>; *Dixie.Tauber@lw.com <Dixie.Tauber@lw.com>; *Chloe.Korban@lw.com <Chloe.Korban@lw.com>; *nlampros@cov.com <nlampros@cov.com>; *PKomorowski@cov.com <PKomorowski@cov.com>; Kaplan, Sydney <SKaplan@lowenstein.com>; 'Stallings-Ala'ilima, Chalia (ATG)' <Chalia.SA@atg.wa.gov>; *Lara.Haddad@doj.ca.gov <Lara.Haddad@doj.ca.gov>; Buenviaje, Megan <megan.buenviaje@kirkland.com>; Ginsburg, Maya

Exhibit H

Plaintiffs' Opposition to Defendants' Motion to Quash Third-Party Subpoena Issued to General Paul J. Selva, *Karnoski v. Trump (Selva),* No. 1:20cv15 (E.D. Va. June 19, 2020), ECF 32

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

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.	Misc. No. 1:20cv15 Underlying Action: Case No. 2:17-cv-01297-MJP (W.D. Wash.) REDACTED

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO QUASH THIRD-PARTY SUBPOENA ISSUED TO GENERAL PAUL J. SELVA

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INTRODUCTION

> *After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow . . .*
>
> *Transgender individuals to serve in any capacity in the U.S. Military*. . . .

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

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

Retired General Paul Selva was the Vice Chair of the Joint Chiefs of Staff (“VCJCS”) when the President announced the Ban and the “Mattis Policy” was implemented. He was charged by Secretary Mattis with developing the “Mattis Policy.” [redacted]

Defendants urge the Court to quash General Selva's deposition under the "apex doctrine," which Defendants assert "protects high-ranking officials . . . from testifying about their official decisions." (Defs' Memo. at 1.) General Selva, however, is not merely a former "high-ranking official," but one of two people specifically delegated by Secretary Mattis to lead the Department of Defense's ("DoD's") implementation of President Trump's ban on open transgender military service, and tasked with recommending the final Policy to Secretary Mattis. Whether General Selva and Secretary Mattis truly used their "independent judgment" to implement the Policy is not only relevant to, but potentially dispositive of, Defendants' case. The "apex doctrine" does not immunize from deposition high-ranking government officials who, like General Selva, "have personal involvement in a material aspect of the claim presented." *United States v. Wal-Mart Stores, Inc.*, No. CIV. A. PJM-01-CV-152, 2002 WL 562301, at *2 (D. Md. Mar. 29, 2002). General Selva is uniquely positioned to provide key factual testimony about his development of the Policy, and Defendants themselves have made his testimony central to this litigation.

Plaintiffs' need for, and the importance of, General Selva's deposition is heightened by Defendants' efforts to stonewall discovery concerning the development of the "Mattis Policy." Defendants have withheld approximately 30,000 documents concerning the "Mattis Policy" under the guise of "deliberative process" privilege, and are even now seeking mandamus in the Ninth Circuit to overturn the order of the District Court for the Western District of Washington (the "District Court"), compelling release of some of those documents. Only a few days ago, after a Special Master appointed by the District Court evaluated, *in camera*, Defendants' assertions that documents originally designated as "non-responsive" were in fact responsive but privileged, the District Court found "the Government has been overbroad in its privilege assertions, ***straying far***

outside the bounds of the deliberative process privilege and asserting the attorney-client privilege without care."[1] Defendants' motion is the latest front in their more than two-year battle against any discovery that could undermine their highly-curated "administrative record."

Besides invoking the "apex doctrine," Defendants assert vaguely that General Selva's testimony would be "privileged." (Memo. at 24–25.) But if Defendants object to specific questions as invading privilege, the time to make those objections is at General Selva's deposition, not before. And if, as Defendants suggest, their privilege objections are bound up in the Ninth Circuit's review of the District Court's order compelling production of documents, *see id*. at 25, that is not a reason to quash the subpoena, but to transfer this motion to the District Court, which is well acquainted with Defendants' privilege assertions and has already implemented a process to address them. Defendants should not be permitted to collaterally attack that court's rulings through a motion to quash in this one. [2]

General Selva was instrumental in developing the "Mattis Policy," and his testimony is essential to rebut Defendants' assertion that the Policy is an exercise of "independent military judgment." Defendants' Motion would remove Plaintiffs' ability to question the official specifically delegated to create and recommend the "Mattis Policy" to Secretary Mattis, and give

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

2 Plaintiffs have filed a motion to transfer Defendants' Motion to the Western District of Washington ("District Court") on the grounds it is best positioned to determine General Selva's role and its implications for his deposition in the District Court. This is especially the case given Defendants' reliance on privilege claims that are the subject of prior rulings and ongoing proceedings before both the District Court and the Ninth Circuit.

Defendants free rein to present their own version of the facts through their *post hoc* "administrative record" and one or two hand-picked witnesses. There is no precedent for such an extraordinary request. Defendants' motion should be denied.

BACKGROUND

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

Plaintiffs challenge the constitutionality of the President's policy barring open military service by transgender individuals (the "Ban"), as implemented by the DoD (the "Mattis Policy"). President Trump first announced the Ban through a series of Tweets on July 26, 2017, abruptly reversing the military's existing policy permitting transgender people to serve openly, provided they satisfy all of the physical and other requirements that apply to all Service Members. *Karnoski*, 926 F.3d at 1188. While the President claimed his announcement was made "[a]fter consultation with my Generals and military experts," it caught the Chairman of the Joint Chiefs and the rest of the military's top brass by complete surprise.[3] Indeed, just a year earlier, in June 2016, the DoD had adopted an open service policy under Secretary Carter ("Carter Policy"), after an intensive year-long review that included consultation with the independent RAND National Defense Research Institute. (Ex. 5, June 30, 2016 Carter Memorandum.) This comprehensive military review addressed each of the "governmental interests" Defendants now rely on in support of the "Mattis Policy," including deployability and military readiness, unit cohesion, and medical costs,

[3] *See* Ex. 4, DoD Final Release re Tweet FOIA (Chairman of Joint Chiefs: "I know yesterday's announcement was unexpected"; "I was not consulted."); *id.* at 4 (USAF Director for Manpower & Personnel: "Everyone was caught flat-footed."); *id.* at 51 (Kurta, leading the DoD's military personnel policy, was on vacation, stating that "we don't have any further info at this point.").

and concluded that those interests *supported* allowing the estimated 10,000 current transgender Service Members, and future transgender enlistees, to serve their country openly. (*See*, *e.g.*, Ex. 6, Expert Report of former Under-Secretary of Defense Brad Carson at 8–12, 40–46; Ex. 7, RAND Report (June 2016).) So far as the record shows, no deliberation or studies led to President Trump's Tweets.

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

II. DoD Implements The Ban.

On September 14, 2017, Secretary Mattis began doing just that, issuing two memoranda which confirmed that "DoD will carry out the President's policy and directives" and setting forth a process to do so. (Ex. 10 at 1.) In the first, Secretary Mattis stated that DoD would "carry out the President's policy and directives" from the August 25, 2017 Memorandum, and that he would "present the President ***with a plan to implement [his] policy*** and directives in the Presidential Memorandum" by February 21, 2018. (*Id*. (emphasis added).) In the second, Secretary Mattis

directed General Selva, along with Deputy Secretary of Defense ("DSD") Patrick Shanahan, to lead DoD "in developing an Implementation Plan on military service by transgender individuals, to effect the policy and directives in" the President's August 25, 2017 Memorandum. (Ex. 11 at 1.)

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

Although Defendants claim the Mattis Memorandum set forth a "new" policy (Memo. at 5), in fact, it faithfully implements each of the President's directives. First, it bans from service anyone with a history of gender dysphoria—a medical condition that is almost exclusively limited to transgender persons and is resolved by transition—unless "they have been stable for 36 consecutive months ***in their biological sex*** prior to accession." (Memo, Ex. D at 2) (emphasis added.) Second, it *categorically* bans any "persons who require or have undergone gender transition"—even though a need to transition is what defines a person as transgender, and does so even if they have never been diagnosed with gender dysphoria or have completely resolved it through transitioning. (*Id.*) Third, to the extent that any transgender individuals do not fall under the first two categories, they may only serve if they suppress their gender identities—the very

characteristic that makes them transgender—and serve "in their biological sex." (*Id.* at 3.) The only exception is a limited grandfather clause for Service Members who came out in reliance on the Carter Policy. President Trump approved the implementation plan on March 23, 2018, the date specified in his August 25, 2017 Memorandum. (Ex. 12.)

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

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

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

A. The Gender Dysphoria Excuse

First, Defendants claim the "Mattis Policy" discriminates based not on transgender status, but rather "on the medical condition of gender dysphoria." (*See, e.g.*, Memo. at 5.) The Ninth

Circuit has already rejected this argument, instructing that heightened constitutional scrutiny applies because the "Mattis Policy" "regulates on the basis of transgender status … on its face." *Karnoski*, 926 F.3d at 1201. This is also clear from the policy's effect. A transgender person who has completed gender transition, whose gender dysphoria has been resolved, and who otherwise meets every physical and other qualification to serve is nonetheless categorically barred.[4]

B. The Military Deference Rationalization

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

1. The "Panel of Experts"

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

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

rejecting their privilege claims—contradict their story of independent military judgment by a disinterested panel of experts.

Secretary Mattis's September 14, 2017 Memorandum, which ordered the Panel's creation, made clear the Panel lacked authority to second-guess the Presidential policy it was tasked with implementing. (Ex. 11.) As to accessions, "[t]he Presidential Memorandum directs DoD to … generally prohibit [ ] accession of transgender individuals into military service." (*Id.* at 2.) Rather than evaluate ***whether*** to access transgender individuals, Mattis asked the Panel merely to update the pre-Carter policy barring accession of openly transgender persons "to reflect currently accepted medical terminology." (*Id.*) As for transition-related medical care, Mattis directed that "[t]he Presidential Memorandum halts the use of [government] resources to fund sex-reassignment surgical procedures." (*Id.*) The Panel's task, therefore, was limited to implementing that directive by "enumerat[ing] the specific surgical procedures associated with sex reassignment treatment that shall be prohibited." (*Id.*) Finally, as to transgender persons openly serving in the military, "[t]he Presidential Memorandum directs that the Department return to the longstanding policy and practice" barring open service. (*Id.*) However, "[t]he Presidential Memorandum…allows the Secretary to determine how to address transgender individuals" who came out under the Carter policy. *Id.* Accordingly, the Panel "will set forth, in a single policy document, the standards and procedures applicable to military service by transgender persons, with specific attention to addressing transgender persons currently serving." (*Id.*)

The Panel initially met from October 13 through December 13, 2017. Defendants produced "minutes" for some of the Panel's meetings, but recently admitted there are no minutes or other documents regarding the Panel's last four meetings. (Ex. 14.) For meetings where minutes were

produced, documents produced pursuant to a court order in parallel litigation—*Doe 2 v. Esper*, No. CV 17-1597 (D.D.C.)—raise questions about their accuracy. For example, [redacted]

As described in its "Final Report," the Panel relied upon multiple working groups to report "regularly" to it and answer "numerous" inquiries "to support their deliberations." (Ex. 16 at 1.) These working groups were crucial to the Panel process; [redacted] But they have withheld all documents and communications from these working groups except for a handful of documents that were provided to Panel members.

What is clear is that both the Panel and its working groups viewed their mandates as constrained by the President's Tweets and August 2017 Memorandum. One of the few working-group documents produced—through third-party discovery over Defendants' objections—[redacted]

The Panel issued its Final Report on December 13, 2017. The very first sentence made clear the Panel understood its charge was limited to recommending policy changes "pursuant to

direction from the Commander in Chief dated August 25, 2017." (Ex. 16 at 1.) Accordingly, its recommendations effected each of the three directives in the President's August 2017 Memorandum: (1) transgender persons could serve only based on the standards associated with "their biological sex," with the exception of those who had come out during the Carter Policy; (2) transgender persons could access into the military only "in their biological sex"; and (3) there could be no transition-related surgical care because anyone who needed or sought to transition would be separated (except for those who came out during the Carter Policy). (Ex. 20.)

[redacted]

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

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

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

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

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

(Ex. 20 at 1.) The USDP&R did not attach the Panel's "Final Report" or any other document purporting to reflect its work. Instead, he attached only the President's August 2017 Memorandum and Secretary Mattis's September 14, 2017 Memorandum confirming that DoD would implement the President's directives and the Panel would advise how to do so. The memorandum then repeated the *same* recommendations the Panel made a month earlier to General Selva and Mr. Shanahan, which they had rejected. (*Compare* Ex. 20 at 1 *with* Ex. 16 at 4.)

2. The "DoD Report"

Although Defendants repeatedly invoke the Panel's military expertise, Defendants do not contend the Panel's Final Report contains the official justifications for the "Mattis Policy." Indeed, Secretary Mattis did not even send the Panel's Final Report to the President when he submitted the required implementation plan. Rather, Defendants rely *exclusively* on the 44-page, anonymous DoD Report as representing the justifications for the "Mattis Policy" and their arguments that it passes constitutional scrutiny. (Ex. 23 at 15-16.)

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

Defendants have refused to produce any information related to the DoD Report, or the period from January 11, 2018 through February 22, 2018, during which it was prepared. This includes any documents concerning how it was prepared or what sources, information, or alternatives were considered in its preparation. This is so notwithstanding that the report itself shows it relied on sources that were *not* considered by the Panel. For example, third-party discovery, which Defendants unsuccessfully sought to quash, confirmed that in early February 2018 (after the Panel had disbanded) Secretary Mattis's "special assistant," who appears to be the

5 [redacted]

principal author of the DoD Report, reached out to several leading opponents of transgender rights and solicited—and received—information and published sources that the Report cited. For example, on February 5, 2018, one of those anti-transgender advocates, Dr. Paul McHugh, provided DoD a list of additional sources he believed support the Ban, (Ex. 24), including a May 2014 Hayes Directory article, which the DoD Report cites five times as support for the "Mattis Policy." (*See* Memo. Ex. E at nn. 26, 67, 72, 88–89; *see also* Ex. 25 (other correspondence with anti-transgender advocates and sources collected).)

IV. Defendants Stonewall Discovery Into The Ban And The "Mattis Policy."

Throughout this proceeding, Defendants have taken the position that Plaintiffs are not entitled to *any* discovery concerning the "Mattis Policy" beyond a so-called "administrative record" that Defendants' lawyers prepared after the Panel was disbanded, comprised of documents they rely on in support of the Policy. (*E.g.*, Memo. at 6–7, 11, 16.) However, this is not an administrative proceeding, and Plaintiffs challenge the Mattis Policy on constitutional and not Administrative Procedure Act grounds. Accordingly, the Ninth Circuit (and every other court to consider this argument) has rejected Defendants' argument. *See, e.g.*, *Karnoski*, 926 F.3d at 1194 (noting Defendants' argument that "further litigation should be confined to the administrative record," *id.*, and instead ordering further discovery, *id.* at 1202).

Defendants then sought to achieve the same result by broadly asserting that nearly every responsive document concerning the "Mattis Policy" (approximately 30,000 documents in total) is subject to the deliberative process privilege. The District Court rejected those claims. (Ex. 26.) It held that the privilege does not apply where, as here, the government's decision-making and intent are the basis for the Plaintiffs' claims and the central issue in dispute, and that, even if the

privilege did apply, it was overcome based on a balancing of the four factors recognized by the Ninth Circuit in *FTC v. Warner Communications Inc.*, 742 F.2d 1156 (9th Cir. 1984).

Defendants then filed their first petition for mandamus with the Ninth Circuit. *See Karnoski*, 926 F.3d at 1187. Far from "rejecting" Plaintiffs' argument that the "Mattis Policy" implements the Ban (Memo. at 17), the Ninth Circuit did just the opposite. It found that "Plaintiffs raise non-frivolous arguments that the 2018 Policy did not independently analyze the impact of transgender individuals serving in the armed services," and that "the litigation may require the district court to consider the basis of the President's initial decision, as well as the 2018 Policy." *Karnoski*, 926 F.3d at 1204.[6] However, the Court remanded for a more granular analysis of whether Defendants' privilege claims had been overcome, including by "class" or "category" of document. *See id*. at 1206.

On remand, the District Court undertook just such an analysis, ordering a review of Defendants' privilege claims on a document request-by-document request basis, followed by in-person conferences with counsel to review Defendants' claims as to five requests at a time. (Ex. 27, Nov. 12, 2019 Mot. Hr'g Tr. at 59:14-64:20; Ex. 28, Order, Nov. 19, 2019, *Karnoski*, Dkt. 394; Ex. 29, Dec. 10, 2019 Status Hr'g Tr.) After the first such conference resulted in an order requiring that Defendants produce three categories of documents to which they objected (Ex. 30,

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[6] Defendants also misrepresent the Ninth Circuit's decision on their appeal from the District Court's denial of their motion to dissolve the preliminary injunction. The Ninth Circuit did not "vacate the preliminary injunction," as Defendants claim. (Memo. at 7.) In fact, it expressly declined to do so. *Karnoski*, 926 F.3d at 1207–08. The Ninth Circuit also rejected Defendants' argument that, due to "military deference," the Ban and Mattis Policy were subject to only rational basis review. The Court held that Defendants must satisfy heightened scrutiny to justify their discrimination, "and that is not a trivial burden." *Id.* at 1202.

Dec. 18, 2019 Order, at 5-6; Ex. 17, Feb. 3, 2020 Hr'g Tr. at 14:17-24:16), Defendants filed a second petition for mandamus on February 8, 2020, which has been fully briefed and is awaiting the Ninth Circuit's decision. At the Ninth Circuit's invitation, the District Court also responded to the petition describing its detailed review of Defendants' privilege claims and, more generally, Defendants' repeated "fail[ure] to comply with Court orders," "inconsistent positions," and inability "to respond to the Court's basic inquiries" about documents in their possession. (Ex. 31, District Court's Requested Resp. to Pet., No. 20-70365, at 11–12.)

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

6, 2020, Joint Status Report at 9–10.) Moreover, Defendants' counsel recently advised Plaintiffs that, "during the upcoming depositions Defendants expect to assert the deliberative process privilege and instruct our witnesses not to answer questions that call for privileged information except where the deliberative process privilege has been set aside by court orders which have not been stayed or vacated . . . ." (Ex. 35, May 28, 2020 Email from D. Carmichael to J. Heinz, *et al*.) Although this email concerned the upcoming depositions of Rule 30(b)(6) witnesses, Plaintiffs expect that Defendants will take the same position with respect to other depositions, including General Selva's.

ARGUMENT

Federal Rules 26(b) and 30(a) allow a party to depose any person "regarding any non-privileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1); Fed. R. Civ. P. 30(a). Courts have long recognized that depositions are an essential part of the discovery process: "Only by examining a witness live can a lawyer use the skills of his trade to plumb the depths of a witness' recollection, using to advantage not only what a witness may have admitted in answering interrogatories, but also any new tidbits that usually come out in the course of answering carefully framed and pin-pointed deposition questions." *Shoen v. Shoen*, 5 F.3d 1289, 1297 (9th Cir. 1993). For that reason, "[i]t is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error." *Big Ernie's, Inc. v. United States*, No. 1:09-cv-00122, 2009 WL 3166839 (E.D. Va. Aug. 13, 2009) (*quoting Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979)); *see also Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 125 (D. Md. 2009) ("A motion seeking to prevent the taking of a deposition is regarded unfavorably.").

Defendants' motion in no way justifies this extraordinary relief here. According to Defendants' contemporaneous documents, General Selva, at the direction of Secretary Mattis, was personally responsible for, and led the effort to create, the challenged transgender service policy; and the various facets of his personal involvement (or, alternatively, lack thereof) are crucial to rebutting Defendants' primary constitutional defense of the Policy—that it was the product of "independent military judgment." Neither the (limited) documents nor the (hand-picked) alternative witnesses Defendants proffer can adequately substitute for General Selva's first-hand testimony on numerous, critical points. Furthermore, Defendants' generic and overbroad claims of "privilege" are no reason to preclude General Selva's deposition.

I. "Exceptional Circumstances" Require General Selva's Deposition.

A. General Selva Was Personally Involved In Crafting The Challenged "Mattis Policy."

"Exceptional circumstances" for deposing a current or former government official exist where the official "ha[s] personal involvement in a material aspect of the claim presented." *Wal-Mart Stores*, 2002 WL 562301, at *2; *see also United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 322 (D.N.J. 2009) ("Courts have time and again allowed the deposition of current and former high-ranking government officials upon a showing that the official has personal involvement or knowledge relevant to the case.").[7] There can be no doubt that General Selva, to

[7] *See, e.g.*, *NRA v. Cuomo*, No. 1:18-CV-566, 2019 WL 2918045, at *5 (N.D.N.Y. Mar. 20, 2019) (allowing deposition of New York's former Superintendent of Financial Services where her "specific rationale for her alleged actions is at issue"); *Greater Birmingham Ministries v. Merrill*, 321 F.R.D. 406, 413 (N.D. Ala. 2017) (permitting deposition of Alabama's Secretary of State where "Secretary Merrill's role with respect to implementation of the challenged Photo ID Law has been ongoing since he assumed office," and "Plaintiffs have sufficiently established that . . . he has been personally involved in implementing the law"); *Fish v. Kobach*, 320 F.R.D. 566, 579 (D. Kan. 2017) (allowing deposition of Kansas Secretary of State

whom Secretary Mattis personally delegated the task of overseeing the Panel and recommending the final Policy—[redacted], was personally involved in the factual issues at the heart of this case.

First, General Selva, in June 2017, was directly and personally involved in Secretary Mattis's decision, prior to President Trump's July 2017 Tweets, to delay the implementation of the Carter Policy with respect to enlistment ("accession") of transgender Service Members for six months, from July 1, 2017 to January 1, 2018, which Defendants allege was "based on recommendations of the Secretaries of the Military Departments and the Chiefs of the Military Services." (Memo. at 4.) A contemporaneous document recently produced by Defendants suggests that this delay was prompted by questions concerning whether, as to enlistees previously

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where "the official [was] shown to have exclusive first-hand knowledge directly relevant to the claims being litigated"); *Libertarian Party v. Husted*, 33 F. Supp. 3d 914, 920 (S.D. Ohio 2014) (permitting deposition of Hearing Officer and General Counsel for the Ohio Secretary of State); *United States v. City of New York*, No. 07-cv-2067, 2009 WL 2423307, at *2–3 (E.D.N.Y. Aug. 5, 2009) (authorizing the deposition of the Mayor of New York City where the Mayor's congressional testimony "suggest[ed] his direct involvement in the events at issue in the case"); *Bagley v. Blagojevich*, 486 F. Supp. 2d 786, 789 (C.D. Ill. 2007) (allowing the deposition of the Governor of Illinois where evidence suggested "the Governor was either the ultimate decision maker or at least personally involved" in the decision at issue); *Energy Capital Corp. v. United States*, 60 Fed. Cl. 315, 318 (Fed. Cl. 2004) (authorizing depositions of the former Secretary of Housing and Urban Development, and HUD's former General Counsel, holding "it is also clear in the context of deposing former high-ranking government officials is that depositions are allowed if the party has personal knowledge of the facts in issue"); *Martin v. Valley Nat'l Bank of Ariz.*, 140 F.R.D. 291, 314–15 (S.D.N.Y. 1991) (authorizing the deposition of the Director of Enforcement for the Department of Labor who "was apparently involved" personally in the challenged government decisions); *Am. Broad. Cos. v. U.S. Info. Agency*, 599 F. Supp. 765, 769 (D.D.C. 1984) (permitting deposition of agency chief where he was "the sole person responsible for the creation of the documents in question"); *Union Sav. Bank of Patchogue v. Saxon*, 209 F. Supp. 319, 320 (D.D.C. 1962) (permitting deposition of senior Treasury official where "Plaintiffs allege actions personal to the Defendant").

diagnosed with gender dysphoria, the period of post-transition stability (18 months) required by the Carter policy was long enough, and ***not*** to revisit whether transgender persons should be allowed to access at all. (*See* Ex. 36 at Tabs A-D; *id*. at USDOE00197786 ("I direct you to assess ***the Department's readiness to begin accessing transgender applicants*** into military service on July 1, 2017. . . . ***We do not intend to reconsider prior decisions*** unless they cause readiness problems . . .") (emphasis added).) Nevertheless, Defendants argue that this delay was ordered to allow an overall "review" of whether transgender persons should be allowed to access into the military, which was "ongoing" when the President Tweeted the Ban, and that the subsequent review General Selva led was simply a continuation of this prior review. (*See*, *e.g.*, Memo. at 4.) This disputed issue is directly relevant to whether the subsequent review and process to develop the "Mattis Policy," which General Selva led, was prompted by the President's Order and directive, as Defendants' contemporaneous documents make clear, or rather was simply a continuation of a review the military had already commenced, as Defendants now contend. General Selva has unique and personal knowledge on this issue, both as the person leading the subsequent effort, and as the second highest member of the military leadership that allegedly recommended the prior delay of the Carter accession policy. For example, a heavily redacted June 17, 2017 email chain references General Selva's unspecified "Question/Concern" with respect to this delay and a "meeting with Service and Mil Dept leadership," which General Selva attended and at which it was apparently discussed. (Ex. 37.)

Second, President Trump claimed, in his July 2017 Tweets, that he was announcing his Ban "after consultation with my Generals and military experts." (Ex. 1.) Contemporaneous emails sent to General Selva and his immediate superior, the Chairman of the Joint Chiefs of Staff General

Joseph Dunford, indicate that "[e]veryone was caught flat-footed" by the President's Ban. (Ex. 38 at USDOE00283085.) Again, General Selva is uniquely positioned (along with General Dunford, whom Plaintiffs have not requested to depose) to confirm or deny the accuracy of that statement. As VCJCS, General Selva would have been one of only a handful of senior military officials President Trump would have consulted before announcing the Ban. General Selva's testimony is necessary to disprove any prior consultation between President Trump and the armed forces, and further defeat Defendants' contention that the eventual "Mattis Policy" had as its ultimate source anything other than the President's July 26, 2017 Tweets. And General Selva (again, along with General Dunford) can also uniquely speak to what occurred in the aftermath of the President's Twitter session—what the military's response was; what plans were articulated to address the President's stated desire for a Ban; and what role he had, if any, in translating the Tweets into the President's eventual August 25, 2017 memorandum.[8]

Third, while Defendants emphasize the participation of the so-called "Panel of Experts" in creating recommendations for General Selva, it was General Selva—not members of the Panel—who was personally tasked by Secretary Mattis with "propos[ing] for [Secretary Mattis's] consideration recommendations supported by appropriate evidence and information" relating to "military service by transgender individuals." (Ex. 11.) And it was General Selva who was to be

[8] What little evidence Defendants have produced regarding the development of the August 25, 2017 memorandum suggests that General Selva, along with General Dunford, received early drafts of the President's memorandum. (Ex. 39.) Only General Selva or General Dunford can provide information on what, if any, comments they provided; whether they or anyone else from the military was involved in the creation or editing of the memorandum; and what, if any, input the military had on the Ban.

supported by the Panel and to receive reports from the Panel and the Undersecretary of Defense for Personnel and Readiness "at least every 30 days." (*Id.*)

As one of only two people charged with proposing policy recommendations related to transgender military service to Secretary Mattis, General Selva indisputably has unique knowledge with respect to the military's policy recommendation. Defendants' assertion that General Selva "do[es] not possess any unique knowledge regarding the Panel's deliberations, findings, or report that others who directly participated in the Panel hold" (*see* Memo. at 1) ignores General Selva's central role in the process entirely. After the Panel deliberated, it provided its "Final Report" to General Selva and the DSD, who in turn were solely responsible for deliberating among themselves and providing a recommendation to Secretary Mattis. Plaintiffs have not sought the testimony of Mr. Shanahan, and Defendants have sought to quash the deposition of Secretary Mattis. This means General Selva is the only person privy to the deliberations between General Selva, the DSD, and Secretary Mattis related to the Policy's recommendation and development.

What little evidence Defendants have produced regarding General Selva's oversight of the Panel belies Defendants' assertion that Panel participants would be equally able as General Selva to testify regarding the Panel's mission and operating directives. For example, an October 17, 2017 email from a participant in an "executive feedback session" with General Selva to review the Panel's deliberations indicates that General Selva and Mr. Shanahan "wanted all members of the panel to be knowledgeable on the President's TG guidance memo to the SECDEF and SECHS." (Ex. 40 at USDOE00016577.) That is, General Selva apparently wanted to emphasize to the Panel that the Panel should be mindful of the President's August 2017 memorandum in making its recommendation. General Selva is thus uniquely positioned to discuss the instructions he gave the

Panel, including whether he directed the Panel to attempt to support the President's Ban rather than formulate an "independent" policy on transgender service.

Defendants make much of the fact that General Selva did not attend all of the Panel's meetings and that what meetings he attended was as a "non-voting observer." (*See* Memo. at 5.) But they do not contest that the Panel served for the benefit of, and at the behest of, General Selva—who was the ultimate decision maker tasked with providing a recommended policy to Secretary Mattis. That is, regardless what the Panel eventually recommended to General Selva, the General—not the Panel—had final control over what Panel recommendations, if any, would be recommended to Secretary Mattis. None of the Panel members can adequately speak to General Selva's personal review of the Panel's findings, the regular updates he received regarding the Panel's progress, and the key discussions that occurred between General Selva, Mr. Shanahan, and Secretary Mattis concerning General Selva's recommended course of action.

Fourth, General Selva has unique and personal knowledge as to the reasons why, in the critical [redacted] As discussed previously, on December 15, 2017 the Panel briefed General Selva and Mr. Shanahan regarding its final report and recommendation. Immediately following that briefing, [redacted]

[redacted] Following that meeting, the Panel did "reconvene," and met a total of three more times, but Defendants have produced no minutes or written work product of those meetings. General Selva has first-hand knowledge as to [redacted] what meetings or communications he had with Mr. Shanahan and/or Secretary Mattis regarding the recommendations, and the apparent subsequent decision to ***not*** document the Panel's reconvened meetings.

Finally, General Selva has unique knowledge regarding the role, if any, the military leadership (as opposed to DoD civilians and political appointees) played in the drafting and review of the February 22, 2018 "Mattis Memorandum" and the February 2018 DoD Report, which provides the purported reasons and justification for the "Mattis Policy." [redacted] Not one of the individuals was a member of the Joint Chiefs of Staff or a senior military leader in one of the Services. As the only current or former member of the Joint Chiefs that Plaintiffs currently intend to depose, General Selva has critical and unique knowledge as to what, if any, role the Joint Chiefs played in the preparation of the DoD Report and Defendants' *post hoc* justification for the "Mattis Policy,"

including whether he and the other Joint Chiefs ever saw that Report before it was finalized and provided to the President on February 22, 2018.

These examples also distinguish the cases on which Defendants principally rely. This is not a case where the senior official Plaintiffs seek to depose was not directly involved, or only tangentially involved, in the decision in dispute.[9] Rather, General Selva's involvement in the

[9] *Compare Lederman v. N.Y. City Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013) (blocking depositions of former Mayor and Deputy Mayor of New York City where plaintiffs "did [not] contend that [the deponents] had first-hand knowledge about the litigated claims"); *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (quashing deposition of the Vice President's Chief of Staff, where he "had no apparent involvement in this litigation"); *Bogan v. City of Boston*, 489 F.3d 417, 424 (1st Cir. 2007) (prohibiting deposition of Mayor of Boston where there was no direct evidence of his personal involvement in the decision in question and the requesting party "failed to pursue discovery from other City employees who could have shed light on the Mayor's involvement"); *In re United States*, 197 F.3d 310, 314 (8th Cir. 1999) (disallowing deposition of the U.S. Attorney General and Deputy Attorney General where there was no dispute that "[Attorney General] Reno did not participate in or approve the decision" at issue); *In re Federal Deposit Ins. Corp.*, 58 F.3d 1055, 1062 (5th Cir. 1995) (finding no extraordinary circumstances requiring the deposition of three FDIC officials where "the August 24 decision [in question] was in fact made by Director Stein of the FDIC's Division of Resolutions, whom [plaintiff] has already deposed"); *In re United States*, 985 F.2d 510, 513 (11th Cir. 1993) (blocking the deposition of the FDA Commissioner where the Commissioner "did not assume office until four years after the initial investigation and over two years after the case was sent to the Justice Department for further action; accordingly, he could not have been responsible for selectively prosecuting the defendants"); *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586–87 (D.C. Cir. 1985) (preventing depositions of Department of Labor officials where the officials "had no first-hand knowledge of the facts of this case" and they had no information "that [the requesting party] could not obtain from published reports and available agency documents"); *Raymond v. City of New York*, No. 15 Civ. 6885, 2020 WL 1067482, at *5 (S.D.N.Y. Mar. 5, 2020) (quashing depositions of former police commissioners where plaintiffs "have not shown that [the commissioners] had any first-hand knowledge of the alleged retaliation"); *Federal Deposit Ins. Corp. v. Galan-Alvarez*, No. 1:15-mc-00752, 2015 WL 5602342, at *5 (D.D.C. Sept. 4, 2015) (prohibiting deposition of former FDIC Chairperson and current FDIC Deputy Director where deponents, at best, "***may*** have attended meetings and requested briefings" on the policy at issue (emphasis added)); *Sensient Colors, Inc.*, 649 F. Supp. 2d at 318 (denying deposition of official where requesting party "submitted no evidence suggesting [the official] had any personal involvement in or knowledge relevant to" the factual issues in question); *Croddy v. Federal Bureau of Investigation*, Civ. Action No. 00-0651, 2005 WL 8168910, at *1 (D.D.C. Mar. 30,

development of the "Mattis Policy" was direct, personal, and critical to Defendants' own contentions that the Policy was not the actualization of President Trump's July 2017 Tweets but an exercise of "independent military judgment." [redacted] and January 11, 2018, when he signed on to the Wilkie Memorandum making those exact same recommendations to Secretary Mattis—is one of the crucial events in this chronology. Having made the factual assertion that the "Mattis Policy" was the result of "independent military judgment," Defendants should not be permitted to now foreclose Plaintiffs' ability to test Defendants' claims.

B. General Selva Has Unique Factual Knowledge At Issue In This Litigation.

This case is also readily distinguishable from *United States v. Morgan* and its progeny, which limit questions which would "probe [the officials'] mental processes." 313 U.S. 409, 421–22 (1941). Here, Plaintiffs seek basic factual testimony that General Selva can uniquely provide. In *Franklin Sav. Ass'n v. Ryan*, for example, the Fourth Circuit considered the propriety of a deposition of the Director of the Office of Thrift Savings. 922 F. 2d 209 (4th Cir. 1991). Neither the Fourth Circuit nor the parties challenged the Director's deposition as a whole—indeed, the court noted the Director "responded to the subpoena and answered all questions directed at him with the exception of five." *Id*. at 210. Instead, the court held the district court erred by requiring the Director to answer five questions that "clearly went to the mental processes by which [the

2005) (quashing deposition of former FBI director where plaintiffs "have not shown that the former director, Louis Freeh, possesses unique personal knowledge of the circumstances that led to the rescission of plaintiffs' employment offers"); *Wal-Mart Stores*, 2002 WL 562301, at *5 (prohibiting deposition of former Consumer Product Safety Commission where requesting party "failed to make a *prima facie* showing of . . . personal involvement").

Director] arrived at his decision," where there was no "misconduct or wrongdoing" justifying an exception from *Morgan*. *Id*. at 211.

As a threshold matter, here Plaintiffs are claiming, and have made a showing, of "misconduct or wrongdoing"—intentional discrimination and animus against transgender persons based on their gender. Moreover, Plaintiffs are not seeking discovery of General Selva's "mental processes," let alone of "mental processes" that are irrelevant or unnecessary to their claims as in *Morgan* and the other cases Defendants cite. Instead, and as discussed above, General Selva's testimony is required to address basic, factual questions regarding a number of key events and decisions.

None of the various documents or two witnesses Defendants proffer as alternatives adequately substitute for General Selva's first-hand testimony on these and other issues. As previously noted, the purported "Administrative Record" is nothing of the sort—it is a series of documents Defendants' lawyers assembled after the fact to justify their positions in this litigation. (*See supra* at 14-15.) And even then, the "Administrative Record" is full of holes: Defendants have produced no "minutes" for the last few critical meetings of the "Panel of Experts"; the discovery they have produced suggests that the "minutes" are inaccurate or at the least, highly slanted retellings of what actually occurred at the Panel's meetings; and Defendants have categorically refused to produce any documents regarding the critical time period after the Panel disbanded but before Secretary Mattis promulgated the "Mattis Memorandum" and the DoD Report. (*See supra* at 9-10.) As such, Defendants' contention that Plaintiffs "already have access

to all of the relevant documents," (Memo. at 18), is demonstrably false—and even if it were true, documents are no substitute for live testimony.[10]

Likewise, neither Anthony Kurta, the former Deputy Assistant Secretary of Defense for Military Personnel Policy, or Lernes Hebert, who followed Mr. Kurta as Deputy Assistant, can provide the testimony Plaintiffs seek. Neither Mr. Kurta nor Mr. Hebert can address these and other critical issues, and even where they may have personal knowledge relevant to these questions, it will not include communications, events, and other information they were not party or privy to. More fundamentally, neither Mr. Kurta nor Mr. Hebert was the decision maker here, and neither can address the role the President's order and directives played in General Selva's

[redacted]

Finally, General Selva's declaration, (*see* Memo. at Ex. B), provides no basis to quash his deposition. The declaration carefully limits General Selva's statements to his "limited direct involvement ***with the Panel of Experts***." (*Id*. ¶ 5 (emphasis added).) Thus, General Selva's declaration that he does not "possess any unique knowledge ***regarding the Panel's deliberations, findings, or report*** that others who directly participated in the Panel hold," *id*. (emphasis added), does not address the numerous other factual issues, as described above, on which General Selva's testimony is essential. And General Selva's declaration that he "did not . . . offer any opinion about the Panel's findings," *see id*., which is contradicted by the email in which the acting

[redacted]

[10] Notably, because General Selva currently resides outside of the trial subpoena power of the District Court, the noticed deposition will likely be the only chance for Plaintiffs to obtain General Selva's testimony for trial.

[redacted] only supports Plaintiffs' need to depose General Selva, including with respect to this contradiction.

II. Defendants' Unspecified Claims Of "Privilege" Do Not Support Their Motion.

"Given that the [deliberative process] privilege is not absolute and that discovery might reveal reasons why it should not be applied, it is fairly standard practice to permit a person who may be able to claim the privilege to be deposed, and to require that the claim of privilege be made in response to specific questions." *Libertarian Party of Ohio*, 33 F. Supp. 3d at 920 (citing *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974) ("A general refusal to cooperate is not enough.")); *see also Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 164 F.R.D. 257, 268 (N.D. Fla. 1995) (holding that any "deliberative process privilege" objection could not confer "immunity from attendance at a deposition"); *Scovill Mfg. Co. v. Sunbeam Corp.*, 61 F.R.D. 598, 603 (D. Del. 1973) ("The circumstances are rare which justify an order that a deposition not be taken at all, and the existence of privilege is not one of those circumstances."). This standard process is particularly applicable here, where the court presiding over the underlying litigation has already rejected Defendants' repeated attempts to invoke "deliberative process" to immunize relevant documents and information from discovery.

Likewise, Defendants' assertion that the Ninth Circuit is currently reviewing Defendants' attempt to overturn one of the District Court's privilege rulings is no basis to quash General Selva's deposition. Instead, to the extent Defendants argue that proceeding with the deposition here would "circumvent the Ninth Circuit's administrative stay," the proper solution is to transfer this Motion to the District Court, who is best positioned to decide the scope of the stay and any related privilege issues, with guidance from the Ninth Circuit. *See* Mot. to Transfer at 10–11. It is Defendants, not

Plaintiffs, who are attempting to "circumvent" the Ninth Circuit's and the District Court's rulings by moving to quash General Selva's deposition on the basis of what the District Court has ruled are "overbroad" objections.

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' Motion and permit the deposition of General Selva pursuant to the Federal Rules.

Dated: June 4, 2020

Respectfully submitted,

/s/ K. Ross Powell
K. Ross Powell (VA Bar No. 89495)
ross.powell@kirkland.com
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 389-5000
Facsimile: (202) 389-5200

Stephen R. Patton (*pro hac vice* application pending)
stephen.patton@kirkland.com
Jordan M. Heinz (*pro hac vice* application pending)
jordan.heinz@kirkland.com
KIRKLAND & ELLIS LLP
300 North LaSalle
Telephone: (312) 862-2000
Facsimile: (312) 862-2200

Counsel for Plaintiffs

/s/ Catherina F. Hutchins
Catherina F. Hutchins
Senior Assistant Attorney General
Virginia Bar Number 33825
OFFICE OF THE VIRGINIA ATTORNEY GENERAL
10555 Main Street, Suite 350
Fairfax, Virginia 22030
703-359-1120
703-277-3547 (f)
chutchins@oag.state.va.us

Chalia I. Stallings-Ala'ilima (*pro hac vice* application pending)
OFFICE OF THE WASHINGTON STATE ATTORNEY GENERAL
Civil Rights Division
Attorney General's Office
800 5th Ave, Suite 2000
Seattle, WA 98104
Telephone: 206-464-7744
Facsimile: 206-464-6451
chalias@atg.wa.gov

Counsel for Plaintiff-Intervenor State of Washington

CERTIFICATE OF SERVICE

The undersigned certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on June 4, 2020.

/s/ K. Ross Powell
K. Ross Powell

Exhibit I

Plaintiffs' Opposition to Defendants' Motion to Quash Third-Party Subpoena Issued to James N. Mattis, *Karnoski v. Trump (Mattis)*, No. 1:20cv15 (E.D. Va. June 19, 2020), ECF 32

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

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.	Misc. No. 2:20-mc-00010-RAJ-RJK Underlying Action: Case No. 2:17-cv-01297-MJP (W.D. Wash.) REDACTED

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO QUASH THIRD-PARTY SUBPOENA ISSUED TO JAMES N. MATTIS

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Rules

INTRODUCTION

> *After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow . . .*
>
> *Transgender individuals to serve in any capacity in the U.S. Military*.

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

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

Defendants urge the Court to quash the deposition of former Secretary of Defense Mattis under the "apex doctrine," which Defendants assert "protects high-ranking officials . . . from testifying about their official decisions." (Defs' Memo. at 1.) But Secretary Mattis is not merely a former "high-ranking official"—he is, under Defendants' theory, the eponymous architect of the "Mattis Policy." Whether he truly made an "independent judgment"[1] to implement the Policy is not only relevant to, but potentially dispositive of, Defendants' defense of this case. The "apex

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[1] *See* Defs.' Pet. to S. Ct. for Cert. Before Judgment, *Trump v. Karnoski*, No. 18-676, 2018 WL 6169245, at *24–25 (Nov. 23, 2018) (claiming that the Policy "reflects the exercise of Secretary Mattis's 'independent judgment'"); *id*. at *8–9 (same).

doctrine" does not immunize from deposition high-ranking government officials who, like Secretary Mattis, "have personal involvement in a material aspect of the claim presented." *United States v. Wal-Mart Stores, Inc.*, No. CIV. A. PJM-01-CV-152, 2002 WL 562301, at *2 (D. Md. Mar. 29, 2002). Secretary Mattis is uniquely positioned to provide key factual testimony about the development of the Policy, and Defendants themselves have made his testimony central to this litigation.

Plaintiffs' need for, and the importance of Secretary Mattis's deposition is heightened by Defendants' efforts to stonewall discovery concerning the development of the "Mattis Policy." Defendants have withheld approximately 30,000 documents concerning the Mattis Policy under the guise of "deliberative process" privilege, and are even now seeking mandamus in the Ninth Circuit to overturn the order of the District Court for the Western District of Washington (the "District Court"), compelling the release of some of those documents. Only a few days ago, after a Special Master appointed by the District Court evaluated, *in camera*, Defendants' assertions that documents originally designated as "non-responsive" were in fact responsive but privileged, the District Court found "the Government has been overbroad in its privilege assertions, ***straying far outside the bounds of the deliberative process privilege and asserting the attorney-client privilege without care***."[2] Defendants' motion is simply the latest front in their more than two-year battle against any discovery that could undermine their highly-curated "administrative record."

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

Because Defendants cannot contest the relevance of Secretary Mattis's testimony or his direct personal involvement, they ultimately fall back on the argument that Secretary Mattis could not provide any unique "non-privileged" testimony. But Defendants cite no authority allowing the Court to quash an entire deposition because some yet-unasked questions may draw a privilege objection. If Defendants object to specific questions on the grounds of privilege, or if Defendants intend to invoke the "presidential communications privilege" (*see* Memo. at 21–22) the time to make those objections is at Secretary Mattis's deposition, not before. And if, as Defendants suggest, their privilege objections are bound up in the Ninth Circuit's review of the District Court's order compelling production of documents (*see id*. at 21), that is not a reason to quash the subpoena, but to transfer this motion to the District Court, which is well acquainted with Defendants' privilege assertions and has already implemented a process to address them. Defendants should not be permitted to collaterally attack that court's rulings through a motion to quash in this one.[3]

At base, Defendants urge the Court to prevent Plaintiffs from questioning the very person they claim the courts ultimately should defer to in deciding the constitutionality of the transgender service ban. Doing so would give Defendants free rein to present their own version of the facts through their post hoc "administrative record" and one or two hand-picked witnesses. There is no precedent for such an extraordinary request. Defendants' motion should be denied.

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[3] Plaintiffs have filed a motion to transfer Defendants' Motion to the Western District of Washington. The court is the best positioned to determine Secretary Mattis's role and its implications for his deposition is the District Court. This is especially the case given Defendants' reliance on privilege claims that are the subject of prior rulings and ongoing proceedings before both the District Court and the Ninth Circuit as grounds for opposing Secretary Mattis's deposition.

BACKGROUND

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

Plaintiffs challenge the constitutionality of the President's policy barring open military service by transgender individuals (the "Ban"), as implemented by the DoD (the "Mattis Policy"). President Trump first announced the Ban through a series of Tweets on July 26, 2017, abruptly reversing the military's existing policy permitting transgender people to serve openly, provided they satisfy all of the physical and other requirements that apply to all Service Members. *Karnoski*, 926 F.3d at 1188. While the President claimed his announcement was made "[a]fter consultation with my Generals and military experts," it caught the Chairman of the Joint Chiefs and the rest of the military's top brass by complete surprise.[4] Indeed, just a year earlier, in June 2016, the DoD had adopted an open service policy under Secretary Carter ("Carter Policy"), after an intensive year-long review that included consultation with the independent RAND National Defense Research Institute. (Ex. 3, June 30, 2016 Carter Memorandum.) This comprehensive military review addressed each of the "governmental interests" Defendants now rely on in support of the "Mattis Policy," including deployability and military readiness, unit cohesion, and medical costs, and concluded that those interests *supported* allowing the estimated 10,000 current transgender Service Members, and future transgender enlistees, to serve their country openly. (*See*, *e.g.*, Ex. 4, Expert Report of former Under-Secretary of Defense Brad Carson, at 8–12, 40–46; Ex. 5, RAND

[4] *See* Ex. 6, DoD Final Release re Tweet FOIA (Chairman of Joint Chiefs: "I know yesterday's announcement was unexpected"; "I was not consulted."); *id.* at 4 (USAF Director for Manpower & Personnel: "Everyone was caught flat-footed."); *id.* at 51 (Kurta, leading the DoD's military personnel policy, was on vacation, stating that "we don't have any further info at this point.").

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

The President formalized his Tweets in an August 25, 2017 "Presidential Memorandum" ordering the DoD to submit a "plan for implementing" three policy directives: (1) returning to the pre-Carter policy of banning transgender Service Members from serving openly, with a possible exception for those who came out during the Carter Policy; (2) a bar on enlistment ("accession") of transgender applicants who seek to serve openly; and (3) a bar on transition-related surgical treatment for Service Members except as necessary to protect the health of those who began treatment under the Carter Policy. (Ex. 7 at 87a.) The President ordered the DoD to submit the "Implementation Plan" by February 21, 2018, and the accessions and medical-treatment bans to take effect on March 23, 2018. (*Id.* at 88a.) On August 29, 2017, then-Secretary Mattis announced the DoD would "carry out the president's policy direction." (Ex. 8.)

II. The DoD Implements The Ban.

On September 14, 2017, Secretary Mattis began doing just that, issuing two memoranda which confirmed that the "DoD will carry out the President's policy and directives" and setting forth a process to do so. (Ex. 9 at 1.) In the first, Secretary Mattis confirmed he would "present the President ***with a plan to implement [his] policy*** and directives in the Presidential Memorandum" by February 21, 2018. *Id*. (emphasis added). In the second, Secretary Mattis directed General Selva, then Vice Chairman of the Joint Chiefs of Staff ("VCJCS"), along with Deputy Secretary of Defense ("DSD") Patrick Shanahan, to lead the DoD "in developing an Implementation Plan on military service by transgender individuals, to effect the policy and directives in" the President's August 25, 2017 Memorandum. (Ex. 10 at 1.)

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

Although Defendants claim the Mattis Memorandum sets forth a "new" policy (Memo. at 5), in fact, it faithfully implements each of the President's directives. First, it bans from service anyone with a history of gender dysphoria—a medical condition that is almost exclusively limited to transgender persons and is resolved by transition—unless "they have been stable for 36 consecutive months *in their biological sex* prior to accession." (Memo, Ex. C at 2) (emphasis added). Second, it *categorically* bans any "persons who require or have undergone gender transition"—even though a need to transition is what defines a person as transgender, and does so even if they have never been diagnosed with gender dysphoria or have completely resolved it through transitioning. (*Id.*) Third, to the extent that any transgender individuals do not fall under the first two categories, they may only serve if they suppress their gender identities—the very characteristic that makes them transgender—and serve "in their biological sex." (*Id.* at 3.) The only exception is a limited grandfather clause for Service Members who came out in reliance on the Carter Policy. President Trump approved the implementation plan on March 23, 2018, the date specified in his August 25, 2017 Memorandum. (Ex. 11.)

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

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

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

A. The Gender Dysphoria Excuse

First, Defendants claim the "Mattis Policy" discriminates based not on transgender status, but rather "on the medical condition of gender dysphoria." (*See, e.g.*, Memo. at 5.) The Ninth Circuit has already rejected this argument, instructing that heightened constitutional scrutiny applies because the "Mattis Policy" "regulates on the basis of transgender status . . . on its face." *Karnoski*, 926 F.3d at 1201. This is also clear from the policy's effect. A transgender person who

has completed gender transition, whose gender dysphoria has been resolved, and who otherwise meets every physical and other qualifications to serve is nonetheless categorically barred.[5]

B. The Military Deference Rationalization

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

1. The "Panel of Experts"

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

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

[5] Defendants assert--incorrectly--that the Carter Policy also turned on a diagnosis of gender dysphoria and required transgender individuals to "meet the standards associated with their biological sex." *See* Memo. at 5. In fact, under the Carter Policy, Service Members who underwent sex reassignment surgery or received other medical treatment for gender dysphoria were allowed to serve openly *consistent with their gender identity* after 18 months of stability. Ex. [3], Attachment at 1–2. And, unlike the "Mattis Policy," the Carter Policy contained no ban on gender transition and no requirement of service in accordance with one's biological sex. *See id.*

implementing. (Ex. 10.) As to accessions, "[t]he Presidential Memorandum directs DoD to … generally prohibit[ ] accession of transgender individuals into military service." *Id.* at 2. Rather than evaluate ***whether*** to access transgender individuals, Mattis asked the Panel merely to update the pre-Carter policy barring accession of openly transgender persons "to reflect currently accepted medical terminology." *Id.* As for transition-related medical care, Mattis directed that "[t]he Presidential Memorandum halts the use of government resources to fund sex-reassignment surgical procedures." *Id.* The Panel's task, therefore, was limited to implementing that directive by "enumerat[ing] the specific surgical procedures associated with sex reassignment treatment that shall be prohibited." *Id.* Finally, as to transgender persons openly serving in the military, "[t]he Presidential Memorandum directs that the Department return to the longstanding policy and practice" barring open service. *Id*. However, "[t]he Presidential Memorandum . . . allows the Secretary to determine how to address transgender individuals" who came out under the Carter policy. *Id*. Accordingly, the Panel "will set forth, in a single policy document, the standards and procedures applicable to military service by transgender persons, with specific attention to addressing transgender persons currently serving." *Id.*

The Panel initially met from October 13 through December 13, 2017. Defendants produced "minutes" for some of the Panel's meetings, but recently admitted there are no minutes or other documents regarding the Panel's last four meetings. (Ex. 13 at 1.) For meetings where minutes were produced, documents produced pursuant to a court order in parallel litigation—*Doe 2 v. Esper*, No. CV 17-1597 (D.D.C.)—raise questions about their accuracy. For example, at one meeting, the Panel heard from ten commanders of units with transgender persons serving openly. After reviewing the minutes for that meeting, [redacted]

[redacted]

As described in its ”Final Report”, the Panel relied upon multiple working groups to report “regularly” to it and answer “numerous” inquiries “to support their deliberations.” (Ex. 15 at 1.) These working groups were crucial to the Panel process; [redacted] But they have withheld all documents and communications from these working groups except for a handful of documents that were provided to Panel members.

What is clear is that both the Panel and its working groups viewed their mandates as constrained by the President’s Tweets and August 2017 Memorandum. One of the few working-group documents produced—through third-party discovery over Defendants’ objections—[redacted]

The Panel issued its Final Report on December 13, 2017. The very first sentence made clear the Panel understood its charge was limited to recommend policy changes “pursuant to direction from the Commander in Chief dated August 25, 2017.” (Ex. 15 at 1.) Accordingly, its recommendations effected each of the three directives in the President’s August 2017 Memorandum: (1) transgender persons could serve only based on the standards associated with “their biological sex,” with the exception of those who had come out during the Carter Policy;

(2) transgender persons could access into the military only "in their biological sex"; and (3) there could be no transition-related surgical care because anyone who needed or sought to transition would be separated (except for those who came out during the Carter Policy). (Ex. 19.)

[redacted]

The Panel presented its Final Report to General Selva and Mr. Shanahan on December 15, 2017—four days after the District Court in *Karnoski* found the Ban was likely unconstitutional and issued its preliminary injunction. (Ex. 21.) [redacted]

[redacted]

The Panel then reconvened three more times in late December 2017 and early January 2018, in the shadow of two further court orders finding the Ban likely unconstitutional. Defendants

have represented there are no documents reflecting what occurred at these meetings. (*See* Ex. 13.) Nor have Defendants provided any documents regarding the time between when the Panel's recommendations were rejected on December 15, 2017 and its disbandment on January 11, 2018.

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

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

(Ex. 19 at 1.) The USDP&R did not attach the Panel's "Final Report" or any other document purporting to reflect its work. Instead, he attached only the President's August 2017 Memorandum and Secretary Mattis's September 14, 2017 Memorandum confirming that the DoD would implement the President's directives and the Panel would advise how to do so. The memorandum then repeated the *same* recommendations the Panel made a month earlier to General Selva and Mr. Shanahan, which they had rejected. (*Compare* Ex. 19 at 1 *with* Ex. 15 at 4.)

2. The "DoD Report"

Although Defendants repeatedly invoke the Panel's military expertise, Defendants do not contend the Panel's Final Report contains the official justifications for the "Mattis Policy." Indeed, Secretary Mattis did not even send the Panel's Final Report to the President when he submitted the required implementation plan. Rather, Defendants rely *exclusively* on the 44-page, anonymous

DoD Report as representing the justifications for the "Mattis Policy" and their arguments that it passes constitutional scrutiny. (Ex. 23 at 15–16.)

The Panel had no role in writing, reviewing, or editing the DoD Report, which was prepared *after* the Panel was disbanded. Rather, the DoD Report represents the *post-hoc* justifications for the "Mattis Policy" that [redacted][6]

Defendants have refused to produce any information related to the DoD Report, or the period from January 11, 2018 through February 22, 2018, during which it was prepared. This includes any documents concerning how it was prepared or what sources, information, or alternatives were considered in its preparation. This is so notwithstanding that the report itself shows it relied on sources that were *not* considered by the Panel. For example, third-party discovery, which Defendants unsuccessfully sought to quash, confirmed that in early February 2018 (after the Panel had disbanded) Secretary Mattis's "special assistant," who appears to be the principal author of the DoD Report, reached out to several leading opponents of transgender rights and solicited—and received—information and published sources that the Report cited. For example, on February 5, 2018, one of those anti-transgender advocates, Dr. Paul McHugh, provided the DoD a list of additional sources he believed support the Ban, (Ex. 24), including a May 2014 Hayes Directory article, which the DoD Report cites five times as support for the

6 [redacted]

"Mattis Policy." (*See* Memo. Ex. C at nn. 26, 67, 72, 88–89; *see also* Ex. 25 (other correspondence with anti-transgender advocates and sources collected).)

IV. Defendants Stonewall Discovery Into The Ban And The "Mattis Policy."

Throughout this proceeding, Defendants have taken the position that Plaintiffs are not entitled to *any* discovery concerning the "Mattis Policy" beyond a so-called "administrative record" that Defendants' lawyers prepared after the Panel was disbanded comprised of documents they rely on in support of the Policy. (*E.g.*, Memo. at 6–7, 11, 16).. However, this is not an administrative rule-making or adjudicative proceeding, and Plaintiffs challenge the Mattis Policy on constitutional and not Administrative Procedure Act grounds. Accordingly, the Ninth Circuit (and every other court to consider this argument) has rejected Defendants' argument. *See, e.g.*, *Karnoski*, 926 F.3d at 1194 (noting Defendants' argument that "further litigation should be confined to the administrative record," *id.*, and instead ordering further discovery, explaining "deference does not mean abdication," *id.* at 1202 (citation omitted)).

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

Defendants then filed their first petition for mandamus with the Ninth Circuit. *See Karnoski*, 926 F.3d at 1187. Far from "rejecting" Plaintiffs' argument that the "Mattis Policy"

implements the Ban, (Memo. at 17), the Ninth Circuit did just the opposite. It found that "Plaintiffs raise non-frivolous arguments that the 2018 Policy did not independently analyze the impact of transgender individuals serving in the armed services," and that "the litigation may require the district court to consider the basis of the President's initial decision, as well as the 2018 Policy." *Karnoski*, 926 F.3d at 1204.[7] However, the Court remanded for a more granular analysis of whether Defendants' privilege claims had been overcome, including by "class" or "category" of document. *See id*. at 1206.

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

[7] Defendants also misrepresent the Ninth Circuit's decision on their appeal from the District Court's denial of their motion to dissolve the preliminary injunction. The Ninth Circuit did not "vacate the preliminary injunction," as Defendants claim. (Memo. at 7.) In fact, it expressly declined to do so. *Karnoski*, 926 F.3d at 1207–08. The Ninth Circuit also rejected Defendants' argument that, due to "military deference," the Ban and Mattis Policy were subject to only rational basis review. The Court held that Defendants must satisfy heightened scrutiny to justify their discrimination, "and that is not a trivial burden." *Id.* at 1202.

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

Defendants' disputed claims of deliberative process privilege also extend to deposition testimony concerning the development of the Mattis Policy, and are likewise the subject of ongoing proceedings before the District Court and the Ninth Circuit. In the only depositions of Panel attendees to date (in the parallel *Doe* case), Defendants objected on grounds of deliberative process privilege and instructed the witness not to answer virtually every substantive question concerning the development of the Mattis Policy. (Ex. 32, Dep. Tr. of Martie Soper at 90–91, 160, 222; Ex. 33, Dep. Tr. of Mary Krueger at 64, 77, 88, 95-97, 105–08, 157.) Anticipating similar objections in upcoming depositions in this case, and seeking to avoid the inconvenience to both the witness and the parties of re-deposing witnesses as to whom Defendants' privilege claims were subsequently overruled, the District Court ordered that, where there is an objection based upon the deliberative process privilege, the witness should answer and the testimony sealed pending a subsequent *in camera* review and determination by the Court whether the privilege applies and/or has been overcome. (Ex. 16, Feb. 3, 2020 Hr'g. Tr., at 63–65.) Even though Defendants did not challenge that order in their current petition for mandamus, Defendants have taken the position that it is nevertheless subject to the administrative stay entered by the Ninth Circuit. (Ex. 35, May 6, 2020, Joint Status Report, at 9–10.) Moreover, Defendants' counsel recently advised Plaintiffs that, "during the upcoming depositions Defendants expect to assert the deliberative process privilege and instruct our witnesses not to answer questions that call for privileged information except where the deliberative process privilege has been set aside by court orders which have not

been stayed or vacated." (Ex. 34, May 28, 2020 Email from D. Carmichael to J. Heinz, *et al*.) Although this email concerned the upcoming depositions of Rule 30(b)(6) witnesses, Plaintiffs expect that Defendants will take the same position with respect to other depositions, including Secretary Mattis's.

ARGUMENT

Federal Rules 26(b) and 30(a) allow a party to depose any person "regarding any non-privileged matter that is relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1); FED. R. CIV. P. 30(a). Courts have long recognized that depositions are an essential part of the discovery process: "Only by examining a witness live can a lawyer use the skills of his trade to plumb the depths of a witness' recollection, using to advantage not only what a witness may have admitted in answering interrogatories, but also any new tidbits that usually come out in the course of answering carefully framed and pin-pointed deposition questions." *Shoen v. Shoen*, 5 F.3d 1289, 1297 (9th Cir. 1993). For that reason, "[i]t is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error." *Big Ernie's, Inc. v. United States*, No. 1:09-cv-00122, 2009 WL 3166839 (E.D. Va. Aug. 13, 2009) (quoting *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979)); *see also Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 125 (D. Md. 2009) ("A motion seeking to prevent the taking of a deposition is regarded unfavorably.").

Defendants' motion in no way justifies this extraordinary relief here. Under Defendants' theory of the case, Secretary Mattis was personally involved in creating the challenged policy; and the various facets of his personal involvement (or, alternatively, lack thereof) are crucial to rebutting Defendants' primary constitutional defense of the Policy—that it was the product of

Mattis's "independent military judgment." Neither the (limited) documents nor the (hand-picked) alternative witnesses Defendants proffer can adequately substitute for Secretary Mattis's first-hand testimony on numerous, critical points. Furthermore, Defendants' generic and overbroad claims of "privilege" are no reason to preclude Secretary Mattis's deposition.

I. "Exceptional Circumstances" Require Secretary Mattis's Deposition.

A. Secretary Mattis Was Personally Involved In The Challenged "Mattis Policy."

"Exceptional circumstances" for deposing a current or former government official exist where the official "ha[s] personal involvement in a material aspect of the claim presented." *Wal-Mart Stores*, 2002 WL 562301, at *2; *see also United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 322 (D.N.J. 2009) ("Courts have time and again allowed the deposition of current and former high-ranking government officials upon a showing that the official has personal involvement or knowledge relevant to the case.").[8] There can be no doubt that Secretary Mattis,

[8] *See, e.g.*, *NRA v. Cuomo*, No. 1:18-CV-566, 2019 WL 2918045, at *5 (N.D.N.Y. Mar. 20, 2019) (allowing deposition of New York's former Superintendent of Financial Services where her "specific rationale for her alleged actions is at issue"); *Greater Birmingham Ministries v. Merrill*, 321 F.R.D. 406, 413 (N.D. Ala. 2017) (permitting deposition of Alabama's Secretary of State where "Secretary Merrill's role with respect to implementation of the challenged Photo ID Law has been ongoing since he assumed office," and "Plaintiffs have sufficiently established that . . . he has been personally involved in implementing the law"); *Fish v. Kobach*, 320 F.R.D. 566, 579 (D. Kan. 2017) (allowing deposition of Kansas Secretary of State where "the official [was] shown to have exclusive first-hand knowledge directly relevant to the claims being litigated"); *Libertarian Party v. Husted*, 33 F. Supp. 3d 914, 920 (S.D. Ohio 2014) (permitting deposition of Hearing Officer and General Counsel for the Ohio Secretary of State); *United States v. City of New York*, No. 07-cv-2067, 2009 WL 2423307, at *2–3 (E.D.N.Y. Aug. 5, 2009) (authorizing the deposition of the Mayor of New York City where the Mayor's congressional testimony "suggest[ed] his direct involvement in the events at issue in the case"); *Bagley v. Blagojevich*, 486 F. Supp. 2d 786, 789 (C.D. Ill. 2007) (allowing the deposition of the Governor of Illinois where evidence suggested "the Governor was either the ultimate decision maker or at least personally involved" in the decision at issue); *Energy Capital Corp. v. United States*, 60 Fed. Cl. 315, 318 (Fed. Cl. 2004) (authorizing depositions of the former Secretary of Housing and Urban Development, and HUD's former General

the supposed architect of the "Mattis Policy," was personally involved in the factual issues at the heart of this case.

Indeed, the Government's strategy for defending this case has thrust Secretary Mattis into a central role as ***the*** decision-maker who personally approved the policy Plaintiffs challenge (*i.e.*, the eponymous "Mattis Policy") and thereby has made his testimony uniquely and critically important. Unable and unwilling to defend what Plaintiffs contend is the actual source of the discriminatory policy banning open transgender service—President Trump's July 26, 2017 Tweets announcing the Ban, and his subsequent August 25, 2017 Memorandum ordering the military to implement the Ban—Defendants instead have constructed an alternative reality in which that policy is Secretary Mattis's policy. According to Defendants' theory, the policy was conceived by the military through a process personally and independently put into place by Secretary Mattis, including the designation of General Selva and Mr. Shanahan to recommend that "new" policy, with the assistance of a "Panel of Experts," which Secretary Mattis then personally approved and recommended to the President in "the exercise of his independent judgment" and unrelated to the President's Tweets and August 25, 2017 Memorandum. (*See* Memo. at Ex. D, DoD Report at 4.) Defendants thereby hope to convert a policy that was decreed by the President without the input

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Counsel, holding "it is also clear in the context of deposing former high-ranking government officials is that depositions are allowed if the party has personal knowledge of the facts in issue"); *Martin v. Valley Nat'l Bank of Ariz.*, 140 F.R.D. 291, 314–15 (S.D.N.Y. 1991) (authorizing the deposition of the Director of Enforcement for the Department of Labor who "was apparently involved" personally in the challenged government decisions); *Am. Broad. Cos. v. U.S. Info. Agency*, 599 F. Supp. 765, 769 (D.D.C. 1984) (permitting deposition of agency chief where he was "the sole person responsible for the creation of the documents in question"); *Union Sav. Bank of Patchogue v. Saxon*, 209 F. Supp. 319, 320 (D.D.C. 1962) (permitting deposition of senior Treasury official where "Plaintiffs allege actions personal to the Defendant").

of, or even advance notice to, the military, into a policy conceived and recommended by the military pursuant to the exercise of its "independent judgment," entitled to "military deference" and, in an argument that has been rejected by the Ninth Circuit, subject to a lesser standard of constitutional scrutiny akin to "rational basis" review. Whether Secretary Mattis's approval and recommendation were truly independent of the President's order and directives, therefore, is a central issue in this dispute and one as to which Secretary Mattis's testimony is irreplaceable and critical.

Defendants' theory of the case presents a fundamental and potentially dispositive question: in recommending the "Mattis Policy," was Secretary Mattis following the orders of his Commander-in-Chief, as the contemporaneous documents make clear, or was he adopting a policy the military conceived and he approved and recommended to the President in the exercise of the military's "independent judgment"—as required for any type of "military deference"? Defendants cannot have it both ways—on the one hand, contending the "Mattis Policy" was unrelated to the Ban and, instead, the result of Mattis's "exercise of his independent judgment," while, on the other hand, refusing to produce the only witness with direct, first-hand knowledge of the truth of that assertion. In view of Defendants' litigation strategy and factual contentions, Plaintiffs have a right to question Secretary Mattis on this critical and potentially dispositive issue.

As a matter of both fairness and the law of the case, Plaintiffs should not be compelled to simply take Defendants' word for it, or be forced to accept the self-serving statements in Secretary Mattis's February 22, 2017 memorandum (Memo. at Ex. C), in which Secretary Mattis "recommended" "his" policy to the President. This is particularly true in view of Defendants' subsequent [redacted]

[redacted] This result is also mandated by the Ninth Circuit's June 20, 2019 decision, which rejected this same argument. There, in moving to dissolve the preliminary injunction issued by the District Court enjoining the Ban, both as ordered by President Trump and, subsequently, as implemented by the "Mattis Policy," Defendants argued that, "[u]nless Plaintiffs are prepared to accuse senior military leadership, including the Secretary of Defense himself, of making deliberate misrepresentations, they should abandon any suggestion that the new policy does not reflect the independent, professional judgment of the United States military." (Ex. 38, *Doe 2 v. Trump*, Defs.' Mot. to Dissolve the Prelim. Inj., Dkt. 116, at 40 (Apr. 20, 2018).) The Ninth Circuit rejected this argument, holding that "Plaintiffs raise non-frivolous arguments that the 2018 Policy did not independently analyze the impact of transgender individuals serving in the armed services," and that "the litigation may require the district court to consider the basis of the President's initial decision, as well as the 2018 Policy." *Karnoski*, 926 F.3d at 1204.

These examples also distinguish the cases on which Defendants principally rely. This is not a case where the senior official Plaintiffs seek to depose was not directly involved, or only tangentially involved, in the decision in dispute.[9] Rather, Defendants themselves contend that the

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

policy Plaintiffs challenge was Secretary Mattis's. For example, in their unsuccessful effort to bypass the Ninth Circuit by seeking certiorari before judgment in the United States Supreme Court, Defendants represented to the Court that the "Mattis Policy" reflected "the exercise of [Mattis's] independent military judgment." (Ex. 36, *Trump v. Karnoski*, Pet. for Writ of Cert. Before Judgment, at 9 (Nov. 23, 2018); *see also id*. at 15 ("In arriving at that new policy, Secretary Mattis . . . determined that the prior policy, adopted by Secretary Carter, posed too great a risk to military effectiveness and lethality."); *id.* at 19 ("Secretary Mattis recognized the need for 'medical standards' to 'help insure that those entering service are free of medical conditions or physical

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decision" at issue); *In re FDIC*, 58 F.3d 1055, 1062 (5th Cir. 1995) (finding no extraordinary circumstances requiring the deposition of three FDIC officials where "the August 24 decision [in question] was in fact made by Director Stein of the FDIC's Division of Resolutions, whom [plaintiff] has already deposed"); *In re United States*, 985 F.2d 510, 513 (11th Cir. 1993) (blocking the deposition of the FDA Commissioner where the Commissioner "did not assume office until four years after the initial investigation and over two years after the case was sent to the Justice Department for further action; accordingly, he could not have been responsible for selectively prosecuting the defendants"); *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586–87 (D.C. Cir. 1985) (preventing depositions of Department of Labor officials where the officials "had no first-hand knowledge of the facts of this case" and they had no information "that [the requesting party] could not obtain from published reports and available agency documents"); *Raymond v. City of New York*, No. 15 Civ. 6885, 2020 WL 1067482, at *5 (S.D.N.Y. Mar. 5, 2020) (quashing depositions of former police commissioners where plaintiffs "have not shown that [the commissioners] had any first-hand knowledge of the alleged retaliation"); *FDIC v. Galan-Alvarez*, No. 1:15-mc-00752, 2015 WL 5602342, at *5 (D.D.C. Sept. 4, 2015) (prohibiting deposition of former FDIC Chairperson and current FDIC Deputy Director where deponents, at best, "***may*** have attended meetings and requested briefings" on the policy at issue (emphasis added)); *Sensient Colors, Inc.*, 649 F. Supp. 2d at 318 (denying deposition of official where requesting party "submitted no evidence suggesting [the official] had any personal involvement in or knowledge relevant to" the factual issues in question); *Croddy v. FBI*, Civ. Action No. 00-0651, 2005 WL 8168910, at *1 (D.D.C. Mar. 30, 2005) (quashing deposition of former FBI director where plaintiffs "have not shown that former director, Louis Freeh, possesses unique personal knowledge of the circumstances that led to the recision of plaintiffs' employment offers"); *Wal-Mart Stores*, 2002 WL 562301, at *5 (prohibiting deposition of former Consumer Product Safety Commission where requesting party "failed to make a *prima facie* showing of . . . personal involvement").

defects that may require excessive time lost from duty."); *id.* at 24 (The "Mattis Policy" Plaintiffs challenge "reflects the exercise of Secretary Mattis's 'independent judgment'.").) Defendants repeatedly made similar representations to the Ninth Circuit in their briefing there. (*See*, *e.g.*, Ex. 37, *Karnoski*, No. 18-35347 (9th Cir. May 29, 2018), Dkt. 30, Appellants' Opening Br., at 1–2 ("As Secretary Mattis observed, generally allowing service by [transgender] individuals poses 'substantial risks.'"); *id.* at 24 ("As Secretary Mattis explained, generally allowing [transgender] individuals to serve would pose 'substantial risks'."); *id.* at 28 ("Secretary Mattis determined the military should 'proceed with caution before compounding the significant challenges inherent in treating gender dysphoria'."); *see also* Ex. 39, Pet. for Mandamus, Aug. 1, 2018, at 19 ("The governing policy is that established by Secretary Mattis in 2018."); *id.* at 8 ("In February 2018, following an extensive review by a panel of experts, Secretary Mattis proposed a new policy.").) Having made those representations—and indeed based their constitutional defense of the Policy on their truth—Defendants should not be permitted to now foreclose Plaintiffs' ability to test Defendants' claims.

B. Secretary Mattis Has Unique Factual Knowledge At Issue In This Litigation.

This case is also readily distinguishable from *United States v. Morgan* and its progeny, which limit questions that would "probe [the officials'] mental processes," except in "exceptional circumstances." 313 U.S. 409, 421–22 (1941). Here, Plaintiffs seek basic factual testimony that Secretary Mattis can uniquely provide. In *Franklin Savings Association v. Ryan*, for example, the Fourth Circuit considered the propriety of a deposition of the Director of the Office of Thrift Savings. 922 F.2d 209 (4th Cir. 1991). Neither the Fourth Circuit nor the parties challenged the Director's deposition as a whole—indeed, the court noted the Director "responded to the subpoena

and answered all questions directed at him with the exception of five." *Id*. at 210. Instead, the court held the district court erred by requiring the Director to answer five questions that "clearly went to the mental processes by which [the Director] arrived at his decision," where there was no "misconduct or wrongdoing" justifying an exception from *Morgan*. *Id*. at 211.

As a threshold matter, here Plaintiffs are claiming, and have made a showing, of "misconduct or wrongdoing"—intentional discrimination and animus against transgender persons based on their gender. Moreover, Plaintiffs are not seeking discovery of Secretary Mattis's "mental processes," let alone of "mental processes" that are irrelevant or unnecessary to their claims as in *Morgan* and the other cases Defendants cite. To the contrary, Defendants' refusal to produce documents or information related to the creation of the DoD Report (Memo. at Ex. D) and the Mattis Memorandum (Memo. at Ex. C) pose basic, factual questions about the development of the "Mattis Policy," including the actual reasons it was "recommended" and adopted, such as:

- What was Secretary Mattis's role in drafting the Mattis Memorandum and the DoD Report?
- What information did Secretary Mattis obtain before the Mattis Memorandum was drafted and approved?
- To what extent, if any, did Secretary Mattis obtain input from the "Panel of Experts" in drafting the Mattis Memorandum and/or the DoD Report; and, if so, what input did he obtain from the Panel?
- Did Secretary Mattis seek information from outside the Panel in preparation of these documents; and, if so, what information did he seek, who provided that information, and what information did they provide?
- Was Secretary Mattis instructed to obtain particular information cited in the Mattis Memorandum and/or the DoD Report, but absent from the Panel's prior Final Report? If so, who instructed him to obtain that information, and how did he go about doing so?

A deposition on these and similar factual issues, which will not invade Secretary Mattis's "mental processes," is entirely permissible under *Morgan*. *Compare Franklin Sav. Ass'n*, 922 F.2d at 210 n.2.

None of the various documents or two witnesses Defendants proffer as alternatives adequately substitute for Secretary Mattis's first-hand testimony on these and other issues. As previously noted, the purported "Administrative Record" is nothing of the sort—it is a series of documents Defendants' lawyers assembled after the fact to justify their positions in this litigation. (*See supra* at 14-15.) And even then, the "Administrative Record" is full of holes: Defendants have produced no "minutes" for the last few critical meetings of the "Panel of Experts;" the discovery they have produced suggests that the "minutes" are inaccurate or, at the least, highly slanted retellings of what actually occurred at the Panel's meetings; and Defendants have categorically refused to produce any documents regarding the critical time period ***after the Panel disbanded but before Secretary Mattis*** promulgated the "Mattis Memorandum" and the DoD Report. (*See supra* at 13-14.) As such, Defendants' contention that Plaintiffs "already have access to all of the relevant documents" (Memo. at 18) is demonstrably false—and even if it were true, documents are no substitute for live testimony.[10]

Likewise, neither Anthony Kurta, the former Deputy Assistant Secretary of Defense for Military Personnel Policy, or Lernes Hebert, who followed Mr. Kurta as Deputy Assistant, can provide the testimony Plaintiffs seek. Neither Mr. Kurta nor Mr. Hebert can address these and

[10] Notably, because Secretary Mattis currently resides outside of the trial subpoena power of the District Court, the noticed deposition will likely be the only chance for Plaintiffs to obtain Secretary Mattis's testimony for trial.

other critical issues, and even where they may have personal knowledge relevant to these questions, it will not include communications, events, and other information they were not party or privy to. More fundamentally, neither Mr. Kurta nor Mr. Hebert was the decision maker here, and neither can address the role the President's order and directives played in Secretary Mattis's decision to approve and recommend the "Mattis Policy," and/or the true reasons and justification for that policy and decision.

C. Secretary Mattis's Testimony Is Necessary To Address Animus.

Finally, and contrary to Defendants' assertions, this is not a case like *Morgan* because there is strong evidence of "misconduct or wrongdoing" justifying an exception from any bar on discovery of "mental processes." *Compare Franklin Sav. Ass'n*, 922 F.2d at 211. The Ninth Circuit has already determined that the Mattis Policy "discriminates on the basis of transgender status on its face." *Karnoski*, 926 F.3d at 1201 n.18. And, there is evidence suggesting Secretary Mattis's decision-making may have been influenced by animus, including the views of leading third-party advocates against transgender rights. For example, on September 30, 2017, at the beginning of his efforts to develop what he and President Trump referred to as the "Implementation Plan" effecting the Ban on open service ordered by the President, Secretary Mattis sent himself an email reminder providing the names and contact information for two such advocates and a note that they were "[a]uthoritative people, who defy PC doctrine. You can't talk to them, but perhaps someone trustworthy can. Perhaps DSD." (Ex. 40, USDOE00134732_001.) Secretary Mattis did not state why he did not feel he could talk to these advocates, but would instead use a "trustworthy" proxy.

There is no record that the "Panel of Experts" heard from these anti-transgender advocates, and they are not referenced in the "Administrative Record" that Government lawyers subsequently

compiled of the information the Panel considered and/or that Defendants rely on in support of the "Mattis Policy." Nevertheless, on February 2, 2018, after the Panel had completed its work and made its final recommendations, and during the period that the anonymous February 2018 Report that Defendants rely on as the justification and support for that policy was being drafted, Secretary Mattis's "special assistant," William Bushman, contacted these advocates soliciting their input. (*See* Ex. 41, USDOE00285187.) In response, the advocates provided Bushman with citations to several articles and other sources that were extensively relied upon and cited in the DoD Report. (*See id.*; Ex. 25 at MCHUGH00062-64; Ex 24 at MCHUGH 00001.)

During that same time, Secretary Mattis also communicated with a retired Marine general and colleague, who likewise recommended that Mattis reach out to these advocates and provided links to some of their writings. (*See* Ex. 25 at USDOE00134724_0001.) These communications, too, provide evidence of animus and views concerning the purported medical needs and "psychological issues" of transgender persons that are contrary to current medical and scientific consensus. *See id*. ("One additional thought in amplifying the hypocrisy -- for good reason, we don't accept enlistments from people who need extensive dental work or have a knee that needs surgery, but the medical obligations of this [transgender service] are beyond the pale. Then add the suicide rates and other psychological issues that disrupt cohesion and consume time (and make one non-deployable).") Such evidence of animus and anti-transgender views and sources that were not considered by the Panel, but nevertheless relied upon, after-the-fact, as part of the purported justifications for the "Mattis Policy," bear directly on whether that policy passes heightened scrutiny. Plaintiffs should not be precluded from examining Secretary Mattis regarding the

circumstances surrounding the use of these advocates to apparently buttress the lack of support for the Ban found in the final report of the "Panel of Experts."

II. Defendants' Unspecified Claims Of "Privilege" Do Not Support Their Motion.

Defendants all but acknowledge that Secretary Mattis has unique factual knowledge requiring his testimony, but urge the Court to nonetheless quash his deposition because he has no unique, "non-privileged" information. (*See* Memo. at 17, 20.) But Defendants' generalized privilege assertions—which have already been rejected, repeatedly, by the District Court in this underlying litigation—cannot preclude Plaintiffs from deposing Secretary Mattis.

"Given that the [deliberative process] privilege is not absolute and that discovery might reveal reasons why it should not be applied, it is fairly standard practice to permit a person who may be able to claim the privilege to be deposed, and to require that the claim of privilege be made in response to specific questions." *Libertarian Party of Ohio*, 33 F. Supp. 3d at 920 (citing *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974) ("A general refusal to cooperate is not enough.")); *see also Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 164 F.R.D. 257, 268 (N.D. Fla. 1995) (holding that any "deliberative process privilege" objection could not confer "immunity from attendance at a deposition"); *Scovill Mfg. Co. v. Sunbeam Corp.*, 61 F.R.D. 598, 603 (D. Del. 1973) ("The circumstances are rare which justify an order that a deposition not be taken at all, and the existence of privilege is not one of those circumstances."). This standard process is particularly applicable here, where the court presiding over the underlying litigation has already rejected Defendants' repeated attempts to invoke "deliberative process" to immunize relevant documents and information from discovery.

Likewise, Defendants' assertion that the Ninth Circuit is currently reviewing Defendants' attempt to overturn one of the District Court's privilege rulings is no basis to quash Secretary Mattis's deposition. Instead, to the extent Defendants argue that proceeding with the deposition here would "circumvent the Ninth Circuit's administrative stay," the proper solution is to transfer this Motion to the District Court, who is best positioned to decide the scope of the stay and any related privilege issues, with guidance from the Ninth Circuit. (*See* Mot. to Transfer at 10-11.) It is Defendants, not Plaintiffs, who are attempting to "circumvent" the Ninth Circuit's and the District Court's rulings by moving to quash Secretary Mattis's deposition on the basis of what the District Court has ruled are "overbroad" and careless privilege objections.

Defendants' assertion of the "presidential communications" privilege is no better. Defendants claim, generically, that "any questions about Secretary Mattis's communications with the President or his close advisors would be subject to the presidential communications privilege." (Memo. at 21.) But again, if Defendants believe that a particular question at Secretary Mattis's deposition would require him to reveal a communication with President Trump, the parties can address that issue at the appropriate time; it is no reason to preclude Secretary Mattis's deposition altogether. *See Libertarian Party of Ohio*, 33 F. Supp. 3d at 920. And again, if Defendants believe that Secretary Mattis's deposition is bound up in the Ninth Circuit's prior ruling, the District Court is far better positioned than this Court, given its history with the case, to address any privilege issues that may arise at Secretary Mattis's deposition.

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' Motion and permit the deposition of Secretary Mattis pursuant to the Federal Rules.

Dated: June 4, 2020

Respectfully submitted,

/s/ K. Ross Powell
K. Ross Powell (VA Bar No. 89495)
ross.powell@kirkland.com
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 389-5000
Facsimile: (202) 389-5200

Stephen R. Patton (admitted *pro hac vice*)
stephen.patton@kirkland.com
Jordan M. Heinz (admitted *pro hac vice*)
jordan.heinz@kirkland.com
KIRKLAND & ELLIS LLP
300 North LaSalle
Telephone: (312) 862-2000
Facsimile: (312) 862-2200

Counsel for Plaintiffs

/s/ Catherina F. Hutchins
Catherina F. Hutchins
Senior Assistant Attorney General
Virginia Bar Number 33825
OFFICE OF THE VIRGINIA ATTORNEY GENERAL
10555 Main Street, Suite 350
Fairfax, Virginia 22030
703-359-1120
703-277-3547 (f)
chutchins@oag.state.va.us

Chalia I. Stallings-Ala'ilima (*pro hac vice* application pending)
OFFICE OF THE WASHINGTON STATE ATTORNEY GENERAL
Civil Rights Division
Attorney General's Office
800 5th Ave, Suite 2000
Seattle, WA 98104
Telephone: 206-464-7744
Facsimile: 206-464-6451
chalias@atg.wa.gov

Counsel for Plaintiff-Intervenor State of Washington

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2020, the foregoing document was filed via the Court's CM/ECF system, which will automatically serve and send email notification of such filing to all registered attorneys of record.

/s/ K. Ross Powell
K. Ross Powell

Exhibit J

U.S. Senate Testimony before Senate Comm. on Armed Services (Apr. 26, 2018)

Stenographic Transcript
Before the

COMMITTEE ON
ARMED SERVICES

UNITED STATES SENATE

HEARING TO RECEIVE TESTIMONY ON THE DEPARTMENT OF DEFENSE BUDGET POSTURE IN REVIEW OF THE DEFENSE AUTHORIZATION REQUEST FOR FISCAL YEAR 2019 AND THE FUTURE YEARS DEFENSE PROGRAM

Thursday, April 26, 2018

Washington, D.C.

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look at what they are doing with their support for terrorism from Bahrain to Yemen, from Syria to Lebanon and elsewhere, their maritime threat, their cyber threat. We have got to look at all these things, sir, as a whole, but at the same time focus on this imperfect arms control agreement and determine if that is in our best interest.

Senator Sullivan: Trust factor?

Secretary Mattis: I think trust but verify would be an exaggeration. I think it is distrust and verify.

Senator Sullivan: Thank you.

Senator Inhofe: Thank you, Senator Sullivan.

Senator Gillibrand: Thank you, Mr. Chairman.

General Dunford, your fellow chiefs have told me that they are not aware of any instances of issues with unit cohesion, morale, and discipline as a result of open transgender service. Have you heard of any such incidents?

General Dunford: Senator, thanks. I would not typically hear of individual cases of cohesion or discipline issues.

And maybe just a comment on transgender. For me, the issue with transgender has never been about cohesion or discipline anyway. It was just about any individual, regardless of circumstances, being able to meet the physical and mental qualifications of being worldwide deployable. So if an individual is serving without accommodation, then I do

not think I would expect to see discipline or cohesion issues in that unit.

Senator Gillibrand: During our last discussion on this topic, you said that you would treat all service members, including transgender service members, with dignity and respect.

The recommendations on transgender service and the accompanying panel report were released as part of the DOJ's filing on Friday night. Service members found out in the news that the Department had submitted a report that cast dispersions on their fitness to serve, implied they could harm the lethality of the force, and left their futures in the military up in the air.

Do you think this rollout accords transgender service members with the dignity and respect they deserve?

General Dunford: Senator, one thing we have tried to clarify for our men and women that are current serving is that -- and I cannot talk about any changes in the policy. But one thing that did not change was the status of the men and women that are currently serving.

Senator Gillibrand: That is not the impression the report leaves.

Do you know whether this has created anxiety among these troops? Have you met with any transgender troops given this report?

General Dunford: I have not since the report was released, Senator.

Senator Gillibrand: I recommend that you do so so you are more informed.

Secretary Mattis, one of the things that struck me about your panel's report was its claim that, quote, unlike past reviews, the panel's analysis was informed by the Department's own data and experience obtained since the Carter policy took effect. That is why I have been asking the chiefs about unit cohesion. In fact, General Milley put it with regard to the Army as precisely zero instances of units with less unit cohesion, morale, and discipline.

I am very concerned about this report because it says that there is, quote, scientific uncertainty surrounding the efficacy of transition-related treatments for gender dysphoria. Yet, the American Medical, Psychological, and Psychiatric Associations have all said the report misrepresents what is the scientific consensus when it comes to gender dysphoria and transition. In fact, despite the report's stated concerns about deployability of transgender service members because of gender dysphoria or associated medical care, a report being issued today by the Palm Center here, which I am going to give to you so you can read in full, says that, quote, out of 994 service members diagnosed with gender dysphoria in 2016 and the first half of 2017, 40

percent deployed in support of Operation Enduring Freedom, Operation Iraqi Freedom, or Operation New Dawn, and only one had an issue during that deployment.

It appears that this report that your Department has issued is not based on the Department's data or science but rather, quote, potential risks that the authors cannot back up. And in fact, this seems to me to be the same uninformed and unfounded concerns that led to the opposition of repealing don't ask/don't tell, integrating women into the military, integrating African Americans into the military. And I think you need to do a lot more work on this topic to inform yourselves.

What is so different about transgender service that makes you think that though the data and medical science do not justify it, transgender service will harm the readiness and lethality of our force?

Secretary Mattis: Well, Senator, I regret the way you characterize it. I would remind you that when I came into this job, I said I do not come in with a preordained or agenda to change something. I am in to carry three lines of effort forward. One of them was to create a more lethal military. And I believe that service in the military is a touchstone for patriotic Americans. The military protects all Americans' freedom and liberty to live as they choose, and we are proud of that.

71 percent of 18 to 24-year-old men and women in this country do not qualify for medical, legal, behavioral, intellectual reasons to enlist as a private in the U.S. Army. 71 percent.

In this case, I was meeting with the service chiefs and the Chairman -- not the Joint Chiefs, the service chiefs -- last spring, and they were asking me questions because we were coming up on the advent of the induction of transgender. And they wanted to know how they were going to deal with certain issues about basic training, about deployability. I said, did you not get all of this when the policy came out? The Carter policy we call it. They said no. And I said, well, did you have input? They said no, they did not.

So I convened that panel. That panel was made up of combat veterans, the vice chiefs of the services, and the under secretaries. And they called together transgender troops. They brought in commanders of transgender troops, and they brought in and listened to civilian and military medical experts who have provided care for transgenders both in the military and outside. And I gave my 44-page advice. I would like to have it entered, Chairman, for the record.

[The information referred to follows:]

[COMMITTEE INSERT]

Senator Gillibrand: And a list of all experts you consulted, please.

Secretary Mattis: Pardon?

Senator Gillibrand: I would like a list of all the experts, medical experts, that were consulted for that report, please.

Secretary Mattis: Right now, this is under litigation. I will see what I can provide or when I can provide it. I will do that, Senator.

But at the same time, basically my responsibility is to give the best advice I can for making a lethal force. And I think that right now the Carter policy is still in effect, and we have the four cases being litigated.

Why these issues like this would not come to the service chief level during this was a very, very, I would call it, newsworthy situation. And the reason is that under the Carter policy, the reporting is opaque. We cannot report that a problem emanated from a transgender. We cannot under the Carter policy do that. So the question you have asked the service chiefs and the Chairman are ones that right now the Carter policy prohibited that very information from coming up because it is private information. And it is specifically called out in his policy statement. So it is impossible for them to have responded to you.

And I would just say that right now we look at medical

conditions. If gender dysphoria has anxiety or it has some kind of depression, we do not allow anyone in with that. I would have to make a special category that said you can have these disqualifying factors only if you are transgender, and then we can bring you in. I think you understand why we have not chosen to do that.

Senator Inhofe: Thank you.

Senator Fischer?

Senator Fischer: Thank you, Mr. Chairman.

Secretary Mattis, in last year's NDAA, Congress required the Department to evaluate whether existing cruise missile systems could be converted into a ground-launched version as part of our response to Russia's violation to the INF Treaty. The Department's response, which was a letter from Under Secretary Lord, was sent to the committee 2 weeks ago. And it states that DOD is in the early stages of identifying the system requirements and is therefore unable to conduct an assessment at this time.

I know the Department is moving forward on a broader effort beyond just a ground-launched cruise missile, but I am concerned about the urgency of our response because, as we both know, we can spend the next 3 years defining requirements and analyzing alternatives and not conduct any actual research and development.

So I would just ask, what is your expected timeline for