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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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

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[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", [redacted]

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 [redacted] Accordingly, its recommendations effected each of the three directives in the President's August 2017 Memorandum: (1) transgender persons could serve only based on the standards associated with "their biological sex," with the exception of those who had come out during the Carter Policy;

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

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, [redacted] (*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]

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] Three former members or chairs of the Panel assisted in drafting and/or reviewing the DoD Report after the Panel was disbanded pursuant to their official duties separate from the Panel (acting USDP&R Anthony Kurta, his successor, Robert Wilkie, and their deputy, Lernes Hebert). There is no evidence that the 16 other Panel members even saw the DoD Report before it was issued.

"Mattis Policy." (*See* Memo. Ex. C at nn. 26, 67, 72, 88–89; [redacted]

[redacted]

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

Throughout this proceeding, Defendants have taken the position that Plaintiffs are not entitled to *any* discovery concerning the "Mattis Policy" beyond a so-called "administrative record" that Defendants' lawyers prepared after the Panel was disbanded comprised of documents they rely on in support of the Policy. (*E.g.*, Memo. at 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, [redacted]

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, [redacted]

During that same time, [redacted] 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.

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Respectfully submitted,

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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
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