EXHIBIT 25

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

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

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

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

Thank you, sir. This is most helpful.

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

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

Thank you again for your help.

Best,
Will

William G. Bushman

Office of the Secretary of Defense

Office: 703.571.8935

Cell: 703.216.5782

NIPR: william.bushman@sd.mil

SIPR: william.bushman@sd.smil.mil

JWICS: william.bushman@sd.ic.gov

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

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

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

Dr. McHugh,

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

Thanks,

Will Bushman

William G. Bushman

Office of the Secretary of Defense

Office: 703.571.8935

Cell: 703.216.5782

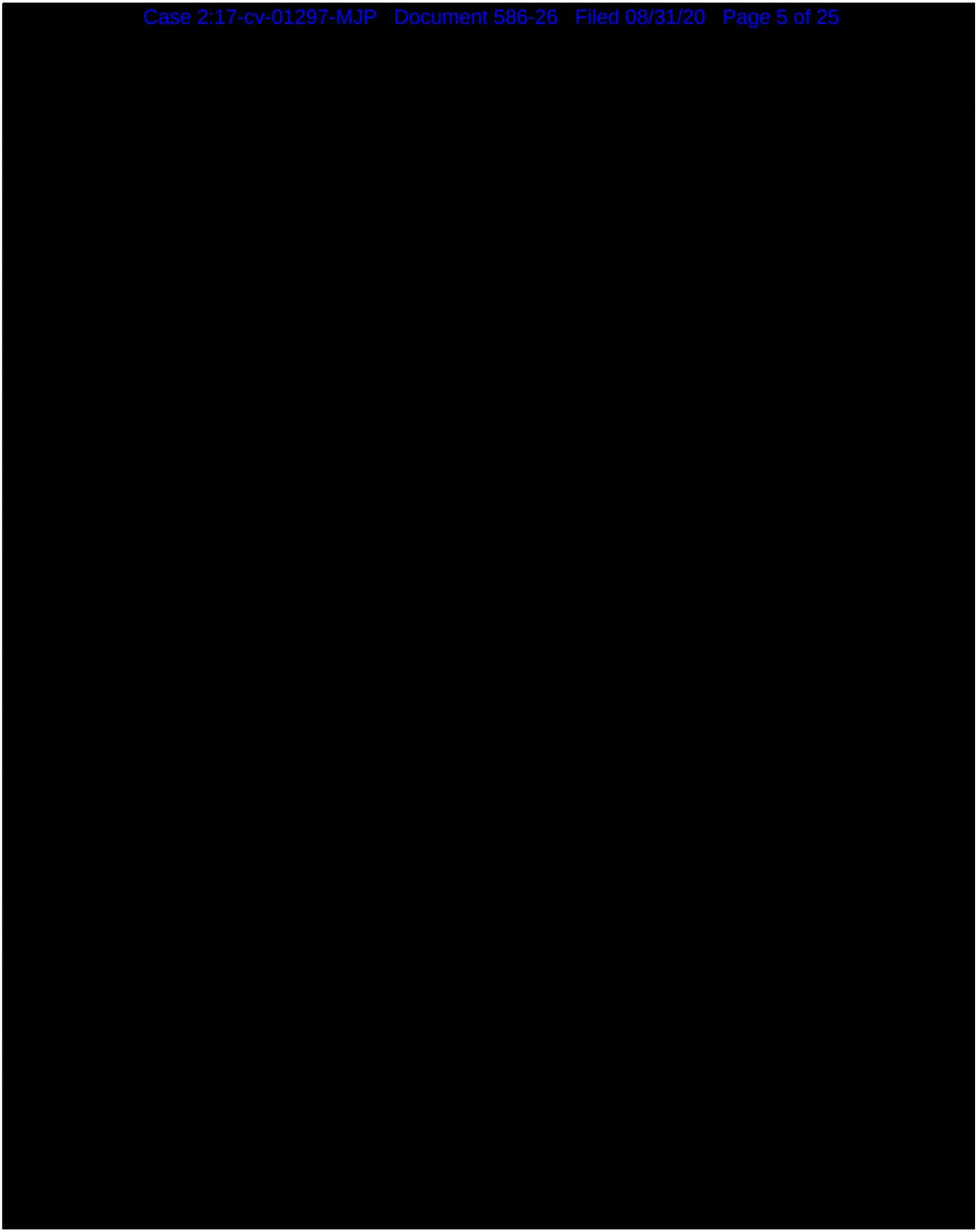
NIPR: william.bushman@sd.mil

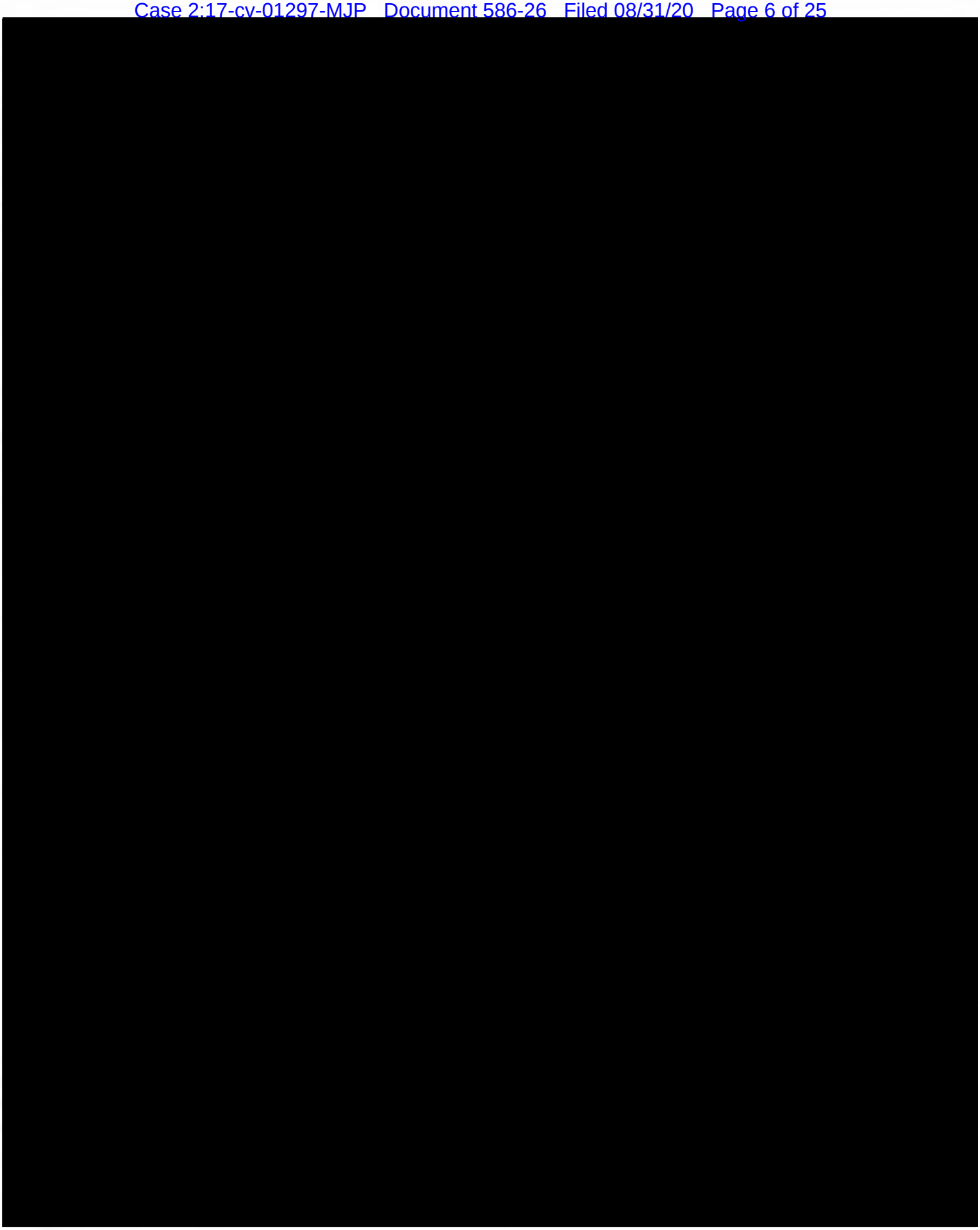
SIPR: william.bushman@sd.smil.mil

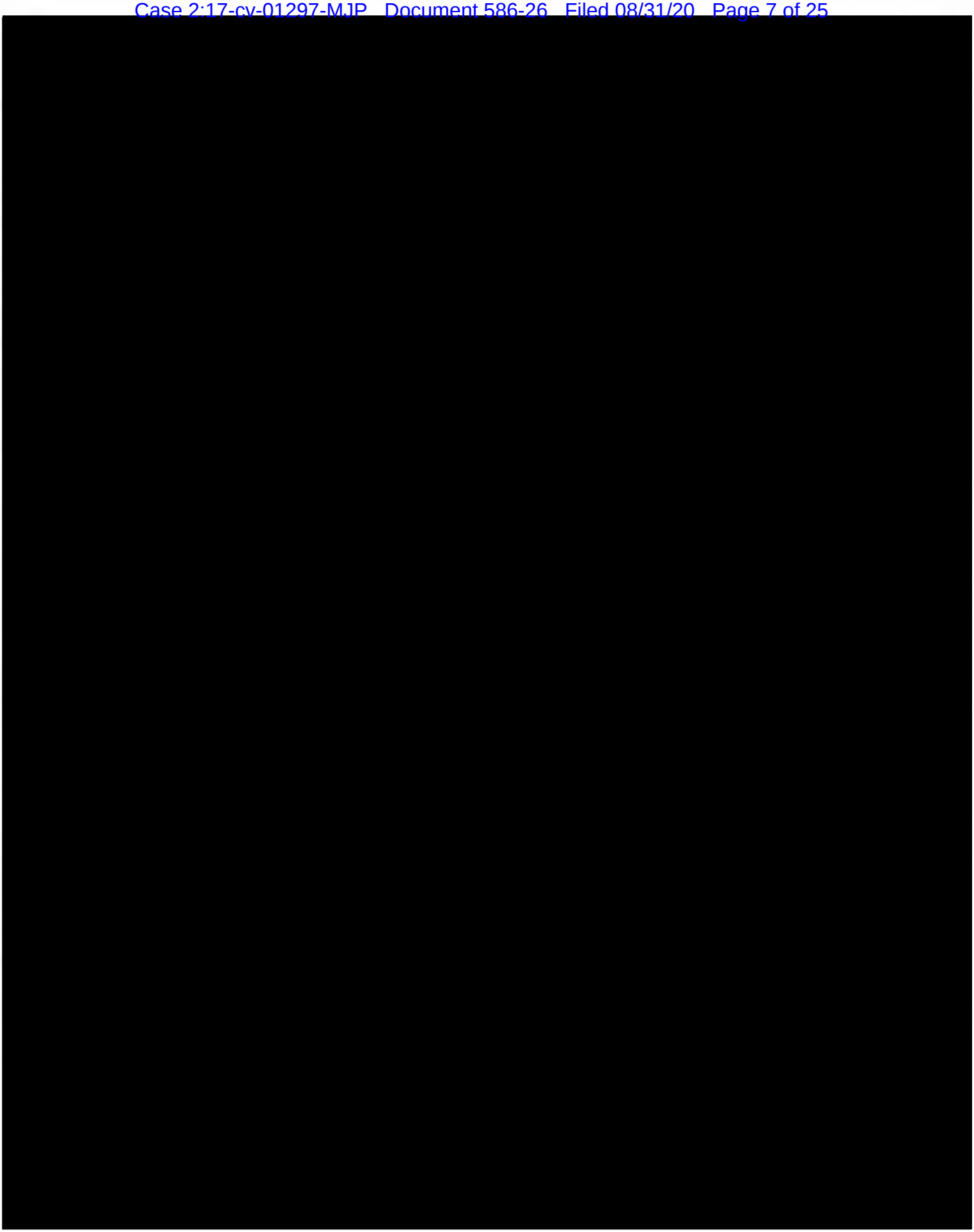
JWICS: william.bushman@sd.ic.gov

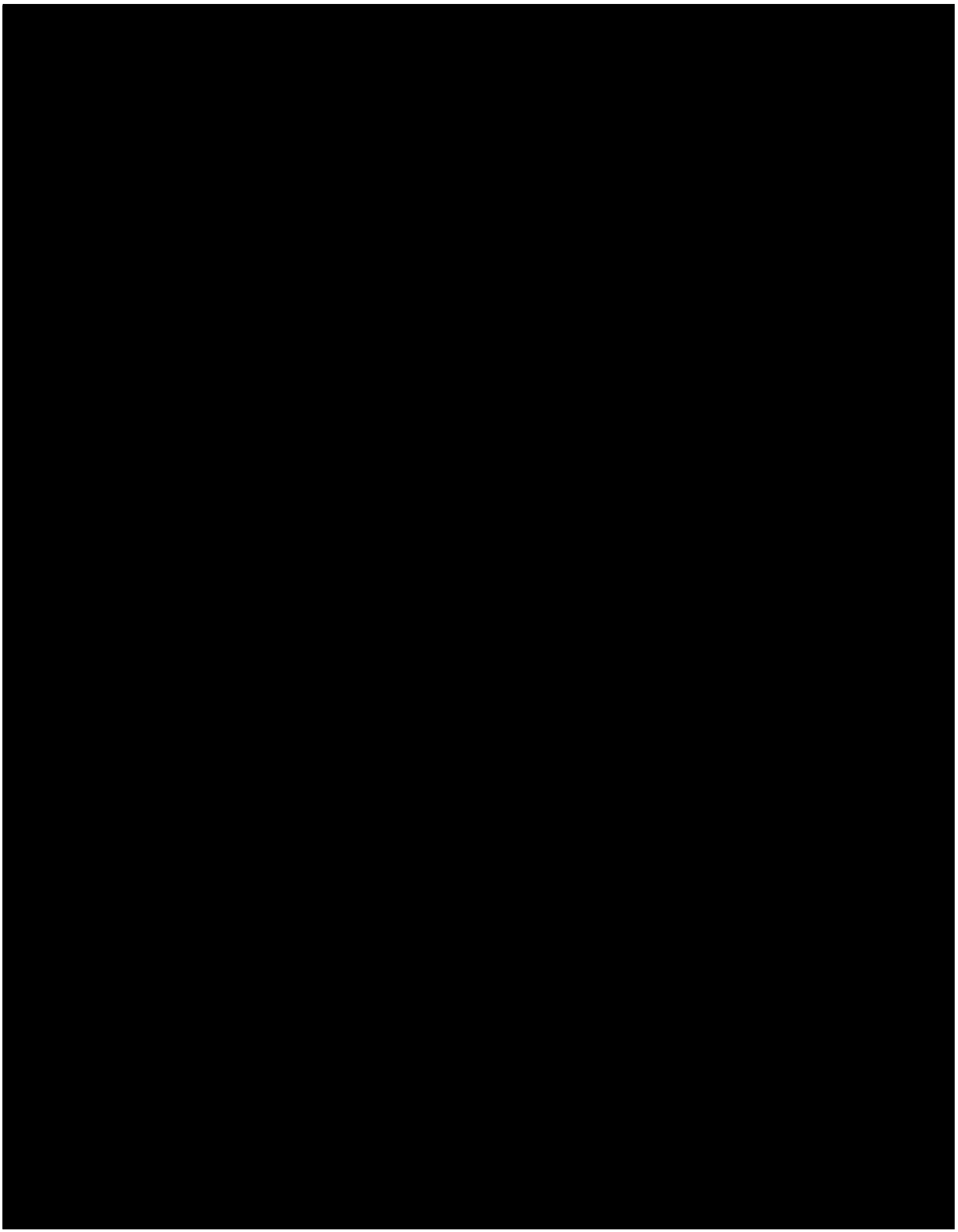
From: Paul McHugh [mailto:pmchugh1@jhmi.edu]
Sent: Monday, February 5, 2018 2:51 PM
To: Bushman, William CIV SD <William.Bushman@sd.mil>
Subject: attachments

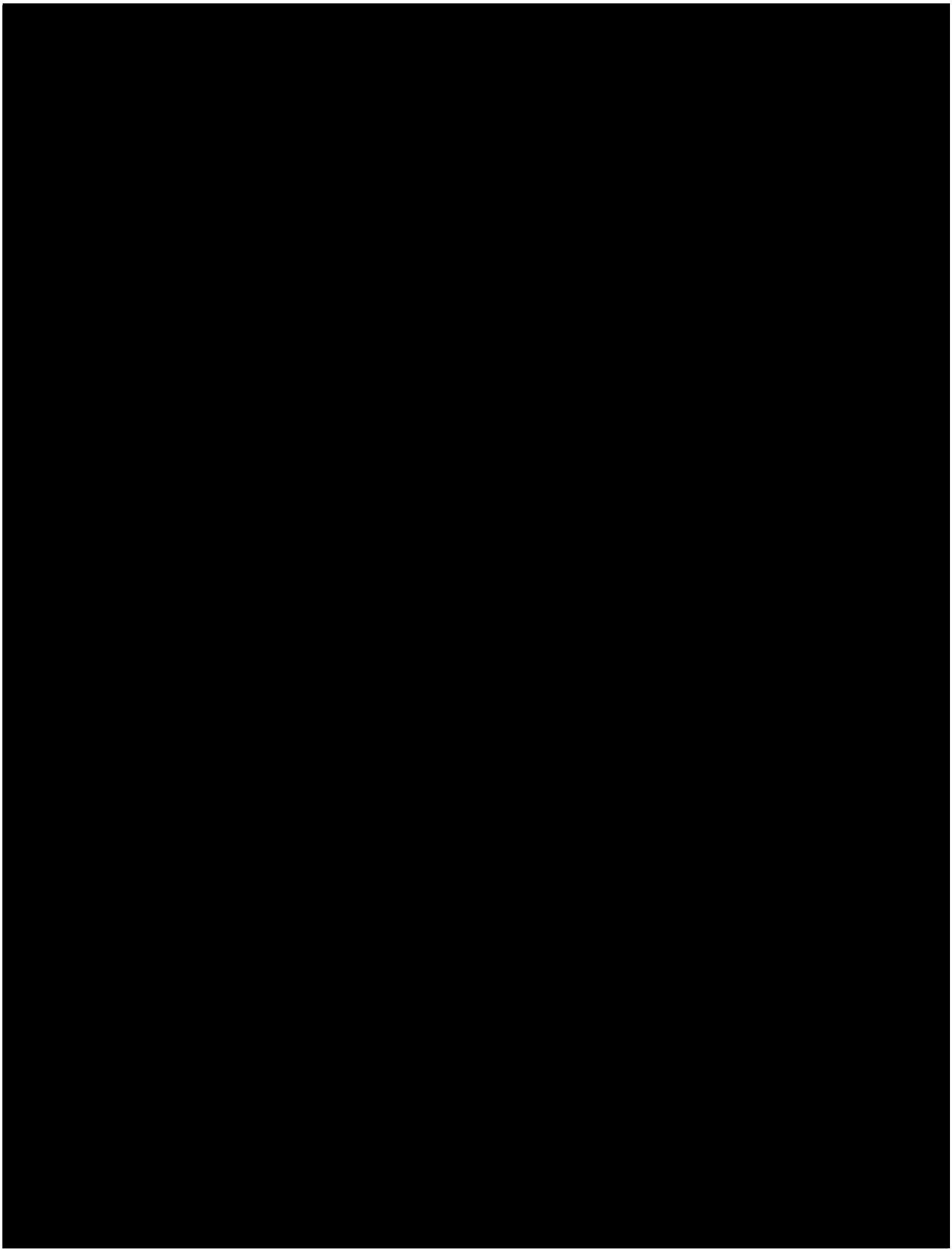
Mr. Bushman, I mentioned these several articles in our conversation The Hayes Directory on evidence for sex reassignment surgery and other medical treatments , The long term follow-up from Sweden for transgender surgery, My article in Nature Medicine in 1995, and our recent article in the New Atlantis.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

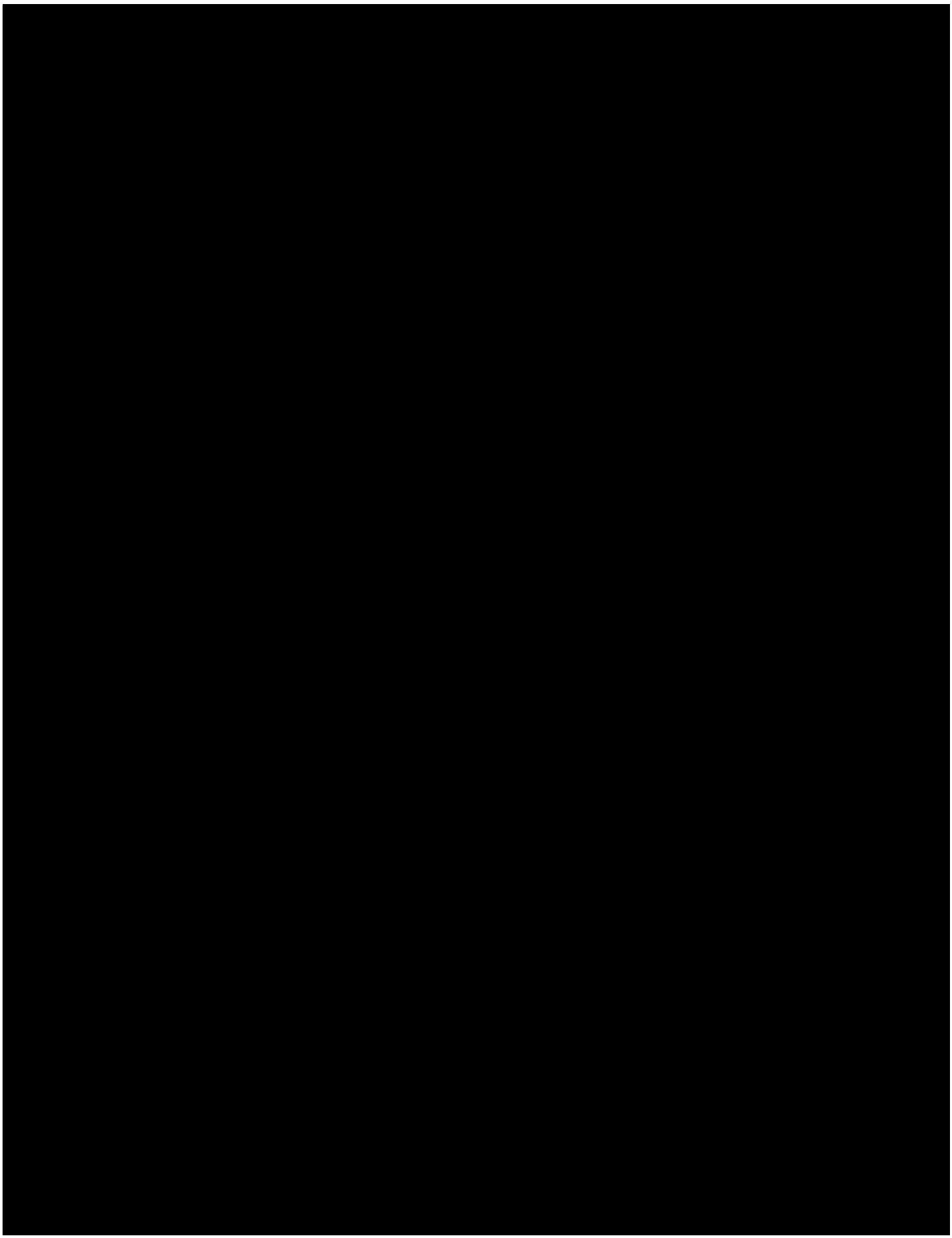


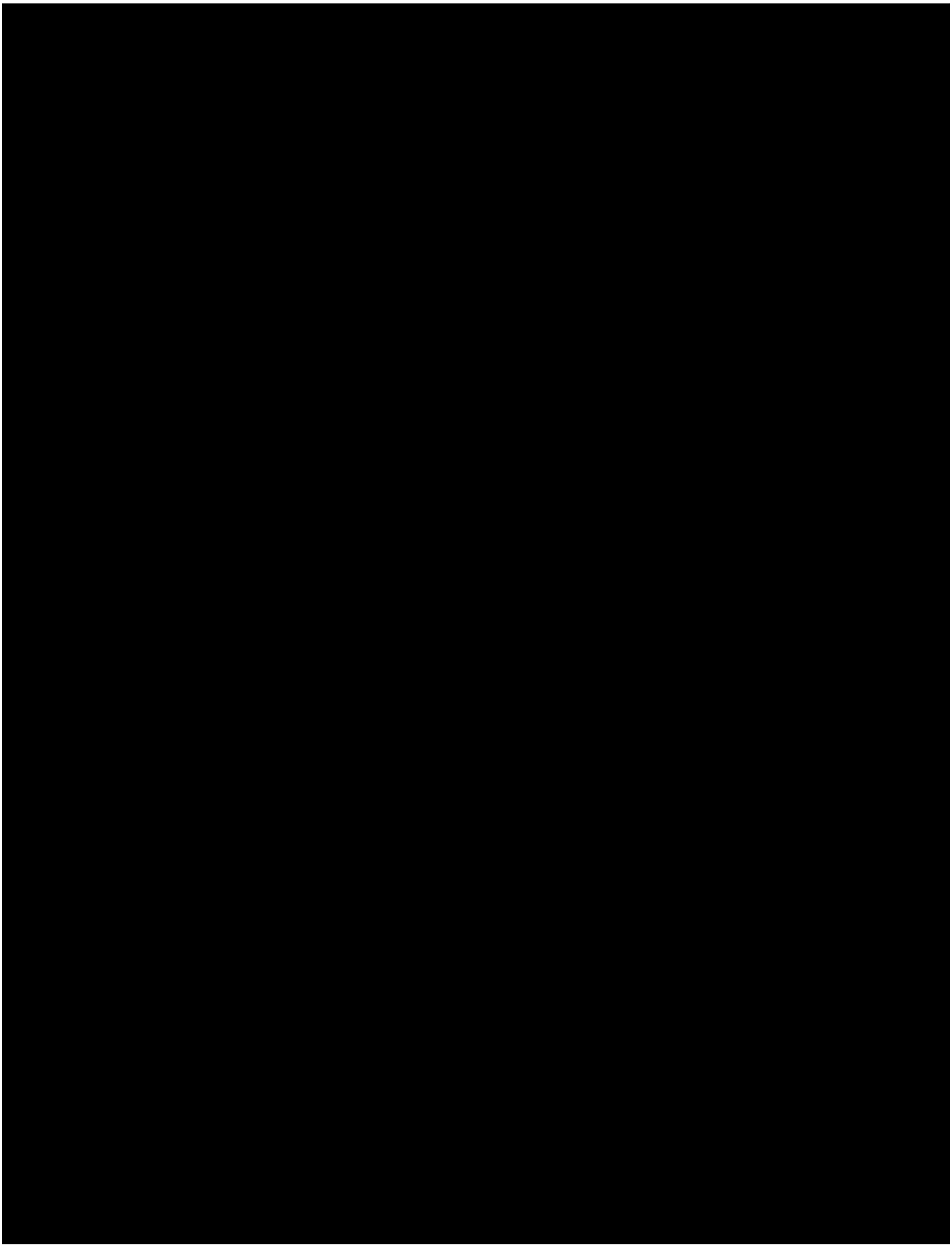


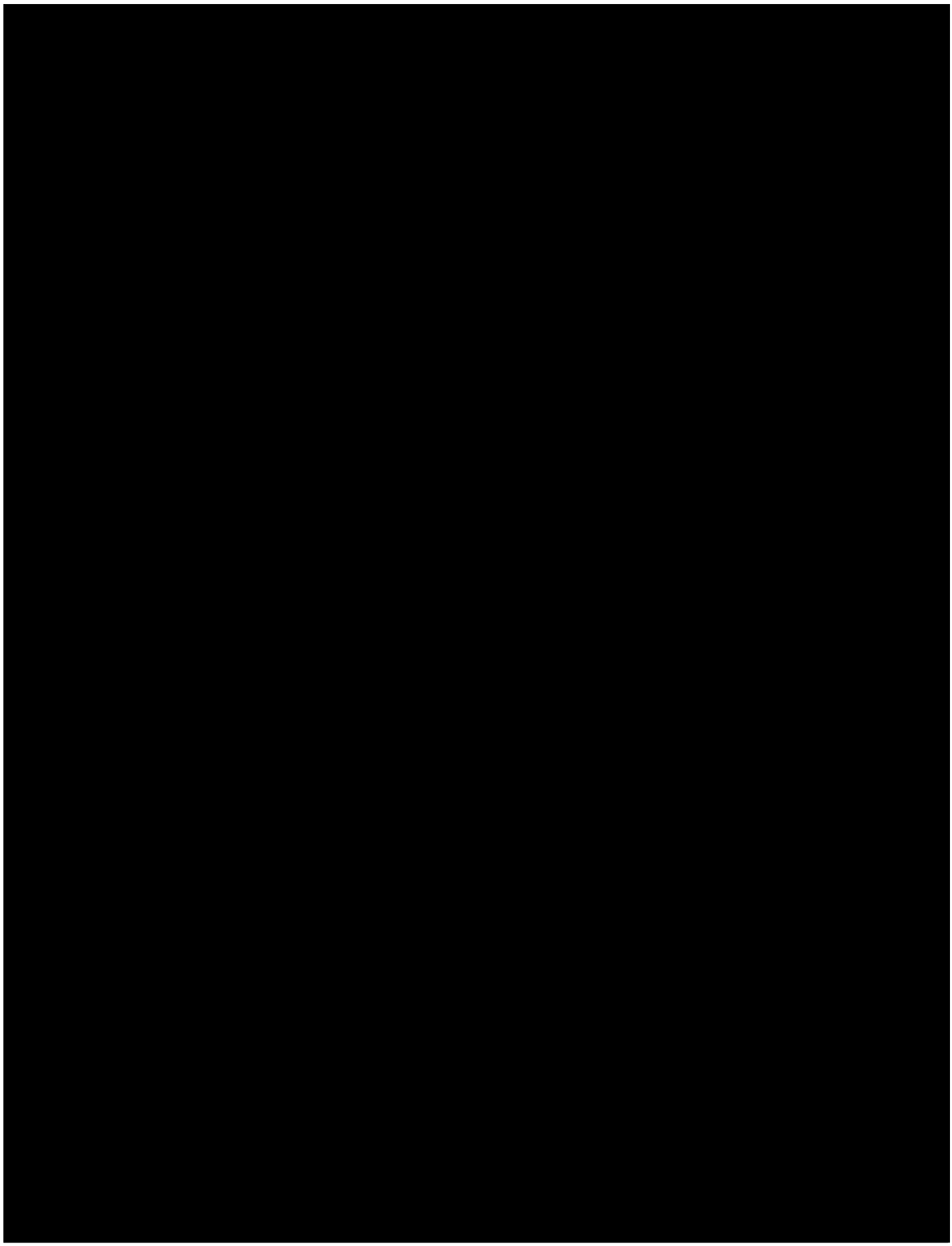


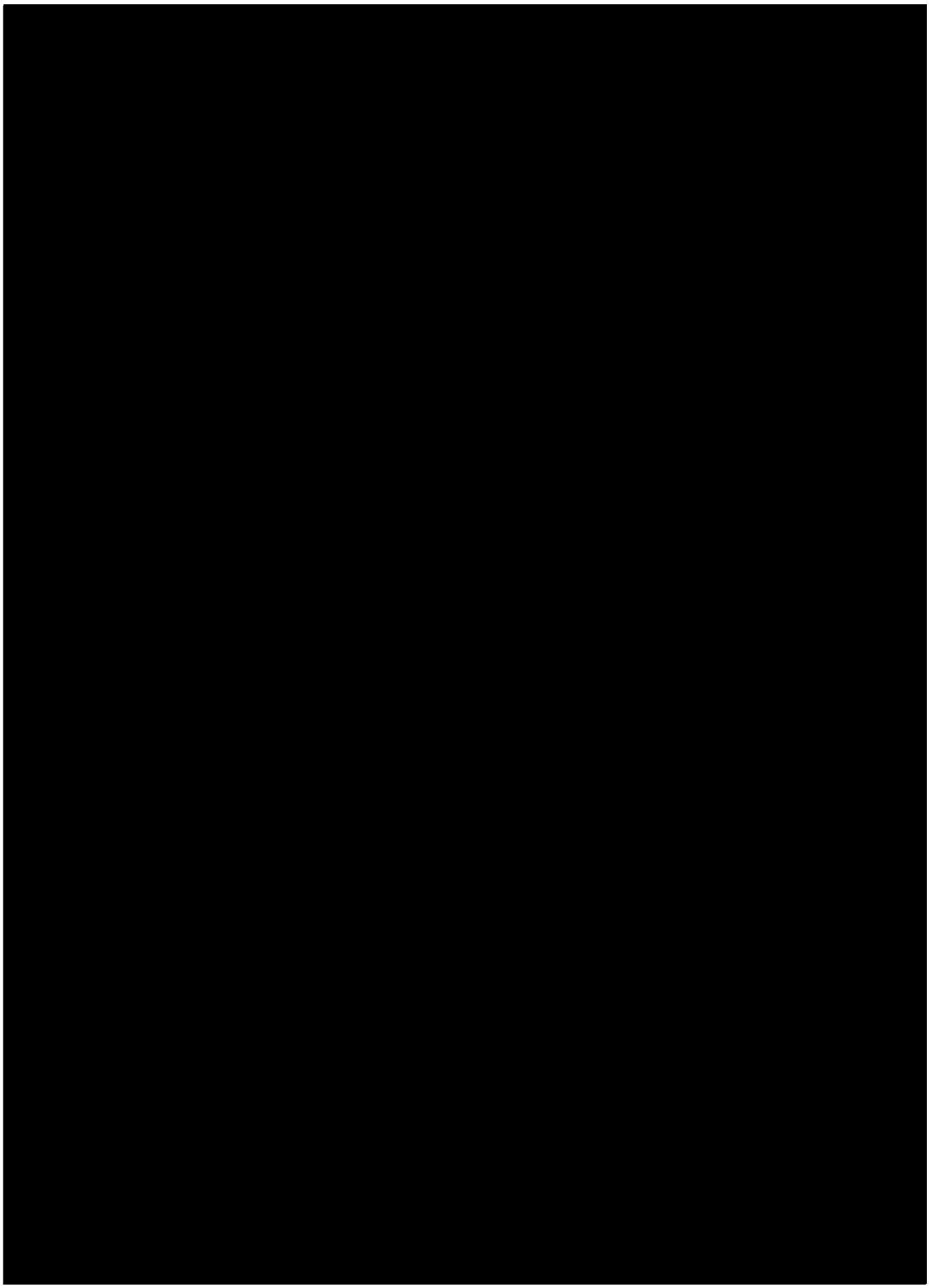


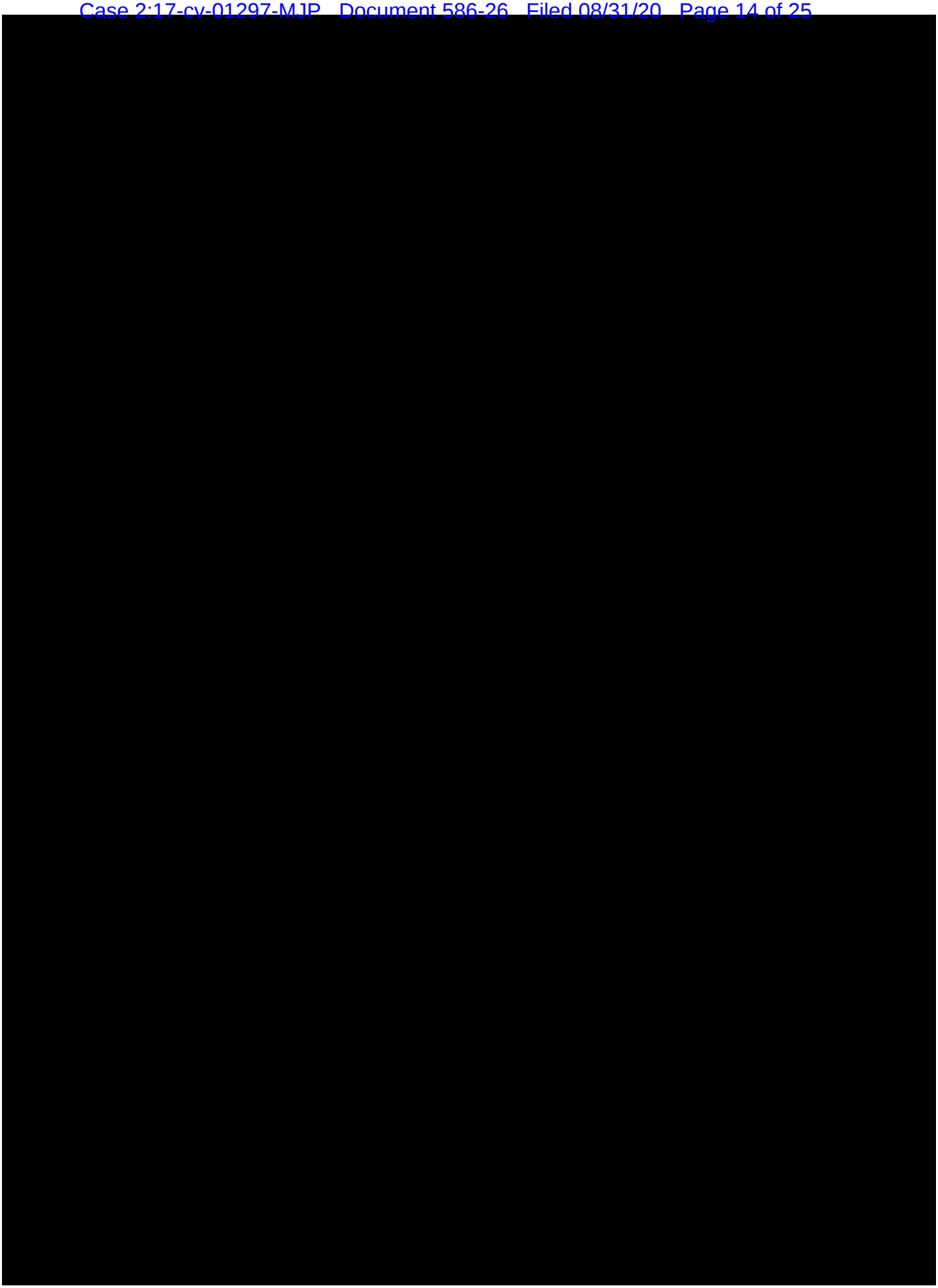


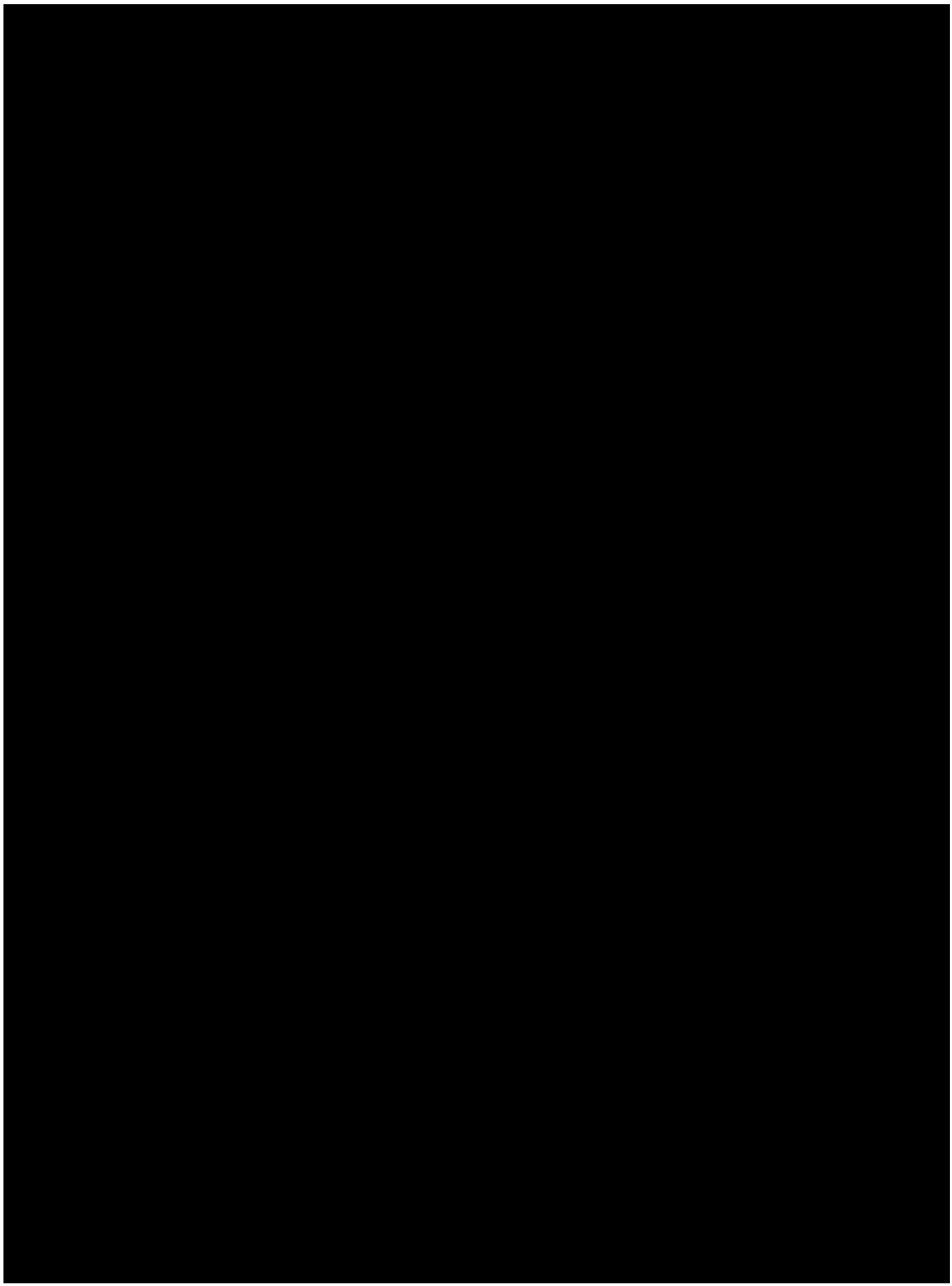


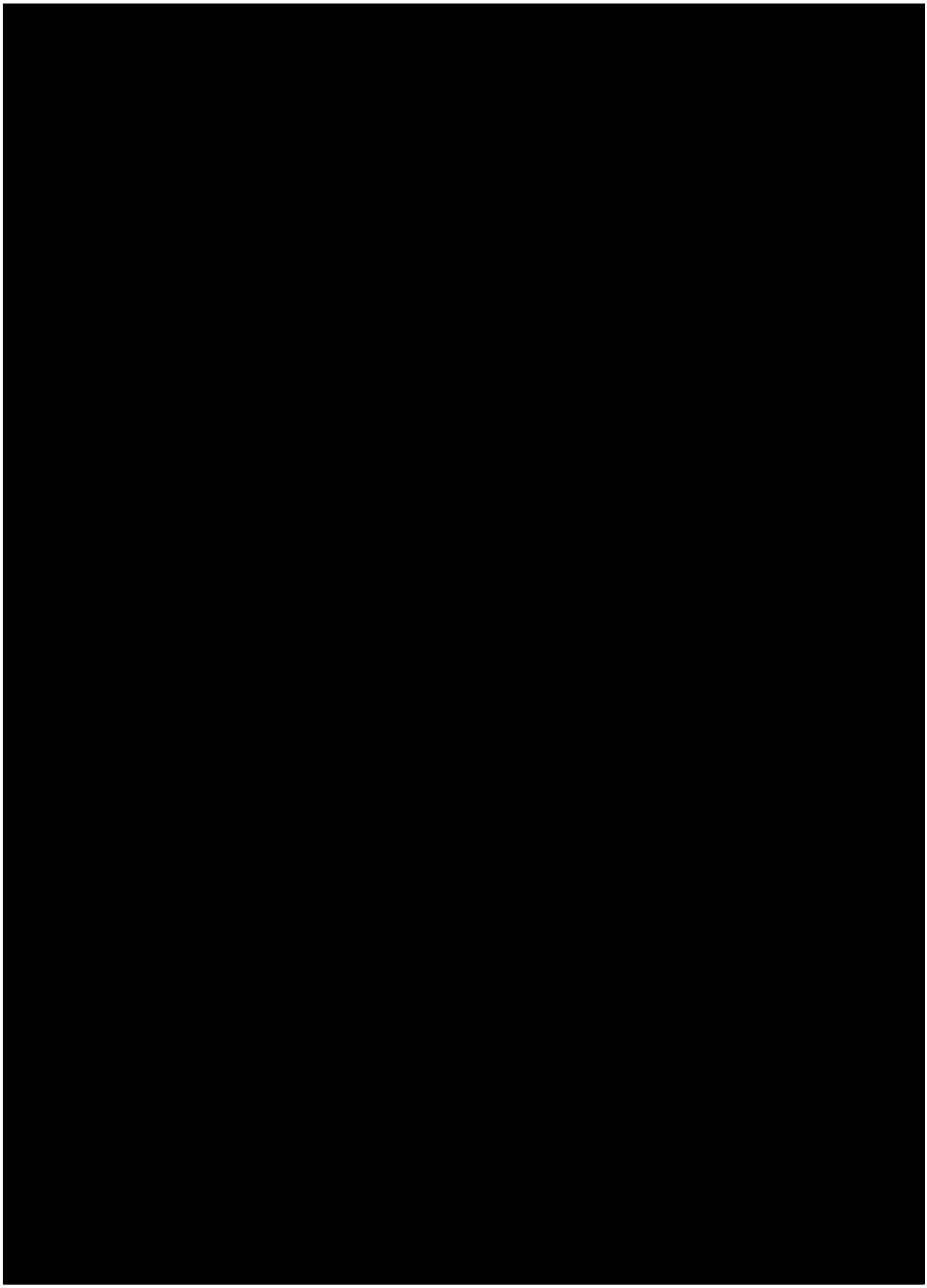


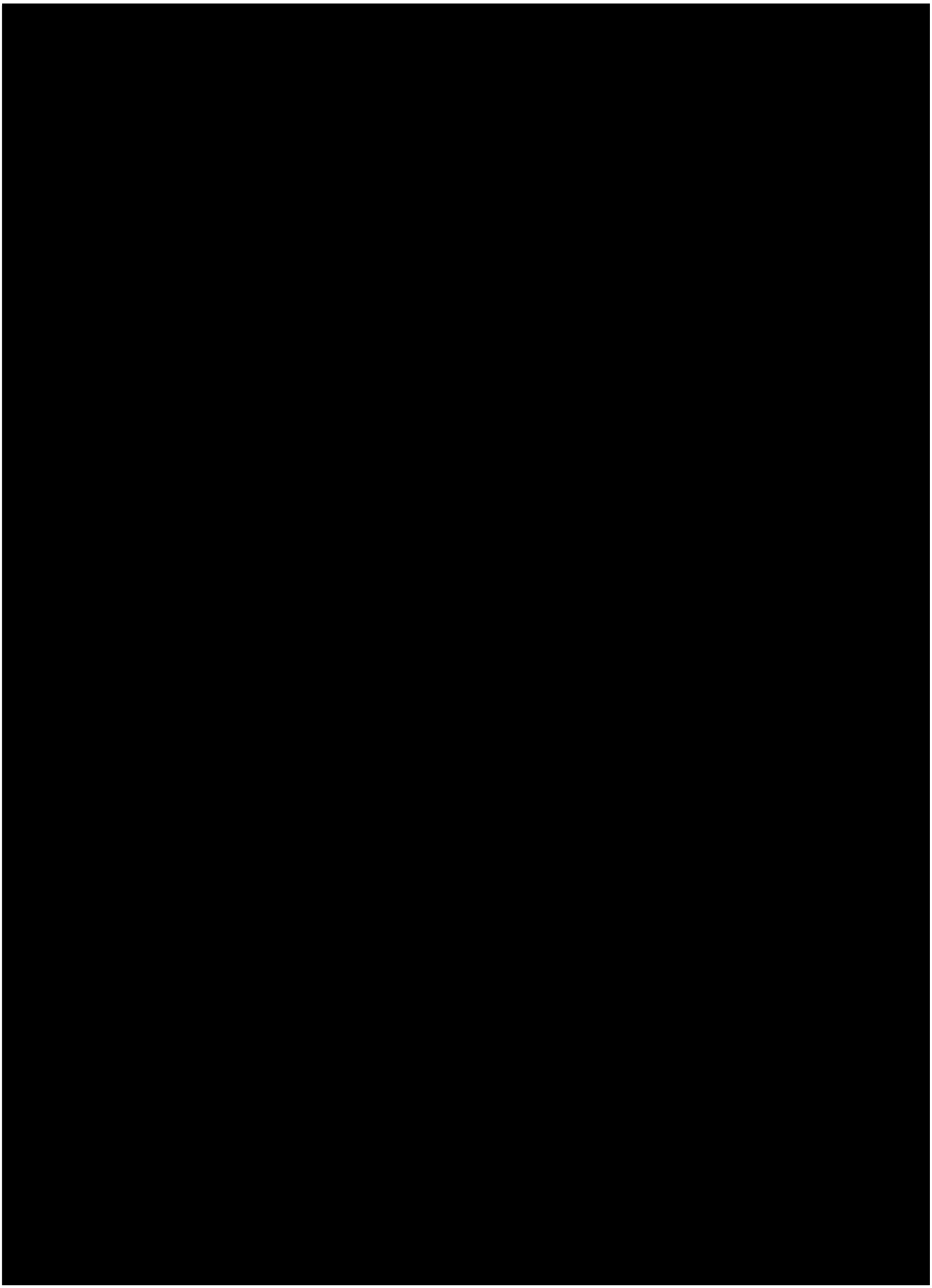


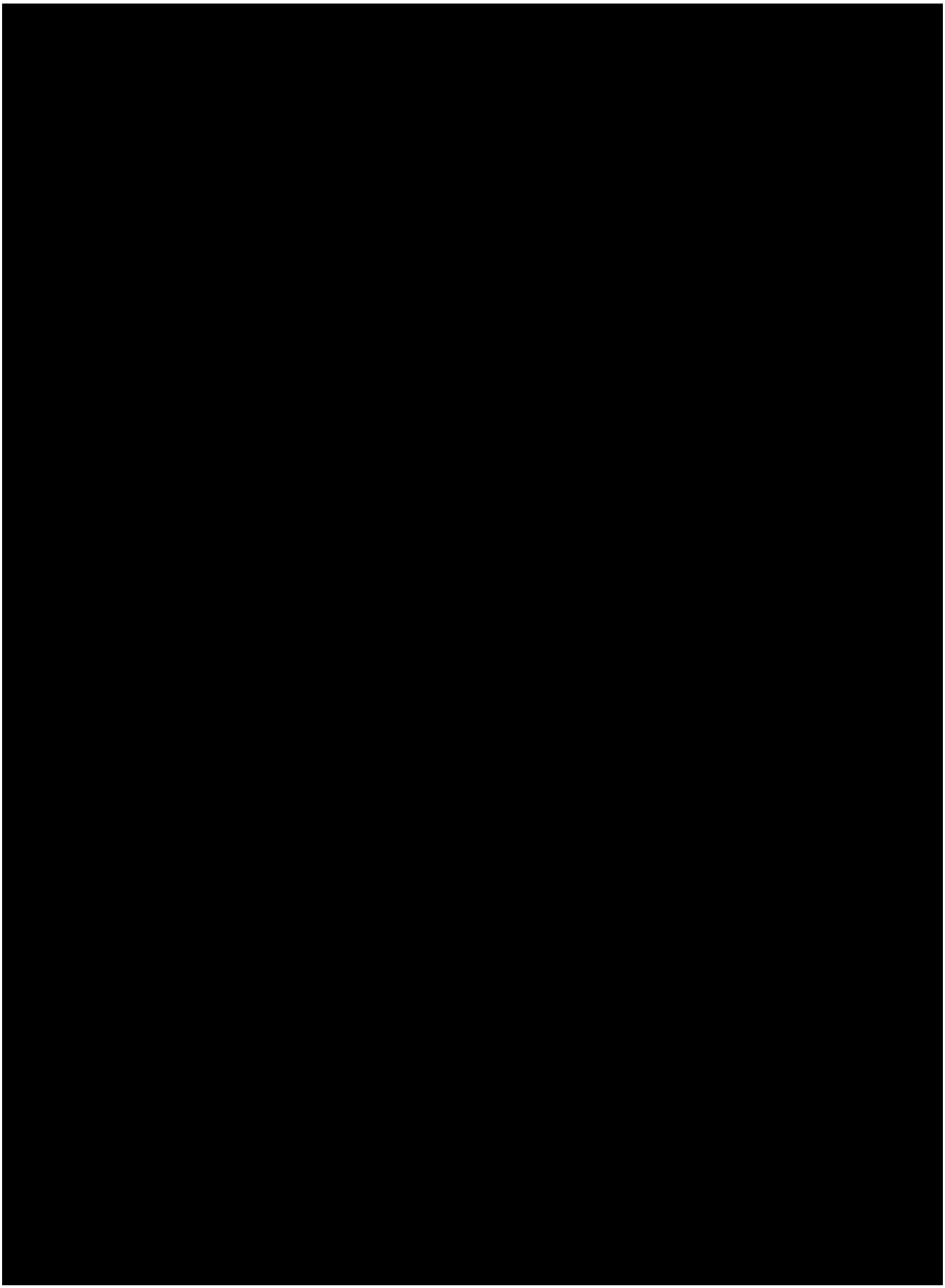


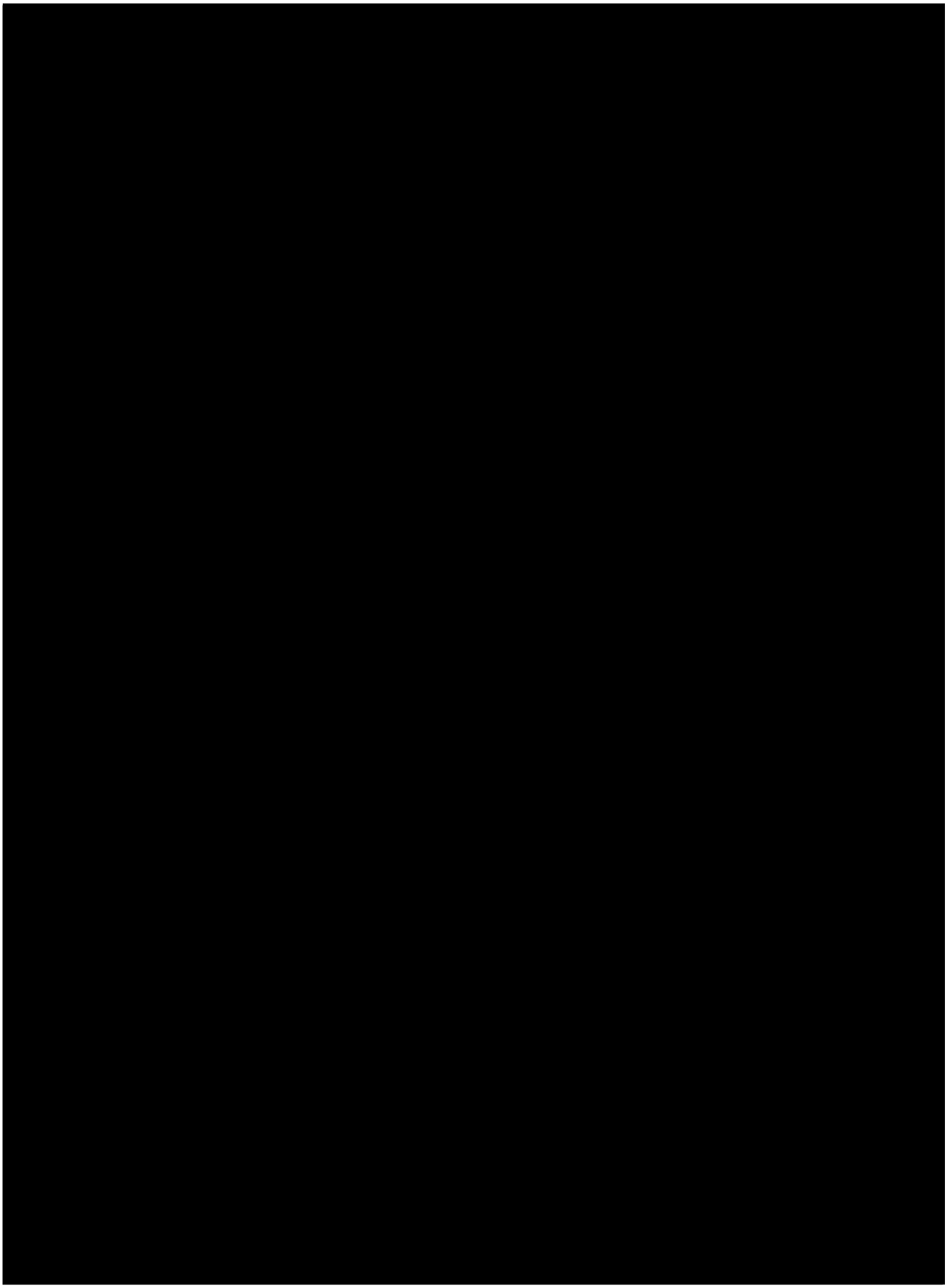


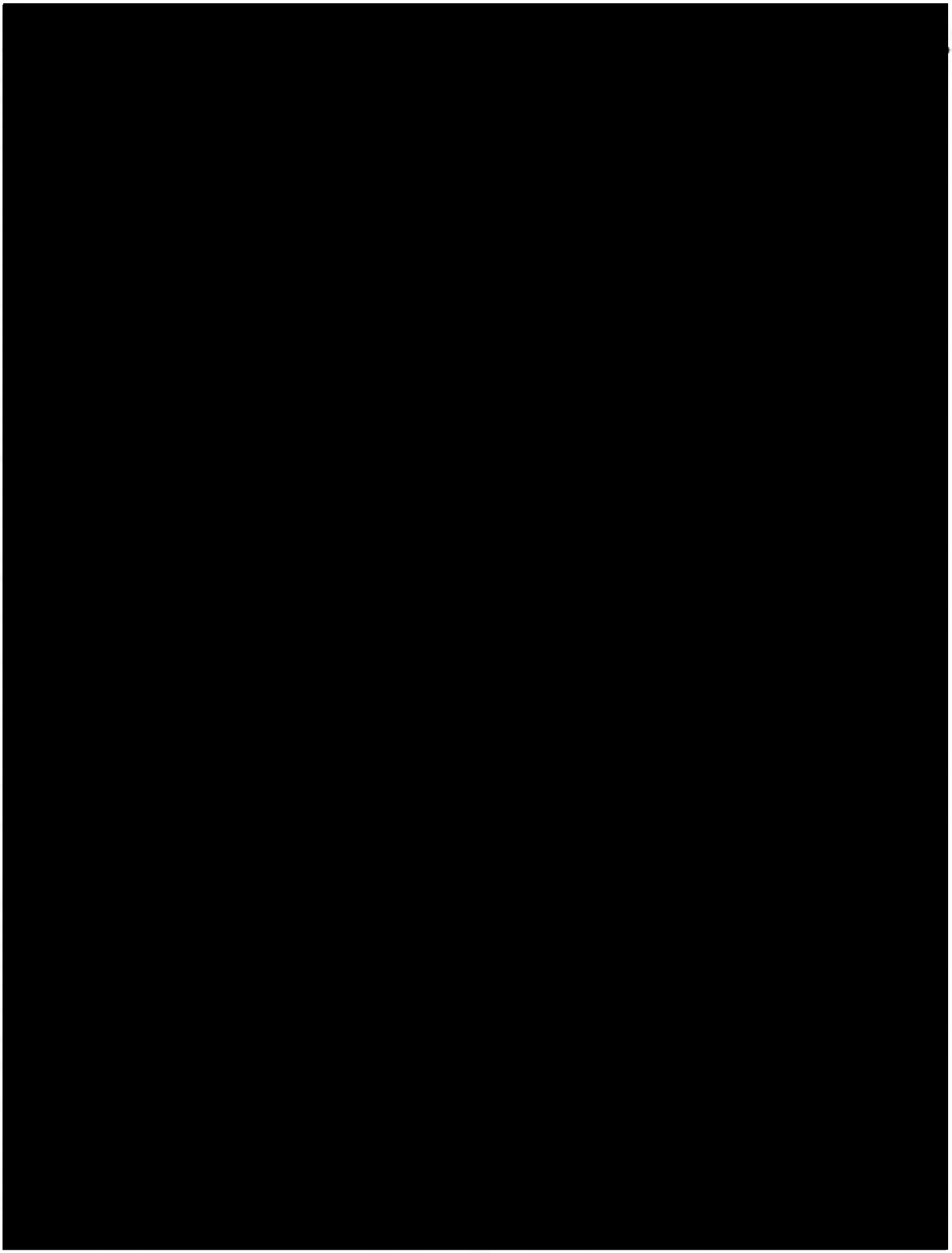


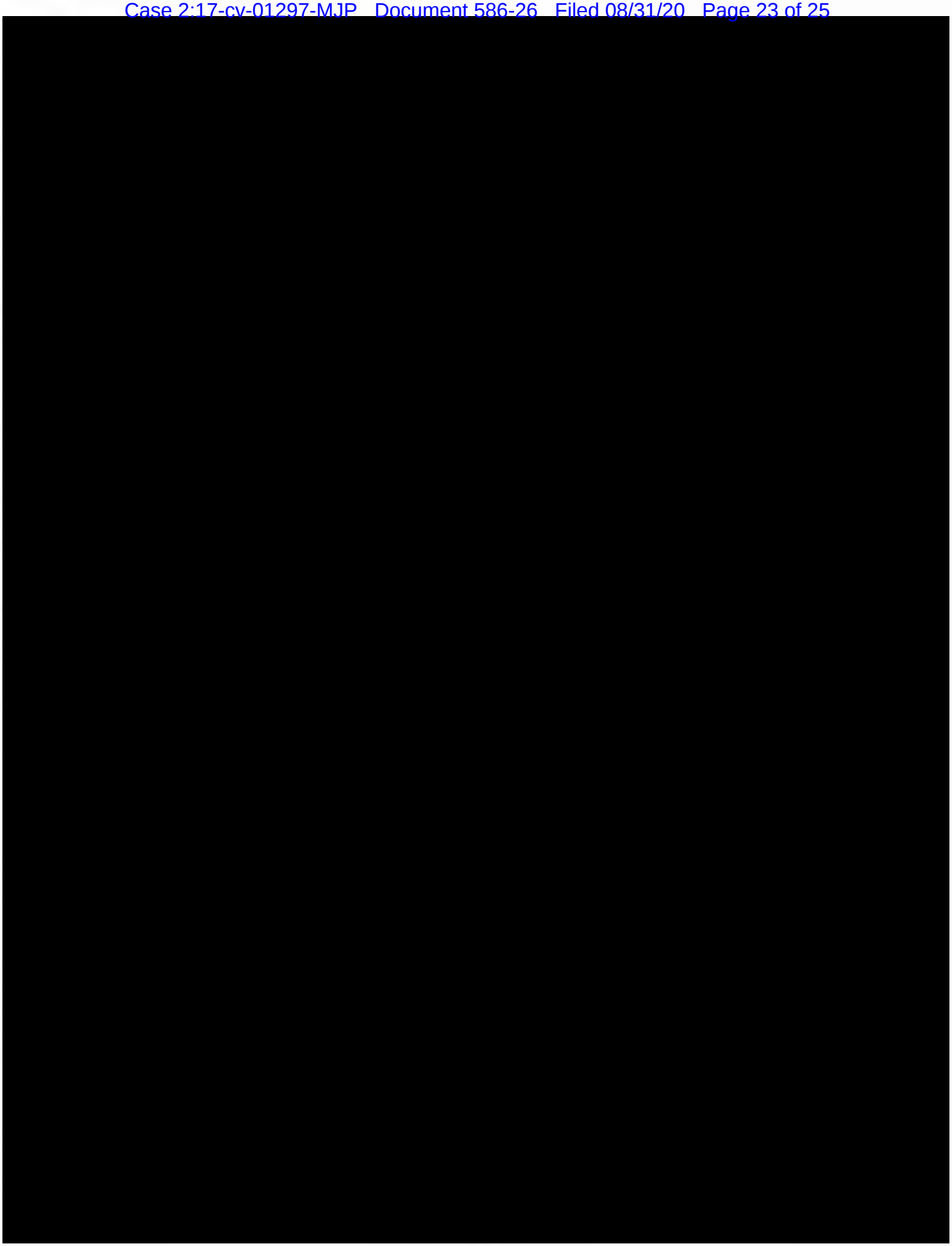


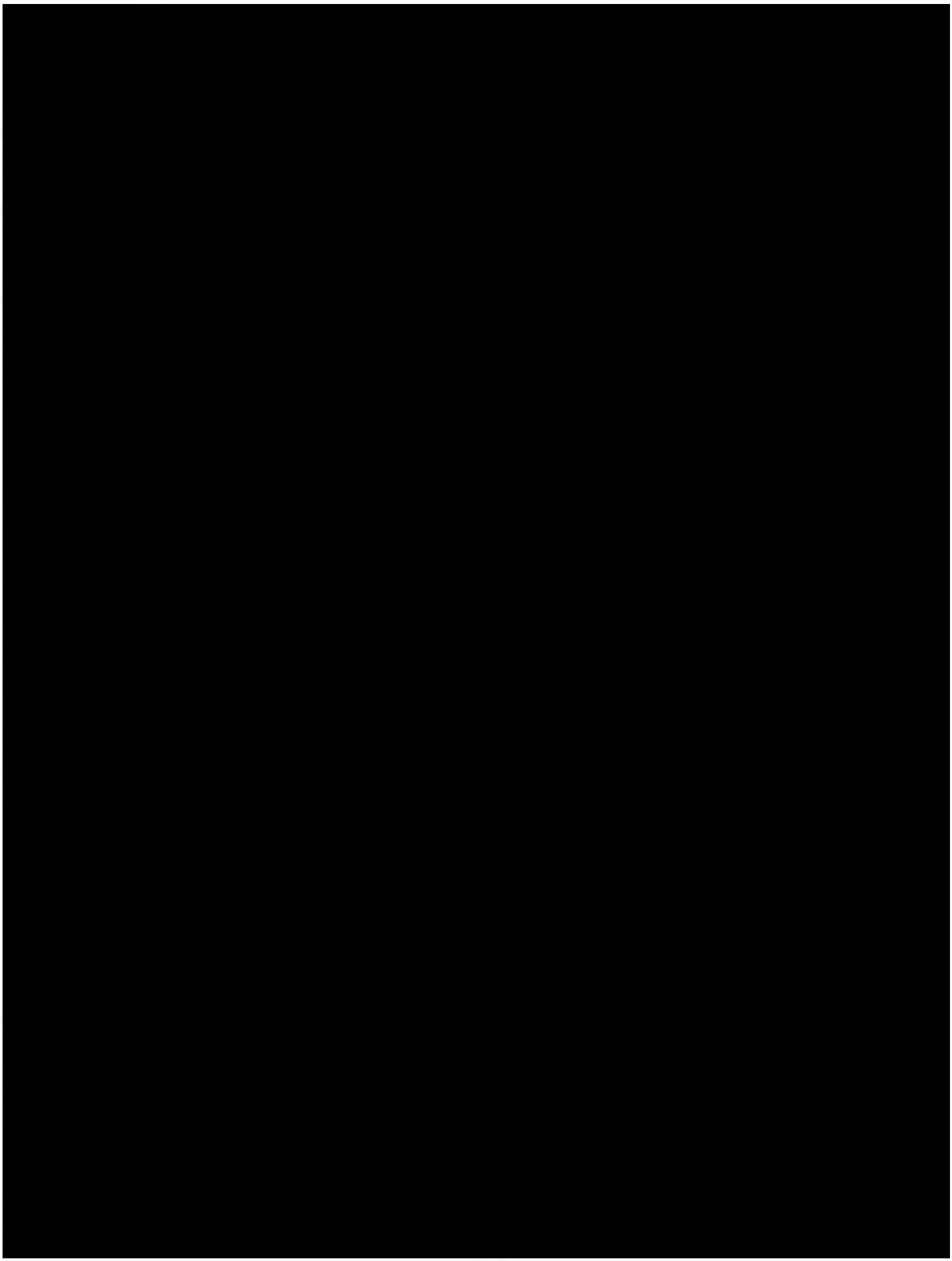












[redacted]

EXHIBIT 26

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

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

Background

I. Procedural History

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

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

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

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

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

II. The Requested Discovery

Throughout this litigation, Plaintiffs have sought discovery regarding:

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

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

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

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

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

Discussion

I. Trump v. Hawaii

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

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

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

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

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

II. Plaintiffs' Motion to Compel

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

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

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

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

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

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

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

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

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

A. Relevance of the Evidence

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

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

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

B. Availability of Other Evidence

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

C. Government's Role in the Litigation

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

D. Extent to Which Disclosure Would Hinder Independent Discussion

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

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

III. Defendants' Motion for Protective Order

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

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

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

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

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

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

Conclusion

The Court ORDERS as follows:

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

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

Dated July 27, 2018.

Marsha J. Pechman
United States District Judge

EXHIBIT 27

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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

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

APPEARANCES:

For the Plaintiff Karnoski:

Jordan Heinz
Kirkland & Ellis
300 North Lasalle
Chicago, IL 60654

Jason Sykes
Rachel Horvitz
Newman & DuWors LLP
2101 Fourth Avenue
Suite 1500
Seattle, WA 98121

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

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

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

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

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

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

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

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

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

THE COURT: Okay. Thank you.

MR. HEINZ: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. CARMICHAEL: All right.

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

MR. HEINZ: Just one follow-up question.

THE COURT: Yeah.

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

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

MR. HEINZ: Okay.

THE COURT: Okay?

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

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

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

MR. HEINZ: Understood.

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

We'll be at recess.

(Recess.)

C E R T I F I C A T E

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

/s/ Debbie Zurn

DEBBIE ZURN
COURT REPORTER

EXHIBIT 28

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

DONALD J TRUMP et al.,

Defendants.

CASE NO. C17-1297 MJP

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

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

Background

I. Requested Discovery

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

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

II. Procedural History

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

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

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

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

III. Doe Opinion

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

Discussion

I. Legal Standards

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

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

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

II. Privilege Assessment

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

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

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

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

Conclusion

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

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

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

Dated November 19, 2019.

Marsha J. Pechman
United States District Judge

EXHIBIT 29

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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

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

APPEARANCES:

For the Plaintiff Karnoski:

Jordan Heinz
Sam Ikard
Daniel I. Siegfried
Kirkland & Ellis
300 North Lasalle
Chicago, IL 60654

Jason Sykes
Rachel Horvitz
Newman & DuWors LLP
2101 Fourth Avenue
Suite 1500

For the Plaintiff Intervenor, State of Washington,	Seattle, WA 98121 Chalia Stallings-Ala'ilima Attorney General's Office 800 5th Avenue Suite 2000 Seattle, WA 98104
For the Defendants:	Andrew Carmichael Matthew Skurnik US Department of Justice 1100 L. Street NW Suite 12108 Washington, DC 20530

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

MR. HEINZ: Jordan Heinz for the plaintiffs.

MR. SIEGFRIED: Dan Siegfried for the plaintiffs.

MR. IKARD: Sam Ikard for the plaintiffs.

THE COURT: Can you speak up, please?

MR. IKARD: Sam Ikard for the plaintiffs.

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

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

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

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

MR. SKURNIK: Matthew Skurnik for the defendants.

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

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

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

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

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

MR. CARMICHAEL: I do, Your Honor.

THE COURT: Okay.

MR. CARMICHAEL: From the defendants.

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

the most important meetings.

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

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

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

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

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

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

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

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

THE COURT: How many people are we talking about?

MR. CARMICHAEL: There's 156 custodians.

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

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

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

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

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

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

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

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

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

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

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

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

MR. CARMICHAEL: Yes. Yes, Your Honor.

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

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

Deputy Undersecretary.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

MR. CARMICHAEL: Of --

THE COURT: Is there any other category?

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

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

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

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

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

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

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

THE COURT: Okay.

MR. CARMICHAEL: And that it would be more relevant

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

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

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

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

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

THE COURT: Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HEINZ: Yes.

THE COURT: Okay.

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

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

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

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

MR. HEINZ: You have.

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

done in these working groups.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

MR. CARMICHAEL: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

MR. CARMICHAEL: Yes.

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

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

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

MR. CARMICHAEL: Yes.

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

MR. CARMICHAEL: Yes.

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

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

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

MR. CARMICHAEL: Our intent is to provide everything

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

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

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

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

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

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

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

MR. CARMICHAEL: Okay.

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

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

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

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

development of the report.

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

Explain to me these two lines that you just referenced.

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

MR. CARMICHAEL: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. CARMICHAEL: But how does the need for drafts

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

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

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

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

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

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

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

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

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

MR. HEINZ: Drafting the report.

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

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

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

The other one should be fairly quick, I think.

THE COURT: Okay. Tell me about 15.

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

transgender individuals could serve.

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

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

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

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

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

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

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

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

MR. SIEGFRIED: Thank you.

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

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

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

THE COURT: Sure.

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

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

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

THE COURT: Okay. What's next?

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

MR. CARMICHAEL: Still doing it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay. Moving right along.

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

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

MR. HEINZ: I would think so, yeah.

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

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

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

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

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

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

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

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

MR. CARMICHAEL: Yes, Your Honor.

THE COURT: Okay. All right. Anything else?

MR. HEINZ: No, Your Honor.

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

THE CLERK: January 24th is a Friday.

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

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

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

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

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

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

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

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

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

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

MR. HEINZ: And I think we have protective orders

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

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

MR. HEINZ: Understood.

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

THE COURT: Remind me what your trial date is.

MR. SYKES: What is our trial date?

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

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

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

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

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

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

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

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

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

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

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

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

MR. HEINZ: It sure does.

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

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

MR. SIEGFRIED: No, Your Honor.

THE COURT: Are you coming from DC?

MR. HEINZ: Chicago.

MR. SIEGFRIED: Chicago.

MR. CARMICHAEL: We're DC.

MR. SKURNIK: We're DC.

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

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

MR. HEINZ: Understood.

THE COURT: Okay. Have a nice holiday.

(Recess.)

C E R T I F I C A T E

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

/s/ Debbie Zurn

DEBBIE ZURN
COURT REPORTER

EXHIBIT 30

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

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

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Background

I. Requested Discovery

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

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

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II. Procedural History

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

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

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Discussion

I. Legal Standard

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

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

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

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

II. Requests for Production

A. Request No. 29

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

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

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

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

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

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

2019 WL 4394842, at *9.

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

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

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

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

Conclusion

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

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

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

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

Dated December 18, 2019.

Marsha J. Pechman
United States District Judge

EXHIBIT 32

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Complete caption on Page 2.

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Thursday, February 1, 2018

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

identification.)

BY MS. LAPORTE:

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

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

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

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

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

A. Correct.

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

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

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

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

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

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

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

BY MS. LAPORTE:

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

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

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

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

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

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

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

A. No, ma'am.

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

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

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

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

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

BY MS. LAPORTE:

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

A. Yes.

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

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

identification.)

BY MS. LAPORTE:

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

A. Yes, ma'am.

Q. Can you identify this document?

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

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

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

Q. Mr. Work?

A. Okay.

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

A. Yes, ma'am.

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

(The witness reviewed Exhibit 13.)

THE WITNESS: Yes, ma'am.

BY MS. LAPORTE:

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

A. Correct.

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

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

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

I would direct you not to answer that portion.

BY MS. LAPORTE:

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

What kinds of support did you provide?

A. Again, there were several meetings that

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

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

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

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

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

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

were referring?

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

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

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

Q. Is that because you don't know?

A. It was never really defined.

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

A. I did.

Q. And what was it?

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

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

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

meant.

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

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

I won't instruct her not to answer.

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

BY MS. LAPORTE:

Q. A recommendation by you?

A. No, ma'am.

(Deposition Exhibit 34 was marked for identification.)

BY MS. LAPORTE:

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

A. Yes, ma'am.

Q. Okay. Great.

This document is entitled "Data Extracts,

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

A. Yes, ma'am.

Q. Do you know who provided this data?

A. No, ma'am.

Q. Did you help put it together?

A. No, ma'am.

Q. Have you ever seen this document before?

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

Q. You have seen it before?

A. Yes, ma'am.

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

A. No, ma'am.

Q. Did you supply any of the data?

A. No, ma'am.

Q. Do you know who did put it together?

A. Yes, ma'am.

Q. Who?

A. Dr. Adirim and Dr. Findley.

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

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

EXHIBIT 32

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

BY MS. LAPORTE:

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

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

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

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

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

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

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

A. No, ma'am.

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

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

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

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

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

BY MS. LAPORTE:

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

A. Yes.

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

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

identification.)

BY MS. LAPORTE:

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

A. Yes, ma'am.

Q. Can you identify this document?

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

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

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

Q. Mr. Work?

A. Okay.

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

A. Yes, ma'am.

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

(The witness reviewed Exhibit 13.)

THE WITNESS: Yes, ma'am.

BY MS. LAPORTE:

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

A. Correct.

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

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

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

I would direct you not to answer that portion.

BY MS. LAPORTE:

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

What kinds of support did you provide?

A. Again, there were several meetings that

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

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

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

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

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

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

were referring?

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

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

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

Q. Is that because you don't know?

A. It was never really defined.

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

A. I did.

Q. And what was it?

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

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

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

meant.

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

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

I won't instruct her not to answer.

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

BY MS. LAPORTE:

Q. A recommendation by you?

A. No, ma'am.

(Deposition Exhibit 34 was marked for identification.)

BY MS. LAPORTE:

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

A. Yes, ma'am.

Q. Okay. Great.

This document is entitled "Data Extracts,

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

A. Yes, ma'am.

Q. Do you know who provided this data?

A. No, ma'am.

Q. Did you help put it together?

A. No, ma'am.

Q. Have you ever seen this document before?

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

Q. You have seen it before?

A. Yes, ma'am.

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

A. No, ma'am.

Q. Did you supply any of the data?

A. No, ma'am.

Q. Do you know who did put it together?

A. Yes, ma'am.

Q. Who?

A. Dr. Adirim and Dr. Findley.

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

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

EXHIBIT 33

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Complete caption on Page 2.

Tuesday, April 17, 2018

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

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

Q. Do you know what form the deliverables took?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Factual information you can answer, but nothing deliberative.

THE WITNESS: Okay. All right.

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

BY MS. LAPORTE:

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

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

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

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

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

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

A. Right.

Q. -- Exhibit 48.

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

A. I do see it.

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

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

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

A. No. That's HA level.

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

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

Q. Were you involved in any meetings where that

topic was discussed?

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

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

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

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

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

THE WITNESS: Yes.

BY MS. LAPORTE:

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

A. I don't.

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

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

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

Do you see that?

A. Right.

Q. Did you have any role in that?

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

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

A. Yes.

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

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

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

A. Yes. Uh-huh.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BY MS. LAPORTE:

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

A. No.

Q. Do you know when it occurred?

A. No.

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

THE WITNESS: Okay.

(Previously marked Exhibit 30 was handed to

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

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

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

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

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

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

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

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

Q. What were the working assumptions that you

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

A. I don't recall.

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

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

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

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

MS. LAPORTE: Well, I'm not asking what they ultimately deliberated about that or what they decided, but I am interested and I think we're entitled to understand the contours of what the decision was of what they were being asked to make.

MS. ENLOW: The different courses of action or policies that they considered are predecisional and

deliberative, and therefore, squarely covered by the deliberative process privilege.

MS. LAPORTE: Well, the ones that they did consider, yes, but I'm asking about whether they did not consider certain policies.

MS. ENLOW: That's also deliberative. What they considered necessarily tells you what they didn't consider.

MS. LAPORTE: Okay. So I hear what you're saying and certainly disagree with it. I would also say that I'm concerned about this assertion of deliberative process privilege in the context of a situation where the government is now relying on this process as a justification for the new policy. And so it seems to me that there is either a waiver or we have a need to understand this deliberative process, at least to the very general extent that I am asking in this deposition.

Will you maintain your objection even given the fact that you are relying on the process?

MS. ENLOW: Yes. I maintain the objection that it is deliberative what the panel of experts considered before they got to their final recommendation, yes.

MS. LAPORTE: Well, right now I'm not asking

about the panel of experts. I'm asking about the Transgender Personnel Policy Working Group.

MS. ENLOW: Personnel Policy Working Group fed into the panel of experts. So their work of the subordinates that ultimately lead to the decision is predecisional and deliberative. So yes.

MS. LAPORTE: Okay. So you object to the question.

And can you just read the question again, please.

(Record read.)

MS. ENLOW: I'm instructing you not to answer that question.

THE WITNESS: Okay.

BY MS. LAPORTE:

Q. Are you going to follow that instruction?

A. Yes. Sure. You would want your client to follow your advice too.

Q. Yes. We typically ask that too.

MS. LAPORTE: Okay. Let me figure out what my options are, then, my courses of action in view of that instruction.

Why don't we take five.

(A recess was taken from 11:47 a.m. to 12:16 p.m.)

(Deposition Exhibit 51 was marked for identification.)

BY MS. LAPORTE:

Q. All right. Colonel Krueger, you should have before you Exhibit 51, which should be Bates stamped USDOE109419 through -453.

Is that what you've got?

A. -419 through -453.

Q. And is that a differently redacted version of the document we talked about before?

A. Yes.

Q. Okay. All right. So getting back, then, to the task, so I think that you mentioned that -- or in the Kurta memo it says that this group, the one that we've been talking about, is tasked with coming up with a new version of the DoDI. So what kinds of information did this working group consider in reaching whatever conclusions or work product it did about that?

A. Can you be more specific, what information we considered?

Q. Yes. Yeah. So when you were going through this process, trying to figure out what you were going to do to revise the DoDI, what were your inputs in terms of information?

Q. So as of the time that this -- so did the work of this working group come to a halt at some point?

A. So this working group -- so in reference specifically to the Mr. Kurta's memo --

Q. Yes.

A. -- so yes, there was an end to that, and then from there, I don't know what the process was for the group lead submitting that product. But that would have been the end of it is the submission of whatever he submitted in support of the panel of experts as outlined in Mr. Kurta's memo.

Q. What product did the group come up with at the end of that process to feed into what Mr. Kurta wanted?

A. I don't know what their final product was. I don't know if what they were drafting as we worked was their final product.

Q. Okay. Was there a completed product, whether final or not, that the group finished at some point and then after that it went off to be an input in another process?

A. Yeah. I don't recall that being distributed back to us. And sometimes that's how the processes go. You give your input, and then that is passed on

for whatever use it's intended by the seniors.

Q. Okay. Did the new proposed DoDI that you all were working on, understanding that it wasn't complete -- oh, I'm going to ask you some "yes" or "no" questions here. So no detail, just "yes" or "no."

Did the document, as it was at the time that you all stopped working on it, did it continue to address in-service transition?

MS. ENLOW: I object to any yes-or-no answer. This is still a draft document as Colonel Krueger -- or as far as she knows, she's already testified. It would call for deliberations, at least a recommendation, if nothing else.

MS. LAPORTE: No. I'm just asking whether it addresses a particular topic. I'm not asking for what the recommendation is. And this is just a subject matter topic. It's not even a constraint. It's just sort of does it talk about this subject, that subject, or the other subject.

MS. ENLOW: You're asking whether a draft document addresses a certain subject that may or may not have ended up in a final policy or may still be at issue.

MS. LAPORTE: Right. But that's not

deliberative. It's not complete, but it's also not deliberative. I'm just asking for the fact of whether it addresses a particular thing.

MS. ENLOW: It was -- what she referred to is a draft document. What a draft contained or didn't contain when she was aware is deliberative.

MS. LAPORTE: No, I don't think it's deliberative. I mean if the draft contains facts, then that's not deliberative; right?

So all I'm trying to understand is just the facts of the general topic areas of what it covers. I'm not trying to ask what it says about those subjects, and I won't ask that for now.

MS. ENLOW: Do you mind if we go off the record for a moment?

MS. LAPORTE: No. That's fine.

MS. ENLOW: All right. We'll just take a minute.

MS. LAPORTE: Sure.

(A recess was taken from 12:29 p.m. to 12:31 p.m.)

MS. ENLOW: So I just want to be clear what you're asking Colonel Krueger. Are you asking whether the draft DoDI that she worked on includes a certain topic, or are you asking what the name of the draft

document is? I'm sorry. I'm a little confused with the --

MS. LAPORTE: I'm asking if it discusses certain topics.

MS. ENLOW: Okay. Then, yes, since it's a draft document still, it's not final, then, yes, we're going to object to that on deliberative process grounds.

MS. LAPORTE: Okay. So can I have that question read back, please.

(Record read.)

MS. ENLOW: Yes. I'm going to keep that objection.

BY MS. LAPORTE:

Q. Okay.

MS. ENLOW: I'm going to instruct Colonel Krueger not to answer.

BY MS. LAPORTE:

Q. You're going to follow that instruction, I take it?

A. Yes.

Q. Okay. Let me zoom out, then, to a different focus on this, which is did the revised draft DoDI that you all were working on, did it -- was it essentially a draft of what that DoDI would look like

if the tweets sustained legal challenge?

MS. ENLOW: Well, objection as to speculation.

MS. LAPORTE: Well, let me rephrase it then.

Q. Was the draft DoDI that you were working on reflective of what the policies would be if President Trump's tweets were fully implemented?

MS. ENLOW: Objection again as to speculation. That's also deliberative in that it calls for information that is included in the draft agency document.

I instruct you not to answer.

BY MS. LAPORTE:

Q. And are you following that instruction?

A. Yes.

Q. Okay. Have you had any information about what the current status is of the revision that your group worked on?

A. No.

Q. Are you aware whether any other group was working on a similar project in parallel? In other words, to work on the DoDI.

A. No.

Q. Okay. So let's move onto another thing that you raised earlier, that you mentioned earlier that

you worked on, which was accessions medical standards. So that was one of the things that Mr. Kurta laid out in the memo that needed to be worked on; right?

A. So my reference to the accession medical standards that we were talking about in regards to transgender policy was prior to this memo.

Q. Right.

A. That was all prior to July of '17.

Q. Okay. So in the post September 2017 world, you had some role also in working through the task that Mr. Kurta said about accessions; correct?

A. So I was not -- the MEDPERS was the one that had the task, and that was one that the primary was the PDASA MNRA. So the Primary Deputy Assistant Secretary of the Army for Manpower and Reserve Affairs, and I back-seated her at some of those meetings.

Q. How many meetings did you attend in that capacity?

A. I don't know how many. Several of them. It was certainly more than one.

Q. What were the general topics that were being addressed in those meetings?

A. Oh, so generally, if recollection serves me well, the topics would sometimes be looking at the

numbers.

Q. Did MEDPERS ultimately come up with a recommendation about surgical procedures that should not be resourced from DoD or DHS funding?

A. I don't recall a specific recommendation on that.

Q. Did you -- do you recall considering different alternative options for that? And that's just a "yes" or "no" question.

A. Can you clarify? Different options for as far as forms of funding types of surgeries.

Q. Well, specifically, different possible answers to the issue of what specific surgical procedures should not be resourced from DoD or DHS funding.

A. Yes, I recall consideration of that.

Q. And was that in a MEDPERS meeting?

A. I can't recall.

Q. Who was present when that was under consideration?

A. I don't recall. I mean I know that there's been discussions of what would be funded and what wouldn't be funded. I don't recall the specific setting.

Q. Do you recall a decision being made about a

recommendation?

A. I don't recall a final decision.

Q. Do you recall what the different possibilities were in terms of the answer to this question that's in Mr. Kurta's memo?

MS. ENLOW: That's just the facts again.

THE WITNESS: I can say, "yes" or "no"?

MS. ENLOW: Uh-huh.

THE WITNESS: Yes, I do recall there being different possibilities.

BY MS. LAPORTE:

Q. Right. And do you recall one of them ultimately being settled upon as a recommendation?

A. I don't recall a final.

Q. Okay. What were the different options that were under consideration?

MS. ENLOW: I would object on deliberative process. I'm going to instruct her not to answer.

BY MS. LAPORTE:

Q. Are you going to follow that instruction?

A. Yes.

MS. LAPORTE: We continue to object as before to all these deliberative process objections.

Okay.

(Deposition Exhibit 57 was marked for

identification.)
BY MS. LAPORTE:
Q. All right. Colonel Krueger, you should have Exhibit 57, which should be USDOE5147 through -5177.
Is that what you've got?
A. -47 through -77, yes.
Q. All right. Do you recognize this document? Please look through it before you answer that question because it's actually a collection.
(The witness reviewed Exhibit 57.)
THE WITNESS: So I recognize the attachment to the document. I don't recognize the E-mails leading up to it. Again, I'm not saying I hadn't seen it. They are just not really distinctive, and I don't know whether I saw this attachment as one of those preps, like I told you about. They would post documents on MAX.GOV, or whether I was in attendance when it was discussed, but I do remember seeing the document.
BY MS. LAPORTE:
Q. So by "the document" you're referring to the slide deck that is near the back of this exhibit?
A. Exactly. So starting on USDOE5151.
Q. Okay. So the agenda that's right before that is an agenda for a MEDPERS meeting on November 6;

EXHIBIT 34

Malloy, Emily N.

From: Carmichael, Andrew E. (CIV) <Andrew.E.Carmichael@usdoj.gov>
Sent: Thursday, May 28, 2020 8:59 AM
To: Heinz, Jordan M.; Barsanti, Vanessa; Stallings-Ala'ilima, Chalia (ATG); Enlow, Courtney D. (CIV); Powers, James R. (CIV); Gerardi, Michael J. (CIV)
Cc: Skurnik, Matthew (CIV); *prenn@lambdalegal.org; *tborelli@lambdalegal.org; *Rachel@newmanlaw.com; Siegfried, Daniel I.; *colleen.melody@atg.wa.gov; *jason@newmanlaw.com; Ikard, Sam
Subject: RE: Karnoski v. Trump, et al. -- Rule 30(b)(6) Designees

Jordan,

Below is some additional information to further our discussion on the possibility of combining 30(b)(6) topics with depositions of other DoD witnesses.

Ms. Miller will not be prepared to addresses any of the 30(b)(6) topics during her deposition currently scheduled for June 4, 2020, but she may end up being DoD's designee for Plaintiffs' topic 3. We propose an additional 3 hour period on topic 3 at a later date.

Mr. Dee will not be addressing any of Plaintiffs' 30(b)(6) topics.

LTC Cron will not be addressing any of Plaintiffs' 30(b)(6) topics.

We are looking into whether COL Meyering may be able to address Plaintiffs' 30(b)(6) topic 8. We will follow up with you on that.

COL Pflanz will not be addressing any of Plaintiffs' 30(b)(6) topics.

DoD expects that Mr. Hebert will address Plaintiffs' 30(b)(6) topics 1, 2, 4, 5. We propose two 5 hour deposition days for Mr. Hebert.

DoD expects that Mr. Bushman will address Plaintiffs' 30(b)(6) topics 6 and 7. Given that these particular topics are so intertwined in the pending mandamus petition we propose not setting a deposition date for Mr. Bushman at this time.

DoD is still determining who will address topic 9 and we will follow up with you on that.

Further, during the upcoming depositions Defendants expect to assert the deliberative process privilege and instruct our witnesses not to answer questions that call for privileged information except where the deliberative process privilege has been set aside by court orders which have not been stayed or vacated. (e.g. the Doe Court's Order and the Karnoski Court's November 19, 2019 Order).

Best regards,

Drew

Drew Carmichael
Trial Attorney | United States Department of Justice
Civil Division | Federal Programs Branch
Tel: (202) 514-3346

From: Carmichael, Andrew E. (CIV)
Sent: Monday, May 18, 2020 1:54 PM
To: Heinz, Jordan M. <jheinz@kirkland.com>; Barsanti, Vanessa <vanessa.barsanti@kirkland.com>; Stallings-Ala'ilima, Chalia (ATG) <Chalia.SA@atg.wa.gov>; Enlow, Courtney D. (CIV) <cenlow@CIV.USDOJ.GOV>; Powers, James R. (CIV) <jpowers@CIV.USDOJ.GOV>; Gerardi, Michael J. (CIV) <mgerardi@CIV.USDOJ.GOV>
Cc: Skurnik, Matthew (CIV) <maskurni@CIV.USDOJ.GOV>; *prenn@lambdalegal.org <prenn@lambdalegal.org>; *tborelli@lambdalegal.org <tborelli@lambdalegal.org>; *Rachel@newmanlaw.com <Rachel@newmanlaw.com>; Siegfried, Daniel I. <daniel.siegfried@kirkland.com>; *colleen.melody@atg.wa.gov <colleen.melody@atg.wa.gov>; *jason@newmanlaw.com <jason@newmanlaw.com>; Ikard, Sam <sam.ikard@kirkland.com>
Subject: RE: Karnoski v. Trump, et al. -- Rule 30(b)(6) Designees

Jordan,

I will coordinate with DoD to confirm the individuals they would use for the various 30(b)(6) topics and get back to you soon.

Best regards,

Drew

Drew Carmichael
Trial Attorney | United States Department of Justice
Civil Division | Federal Programs Branch
Tel: (202) 514-3346

From: Heinz, Jordan M. <jheinz@kirkland.com>
Sent: Friday, May 15, 2020 2:29 PM
To: Barsanti, Vanessa <vanessa.barsanti@kirkland.com>; Carmichael, Andrew E. (CIV) <ancarmic@CIV.USDOJ.GOV>; Stallings-Ala'ilima, Chalia (ATG) <Chalia.SA@atg.wa.gov>; Enlow, Courtney D. (CIV) <cenlow@CIV.USDOJ.GOV>; Powers, James R. (CIV) <jpowers@CIV.USDOJ.GOV>; Gerardi, Michael J. (CIV) <mgerardi@CIV.USDOJ.GOV>
Cc: Skurnik, Matthew (CIV) <maskurni@CIV.USDOJ.GOV>; *prenn@lambdalegal.org <prenn@lambdalegal.org>; *tborelli@lambdalegal.org <tborelli@lambdalegal.org>; *Rachel@newmanlaw.com <Rachel@newmanlaw.com>; Siegfried, Daniel I. <daniel.siegfried@kirkland.com>; *colleen.melody@atg.wa.gov <colleen.melody@atg.wa.gov>;

*jason@newmanlaw.com <jason@newmanlaw.com>; Ikard, Sam <sam.ikard@kirkland.com>
Subject: Karnoski v. Trump, et al. -- Rule 30(b)(6) Designees

Drew, Matt, Jim -

Following up on the status conference on Wednesday and the Court's suggestion that the parties meet and confer to see if we can come an agreement on Rule 30(b)(6) deposition time, could you please advise as to the Government's designees for Plaintiffs' nine topics? We can then see if there is overlap with Rule 30(b)(1) deponents.

Thanks

Jordan

Jordan M. Heinz

KIRKLAND & ELLIS LLP
300 North LaSalle, Chicago, IL 60654
T +1 312 862 7027
F +1 312 862 2200

jordan.heinz@kirkland.com

EXHIBIT 35

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

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

Defendants.

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

JOINT STATUS REPORT FOR MAY 13, 2020 STATUS CONFERENCE

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

In advance of the May 13, 2020 status hearing, the parties respectfully submit the following Joint Status Report.

PLAINTIFFS AND PLAINTIFF-INTERVENOR'S STATEMENT

In this Joint Status Report, Plaintiffs provide the Court an update regarding the following issues:

1. Proposed adjustments to the current May 29 fact discovery cutoff necessitated by delays in completing fact discovery;
2. Deposition scheduling;
3. Scheduling issues arising from the depositions of Plaintiffs' hybrid fact and expert witnesses, former Secretary of the Air Force, Deborah James, and former Secretary of the Navy, Ray Mabus; and
4. Overview of pending discovery motions.

A. Fact Discovery Deadline and Case Schedule

Plaintiffs continue to face roadblocks in completing fact discovery by the current May 29, 2020 deadline. Most of those roadblocks are of the Government's making—filing a mandamus petition and refusing to produce tens of thousands of documents on grounds of deliberative process privilege; extensive objections to Plaintiffs' Rule 30(b)(6) Notice; threatened motions to quash subpoenas directed to military decision-makers at the center of this dispute; and preemptively stating it will refuse to permit witnesses to answer questions at depositions over deliberative process privilege objections. Other roadblocks and delays have resulted from the COVID-19 pandemic. Plaintiffs respectfully request that the Court lift the May 29 fact discovery deadline and order the parties to report on the progress of discovery at the next status conference in June. The reasons for this request are as follows.

First, the Government continues to withhold tens of thousands of documents concerning the decision to impose the Ban, and the circumstances that led to that decision, pursuant to the deliberative process privilege. While the parties await a ruling by the Ninth Circuit on the Government's mandamus petition and motion to stay, Plaintiffs recently filed a LCR 37 motion proposing a framework by which the Special Master would review a random sample of

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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

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Seattle, Washington 98121
(206) 274-2800

Cert. Before Judgment, *Trump v. Karnoski*, No. 18-676, 2018 WL 6169245, at *8–9 (Nov. 23, 2018) (Ban "reflected 'the exercise of Secretary Mattis's independent judgment"); *18 (seeking "a prompt resolution of the validity of Secretary Mattis's proposed policy"); *24–25 (Ban "reflects the exercise of Secretary Mattis's 'independent judgment'").) Former Vice Chairman of the Joint Chiefs of Staff, Paul Selva, in turn was one of two senior DoD officials that Mattis directed "to lead" DoD "in developing an Implementation Plan on military service by transgender individuals, to effect the policy and directives" in the President's August 25, 2017 Memorandum, and, supported by the "Panel of Experts," to recommend to Mattis the policy that would effect the President's directives (what Defendants call the "Mattis policy"). (*See* 9/14/2017 Terms of Reference, Ex. 1.) Wilkie was one of two military officials who chaired the Panel, and according to Defendants, one of the lead authors of the February 2018 Report. And, Moran was a very senior and active member of the Panel who was an author or recipient of a number of the more relevant communications concerning the Panel produced by Defendants. Although Plaintiffs informed the Government on March 2, 2020 that they intended to depose Mattis, Selva, and Wilkie, and on March 27, 2020 requested the deposition of Moran, the Government did not inform Plaintiffs until April 10, 2020 that it will move to quash the subpoenas directed to these four witnesses, all of whom are former Department of Defense officials. Since that time, Plaintiffs determined where these witnesses currently live and work in order to ascertain where the depositions can take place, and identified locations near those localities at which the depositions can be taken. Plaintiffs recently served these subpoenas, but do not expect motion practice concerning the subpoenas to conclude until July at the earliest, given that motion practice will necessarily occur in at least two different jurisdictions (E.D. Va. and M.D.N.C.).

Third, the Government has lodged extensive objections to Plaintiffs' Rule 30(b)(6) Notice, causing delay in scheduling this deposition, which Plaintiffs had noticed as their first deposition in order to obtain information concerning a number of key subject matters that would help them develop and focus their examination of subsequent deponents. While Plaintiffs served the Government with their Rule 30(b)(6) Notice on March 9, 2020, it was not until nearly six weeks

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later, on April 17, 2020, that the Government served a 22-page letter of objections, which are now the subject of Defendants' forthcoming LCR 37 motion for protective order. One common objection across many of the Rule 30(b)(6) topics, which is raised by Defendants' motion, is the Government's intention to instruct witnesses not to answer questions that it believes call for information subject to the deliberative process privilege. This is notwithstanding that the Court already ruled at the February 3, 2020 status conference that "if there is an objection based upon deliberative process, the objection is made, then the question is answered, and you seal the deposition. And if we have to, we will go over line-by-line as to what comes in and what doesn't in terms of public testimony." (2/3/2020 Hr'g Tr., Dkt. No. 412, at 64:14–24.) The Government contends this Order was somehow stayed by the Ninth Circuit's subsequent administrative stay, despite the fact that the Order is nowhere referenced in the Government's mandamus petition. The Government has also asserted numerous other objections that likewise have no basis in law—such as the bizarre proposition that a party cannot take a Rule 30(b)(6) deposition on issues that are also the subject of interrogatories and document requests—all of which must be resolved by this Court and have delayed the Rule 30(b)(6) deposition.

Finally, the COVID-19 pandemic has caused certain depositions of Government witnesses to be delayed into the summer. Plaintiffs had at least five depositions scheduled in March and April that had to be canceled due to the pandemic. Even after the Court urged the parties to use teleconferencing resources to conduct depositions, scheduling depositions in April and May became untenable, in part because of the witnesses' own duties to respond to COVID-19. The parties have confirmed dates for depositions to take place in June should the Court approve extension of the discovery deadline, but some key witnesses may be unavailable for longer than that. For example, the Government has notified Plaintiffs that Colonel Mary Krueger is the Hospital Commander of the Tripler Army Medical Center, which is tasked with leading the military medicine response to COVID-19 in Hawaii. Due to these responsibilities, the Government has advised that it is unable to provide dates for her deposition until the pandemic has stabilized. At the same time, Plaintiff-Intervenor's state agencies are overloaded with requirements in response to the pandemic while other programs are closed or significantly

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.

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Seattle, Washington 98121
(206) 274-2800

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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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 36

In the Supreme Court of the United States

No.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

RYAN KARNOSKI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

The Solicitor General, on behalf of President Donald J. Trump, et al., respectfully petitions for a writ of certiorari before judgment to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the district court granting respondents' motion for a preliminary injunction (App., *infra*, 1a-28a) is not published in the Federal Supplement but is available at 2017 WL 6311305. The order of the district court striking the government's motion to dissolve the preliminary injunction (App., *infra*, 36a-72a) is not published in the Federal Supplement but is available at 2018 WL 1784464.

JURISDICTION

On April 13, 2018, the district court struck the government's motion to dissolve a preliminary injunction.

123a. Under the Mattis retention standards, servicemembers who are diagnosed with gender dysphoria after entering service would be permitted to continue serving if they do not seek to undergo gender transition, are willing and able to serve in their biological sex, and are able to meet applicable deployability requirements. *Id.* at 123a-124a.

Under both the accession and the retention standards of the Mattis policy, individuals with gender dysphoria who have undergone gender transition or seek to do so would be ineligible to serve, unless they obtain a waiver. App., *infra*, 123a. The Mattis policy, however, contains a categorical reliance exemption for "transgender Service members who were diagnosed with gender dysphoria and either entered or remained in service following the announcement of the Carter policy." *Id.* at 200a. Under that exemption, those servicemembers "who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy, may continue to receive all medically necessary treatment * * * and to serve in their preferred gender, even after the new policy commences." *Ibid.* The Department has since confirmed that the exemption would also extend to any servicemember "who was diagnosed with gender dysphoria prior to the effective date of the Carter policy and has continued to serve and receive treatment pursuant to the Carter policy after it took effect." C.A. E.R. 489.

6. In March 2018, the President issued a new memorandum "revok[ing]" his 2017 memorandum "and any other directive [he] may have made with respect to military service by transgender individuals." App., *infra*, 211a. The 2018 memorandum recognized that the

Mattis policy reflected "the exercise of [Secretary Mattis's] independent judgment," and it permitted the Secretaries of Defense and Homeland Security "to implement" that new policy. *Id.* at 210a-211a.

B. Procedural History

1. Shortly after the President issued his 2017 memorandum, respondents—current and aspiring servicemembers as well as various advocacy organizations—brought suit in the Western District of Washington, challenging as a violation of equal protection, substantive due process, and the First Amendment what they described as "the Ban" on military service by transgender individuals reflected in the President's 2017 tweets and memorandum. C.A. E.R. 118; see *id.* at 117-156. The State of Washington subsequently intervened in the suit as a plaintiff. *Id.* at 55-62, 108-116.

Similar suits were filed in the Central District of California and in the District of Columbia. See *Stockman* v. *Trump*, No. 17-cv-1799 (C.D. Cal. filed Sept. 5, 2017); *Doe* v. *Trump*, No. 17-cv-1597 (D.D.C. filed Aug. 9, 2017). A summary of the proceedings in the suit filed in the Western District of Washington (*Karnoski*) follows. A summary of the proceedings in the other suits can be found in the government's petitions for writs of certiorari before judgment in those cases, filed simultaneously with this petition.[2]

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[2] A similar suit was also filed in the District of Maryland. See *Stone* v. *Trump*, No. 17-cv-2459 (D. Md. filed Aug. 28, 2017). Like the district courts in the other suits, the district court in *Stone* issued a nationwide preliminary injunction requiring the military to maintain and implement the Carter retention and accession standards. See *Stone* v. *Trump*, 280 F. Supp. 3d 747 (D. Md. 2017). Unlike the other district courts, however, the district court in *Stone*

2. In December 2017, the district court issued a nationwide preliminary injunction, enjoining the military "from taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement" on Twitter. App., *infra*, 27a.

The district court construed the President's 2017 tweets and memorandum as "unilaterally proclaim[ing] a prohibition on transgender service members." App., *infra*, 16a. The court determined that respondents were likely to succeed in challenging that prohibition on equal-protection, substantive-due-process, and First Amendment grounds. *Id.* at 18a. With respect to respondents' equal-protection claim, the court reasoned that the policy set forth in the President's 2017 memorandum "distinguishe[d] on the basis of transgender status, a quasi-suspect classification, and [wa]s therefore subject to intermediate scrutiny." *Id.* at 19a. The court determined that the policy did not survive such scrutiny because its justifications were "contradicted by the studies, conclusions, and judgment of the military" in adopting the Carter policy. *Id.* at 20a (citation and emphasis omitted). With respect to respondent's substantive-due-process claim, the court determined that the President's policy "directly interfere[d]" with respondents' "fundamental right" to "define and express their gender identity" by "depriving them of employment and career opportunities." *Id.* at 23a. And with respect to re-

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has yet to rule on the government's motion to dissolve that injunction, which the government filed in March 2018, after the President revoked his 2017 memorandum and permitted the military to implement the Mattis policy. See Gov't Mot. to Dissolve the Prelim. Inj., *Stone*, *supra* (No. 17-cv-2459) (Mar. 23, 2018).

soon as possible because the injunction requires the military to maintain a policy that, in its own professional judgment, risks undermining readiness, disrupting unit cohesion, and weakening military effectiveness and lethality. *Ibid.* The government also emphasized that, absent expedition, it would "be difficult for the government, if it loses the appeal, to seek and obtain review during the Supreme Court's 2018 Term." *Ibid.*

The court of appeals denied the government's request for expedition, 18-35347 C.A. Doc. 102 (Aug. 6, 2018), and heard oral argument on October 10, 2018, 18-35347 C.A. Docket entry No. 119 (Oct. 10, 2018).[4] The court has not yet issued a decision as of the printing of this petition.[5]

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[4] On the same day that it heard argument in the government's preliminary-injunction appeal, the court of appeals also heard argument on the government's petition for a writ of mandamus seeking vacatur of an order of the district court requiring the Executive Branch to produce a detailed privilege log of presidential communications and disclose many thousands of documents withheld under the deliberative-process privilege. 18-72159 C.A. Docket entry No. 43 (Oct. 10, 2018). After the government filed an application in this Court seeking a stay of the district court's order pending disposition of the government's mandamus petition, see *Trump* v. *United States Dist. Ct. for the W. Dist. of Wash.*, No. 18A276 (Sept. 14, 2018), the court of appeals granted a stay, 18-72159 C.A. Doc. 36 (Sept. 17, 2018), and the government withdrew its stay application in this Court. The court of appeals has not yet ruled on the government's mandamus petition.

[5] On November 7, 2018, the government informed the court of appeals that, "in order to preserve th[is] Court's ability to hear and decide the case this Term," it intended to file a petition for a writ of certiorari before judgment on November 23 if the court of appeals had not issued its judgment by then. 18-35347 C.A. Doc. 124, at 1-2. As explained more fully in a letter filed simultaneously with this petition, the government's filing of the petition on November 23 would

REASONS FOR GRANTING THE PETITION

This case and related cases in California and the District of Columbia involve constitutional challenges to a policy that Secretary Mattis announced earlier this year after an extensive review of military service by transgender individuals. In arriving at that new policy, Secretary Mattis and a panel of senior military leaders and other experts determined that the prior policy, adopted by Secretary Carter, posed too great a risk to military effectiveness and lethality. As a result of nationwide preliminary injunctions issued by various district courts, however, the military has been forced to maintain that prior policy for nearly a year. And absent this Court's prompt intervention, it is unlikely that the military will be able to implement its new policy any time soon.

Accordingly, the government is filing this petition and two other petitions for writs of certiorari before judgment to the Ninth and D.C. Circuits, which have before them a total of three injunctions enjoining the military from implementing the Mattis policy nationwide. The decisions imposing those injunctions are wrong, and they warrant this Court's immediate review. The government presents each of the petitions to ensure that the Court has an adequate vehicle in which to resolve the question presented in a timely and definitive manner. The government respectfully submits that the Court should grant the petitions for writs of certiorari

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allow the petition to be distributed on December 26, 2018, for consideration at the Court's January 11, 2019 conference, without a motion for expedition.

before judgment, consolidate the cases for decision, and consider this important dispute this Term.[6]

I. THE QUESTION PRESENTED WARRANTS THIS COURT'S IMMEDIATE REVIEW

Congress has vested this Court with jurisdiction to review "[c]ases in the courts of appeals * * * [b]y writ of certiorari * * * *before or* after rendition of judgment or decree." 28 U.S.C. 1254(1) (emphasis added). "An application * * * for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment." 28 U.S.C. 2101(e). This Court will grant certiorari before judgment "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11.

This case satisfies that standard. It involves an issue of imperative public importance: the authority of the U.S. military to determine who may serve in the Nation's armed forces. After an extensive process of consultation and review involving senior military officials

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[6] The government has previously sought stays in the lower courts of the preliminary injunction in this case, and the government intends to do the same in *Stockman* and *Doe*. In the event that the lower courts do not stay the injunctions, the government intends to file applications in this Court, seeking, as an alternative to certiorari before judgment, stays of the injunctions or, at a minimum, stays of the nationwide scope of the injunctions. Should the Court decline to grant certiorari before judgment, such stays would at least allow the military to implement the Mattis policy in whole or in part while litigation proceeds through the Court's 2019 Term. Either way, whether through certiorari before judgment or stays of the injunctions, what is of paramount importance is permitting the Secretary of Defense to implement the policy that, in his judgment after consultation with experts, best serves the military's interests.

and other experts, the Secretary of Defense determined that individuals with a history of a medical condition called gender dysphoria should be presumptively disqualified from military service, particularly if they have undergone the treatment of gender transition or seek to do so. See pp. 7-8, *supra*. The district court in this case entered a nationwide preliminary injunction nullifying that exercise of professional military judgment and blocking the implementation of a policy that the Secretary has deemed necessary to "place the Department of Defense in the strongest position to protect the American people, to fight and win America's wars, and to ensure the survival and success of our Service members around the world." App., *infra*, 208a; see *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986) ("[C]ourts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.").

Although the government has appealed the district court's injunction, an immediate grant of certiorari is warranted to ensure that the injunction does not remain in place any longer than is necessary. Even if the government were immediately to seek certiorari from an adverse decision of the court of appeals, this Court would not be able to review that decision in the ordinary course until next Term at the earliest. And even if the government were to prevail in the Ninth Circuit—where two appeals are pending—the government would still need to proceed with its appeal before the D.C. Circuit. And even then, the government would still be subject to a fourth nationwide preliminary injunction, issued by the district court in Maryland. See *Stone* v. *Trump*, 280 F. Supp. 3d 747 (D. Md. 2017). Although the government moved eight months ago to dissolve

that injunction in light of the new Mattis policy, the district court in Maryland has not ruled on the government's pending motion. See p. 9 n.2, *supra*.

Absent an immediate grant of certiorari, there is thus little chance of a prompt resolution of the validity of Secretary Mattis's proposed policy. And so long as this or any other injunction remains in place, the military will be forced nationwide to maintain the Carter policy—a policy that the military has concluded poses a threat to "readiness, good order and discipline, sound leadership, and unit cohesion," which "are essential to military effectiveness and lethality." App., *infra*, 197a; see *id.* at 206a (stating that the Carter policy poses "substantial risks" and threatens to "undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality"); *id.* at 202a (explaining that the "risks" associated with maintaining the Carter policy should not be incurred "given the Department's grave responsibility to fight and win the Nation's wars in a manner that maximizes the effectiveness, lethality, and survivability" of servicemembers).

This Court has previously granted certiorari before judgment to promptly resolve important and time-sensitive disputes. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981); *United States* v. *Nixon*, 418 U.S. 683, 686-687 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584 (1952); cf. Stephen M. Shapiro et al., *Supreme Court Practice* § 4.20, at 287-288 (10th ed. 2013) (collecting cases where "[t]he public interest in a speedy determination" warranted certiorari before judgment). The Court should follow the same course here and grant this petition.

II. THE DECISION BELOW IS WRONG

Review is also warranted because the district court erred in enjoining implementation of the Mattis policy nationwide. Respondents' constitutional challenges to the Mattis policy lack merit, and in any event, the injunction is vastly overbroad.

A. The Mattis Policy Is Consistent With Equal Protection

1. For decades, transgender status alone was a basis for disqualification from military service. See pp. 2-3, *supra*. The Mattis policy departs from that practice. Under the Mattis policy, individuals may "not be disqualified from service solely on account of their transgender status." App., *infra*, 149a.

Like Secretary Carter before him, however, Secretary Mattis recognized the need for "[m]edical standards" to "help to ensure that those entering service are free of medical conditions or physical defects that may require excessive time lost from duty." App., *infra*, 91a. Thus, under the Mattis policy, as under the Carter policy before it, a history of gender dysphoria would be presumptively disqualifying. *Id.* at 92a, 121a-124a. Because the Mattis policy turns on a medical condition (gender dysphoria) and related treatment (gender transition)—not any suspect or quasi-suspect classification—the policy is subject only to rational-basis review. See, *e.g.*, *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365-368 (2001).

A more searching form of review would be particularly inappropriate given the military context in which the policy arises. This Court has long accorded "a healthy deference to legislative and executive judgments in the area of military affairs." *Rostker* v. *Goldberg*, 453 U.S. 57, 66 (1981). That deference reflects the recognition "[n]ot only" that "courts [are] 'ill-equipped

to determine the impact upon discipline that any particular intrusion upon military authority might have,'" but also that "military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy." *Goldman*, 475 U.S. at 507-508 (citation omitted); see *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (explaining that "complex, subtle, and professional decisions as to the composition * * * of a military force" are "essentially professional military judgments") (citation omitted). The Mattis policy would thus warrant deferential review even if an analogous policy in the civilian context would call for closer scrutiny. See *Rostker*, 453 U.S. at 67 ("[T]he tests and limitations to be applied may differ because of the military context."); cf. *Goldman*, 475 U.S. at 507 (explaining that judicial "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society").

2. The Mattis policy satisfies the deferential standard that applies here. As explained, the Mattis policy would disqualify individuals with a history of gender dysphoria, unless they meet certain criteria. App., *infra*, 121a-124a. Gender dysphoria is a medical condition recognized by the APA and defined by "clinically significant distress or impairment in social, occupational, or other important areas of functioning." C.A. E.R. 417. In presumptively disqualifying individuals with a history of this condition from service, the Mattis policy serves the same compelling interest as the Carter policy: ensuring that those serving in the armed forces are "free of medical conditions or physical defects that may require excessive time lost from duty." App., *infra*, 91a, 130a.

It is true that the Mattis and the Carter policies differ in the circumstances under which they would permit individuals with a history of gender dysphoria to serve. The Carter policy, for example, allows certain individuals who have undergone gender transition to enter the military and serve in their preferred gender; it likewise allows current servicemembers with gender dysphoria to serve in their preferred gender upon transitioning. App., *infra*, 92-93a.[7] The Mattis policy, by contrast, would disqualify from service any individual who has undergone gender transition or seeks to do so, unless that individual obtains a waiver or falls within the reliance exemption. *Id.* at 122a-124a.

Those differences, however, are of no constitutional significance. That is because the Mattis policy reflects the military's reasoned and considered judgment that "making accommodations for gender transition" would "not [be] conducive to, and would likely undermine, the inputs—readiness, good order and discipline, sound leadership, and unit cohesion—that are essential to military effectiveness and lethality." App., *infra*, 197a; see *id.* at 122a. For three reasons, the Department concluded that individuals with a history of gender dysphoria who seek or have undergone "gender transition generally should not be eligible for accession or retention in the Armed Forces absent a waiver." *Id.* at 197a-198a.

First, the Department found that accommodating gender transition as a treatment for gender dysphoria would "present a significant challenge for unit readiness." App., *infra*, 185a. The Department noted the

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[7] Under the Carter policy, transgender servicemembers *without* a diagnosis of gender dysphoria would be required to serve in their biological sex; they would *not* be permitted to serve in their preferred gender. See App., *infra*, 128a; C.A. E.R. 221-222.

existence of "considerable scientific uncertainty" concerning whether transition-related treatment, such as cross-sex hormone therapy and sex-reassignment surgery, "fully remedy * * * the mental health problems associated with gender dysphoria." *Id.* at 178a; see *id.* at 155a-166a. The Department reasoned, however, that even if such treatment could fully remedy the "serious problems associated with gender dysphoria," most servicemembers undergoing such treatment could be rendered "non-deployable for a potentially significant amount of time." *Id.* at 184a-185a. The Department noted, for example, that some servicemembers would have to leave their "theater of operations" to be able to undergo transition-related therapy or surgery. *Id.* at 179a.

Second, the Department determined that accommodating gender transition as a treatment for gender dysphoria would be incompatible with sex-based standards governing various aspects of military life. App., *infra*, 185a. The military maintains separate berthing, bathroom, and shower facilities for each sex. *Ibid.* The Department was concerned that allowing individuals who retained the anatomy of their biological sex to use the facilities of their preferred gender "would invade the expectations of privacy" of the other servicemembers sharing those facilities. *Id.* at 188a; see *United States* v. *Virginia*, 518 U.S. 515, 550 n.19 (1996) (recognizing that it is "necessary to afford members of each sex privacy from the other sex in living arrangements"). The military also maintains different sets of physical-fitness, body-fat, uniform, and grooming standards for biological males and biological females. App., *infra*, 185a. The Department was concerned, among other things, that allowing a "biological male" to "compete

against females in gender-specific physical training" would pose a serious safety risk and generate perceptions of unfairness, *id.* at 174a-175a; see *id.* at 171a, thus undermining "unit cohesion and good order and discipline," *id.* at 185a; see *Virginia*, 518 U.S. at 550 n.19 (acknowledging that it is "necessary" to "adjust aspects of the physical training programs" for servicemembers to address biological differences between the sexes).

Third, the Department determined that accommodating gender transition as a treatment for gender dysphoria would be "disproportionately costly on a per capita basis." App., *infra*, 196a. That determination rested on the Department's own experience under the Carter policy. *Ibid.* The Department explained that, since implementation of the Carter policy, medical costs for servicemembers with gender dysphoria had increased nearly 300% compared to servicemembers without gender dysphoria. *Ibid.* Several commanders had also reported that providing servicemembers in their units with transition-related treatment required the use of "operations and maintenance funds to pay for * * * extensive travel throughout the United States to obtain specialized medical care." *Id.* at 197a. Particularly "in light of the absence of solid scientific support for the efficacy of [transition-related] treatment," the Department found the costs of accommodating gender transition disproportionate. *Id.* at 196a.

In concluding that individuals with a history of gender dysphoria who seek or have undergone gender transition generally should not be eligible for accession or retention in the military, the Department specifically considered—and rejected—the Carter policy's contrary approach to gender transition. App., *infra*, 120a, 168a-

169a, 173a, 202a-203a. That "studied choice of one alternative in preference to another," *Rostker*, 453 U.S. at 72, in light of "military operations and needs," *id.* at 68, is precisely the type of judgment deserving of deference, *ibid.* The Department's decision to replace the Carter policy with the Mattis policy was thus a decision well within constitutional bounds. Given the close fit between the military's reasons for not accommodating gender transition and the military's compelling interests in readiness, unit cohesion, good order and discipline, and effectiveness, the Mattis policy would satisfy constitutional review under even a heightened level of scrutiny.

3. In enjoining the military from implementing the Mattis policy, the district court here failed to consider that policy on its own terms. Instead, the court characterized the Mattis policy as simply "a plan to implement" the "ban on military service by openly transgender people" that the President supposedly announced in his 2017 tweets and memorandum. App., *infra*, 37a. But the Mattis policy would not ban military service by openly transgender people. Quite the opposite, the Mattis policy reflects the Department's conclusion that "transgender persons should *not* be disqualified from service solely on account of their transgender status." *Id.* at 149a (emphasis added). That is why the President had to "revoke" his 2017 memorandum and "any other directive [he] may have made with respect to military service by transgender individuals" to allow the military to implement the Mattis policy. *Id.* at 211a; see *id.* at 208a-209a. That policy, moreover, reflects the exercise of Secretary Mattis's "independent judgment," *id.* at 210a, following an "independent multi-disciplinary review" by a panel of experts, *id.* at 106a. The district

court erred in failing to consider the Mattis policy on its own terms.

B. The Mattis Policy Does Not Violate Respondents' Due Process Or First Amendment Rights

Respondents' substantive-due-process and First Amendment challenges likewise lack merit. The Mattis policy satisfies the deferential review that applies to such challenges. See, *e.g.*, *Goldman*, 475 U.S. at 507; *Brown* v. *Glines*, 444 U.S. 348, 353-359 (1980).

With respect to their substantive-due-process claim, respondents cannot point to any fundamental right that the Mattis policy implicates. There is no fundamental right to serve in the military, much less to do so in a particular manner. As for their First Amendment claim, respondents cannot point to any restriction on speech. Like the Carter policy before it, the Mattis policy turns not on speech, but on a medical condition and related treatment. Taken to their logical conclusion, respondents' claims would mean that the Carter policy itself violates the substantive-due-process and First Amendment rights of the transgender individuals it precludes from either serving in their preferred gender or serving at all, see pp. 5-6, *supra*—and yet the district court in this case, at respondents' request, ordered the military to maintain that policy.

C. The Nationwide Injunction Against The Mattis Policy Is Vastly Overbroad

The district court further erred in enjoining the implementation of the Mattis policy on a nationwide basis. See *Gill* v. *Whitford*, 138 S. Ct. 1916, 1933 (2018) ("The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it."); *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2429 (2018)

EXHIBIT 37

No. 18-35347

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,
Plaintiffs-Appellees,

STATE OF WASHINGTON, Attorney General's Office Civil Rights Unit,
Intervenor-Plaintiff-Appellee,

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

APPELLANTS' OPENING BRIEF

CHAD A. READLER
Acting Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

BRINTON LUCAS
Counsel to the Assistant Attorney General

MARLEIGH D. DOVER
CATHERINE H. DORSEY
TARA S. MORRISSEY
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7236
950 Pennsylvania Ave., NW
Washington, DC 20530

INTRODUCTION

A year after a significant change to longstanding military policy, the Department of Defense in June 2017 began an extensive review of the issue of military service by transgender individuals. That months-long process, involving a panel of senior military officials who thoroughly studied various aspects of the question, culminated in a new policy announced by Secretary of Defense James Mattis in March 2018. Under this 2018 policy, individuals who suffer from the medical condition of gender dysphoria would be presumptively disqualified (subject to various exceptions), but transgender individuals without this condition would be eligible to serve in their biological sex (as was also the case under the preceding policy).

Both historically and today, the military has not permitted individuals to serve if they have medical conditions that may excessively limit their deployability, pose an increased risk of injury to themselves or others, or otherwise require measures that threaten to impair the effectiveness of their unit. In the Department's professional military judgment, these criteria are met for the medical condition of gender dysphoria—a lengthy and marked incongruence between one's biological sex and gender identity characterized by "clinically significant distress or impairment in social, occupational, or other important areas of functioning," ER.175-76, particularly when a person requires or has undergone gender transition to treat this condition. As Secretary Mattis observed, generally allowing service by those individuals poses "substantial risks" and threatens to "undermine readiness, disrupt unit cohesion, and impose an

unreasonable burden on the military that is not conducive to military effectiveness and lethality." ER.161. This conclusion is based on "the Department's best military judgment," the recommendations of the panel of military experts who had thoroughly studied the issue, and the Secretary's "own professional judgment." *Id.*

Without even considering the preliminary-injunction factors, the district court issued a nationwide preliminary injunction blocking the military from implementing this policy. The court neither found that plaintiffs were likely to succeed on the merits of a constitutional challenge to the 2018 policy nor offered any justification for disregarding the considered judgment of senior military leaders. Instead, it simply extended (and refused to dissolve) a previous preliminary injunction from December 2017, even though that injunction concerned a presidential memorandum addressing a substantially different policy that had been revoked in light of the military's 2018 policy.

This disregard for the military's judgment, and for the comprehensive analysis that produced it, is remarkable. The Supreme Court has repeatedly stressed that special deference is owed to the professional judgments of our Nation's military leaders, yet the district court implicitly concluded that their 2018 policy was so unlikely to withstand its scrutiny that it could be enjoined without any significant analysis of its constitutionality. But the Department's careful calculus of military risk in adopting this policy deserves the respect of the Judiciary, and the court below provided scant explanation for disregarding that reasoned and reasonable military assessment. Instead, it simply ordered the military to adhere to the policy adopted by the Secretary's

predecessor in 2016, which also required transgender individuals without gender dysphoria to serve in their biological sex and presumptively disqualified individuals with gender dysphoria from military service subject merely to different exceptions. Such line-drawing exercises, however, are matters for military discretion, and one Defense Secretary cannot bind his successors to his chosen contours for all time.

This injunction against the military's judgment is made all the more inexplicable by the lopsided balance of equities here. The Department is being forced to maintain a course of action that it squarely rejected in its "professional military judgment," concluding that it is "not conducive to, and would likely undermine, the inputs … that are essential to military effectiveness and lethality." ER.204. Yet its 2018 policy will not cause the plaintiffs here to suffer an irreparable injury, or even a cognizable one.

At a minimum, any injunctive relief should have been limited to redressing the injuries of the plaintiffs in this case, not extended to everyone serving or seeking to serve. Article III standing requirements, bedrock equitable principles, and controlling circuit precedent all preclude such an overbroad intrusion into military affairs.

STATEMENT OF JURISDICTION

The district court's jurisdiction in this federal constitutional challenge was invoked under 28 U.S.C. § 1331. ER.121. The district court entered a preliminary injunction on December 11, 2017, ER.54, which it extended and refused to dissolve on April 13, 2018, ER.2, 30-31. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). The government filed a timely notice of appeal on April 30, 2018. ER.63-65.

"emblems of religious … identity," *id.* at 518 (Brennan, J., dissenting). And the Court rejected this claim even though the plaintiff relied on "expert testimony" from a former Air Force official and claimed that the Air Force's position was "mere *ipse dixit*, with no support from actual experience or a scientific study in the record." *Id.* at 509 (majority opinion). *Goldman* thus offers a good illustration of the fact that "[r]egulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities." *Beller v. Middendorf*, 632 F.2d 788, 811 (9th Cir. 1980) (Kennedy, J.), *overruled on other grounds by Witt v. Department of Air Force*, 527 F.3d 806 (9th Cir. 2008).

Finally, even if dispensing with military-deference principles here were somehow justified, heightened scrutiny would be inappropriate. That is because the military's new policy, like the Carter policy before it, draws lines on the basis of a medical condition (gender dysphoria) and its treatment (gender transition)—eminently reasonable considerations in setting standards for military service—and not transgender status. ER.167-69, 177-79, 317-18. Such classifications receive only rational-basis review, which perhaps explains why no one ever challenged the Carter policy on grounds that it was subject to heightened scrutiny. *See, e.g.*, *Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365–68 (2001); *Geduldig v. Aiello*, 417 U.S. 484, 494–97 & n.20 (1974). Given that courts should be "reluctant to establish new suspect classes"—a presumption that "has even more force when the intense judicial scrutiny would be applied to the

'specialized society' of the military"—there is no basis for departing from rational-basis review here. *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc).[2]

2. The 2018 Policy Survives Constitutional Review

The 2018 policy's presumptive disqualification of individuals with gender dysphoria, and especially those who require or have undergone gender transition, easily satisfies the deferential standard that applies here. As Secretary Mattis explained, generally allowing these individuals to serve would pose "substantial risks" as well as "undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." ER.161. There should be no dispute that the military's interest in avoiding those harms is a compelling one: Courts must "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest," *Winter*, 555 U.S. at 24 (quoting *Goldman*, 475 U.S. at 507), and here, the Department has concluded that minimizing these risks is "absolutely essential," ER.161. Therefore, the only issue is whether this Court should defer to the military's judgment that this

[2] Even if this policy could be characterized as turning on transgender status, such classifications do not trigger heightened scrutiny either. *See, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227-28 (10th Cir. 2007). Contrary to the district court's belief, *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), did not hold otherwise. ER.46. Rather, *Schwenk* held only that a particular claim under the Gender Motivated Violence Act survived summary judgment given evidence that the attack on the plaintiff was motivated "by her assumption of a feminine rather than a typically masculine appearance." 204 F.3d at 1202. That individualized, evidentiary, and statutory sex-stereotyping holding does not justify the district court's sweeping constitutional ruling.

presumptive disqualification is not just rationally related to, but actually "necessary" to furthering that critical interest. ER.195. That should not be a close question.

a. Military Readiness

As the Department explained, service by individuals with gender dysphoria, and especially those who need or have undergone gender transition, poses at least two significant risks to military readiness. *First*, the Department was concerned about subjecting those with gender dysphoria to the unique stresses of military life. ER.184, 203. At the outset, any mental-health condition characterized by clinically significant distress or impairment in functioning raises readiness concerns. Servicemembers suffering from "[a]ny DSM-5 psychiatric disorder with residual symptoms" that "impair social or occupational performance[] require a waiver … to deploy," as the military must consider the "risk of exacerbation if the individual were exposed to trauma or severe operational stress." ER.197. Particularly given "the absence of evidence on the impact of deployment on individuals with gender dysphoria," the Department concluded that this condition posed readiness risks. *Id.*; *see* ER.205. That judgment is reflected in the Carter policy, which disqualified individuals with a history of gender dysphoria absent proof that they had been "stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months." ER.317.

In addition to the inherent problem of clinically significant distress or impairment, gender dysphoria comes with associated perils, especially in the military context. As preliminary evidence from the Department's experience with the Carter

concerning whether these treatments fully remedy, even if they may reduce, the mental health problems associated with gender dysphoria." ER.195; *see* ER.184-90.[3]

The Department therefore reasonably decided to modify the Carter policy. In doing so, it was acting consistently with the expectations of former-Secretary Carter, who, in announcing his policy in June 2016, directed that the new accession standards were to "be reviewed" before June 30, 2018, and could be "changed, as appropriate," to "ensure consistency with military readiness." ER.318. The Department conducted that review, on that timetable, using evidence unavailable to then-Secretary Carter, and concluded that his accession standards must be revised.

Nor were the Department's concerns new ones. RAND had cautioned the prior administration that "it is difficult to fully assess the outcomes of treatment" for gender dysphoria as a general matter given "the absence of quality randomized trial

[3] For example, the Centers for Medicare and Medicaid Services (CMS) issued a report in August 2016 concluding that there was "not enough high quality evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria." ER.187. While this study was primarily concerned with Medicare beneficiaries, CMS "conducted a comprehensive review" of "the universe of literature regarding sex reassignment surgery," which consisted of more than "500 articles, studies, and reports" addressing a general population. *Id.* Of these materials, only six studies provided "useful information" on the efficacy of sex-reassignment surgery, and "the four best designed and conducted" among them "did not demonstrate clinically significant changes" after the procedure. *Id.* And "one of the most robust" of the six "found increased mortality and psychiatric hospitalization" for those "who had undergone sex reassignment surgery as compared to a healthy control group." ER.188-89. According to that study, "post[-]surgical transsexuals are a risk group that need long-term psychiatric and somatic follow-up," and "[e]ven though surgery and hormonal therapy alleviates gender dysphoria, it is apparently not sufficient to remedy the high rates of morbidity and mortality." ER.189.

evidence"—"the gold standard for determining treatment efficacy"—and that, in any event, "it is not known how well these findings generalize to military personnel." ER.349. Although former-Secretary Carter was willing to tolerate these risks, Secretary Mattis determined the military should "proceed with caution before compounding the significant challenges inherent in treating gender dysphoria with the unique, highly stressful circumstances of military training and combat operations." ER.161. And there is no constitutional requirement that the Secretary of Defense must hew to the risk tolerance of his predecessor, especially when new information has come to light.

Second, even if it were guaranteed that the risks associated with gender dysphoria could be fully addressed by gender transition, it remains the case that transition-related medical treatment—namely, cross-sex hormone therapy and sex-reassignment surgery—could render transitioning servicemembers "non-deployable for a potentially significant amount of time." ER.198. Some commanders, for example, reported that transitioning servicemembers under their authority would be non-deployable for up to two to two-and-a-half years. ER.197. More generally, Endocrine Society guidelines recommend "quarterly bloodwork and laboratory monitoring of hormone levels during the first year" of therapy, meaning that if "the operational environment does not permit access to a lab for monitoring hormones," then the transitioning servicemember "must be prepared to forego treatment, monitoring, or the deployment," each of which "carries risks for readiness." ER.196. That period of potential non-deployability only increases for those who obtain sex-reassignment surgery, which in addition to a

recommended "12 continuous months of hormone therapy … prior to genital surgery," comes with "substantial" recovery time even without complications. *Id.*

In addition to being inherently problematic, these limits on deployability would have harmful effects on transitioning servicemembers' units as a whole. As the Department explained, any increase in non-deployable servicemembers will require those who can deploy to bear "undue risk and personal burden," which itself "negatively impacts mission readiness." ER.198. On top of these personal costs, servicemembers deployed more frequently to "compensate for" their unavailable comrades face risks to family resiliency as well. *Id.* And when servicemembers with conditions do deploy but then fail to meet fitness standards in the field, "there is risk for inadequate treatment within the operational theater, personal risk due to potential inability to perform combat required skills, and the potential to be sent home from the deployment and render the deployed unit with less manpower." ER.197. All of this, the Department concluded, posed a "significant challenge for unit readiness." ER.198.

Again, these are not new concerns. Former-Secretary Carter acknowledged that "[g]ender transition while serving in the military presents unique challenges associated with addressing the needs of the Service member in a manner consistent with military mission and readiness needs," ER.318, a conclusion reflected in his policy's requirement that applicants with a history of transition-related treatment must demonstrate that they had finished treatment and had been stable and free of complications for an 18-month period in order to serve. ER.317-18. Likewise, RAND acknowledged that gender

EXHIBIT 38

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2 *et al.*, **Plaintiffs,** **v.** **DONALD J. TRUMP *et al.*,** **Defendants.**	**Civil Action No. 17-cv-1597 (CKK)**

DEFENDANTS' MOTION TO DISSOLVE THE PRELIMINARY INJUNCTION

The *Karnoski* court's only explanation for why the new policy was a categorical ban was that it would disqualify "transgender people—including those who have neither transitioned nor been diagnosed with gender dysphoria—from serving, unless they are 'willing and able to adhere to all standards associated with their biological sex,'" and thereby "force [them] to suppress the very characteristic that defines them as transgender in the first place." 2018 WL 1784464, at *6. But the same could be said about the Carter policy the *Karnoski* court ordered the military to maintain, as that policy likewise requires transgender individuals who have not "been diagnosed with gender dysphoria … to adhere to all standards associated with their biological sex." *Id.*; *see* Report 15. Moreover, not all transgender service members who choose to meet the standards associated with their biological sex are being "force[d] to suppress the very characteristic that defines them as transgender in the first place." 2018 WL 1784464, at *6. To the contrary, as RAND explained, only "a subset" of transgender individuals "choose to *transition*, the term used to refer to the act of living and working in a gender different from one's sex assigned at birth." Dkt. No. 13-3, Ex. B., at 6. In other words, the defining feature of transgender individuals is that they "identify with a gender different from the sex they were assigned at birth," not that they choose to live and work in accordance with that identity. Dkt. No. 13-4, Ex. B., at 6. The *Karnoski* court reached its conclusion only by conflating transgender with transition.

b. On the law, even if this Court believes that no daylight exists between the policy set forth in the 2017 Memorandum and the one recommended by the Department, it should still defer to the military's judgment. Although Plaintiffs suggest that the process here was a *post hoc* effort with a preordained result, that is not the case. To the contrary, the Department's review of the issue of transgender service began at the initiative of Secretary Mattis nearly a month *before* the President made his statement on Twitter. *See supra* p. 4. After the 2017 Memorandum was issued, Secretary Mattis then ordered the creation of a Panel of Experts to engage in "an *independent* multi-disciplinary review

and study of relevant data and information pertaining to transgender Service members." Terms of Reference 2 (emphasis added); *accord* Report 17. As he later explained, "I charged the Panel to provide its best military advice … without regard to any external factors." Mattis Memorandum 1. Following this review, "[t]he Panel made recommendations based on each Panel member's independent military judgment." Report 4. After considering "those recommendations and the information underlying them, as well as additional information," the Department conducted an analysis that did not "start with [a] presumption" in favor of an outcome, but "ma[de] no assumptions" at all. *Id.* at 18–19. The resulting policy, in Secretary Mattis's words, was the product of "the Panel's professional military judgment," "the Department's best military judgment," and his "own professional judgment." Mattis Memorandum 2, 3. Unless 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. *Cf. Phila. & Trenton R. Co. v. Stimpson*, 39 U.S. (14 Pet.) 448, 458 (1840) (presumption of regularity applies *a fortiori* to Cabinet Secretaries and the President).

Nor does the fact that the Department's new policy postdates the 2017 Memorandum change the analysis. Again, because the new policy differs from the one set forth under any reading of the 2017 Memorandum, Defendants are not trying to support an existing policy with after-the-fact evidence. But even if they were, the consideration of such materials would be appropriate in this context. As discussed, the Supreme Court has repeatedly considered evidence and rationales produced after the adoption of a military policy, even if the same policy would trigger heightened scrutiny in the civilian sphere. In fact, it has even gone so far as to rely on theories as to what "Congress may … quite rationally have believed" to sustain a sex-based classification concerning military affairs. *Ballard*, 419 U.S. at 508.

That willingness to rely on *post hoc* explanations in the military context makes sense. Even if a decision concerning military matters originally rested on constitutionally impermissible reasons, it would be imprudent to hold that courts should ignore (or even discount) a subsequent judgment by military experts that the decision itself was in fact good for national defense. Again, *Rostker* is instructive: Even though Congress's original exemption of women from the requirement to register was apparently based on impermissible stereotypes, the Supreme Court refused to ignore Congress's later justification of that rule on military grounds. Yet under Plaintiffs' approach, those legitimate concerns about national defense should have been disregarded simply because they were raised after the law's enactment.

Likewise, even the *Karnoski* court declined to ignore the Department's new policy as an irrelevant *post hoc* justification, but instead "carefully considered" the military's documents. 2018 WL 1784464, at *12. Although that court wrongly went on to rule that discovery into the Department's deliberative process was necessary, it at least refused to dismiss the new policy out of hand.

In fact, the Carter policy itself was the product of post hoc decisionmaking. The deliberative process leading up to that policy began with then-Secretary Carter's statement that the current policy was "outdated, confusing, [and] inconsistent," 2015 Statement, an effective moratorium on gender-identity-based discharges, Report 13, and an instruction to the working group to "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness, unless and except where objective practical impediments are identified," *id.* Yet no one would contend that in a challenge to the Carter policy, courts should disregard the RAND Report.

At bottom, Plaintiffs' position is that, due to the President's actions last summer, the military must adhere to the Carter policy (or some variant of it) going forward. That view cannot be squared with this Court's opinion, which "fully agree[d]" that "the military's previous study of transgender

EXHIBIT 39

No. 18-_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES OF AMERICA; JAMES N. MATTIS, in his official capacity as Secretary of Defense; U.S. DEPARTMENT OF DEFENSE; U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN, Secretary of Homeland Security,
Petitioners-Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent,

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

STATE OF WASHINGTON,
Real Party in Interest-Intervenor Plaintiff.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AND EMERGENCY MOTION FOR STAY PENDING CONSIDERATION OF THE PETITION

CHAD A. READLER
Acting Assistant Attorney General

HASHIM M. MOOPPAN
Deputy Assistant Attorney General

BRINTON LUCAS
Counsel to the Assistant Attorney General

MARK R. FREEMAN
MARK B. STERN
MARLEIGH D. DOVER
TARA S. MORRISSEY
BRAD HINSHELWOOD
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7261
950 Pennsylvania Ave., NW
Washington, DC 20530

court's July 27 order pending the Court's disposition of this mandamus petition and an immediate administrative stay pending consideration of the stay motion.

STATEMENT

The factual and legal background of this litigation is set out in detail in the government's briefs in *Karnoski v. Trump*, No. 18-35347 (9th Cir.), which is currently set for oral argument on October 10. We summarize that background below as it relates to the district court's July 27 discovery order.

A. Background

1. In June 2016, then-Secretary of Defense Ashton Carter ordered the armed forces to revise their standards for accession into the military by transgender individuals, setting an implementation date of July 1, 2017. Doc.48-3. Longstanding military standards had presumptively barred transgender individuals from entering the military on the basis of transgender status. Doc.197, ex. 5, at 27, 48. The Carter policy altered these standards to turn on the medical diagnosis of "gender dysphoria," which involves a "clinically significant distress or impairment in social, occupational, or other important areas of functioning." Doc.224-2, at 12-13, 20. Under the Carter policy, a "history of gender dysphoria" was disqualifying unless a medical provider certified that the applicant had been stable for 18 months. Doc.48-3, attach., at 1. Similarly, a "history of medical treatment associated with gender transition" to address gender dysphoria—*e.g.*, hormone therapy, sex-reassignment surgery—was disqualifying absent 18 months of stability following the completion of treatment. *Id.*

While those who had transitioned could serve in their preferred gender, transgender individuals without a history of gender dysphoria could serve on the same terms as all others—*i.e.*, subject to the terms and conditions applicable to their biological sex. *Id.* at 1-2; Doc.224-2, at 4.

2. On June 30, 2017, the day before the Carter accession standards took effect, Secretary Mattis deferred their implementation until January 1, 2018, pending a five-month review of the issue. Doc.197, ex. 3.

On July 26, 2017, the President stated on Twitter that "[a]fter consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow . . . Transgender individuals to serve in any capacity." Add.77.

The President issued a memorandum in August 2017 calling for further study on this issue and directing the military to "return to the longstanding policy" on service by transgender individuals "until such time as a sufficient basis exists upon which to conclude that terminating [it] would not have . . . negative effects" on the military. Add.75. The President stressed, however, that the Secretary of Defense, in consultation with the Secretary of Homeland Security, could provide "a recommendation to the contrary that I find convincing" and "may advise me at any time, in writing, that a change to this policy is warranted." *Id.*

3. In February 2018, following an extensive review by a panel of experts, Secretary Mattis proposed a new policy that differed from both the Carter policy and

the longstanding policy addressed in the 2017 memorandum. Add.72-74. The Secretary recommended that the President "revoke" his 2017 memorandum, "thus allowing" the military to adopt the new policy. Add.74. In response, the President issued a memorandum on March 23, 2018, stating "I hereby revoke my [2017] memorandum . . . and any other directive I may have made with respect to military service by transgender individuals." Add.70.

The military's 2018 policy, like the Carter policy, does not operate on the basis of transgender status. *Both* policies allow transgender individuals without a history of gender dysphoria to serve, if they meet the standards associated with their biological sex. Add.74. And *both* policies restrict the ability of transgender individuals with a history of gender dysphoria to serve, though they differ as to the scope of the restrictions. Under the 2018 policy, individuals with a history of gender dysphoria may join the military if they can show 36 months of stability (as opposed to the Carter policy's 18 months) before applying and neither need nor have undergone gender transition. Add.73. Current servicemembers diagnosed with gender dysphoria may continue serving either in their preferred gender (if, under a reliance exemption, they received that diagnosis from a military medical provider while the Carter policy was in effect) or in their biological sex. *Id.*

B. Prior Proceedings

1. In August 2017, several individuals and organizations brought this constitutional challenge against the July 2017 Twitter announcement and the 2017

The factors that typically inform this Court's exercise of its mandamus jurisdiction—whether the petitioner has "no other adequate means" of relief or will suffer harm that is not correctable on appeal, and whether the order is "clearly erroneous as a matter of law," reflects a frequent error or "persistent disregard of the federal rules," or raises "new and important problems"—confirm that mandamus is warranted. *Bauman v. United States Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977). These factors "serve as guidelines," and "[n]ot every factor need be present at once" or even "point in the same direction." *Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010). Here, the government has "no other adequate means" to obtain relief from the district court's discovery demands. *Bauman*, 557 F.2d at 654. And the extraordinary burdens that these demands would impose on the President and the military—and the intrusion into their deliberations and consultations that would result—cannot be undone. *Id.* The district court's order is based on serious legal errors and cannot be reconciled with *Cheney*'s admonition that courts should be "mindful of the burdens imposed on the Executive Branch." 542 U.S. at 391; *see also Bauman*, 557 F.2d at 654-55.

B. The Discovery Order Is Premised On Issues That This Court Will Decide In The Government's Pending Appeal.

The premises of the July 27 order are set out in the district court's opinion and order of April 13. The government's appeal of that order is fully briefed and is currently scheduled for argument on October 10 (absent further expedition). *Karnoski*

v. Trump, No. 18-35347 (9th Cir.). The resolution of that appeal may eliminate the purported basis for the discovery and, at a minimum, will clarify the issues presented and the standard of review. The district court could not properly impose intrusive discovery obligations on the White House while this Court is reviewing the predicate of the discovery order, and the significant consequences of the court's error call for this Court's immediate exercise of its mandamus authority. *See In re United States*, 138 S. Ct. 443, 445 (2017) (per curiam) (vacating denial of mandamus and recognizing that "the Government's threshold arguments . . . , if accepted, likely would eliminate the need for the District Court to examine" the requested materials).

Among other things, the disposition of the appeal will clarify which policy is properly the subject of the court's review. The government's briefs explain that the governing policy is that established by Secretary Mattis in 2018, and that the policy should be reviewed on its own terms, without regard to any rescinded presidential directives. *See* Gov't Br. 40-49; Reply Br. 2-10; *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (upholding presidential proclamation based solely on its text and the "review process" that supported it, without regard to previous executive orders or past statements by the President, or any discovery into that deliberative process).

By contrast, the district court's decision to allow "discovery related to President Trump" is premised on the mistaken assumption that the 2018 policy announced by Secretary Mattis is "not a 'new policy,' but rather a plan to implement . . . the directives of the 2017 Memorandum." Add.14. That is incorrect, and much of the

requested discovery has nothing to do with the new policy. The district court's theory rests on its view that the President did not "substantively rescind or revoke" his 2017 memorandum and statements, Add.27—a conclusion that inexplicably disregards the President's unambiguous action "revok[ing]" the 2017 memorandum and "any other directive . . . with respect to military service by transgender individuals." Add.70. It also overlooks the substantive terms of the 2018 policy, which draws classifications based on the medical condition of gender dysphoria, rather than on transgender status. *Compare* Add.73-74, *with* Add.4-5.

The pending appeal will address these and other errors infecting the court's conclusion that strict scrutiny applies. That view has shaped the district court's discovery orders, and it is the linchpin of the court's ruling requiring the wholesale production of documents subject to the deliberative process privilege. The government's briefs explain that this standard is inapplicable and that "great deference" is owed to "the professional judgment of military authorities," *Winter v. NRDC*, 555 U.S. 7, 24 (2008). *See* Gov't Br. 19-40; *see also Hawaii*, 138 S. Ct. at 2421 (emphasizing that courts "cannot substitute [their] own assessment for the Executive's predictive judgments" on matters of "national security").

In affording deference to military decisions, courts do not reexamine *de novo* the "timing and thoroughness" of military studies and deliberations. Add.41; *cf. Hawaii*, 138 S. Ct. at 2421 (rejecting attempt to discredit "the thoroughness of [a] multi-agency review" on the ground that the final government "report 'was a mere 17 pages'").

EXHIBIT 40

FILED UNDER SEAL

EXHIBIT 41

FILED UNDER SEAL