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## INTRODUCTION

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

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

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

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

The principal basis for Defendants’ contention is a so-called “Panel of Experts” (“Panel”), which Secretary Mattis established to assist in implementing the Ban, but which Defendants now argue conducted a *de novo* review, unconstrained by the President’s directives, and “developed a new policy.” (Memo. at 5.) Retired Admiral William Moran is one of only two voting members of that 17-member Panel that Plaintiffs seek to depose. On information and belief, he was the *only* voting member who also served on the prior Working Group appointed by Secretary Carter, which only a year before had recommended

transgender persons be permitted to serve openly. The Carter Working Group did so after concluding, based on comprehensive review, that the exact same governmental interests Defendants now cite to support the Ban did *not* support a ban, but rather would be *promoted* by open service.

Admiral Moran has unique and critically important knowledge as to why the Panel made the exact opposite recommendation less than 18 months later. He also authored documents suggesting the evidence the Panel heard did *not* support a ban. The “apex doctrine” does not immunize from deposition high-ranking government officials who, like Admiral Moran, “have personal involvement in a material aspect of the claim presented.” *United States v. Wal-Mart Stores*, 2002 WL 562301, at \*2 (D. Md. Mar. 29, 2002).

Plaintiffs’ need for Admiral Moran’s testimony is heightened by Defendants’ efforts to stonewall discovery concerning the development of the “Mattis Policy.” Defendants have withheld approximately 30,000 documents concerning the Policy on grounds of “deliberative process” privilege, and are even now seeking mandamus in the Ninth Circuit to overturn the District Court’s order that those documents be released. Only a few days ago, after a Special Master evaluated, *in camera*, Defendants’ assertions that documents originally designated as “non-responsive” were in fact responsive but privileged, the District Court found “the Government has been overbroad in its privilege assertions,

*straying far outside the bounds of the deliberative process privilege and asserting the attorney-client privilege without care.”<sup>1</sup>*

Here, Defendants assert that Admiral Moran could not provide *any* testimony that is not “privileged or protected.” But Defendants’ claim of deliberative process privilege with respect to the *Panel’s* deliberations has already been rejected in a ruling Defendants have not challenged. Moreover, Defendants cite no authority allowing a court to quash a deposition because some yet-unasked questions may draw a privilege objection. If Defendants object to specific questions as invading privilege, the time to make those objections is at the deposition. And if, as Defendants suggest, those objections are bound up in the pending Ninth Circuit’s decision, that is only a further reason to transfer this motion to the District Court for the Western District of Washington, which is well acquainted with Defendants’ privilege claims and has already implemented a process to address them. Defendants should not be permitted to collaterally attack that court’s rulings here.<sup>2</sup>

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

<sup>2</sup> Plaintiffs also have filed a motion to transfer Defendants’ Motion to the Western District of Washington on the ground that the District Court is best positioned to determine the need for and uniqueness of Admiral Moran’s testimony.

## BACKGROUND

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

Plaintiffs challenge the constitutionality of the President's Ban, as implemented by the "Mattis Policy." President Trump first announced the Ban through a series of Tweets on July 26, 2017, abruptly reversing the military's existing "Carter Policy" permitting transgender people to serve openly. *Karnoski*, 926 F.3d at 1188. While the President claimed his announcement was made "[a]fter consultation with my Generals," it caught the Chairman of the Joint Chiefs and other top brass by surprise.<sup>3</sup> Indeed, just a year earlier, in June 2016, the DoD had adopted the Carter Policy after a year-long review that addressed each of the "governmental interests" Defendants now rely on to support the "Mattis Policy," and concluded that those interests *supported* allowing the estimated 10,000 current transgender Service Members, and future transgender enlistees, to serve their country openly. (*See, e.g.*, Ex. 3, Expert Report of former Under-Secretary of Defense Brad Carson, at 8–12, 40–46; Ex. 4, RAND Report (June 2016).) So far as the record shows, no such studies led to President Trump's Tweets.

The President formalized his Tweets in an August 25, 2017 "Presidential Memorandum" ordering the DoD to submit a "plan for implementing" three policy directives: (1) returning to the pre-Carter policy of banning transgender service members

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<sup>3</sup> Ex. 6, DoD Final Release re Tweet FOIA (Chairman of the Joint Chiefs of Staff Joseph Dunford: "I know yesterday's announcement was unexpected"; "I was not consulted.").

from serving openly, with a possible exception for those who came out during the Carter Policy; (2) a bar on enlistment (“accession”) of transgender applicants who seek to serve openly; and (3) a bar on transition-related surgical treatment for Service Members except as necessary to protect the health of those who began treatment under the Carter Policy. (Ex. 5 at 87a.) The President ordered the DoD to submit the “Implementation Plan” by February 21, 2018, and the accessions and medical-treatment bans to take effect on March 23, 2018. *Id.* at 88a.

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

On September 14, 2017, Secretary Mattis began doing just that, confirming that he would “present the President *with a plan to implement [his] policy* and directives in the Presidential Memorandum” by February 21, 2018, and directing General Selva, then Vice Chairman of the Joint Chiefs of Staff (“VCJCS”), along with Deputy Secretary of Defense (“DSD”) Patrick Shanahan, to lead the DoD “in developing an Implementation Plan on military service by transgender individuals, to effect the policy and directives in” the President’s August 25, 2017 Memorandum. (Ex. 7 at 1; Ex. 8 at 1.) Secretary Mattis further ordered creation of a “Panel of Experts” to report to and assist them in this effort. *See id.*

As ordered, Secretary Mattis provided the implementation plan to the President on February 22, 2018. The plan consisted of a memorandum in which Mattis set forth for the President’s approval a policy that effected each of the President’s three directives (the “Mattis Memorandum,” *see* Memo. Ex. C), and a 44-page “Report and Recommendations”

(“DoD Report,” *id.* Ex. D), which purports to set forth “the factors and considerations forming the basis of the Department’s policy proposals.” The DoD Report was unsigned, dated only “February 2018,” and anonymous, omitting any official, unit, or group responsible for its preparation.

Although Defendants claim the Mattis Memorandum established a “new” policy, in fact, it faithfully implements each of the President’s directives. First, it bans from service anyone with a history of gender dysphoria—a medical condition that is almost exclusively limited to transgender persons and is resolved by transition—unless “they have been stable for 36 consecutive months *in their biological sex* prior to accession.” (Memo, Ex. C at 2 (emphasis added).) Second, it *categorically* bans any “persons who require or have undergone gender transition”—though a need to transition is what defines a person as transgender, and does so even if they have never been diagnosed with gender dysphoria or have completely resolved it through transitioning. *Id.* Third, to the extent that any transgender individuals do not fall under the first two categories, they may only serve if they suppress their gender identities—the very characteristic that makes them transgender—and serve “in their biological sex.” *Id.* at 3. The only exception is a limited grandfather clause for Service Members who came out in reliance on the Carter Policy. President Trump approved the implementation plan on March 23, 2018. (Ex. 9.)

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

While the DoD was implementing the President’s August 25, 2017 directives, four suits were filed challenging the Ban, and in late 2017 each of those courts held the Ban was

likely unconstitutional and preliminarily enjoined it. *See Karnoski*, Dkt. 103 (Dec. 11, 2017); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 177 (D.D.C. 2017); *Stone v. Trump*, 280 F. Supp. 3d 747, 769 (D. Md. 2017); *Stockman v. Trump*, 2017 WL 9732572, at \*16 (C.D. Cal. Dec. 22, 2017).

In response, Defendants, with the assistance of more than 25 government lawyers (including the DOJ lawyers defending this suit), (*see* Ex. 9, Defs.’ Interrogatory Responses, at 5–7, 10–12), attempted to create a record that supports their litigation-driven characterizations of the Ban as (1) turning on “a medical condition,” gender dysphoria, and not transgender status, and (2) as a supposedly “new” policy conceived by Secretary Mattis and the military in “the exercise of their independent judgment” unrelated to the President’s directives. Though both of these assertions are belied by the contemporaneous documents Plaintiffs have been able to obtain, Defendants repeat them in their motion.

**A. The Gender Dysphoria Excuse.**

First, Defendants claim the “Mattis Policy” discriminates based not on transgender status, but rather “on the medical condition of gender dysphoria.” (*See, e.g.*, Memo. at 5.) The Ninth Circuit has already rejected this argument, instructing that heightened constitutional scrutiny applies because the “Mattis Policy” “regulates on the basis of transgender status . . . on its face.” *Karnoski*, 926 F.3d at 1201. This is also clear from the policy’s effect. A transgender person who has completed gender transition, whose gender dysphoria has been resolved, and who otherwise meets every physical and other qualification to serve, is nonetheless categorically barred from doing so.

**B. The Military Deference Rationalization.**

Second, Defendants argue the “Mattis Policy” is a “new policy,” unrelated to the President’s directives, that is the product of independent military judgment. This claim, too, is belied by the record.

**1. The “Panel of Experts”**

The primary basis for Defendants’ argument is the Panel, which Defendants claim “developed a new policy” and conducted a *de novo* review unconstrained by the President’s directives. (Memo. at 5.) At the same time, Defendants have steadfastly opposed Plaintiffs’ efforts to test those claims through discovery, asserting the deliberative process privilege as to more than 30,000 documents relating to the “Mattis Policy.” The documents Defendants *have* produced—almost all of them pursuant to court order—contradict their story of independent military judgment by a disinterested Panel.

Secretary Mattis’s September 14, 2017 Memorandum ordering the Panel’s creation made clear the Panel lacked authority to second-guess the Presidential policy it was tasked with implementing. (Ex. 8.) As to accessions, “[t]he Presidential Memorandum directs DoD to ... generally prohibit [ ] accession of transgender individuals into military service.” *Id.* at 2. Rather than evaluate *whether* to access transgender individuals, therefore, Secretary Mattis asked the Panel merely to update the pre-Carter policy barring accession of openly transgender persons with “currently accepted medical terminology.” *Id.* As for transition-related medical care, Mattis noted that “[t]he Presidential Memorandum halts the use of [government] resources to fund sex-reassignment surgical procedures.” *Id.* The

Panel’s task, therefore, was limited to “enumerat[ing] the specific surgical procedures associated with sex reassignment treatment that shall be prohibited.” *Id.* Finally, as to transgender persons openly serving, “[t]he Presidential Memorandum directs that the Department return to the longstanding policy and practice” barring open service. *Id.* However, “[t]he Presidential Memorandum . . . allows the Secretary to determine how to address transgender individuals” who came out under the Carter policy. *Id.* Accordingly, the Panel “will set forth, in a single policy document, the standards and procedures applicable to . . . addressing transgender persons currently serving.” *Id.*

The Panel initially met from October 13 through December 13, 2017. Defendants produced “minutes” for some of the Panel’s meetings, but recently admitted there are no minutes or other documents regarding the Panel’s last four meetings. (Ex. 11 at 1.) For meetings where minutes were produced, documents produced pursuant to court order raise questions about their accuracy. For example, at one meeting, the Panel heard from ten commanders of units with transgender persons serving openly. After reviewing the minutes for that meeting, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



(3) there could be no transition-related surgery because anyone who needed to transition would be separated (except for those who came out during the Carter Policy). (Ex. 17.)

One Panel member [REDACTED]

[REDACTED]

[REDACTED]

The Panel presented its Final Report to General Selva and Mr. Shanahan on December 15, 2017—four days after the District Court in *Karnoski* found the Ban was likely unconstitutional and enjoined it. (Dkt. 103.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Panel then reconvened three more times in late December 2017 and early January 2018, in the shadow of two further court orders finding the Ban likely unconstitutional. Defendants have represented there are no documents reflecting what occurred at these meetings. (*See* Ex. 11.) Nor have Defendants provided any documents

regarding the time between when the Panel's recommendations were rejected on December 15, 2017 and its disbandment on January 11, 2018.

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

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

(Ex. 17 at 1.) The USDP&R did not attach the Panel's "Final Report" or any other document purporting to reflect its work. Instead, he attached only the President's August 2017 Memorandum and Secretary Mattis's September 14, 2017 Memorandum confirming the DoD would implement the President's directives and the Panel would advise how to do so. The memorandum then repeated the *same* recommendations the Panel made a month earlier to General Selva and Mr. Shanahan, [REDACTED]. (Compare Ex. 16 at 1 with Ex. 13 at 4.)

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

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

he submitted the required implementation plan. Rather, Defendants rely *exclusively* on the 44-page, anonymous DoD Report as representing the justifications for the “Mattis Policy” and their arguments that it passes constitutional scrutiny. (Ex. 20 at 15–16.)

It is undisputed the Panel had no role in writing, reviewing, or editing the DoD Report, which was prepared *after* the Panel was disbanded. Rather, the DoD Report represents a *post-hoc* justification that [REDACTED]

[REDACTED]

Likely for that reason, Defendants have refused to produce any information related to the DoD Report, or the period from January 11, 2018 through February 22, 2018 when it was prepared. Nevertheless, the report itself shows it relied on sources that were *not* considered by the Panel, and third-party discovery, which Defendants unsuccessfully sought to quash, confirmed that, in early February 2018, Secretary Mattis’s “special assistant,” who appears to be the Report’s principal author, reached out to leading opponents of transgender rights and solicited—and received—information and published sources that the Report cited. For example, on February 5, 2018, one of those anti-transgender advocates, Dr. Paul McHugh, provided the DoD a list of additional sources he believed support the Ban, (Ex. 21), including a May 2014 Hayes Directory article, which the DoD Report cites five times as support for the “Mattis Policy.” (*See* Memo. Ex. D at

nn. 26, 67, 72, 88–89; *see also* Ex. 22 (other correspondence with anti-transgender advocates and sources collected).)

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

Throughout this proceeding, Defendants have taken the position that Plaintiffs are not entitled to *any* discovery concerning the “Mattis Policy” beyond a so-called “administrative record” that Defendants’ lawyers prepared after the Panel was disbanded. However, Plaintiffs challenge the Mattis Policy on constitutional and not Administrative Procedure Act grounds, and both the District Court and the Ninth Circuit rejected this argument. *See* Dkt. 235 at 2; *Karnoski*, 926 F.3d at 1194 (noting Defendants’ argument that “further litigation should be confined to the administrative record” and instead ordering further discovery).

Defendants then sought to achieve the same result by withholding tens of thousands of documents concerning the “Mattis Policy” on claims of deliberative process privilege. The District Court rejected those claims in July 2018. (Ex. 23, Order Granting Motion to Compel, *Karnoski*, Dkt. 299.) It held that the privilege does not apply where, as here, the government’s decision-making and intent are the basis for the Plaintiffs’ claims and the central issue in dispute. And, even if the privilege did apply, it was overcome based on a balancing of the four factors recognized by the Ninth Circuit in *FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984).

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

Policy” implements the Ban (Memo. at 17), the Ninth Circuit did the opposite. It found “Plaintiffs raise non-frivolous arguments that the 2018 Policy did not independently analyze the impact of transgender individuals serving in the armed services,” and “the litigation may require the district court to consider the basis of the President’s initial decision, as well as the 2018 Policy.” *Karnoski*, 926 F.3d at 1204.<sup>4</sup> Instead, the Court remanded for a more granular analysis of whether Defendants’ privilege claims had been overcome. *See id.* at 1206.

On remand, the District Court undertook that analysis, ordering a review of Defendants’ privilege claims on a document request-by-request basis and scheduling two-hour in-person conferences to review Defendants’ claims as to five requests at a time. (Ex. 24, Nov. 12, 2019 Mot. Hearing Tr., at 59:14-64:20; Ex. 25, Order, Nov. 19, 2019, *Karnoski*, Dkt. 394; Ex. 26, Dec. 10, 2019 Status Hearing Tr.) After the first such conference resulted in an order requiring Defendants produce three categories of documents to which they objected (Ex. 27, Dec. 18, 2019 Order, at 5–6; Ex. 14, Feb. 3, 2020 Hearing Tr., at 14:17-24:16), Defendants filed a second mandamus petition on February 8, 2020, which has been fully briefed and is awaiting decision. At the Ninth Circuit’s invitation, the District Court also responded to the petition, describing its detailed

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<sup>4</sup> Defendants state that the “Ninth Circuit vacated the preliminary injunction” (Memo. at 7), but this incorrectly describes the Ninth Circuit’s decision on their Defendants’ appeal. The Ninth Circuit expressly declined to vacate the preliminary injunction, and instead remanded for the District Court to consider the merits of Defendants’ motion to dissolve the preliminary injunction. *Karnoski*, 926 F.3d at 1207–08.

review of Defendants' privilege claims and, more generally, Defendants' repeated "fail[ure] to comply with Court orders," "inconsistent positions," and inability "to respond to the Court's basic inquiries" about documents in their possession. (Ex. 28, District Court's Requested Resp. to Pet., No. 20-70365, Dkt. 15, at 11–12.)

### **ARGUMENT**

Rules 26(b) and 30(a) allow a party to depose any person "regarding any non-privileged matter that is relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1); FED. R. CIV. P. 30(a). "Only by examining a witness live can a lawyer use the skills of his trade to plumb the depths of a witness' recollection, using to advantage not only what a witness may have admitted in answering interrogatories, but also any new tidbits that usually come out in the course of answering carefully framed and pin-pointed deposition questions." *Shoen v. Shoen*, 5 F.3d 1289, 1297 (9th Cir. 1993). For that reason, "[i]t is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error." *Medlin v. Andrew*, 113 F.R.D. 650, 652–53 (M.D.N.C. 1987). Even assuming Defendants have standing to quash the deposition, Defendants' motion in no way justifies this extraordinary relief.

**I. “Exceptional Circumstances” Require Admiral Moran’s Deposition.**

**A. Admiral Moran Was Personally Involved In The Panel Deliberations Defendants Claim Were Central To The “Mattis Policy.”**

“Exceptional circumstances” for deposing current or former government officials exist where the official “ha[s] personal involvement in a material aspect of the claim presented.” *See Wal-Mart Stores*, 2002 WL 562301, at \*2; *United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 322 (D.N.J. 2009) (“Courts have time and again allowed the deposition of current and former high-ranking government officials upon a showing that the official has personal involvement or knowledge relevant to the case.”).<sup>5</sup> Admiral Moran, as an active, “voting member” of the Panel (Memo. at 5), was directly

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<sup>5</sup> *See, e.g., NRA v. Cuomo*, 2019 WL 2918045, at \*5 (N.D.N.Y. Mar. 20, 2019) (allowing deposition of New York’s former Superintendent of Financial Services where her “specific rationale for her alleged actions is at issue”); *Greater Birmingham Ministries v. Merrill*, 321 F.R.D. 406, 413 (N.D. Ala. 2017) (permitting deposition of Alabama’s Secretary of State where his “role with respect to implementation of the challenged Photo ID Law has been ongoing since he assumed office”); *Fish v. Kobach*, 320 F.R.D. 566, 579 (D. Kan. 2017) (allowing deposition of Kansas Secretary of State who had “exclusive first-hand knowledge directly relevant to the claims being litigated”); *United States v. City of New York*, 2009 WL 2423307, at \*2–3 (E.D.N.Y. Aug. 5, 2009) (authorizing deposition of New York City Mayor whose congressional testimony “suggest[ed] his direct involvement in the events at issue”); *Bagley v. Blagojevich*, 486 F. Supp. 2d 786, 789 (C.D. Ill. 2007) (allowing deposition of Illinois Governor where “the Governor was either the ultimate decision maker or at least personally involved”); *Energy Capital Corp. v. United States*, 60 Fed. Cl. 315, 318 (Fed. Cl. 2004) (authorizing depositions of former Secretary of Housing and Urban Development, and General Counsel, holding such “depositions are allowed if the party has personal knowledge of the facts in issue”); *Martin v. Valley Nat’l Bank of Ariz.*, 140 F.R.D. 291, 314–15 (S.D.N.Y. 1991) (authorizing deposition of Labor Department’s Director of Enforcement who “was apparently involved” in the challenged government decisions); *Am. Broad. Cos. v. U.S. Info. Agency*, 599 F. Supp. 765, 769 (D.D.C. 1984) (permitting deposition of agency chief who was “responsible for the creation of the documents in question”); *Union Sav. Bank of Patchogue v. Saxon*, 209 F. Supp. 319, 320 (D.D.C. 1962) (permitting deposition of senior Treasury official where “Plaintiffs allege actions personal to the Defendant”).

involved in the Panel’s deliberations central to this litigation. This is confirmed by his declaration, in which he “recall[s] personally attending seven of the thirteen Panel Meetings,” where he “listen[ed] to the presentation of data and testimony from a variety of sources” and “took part in the Panel’s deliberations and voted on a number of recommendations concerning the military’s policy regarding service by transgender individuals.” (Memo. at Ex. E., Moran Decl. ¶¶ 7–8.) What his declaration omits is that, even as to those meetings he did not attend, [REDACTED]

Admiral Moran’s correspondence also bears directly on Plaintiffs’ contention the Panel was part of an effort to justify the President’s Ban. For example, on November 2, 2017, Admiral Moran e-mailed Navy officials after the Panel’s fourth meeting and reported: his “growing sense” that transgender service “really isn’t a yes/no discussion” and a “fait accompli (based on legal opinion and recent court action, medical opinion, and general overall political climate)”; that “[t]he panel is unanimous in the opinion that the data” presented to it was “so poor that it is nearly impossible to take a purely analytic approach—data can be used to support either opinions for or against”; that a ban could not be supported by “physical accommodation requirements” or costs; that as a result, “any policy discussion on excluding TG from service are based on morals and/or morale (in good order and discipline sense),” which “[f]rom a legal standpoint have . . . been considered and ruled as not a basis for a blanket policy”; that if the Secretary of Defense

nevertheless went ahead and issued the “new policy without new evidence, it seems likely to be overturned by the court”; and that, “[a]fter sitting through hours of this discussion, it feels we are circling old ground and coming back to right where we started last summer” (apparently referencing the Carter Group’s conclusions supporting open service). *Id.* All of this raises the question why the Panel nevertheless recommended a policy implementing the President’s Ban and undermines Defendants’ claims that the Panel conducted a *de novo*, evidence-based review.

Admiral Moran also appears to have played a significant role in the Panel’s deliberations after General Selva and DSD Shanahan rejected the Panel’s recommendations. In a December 18, 2017 memorandum to Panel participants, Admiral Moran proposed a number of questions and data that might show whether the President’s Ban was supported by military interests, including: the number of transgender Service Members deployed overseas who had to return “due to medical/hormone treatment issues”; of the transgender Service Members “who have transitioned, or are in the process of transitioning, how many have worked with their commands to minimize impact on operations or deployment” or “delayed their transition . . . in order to reduce operational impacts”; and “[h]ow much deployed time do TG service members have as compared to their peers.” (Ex. 30, at USDOE00081161.) There is no record any of this available data was gathered. And, if it was, it is not cited in the DoD Report. This, too, raises questions, including “why not?,” which Admiral Moran is uniquely positioned to answer.

These examples also distinguish the cases on which Defendants principally rely. This is not a case where the senior official Plaintiffs seek to depose was not directly involved in the decision in dispute.<sup>6</sup> Rather, Defendants themselves contend that the “Mattis Policy” was the result of the Panel’s “independent military judgment.” Having put

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<sup>6</sup> Compare *Lederman v. N.Y. City Dep’t of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013) (blocking depositions of former New York City Mayor and Deputy Mayor where plaintiffs “did [not] contend that [the deponents] had first-hand knowledge about the litigated claims”); *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (quashing deposition of Vice President’s Chief of Staff who “had no apparent involvement in this litigation”); *Bogan v. City of Boston*, 489 F.3d 417, 424 (1st Cir. 2007) (prohibiting deposition of Boston Mayor where there was no evidence of his personal involvement and requesting party “failed to pursue discovery from other City employees who could have shed light on the Mayor’s involvement”); *In re United States*, 197 F.3d 310, 314 (8th Cir. 1999) (disallowing deposition of the U.S. Attorney General and Deputy Attorney General where there was no dispute that “[Attorney General] Reno did not participate in or approve the decision” at issue); *In re FDIC*, 58 F.3d 1055, 1062 (5th Cir. 1995) (finding no extraordinary circumstances requiring deposition of three FDIC officials where the “decision [in question] was in fact made by Director Stein of the FDIC’s Division of Resolutions, whom [plaintiff] has already deposed”); *In re United States*, 985 F.2d 510, 513 (11th Cir. 1993) (blocking deposition of FDA Commissioner who “could not have been responsible for selectively prosecuting the defendants”); *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586–87 (D.C. Cir. 1985) (preventing depositions of Department of Labor officials who “had no first-hand knowledge of the facts of this case”); *Raymond v. City of New York*, 2020 WL 1067482, at \*5 (S.D.N.Y. Mar. 5, 2020) (quashing depositions of former police commissioners where plaintiffs “have not shown that [the commissioners] had any first-hand knowledge”); *Federal Deposit Ins. Corp. v. Galan-Alvarez*, 2015 WL 5602342, at \*5 (D.D.C. Sept. 4, 2015) (prohibiting deposition of former FDIC Chairperson and current FDIC Deputy Director where deponents, at best, “*may* have attended meetings and requested briefings” on the policy at issue (emphasis added)); *Sensient Colors, Inc.*, 649 F. Supp. 2d at 318 (denying deposition of official where requesting party “submitted no evidence suggesting [the official] had any personal involvement in or knowledge relevant to” the factual issues in question); *Croddy v. FBI*, 2005 WL 8168910, at \*1 (D.D.C. Mar. 30, 2005) (quashing deposition where plaintiffs “have not shown that the former director, Louis Freeh, possesses unique personal knowledge of the circumstances that led to the rescission of plaintiffs’ employment offers”); *Wal-Mart Stores*, 2002 WL 562301, at \*5 (prohibiting deposition of former Consumer Product Safety Commission official where requesting party “failed to make a *prima facie* showing of . . . personal involvement”).

the Panel’s deliberations at issue—and indeed based their defense on them—Defendants should not be permitted to foreclose Plaintiffs’ ability to test Defendants’ claims.

**B. Admiral Moran Has Unique Factual Knowledge Critical To This Litigation.**

This case is also readily distinguishable from *United States v. Morgan* and its progeny, which limit questions which would “probe [the officials’] mental processes,” 313 U.S. 409, 421–22 (1941), because here Plaintiffs require basic factual testimony—not opinions—that Admiral Moran can uniquely provide. In *Franklin Savings*, for example, the Fourth Circuit considered the propriety of a deposition of the Director of the Office of Thrift Savings. 922 F.2d 209 (4th Cir. 1991). Neither the Fourth Circuit nor the parties challenged the deposition as a whole—indeed, the court noted the Director “responded to the subpoena and answered all questions directed at him with the exception of five.” *Id.* at 210. Instead, the court held that the district court had erred by requiring the Director to answer five questions which “clearly went to the mental processes by which [the Director] arrived at his decision,” because there was no “showing of misconduct or wrongdoing” justifying an exception from *Morgan*. *Id.* at 211.

As a threshold matter, here Plaintiffs are claiming, and have made a showing, of “misconduct or wrongdoing”—intentional discrimination and animus against transgender persons. Moreover, unlike in *Morgan*, Plaintiffs are not seeking discovery of Admiral Moran’s “mental processes,” let alone “mental processes” that are irrelevant to

their claims. To the contrary, Plaintiffs are seeking *facts* about the development of the “Mattis Policy,” including the actual reasons it was recommended and adopted.

Defendants’ further assertion that Admiral Moran’s testimony is unnecessary because Defendants have agreed to allow depositions of one other voting Panel member (Thomas Dee) and the political appointee who chaired the Panel (Anthony Kurta) and his deputy (Lernes Hebert) is exactly backwards. Each of these witnesses is also a “high-ranking military official” (*see* Memo. at 20) for whom Defendants could have proffered the same arguments to quash. Thus, Defendants are using the “apex doctrine” as both a sword and a shield, allowing some Panel participants to testify, while moving to block the deposition of a Panel member Plaintiffs selected because his emails suggest he may be more forthright on the Panel’s deliberations. This strategic assertion of the “apex doctrine” undermines its purpose entirely.

Additionally, Defendants’ related contention that Plaintiffs “already have access to all of the relevant documents” (Memo. at 18) is demonstrably false. *See supra* at 12–14. Even if it were not, documents are no substitute for live testimony. Moreover, because Admiral Moran resides outside the subpoena range of the District Court, the noticed deposition will likely be the only chance for the Court to hear his testimony

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

Nor do Defendants’ generalized privilege assertions—which have already been rejected, repeatedly, by the District Court—preclude Admiral Moran’s deposition. “Given that the [deliberative process] privilege is not absolute and that discovery might reveal

reasons why it should not be applied, it is fairly standard practice to permit a person who may be able to claim the privilege to be deposed, and to require that the claim of privilege be made in response to specific questions.” *Libertarian Party v. Husted*, 33 F. Supp. 3d 914, 920 (S.D. Ohio 2014); *see also Fla. Ass’n of Rehab. Facilities, Inc. v. State of Fla. Dep’t of Health & Rehab. Servs.*, 164 F.R.D. 257, 268 (N.D. Fla. 1995). This standard practice is particularly applicable here, where the District Court has already rejected Defendants’ attempts to invoke “deliberative process” to avoid discovery.

Finally, Defendants’ pending mandamus petition undermines, rather than supports, Defendants’ motion. To the extent Defendants argue the deposition would “circumvent the Ninth Circuit’s administrative stay,” the proper solution is to transfer this motion to the District Court, which, along with the Ninth Circuit, are in the best position to decide the scope of the stay, as well as any related privilege issues. (*See Mot. to Transfer at 12.*) It is Defendants, not Plaintiffs, who are attempting to “circumvent” the Ninth Circuit’s and the District Court’s rulings by moving to quash Admiral Moran’s deposition on the basis of what the District Court has ruled are “overbroad” privilege objections.

### **CONCLUSION**

Plaintiffs respectfully request that the Court deny Defendants’ motion.

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**CERTIFICATE OF WORD COUNT**

I hereby certify that the foregoing brief is in compliance with Local Rule 7.3(d)(1) because the body of this brief, including headings and footnotes, does not exceed 6,250 words as indicated by Microsoft Word, the program used to prepare this document.

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**CERTIFICATE OF SERVICE**

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

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