

1 I, Andrew E. Carmichael, swear under penalty of perjury under the laws of the United
2 States to the following:

3 1. I am a Senior Trial Counsel at the United States Department of Justice and
4 counsel of record for Defendants in this action. I submit this declaration in support of
5 Defendants' Second Notice of Compliance Regarding ECF No. 569.

6 2. Attached to this declaration as Exhibit A is a true and correct copy of the
7 declaration of Platte B. Moring, III, Department of Defense Deputy General Counsel (Legal
8 Counsel). Exhibit A formally asserts the deliberative process privilege over 347 documents on
9 behalf of the Department of Defense.

10 3. Attached to this declaration as Exhibit B is a true and correct copy of the
11 declaration of Rear Admiral Brendan C. McPherson, U.S. Coast Guard, Military Advisor to the
12 Acting Secretary of Homeland Security. Exhibit B formally asserts the deliberative process
13 privilege over 27 documents on behalf of the Department of Homeland Security.

14 3. Attached to this declaration as Exhibit C is a true and correct copy of the
15 declaration of Colonel Jacqueline Emanuel, U.S. Army, Chief of the Litigation Division,
16 Army Legal Services Agency. Exhibit C formally asserts the deliberative process privilege
17 over 21 documents on behalf of the Department of the Army.

18 4. Attached to this declaration as Exhibit D is a true and correct copy of the
19 declaration of Lieutenant Colonel Jacqueline M. Stingl, U.S. Air Force, Chief General
20 Litigation Division, Air Force Legal Operations Agency. Exhibit D formally asserts the
21 deliberative process privilege over 10 documents on behalf of the Department of the Air Force.

22 5. Attached to this declaration as Exhibit E is a true and correct copy of the
23 declaration of Brian Judge, Chief of the Office of Claims and Litigation, Office of the Judge
24 Advocate General of the Coast Guard. Exhibit E formally asserts the deliberative process
25 privilege over 4 documents on behalf of the Coast Guard.
26
27
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EXHIBIT A

The Honorable Marsha J. Pechman

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

No. 2:17-cv-1297-MJP

**DECLARATION OF
PLATTE B. MORING, III IN
SUPPORT OF
DEFENDANTS'
SUBMISSION FOR *IN*
CAMERA REVIEW OF
DOCUMENTS WITHHELD
UNDER THE
DELIBERATIVE PROCESS
PRIVILEGE**

DECLARATION OF PLATTE MORING III

I, Platte B. Moring, III, do hereby declare as follows:

1. I currently serve as the Department of Defense (“DoD”), Deputy General Counsel (Legal Counsel), as a member of the Senior Executive Service. Under the authority of the DoD General Counsel, I provide overall supervision of all litigation involving the DoD, particularly the Office of Secretary of Defense (“OSD”). Among other responsibilities, I supervise the Directors of the Office of Litigation Counsel, Office of Information Counsel, Defense Office of Hearings and Appeals, and Office of the Chief Prosecutor of the Military Commissions.

2. I assumed my current responsibilities in March 2020. Previously, I served as the managing partner of a regional office of the Philadelphia law firm of White and Williams LLP. In that capacity, I was a commercial litigator performing trial work for insurance and international trade clients for over twenty-seven years. Earlier in my legal career, I was a trial attorney in the Civil Division of the U.S. Department of Justice. In 1979, I was commissioned as an officer in the United States Army. I obtained the rank of Lieutenant Colonel while serving as the Staff Judge Advocate, 213th Area Support Group, Pennsylvania Army National Guard and deployed on active duty in support of Operation Enduring Freedom in Afghanistan.

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

4. I submit this Declaration in response to the Court’s August 24, 2020, Order directing the DoD to provide certain documents to the Court for *in camera* review. I base this Declaration on my personal knowledge and information made available to me in the

performance of my official duties.

5. The Court directed DoD to submit for *in camera* review certain communications from the time period January 11, 2018 to February 22, 2018, that had been listed on the DoD privilege log reflecting documents the government had withheld from production pursuant to the deliberative process privilege.

6. Based on my review of the relevant documents, I have determined that the following documents submitted with and discussed within this Declaration were created as part of DoD's decision-making process and reflect the deliberative process undertaken by DoD and military personnel in developing and implementing DoD's policy on military service by transgender individuals or individuals diagnosed with or having a history of gender dysphoria, as well as other policy deliberations that occurred from January 11, 2018 to February 22, 2018, that mention or refer to this policy. DoD accordingly asserts the deliberative process privilege over each of these documents. Where the equities of the military Services are jointly implicated in a particular document, DoD is hereby asserting the deliberative process privilege over the deliberative material in the document. The military Services are also submitting Service-specific Declarations covering the deliberative documents which contain only the Service-specific equities.

7. There are a number of categories of documents that are subject to the deliberative process privilege. Each numbered paragraph below addresses a specific category of documents subject to the deliberative process privilege. Bulleted subparagraphs address any subcategories of documents.

DOCUMENTS PROTECTED BY THE DELIBERATIVE PROCESS PRIVILEGE

8. The first category contains 24 documents that show internal deliberations, including discussions, recommendations, analyses and draft analyses, by DoD personnel regarding the application of the 2016 study by the RAND Corporation, entitled “Assessing the Implications of Allowing Transgender Personnel to Serve Openly,” to DoD’s ongoing review of its transgender military service policy. These deliberations include, in particular, consideration of how the 2016 RAND study should be addressed in formulating DoD’s Report and Recommendations on Military Service by Transgender Persons (“DoD’s Report”). The documents in this category are all pre-decisional. They were created before DoD’s Report was finalized and before Secretary Mattis adopted the Panel of Expert’s recommendations in full and presented them to the President on or about February 22, 2018. These document are also deliberative. They reflect the views and analyses of DoD officials regarding the RAND Report’s content and conclusions and how to address issues raised by the RAND Report in future DoD policy and in formulating DoD’s Report. These 24 documents are listed below:

- DoD00007452 is a draft information paper analyzing, critiquing, and providing recommendations regarding the RAND Report that was prepared for the Secretary of Defense to be used in deliberations concerning DoD’s Transgender Service Policy. Five documents (DoD00007451, DoD00087724, DoD00137997, DoD00137999, and DoD00141675) are additional versions of that draft information paper containing comments from senior DoD officials in the Office of the Undersecretary of Defense for Personnel and Readiness (“OUSD (P&R)”). Two documents (DoD00122716 and DoD00140449) are identical versions of a separate memorandum prepared by Dr. Terry Adirim, a senior doctor and subject

matter expert in the Office of the Assistant Secretary of Defense for Health Affairs, that contains comments on a draft of the above-noted information paper for the Secretary of Defense. DOD00127172 is an email from Dr. Adirim to Mr. Lernes Hebert, a senior DoD official serving in OUSD (P&R), which transmitted her memorandum. The body of the email contains a characterization of the draft information paper and expresses the opinions of two senior DoD officials concerning the content of the draft information paper.

- DoD00133478, DoD00138045 and DoD00141490 are identical copies of a separate draft information paper written by Mr. Hebert that provides commentary and analysis of the RAND study for use in formulating DoD's Report. DoD00133477 is another version of this draft information memorandum.
- DoD00006644 is a draft memorandum from Robert Wilkie, the Under Secretary of Defense for Personnel and Readiness, providing analysis of the RAND Report to the Secretary of Defense for his deliberations on the military transgender policy and DoD Report.
- DoD00087717, DoD00087723, DoD00137996, DoD00137998, DoD00139944, DoD00139968, DoD00140054, DoD00140110, DoD00141671, DoD00141674 are email chains with deliberations about the content of Under Secretary Wilkie's draft RAND information memorandum.

9. The next category of documents relate to an action memorandum from Under Secretary Wilkie to the Secretary of Defense, providing detailed recommendations regarding the future development of a military policy on universal accession and retention standards. These documents are pre-decisional. They reflect the early stages of DoD deliberations on what

ultimately culminated in the Department's July 30, 2018 instruction on non-deployable service members (Department of Defense Instruction ("DoDI") 1332.45). Further, to the extent portions of those deliberations related to transgender military service, they occurred before the DoD Transgender Service Policy was finalized by DoD. These documents and draft documents are also deliberative. They reflect the views, recommendations and analyses of DoD officials about issues regarding the development of DoDI 1332.45 and other potential DoD policies.

These six documents are listed below.

- DoD00000311, DoD00000314, and DoD00138056 are identical copies of the signed action memorandum which reflect Secretary Wilkie's recommendations to the Secretary of Defense regarding the future development of a military policy on universal accession and retention standards.
- DoD00010505, DoD00138061, and DoD00141492 are draft versions of the above referenced memorandum, including drafts with comments from senior officials in OUSD (P&R).

10. Several documents are various working drafts of DoD's Report, which was finalized and submitted to the President by then-Secretary of Defense James Mattis on February 22, 2020. The final version of DoD's Report was filed on the docket in this case on March 23, 2020. Dkt. No. 216-2. This category of documents includes working drafts of DoD's Report and sections of DoD's Report containing comments, substantive revisions, citations, and editing proposals exchanged among staff members and personnel from DoD, the Department of Homeland Security ("DHS"), and the Military Services between January 11, 2018 and February 21, 2020. These documents are pre-decisional. As working drafts of DoD's Report and draft sections of that Report, they were still subject to internal DoD editing, review, and comment

before that Report was finalized and sent to the President. Indeed, the working drafts of the Report were created, edited, and revised multiple times by senior officials within DoD, the Military Services, and DHS before the DoD Transgender Service Policy was finalized by DoD. These working drafts are also deliberative. They reflect the recommendations, views, and analyses from senior DoD, Military Service, and DHS officials, and reveal the consultative process undertaken by the Government in finalizing the DoD Transgender Service Policy. These documents are: DoD00000337, DoD00000358, DoD00000363, DoD00000364, DoD00000366, DoD00000380, DoD00007555, DoD00007562, DoD00085742, DoD00086280, DoD00086338, DoD00086343, DoD00086350, DoD00086355, DoD00087045, DoD00087089, DoD00087098, DoD00087160, DoD00087170, DoD00118913, DoD00122464, DoD00122597, DoD00126939, DoD00127095, DoD00127103, DoD00127201, DoD00130409, DoD00130413, DoD00131795, DoD00132160 (this document is also included paragraph 23), DoD00138069, DoD00141978, DHS00000187, DHS00000188, DHS00000189, DHS00002533, DHS00000129, and DHS00000142.

11. Several documents consist of emails containing comments, recommendations, edits, and proposed revisions to the working drafts of DoD's Report or a section of those working drafts. These email communications are pre-decisional. They were sent before DoD finalized its Report and delivered that Report to the President on February 22, 2018, and before DoD's Transgender Service Policy was finalized by DoD. They are also deliberative. They reflect the views, recommendations, and analyses of DoD, Military Service and DHS officials regarding the process of drafting the report and the substance of drafts of the Report itself, along with additional inputs, thoughts and opinions regarding that Report. These emails fall into the following categories:

- A number of documents consist of email discussions among senior DoD officials and contain internal deliberations in which the senior officials seek and provide comments and recommendations on an outline of the Report and in which they discuss the editing process. These documents are DoD00000365, DoD00000379, DoD00000387, DoD00000390, DoD00007828, DoD00137509, DoD00137510, DoD00007829, DoD00007831, DoD00007832, DoD00010522, DoD00010514, DoD00010523, DoD00010524, DoD00131296, DoD00122499, DoD00131292, DoD00137416, DoD00137428, DoD00137431, DoD00137795, DoD00142610, DoD00142785, DoD00142860, and DoD00142796.
- Six documents consist of emails containing or discussing the Secretary of Defense's comments and additions on the draft Report. These documents are DoD00086913, DoD00086928, DoD00086209, DoD00082720, DoD00086907, and DoD00140098.
- Six documents consist of emails containing comments and recommendations regarding the draft Report from Army Colonel Mary Krueger, a subject matter expert. These documents are DoD00086931, DoD00086909, DoD00086835, DoD00086891, DoD00086903 and DoD00086905.
- One document is an email communication among senior DoD officials concerning drafts of the proposed Secretary of Defense Memorandum (the "Mattis Memorandum") and DoD's Report. This documents is DoD00132041. The initial email in the chain of this document reflects legal advice and deliberations by Department of Justice litigation counsel and has been separately redacted of information subject to the attorney-client and work product

privileges.

- Fourteen documents involve an email chain between William Bushman, a senior DoD official in the Office of the Secretary of Defense, and Dr. Adirim seeking and receiving review and edits on draft language and citations for inclusion in the draft of DoD's Report. These documents are DoD00086926, DoD00086934, DoD00086936, DoD00086938, DoD00086940, DoD00086942, DoD00086944, DoD00086946, DoD00086955, DoD00086957, DoD00086977, DoD00086979, DoD00086981, and DoD00086895.
- A number of documents involve an email chain among Mr. Bushman, Dr. Adirim, and Anthony Kurta, a senior official in OUSD (P&R) (and chair of the Panel of Experts), seeking and receiving review and edits of several citations in a draft of DoD's Report. These conversations also include email chains of Dr. Adirim (or other HA officials) seeking additional information from subject matter experts. Documents in this subcategory are DoD00086390, DoD00086395, DoD00086397, DoD00086413, DoD00120006, DoD00120007, DoD00120008, DoD00120582, DoD00142612, DoD00122611, DoD00118874, DoD00122665, DoD00122709, DoD00122713, DoD00122714, DoD00127119, DoD00127142, DoD00127163, DoD00127164, DoD00127165, DoD00137650, DoD00140066, and DoD00140117.
- A final subcategory of documents consists of emails between the Army and DoD seeking and providing inputs and edits to DoD's Report and the DoD Transgender Service Policy. Documents in this subcategory are Army_10030439, Army_10030440, Army_10030459, Army_10030460, and

Army_10030923. These documents reflect inputs and suggestions from Colonel Krueger to Senior DOD officials Will Bushman and Ryan Newman. They are pre-decisional because they reflect inputs, thoughts and opinions concerning the final Report prior to the issuance of the DoD Transgender Service Policy. They are deliberative because they reflect inputs, thoughts and opinions on the policy concerning military service by transgender individuals.

12. DoD00000302 is an executive summary regarding the Army's deliberations concerning the accession processing of a specific individual diagnosed with gender dysphoria. This document is pre-decisional. It was created while the individual was in the accession process and before the Army had reached a decision on whether the individual would be permitted to access into the Army. It is also deliberative. It reflects the views and analyses of Army officials about how to handle accession for the individual and how to respond to media inquiries related to the individual's application for accession.

13. DoD00122597, DoD00127103 and DoD00139728 are copies of a memorandum prepared by Dr. Adirim analyzing sources to be used in DoD's Report and recommending that certain sources be relied on over others. This document is pre-decisional. It was created before DoD's report was finalized and before the DoD Transgender Service Policy itself was finalized by DoD. The memorandum is also deliberative. It reflects the views and analyses of a senior DoD official about the sources relied on in the DoD Report, and reveals the officials' thoughts and opinions regarding proposed sources for the Report.

14. Ten documents involve an email chain discussion among Stephanie Miller, a senior official in OUSD (P&R), Mr. Hebert, and Mr. Bushman about a proposed draft action memorandum for the Secretary of Defense on a potential policy concerning military service by

transgender individuals and individuals with gender dysphoria. These documents are, DoD00141463, DoD00141469, DoD00141470, DoD00141472, DoD00141474, DoD00141726, DoD00141735, DoD00142940, DoD00142945 and DoD00142947. These documents are pre-decisional and deliberative. They preceded the finalizing of the proposed action memorandum at issue, as well as the Secretary of Defense's ultimate decision on the DoD Transgender Service Policy. And they reflect the mental impressions and opinions of senior DoD officials regarding what information and analyses to include in the proposed action memorandum as the Department worked to refine and finalize that memorandum and the Transgender Service Policy. DoD will segregate factual material from the records in this paragraph and will provide redacted versions to the plaintiffs.

15. Five documents contain draft outlines of potential "ways forward" on military service by transgender individuals and individuals with gender dysphoria, prepared by senior DoD officials in OUSD (P&R), for use in briefing the Secretary of Defense on these issues. The documents are DoD00137623, DoD00141426, DoD00141428, DoD00141691, and DoD00141693. These documents are pre-decisional. They preceded any decision on the "way forward" and the Secretary of Defense's ultimate decision on the DoD Transgender Service Policy. They are also deliberative. They reflect senior DoD officials' opinions and recommendations concerning how DoD' policy process should proceed, and include proposed policy options for the Secretary of Defense's consideration.

16. Nine documents involve a draft action memorandum containing policy guidance from Under Secretary Wilkie to the military Services on the proposed policy regarding military service of transgender individuals and individuals with gender dysphoria. These documents are DoD00141600, DoD00141762, DoD00010487, DoD00010488, DoD00137639, DoD00141343,

DoD00141440, DoD00141506, and DoD00142675. These documents are pre-decisional and deliberative. They preceded the final policy guidance adopted and disseminated by the Under Secretary, as well as the Secretary of Defense's ultimate decision on the DoD Transgender Service Policy and the final version of the action memo at itself. The drafts also reflect the advice, opinions and recommendations of senior DoD officials in the form of the comments and edits they provided on the draft guidance.

17. Three documents contain edits to a proposed action memorandum from Under Secretary Wilkie to the Secretary of Defense regarding requests by the Secretary of Defense for additional information pertaining to military service by transgender individual and individual with gender dysphoria. The documents are DoD00141480, DoD00131384 and DoD00142951. These documents are pre-decisional. They preceded the finalized version of the action memo, as well as the Secretary of Defense's ultimate decision on the DoD Transgender Service Policy. They are also deliberative. They reveal the particular issues on which the Secretary of Defense requested additional information in the course of his deliberations. The documents thus reveal the Secretary of Defense's mental impressions and thought process as he worked to decide and consider relevant issues in the formulation of policy. The documents also reflect legal advice of the Department of Defense Office of General Counsel and the Department of Justice, and have been separately redacted of information subject to the attorney-client and work product privileges.

18. The next category of documents contain deliberations from the military Services in response to a DoD inquiry regarding privacy concerns with new transgender accessions in basic training. DoD00000288, DoD00000289, DoD00000291, DoD00000293, DoD00000294, DoD00000295 contain email conversations between senior DoD officials and personnel from

the military Services on privacy concerns of transgender military personnel. These documents are pre-decisional. They occurred before the DoD Transgender Service Policy was finalized by DoD. They are also deliberative. They reflect the views and recommendations of Service officials concerning a sensitive set of policy questions.

19. DoD00000290 and DoD00000292 are a memorandum from the Air Force discussing and presenting recommendations on several policy “Gaps” related to service in the Air Force of transgender individuals. This memorandum is pre-decisional. It was formulated prior to final Air Force decisions on the policy “Gaps” discussed in the memorandum, and before the DoD Transgender Service Policy was finalized by DoD. It is also deliberative. It reflects the views and recommendations of Air Force officials concerning a sensitive set of policy questions.

20. Several documents relate to preparations for meetings with Secretary Mattis to discuss policy related to military service of transgender individuals and individuals diagnosed with gender dysphoria. These documents include a “briefing card,” or briefing paper, prepared by staff members in the Office of the Secretary of Defense, talking points for meetings, and discussions among senior DoD officials about what to present to the Secretary at meetings. These documents are pre-decisional. They each preceded the meetings at issue and also preceded Secretary Mattis’s ultimate decision on the DoD Transgender Service Policy. And, they are deliberative. They reflect the candid advice, opinions and recommendations of senior DoD officials and capture the process undertaken by DoD as it developed and refined relevant policy.

- DoD00088300, DoD00088391, DoD00083667, DoD00083670, and DoD00088408 contain a briefing card for a January 17, 2018 meeting, which

was created in advance of the meeting and reflects advice and recommendations to be presented to Secretary Mattis at the meeting.

- DoD00088390, DoD00088397, DoD00088399, DoD00088401, DoD00088403, DoD00088407 is an email chain discussing recommended edits to the draft briefing card for the January 17, 2018 meeting.
- DoD00088299 consists of an email between Mr. Bushman and Mr. Wilkie containing deliberations concerning the January 17, 2018 meeting and the topics the Secretary of Defense will likely want to discuss at the meeting.
- DoD00010501 is an email containing deliberations among OUSD (P&R) personnel regarding a separate forthcoming meeting with the Secretary of Defense on transgender military service policy on January 19, 2018.
- DoD00007804, DoD00142994, DoD00142957 are emails among OUSD (P&R) officials containing deliberations from a meeting with SD regarding the transgender military service policy including questions presented and opinions offered by the SD.
- DoD00139383 and DoD00143308 are emails to the Deputy Secretary of Defense with a proposal for topics to cover with the Secretary of Defense at an upcoming meeting.

21. A related category, encompassing DoD00130590, DoD00131373, DoD00137622, and DoD00139584, is email discussions among Mr. Bushman, Mr. Kurta, and Anthony DeMartino, then serving as the Chief of Staff to the Deputy Secretary of Defense, and their staff concerning how to structure and what to cover in a meeting with Secretary Mattis on January 30, 2018. The emails in this category reflect the recommendations and advice of the officials

included on the emails, as well as policy recommendations of the military Services. The emails preceded both the January 30, 2018 meeting itself and Secretary Mattis's eventual decision on the transgender military service policy.

22. Three documents relate to a draft proposed December 2017 letter from the Secretary of Defense to the President regarding DoD's policy on military service by transgender individuals and individuals with or having a history of gender dysphoria. The letter was never finalized or sent and preceded the Secretary of Defense's ultimate decision on the DoD Transgender Service Policy. The documents are deliberative in that they discuss possible strategic decisions and recommendations for DoD policy.

- DoD00087202 and DoD00133344 are copies of that draft letter.
- DoD00087201 consists of an email containing discussions regarding the proposed contents of the draft December 2017 letter.

23. Another category of documents relate to drafts of the "Mattis Memorandum," which the Secretary of Defense used as a cover memorandum to the DoD Report when he transmitting that report to the President. The final Mattis Memorandum is filed on the docket. *See* Dkt. 216-1. The category of documents related to that memorandum includes working drafts of the memorandum and parts of the memorandum—including drafts containing comments, substantive revisions, and editing proposals exchanged among senior DoD officials—as well as emails among senior DoD officials suggesting edits and changes to the memorandum. These documents are pre-decisional. They were created before the Mattis Memorandum was finalized and transmitted to the President (along with DoD's Report) and before Secretary Mattis adopted the current DoD policy. They are also deliberative. They reflect the opinions and advice of Senior DoD officials and the give-and-take of the consultative

process at DoD and in particular in the office of the Secretary of Defense.

- DoD00087055 and DoD00130406 are an email chain providing a recommendation about how language in a certain part of the memorandum should be treated in further rounds of edits.
- DoD00130513, DoD00130515, DoD00130517, and DoD00131229 are email chains explaining edits and a recommendation related to the memorandum.
- DoD00086255, DoD00086257, DoD00086259, and DoD00086261 are a word document and email chains containing edits to a suggested definition of the word “transgender” to be used in the Mattis Memorandum.
- DoD00087071, DoD00086340, DoD00086345, DoD00086352, DoD00086357, DoD00087086, DoD00087161, DoD00087172, DoD00131700, DoD00131704, DoD00131796, DoD00131800, DoD00131807, and DoD00141980 are non-final drafts of the memorandum itself, some of which contain line edits and comments, and all of which preceded the final version of the memorandum.

24. A related category, encompassing documents DoD00087062, DoD00087063, DoD00087067, DoD00087068, consists of drafts of the Mattis Memorandum with edits from Secretary Mattis, himself. In addition, documents DoD00131806 and DoD00131896 contain email discussions among senior DoD officials in which senior officials seek input from Secretary Mattis on DoD’s Report and provide comments regarding that input. Like the other drafts of the memorandum, the drafts with Secretary Mattis’s own edits, as well as deliberations of OSD staff regarding those edits, are both pre-decisional and deliberative. They preceded the final version of the memorandum, as well as Secretary Mattis’s final decision on the Transgender Service Policy. And they reflect the Secretary of Defense’s opinions and non-final

views on drafts of the Mattis Memorandum and on the Transgender Service Policy.

25. Documents DoD00118907, DoD00120019, DoD00122788, DoD00137591 consist of drafts of a DoD policy on medical accessions standards as they relate to psychiatric disorders and gender dysphoria. The documents show the current standards and propose changes to those standards. The documents contain comments and proposed edits from DoD staff as well as pre-decisional markings. The documents are deliberative because they contain opinions and recommendations regarding changes to the current medical accessions standards and are in draft form. They are pre-decisional because the comments and recommendations preceded changes to those standards.

26. Ten documents are non-final drafts of the March 2018 Presidential Memorandum. The final version of the March 2018 Presidential Memorandum was filed on the docket on March 23, 2018. Dkt. 216-3. For example, DoD00131699 and DoD00141979 are drafts of the memorandum containing line edits from Mr. Bushman, and DoD00086339 is a draft that was sent to DoD's Office of the General Counsel and Mr. Kurta. Other drafts of the March 2018 Presidential Memorandum include DoD00086344, DoD00086351, DoD00086356, DoD00131794, DoD00131799, DoD00131703, and DoD00141629. All these documents are pre-decisional and deliberative. They preceded the finalization of the March 2018 Presidential Memorandum, as well as the Secretary of Defense's ultimate decision on the DoD Transgender Service Policy.

27. Nineteen documents consist of draft talking points to prepare various senior DoD officials to testify before Congress. Talking points are developed by staff members for senior leaders so they have correct facts and policy positions. In addition, these documents reflect the review, comment, and reflection by DoD officials concerning policy and suggested public

statements. Accordingly, these talking points and proposed responses to questions are pre-decisional as they precede any relevant testimony, and they are deliberative, as they reflect the development of suggested public statements on questions of policy and are in draft form. They are not congressional testimony.

- DoD00084274 contains draft questions and answers prepared by the staff of the Secretary of Defense in preparation for the Secretary's congressional testimony on a number of issues including transgender military service.
- DoD00137569 and DoD00137628 contain draft questions and answers created for DoD's nominee to be Principal Deputy Under Secretary of Defense for Personnel and Readiness to prepare him for his confirmation hearing.
- DoD00137570 contains draft questions and answers to prepare DoD's nominee to be the Assistant Secretary of Defense for Manpower and Reserve Affairs for congressional hearings.
- Other draft talking points in this category include DoD00141415, DoD00087730, DoD00087879, DoD00122683, DoD00122685, DoD00137606, DoD00137626, DoD00137627, DoD00137629, DoD00137851, DoD00137876, DoD00137929, DoD00137930, DoD00137933, and DoD00141417.

28. Nine documents consist of talking points to be used with members of the press. DoD00087182, DoD00087190, DoD00087449, DoD00087455, DoD00087753, DoD00087772, DoD00087778, DoD00088316, and DoD00088320 all consist of recommendations for senior DoD officials regarding how to respond to specific press inquiries on a range of topics, one of which is military service by transgender individuals. They are deliberative because they contain recommendations for senior military officials and they are pre-decision because they were not

the final version of the talking points circulated once all relevant stakeholders had an opportunity to review and edit. The portions relating to transgender individuals will be produced to Plaintiffs; all other non-responsive material will be redacted as appropriate.

29. Two documents relate to a draft information paper pertaining to screening service members and veterans for risk of suicide. DoD00122773 and DoD00127195 are non-final drafts of this paper and contain internal edits and comments by DoD officials. Both documents are pre-decisional and deliberative. The drafts preceded the finalization of the information paper and reflect the deliberations that led to the final version of that paper.

30. DoD00143145 is an email discussion among senior Air Force Officials, including the Secretary of the Air Force, pertaining to edits to a draft DoD policy memo concerning military service by transgender individuals. This document is pre-decisional and deliberative. It preceded the Secretary of Defense's ultimate decision on the DoD Transgender Service Policy, and it shows the mental impressions and thoughts of Air Force officials as the Department worked to refine and finalize that policy. The document is also in draft form.

- A subcategory of these deliberations is an email chain between Deputy Assistant Secretary of the Army Donald G. Salo Jr. and Stephanie Miller regarding transgender military service for ROTC cadets. The documents in this subcategory are Army_10025770, Army_10034780, Army_10034784, Army_10035759. These documents are pre-decisional. They reflect thoughts and opinions offered prior to any decision on transgender military service for ROTC cadets and the issuance of the DoD Transgender Service Policy. They are deliberative because they reflect inputs, thoughts and opinions on the policy concerning military service by transgender individuals in ROTC. A portion of

this document has been redacted of information subject to the attorney-client privilege.

31. Another category of documents concerns a deliberative discussion among senior DoD officials regarding the merits of certain courses of action regarding transgender applicants to ROTC programs. DoD00137466, DoD00137469, DoD00137473, DoD00137477, DoD00137480, and DoD00137481 capture the back and forth discussion between senior DoD officials as they discuss different considerations relevant to the accessions of transgender ROTC cadets. They are deliberative and pre-decisional because they reflect the deliberative discussions among officials focused on accessions regarding how best to develop guidance based on what was then still a developing policy.

32. The next category of documents concern a deliberative discussion regarding a possible survey on the accession of transgender individuals and individuals with a diagnosis or history of gender dysphoria. These documents capture the deliberative conversation between DoD officials from several offices and DoD officials from the Office of People Analytics discussing the pros and cons of conducting an internal DoD survey that would assist the development of policy for accessions of transgender individuals as well as the various options for conducting such a survey. DoD00137668, DoD00137669, DoD00138040, DoD00141460, DoD00141475, DoD00141477, DoD00141481, DoD00141495, DoD00141507, DoD00141508, DoD00141724, DoD00141738, DoD00141740, DoD00141741, DoD00141743, DoD00141747, DoD00141777, DoD00142646, and DoD00142953 are pre-decisional because they occurred before any such survey was conducted and before Secretary Mattis made his February 22, 2018 recommendation to the President. They are also deliberative because they show the internal

discussions of senior DoD officials as they worked through the possible use and development of an internal tool to inform policy development.

33. Another category of documents consist of an email thread initiated by Under Secretary Wilkie seeking recommendations and input regarding various transgender policy considerations for which guidance was being prepared and discussions and deliberations were taking place, including with the Secretary of Defense. Secretary Wilkie's email sought coordination from the Military Services for the purpose of developing DoD's Report and the Transgender Service Policy. The documents in this category are pre-decisional. They sought or provided comments, opinions, and recommendations from the Military Services prior to the issuance of the DoD Transgender Service Policy. They are also deliberative. They reflect inputs, thoughts, opinions, and recommendations on the contours of the policy concerning military service by transgender individuals.

- AF_00038434, Army_10024450 (AF inputs) and AF_00038005_AF2 reflect Air Force comments and recommendations in response to Sec. Wilkie's email.
- Army_10024454 reflect Coast Guard comments and recommendations in response to Sec. Wilkie's email.
- Navy_00087337, Navy_00087339, Navy_00087341, Navy_00087460, and Army_10024448 (Navy inputs) reflect Navy comments and recommendations to Sec. Wilkie's email.
- Army_10024461, Army_10024578, Army_10024583, Army_10024587, Army_10024590, Army_10024595, Army_10042572, Army_10001328, Army_10001329, Army_10001330, Army_10001331, Army_10007036, Army_10011057.0001, Army_10011376, Army_10011498, Army_10011517,

Army_10012143, Army_10014683, and Army_10018719 reflect Army comments and recommendations in response to Sec. Wilkie's email..

34. Another category of documents consist of meeting notes from a January 23, 2018 meeting between Senior DoD and military medical professionals. These meeting notes contain deliberative discussions between Senior DOD and Service officials in the military medical community. Army_10025678, Army_10026120, DoD00139877, Army_10030503, and Army_10031145 are copies of the meeting notes. These documents are pre-decisional because they each contain deliberations pertaining to DoD's Transgender Service Policy before the final issuance of that policy. And they are deliberative because they reflect inputs, thoughts and opinions on the policy concerning military service by transgender individuals. A portion of each of these documents has been redacted of information subject to attorney-client privilege.

35. As these descriptions demonstrate, these documents are privileged because they reflect the frank discourse and dialogue between senior DoD, DHS and Military Service officials that lead to robust and well-informed decision-making.

36. In addition, as discussed below, compelled disclosure of these documents would substantially and materially chill deliberative discussions across the Department on critical personnel issues.

THE CHILLING EFFECT OF COMPELLED RELEASE

37. As discussed in other filings submitted to this Court, the release of DoD information protected by the deliberative process privilege in this case would have a substantial and immediate chilling effect on policy deliberation and development within DoD writ large. The DoD decision-making apparatus relies on open and candid conversations among leadership, advisors, and policy analysts to advise and inform DoD policy makers across the Military

Services on various courses of action for any decision. Matters of national security frequently present multiple courses of action that require careful and delicate balancing of equities and priorities against the need to serve national defense interests, and leaders within the Department encourage open and candid discussions about the merits of such actions. Opinions identifying risks or areas of concern are critical to the integrity and viability of the military decision-making process.

38. In addition, the geographically dispersed nature of DoD activities and the high operational tempo with which many of the Department's activities are conducted mean that deliberative and pre-decisional conversations frequently occur via email. Leaders across the Department routinely solicit feedback, thoughts, and opinions on highly sensitive topics, including those with national-security implications, using email so that those who need to review and weigh-in on a decision can do so in real time regardless of their physical location.

39. The forced release of these types of delicate and candid communications would directly and immediately impair open and frank conversations at both the operational and strategic levels. If DoD personnel knew that their thoughts, impressions, and opinions, including those reflected in draft documents, whether related to DoD transgender policy or otherwise, would be open to public scrutiny, they may hesitate to provide their genuine positions on potential courses of action, not only as to military personnel decisions but regarding any politically sensitive decision that DoD faces in the future, for fear that these discussions could be revealed to wider audiences. The lack of essential input would degrade DoD's decision-making process and could expose the nation to greater overall risk.

40. These risks are heightened with respect to the documents discussed in this declaration. These documents involve discussions among the highest levels of the military and

the Department, including, for example, discussions involving the Secretary of Defense. The potential consequences for national security of chilling the decision-making process at that level are significant and should be given due weight and consideration.

41. Finally, the disclosure of deliberative, pre-decisional input, analysis, and opinions from these individuals would breach DoD's commitment to maintain the confidentiality of participants' honest deliberations regarding the sensitive and complex topic of transgender service. This breach of trust would irreparably harm DoD's ability to obtain candid and open input on any subject in the future, including any revision to the transgender policy.

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

EXECUTED this 4th day of September 2020, Arlington, VA.

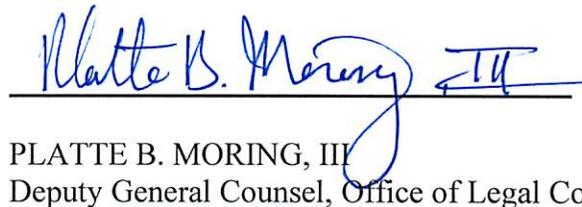

PLATTE B. MORING, III
Deputy General Counsel, Office of Legal Counsel

EXHIBIT B

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

The Honorable Marsha J. Pechman

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

DECLARATION OF REAR ADMIRAL BRENDAN C. MCPHERSON

I, Brendan C. McPherson, hereby state and declare as follows:

1. I am a Rear Admiral (RDML) in the U.S. Coast Guard currently assigned as the Military Advisor to the Acting Secretary of Homeland Security. I have been in this position since July 2019. As a part of my duties, I represent the Secretary of Homeland Security and serve as an advisor regarding military issues, major policies, and homeland security initiatives within the Secretary's responsibility. In the exercise of my official duties, I have been made aware of this lawsuit involving the Department of Defense ("DoD") Policy on Military Service by Transgender Persons and Persons with Gender Dysphoria (the "DoD Policy") and am familiar with the government's efforts to defend the DoD Policy.

2. I make this declaration in my official capacity as the Military Advisor and based upon my personal knowledge and upon information that has been provided to me

in the course of my official duties. I submit this declaration in response to the Court's August 24, 2020 Order directing the government to provide documents to the court for *in camera* review.

MATERIALS SUBJECT TO THE DELIBERATIVE PROCESS PRIVILEGE

3. The Court directed DHS to submit for *in camera* review certain documents from January and February 2018 that the government has withheld from production pursuant to the deliberative process privilege. Based on my review of the relevant documents, I have determined that the documents submitted with this Declaration were created as part of DHS's and the executive branch's decision-making process and reflect the deliberative process undertaken by DHS and executive branch personnel in developing and implementing the DoD Policy. DHS accordingly asserts the deliberative process privilege over each of the documents discussed in this declaration.

A. Documents Protected by the Deliberative Process Privilege

4. Of the documents submitted for *in camera* review, the first group of documents includes four documents containing an email chain between DHS and U.S. Coast Guard leadership regarding circulation of the DoD Transgender Report to DHS leadership. Those documents are DHS00000114, DHS00000115, DHS00000116, and DHS00002028. Within these documents, the second paragraph of the email from Eric Jones to Chad Wolf, dated February 21, 2018, 6:45:26 PM, provides impressions of a draft report regarding military service of transgender persons and conveys suggested changes from Admiral Charles D. Michel, Vice Commandant of the U.S. Coast Guard. That portion of this document, which DHS will produce redacted to

Plaintiffs, is pre-decisional. It was created before the DoD Policy was finalized. It is also deliberative, as it reflects impressions and suggestions among DHS and Coast Guard Officials regarding development of the DoD Policy.

5. A second group of documents, DHS00002481, DHS00002482, DHS00002483, DHS00002484, DHS00002485, DHS00002486, DHS00002487, DHS00002488, and DHS00002489, includes an email chain between Claire Grady, DHS Under Secretary for Management, and Stephanie Barna, Acting Assistant Secretary of Defense, Manpower and Reserve Affairs. These email chains discuss the logistics of coordinating DHS and DoD positions, but also convey preliminary opinions or impressions concerning how the DoD Policy is developing. DHS will produce the emails to Plaintiffs with certain portions redacted, including: (1) February 13, 2018 2:09:32 AM email from Stephanie Barna to Claire Grady, first paragraph, second half of last sentence; (2) Friday, February 2, 2018 8:05 AM email from Claire Grady to Stephanie Barna, the third sentence of the second paragraph and the entirety of the third paragraph; and (3) Thursday, February 1, 2018 8:07 PM email from Stephanie Barna to Claire Grady, the third full paragraph. These portions are pre-decisional, exchanged before the DoD Policy was finalized, and are also deliberative, reflecting impressions and suggestions among DHS and DoD Officials regarding development of the policy.

6. Another group of documents, DHS00000135, DHS00000136, DHS00002530, and DHS00002531, concern an email chain between Deputy Secretary of Homeland Security Elaine C. Duke and Military Advisor to the Secretary, Rear Admiral Eric C. Jones, U.S. Coast Guard. These emails contain opinions or impressions concerning a draft DoD Transgender Report. DHS

will produce the emails to Plaintiffs with redactions to the message text of the February 18, 2018 5:40:34 PM email from Deputy Secretary Duke to RDML Jones and the February 18, 2018 6:57 PM email from RDML Jones to Deputy Secretary Duke. These portions are pre-decisional, exchanged before the DoD Policy was finalized. They are also deliberative, reflecting impressions of DHS officials concerning the direction of the new policy under development.

7. Document DHS00002038 is an email chain that includes: (1) a Wednesday, February 14, 2018 10:48:35 AM email from Scott Shuchart to Cameron Quinn; (2) a Tuesday, February 13, 2018 4:23 PM email from Montrece Rolling, CRCL Exec Sec to Veronica Venture, Jennifer Sultan and Dana Salvano-Dunn; and (3) a Tuesday, February 13, 2018 1:40 PM from Brennan Pritchard to CRCL Exec Sec. a Wednesday, February 14, 2018 10:48:35 AM email from Scott Shuchart to Cameron Quinn, DHS Officer for Civil Rights and Civil Liberties, discussing an assignment to respond to Congressional correspondence concerning transgender discrimination. These emails contain pre-decisional, deliberative suggestions and recommendations regarding how to respond to the Congressional correspondence. DHS will produce this document to Plaintiffs with redactions of the message text of the three email messages identified above.

8. The next category of documents includes internal DHS briefing materials regarding military service by transgender persons. Documents DHS00000192, DHS00002493, DHS00002494, DHS00002053 and DHS00002054 are copies of a briefing memorandum and White Paper for Deputy Secretary Duke, prepared by U.S. Coast Guard officials, describing the then-current status of and proposed changes to DoD's policy regarding military service by transgender persons and providing recommendations regarding the policy. These documents are

pre-decisional, as they pre-date the Secretary of Defense's ultimate decision on the DoD Policy and the Secretary of Homeland Security's concurrence. They are also deliberative, as they show the mental impressions and thoughts of executive branch officials regarding the proposed new policy.

9. Documents DHS00000128, DHS00000141 and DHS00002532 consist of an email chain that includes a February 20, 2018 email from Military Advisor Eric Jones to DHS officials Chad Wolf and Elizabeth Neumann (DHS0000128 only) and a February 16, 2018 email from Admiral Michel, Vice Commandant, U.S. Coast Guard, to Deputy Secretary of Homeland Security Elaine Duke describing DoD's Transgender Report and recommended policy changes, and describing opinions of executive branch officials regarding the proposed recommendations. This document is pre-decisional, as it pre-dates the Secretary of Defense's ultimate decision on the DoD Policy. It is also deliberative. It shows the mental impressions and thoughts of senior executive branch officials regarding the proposed new policy. Document DHS00000128 also contains attorney-client privileged information that has been redacted.

10. Finally, Document DHS00000087 is an email chain that reflects pre-decisional discussions regarding public affairs strategies for responding to media. Talking points and proposed responses to press are developed by DHS staff for public affairs officials and other senior leaders to arm these officials with correct facts and policy positions so that DHS is speaking with one voice to its components, other parts of the U.S. Government, and the public. Document DHS00000087 includes a February 22, 2018 4:30 PM email message from former Assistant Secretary for Public Affairs Jonathan Hoffman to other DHS officials requesting information

regarding DHS's position concerning development of DoD's policy regarding military service of transgender persons and persons with or having a history of gender dysphoria, and a February 22, 2018 4:55:47 PM response from his subordinate, Katie Waldman, with impressions concerning the status of DHS consultation with DoD regarding the policy and proposed responses to media.

Document DHS000000087 will be produced to plaintiffs with these portions of the email chain redacted. These portions are pre-decisional, as they precede DHS's decision about how to respond to the media. These documents are also deliberative, as they contain questions and recommendations from senior policy makers concerning possible responses to media.

B. The Chilling Effect of Compelled Release

11. Release of DHS information protected by the deliberative process privilege in this case would have a substantial and immediate chilling effect on policy deliberation and development within DHS writ large. The DHS decision-making apparatus relies on open and candid conversations among leadership, advisors, and employees to advise and inform policy makers on various courses of action for any decision. Matters of homeland security and national security frequently present multiple courses of action that require careful and delicate balancing of equities and priorities against the need to serve national interests, and DHS encourages open and candid discussions about the merits of such actions. Opinions identifying risks or areas of concern are critical to the integrity and viability of the military decision-making process.

12. The high operational tempo with which many of DHS's activities are conducted mean that deliberative and pre-decisional conversations frequently occur via email.

13. Leaders across DHS routinely solicit feedback, thoughts, and opinions on highly

sensitive topics, including those with homeland-security and national-security implications, using email so that those who need to review and weigh-in on a decision can do so in real time.

14. The forced release of these types of delicate and candid communications would directly and immediately impair open and frank conversations at both the operational and strategic levels. If DHS personnel knew that their thoughts, impressions, and opinions, including those reflected in draft documents, whether related to the DoD Policy or otherwise, would be open to scrutiny, they may hesitate to provide their genuine positions on potential courses of action, not only as to the decisions at issue in this litigation, but regarding any politically sensitive decision that DHS faces in the future, for fear that these discussions could be revealed to wider audiences. The lack of essential input would degrade DHS's decision-making process and could expose the nation to greater overall risk.

15. These risks are heightened with respect to the documents discussed in this declaration. These documents involve discussions among the most senior levels of leadership of DHS including, for example, the Deputy Secretary of Homeland Security Secretary and the Vice Commandant of the U.S. Coast Guard. The potential consequences for homeland security and national security of chilling the decision-making process at that level are significant and would affect not only communications among officials and employees within DHS, but also communications between DHS and DoD. If pre-decisional deliberative communications between DoD and DHS are released, DHS officials would also be less likely to provide their candid feedback to DoD. There is a real danger that officials would instead either significantly suppress the intensity of their opinions or objections (which could be misinterpreted by decision-making

authorities as an indication of only minor resistance) or fail to raise their concerns at all. Such a result would greatly diminish the quality of decision-making of the government to the detriment of the general public.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd day of September, 2020.

BRENDAN C
MCPHERSON

Digitally signed by BRENDAN C
MCPHERSON
Date: 2020.09.03 18:46:03 -04'00'

Brendan C. McPherson
Rear Admiral, U.S. Coast Guard
Military Advisor to the
Acting Secretary of Homeland Security

EXHIBIT C

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,)
)
 Plaintiffs,)
v.)
)
DONALD J. TRUMP, et al.,)
)
 Defendants.)
_____)

No. 2:17-cv-1297-MJP

DECLARATION OF COLONEL JACQUELINE L. EMANUEL

I, Jacqueline L. Emanuel, hereby state and declare as follows:

1. I am a Colonel (COL) in the U.S. Army currently assigned as the Chief, Litigation Division, United States Army Legal Services Agency. I have been in this position since July 2019. As a part of my duties, I am responsible for providing oversight for litigation concerning the Department of the Army, to include the matters in the above-entitled case.

2. I make this declaration in my official capacity as the Chief of the U.S. Army Litigation Division and based upon my personal knowledge and upon information that has been provided to me in the course of my official duties. I submit this declaration in response to the Court's Order Re: August 24, 2020 Status Conference (Dkt. 569). In particular, on behalf of the Army, I am asserting the deliberative process privilege over the categories of documents, discussed below, and addressing the basis for withholding those documents solely pursuant to the deliberative process privilege.

A. Documents Protected by the Deliberative Process Privilege

3. One category consists of one document, Army_10000093, which contains Army officials' comments on and recommendations to the draft Department of Defense (DoD) memorandum entitled "Medical Standards for Appointment, Enlistment, or Induction of Transgender Applicants into the Military Services." Army_10000093 is a comments matrix for DoD issuances that contains the Army's comments and proposed changes to the draft DoD memorandum; it also, in large part, is protected by the attorney-client privilege. This document is pre-decisional because it comments on a DoD policy that was not yet finalized. The suggested edits in the comments matrix show deliberations by Army officials as they consider and recommend the material that they believe should be included in the policy. This document is deliberative because it comments on and provides recommendations pertaining to a policy while that policy was being developed. Release of comments to draft policies would cause public confusion, as it could reveal information that may not ultimately have been included in the final Army policy.

4. Another category consists of two documents, both e-mail chains, Army_10001337 and Army_10001338, reflecting internal Army deliberations regarding the policy pertaining to accession of transgender persons and persons diagnosed with or having a history of gender dysphoria. The email chains provide specific recommendations from an Army subject matter expert to high ranking Army officials regarding aspects of DoD's accessions policy where Army commands require further policy guidance from the DoD. These documents are pre-decisional because they were generated prior to the finalization of

the DoD Policy on Military Service by Transgender Persons and Persons with Gender Dysphoria (the “DoD Policy”), and prior to the issuance of the additional guidance requested in the email chain, and they are deliberative because they reflect the views, recommendations and analysis of Army personnel with respect to the development of the DoD Policy.

5. Another category consists of two documents, both email chains: Army_10001340 and Army_10001341. These documents reflect the views, recommendations and analysis of senior Army officials regarding the development of the DoD Policy, specifically with respect to privacy accommodations. These documents also reveal deliberative discussions between the Army and DoD concerning the development of the DoD Policy with respect to the integration of transgender applicants into recruit training. These documents are deliberative because they reflect the Army’s views, analysis and recommendations concerning the development of DoD’s Policy. These documents are pre-decisional because those views, analysis and recommendations regarding DoD’s policy were generated prior to the finalization of DoD’s Policy.

6. Another category consists of a single document, Army_10001348.001, an information paper drafted by an Army subject matter expert, COL Mary Krueger, dated January 29, 2018, that provided an update to the Under Secretary of the Army on the Army’s recommendations regarding the development of DoD’s Policy as it pertains to accessions. This document is deliberative because it contains Army recommendations and views on DoD’s Policy and reflects discussions between the Army regarding those

recommendations. This document is pre-decisional as it was generated prior to the finalization of DoD's Policy.

7. Another category consists of six documents that reflect the Army's deliberations regarding its policy for the management of transgender Reserve Officers' Training Corps ("ROTC") cadets. This category includes two email chains (Army_10011024 and Army_10038657) and four (duplicate) information papers (Army_10011024.002; Army_10035295; Army_10038659; Army_10039832). These documents are deliberative because they contain Army views and analysis of the then-current Army policy on the management of transgender ROTC cadets as well as recommendations to address specific aspects of that policy. These documents are pre-decisional because they propose, and thus precede, any changes to this policy.

8. Another category consists of one document, Army_10013135.0001, proposed talking points for the Army's Deputy Judge Advocate General ("DJAG") concerning the policy on military service by transgender persons and persons diagnosed with or having a history of gender dysphoria. This document was prepared in preparation for the DJAG's participation in an American Bar Association ("ABA") conference. Because the recommendations contained in this document were generated prior to, and in preparation for, DJAG's participation in the ABA conference, they are pre-decisional. This document is deliberative as its recommendations reflect the deliberative process undertaken by the Army in preparing DJAG to discuss the policy in a public setting.

9. Another category consists of two information papers entitled "Update on

Transgender Service,” dated January 29, 2018: Army_10039943 and Army_10039945. These documents are deliberative because they reflect internal deliberations and discussions between DoD and the Army regarding the development of DoD’s Policy, and identify and discuss areas for which the Army recommended that DoD provide additional guidance. These documents are pre-decisional because they were generated prior to the finalization of the DoD Policy and the issuance of further DoD guidance.

10. Another category consists of an e-mail chain containing deliberations and recommended edits to a draft of the United States Military Academy (“USMA”) policy regarding transgender persons and persons diagnosed with or having a history of gender dysphoria: Army_10040199. The redacted portion of this document contains comments on and proposed revisions to that policy. The redacted portion of this document is pre-decisional because its comments and proposals precede any change to that policy. The redacted portion of this document is deliberative because the information reflects the Army’s input, analysis, and opinion concerning proposals to the USMA policy.

11. Another category consists of four e-mail chains that reflect deliberations between DoD and Army personnel in drafting DoD’s Report and Recommendations on Military Service by Transgender Persons (“DoD’s Report”): Army_10030442; Army_10030447; Army_10030459; and Army_10030460. These documents reflect the review, comments, edits, and suggestions of COL Mary Krueger and senior DOD officials William Bushman and Ryan Newman on a working draft of DoD’s Report. These documents are pre-decisional because they were generated prior to the finalization of the DoD Report and the DoD Policy. These documents are

deliberative because they reflect the Army's and DoD's inputs, thoughts and opinions on both the draft DoD Report and the policy concerning military service by transgender persons and persons diagnosed with or having a history of gender dysphoria.

12. Another category consists of a single document, Army_10030461, which is a working draft of DoD's Report. This document is pre-decisional because it is an incomplete and non-final draft generated prior to the finalization of DoD's Report or the DoD Policy. This document is deliberative because it reflects COL Mary Krueger's inputs, thoughts, comments and opinions on the draft DoD Report and the DoD Policy. Release of the draft DoD Report would cause public confusion, as it could reveal information that may not ultimately have been included in the final DoD Report and it would chill the ability of DoD to receive candid opinions and recommendations from its personnel on draft policies and draft documents prior to their finalization.

B. The Chilling Effect of Compelled Release

13. The release of Army information protected by the deliberative process privilege in this case would have an immediate chilling effect on policy deliberations and development across the Army. The Army relies on the ability of its personnel to engage in open and candid internal conversations. The Army also relies on its ability to have open and candid discussions of policy with the Department of Defense. The forced release of information protected by the deliberative process privilege would reduce the ability of Army leaders to solicit feedback in an environment where its personnel openly communicate their thoughts and concerns about highly sensitive topics. Army personnel aware that their thoughts, impressions, and opinions—

including those reflected in e-mail communications and draft documents—are subject to external scrutiny would be more reluctant to communicate freely. This would not only degrade the Army’s ability to generate policies based on critical feedback from open discourse, but also would impair candid communication with the Department of Defense and degrade the Army’s decision-making process writ large.

14. In addition, with respect to the talking points discussed above in paragraph 8, the release of this document (Army_10013135.0001) would harm the Army by chilling open and candid requests for, and the provision of, information and advice necessary for its leaders to make fully informed decisions and to prepare to discuss Army policy in public settings.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 4th day of September 2020.



JACQUELINE L. EMANUEL
Colonel, Judge Advocate
U.S. Army

EXHIBIT D

The Honorable Marsha J. Pechman

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

RYAN KARNOSKI, et al.,)
)
Plaintiffs,)
v.)
)
DONALD J. TRUMP, et al.,)
)
Defendants.)
_____)

No. 2:17-cv-1297-MJP

DECLARATION OF LIEUTENANT COLONEL JACQUELINE M. STINGL

I, Jacqueline M. Stingl, hereby state and declare as follows:

1. I am a Lieutenant Colonel (and Colonel-select) in the United States Air Force currently assigned as the Chief, General Litigation Division, Air Force Legal Operations Agency. I have been in this position since August 2020. As a part of my duties, I am responsible for providing oversight for litigation concerning the Department of the Air Force in certain areas of practice, to include the matters in the above-titled case.
2. I make this declaration in my official capacity as the Chief of the General Litigation Division and based upon my personal knowledge and upon information that has been provided to me in the course of my official duties.
3. I submit this declaration in response to the Court’s Order Re: August 24, 2020 Status Conference (Dkt. 569). In particular, on behalf of the Air Force, I am asserting the deliberative process privilege over ten documents, discussed below, and addressing the basis for withholding these document solely pursuant to the deliberative process privilege.

4. **AF_00035762_AF2:**

a. AF_00035762_AF2 is an email exchange, taking place from February 22, 2018 through February 24, 2018, between then-Under Secretary of the Air Force Matthew P. Donovan and, then-Chief of Staff of the Air Force, General David L. Goldfein. The February 22, 2018 email message from Under Secretary Donovan recounts in significant detail the discussion between the various military departments and other Department of Defense (DoD) organizations at the Secretary of Defense Staff Meeting that same day. The meeting was noted as hosted by then-Deputy Secretary of Defense Patrick M. Shanahan. The February 22, 2018 email also separately raised some grievances about an Air Force officer's professional conduct.

b. In the February 22, 2018 email, the topic of military service by transgender individuals was only raised in discussion by one out of ten of the organizations participating in the meeting, as summarized in two bullet points of the email under the heading "P&R." That portion will be released.

c. The February 22, 2018 email contains the thoughts, deliberations, and intended actions of the senior leaders on a variety of issues and projects then underway at those various DoD organizations. Production of AF_00035762_AF2 to the plaintiffs would reveal pre-decisional intentions, impressions, analysis, and recommendations on numerous potential DoD actions irrelevant to any policy concerning military service by transgender individuals.

d. Across the two emails, the discussion concerning the Air Force officer contains personal impressions and descriptions of the officer's behavior. The emails identify the officer by his name and unique high-profile duty position. In his February 24, 2018 reply as part of this email thread, General Goldfein asked questions regarding that officer in explicit contemplation of personnel action.

e. The only factual material within AF_00035762_AF2 releasable to plaintiffs is as follows:

- (1) Secretary Shanahan hosted.
- (2) [Research and Engineering (R&E)]: Mike Griffin's first meeting.
- (3) [Personnel and Readiness (P&R)]:
 - Transgender; the DoD is operating in compliance with four separate court orders. There have been no changes effected since the July 2016 policy change.
 - [Secretary of Defense (SD)] will transmit his recommendations on transgender service to POTUS this week. At that time the WH will have the lead on policy rollout, media engagements, etc.
- (4) SD [Chief of Staff (CoS)]:
 - Sally Donnelly will depart in early March. Was always the plan for her to depart after about a year.
 - SD will return to the building next Tuesday morning, 27 Feb (Mr. Shelton, deputy SAF/AA, will take the Tuesday SD meeting for us)

f. The remainder of AF_00035762_AF2 is protected by deliberative process privilege, as discussed in Paragraph 7, below.

5. AF_00038441 and AF_00038516:

a. AF_00038441 and AF_00038516 are identical copies of an email thread on January 31, 2018 among four colonels in the Air Force Surgeon General reporting chain. The first email requests information about proposed medical policies for transgender service members. The next email asks further questions about that same topic. The final email in the

chain explains a proposed medical policy for transgender service members from the DoD Medical Personnel Executive Steering Committee (MEDPERS) which, as stated in the email, has not been published or approved. The discussion in the email chain is predecisional to the development of a final medical policy. The questions and answers reflect deliberations from Air Force colonels regarding the contents of that policy and reveal deliberations from other discussions those individuals participated in.

b. AF_00038441 and AF_00038516 are protected by deliberative process privilege in its entirety, as discussed in Paragraph 7, below.

6. **AF_00038018_AF2, AF_00038020_AF2, AF_00038439, Army_10024452, Army_10024592, Army_10039588, and DoD00143145:**

a. AF_00038020_AF2, AF_00038439, Army_10024452, Army_10024592, and Army_10039588 are drafts of a DoD policy memorandum for signature by then-Under Secretary of Defense for Personnel and Readiness Robert L. Wilkie Jr., with tracked changes and comments by Air Force personnel on January 26, 2018.. Army_10024452, Army_10024592 contain the inputs of then-Under Secretary Donovan. AF_00038020_AF2 and Army_10039588 contain the inputs of Ms. Martha Soper, Assistant Deputy of Health Policy. AF_00038439 contains the inputs of Senior Master Sergeant Tanya P. Tennyson, Manager of Medical Operations Division, Defense Health Headquarters. These drafts are predecisional to a final DoD policy memorandum and the drafts reflect the deliberations of Air Force personnel as to the contents of the memorandum rather than a final position of DoD or the Air Force.

b. AF_00038018_AF2 and DoD00143145 are emails internal to the Air Force, from January 26, 2018 to January 29, 2018, which circulate as an attachment one of the marked-up drafts referenced in the previous paragraph. The body of the emails explain various individuals'

assessment, advice, and justifications for changes on the draft policy memo. These emails are predecisional to a final DoD policy memorandum and the drafts reflect the deliberations of Air Force personnel as to the contents of the memorandum rather than a final position of DoD or the Air Force.

c. The following is the sole excerpt of factual material within DoD00143145 that is releasable to plaintiffs: “I just looked on MAX.GOV, there's nothing there regarding any meeting for tomorrow.”

d. The remainder of DoD00143145 and all remaining documents are protected by deliberative process privilege in their entirety, as discussed in Paragraph 7, below.

7. Direct Harm to the Air Force from Compelled Release:

a. The release of Air Force deliberative process privileged information would hamper policy deliberation and development within the Department of the Air Force. Leaders within the Department require open, candid, and timely discussion on the merits of its actions and decisions. Email communication is a necessity given the geographically dispersed nature of Air Force activities and the high operations tempo with which the Department makes its multitude of decisions. The abovementioned documents, in particular, demonstrate that sensitive and complex topics are discussed and decided by email.

b. Compelled release of these documents would chill the frank and independent discussion required to carry out the Air Force decision-making process. If Air Force personnel became aware their thoughts, impressions, tentative opinions, and advice were open to external scrutiny, they may hesitate and be deterred from offering honest feedback when their opinions are solicited by either the Air Force or the Department of Defense. They may also shrink the size of the cohort to which they disseminate proposed policy for feedback. The risks increase with

any politically sensitive or difficult topic area, such as transgender military service policy. The risks are also severe with discussion of employee grievances and adverse personnel actions, where timely full description of misconduct and weighing of personal impressions are paramount for taking swift appropriate action.

c. In short, disclosure of the documents discussed herein cause a direct harm to the Air Force's capacity to successfully conduct its affairs, address personnel grievances, enforce standards of duty performance, respond to the Department of Defense's request for comments on draft DoD policies, and enact policy in service of the national defense.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 2nd day of September 2020.

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JACQUELINE M. STINGL, Lt Col, USAF
Chief, General Litigation Division

EXHIBIT E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RYAN KARNOSKI, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

No. 2:17-cv-1297-MJP

DECLARATION OF BRIAN
JUDGE IN SUPPORT OF
DEFENDANTS' SUBMISSION
FOR *IN CAMERA* REVIEW OF
DOCUMENTS WITHHELD
UNDER THE DELIBERATIVE
PROCESS PRIVILEGE

DECLARATION OF BRIAN JUDGE

I, Brian Judge, make the following declaration:

1. I am employed by the United States Coast Guard within the Department of Homeland Security and am located in Washington, D.C. I have been employed by the U.S. Coast Guard as a civilian for over six years. I also served on active duty in the Coast Guard for over 24 years. I am currently the Chief of the Office of Claims and Litigation within the Office of the Judge Advocate General. As the Chief of the Office of Claims and Litigation, my duties include advising Coast Guard programs on matters that are or may be involved in litigation and providing any necessary litigation support to the Department of Justice.

2. In the exercise of my official duties, I have been made aware of this lawsuit and the related cases involving the Coast Guard and Department of Defense ("DoD") Policy on Military Service by Transgender Persons and Persons with Gender Dysphoria. I base this declaration on

my personal knowledge and on information made available to me in the performance of my official duties.

3. I submit this declaration in response to the Court's Order following the August 24, 2020 status conference directing the government to provide documents to the Court for *in camera* review. Dkt. 569.

4. The Court directed Defendants to submit for *in camera* review all documents withheld under the deliberative process privilege from the time period January 11, 2018 to February 22, 2018. Dkt. 569 at 2.

5. Within the relevant time period of January 11, 2018 to February 22, 2018, the Coast Guard asserts the deliberative process privilege over four documents with the following document identification numbers: USCG 00006084-00006375, USCG 00006631-00006668, ARMY_10024454, and ARMY_10024456.

6. Both USCG 00006084-00006375 and USCG 00006631-00006668 consist of multiple working draft versions of the Coast Guard's policy titled "Military Gender Transition," COMDTINST M.1000.13, with markups in track changes containing numerous suggested edits and substantive comments. The suggested edits and substantive comments show deliberations by Coast Guard officials as they discuss the material that they believe should be included in the Coast Guard policy. These draft versions of Coast Guard policy are being withheld in their entirety as the suggested edits and substantive comments cannot be meaningfully segregated for redaction from the draft documents. These draft versions of Coast Guard policy are predecisional to the creation of the final policy. The final version of this Commandant Instruction is publically available at https://media.defense.gov/2019/Apr/15/2002116336/-1/-1/0/CIM_1000_13A.PDF.

7. ARMY_10024454 and ARMY_10024456 consist of an email and attached draft guidance regarding military service of transgender persons and persons with gender dysphoria titled, “Transgender Service Policy.” Rather than withhold these documents in their entirety, the Coast Guard redacted only the portions of ARMY_10024454 and ARMY_10024456 that constituted substantive suggested edits. The first document, ARMY_10024454, is an email authored by Admiral Charles Michel, Vice Commandant of the Coast Guard, to Mr. Robert Wilkie, the Under Secretary of Defense for Personnel and Readiness. The email denotes at the outset that Admiral Michel reviewed and commented on the attached draft guidance. The draft guidance and the suggested changes to the draft guidance are predecisional to the creation of the Transgender Service Policy memorandum. The suggested edits and substantive comments in the email and in the draft guidance show deliberations by Coast Guard officials as they discuss the material that they believe should be included in the guidance. The substantive comments summarizing suggested changes to the draft guidance and the rationale for those changes that follow within the email have been redacted because they are protected from disclosure under the deliberative process privilege. The associated suggested substantive edits to the draft guidance at ARMY_10024456, which is a page from an attachment to the e-mail, have also been redacted for that same reason.

8. These four documents, or portions therein, constitute quintessential examples of documents that the deliberative process privilege protects from disclosure. The privileged portions of these documents are integrally related to policy formation. Coast Guard officials must have the ability to review draft policies and guidance and provide suggested edits and substantive comments prior to publication to ensure the Coast Guard maintains the highest quality of decision-making. This is particularly true with the development of military personnel policy where the Coast Guard maintains tight alignment with the military personnel policies of

the Department of Defense, but must be able to freely and frankly discuss and resolve differences with their Department of Defense counterparts that may arise because of the Coast Guard's different force structure, authorities, and missions. If Coast Guard officials knew that their suggested edits and substantive comments to draft policies and guidance would be revealed, they would be less likely to provide their candid assessment, which would harm the quality of the Coast Guard's decision-making process. Therefore, the disclosure of these privileged documents would result in detrimental and irreparable harm to the open and independent review and discussion among those individuals involved in developing policy in the future. Finally, release of draft policies and guidance would cause public confusion, as it could reveal information that may not ultimately have been included in the final Coast Guard policies or guidance.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge and belief.

Executed on this 3rd day of September, 2020.



Brian Judge
Chief, Office of Claims and Litigation
Office of the Judge Advocate General
U.S. Coast Guard