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October 8, 2020

### VIA ELECTRONIC FILING

Molly C. Dwyer  
Clerk of the Court  
U.S. Court of Appeals for the Ninth Circuit  
The James R. Browning Courthouse  
95 Seventh Street  
San Francisco, CA 94103

Re: Response to Defendants' October 5, 2020 Rule 28(j) Letter  
*In re Trump*, No. 20-70365 (Clifton, Callahan, Friedland, JJ.)  
*In re Trump*, No. 20-72793 (Clifton, Callahan, Friedland, JJ.)

Dear Ms. Dwyer:

The District Court's September 25th Order is supplemental authority for Plaintiffs, not Defendants. It confirms that Defendants have withheld numerous documents devoid of any colorable privilege claim and that the documents undermine their representations of independent military judgment.

Defendants largely ignore the Order's substance and reasoning. For good reason. Based on a careful review of the documents, the Order concludes—and explains why—they are neither “predecisional” nor “deliberative.” Dkt. 614 at 7-8. Instead, Defendants complain that the Order quotes some of the documents in question. Defendants omit that, when they raised this complaint with the Court, the Court explained that it could not explain its rationale without discussing how the documents supported its decision—although it was “very circumspect in picking out only a few examples.” Dkt. 620 (Tr.) at 28 (further noting that Defendants could request that portions of the opinion be sealed, which they failed

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to do). Otherwise, Defendants would have accused the Court of failing to support its decision.

Defendants' remaining complaint misstates the Order as assuming that President Trump's tweets constitute the challenged policy. In fact, the Court analyzed the documents with reference to the "Mattis Policy." Dkt. 614 at 7-8. Relatedly, the Court did not "declare" the documents "post-decisional." Letter at 1. It found they were *not* "predecisional," since they were dated two months before deliberations on the "Mattis Policy" commenced in September 2017. Dkt. 614 at 8. Instead, the Order discusses the President's tweets in explaining why "these communications are material," finding they show that members of the transgender working group interpreted President Trump's statements "as an Order" directing the military to implement his views. *Id.*

The Order confirms that Defendants have improperly invoked privilege to avoid producing documents that undermine their defenses.

Respectfully submitted,

/s/ Stephen R. Patton

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 8th day of October, 2020, the attached letter was filed electronically through the Court's CM/ECF system, and was provided by electronic mail to all counsel of record.

*/s/ Stephen R. Patton*

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