

INTRODUCTION

On November 25, 2020, the Court determined that 539 documents from the Department of Defense, the Department of Homeland Security, the Army, and the Air Force submitted for *in camera* review are pre-decisional and deliberative, and thus “qualify as protected by the [deliberative process privilege].” Order at 5, Dkt. 641. The Court concluded, however, that for 145 of those documents, it needed additional information concerning “the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions” so it could conduct the balancing test set forth by the Ninth Circuit in *FTC v. Warner Communications Inc.*, 742 F.2d 1156 (9th Cir. 1984). *Id.* The Court directed Defendants “to file a submission indicating why and how the transmittal of the specific identified documents would injure the Government, either now or in the future.” *Id.* at 6.

In compliance with the Court’s Order, Defendants respectfully submit supplemental declarations from Robert Easton, Rear Admiral Brendan C. McPherson, Colonel Jacqueline Emanuel, and Lieutenant Colonel (and Colonel-select) Jacqueline M. Stingl that describe in detail why and how disclosure to Plaintiffs of each of the 145 documents would injure the DoD, DHS, Army, and Air Force. These declarations “indicate the document number of all documents referenced” in the Court’s Order and provide an explanation of the harm that would occur upon release of each document. *Id.* In addition to those detailed declarations, Defendants respectfully submit this brief, which provides legal support for the harms identified by the declarants.

LEGAL STANDARD

The deliberative process privilege protects the Government’s decision-making process by shielding from disclosure documents “reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). The purpose of the privilege “is to allow agencies freely to explore possibilities, engage in internal debates, or play devil’s advocate without fear of public scrutiny.” *Assembly of State of Cal. v. Dep’t of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). The privilege may be overcome only if Plaintiffs show that their need for privileged material outweighs the Government’s interest in non-

1 disclosure. *See Warner*, 742 F.2d at 1161. To make this determination, courts consider: “1) the
2 relevance of the evidence; 2) the availability of other evidence; 3) the Government’s role in the
3 litigation; and 4) the extent to which disclosure would hinder frank and independent discussion
4 regarding contemplated policies and decisions.” *Id.* The Ninth Circuit has cautioned that in this
5 case, “the fourth factor deserves careful consideration, because the military’s interest in full and
6 frank communication about policymaking raises serious—although not insurmountable—
7 national defense interests.” *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019).

8 ARGUMENT

9 **I. Disclosure of the 145 Deliberative Documents Would Harm the Military’s 10 Interest in Full and Frank Communication and Would Risk Public Confusion.**

11 The declarations of Mr. Easton, Rear Admiral McPherson, Colonel Emanuel, and
12 Lieutenant Colonel Stigl demonstrate that disclosure of deliberative material from the 145
13 documents at issue risks acute harms to the government and the public interests. These include
14 both (a) the chilling of future policy discussions on sensitive personnel and national security
15 matters that require free and frank communication within the highest ranks of DoD, DHS, and
16 the military, and (b) the potential of public confusion concerning the government’s position on
17 the sensitive and high-profile topic of military service by transgender individuals.

18 As explained in the declarations, certain common characteristics among the documents
19 at issue make these harms particularly likely if they were to be disclosed. First, each of the 145
20 documents were drafted by officials who were making recommendations, seeking input, or were
21 otherwise deliberating about a sensitive and high-profile topic—military service by transgender
22 individuals. *See* Easton Decl. ¶ 4; McPherson Decl. ¶ 5; Emanuel Decl. ¶¶ 4, 8, 10; Stigl Decl.
23 ¶ 8. In such cases of “substantial public interest,” the possibility of outside scrutiny “would
24 almost certainly hamper the candor of future discussions.” *Hinckley v. United States*, 140 F.3d
25 277, 285 (D.C. Cir. 1998). Indeed, the Supreme Court has recognized that “officials will not
26 communicate candidly among themselves if each remark is a potential item of discovery and
27 front page news.” *Dep’t of Interior v. Klamath Water Users Prot. Ass’n*, 532 U.S. 1, 8–9 (2001).

28 As Mr. Easton attested, for example, “If officials believe that they face harms to their

1 careers as a result of their involvement in sensitive or high-profile matters, they may be less
2 willing to participate in policy development concerning those matters and less willing to provide
3 their candid assessments, which would harm the overall quality of DoD’s final policies.” Easton
4 Decl. ¶ 7; *see also Leopold v. Office of Dir. of Nat’l Intel.*, 442 F. Supp. 3d 266, 279–80 (D.D.C.
5 2020) (finding that disclosure of emails in which “multiple stakeholders shared their opinions
6 and their candid advice regarding strategy” “risks chilling government personnel from providing
7 their true feedback on controversial issues”); *Ctr. for Biological Diversity v. U.S. Army Corps of*
8 *Eng’rs*, 2015 WL 3606419, at *7 (C.D. Cal. Feb. 4, 2015) (“Operating in a ‘fishbowl,’ the agency
9 officials might skirt around or sterilize their discussions of the more difficult or controversial
10 issues, in order to avoid criticism[.]”). This is not a hypothetical concern in this case: notes from
11 a meeting of the Panel of Experts reveal that at least one member was concerned with attribution.
12 Easton Decl. ¶ 7. Indeed, Anthony Kurta’s nomination as Principal Deputy Under Secretary of
13 Defense for Personnel and Readiness was stalled largely because of his involvement in
14 developing the transgender service policies in both administrations. *Id.* The harm here is not
15 that officials may face career consequences for the decisions they make in public office, but
16 rather that officials may be reluctant to provide their candid assessments on sensitive matters for
17 fear of professional reprisal, resulting in DoD leaders not having the information they need to
18 make informed decisions, thus “harm[ing] the overall quality of DoD’s final policies.” *Id.*

19 Second, many of the documents were prepared by or contain deliberative
20 communications from the most senior officials in the Departments of Defense and Homeland
21 Security and the Military Services. As the Ninth Circuit recognized, “Documents involving the
22 most senior executive branch officials . . . may require greater deference.” *Karnoski*, 926 F.3d
23 at 1206. The documents at issue here include, for example: a memorandum regarding the delay
24 of accessions of transgender individuals into the military drafted by then Deputy Secretary of
25 Defense Robert Work that includes handwritten notes by Secretary of Defense James Mattis
26 showing his thought processes, questions, and areas of concern, Easton Decl. ¶ 43; an email from
27 the second-highest military officer in the Coast Guard to the Deputy Secretary of Homeland
28 Security containing recommendations for DHS’s position and edits on DoD’s Report, McPherson

1 Decl. ¶ 4; PowerPoint slides expressing concerns and opinions raised by the highest-ranking
2 officer in the Army in connection with the decision whether to delay the accession of transgender
3 individuals into military service, Emanuel Decl. ¶ 9; and a draft DoD policy memorandum by
4 Under Secretary of Defense for Personnel and Readiness with edits in track changes and
5 comments made by the Under Secretary of the Air Force, Stigl Decl. ¶ 5. The most senior
6 officials at DoD, DHS, and the Services must be able to correspond freely and candidly amongst
7 themselves to make well-informed decisions concerning the composition of the Armed Forces.
8 Easton Decl. ¶ 4. “Any inhibition on senior officials’ ability to speak candidly to one another
9 concerning the composition to the fighting force would directly affect national security.” *Id.*; *see*
10 *also* McPherson Decl. ¶ 7 (describing the need for Coast Guard officials to provide their candid
11 advice to DHS leadership and stating that a “loss of essential, unvarnished, and open input” from
12 Coast Guard officials “would degrade DHS’s decision-making process and could expose the
13 nation to greater overall risk”); *Leopold*, 442 F. Supp. 3d at 282 (finding that “disclosure of draft
14 remarks” that “reflect the agency’s consultative process in developing standards” for the head of
15 the agency “could chill agency staff in the free exchange of ideas with the Director”). These
16 serious national defense interests should be given great weight. *Karnoski*, 926 F.3d at 1206.

17 Third, as the four declarants have attested, a protective order would not prevent the
18 chilling effect that would occur with disclosure of these documents. It is cold comfort to those
19 participating in the deliberative process to know that their candid advice will be disclosed to
20 adversaries in litigation. *See Klamath*, 532 U.S. at 8–9. Harms would occur from disclosure
21 even with the protective order “because a party would have the opportunity to use the material
22 to examine or cross examine witnesses in depositions or other proceedings in an effort to second-
23 guess their underlying advice and analysis, highlight any preliminary or contrary views of certain
24 Department officials, and use the views of some Department officials to attack the views of other
25 officials,” which “would seriously undermine the working relationships among national security
26 officials and influence their decisions to abstain or provide less than complete candor during
27 policy development.” Easton Decl. ¶ 9; *see also* McPherson Decl. ¶ 7; Emanuel Decl. ¶¶ 4, 6, 8,
28 10; Stigl Decl. ¶¶ 8, 9; *see also In re World Trade Ctr. Disaster Site Litig.*, 2009 WL 4722250,

1 at *5 (S.D.N.Y. Dec. 9, 2009) (finding that “the willingness of medical experts to serve on Boards
2 and express their opinions fully and candidly will be chilled if they fear that what they think and
3 say will become the subjects of examination and cross-examination in depositions and civil
4 proceedings”). Indeed, the essential premise of the deliberative process privilege rests on “the
5 obvious realization that officials will not communicate candidly among themselves if each
6 remark is a *potential item of discovery*,” *Klamath*, 532 U.S. at 8–9 (emphasis added), which is
7 why a “protective order limiting dissemination” may “ameliorate but cannot eliminate” the
8 “chilling effects of disclosure,” *Perry v. Schwarzenegger*, 591 F.3d 1147, 1164 (9th Cir. 2009).

9 In addition to these overarching concerns, certain particular types of documents raise
10 specific risks of harm from disclosure. For example, DoD and the Air Force withheld draft
11 documents, many of which contain edits in track changes and/or comments that are directly
12 attributable to both lower-level and senior officials. *See, e.g.*, Easton Decl. ¶¶ 5, 11, 20, 26, 28,
13 30, 32, 36, 40; Stigl Decl. ¶¶ 5, 8, 9. These drafts reflect the non-final position of DoD and
14 contain the drafters’ preliminary thoughts as to the information that should be included in or
15 excluded from the document. Easton Decl. ¶ 5. Disclosure of these drafts would deter “officials
16 from seeking comments and input from subject matter experts out of fear that early drafts of their
17 non-final work product would be released before the authorized signer had the opportunity to
18 review language and had obtained approval from superiors within the Department.” *Id.* ¶ 5; *see*
19 *also id.* ¶¶ 6, 13, 20, 27, 31, 33, 35, 37. Disclosure would also deter subject matter experts and
20 subordinates from providing candid feedback in edits or comments to a draft document. *See Id.*
21 ¶ 6; Stigl Decl. ¶ 8; *see also Wolfe v. Dep’t of Health & Human Servs.*, 839 F.2d 768, 776 (D.C.
22 Cir. 1988) (“When...subordinates are reporting to superiors, disclosure could chill discussion at
23 a time when agency opinions are fluid and tentative.”). If officials are chilled from seeking input
24 on drafts and subject matter experts and subordinates are chilled from providing their candid
25 feedback on drafts, DoD would not have the best information with which to make decisions,
26 causing the overall quality of DoD’s decision-making process to deteriorate. Easton Decl. ¶ 5.

27 “This is exactly the type of impact the deliberative process privilege is designed to avoid.”
28 *Modesto Irrigation Dist. v. Gutierrez*, 2007 WL 763370, at *12 (E.D. Cal. Mar. 9, 2007)

1 (concluding that there was “no doubt that the forced disclosure of draft documents and internal
2 deliberations among high-level policymakers within the [agency] and related agencies would
3 stifle frank and independent discussions regarding policy matters”). Numerous courts have
4 recognized the chilling effect the disclosure of drafts, edits, and comments can have on agency
5 officials. *See, e.g., Lahr v. Nat’l Transp. Safety Bd.*, 569 F.3d 964, 983 (9th Cir. 2009) (draft
6 report was protected by the deliberative process privilege as its release “would expose the
7 agency’s internal deliberations in such a way that would discourage candid discussion and
8 effective decisionmaking”); *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1120–22
9 (9th Cir. 1988) (holding that disclosure of draft documents was “inimical to [the privilege]’s goal
10 of encouraging uninhibited decisionmaking”); *Dudman Commc’ns Corp. v. Dep’t of Air Force*,
11 815 F.2d 1565, 1568–69 (D.C. Cir. 1987) (explaining that “[t]he danger of ‘chilling’ arises from
12 disclosure that the Air Force as an institution made changes in a draft at some point”); *Leopold*
13 *v. Dep’t of Justice*, 411 F. Supp. 3d 1094, 1107 (C.D. Cal. 2019) (finding that disclosure of a
14 “draft FBI response letter” that “was shared to solicit feedback and edits and contained the
15 employees’ unrefined ideas” would cause “a chilling effect on agency employees’ willingness to
16 share such drafts”); *Leopold*, 442 F. Supp. 3d at 278 (finding that release of “drafts” sent via
17 email “for review and comment” by agency employees and the employees’ “feedback and edits
18 on a circulated draft response” “could result in a chilling effect on the free and candid sharing of
19 ideas between personnel at the [agency]”); *Reliant Energy Power Generation, Inc. v. FERC.*, 520
20 F. Supp. 2d 194, 204 (D.D.C. 2007) (finding that release of “draft portions of the Staff Report,
21 inserts for the report, or edits or discussions of edits to report drafts” “would allow a reader to
22 probe too deeply into the thought processes of the drafters and would have a chilling effect on
23 communication between agency employees regarding similar projects and the future”);
24 *Conservation Law Found., Inc. v. Dep’t of Air Force*, 1994 WL 279747, at *3 (D.N.H. June 20,
25 1994) (finding that “drafts of [a document] circulated within the [agency], which contains
26 “preliminary opinions among co-workers” would chill the free flow of ideas between members
27 of the agency”); *Gen. Motors Corp. v. United States*, 2009 WL 5171806, at *5, *8 (E.D. Mich.
28 Dec. 23, 2009) (finding that release of “draft rulings and comments made by government

1 employees,” “has the potential to chill such frank discussions in the future”). This chilling effect
2 is no less likely to arise from disclosure of drafts of “internal plans and reports intended for
3 deliberative use,” *United States v. Westland/Hallmark Meat Co.*, 2012 WL 12886501, at *6 (C.D.
4 Cal. Sept. 26, 2012), such as, for example, the draft information paper on the RAND Report that
5 was “prepared for the benefit of senior officials” to consider “in formulating DoD’s policy and
6 in drafting the DoD Report,” “draft outlines of potential ‘ways forward’ for accessing transgender
7 individuals and individuals with gender dysphoria into the military[.]” Easton Decl. ¶¶ 11, 26.
8 And the chilling effect is “heightened,” where, as here, edits, comments, or “draft reports are
9 attributable to a single author who has not had the opportunity to finish editing his own language
10 and soliciting internal review, input, and approval.” *Cal. Air Res. Bd. v. EPA*, 2020 WL 2934914,
11 at *12 (D.D.C. June 3, 2020).

12 Similarly, DoD, DHS, and the Army withheld emails exchanged among agency officials
13 in which those officials sought input on draft documents, discussed the contents of the drafts, or
14 recommended edits to the drafts, *see, e.g.*, Easton Decl. ¶¶ 14, 20, 21, 23; McPherson Decl. ¶ 4;
15 Emanuel Decl. ¶ 7, and emails in which officials discussed potential courses of action and
16 recommended steps, *see, e.g.*, Easton Decl. ¶¶ 34, 38, 44; McPherson Decl. ¶¶ 5; Emanuel Decl.
17 ¶ 7. In these emails, subject matter experts exchanged opinions which they may not have been
18 comfortable sharing if they knew that their preliminary thoughts, and especially any views that
19 may be contrary to the final position of DoD, “would become the subject of examination and
20 cross-examination, possibly juxtaposed against other DoD experts in civil proceedings, or used
21 against them publically.” Easton Decl. ¶ 16; *see also id.* ¶¶ 22, 25, 39, 46; McPherson Decl. ¶
22 6. Any “[r]eluctance of personnel and medical experts to communicate freely and openly would
23 degrade decision-making with respect to medical readiness of the force as well as DoD decision-
24 making at large.” Easton Decl. ¶ 22; *see also* Emanuel Decl. ¶ 4, 6, 8, 10.

25 Courts have found that releasing emails in which the officials discuss the contents of draft
26 documents or potential courses of agency action would chill such officials from engaging in
27 candid discussions with colleagues. For example, in *Leopold*, the court found that the release of
28 emails “seeking review and input from the [Director of National Intelligence], as well as a follow

1 up email with the Director’s thoughts and suggested revisions to the draft statement and his
2 reasons for them” “could result in a chilling effect on the free and candid sharing of ideas between
3 personnel at the [agency].” 442 F. Supp. 3d at 278; *see also, e.g., Reliant*, 520 F. Supp. 2d at
4 204–05 (finding that disclosure of “internal discussions,” including “email exchanges,” that
5 “contain opinions, recommendations, suggestions and strategies pertaining to the creation of the
6 Staff Report” “could hamper future communications between agency employees”); *Leopold*, 411
7 F. Supp. 3d at 1107–08 (finding that disclosure of an “email that contains discussion points from
8 a meeting concerning a possible recommendation from an internal office to senior [CIA]
9 officials” “would [] significant[ly] hamper[] of the ability of [CIA] personnel to candidly discuss
10 and assess the viability of certain courses of action”). This chilling effect would likewise occur
11 if emails to and from officials in DoD’s Office of People Analytics concerning “methods to
12 obtain data and options for improving studies” were to be disclosed. Easton Decl. ¶ 39; *see*
13 *Oceana, Inc. v. Ross*, 2020 WL 2128853, at *4 (N.D. Cal. May 5, 2020) (finding that disclosure
14 of “an email exchange of editorial comments between various scientists” would lead to the
15 “possibility of chilling full and frank discussions”).

16 In short, as the government’s declarants recognized, this chilling effect would deter
17 officials in the future from expressing any contrary views to a proposed policy, thus potentially
18 resulting in final policies that are based on incorrect or incomplete information. *See Warner*, 742
19 F.2d at 1162 (stating that disclosure would “encourages the Commission to have deliberative
20 reports and recommendations prepared only by those economists who will draw the conclusions
21 sought by the Commission”); *All. for the Wild Rockies v. Pena*, 2017 WL 8778579, at *7 (E.D.
22 Wash. Dec. 12, 2017) (quoting *Warner*, 742 F.2d at 1162); *Jones v. Hernandez*, 2017 WL
23 3020930, at *4 (S.D. Cal. July 14, 2017) (finding that disclosure of emails “would prospectively
24 discourage agents from voicing contrary opinions or pointing out weaknesses in certain
25 discretionary decisions if the records of these discussions are to be made public” which “would
26 discourage agents from having frank and open discussions about charging decisions”); *Leopold*,
27 442 F. Supp. 3d at 279 (finding that disclosure of a document that would reveal the agency’s
28 “decision-making process, including which recommendations were ultimately not accepted”

1 “could chill personnel from provided candid feedback and risks providing information to the
2 public which is incorrect or incomplete”); *Chem. Mfrs. Ass’n v. Consumer Product Safety*
3 *Comm’n*, 600 F. Supp. 114, 118 (D.D.C. 1984) (after noting that “[e]xperts do, after all,
4 disagree,” finding that “disclosure of an internal hypothesis or the data related to its formation
5 followed by a demeaning attack on that hypothesis before the author has finally formed a
6 conclusion would have an obvious chilling effect on the persons still in the process of forming
7 the opinion, and those who follow in the same process” in the future).

8 In addition to the chilling effect on agency officials of release of drafts and preliminary
9 recommendations, disclosure of non-final drafts and officials’ deliberations would also cause
10 public confusion as to the government’s position concerning military service by transgender
11 individuals. Easton Decl. ¶¶ 5, 12, 17, 19, 20, 27, 31, 37; *see also Cal. Air Res. Bd.*, 2020 WL
12 2934914, at *12 (finding that “release of these deliberative documents would result in harm for
13 the agency” because “[a]s the draft reports are not finalized, their disclosure would result in
14 confusion as to which documents represent [the agency’s] final decisions and which documents
15 are merely preliminary opinions”). Public confusion as to the final position of the government
16 is particularly a concern when agencies are coordinating among themselves, like DoD, DHS, and
17 the Services did here, before finalizing a policy. *See Stigl Decl.* ¶ 9; *see also Leopold*, 442 F.
18 Supp. 3d at 280 (noting that “coordination among agencies helps to avoid public confusion by
19 presenting a consistent message”).

20 The DoD also withheld recommendations to the Secretary of Defense himself and the
21 Secretary’s comments concerning those proposals. Easton Decl. ¶¶ 35, 43. Specifically, DoD
22 withheld “versions of a memorandum (including draft versions) from then-Deputy Secretary of
23 Defense Robert Work to then-Secretary of Defense Mattis, prepared to assist Secretary Mattis in
24 his decision regarding the delay of accessions of transgender individuals into the military in June
25 2017,” and “an action memorandum from Under Secretary of Defense for Personnel and
26 Readiness Wilkie to the Secretary of Defense providing detailed recommendations regarding the
27 future development of a military policy on universal accession and retention standards and the
28 drafting of that policy’s DoD Instruction.” *Id.* ¶¶ 17, 40. Similarly, the Army withheld

1 information papers prepared for Army leadership, including the Under Secretary of the Army,
2 that proposed policy recommendations. Emanuel Decl. ¶¶ 3, 5. Release of documents that
3 “promote[] a change in policy” “would reduce the willingness of senior DoD officials to provide
4 their uninhibited opinions, discuss policies’ perceived deficiencies, and offer solutions” and, as
5 a result, the Secretary would be “less likely to learn of potential problems with its current policies
6 or recommendations for improving them.” Easton Decl. ¶ 18; Emanuel Decl. ¶¶ 4, 6. Courts
7 have recognized that disclosure of this kind of “option and position papers” that “generally
8 conclude[d] with some form of recommendation” and were “used by agency decision-makers to
9 resolve policy issues” “would chill frank discussion of amendments to the [policy].” *Callaway*
10 *Cnty. Hosp. v. Sullivan*, 1990 WL 125176, at *3, *6 (W.D. Mo. July 6, 1990). And with regard
11 to the Deputy Secretary’s memorandum to Secretary Mattis, which was written by a senior leader
12 in the prior administration who stayed in his position at DoD until his successor was confirmed
13 in this administration, disclosure “would likely harm deliberations in future transitions” because
14 “[t]ransition officials would be less likely to provide their candid assessments and
15 recommendations or to identify problems or issues that still need resolution if they knew their
16 assessments would be subject to external scrutiny and could become the subject of examination
17 and cross-examination if the opinions of current or previous DoD officials differ, or could be
18 used against them as individuals in public.” Easton Decl. ¶ 42; *see also Am. Ctr. for Law &*
19 *Justice v. NSA*, 2020 WL 4260667, *17, *18 (D.D.C. July 24, 2020) (finding that release of a
20 draft transition memorandum would discourage candid discussions). Finally, “personal work
21 notes,” like those of Secretary Mattis, *see* Easton Decl. ¶ 43, “are precisely the type [of material]
22 which the deliberative process privilege is designed to protect.” *Conservation Law Found.*, 1994
23 WL 279747, at *3.

24 DoD also withheld materials that were used to prepare for meetings with Secretary Mattis
25 that concerned the development of DoD policy. Easton Decl. ¶ 34. Release of the “deliberations
26 of the most senior officials at the Department of Defense, including the Secretary of Defense
27 himself” “would deter senior officials—often possessing the most experience and greatest subject
28 matter expertise—from participating in open discussions concerning sensitive issues, especially

1 when these candid thoughts are specifically attributable to them.” *Id.* ¶ 35; *see Leopold*, 411 F.
2 Supp. 3d at 1107 (finding that disclosure of “information used to inform DHS leaders in
3 preparation for an interagency decision meeting on topics of national security and foreign policy”
4 that “reflected different decision choices and goals the government could make” would “chill
5 candid discussions”). This hesitancy by senior DoD leadership to engage in frank discussions
6 with the Secretary of Defense “would directly affect national security.” Easton Decl. ¶ 35. Such
7 a harm to a core government function should be given substantial weight.

8 **II. The Warner Factors Weigh in Favor of Upholding Defendants’ Privilege Claims.**

9 Application of the *Warner* balancing test should foreclose disclosure of the documents at
10 issue here because the harms articulated above far outweigh Plaintiffs’ need for these materials,
11 and neither the relevance of the information nor the availability of other evidence cuts in favor
12 of disclosure. *See Warner*, 742 F.2d at 1161. Under the standard of review set by the Ninth
13 Circuit in this case, the documents at issue have little relevance and Plaintiffs have ample
14 alternative evidence with which to support their claims. *Karnoski*, 926 F.3d at 1202 (stating that
15 the government must “establish[] that [the military] reasonably determined the policy
16 significantly furthers the government’s important interests” and that the court may not “substitute
17 its ‘own evaluation of evidence for a reasonable evaluation’ by the military” (quoting *Rostker v.*
18 *Goldberg*, 453 U.S. 57, 68 (1981))). The documents largely reflect non-final comments and
19 recommendations of particular DoD, DHS, and Military officials generated as part of the
20 policymaking process. Aside from the Secretary of Defense, none of these employees had the
21 authority to establish DoD policy regarding the military service of transgender individuals or
22 those diagnosed with gender dysphoria. *See* Presidential Mem., 82 Fed. Reg. 41,319 (Aug. 25,
23 2017). Nor were any of these documents included in the unredacted administrative record
24 supporting DoD’s decision. Thus, these non-final comments and recommendations necessarily
25 do not concern whether the military “reasonably determined the policy ‘significantly furthers’”
26 governmental interests. *See Karnoski*, 926 F.3d at 1202. Such comments and recommendations
27 could only be used to argue that the Court should conduct an alternative evaluation of the
28 evidence underlying DoD’s policy and reach a different conclusion. Under the Ninth Circuit’s

1 ruling, such evidence is irrelevant to the issues in this litigation, thus weighing against its
2 disclosure. *Cf. Gen. Elec. Co. v. Johnson*, 2007 WL 433095, at *16 (D.D.C. Feb. 5, 2007)
3 (finding that “[w]hat individual agency employees and workgroups thought about doing, or what
4 they proposed in draft versions of guidance that was never issued, has little relevance to proving
5 [the agency’s] ‘actual patterns and practices’ in enforcement [of the statute]”).

6 Moreover, even if the Court concludes that information in one of the documents is
7 relevant to this litigation or cannot be obtained through other means, that would not overcome
8 “the military’s interest in full and frank communication about policymaking.” *Karnoski*, 926
9 F.3d at 1206. As set forth above, no single factor in the *Warner* analysis is dispositive. Therefore,
10 Plaintiffs are not automatically entitled to any deliberative document simply because it is relevant
11 to some issue in this case or because identical information cannot be obtained through alternative
12 means. Instead, courts compare the relative importance of the information and the existence of
13 other information that plaintiff may use to support their claims. *See, e.g., Noel v. City of New*
14 *York*, 357 F. Supp. 3d 298, 308 (S.D.N.Y. 2019) (sustaining a deliberative process withholding
15 as to a document containing relevant information because the relevance factor “weigh[ed] only
16 slightly in favor of disclosure”).

17 Plaintiffs here have access to thousands of deliberative and non-deliberative documents
18 from all levels of DoD, DHS, and the military, including its highest levels, that they may use to
19 advance their position in this litigation. This includes the administrative record of the Panel that
20 recommended the policy, as well as all of the Panel’s deliberations. Plaintiffs thus have more
21 than adequate alternative evidence without the documents now before the Court. And in light of
22 the limited standard of review applicable to this litigation, neither of these *Warner* factors
23 outweighs the substantial harm, set forth above and detailed in the declarations of Mr. Easton,
24 Rear Admiral McPherson, Colonel Emanuel, and Lieutenant Colonel Stigl, that would result to
25 DoD, DHS, and the military from disclosure.

26 CONCLUSION

27 For the foregoing reasons, the Court should find that the *Warner* factors weigh against
28 disclosure of the 145 documents identified in its Order.

1 Dated: December 9, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2020, I electronically filed the foregoing using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: December 9, 2020

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