

4. I submit this declaration in response to the Court's November 25, 2020 Order Re: Documents Submitted for *In Camera* Review (Dkt. Nos. 599, 624, 633, 639). In particular, on behalf of the Air Force, I submit this declaration to demonstrate how the Air Force would be injured, now or in the future, upon the release of the following documents designated by this Court as pre-decisional and deliberative, but requiring supplementation with respect to the fourth *Warner* factor: AF_00038439, Army_10024452, and Army_10024592. (Army_10024452 and Army_10024592 are identical.)

5. As previously stated in my September 2, 2020 declaration to this Court, AF_00038439, Army_10024452, and Army_10024592 are drafts of a Department of Defense (DoD) policy memorandum for signature by then-Under Secretary of Defense for Personnel and Readiness Robert L. Wilkie Jr., with tracked changes and comments made by Air Force personnel on January 26, 2018.¹ Army_10024452 and Army_10024592 contain the inputs of then-Under Secretary of the Air Force Matthew Donovan, who is the second-highest civilian official in the Air Force.² The Under Secretary's edit to the text are shown in track changes, and he provided a comment explaining his rationale for his edit. AF_00038439 also contains the inputs in tracked changes of a Senior Master Sergeant from the Surgeon General's staff in the Air Force. These drafts are predecisional to a final DoD policy memorandum and the drafts reflect the

¹ I understand that, in response to the Court's November 25, 2020 Order, Mr. Robert Easton is also submitting a declaration that addresses the harm of disclosure of this draft action memorandum to the Department of Defense. *See Easton Decl.*, Category E.

² The Under Secretary of the Air Force is responsible for the affairs of the Department of the Air Force, including the organizing, training, equipping and providing for the welfare of approximately 685,000 active duty, Guard, Reserve and civilian Airmen and their families world-wide. *Matthew P. Donovan*, U.S. Air Force (October 2019) <https://www.af.mil/About-Us/Biographies/Display/Article/1270457/acting-secretary-of-the-air-force-matthew-p-donovan/#:~:text=27%2C%202019-,Matthew%20P.,and%20their%20families%20world%2Dwide>. The Under Secretary oversees the Air Force's annual budget of over \$205 billion and directs strategy and policy development, risk management, weapons acquisition, technology investments and human resource management across a global enterprise. *Id.* The Under Secretary is also responsible for implementing decisions of the President and Congress and fulfilling Combatant Commanders' current and future operational requirements. *Id.*

deliberations of Air Force personnel as to the contents of the memorandum rather than a final position of DoD or the Air Force.

6. As background, the Court sustained the privilege assertion for AF_00038020_AF2, which is a version of the same draft memorandum containing edits and comments from another Air Force official, Ms. Martha Soper, then-Assistant Deputy for Health Policy. *See* Dkt. 641-1 at 314. Moreover, the three draft documents at issue in this declaration (AF_00038439, Army_10024452, and Army_10024592) were each attached to emails that the Court found were protected from disclosure by the deliberative process privilege in its November 25, 2020 Order. *See* Dkt. 641-1 at 271, 272, 284. Specifically, AF_00038439 was an attachment to the email with the document number AF_00038434, which contained the Air Force's comments in response to Under Secretary Wilkie's solicitation for input. *See* Dkt. 641-1 at 271 (sustaining the assertion of deliberative process privilege for AF_00038434).³ Army_10024452 was an attachment to the email with the document number Army_10024450, which contained Under Secretary Donovan's substantive response to Under Secretary Wilkie's solicitation for input. *See* Dkt. 641-1 at 272 (sustaining the assertion of deliberative process privilege for Army_10024450). Army_10024592 was an attachment to an email with the document number Army_10024590, which contained Under Secretary Donovan's substantive response to Under Secretary Wilkie's solicitation for input that was forwarded between senior Army officials. *See* Dkt. 641-1 at 284 (sustaining the assertion of deliberative process privilege for Army_10024590). Both the emails with document numbers Army_10024450 and

³ This Court also sustained the privilege assertion for AF_00038018_AF2, which is an email chain containing recommendations concerning the draft memorandum from Air Force officials to Under Secretary Donovan. *See* Dkt. 641-1 at 314.

Army_10024590 contain copies of the same discussion about the contents of Army_10024452 and Army_10024592.

7. All the documents mentioned here and in the previous paragraph (AF_00038018_AF2, AF_00038020_AF2, AF_00038434, AF_00038439, Army_10024450, Army_10024452, and Army_10024592) all form a single decision-making sequence. First, Under Secretary of Defense Wilkie requested feedback from the Military Services. The Air Force pushed the task down to its subject matter experts, who then routed their inputs up through their supervisory chains and eventually to Under Secretary Donovan who made his recommendations to Under Secretary Wilkie. As indicated in the cover email AF_00038434, the task was handed down the Surgeon General's chain to a Senior Master Sergeant. In AF_00038439, the Senior Master Sergeant provided inputs in track changes, which were routed back up the Surgeon General's chain. Eventually, in AF_00038018_AF2, the Surgeon General, Lieutenant General Mark Ediger, formulated his opinions, which were relayed to Under Secretary Donovan. Under Secretary Donovan then relayed the Air Force's edits and comments to the draft DoD memorandum (reflected in Army_10024452 and Army_10024592) in an email (Army_10024450) to Under Secretary Wilkie.

8. **AF_00038439.** There is significant foreseeable harm in the release of AF_00038439. AF_00038459 reflects the edits of a lower-level Air Force official that were provided to higher-level officials for eventual presentation to the Under Secretary of the Air Force and the Under Secretary of Defense. All of this feedback was provided during the span of one business day. Release of this document would chill candid, unguarded feedback at all levels of the Air Force and DoD. If lower-level personnel learned of the release of their work product in this manner, they may be less likely to provide unfiltered feedback to their superiors, especially under tight

timeframes. In addition, at the time the Senior Master Sergeant reviewed and made edits to the draft DoD memorandum, the above-referenced case, and three related cases, were in active, high-profile litigation. Lower-level personnel may be concerned of negative consequences on their personal and professional reputations if they become associated with controversial or high-profile policies and decisions. If their names are tied to such documents, the risk of harm is significant regardless of whether they made substantive or administrative inputs. The risk of harm is present regardless of whether a protective order is in place because a motivated party could still second-guess the underlying advice and analysis in depositions and other proceedings, potentially confronting deponents with the document in question; such confrontation could later influence the deponent and the document author to abstain or provide less than complete candor during policy development. Ensuring vigorous contribution at all levels of the organization is essential to effective decision-making at the top. Reluctance to provide candid input among lower-ranking personnel would directly impede the ability of senior officials to be well informed. Further, release of such correspondence could also deter senior DoD officials from seeking the assessments of the Military Services due to fear that early drafts of their non-final work product would be released before the author had the opportunity to finish editing language and had briefed the Secretary of Defense prior to publishing. Thus, release of AF_00038439 would stifle the overall effectiveness of the Air Force's and DoD's decision-making process due to the chilling impact it would have on individuals' willingness to provide advice when it is most useful in shaping courses of action.

9. **Army_10024452 and Army_10024592.** There is significant foreseeable harm in the release of Army_10024452 and Army_10024592. Army_1002445 and Army_10024592 are identical. Army_1002445 was submitted by Under Secretary Donovan via email as advice to

Under Secretary of Defense for Personnel and Readiness Wilkie, in response to Under Secretary Wilkie's solicitation for feedback on the draft document. Army_10024592 is an identical copy of this document that was forwarded among senior Army leaders. As stated in the cover emails, Under Secretary Wilkie's draft memo and Under Secretary Donovan's changes and comments to the memo were prepared because the Secretary of Defense recognized a need for further guidance and direction to provide to military commanders on granting reasonable accommodations to transgender service members. Army_10024452 and Army_10024592 were an integral part of the feedback given by the Air Force to help formulate that guidance. Release of the information in Army_10024452 and Army_10024592 risks harm to future efforts to improve policy. The DoD relies on frank and unguarded input from the Military Services, especially on short-notice requests, such as the one at issue here where Under Secretary Wilkie needed the inputs in one business day. Senior officials may be less willing to fully share their opinions where time is of the essence if their deliberative, editorial processes were subject to external scrutiny and could be used against the Air Force in litigation. Senior officials may become more likely to refrain from contributing substantial opinions when they lack the time to conscientiously think through how their comments may be viewed in hindsight by outsiders. Such a deterrent to full and frank assessments could degrade communication between the Air Force and DoD, especially when it needs to occur on short notice, which is often. The risk of harm is present regardless of whether a protective order is in place because a motivated party could still second-guess the underlying advice and analysis in depositions and other proceedings, potentially confronting deponents with the document in question; such confrontation may later influence the deponent and the document author to abstain or provide less than complete candor during policy development. Further, release of such correspondence may also deter senior DoD

officials from seeking the assessments of the Military Services due to fear that early drafts of their non-final work product would be released before the author had the opportunity to finish editing language and had briefed the Secretary of Defense prior to publishing. Such hesitancy of the Air Force and DoD personnel to collaborate on high-stakes issues may degrade both Departments' decision-making process, particularly in their ability to respond rapidly and dynamically. Finally, release of non-final drafts and officials' recommendations for changes to those drafts could cause public confusion as to the government's final position on a policy. The Air Force and the Department of Defense need to be able to coordinate with each other to promote a consistent message as to the final position of the government on various issues and policies. If non-final deliberations and recommendations are released, there would be confusion as to which documents represent the Air Force's and DoD's final position and which documents merely represent preliminary opinions by officials in the Air Force and DoD.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of December 2020.

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