IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BROCK STONE, et al., Plaintiffs, vs. DONALD J. TRUMP, et al., Defendants.	Case No. 1:17-cv-02459-GLR Hon. George L. Russell, III

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STAY COMPLIANCE WITH THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER

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I. INTRODUCTION

From the outset of discovery, Defendants have wielded the deliberative process privilege as a shield against discovery concerning the central issue in this constitutional challenge. Defendants insist that President Trump's ban on military service by transgender persons ("the Ban") and the plan developed to implement the Ban (the "Implementation Plan") are not based on impermissible animus but rather are supported by an independent deliberative study. Yet for over seven months they have withheld the very materials Plaintiffs need to test Defendants' position. As a result of Defendants' overbroad and obstructive objections, discovery in this case has ground to a halt.

On August 14, 2018, Magistrate Judge A. David Copperthite granted Plaintiffs' Motion to Compel Supplemental Interrogatory Answers and Production ("Motion to Compel"), ordering Defendants to produce three discrete categories of documents they are withholding on privilege grounds and that are highly relevant to the intent underlying the Ban and Implementation Plan and to Plaintiffs' opposition to Defendants' pending motion for summary judgment. Two district court judges in other litigation challenging the Ban have cited the Magistrate Judge's order with approval. *See Doe v. Mattis*, --- F. Supp. 3d ---, 2018 WL 4053380, at *3 (D.D.C. Aug. 24, 2018) ("In related cases throughout the country, Defendants' assertions of privilege have not fared well." (citing Magistrate Judge's order)); *Karnoski v. Trump*, No. 17-cv-1297-MJP, ECF 311 at 7 (W.D. Wash. Aug. 20, 2018) (same, denying motion to stay order granting motion to compel).

Defendants now seek a stay of the Magistrate's well-reasoned order pending the Court's consideration of their objections to the order. But they do not come close to satisfying the high standard for stay of a discovery order. Indeed, Defendants' arguments all rest on their self-

serving assertion that, after the preliminary injunction was issued, the Department of Defense adopted a "new" policy that was based on the military's independent judgment and unaffected by the President's animus. Plaintiffs vigorously dispute that factual assertion, and Defendants' own documents indicate that the military's independent judgment was limited to *how* to implement the ban—not *whether* to do so. *See, e.g.*, ECF 190 at 13–14. Defendants cannot withhold deliberative process documents while asking the Court to blindly accept their assertions that the deliberative process was independent and untainted. As the U.S. District Court for the District of Columbia recently concluded in rejecting Defendants' motion for summary judgment in parallel litigation:

> [D]espite the fact that one of Defendants' main defenses in this action is that their decisions regarding transgender military service are owed great deference because they are the product of reasoned deliberation, study and review by the military, Defendants have withheld nearly all information concerning this alleged deliberation. This is not how civil litigation works.

Doe, 2018 WL 4053380, at *6; *accord Karnoski v. Trump*, 2018 WL 3608401, at *4 (W.D. Wash. July 27, 2018) (granting plaintiffs' motion to compel: "Defendants may not simultaneously claim that deference is owed to the Ban because it is the product of 'considered reason [and] deliberation,' 'exhaustive study,' and 'comprehensive review' by the military. . . while also withholding access to information concerning these deliberations . . . .").

The Court should reject Defendants' latest effort to delay and otherwise frustrate discovery. For the reasons that follow, the motion for a stay pending appeal should be denied.

II. PROCEDURAL BACKGROUND

In July 2017, President Trump announced on Twitter that he had decided to ban transgender individuals from serving in the military "in any capacity," purportedly based on concerns about military effectiveness. ECF 40-22. The District Court determined, however, that

President Trump's abrupt action was apparently based on no evidence at all, much less "genuine concerns regarding military efficacy." ECF 85 at 43 (internal quotation marks omitted). President Trump ordered Defendants to "implement the Directives" in the Ban, *id.* at 50, which Defendants have now done, *see* ECF 120-1, -2, -3 (the Implementation Plan).

Discovery began in January 2018. It soon stalled, because Defendants objected to every single document request and interrogatory on the basis of, *inter alia*, the deliberative process and presidential communications privileges. *See, e.g.*, ECF 177-8 (Mattis RFP Objections). Although fact discovery was originally scheduled to close on April 24, 2018, ECF 100, this deadline was later extended through May 31, 2018, ECF 145, to permit the parties to meet and confer on a later deadline. The Court then ordered that discovery be extended through August 31, 2018, and denied Defendants' request to stay discovery, despite the pendency of several motions: "[t]he Court does not consider the fact that motions are currently pending to be sufficient justification to warrant a stay of discovery. Nor is the Court persuaded that a stay will serve the interests of judicial economy." ECF 170. Defendants' ongoing failure to timely produce significant volumes of key documents has necessitated a further extension of the fact discovery deadline. *See* ECF 210 (Joint Motion to Suspend Deadlines).

Plaintiffs repeatedly attempted to confer concerning Defendants' extensive assertions of privilege, to no avail. *See, e.g.*, ECF 177-12 (February 21, 2018 deficiency letter); ECF 177-14 (March 16, 2018 deficiency letter); ECF 177-15 (April 9, 2018 deficiency letter). Plaintiffs concluded that they had no choice but to seek an order compelling production of deliberative materials that concern: (1) the issuance of the Ban; (2) the work of the "panel of experts" tasked with developing a proposal to implement the Ban; and (3) the March 23, 2018 Implementation

Plan and the President's acceptance of that plan. *See generally* ECF 177-3 at 7.[1] Defendants responded that the Court should defer any decision on Plaintiffs' Motion to Compel until the resolution of other pending motions, including the parties' cross-motions for summary judgment. ECF 184.

Soon after briefing on Plaintiffs' Motion to Compel was complete, Defendants moved for a protective order to preclude discovery directed at the President of the United States, and discovery that seeks information concerning presidential communications and deliberations from sources other than President Trump. ECF 179.[2] Defendants represented that this preemptive action was necessary because Plaintiffs' Motion to Compel "asked the Court for a declaration that the deliberative process privilege does not apply to large swaths of material, including material in the possession of the White House and material reflecting presidential communications." *Id.* That assertion was incorrect; Plaintiffs' proposed order accompanying the Motion to Compel permitted Defendants to withhold materials on grounds other than deliberative process privilege, including assertion of the presidential communications privilege. ECF 177-2; *see also* ECF 177-1 at 1–2. Nevertheless, in a further effort to allay Defendants' concerns, Plaintiffs expressly stipulated that their Motion to Compel

> does not seek production of (a) any information and documents in the custody, possession or control of the President or the Executive Office of the President or (b) any information and documents (or portions thereof) that Defendants contend are subject to the presidential communications privilege, including any information and documents in the custody, possession, or control of the defendants other than the

[1] Plaintiffs also filed a motion challenging Defendants' attempted clawback of one document on the basis of the deliberative process privilege, under the Court's Rule 502(d) order (ECF 110). ECF 178.

[2] Prior to that filing, Defendants had categorically refused even to confer about their assertions of presidential communications privilege. *See* ECF 177-4 (Kies Aff.) ¶ 32. As of the date of this filing, Defendants have not produced a document-by-document privilege log for Defendant Trump.

> President that constitute or would disclose any information concerning presidential communications and deliberations, including communications to or from the President or Executive Office of the President.

ECF 185-2 at 2. The Magistrate Judge entered the parties' proposed stipulation. ECF 187.

On August 14, 2018, the Magistrate Judge granted Plaintiffs' Motion to Compel and dismissed as moot Plaintiffs' Rule 502(d) motion challenging Defendants' effort to claw back one document for which Defendants had claimed deliberative process privilege protection (ECF 178, filed under seal). ECF 204, 205. As a threshold matter, the Magistrate Judge found that "there are no justifiable reasons to stay decisions on the discovery disputes pending the outcome of the dispositive motions or for any other proffered reasons." ECF 204 at 4. The Magistrate Judge further found that "each of the categories of compelled documents is likely to contain evidence reflecting Defendants' intent," which "is at the very heart of this litigation." *Id.* at 5–6. The Magistrate Judge granted in part and denied in part Defendants' motion for a protective order, ruling that no discovery should be directed to President Trump for the time being, but permitting discovery from other sources to proceed. *Id.* at 10.

On August 17, 2018, Defendants informed Plaintiffs of their intention to seek a stay of the Magistrate Judge's order pending the District Court's resolution of Defendants' forthcoming Objections. Plaintiffs advised Defendants that they opposed a stay of the Magistrate Judge's ruling on deliberative process privilege, but did not oppose a temporary stay of the Magistrate Judge's partial denial of Defendants' motion for a protective order (i.e., "with respect to discovery of information or documents in the custody, possession, or control of Defendants other than the President that would disclose information concerning presidential communications and deliberations").

III. ARGUMENT

Stays of discovery rulings are highly disfavored. *See* Local Rule 301.5(a) ("[U]nless otherwise ordered by the magistrate judge who issued the order or the district judge who designated the magistrate judge to hear and determine the matter, the filing of objections to the magistrate judge's order *shall not* operate as a stay of any obligation or deadline imposed by the order." (emphasis added)); *see also* Local Rule 104.3 ("Unless otherwise ordered by the Court, the existence of a discovery dispute as to one . . . matter does not justify delay in taking any other discovery."). Accordingly, a party seeking a stay must "justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983). This standard creates a high bar. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936) ("the suppliant for a stay must make out a *clear case* of hardship or inequity in being required to go forward" (emphasis added)); *see also Nken v. Holder*, 556 U.S. 418, 433–34 (2009) ("The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [the court's] discretion."); *Pa. Nat'l Mut. Cas. Ins. Co. v. Block Roofing Corp.*, 2010 WL 11566373, at *2 (E.D. Va. Nov. 8, 2010) (denying motion to stay magistrate judge's ruling granting motion to compel). Defendants do not come close to meeting that high burden.

A. There Is No Live Dispute Regarding the Magistrate Judge's Partial Denial of Defendants' Motion for Protective Order.

Defendants seek to confuse this matter by manufacturing a dispute concerning the Magistrate Judge's partial denial of Defendants' motion for protective order, relating to presidential communications. This false dispute provides no support for Defendants' motion.

Defendants assert at several points that the Magistrate Judge's order must be stayed to avoid running afoul of the separation of powers and the presidential communications privilege.

E.g., ECF 208 at 3 ("Plaintiffs may also now seek discovery concerning presidential communications and deliberations from sources other than the President, which would put at issue the need to invoke the presidential communications privilege as to these materials in response to a motion to compel and thus raise significant separation of powers concerns at this stage of the case, in direct conflict with Supreme Court precedent."). They are wrong. To date Plaintiffs have not moved to compel production of documents withheld on the basis of the presidential communications privilege. The parties have stipulated that discovery directed at the President need not proceed at this time. ECF 185 & 187. As described above, in order to eliminate any doubt, Plaintiffs expressly stipulated that Defendants need not at this time produce any documents held by President Trump, or any documents held by the other Defendants that are subject to a claim of presidential communications privilege. *See id.* Further, Plaintiffs have stated that they do not oppose a stay of the Court's partial denial of Defendants' motion for protective order, pending appeal. *See* ECF 208 at 1. Defendants' stated concerns about the presidential communications privilege are therefore premature and do not warrant this Court's attention.

Because there is no pending order relating to documents or information allegedly protected by the presidential communications privilege, Defendants' heavy reliance on the Ninth Circuit's interim stay in *Karnoski v. Trump* is misplaced. In *Karnoski*, the district court ordered Defendants to produce documents previously withheld based on the deliberative process privilege, *as well as* to produce a privilege log identifying documents and information withheld under the presidential communications privilege. 2018 WL 3608401, at *6. Defendants sought a stay pending mandamus relief in that case, arguing that the order to produce a privilege log of presidential communications would reveal information subject to executive privilege and

separation-of-powers concerns. *See Karnoski*, ECF 302-1 (Mandamus Petition) at 33–34. As discussed above, such concerns are not present here. *See* ECF 185. The Ninth Circuit's entry of an interim stay is therefore irrelevant to Defendants' motion and this case.

B. Defendants Are Not Entitled to a Stay of the Magistrate Judge's Ruling Granting Plaintiffs' Motion to Compel and Dismissing Plaintiffs' 502(d) Motion as Moot.

The propriety of a stay is within the Court's "broad discretion." *Digital-Vending Servs. Int'l, LLC v. Univ. of Phoenix Inc.*, 2010 WL 11450510, at *3 (E.D. Va. Apr. 22, 2010); *see also Pa. Nat'l Mut. Cas. Ins. Co.*, 2010 WL 11566373, at *2 ("A district court has inherent power to decide whether or not to stay proceedings in a case before it."). In exercising its discretion, the Court may consider (1) whether the stay applicant has made a "strong showing" that he is likely to succeed on the merits; (2) whether the applicant will be "irreparably" injured absent a stay; (3) whether issuance of the stay will substantially injure the non-movant; and (4) the public interest. *See Digital-Vending*, 2010 WL 11450510 at *3 (quoting and citing *GTSI Corp. v. Wildflower Int'l, Inc.*, 2009 WL 3245396, at *1 (E.D. Va. Sept. 29, 2009)). All of these factors weigh against grant of Defendants' motion for a stay.

As a preliminary matter, and contrary to Defendants' opening argument (ECF 208 at 5–6), the Magistrate Judge did not err by ruling on the discovery motions while other motions were pending. *See* Local Rule 104.3 ("Unless otherwise ordered by the Court, the existence of a discovery dispute as to one . . . matter does not justify delay in taking any other discovery."). The District Court has already rejected Defendants' argument on this point. *See* ECF 170 at 2 ("The Court does not consider the fact that motions are currently pending to be sufficient justification to warrant a stay of discovery."). Moreover, although the district court in *Doe* initially postponed consideration of the plaintiffs' motion to compel until after ruling on the motions for summary judgment, the *Doe* court recently concluded that it was *unable* to resolve

the summary judgment motions because "[t]he parties disagree about the fundamental nature of the process leading up to the issuance of the Mattis Implementation Plan," and "[t]his is a genuine factual dispute." *Doe v. Mattis*, 2018 WL 4053380, at *7. The district court's rulings in *Doe* demonstrate that it is not practical or possible to delay resolution of these discovery disputes while the motions for summary judgment are pending.[3]

1. Defendants have not made any showing—let alone a "strong" one—that their objections are likely to succeed.

Defendants fail to show that their objections to the Magistrate Judge's ruling are likely to succeed. A district court may overturn a magistrate judge's decision on a pre-trial discovery ruling only "where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636; *see also* Fed. R. Civ. P. 72(a). "[T]he 'clearly erroneous' standard is deferential," and a magistrate's findings of fact should be affirmed unless "the reviewing court's view of the entire record leaves the Court with the definite and firm conviction that a mistake has been committed." *FEC v. Christian Coal.*, 178 F.R.D. 456, 460 (E.D. Va. 1998) (citing *Harman v. Levin*, 772 F.2d 1150, 1153 (4th Cir. 1985)).

No mistake has been committed here. To maintain a claim of deliberative process privilege, "the government must show that, in the context in which the materials [were] used, the documents [were] both predecisional and deliberative." *City of Va. Beach v. U.S. Dep't of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993) (internal quotation marks omitted). The

[3] Moreover, this Court is not bound to follow a different court's decision to hold privilege motions in abeyance pending resolution of dispositive briefing in a related case. As the government recently observed in another case, "multiple lower courts considering similar legal questions" is itself "a process of value to the appellate courts and the development of the law more generally." *See City & Cty. of S.F. v. Sessions*, No. 3:17-cv-04642-WHO, ECF 36 (N.D. Cal. Aug. 28, 2017). In any event, the Magistrate Judge reasonably concluded that the particular circumstances of this case warranted proceeding with resolution of this discovery dispute without further delay. ECF 204 at 4.

Magistrate Judge questioned whether the materials Plaintiffs seek meet these criteria. He correctly observed that "the optics of the tweets and corresponding sudden activity lend themselves to a showing that the decision was made and the panel was formed to justify and enforce that decision." ECF 204 at 6; *see also id.* at 7 ("[t]he panel that was formed to consider transgender service was not formed until after the President's tweets occurred and according to President Trump after discussion with 'my Generals and military experts.'"). These conclusions were not erroneous, under any standard. Indeed, the district courts in *Doe* and *Karnoski* have already come to similar conclusions. *See Doe 2 v. Trump*, 315 F. Supp. 3d 474, 484 (D.D.C. 2018) ("[A]t a fundamental level, the Mattis Implementation Plan is just that—a plan that implements the President's directive that transgender people be excluded from the military."); *Karnoski*, 2018 WL 3608401, at *4 (ruling that "the deliberative process privilege does not apply in this case").

Defendants point to Secretary Mattis's June 30, 2017 order regarding the timing of transgender accessions as supposed evidence of an independent deliberative process unaffected by President Trump's order to ban transgender people from serving. ECF 208 at 6. As explained in Plaintiffs' Reply In Support of Cross Motion for Summary Judgment, this is revisionist history, at odds with the actual record. ECF 190 at 12. The Department of Defense did initiate a review of the Open Service Directive in June 2017. ECF 40-11. However, that review involved assessment of the military's readiness to implement the Open Service Directive by July 1, 2017, not whether to implement it at all. *See* ECF 190-2 (USDOE00003258 at 3263). Indeed, each military department was explicitly informed that DoD "d[id] not intend to reconsider prior decisions unless they cause readiness problems that could lessen our ability to fight, survive and win on the battlefield." *Id.* Consistent with that guidance, some of the

branches recommended delays of the date by which accessions of transgender persons were to begin, to permit further study of various issues. Tellingly, no branch recommended reinstating the historical ban on transgender service. *Id.* at 3258 (Air Force: recommending 12- to 36-month delay to starting accessions), 3260 (Army: recommending 24-month delay to starting accessions), 3262–64 (Navy: finding "no impediments" to the July 1, 2017 start date for accessions, but requesting consideration of one year delay), 3265 (Marine Corps: recommending 12-month delay to starting accessions). In July 2017, President Trump interrupted and preempted DoD's review—in his words, doing the military a "great favor" by resolving this "confusing issue" himself and ordering the military to reinstate the historical ban on service by transgender persons. ECF 40-12. Nothing in the record supports the idea that the military would have reinstated a complete ban in the absence of President Trump's directives.[4]

The Magistrate Judge also correctly observed that the deliberative process privilege does not apply at all when, as here, government intent is central to the claims asserted. *See* ECF 204 at 5–6 (citing *In re Subpoena Duces Tecum Served on the Comptroller of the Currency*, 145 F.3d

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[4] Defendants also repeat their facile assertion that the Implementation Plan merely discriminates based on the medical condition of gender dysphoria and not transgender status. As explained in Plaintiffs' Reply In Support of Cross-Motion for Summary Judgment, ECF 190 at 17, that is simply not true. Under the Implementation Plan, eligibility for service is determined not by a diagnosis of gender dysphoria, but rather by whether the person has transitioned. *See id.* Specifically, a person whose gender dysphoria has been completely cured as a result of gender transition is barred from enlisting, whereas a person with a history of gender dysphoria is permitted to enlist after 36 months so long as they serve in their sex assigned at birth. ECF 120-1 at 2–3. A policy that bans transgender people from transitioning and serving consistently with their gender identity facially discriminates based on transgender status. *See Karnoski v. Trump*, 2018 WL 1784464, at *6 (W.D. Wash. Apr. 13, 2018) (stating a person's medical need to transition is the "very characteristic that defines them as transgender in the first place"); *see also EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018) (rejecting distinction between transgender status and gender transition because "transitioning status constitutes an inherently gender non-conforming trait"); *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) (same).

1422, 1424 (D.C. Cir. 1998), and *McPeek v. Ashcroft*, 202 F.R.D. 332, 335 (D.C. Cir. 2001)). The Magistrate Judge's conclusion that Plaintiffs' requests seek information going to Defendants' intent is abundantly supported by the record and is not contrary to law. His statement of the law is consistent with the statements of a number of the courts that have considered this question. *See, e.g.*, *Dunnet Bay Constr. Co. v. Hannig*, 2012 WL 1599893, at *3 (C.D. Ill. May 7, 2012) ("The deliberative process privilege . . . does not apply when the lawsuit puts at issue the intent of the officials making the governmental policy decision."); *Children First Found., Inc. v. Martinez*, 2007 WL 4344915, at *7 (N.D.N.Y. Dec. 10, 2007) ("[I]f the party's cause of action is directed at the government's intent in rendering its policy decision and closely tied to the underlying litigation then the deliberative process privilege 'evaporates.'"); *Jones v. City of Coll. Park, Ga.*, 237 F.R.D. 517, 521 (N.D. Ga. 2006) ("[T]he privilege is simply inapplicable, because government intent is at the heart of the issue in this case."); *United States v. Lake Cty. Bd. of Comm'rs*, 233 F.R.D. 523, 527 (N.D. Ind. 2005) (acknowledging that "the deliberative process privilege does not apply when the government's intent is at issue").

Moreover, even if a balancing test did apply, the balance would decisively weigh in Plaintiffs' favor. *See Jones*, 237 F.R.D. at 521 ("Whether this court applies a balancing test or finds that the privilege simply does not apply, the undersigned reaches the same result."). When the key issue in a lawsuit is the process that led to a particular governmental decision, the balancing test heavily favors the party seeking discovery. *See Holmes v. Hernandez*, 221 F. Supp. 3d 1011, 1021 (N.D. Ill. 2016) ("Where a plaintiff directly challenges a government agency's deliberative process, courts routinely find that there is a particularized need for disclosure"—particularly where the issue "*is* the deliberative process." (internal quotation marks

omitted)); *Scott v. Bd. of Educ. of City of E. Orange*, 219 F.R.D. 333, 337–38 (D.N.J. 2004) (citing the balancing test and concluding that the intent factor is dispositive).

Contrary to Defendants' suggestion, the decision in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), does not undercut the Magistrate Judge's ruling. *See* ECF 208 at 11–12. The Supreme Court in *Trump v. Hawaii* declined to consider extrinsic evidence of animus when applying rational-basis review to *a policy that was* "*neutral on its face*." 138 S. Ct. at 2418 (emphasis added). Here, by contrast, Defendants seek to implement a policy that is facially discriminatory. ECF 85 at 43–44; *accord Karnoski*, 2018 WL 3608401, at *2 ("Unlike the policy in *Hawaii*, the Court need not 'look behind the face' of the Ban, as the Ban is facially discriminatory."). Evidence relating to the motive underlying the establishment and implementation of the Ban is relevant to whether Defendants' asserted justifications for the Implementation Plan are pretextual. This is exactly the inquiry that the Constitution requires when a policy discriminates on its face. *See United States v. Virginia*, 518 U.S. 515, 533 (1996).

2. Defendants will not be "irreparably harmed" absent a stay, and Plaintiffs will be substantially harmed if Defendants' request is granted.

Defendants argue that they will be irreparably harmed absent a stay for several reasons. None of their arguments has merit.

First, Defendants complain that the Magistrate Judge's "sweeping" ruling requires them to produce "thousands" of documents. ECF 208 at 2, 3, 5, 8. Their repeated use of this adjective is both misleading and beside the point. To the extent that Defendants must now produce thousands of documents, that is because they chose to withhold a vast range of documents on

questionable grounds.[5] In any event, inconvenience is not "irreparable harm." *See, e.g.*, *Mason v. DeGeorge*, 483 F.2d 521, 524 (4th Cir. 1973). Defendants' burden argument is all the more inappropriate given how much time they have had to collect the documents at issue. Plaintiffs served their discovery requests in early January 2018 and initiated meet-and-confer discussions in February. It strains credulity for Defendants to argue that it would be unduly burdensome to require them to produce documents that they could and should have produced seven months ago, particularly where they have already collected the documents and listed them in their privilege logs. *See Karnoski*, ECF 311 at 7 ("[W]hile Defendants repeatedly point to the number of documents they will be required to review, they have failed to identify any reason why good faith compliance with the discovery process in this case would impose a greater burden or involve a greater allocation of resources than in any other.").[6]

Second, Defendants contend that denial of their stay motion would harm them by "sacrificing meaningful review" and that a stay is necessary to prevent their objections from becoming moot. ECF 208 at 10; *id.* at 3, 8–9. To the contrary, it is well established that a party's objections to an adverse privilege ruling can and should be remedied on appeal from final judgment. "Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse

[5] Indeed, it is likely that Defendants will ultimately conclude that most of the documents they withheld are not in fact privileged, as has occurred in the past when their privilege assertions were challenged. For example, Defendants issued a "claw back" request under this Court's Rule 502(d) Order on April 19, 2018 as to five documents purportedly inadvertently produced and subject to the deliberative process privilege. ECF 178-8 (filed under seal). After Plaintiffs contested this claw back, Defendants ultimately withdrew their claw back request as to all but one document. ECF 186 (filed under seal).

[6] Defendants have provided no indication of when they would produce the compelled documents absent a stay, or whether they are even capable of producing the documents encompassed by the order within the next several weeks.

judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009). And if Defendants should produce the documents at issue before the Court rules on their objections, and the Court later ruled in their favor, they could seek return or destruction of the documents, similar to the clawback process under the Rule 502(d) order.[7] These circumstances do not present "immediate, irreparable" harm.

In arguing that complying with the motion to compel would "moot" their objections, Defendants rely on cases that are very different from this one. For example, the FOIA cases they highlight (*see* ECF 208 at 2) are distinguishable in view of the unique FOIA statutory framework. *See Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 371 n.25 (4th Cir. 2009) (noting that FOIA-related disputes "are not identical" to standard discovery disputes and that "discovery rules should be applied to FOIA cases only by way of rough analogies" (internal quotation marks omitted)). Cases Defendants cite on page 9 of their motion involve stays granted for the purpose of permitting *in camera* review of documents allegedly covered by the attorney/client privilege or attorney work product protection, journalists' requests for law enforcement records, or materials containing trade secrets.[8] They are not relevant to this case, which involves discovery sought by a party on a key issue relevant to a constitutional challenge.

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[7] To the extent Defendants can show that a particular document or piece of information is truly sensitive, they presumably could designate that material as confidential under the protective order.

[8] To the extent Defendants seek a document-by-document review (*in camera* or otherwise), they are not entitled to one. The Magistrate Judge has correctly ruled that the privilege does not apply *at all* to the categories of documents identified in Plaintiffs' Motion to Compel. ECF 204 at 5–7; *accord Karnoski*, ECF 311 at 7 (finding "no support" for Defendants' claim that deliberative process privilege must be determined "on a document-by-document basis," and reiterating that the deliberative process privilege "does not apply *at all* in cases involving claims of governmental misconduct or where the government's intent is at issue" (emphasis in original)).

On the other hand, there is much more than a "fair possibility" that the requested stay will harm Plaintiffs. For many months Plaintiffs have sought materials they need to prepare their case in order to obtain a final ruling on their constitutional challenge, but Defendants have stymied these efforts with their broad privilege claims. Plaintiffs face irreparable injury under the Implementation Plan, under which "most transgender individuals either cannot serve or must serve under a false presumption of unsuitability, despite having already demonstrated that they can and do serve with distinction." ECF 139-11 (statement by 26 retired general and flag officers in opposition to the Ban). Further delay in resolving the constitutionality of the Ban and Implementation Plan will only serve to compound this egregious harm. Moreover, in their Rule 56(d) affidavit (ECF 163-16), Plaintiffs explained why—at a minimum—further discovery is needed before Defendants' motion for summary judgment can be resolved.[9] *Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D.N.C. 1988) ("[T]he Court ordinarily should not stay discovery which is necessary to gather facts in order to defend against the motion.").

3. The public interest favors disclosure.

A stay of the Magistrate Judge's rulings on Plaintiffs' Motion to Compel and their related Rule 502(d) motion is not in the public interest. This country, and the transgender service members and those aspiring to enlist who seek to serve their country, are entitled to discovery of materials that are likely to demonstrate unlawful intent driving an unconstitutional policy. *See United States v. Nixon*, 418 U.S. 683, 708 (1974) ("The very integrity of the judicial system and

[9] Contrary to Defendants' claim (ECF 208 at 5, 9–10), the fact that Plaintiffs have moved for summary judgment does not defeat their need for the discovery at issue here. *See Zook v. Brown*, 748 F.2d 1161, 1166 (7th Cir. 1984) ("The contention of one party that there are no issues of material fact sufficient to prevent the entry of judgment in its favor does not bar that party from asserting that there are issues of material fact sufficient to prevent the entry of judgment as a matter of law against it." (internal quotation marks omitted)).

public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."). Prompt disclosure of documents wrongly withheld is thus in the public interest. *See United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1370 (9th Cir. 1980) ("The public interest requires not only that Court orders be obeyed but further that Governmental agencies which are charged with the enforcement of laws should set the example of compliance with Court orders.").

C. Should the Court Grant Defendants' Request for a Stay, It Should Expedite Consideration of Defendants' Objections and Require Defendants to Begin Immediate Collection and Processing of the Materials at Issue in the Interim.

As set forth above, Plaintiffs would be significantly harmed by any further delay of discovery. *See supra* Section III.B. Accordingly, should the Court grant Defendants' request for a stay pending appeal, Plaintiffs respectfully request that the Court expedite consideration of Defendants' forthcoming objections in order to prevent further harm. Plaintiffs further request that the Court order Defendants to proceed promptly with collection and processing of the documents at issue, so that they are ready for production if and when Defendants' objections are overruled.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion to stay should be denied.

Dated: August 31, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 31, 2018, a copy of the foregoing was served on Defendants via CM/ECF. In addition, courtesy copies were mailed to the Chambers of Judge Russell and Judge Copperthite.

/s/ Marianne F. Kies
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