IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BROCK STONE, *et al.*, *Plaintiffs*, v. DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*, *Defendants*.	Case 1:17-cv-02459-GLR Hon. George L. Russell, III

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY COMPLIANCE WITH THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER

INTRODUCTION

A stay of the Magistrate Judge's Memorandum Opinion and Order is warranted to prevent the disclosure of thousands of deliberative documents from the Department of Defense ("DoD") and the Armed Services concerning multiple military policies. The balance of harms weighs overwhelmingly in Defendants' favor because DoD will suffer immediate, irreparable harm absent a stay, as a result of the disclosure's chilling effect on discussions regarding sensitive personnel and security matters. In contrast, Plaintiffs will suffer no harm at all because the Court has issued a preliminary injunction. In addition, the Magistrate Judge failed to apply Supreme Court precedent and Fourth Circuit case law and made erroneous factual findings. Plaintiffs compound the Magistrate Judge's errors by ignoring or mischaracterizing case law and the record.

ARGUMENT

I. The Court Should Stay Compliance with the Magistrate Judge's Memorandum Opinion and Order as it Relates to the Disclosure of Materials Protected by the Deliberative Process Privilege.

A. The Balance of Harms Weighs Overwhelmingly in Defendants' Favor.

Plaintiffs fail to show that they suffer any harm from a stay of the discovery obligations at issue while a preliminary injunction is in place. *See* Defs.' Mot. 10, Dkt. 208. Indeed, Plaintiffs fail even to acknowledge the existence of the preliminary injunction, which protects their rights while discovery disputes are pending. *See* Pls.' Opp. 16, Dkt. 211. Instead, Plaintiffs argue that they would be harmed by a stay of this discovery because, in their view, "most transgender individuals either cannot serve or must serve under a false presumption of unsuitability" under DoD's new policy. *Id.* But this does not explain why they would be harmed by a stay of the discovery at issue. And even if Plaintiffs' theory of harm were true under DoD's *new* policy,[1] it is plainly not true under the terms of the preliminary injunction, which allows the Plaintiffs who are current service members to continue to serve, and allows the Plaintiffs who wish to join the military to do so under the terms of the policy announced by former Secretary of Defense Ashton Carter during the prior administration (provided they can meet all other standards for military service). *See* Prelim. Inj., Dkt. 84. Thus, Plaintiffs' contention that "delay in resolving the constitutionality of the Ban and Implementation Plan will only serve to compound this egregious harm," Pls.' Opp. 16, does not explain *how* any delay would harm them while a preliminary injunction is in place. Notably, in the related case *Doe v. Trump*, the Court held a discovery dispute in abeyance and emphasized that this would "not prejudice Plaintiffs, because the Court's preliminary injunction remains in place." *See* Order, Dkt. 145, *Doe v. Trump*, No. 17-cv-

[1] It is not. *See infra* pages 9, 18–19; Mattis Mem., Dkt. 120-1; DoD Report and Recommendations, Dkt. 120-2; *see also* Defs.' Mot. to Dissolve the Prelim. Inj. 6–8, Dkt. 120; Defs.' Mot. to Dismiss 6–8, Dkt. 158.

1597 (D.D.C. June 19, 2018).

In contrast to Plaintiffs' vague assertions of harm, Defendants would suffer immediate, concrete and irreparable harm absent a stay. Disclosure of thousands of documents related to military policies from DoD and the Services plainly would chill future policy discussions on sensitive personnel and security matters that require free and frank communication within the highest ranks of the Department and the military. *See infra* Part I.A.3. Plaintiffs do not argue otherwise.

Instead, Plaintiffs first argue that Defendants "withh[e]ld a vast range of documents on questionable grounds," which, they contend, accounts for the thousands of documents withheld under the deliberative process privilege. Pls.' Opp. 13–14. But particularly given that Plaintiffs have not seen the privileged documents, this assertion is both speculative and baseless. Plaintiffs cite to the parties' dispute over five inadvertently produced privileged documents, and argue that because Defendants withdrew their clawback of four of those documents, Defendants improperly withheld thousands of deliberative documents. *Id.* at 14 n.5. But, as Defendants previously explained, Defendants maintained that the documents were "properly subject to the deliberative process privilege" and withdrew the clawback over certain documents "in an attempt to narrow the dispute before the Court." Defs.' Resp. 1, Dkt. 186. Moreover, the resolution of disputes over five identified documents cannot justify the wholesale disclosure of thousands more. If anything, the clawback dispute illustrates the wholesale nature of Plaintiffs' demands and their failure to put specific documents at issue. Moreover, while Plaintiffs criticize Defendants for "object[ing] to every single document request and interrogatory on the basis of, *inter alia*, the deliberative process and presidential communications privileges," Pls.' Opp. 3, that was the result of the sweeping nature of Plaintiffs' discovery requests, which specifically sought *all* deliberative documents and information related to the decision-making process. *See, e.g.*, Kies Decl. Exh. 2 (Pls.' First Set of Reqs. for Prod. 7, 8, 9, 16, Jan. 3, 2018), Dkt. 177-6 (requesting "All Documents and Communications" that any Defendant

"considered, reviewed, referenced, or relied upon directly or indirectly as a basis or impetus for" the President's statements on Twitter, the August 2017 Presidential Memorandum, and DoD's Interim Guidance, and "All Documents and Communications conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed by the Panel of Experts, Including any recommendations of the Panel of Experts and the implementation plan due on February 21, 2018"); Enlow Decl. Exh. 2 (Pls.' Second Set of Reqs. for Prod. 22–26, May 21, 2018), Dkt. 177-30 (requesting "All Documents and Communications" relating to DoD's new policy, including "drafts" of the Mattis Memorandum, DoD's Report and Recommendations, and the March 2018 Presidential Memorandum). Precisely because Plaintiffs requested all documents underlying the decision-making processes of multiple military policies, it is not surprising that many responsive documents are pre-decisional and deliberative, and thus protected under the deliberative process privilege.

Plaintiffs also argue that the "inconvenience" of producing thousands of deliberative documents "is not irreparable harm." Pls.' Opp. 14. But this is plainly not an issue of mere convenience, where the wholesale disclosure of military deliberations is at issue. Moreover, courts have found that orders imposing onerous discovery burdens may cause irreparable harm and justify a stay. *See In re United States*, 138 S. Ct. 371, 371 (2017) (staying district court's orders "to the extent they require discovery and addition to the administrative record"); *Richards v. Ernst & Young LLP*, No. 08-4988, 2012 WL 92738, at *3–4 (N.D. Cal. Jan. 11, 2012) (granting stay because serious burden, including discovery, would be avoided if defendants won on appeal). The disclosure of documents that have been withheld under the deliberative process privilege requires staff from DoD and the Services to re-review thousands of documents to ensure that deliberative material related to other

polices is not disclosed.[2] Plaintiffs dismiss this significant burden by arguing that Defendants "could and should have produced [those documents] seven months ago," when Plaintiffs initially claimed that the deliberative process is inapplicable as a matter of law in this case. *Id.* But Defendants have no burden to disclose privileged documents merely because Plaintiffs demand that they do so.

Relying on *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), Plaintiffs also argue that that Defendants should produce the deliberative documents and, if the Court overturns the Magistrate Judge's Order, seek to have the documents returned or destroyed. Pls.' Opp. 14–15. Plaintiffs' reliance on *Mohawk* is misplaced. That case concerned when appellate review may be sought with respect to the attorney-client privilege outside of a governmental context. The *Mohawk* Court "express[ed] no view" on executive privileges, 558 U.S. at 113 n.4, and recognized that "a party may petition the court of appeals for a writ of mandamus" to seek relief from an order directing the disclosure of privileged materials, 558 U.S. at 111, just as Defendants have done in cases that post-date *Mohawk*, including the related *Karnoski* case, *see* Pet. for a Writ of Mandamus & Emergency Mot. for Stay, Dkt. 1, *In re Donald J. Trump*, 18-72159 (9th Cir. Aug. 1, 2018); *see also e.g.*, *In re United States*, 678 F. App'x 981 (Fed. Cir. 2017); *In re Perez*, 749 F.3d 849, 854 (9th Cir. 2014). And the rationale underlying *Mohawk*—that "deferring review until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel," 558 U.S. at 109—is plainly inapplicable to the government's deliberative process privilege because one of the underlying purposes of the privilege is to protect against chilling discussions related to future policies, *see Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001); *EPA v. Mink*, 410 U.S. 73, 87 (1973); *City of Va. Beach v. Dep't of Commerce*, 995 F.2d 1247, 1252–53 (4th Cir. 1993).

[2] For example, where an email contains deliberations about DoD's new policy and also contains deliberations about policies wholly unrelated to military service by transgender individuals, staff from DoD will need to redact the unresponsive information from the document prior to production.

Finally, Plaintiffs argue that stays granted in the FOIA cases, and in the cases involving other privileges cited by Defendants, are irrelevant because this case "involves discovery sought by a party on a key issue relevant to a constitutional challenge." Pls.' Opp. 15. But the type of claim for which Plaintiffs are seeking the privileged information is wholly unrelated to whether Defendants will be harmed absent a stay. *See In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008) (explaining in a case involving constitutional claims that "[o]nce information is published, it cannot be made secret again."). And the rationale underlying the grant of a stay in those cases—that once the information is disclosed, "confidentiality will be lost for all time," *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979)—is equally true here.

Accordingly, because Defendants will suffer immediate, irreparable harm from disclosing thousands of deliberative documents related to multiple military policies, and Plaintiffs will suffer *no* harm because a preliminary injunction is in place, the balance of harms weighs overwhelmingly in Defendants' favor.

1. The Magistrate Judge Erred by Deciding Discovery Motions Before this Court Resolved Threshold Jurisdictional Issues.

Plaintiffs argue that "the Magistrate Judge did not err by ruling on the discovery motions while other motions were pending." Pls.' Opp. 8. But courts frequently grant stays of discovery pending the resolution of dispositive motions because "a court's ruling on a motion to dismiss may assist in defining the contours of discovery." *Int'l Refugee Assistance Project v. Trump*, No. CV TDC-17-0361, 2018 WL 1932681, at *6 (D. Md. Apr. 24, 2018). That is the case here. As set forth in Defendants' Motion for a Stay, numerous dispositive motions are pending before the Court that directly affect the extent and scope of discovery in this case. Most significantly, Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, which raises threshold jurisdictional arguments of mootness and standing, remains pending before the Court. *See* Defs.' Mot. 9–23, Dkt. 158; *see also* Defs.' Mot. to Dissolve the Prelim. Inj. 9–11, Dkt. 120 (arguing mootness). Because "'[w]ithout jurisdiction the

court cannot proceed at all in any cause,'" the Magistrate Judge should have at least waited for this Court to resolve threshold jurisdictional issues before considering Plaintiffs' Motion to Compel, setting aside the deliberative process privilege, and directing Defendants to disclose thousands of deliberative documents. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)); *Stop Reckless Econ. Instability Caused By Democrats v. Fed. Election Comm'n*, 814 F.3d 221, 228 (4th Cir. 2016) ("'[F]ederal courts must determine whether they have subject-matter jurisdiction over a claim before proceeding to address its merits.'" (quoting *Steel Co.*, 523 U.S. at 94)), *cert. denied*, 137 S. Ct. 374 (2016); *see also In re United States*, 138 S. Ct. at 445 (vacating court of appeals' denial of mandamus and recognizing that "the Government's threshold arguments . . . , if accepted, likely would eliminate the need for the District Court to examine" the requested discovery).

Even if Defendants' threshold jurisdictional arguments were not pending before the Court, the issuance of the broad discovery order was inappropriate while other dispositive motions were pending. The parties have filed cross-motions for summary judgment, which, if resolved in favor of either party, could be dispositive of all of Plaintiffs' claims. *See* Defs.' Mot., Dkt. 158; Pls.' Mot., Dkt. 163. The Magistrate Judge again should have held discovery motions in abeyance until these dispositive motions were resolved. *See Int'l Refugee Assistance Project*, 2018 WL 1932681, at *6 (recognizing that allowing discovery to proceed while threshold issues were pending before a higher court would "bog [the case] down in motions practice, with the parties essentially relitigating unsettled legal questions through discovery"); *Cleveland Const., Inc. v. Schenkel & Schultz Architects, P.A.*, No. 3:08-CV-407RJCDCK, 2009 WL 903564, *2 (W.D.N.C. Mar. 31, 2009) ("Federal district courts often stay discovery pending the outcome of dispositive motions that will terminate the case." (citing *Yongo v. Nationwide Affinity Ins. Co. of Am.*, No. 5:07-CV-94-D, 2008 WL 516744, at *2 (E.D.N.C. Feb. 25, 2008); *Bellamy v. Ford Motor Co.*, No. 3:07-CV-00287, 2007 U.S. Dist. LEXIS 66093 (W.D.N.C. Sept.

5, 2007), *aff'd*, 286 F. App'x 13 (4th Cir. 2008); *Graham v. Stansberry*, No. 5:07-CT-3015-FL, 2008 WL 3910689 (E.D.N.C. Aug. 19, 2008))); *Chavous v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001) ("[I]t is well settled that discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the claims in the Complaint is pending." (quoting *Anderson v. U.S. Attorneys Office*, No. CIV.A. 91–2262, 1992 WL 159186, at *1 (D.D.C. June 19, 1992))).

2. The Court's Review of the Magistrate Judge's Legal Conclusions is not Deferential.

Plaintiffs also argue that Defendants "fail to show that their objections to the Magistrate Judge's ruling are likely to succeed" because the Magistrate Judge's findings were not clearly erroneous and should therefore be upheld under that deferential standard. Pls.' Opp. 9. But that argument misstates several of Defendants' arguments. A Magistrate Judge's order must be modified or set aside if it is "clearly erroneous *or contrary to law*." 28 U.S.C. § 636(b)(1)(A) (emphasis added); Local Civil Rule 301(5)(a). Although the Court "review[s] the factual portions of the Magistrate Judge's order under the clearly erroneous standard," it "review[s] legal conclusions to determine if they are contrary to law." *Bruce v. Hartford*, 21 F. Supp. 3d 590, 594 (E.D. Va. 2014) (citations omitted). "For questions of law, there is no practical difference between review under Rule 72(a)'s 'contrary to law' standard and a de novo standard." *Perez v. Figi's Companies, Inc.*, No. 5:15-CV-13559, 2016 WL 10100742, at *2 (S.D.W. Va. Feb. 26, 2016) (citation omitted). Thus, the Court does not defer to the Magistrate Judge's conclusions of law at issue here, and Defendants have shown that several of those conclusions of law were contrary to law.

3. The Magistrate Judge's Conclusion that the Deliberative Process Privilege is Inapplicable in this Case is Contrary to Law.

Plaintiffs next argue that the Magistrate Judge "correctly observed that the deliberative process privilege does not apply at all when, as here, government intent is central to the claims asserted." Pls.'

Opp. 11. But the Supreme Court's recent decision in *Trump v. Hawaii* shows that when the Government takes a "military action," as DoD did here, its subjective intent is irrelevant so long as the Government's action "can reasonably be understood to result from a justification independent of unconstitutional grounds" based on the face of the challenged policy. 138 S. Ct. 2392, 2420, 2420 n.5 (2018). Plaintiffs attempt to brush aside *Hawaii* by arguing that the policy at issue in that case was facially neutral, unlike DoD's new policy. Pls.' Opp. 13. This argument is incorrect as a matter of fact and meritless as a matter of law. The Department of Defense's new policy—like the Carter policy before it—turns not on transgender status, but on a medical diagnosis (gender dysphoria) and an associated medical treatment (gender transition). DoD Report and Recommendation 4–6, Dkt. 120-2. Indeed, under the new policy, transgender individuals who have neither transitioned nor been diagnosed with gender dysphoria are free to join the military on the same terms as any other prospective servicemember. *See id.* And even if DoD's new policy did turn on transgender status, the deferential standard the Supreme Court applied in *Hawaii* would still be appropriate. In *Hawaii*, the Supreme Court rejected the invitation to import "the *de novo* 'reasonable observer' inquiry" into "the national security and foreign affairs context," including cases that involve review of "military actions." 138 S. Ct. at 2420 n.5. Instead, based on deference principles, the Court applied "rational basis review" and stressed that judicial "inquiry into matters of . . . national security is highly constrained." *Id.* at 2420 (citing *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976)). That standard applies not just to policies in the areas of national security or foreign affairs that are facially neutral, but also to policies in those areas that contain "categorical" classifications, such as classifications "on the basis of sex". *Id.* at 2419 (citing *Fiallo v. Bell*, 430 U.S. 787, 795, 799 (1977)); *see also Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (according deference to a statute that drew distinctions based on sex). Therefore, *Hawaii* underscores that deferential review applies to "military actions," *id.* at 2420 n.5—regardless of whether a similar action would trigger heightened scrutiny in the civilian context—and that such deference is triggered

by the subject matter of the decision; here, personnel decisions concerning the armed forces.[3]

Plaintiffs also argue that the Magistrate Judge's conclusion that the deliberative process privilege does not apply as a matter of law when intent is at issue is "consistent with the statements of a number of the courts that have considered this question." Pls.' Opp. 12. Plaintiffs cite to no Fourth Circuit case for this proposition, *see id.,* and such an approach is contrary to the analysis described by the Fourth Circuit in *Cipollone v. Liggett Grp. Inc.*, under which courts must balance a party's articulated need for specific deliberative documents or information against the Government's interests in non-disclosure to determine whether the deliberative process privilege can be overcome. 812 F.2d 1400 (4th Cir. 1987) (table) (quoting *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)). This balancing test requires a document-by-document (or at least a category-by-category) analysis, which the Magistrate Judge failed to undertake. *See In re United States*, 678 F. App'x at 987 (noting "document-by-document" analysis required in assessing claims that the deliberative process privilege has been

[3] To the extent Plaintiffs argue that they need the deliberative documents so the Court may determine whether principles of military deference apply in this case, *see* Pls.' Opp. 2, 8–9, that argument is meritless. As one of the "complex, subtle, and professional decisions as to the composition . . . of a military force, which are essentially professional military judgments," DoD's 2018 policy is subject to a highly deferential form of review. *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (quotation omitted). This deference stems from the Supreme Court's recognition that control of the armed forces is vested in the Executive and Legislative branches by the text of the Constitution. *See Rostker*, 453 U.S. at 67 (holding, in a case involving facial classifications on the basis of gender, that "the Constitution itself requires such deference"); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."). The notion that deference can only be applied once the court determines that that the military followed what it deems to be an adequate review process, is wrong. For example, in *Rostker*, the Supreme Court specifically stated that it applied a lower standard of review because "[t]he case ar[ose] in the context of Congress' authority over national defense and military affairs," where deference to its judgments was "unquestionably due." 453 U.S. at 64–65. Likewise, the Supreme Court in *Goldman* applied deference based on the "military context" of the case, not because it reviewed the decision-making process and determined that the process met a court's specifications. 475 U.S. at 507.

overcome).[4]

Moreover, none of the out-of-circuit case law Plaintiffs cite involved a military policy concerning the composition of the fighting force, and thus none of those courts applied the deferential standard required to review challenges to military policies. *See Hawaii*, 138 S. Ct. at 2420 n.5; *see also Rostker*, 453 U.S. at 72–74.

The basis for the cases relied upon by Plaintiffs is a bankruptcy case from the D.C. Circuit, *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998), which is plainly inapposite. There, the D.C. Circuit held that the deliberative process privilege did not apply in a fraudulent transfer action in which the plaintiff was required to show that the transfers were made "with actual intent to hinder, delay, or defraud." 145 F.3d at 1423–24. On rehearing, the D.C. Circuit clarified that its "holding that the deliberative process privilege is unavailable is limited to those circumstances in which the cause of action is directed at the agency's subjective motivation." *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1280 (D.C. Cir. 1998); *see also In re Subpoena*, 145 F.3d at 1424 (holding privilege inapplicable where "Congress creates a cause of action that deliberatively exposes government decisionmaking to the light"). But *In re Subpoena*, in limiting its applicability to a narrow class of claims, did not state a categorical rule that in every circumstance where a plaintiff questions an agency's motives, the plaintiff automatically overcomes the deliberative process privilege.

Moreover, in two of the cases Plaintiffs cite for the proposition that the privilege does not apply when intent is at issue, the courts declined to apply the deliberative process privilege to "routine

[4] Plaintiffs also state that the Magistrate Judge "questioned whether the materials Plaintiffs seek" are predecisional and deliberative. Pls.' Opp. 9–10. But the Magistrate Judge did *not* make any such finding and instead ruled that the deliberative process privilege "is simply inapplicable where government intent is at the heart of the issue." Mem. Op. 5, Dkt. 204. Moreover, in their Motion to Compel, Plaintiffs did not dispute that the documents the Government has withheld under the deliberative process privilege are predecisional and deliberative. *See generally* Pls.' Mot., Dkt. 177-3.

personnel decisions," such as the decision to terminate an employee, but observed that the deliberative process privilege is intended to protect deliberations behind broad policy decisions—precisely the kind of information at issue here. *See United States v. Lake Cty. Bd. of Comm'rs*, 233 F.R.D. 523, 528 (N.D. Ind. 2005); *Jones v. City of Coll. Park*, 237 F.R.D. 517, 521 (N.D. Ga. 2006). Further, the court in *Jones* applied a balancing test before ordering disclosure despite finding that "government intent is at the heart of the issue in this case"—contrary to Plaintiffs' own position. 237 F.R.D. at 521. None of the authority cited by Plaintiffs or the Magistrate Judge provide any basis for deviating from Fourth circuit authority or the Supreme Court's instruction in *Hawaii* that a military personnel policy be assessed based on its own stated justifications, not a plaintiff's assertion of the intent behind it. 138 S. Ct. at 2417–23.

Plaintiffs also fail to acknowledge that numerous other courts have rejected that categorical approach, *see, e.g.*, Order at 2, *State of New York v. Dep't of Commerce*, No. 1:18-cv-02921-JMF (S.D.N.Y. Aug. 14, 2018), Dkt. 241 ("conclud[ing] that a 'balancing approach that considers the competing interests of the party seeking disclosure and of the government—specifically, its need to engage in policy deliberations without the omnipresent threat of disclosure—is more appropriate than a *per se* rule' providing that the deliberative-process privilege does not apply to any claim challenging governmental decisionmaking" (quoting *Winfield v. City of New York*, No. 15-CV-5236 (KHP) (LTS), 2018 WL 716013, at *5 (S.D.N.Y. Feb. 1, 2018))); *In re Delphi Corp.*, 276 F.R.D. 81, 84–85 (S.D.N.Y. 2011) (rejecting plaintiff's argument that the deliberative process privilege "is not applicable where the litigation 'involves a question concerning the intent of the governmental decisionmakers or the decisionmaking process itself'" and instead applying the five factor balancing test); *Vietnam Veterans of Am. v. CIA*, No. 09-cv-0037 (JSC), 2011 WL 4635139, at *10 (N.D. Cal. Oct. 5, 2011) (declining to adopt a categorical rule that the deliberative process privilege is inapplicable when plaintiffs challenge intent, and explaining that the issue of "intent is properly considered as a factor in the substantial need

analysis"); *First Heights Bank, FSB v. United States*, 46 Fed. Cl. 312, 321–22 (2000) ("declin[ing] to follow the reasoning of *In re Subpoena* to the extent that it supports an automatic bar on assertions of deliberative process privilege in any case where the Government's intent is potentially relevant," and applying the balancing test weighing "a showing of evidentiary need" against "the harm that may result from disclosure"). The reason for this widespread rejection of *In re Subpoena*'s categorical approach is obvious: as the Federal Circuit observed, "[t]he privilege would be meaningless if all a litigant had to do was raise a question of intent to warrant disclosure." *In re United States*, 678 F. App'x at 990; *see also Utah Med. Prods. v. McClellan*, No. 2:03–cv–525–PGC, 2004 WL 988877, at *8 (D. Utah Mar. 31, 2004) (finding that a per se rule that the deliberative process privilege did not apply when a party challenges the decision-making process would lead plaintiffs to "recast [their] complaints as a challenge to the decision-making process").

Plaintiffs next argue that "even if a balancing test did apply, the balance would decisively weigh in Plaintiffs' favor," Pls.' Opp. 12, but that too is mistaken. The four-factor balancing test outlined in *Cipollone* requires weighing "(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government's role (if any) in the litigation, and (4) 'the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.'" 812 F.2d at 1400 (quoting *Warner*, 742 F.2d at 1161). Rather than meet their burden to show that these four factors weigh in favor of disclosure, Plaintiffs simply cite to two out-of-circuit cases and assert that "[w]hen the key issue in the lawsuit is the process that led to a particular governmental decision, the balancing test heavily favors the party seeking discovery." Pls.' Opp. 12 (citing *Holmes v. Hernandez*, 221 F. Supp. 3d 1011, 1021 (N.D. Ill. 2016); *Scott v. Bd. of Educ. of City of E. Orange*, 219 F.R.D. 333, 337–38 (D.N.J. 2004)). Neither of the two cases Plaintiffs cite involved a military policy, and neither court applied the deferential standard required to

review challenges to military policies.[5] *See Hawaii*, 138 S. Ct. at 2420 n.5; *see also Rostker*, 453 U.S. at 72–74. Moreover, Plaintiffs' generalized assertion of need is far from the particularized and "compelling need" required to overcome the privilege for *each and every* document withheld relating to the President's 2017 actions, the Panel of Experts' study, or DoD's 2018 policy. *Cipollone*, 812 F.2d 1400 (affirming the district court's decision to override the privilege after finding that the corporation "demonstrated a compelling need for the materials"); *see also United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993) (stating that the plaintiff had to show a "particularized need" for specific documents to overcome the privilege); *Marriott Int'l Resorts, L.P. v. United States*, 437 F.3d 1302, 1307 (Fed. Cir. 2006) (stating that a plaintiff must show a "compelling need" to overcome the privilege); *In re United States*, 678 F. App'x at 987 (requiring a "document-by-document" analysis).

Aside from their generalized statement of need for thousands of deliberative documents, Plaintiffs fail to mention, much less weigh, the remaining factors in the *Cipollone* balancing test. *See* Pls.' Opp. 12–13. In particular, Plaintiffs make no attempt to defend the Magistrate Judge's failure to address whether they could obtain the same or similar information through other channels. *See Warner*, 742 F.2d at 1161–62 (concluding that the parties seeking two memoranda prepared by the Federal Trade Commission had "little need for the memoranda," because ample additional information on "market structure and competitive effects" was already available); *see also Utah Med. Prods.*, 2004 WL 988877, at *5 (finding that even though the requested document was relevant to plaintiff's claims, the production of a "fifteen-volume administrative record" and other documents "all provided [the plaintiff with] a clear explanation" as to why the agency took an enforcement action). Defendants

[5] In addition, although Plaintiffs cite to *Scott v. Bd. of Educ. of City of E. Orange*, 219 F.R.D. 333, 337–38 (D.N.J. 2004), as supporting their position that the "intent factor is dispositive," Pls.' Opp. 13, the *Scott* Court actually held that the deliberative process privilege "cannot be invoked by the Board in this matter because the Privilege shields deliberations that contribute to the formulation of important public policy not routine operating decisions like the termination of a HVAC Supervisor," 219 F.R.D. at 338.

have produced over 30,000 pages of non-privileged documents, provided non-privileged responses to interrogatories, and produced a 3,000-page administrative record composed of documents explaining why the military adopted its new policy. The Magistrate Judge's failure to consider the availability of this evidence was contrary to law.

Significantly, both Plaintiffs and the Magistrate Judge entirely ignore the fourth *Cipollone* factor—"'the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.'" 812 F.2d at 1400 (quoting *Warner*, 742 F.2d at 1161). Disclosure of thousands of deliberative documents from the Department of Defense and the Services covering multiple policies plainly risks chilling future policy discussions on sensitive personnel and security matters that require free and frank communication within the highest ranks of the Department and the military. Plaintiffs have requested from DoD and the Services "[a]ll [d]ocuments and [c]ommunications . . . conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed [c]oncerning military service by transgender individuals." Kies Decl. Ex. 2 (Req. for Prod. No. 1), Dkt. 177-6. That request would encompass, for example, any candid advice given to Secretary Mattis by the Deputy Secretary of Defense on the topic of the transgender military service—the kind of sensitive advice that, if disclosed, could diminish his subordinates' willingness to present their candid views to the Secretary in the future. *See Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 360 (1979) (stating that documents "shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice"); *Nat'l Sec. Archive v. CIA*, 752 F.3d 460, 464 (D.C. Cir. 2014) (stating that "[p]remature release of material protected by the deliberative process privilege would have the effect of chilling current and future agency decisionmaking because agency officials … would no longer have the assurance that their communications would remain protected," and thus would "not feel as free to advance the frank and

candid ideas and advice that help agencies make good decisions"); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (finding that one of the purposes of the deliberative process privilege is "to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism"). If subordinates are chilled from providing their candid views on future policy matters to the Secretary of Defense and military leaders, the overall quality of the decision-making process will be affected, potentially leading to a direct negative impact to national security. *Cf. Heyer v. U.S. Bureau of Prisons*, No. 5:11-CT-03118-D, 2014 WL 4545946, at *5 (E.D.N.C. Sept. 12, 2014) (in a case involving due process claims by inmates, finding that "the unique security and other concerns presented by the correctional setting enhance the need for correctional facility decision makers to be able to freely and openly consider among themselves appropriate accommodations for inmates"). The Magistrate Judge's failure to consider the "'the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions,'" as required by *Cipollone*, was contrary to law. 812 F.2d at 1400 (quoting *Warner*, 742 F.2d at 1161).

4. The Magistrate Judge's Factual Findings were Clearly Erroneous.

The Magistrate Judge's Opinion contains numerous factual errors, some of which Plaintiffs do not even attempt to dispute. *See* Dkt. 208 at 6–7 (explaining why the Magistrate Judge erred in finding that (1) a review panel from DoD would not have existed but for the President's statement on Twitter and the August 2017 Presidential Memorandum, Mem. Op. at 6–7; (2) circumstances regarding readiness and deployability [could not] have changed so dramatically" between 2016 and 2018 to warrant the creation of a new policy, *id.* at 6; and (3) the Department's new policy has resulted in "transgender persons [being] barred from military service," *id.* at 9). Indeed, Plaintiffs concede that, contrary to the Magistrate Judge's findings, the Department of Defense began its review of the accession policy in June 2017. Plaintiffs assert that the Magistrate Judge correctly found that a review

panel from DoD would not have existed but for the President's influence, Mem. Op. at 6–7, arguing that the June 2017 "review involved assessment of the military's readiness to implement [the accession policy], not whether it implement it at all." Pls.' Opp. 10. But that is not the case.

In May 2017, the Deputy Secretary of Defense directed the Service Secretaries "to assess the Department's readiness to begin accessing transgender applicants into military service on July 1, 2017." Dkt. 190-2 (USDOE00003263). In response, the Service Secretaries assessed their Service's readiness to begin accessions on July 1, 2017, and all recommended lengthy delays (of one to three years) to the accessions policy because the Services had "significant concerns about the potential availability, readiness, and deployability of potential transgender accessions." Dkt. 190-2 (USDOE00003258–62). Thus, this "readiness" review by the Service Secretaries took place in May 2017 in response to the Deputy Secretary of Defense's request.

The Magistrate Judge overlooked that in response to the recommendations by the Service Secretaries, Secretary of Defense James Mattis issued a memorandum on June 30, 2017, in which he ordered a delay in accessions. Secretary Mattis determined that additional time was needed to "evaluate more carefully the impact of such accessions on readiness and lethality" and stated that DoD's "review will include all relevant considerations." AR 326, Dkt. 133-4. Thus, contrary to the Magistrate Judge's findings, Secretary Mattis ordered a comprehensive review of the impact of accessions by transgender individuals on readiness and lethality before the President's statements on Twitter in July 2017.

Plaintiffs attempt to bolster the Magistrate Judge's erroneous findings about presidential influence by asserting that, in the Service Secretaries' recommendations to the Deputy Secretary of Defense, "no branch recommended reinstating the historical ban on transgender service." Pls.' Opp. 11. But DoD's new policy, which allows current service members with a diagnosis of gender dysphoria to continue to serve in their preferred gender and allows transgender individuals to join the military

in their biological sex, is far from the historical ban on the accession and retention of transgender individuals. *Compare* Mattis Mem., Dkt. 120-1 (setting forth DoD's new policy), *with* DoD Report and Recommendations 7, Dkt. 120-2 (describing the historical ban on military service by transgender individuals). Similarly, in an effort to bolster the Magistrate Judge's findings, Plaintiffs assert that "[n]othing in the record supports the idea that the military would have reinstated a complete ban in the absence of President Trump's directives." Pls.' Opp. 11. But that assertion again rests on the false premise that DoD's new policy is a categorical ban on military service by transgender individuals.[6] *See* Mattis Mem., Dkt. 120-1; DoD Report and Recommendations, Dkt. 120-2. The Department's new policy, like the Carter policy, allows transgender individuals without a history of the medical condition of gender dysphoria to serve, if they meet the standards associated with their biological sex. *See* Mattis Mem., Dkt. 120-1; DoD Report and Recommendations, Dkt. 120-2; *see also* Defs.' Mot. to Dissolve the Prelim. Inj. 6–8, Dkt. 120; Defs.' Mot. to Dismiss 6–8, Dkt. 158. Moreover, the new policy allows service members "who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy," including those who entered the military "after January 1, 2018," to "continue to receive all medically

[6] Plaintiffs also argue that, under DoD's new policy, "eligibility for service is determined not by a diagnosis of gender dysphoria, but rather by whether the person has transitioned," because "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." Pls.' Opp. 11 n.4. Because the Magistrate Judge did not base his ruling upon such a finding, Plaintiffs' argument is irrelevant for this motion. In any event, Plaintiffs fail to acknowledge that considering a prospective servicemember's history of a medical condition and its treatment is a standard military practice. Indeed, prospective servicemembers are presumptively disqualified based solely on a history of many different medical conditions. *See* AR 210–261 (DoDI 6130.03), Dkt. 133 (setting "medical standards for appointment, enlistment, or induction into the military services"). Thus, it is unsurprising that the military would take into account past transition treatments, and doing so does not turn DoD's new policy into a categorical sex-based or transgender ban. In addition, Plaintiffs ignore the fact that under DoD's new policy, many individuals who require or have undergone gender transition may serve pursuant to its reliance exemption. DoD Report and Recommendation 5–6, Dkt. 120-2.

necessary care, to change their gender marker in the Defense Enrollment Eligibility Reporting System (DEERS), and to serve in their preferred gender, even after the new policy commences." DoD Report and Recommendations 5–6, Dkt. 120-2; *see also* Defs.' Mot. to Dissolve the Prelim. Inj. 7, Dkt. 120; Defs.' Mot. to Dismiss 7, Dkt. 158. Because the new policy does not operate on the basis of transgender status and, as under the Carter policy, allows transgender individuals without a history of the medical condition of gender dysphoria to serve, if they meet the standards associated with their biological sex, *see* Mattis Mem., Dkt. 120-1; DoD Report and Recommendations, Dkt. 120-2, the Magistrate Judge's findings to the contrary were clearly erroneous.

B. A Stay is in the Public Interest.

Plaintiffs argue that a stay is not in the public interest because it delays the Court's ability to obtain information. *See* Pls.' Opp. 16–17 (citing *United States v. Nixon*, 418 U.S. 683, 707 (1974)). But Plaintiffs first ignore Defendants' argument that disclosure of deliberative documents would harm the deliberative process in a manner that may affect national security. *See* Defs.' Mot. 16, Dkt. 158. And they rely on case law related to the importance of obtaining information for *criminal* proceedings, which is clearly distinguishable from the interest at issue in civil cases.

Plaintiffs also argue that "[p]rompt disclosure of documents wrongly withheld" is in the public interest. *Id.* at 17. But this Court has not yet resolved whether Defendants "wrongly withheld" any documents. Defendants' Objections to the Magistrate Judge's Order, which demonstrates that the Magistrate Judge's findings are clearly erroneous and its conclusions contrary to law, are pending before the Court. *See* Defs.' Objs., Dkt. 209. It is not in the public interest to order disclosure of thousands of deliberative documents before the Court has decided whether the Magistrate Judge's broad ruling was in error.

II. The Court Should Stay Compliance with the Magistrate Judge's Memorandum Opinion and Order as it Relates to Presidential Communications and Deliberations.

Because Plaintiffs do not oppose a stay of the Magistrate Judge's partial denial of Defendants' Motion for a Protective Order as it relates to presidential communications and deliberations in the possession of Defendants other than the President, *see* Pls.' Opp. 7, there is no basis on which that aspect of the Magistrate Judge's Order should proceed pending final resolution of Defendants' Objections.

Although Plaintiffs argue that because they did not file a motion to compel the disclosure of presidential communications and deliberations, there is no live controversy concerning Defendants' Motion for a Protective Order, *id.* at 6–8, that is not the case. The Magistrate Judge's partial denial of Defendants' Motion for a Protective Order means that Plaintiffs may now move to compel the disclosure of presidential communications and deliberations in the possession of Defendants other than the President. That, in turn, would immediately implicate the question of invoking Executive privilege in response. *See In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) (finding that the privilege does not have to be formally invoked "in advance of the motion to compel"). And forcing the Executive to invoke privilege in response to a motion to compel is directly contrary to the Supreme Court's admonition in *Cheney v. U.S. District Court for the District of Columbia*, which directs courts to "explore other avenues, short of forcing the Executive to invoke privilege." 542 U.S. 367, 390 (2004). Because the Magistrate Judge's partial denial of Defendants' Motion for a Protective Order sets the stage for precisely this prospect, which "should be avoided whenever possible," *id.* at 389–90, that decision is also contrary to law.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Defendants' Motion to Stay, Defendants respectfully request that the Court stay the Magistrate Judge's Memorandum Opinion and Order pending the Court's resolution of Defendants' Objections to the Magistrate Judge's Memorandum Opinion and Order.

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