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-MJG

MEMORANDUM IN SUPPORT OF MOTION TO COMPEL
SUPPLEMENTAL INTERROGATORY ANSWERS AND PRODUCTION

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INTRODUCTION

This case is about President Trump's decision to ban transgender people from serving in the military, and the Department of Defense's implementation of the President's directives. As this Court has already recognized in its memorandum opinion granting a preliminary injunction, President Trump's reasons and motivations for issuing the original ban via Twitter in July 2017 and in a formal memorandum in August 2017 are central issues in this case:

> President Trump's tweets did not emerge from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest. Based on the circumstances surrounding the President's announcement and the departure from normal procedure, . . . there is sufficient support for Plaintiffs' claims that the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy.

Stone v. Trump, 280 F. Supp. 3d 747, 768 (D. Md. 2017) (internal quotation marks omitted).

The process followed by the other Defendants in implementing President Trump's decision is similarly central. Defendants attempt to portray the Implementation Plan released by the Department of Defense ("DoD") on March 23, 2018—consisting of an unsigned February 2018 report released by DoD (ECF 120-2, the "Implementation Report") and the "recommendations" that Secretary of Defense Mattis sent to the President on February 22, 2018 (ECF 120-1, the "Implementation Memo")—as the result of a putatively independent policy-making process. However, the President's directives and Secretary Mattis's own statements make clear that the scope of DoD's "independent judgment" was limited to determining *how* to implement the Ban, not *whether* to implement it. Indeed, it has already emerged that the White House itself participated in crafting the ostensibly independent "recommendations" that Secretary Mattis sent to the President.

In January 2018, Plaintiffs served interrogatories and requests for production of documents seeking information about the process and the bases (or lack thereof) for President Trump's decision and the other named Defendants' implementation of it—information that was then, and remains, central to Plaintiffs' ability to prove their case. Defendants have refused to answer a broad swath of Plaintiffs' requests, asserting that numerous categories of information and documents are protected by the deliberative process privilege.[1]

After months of unsuccessful attempts to resolve discovery disputes through meet and confer communications with Defendants, Plaintiffs now bring this motion to compel regarding Defendants' assertion of the deliberative process privilege. Specifically, Plaintiffs seek a declaration that no deliberative process privilege attaches to three categories of documents:

(1) Deliberative materials regarding the President's original July 2017 Tweets and August 2017 Memorandum;

(2) Deliberative materials regarding the activities of DoD's so-called "panel of experts" and its working groups (the "Panel") tasked with developing a plan to study and implement the President's decision; and

(3) Deliberative materials regarding DoD's Implementation Plan and the President's acceptance of the Plan in his March 23 memorandum, including any participation or interference in that process by anti-transgender activists and lobbyists.

The case law is clear that the deliberative process privilege is inapplicable in a case such as this one where the motive underlying government deliberations is central to the claims at issue, there is evidence of government misconduct (here, unlawful discrimination), or where the government

[1] Defendants also claimed the protection of other privileges, including the presidential communications privilege, for some information and documents, but they have refused to confer regarding the latter privilege pending a decision on their partial motion for judgment on the pleadings addressing claims against the President. Declaration of Marianne F. Kies (attached hereto) ¶ 32. For that reason, this motion is confined to the dispute regarding the deliberative process privilege.

has engaged in selective waiver by publicly relying on portions of the withheld deliberative material in justifying a challenged policy. The three categories of materials listed above fall within these exceptions to the privilege.

Plaintiffs further request that the Court order Defendants to supplement their prior interrogatory responses and document production, consistent with the above-requested declaration and Rule 26(e), including production of more recent documents related to the Implementation Plan, and President Trump's acceptance of that Plan, released on March 23. Plaintiffs have attempted to resolve or narrow the disputes concerning Defendants' assertion of the deliberative process privilege through a lengthy meet and confer process, but these efforts have been unsuccessful. *See* pp. 27–28, *infra*; Kies Decl. ¶¶ 10–20. An order addressed to the points raised here should help to move this litigation forward, by overruling Defendants' unfounded assertions of the deliberative process privilege and its application to this case, providing guidance for future discovery negotiations and the conduct of depositions, and reducing the need for future motions practice.[2]

BACKGROUND

On June 30, 2016, then-Secretary of Defense Ashton Carter issued a directive to all military departments: "Effective immediately, no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity," and "[t]ransgender Service members will be subject to the same standards as any other Service member of the same gender." ECF 40-4. This announcement

[2] Plaintiffs reserve all rights to move to compel on other grounds at a later date if other deficiencies in Defendants' discovery responses cannot be corrected without Court intervention.

followed DoD's year-long analysis of the policy and readiness implications of welcoming transgender persons to serve openly. *See, e.g.*, ECF 40-35.

On July 26, 2017, President Trump announced, via Twitter, his decision to ban all individuals who are transgender from serving in the military. ECF 40-22. While the President asserted that he had "consult[ed] with [his] Generals and military experts," the announcement reportedly came as a surprise to the Secretary of Defense and other military officials. *See, e.g.*, ECF 39 (Am. Compl.) ¶¶ 97, 101, 104. The President formalized his decision in an August 25, 2017 memorandum to the Secretaries of Defense and Homeland Security, which directed Secretary Mattis to "implement" three directives: (1) a prohibition on new enlistment of transgender persons (§ 2(a)); (2) a requirement that transgender persons become automatically subject to discharge because they are transgender (§ 1(b)); and (3) denial of gender transition-related surgical care to currently serving transgender service members (§ 2(b)) (collectively, "the Transgender Service Member Ban" or "the Ban"). ECF 40-21.

The President also directed Defense Secretary Mattis to provide an "implementation plan" by February 21, 2018, which would also address "how to address transgender individuals currently serving in the United States military." *Id.* As this Court has explained, the instruction to provide an implementation plan "[wa]s not a request for a study but an order to implement the Directives contained therein." ECF 85 at 50. That is precisely what Secretary Mattis did. On September 14, 2017, Secretary Mattis issued a "Terms of Reference" regarding "Implementation of the Presidential Memorandum on Military Service By Transgender Individuals." Kies Decl., Ex. 20. In the memorandum, Secretary Mattis "direct[ed] the Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff to lead [DoD] in developing an Implementation Plan to effect the policies and directives in [the] Presidential Memorandum." *Id.* Secretary Mattis

also instructed them to convene a "panel of experts" from within DoD to conduct a study that is "planned and executed to inform the Implementation Plan." *Id.* at 2.

Plaintiffs filed this lawsuit on August 28, 2017; an amended complaint followed on September 14, 2017. ECF 1, 39. Plaintiffs allege that the Ban violates their rights to equal protection and substantive due process under the Fifth Amendment because it discriminates against transgender persons on the basis of invidious stereotypes, irrational fears, animus, and moral disapproval, which are not permissible bases for differential treatment. ECF 39 ¶ 152. Plaintiffs also allege that Defendants lacked any rational basis for imposing the Ban—much less a basis that would survive the heightened scrutiny applicable to discrimination against members of a quasi-suspect class. *Id*. ¶¶ 150–51. Plaintiffs further allege that the Ban is so arbitrary as to be an abuse of governmental authority. *Id*. ¶ 157. In response, Defendants argued that the President's decision is entitled to deference as an exercise of "essentially professional military judgment []." ECF 52-1 at 24 (*quoting Rostker v. Goldberg*, 453 U.S. 57, 65 (1981)).

On November 21, 2017, this Court ruled that Plaintiffs have established a likelihood of success on their claim that President Trump's decision to ban transgender persons from military service violates equal protection, and the Court preliminarily enjoined the Ban. ECF 85 at 41–44. A scheduling order required the parties to serve their written discovery requests by January 9, 2018 and to complete discovery by April 24, 2018. ECF 100.

Plaintiffs served their first set of interrogatories and requests for production of documents ("RFPs") on January 3, 2018. Kies Decl., Exs. 1, 2. The RFPs and interrogatories seek documents and information relating to President Trump's grounds for issuing his Twitter announcement and the August 25 Memorandum formalizing the Transgender Service Member Ban; his communications with others relating to development of the Ban; Defendants' efforts to

implement the Ban; the costs allegedly associated with military service by transgender individuals; and the effects (if any) of military service by transgender persons on unit cohesion and military readiness. *See, e.g., id.*, Ex. 1 at 8–12; Ex. 2 at 10–14. Plaintiffs need this information to prove their claims that the Ban was motivated by animus and lacked a legitimate government rationale, and that steps Defendants have taken to implement the Ban are similarly infected.

On February 9, 2018, Defendants served objections and responses to Plaintiffs' interrogatories and requests for production of documents. *See, e.g., id.*, Exs. 3, 4.[3] Defendants objected to every single request on privilege grounds, asserting presidential communications privilege, deliberative process privilege, attorney-client privilege, and the attorney work product doctrine for every request. *Id.* President Trump refused to provide any information at all. *Id.*, Exs. 6, 7. The vast majority of the other Defendants' interrogatory responses state merely that the answer "may be derived" from a review of "certain documents" in Defendants' document productions, "to the extent" the information is not privileged. But Defendants have not identified those documents, as required by Rule 33(d)(1). *See, e.g., id.*, Ex. 3 at 6–8.[4]

On February 9, 2018, Defendants produced approximately 17,000 documents. Kies Decl. ¶ 11. This production was identical to their January 2018 productions in *Doe, et al. v. Trump, et al.*, No. 17-1597 (D.D.C.), minus information pertinent to the individual *Doe* plaintiffs. *Id.*

[3] In the interest of not overburdening the Court, Plaintiffs have not included as exhibits the objections and responses served by each and every Defendant. The objections and responses served on behalf of DoD are representative of those served by all Defendants (other than President Trump) for the deliberative process privilege matters here at issue.

[4] Despite promising in March that they would supplement their interrogatory responses in the future to (at a minimum) direct Plaintiffs to particular Bates numbers, Defendants have not done so as of the date of this filing. Kies Decl. ¶ 10.

Defendants made a supplemental production of a similar number of documents on March 9, 2018. *Id.* ¶ 12. Defendants have not yet completed their production of documents and have advised that they are not likely to complete production until sometime in May. *Id.*

On February 13, 2018, Defendants produced twelve privilege logs from the President, DoD, each of the military services, the Chairman of the Joint Chiefs of Staff, and the Defense Health Agency. Kies Decl. ¶ 13. On March 20, 2018, Defendants produced six additional privilege logs. *Id*. ¶ 14. The President's privilege log presents "categories" of documents within broad date ranges, with boiler plate descriptions and no identification of individual senders or recipients, document titles, or specific dates. *Id.*, Ex. 22. Several of the other logs omit critical information, such as the authors or recipients of withheld documents. *E.g.*, *id.*, Ex. 5. All twelve of the privilege logs feature repetitive, boilerplate justifications for withholding the allegedly privileged materials. *E.g.*, *id.*

Despite the fact that the government's decision-making is *the* key issue in this case, Defendants have broadly and categorically invoked privilege for *any* information about President Trump's grounds for imposing the Ban and the other Defendants' rationale in implementing it—including interrogatories that merely seek the *date* on which President Trump decided to issue the Ban and the *identities* of the "generals and military experts" whom President Trump publicly (via Twitter) claimed to have consulted. Kies Decl., Ex. 6. Plaintiffs have attempted to confer with Defendants over their failure to adequately respond to interrogatories and to identify and produce documents responsive to Plaintiffs' requests, as well as Defendants' facially deficient objections and privilege logs, including their broad claims of deliberative process privilege. Kies Decl. ¶¶ 15–20. Despite Plaintiffs' extensive efforts to engage Defendants on this issue, the parties have been unable to resolve their differences.

On March 23, 2018, Defendants released DoD's Implementation Plan publicly for the first time, and President Trump accepted that Implementation Plan in a further directive. ECF 120-1, -2, -3. That same day, Defendants moved to dissolve the Court's preliminary injunction (ECF 120) and for a protective order (ECF 121), seeking to halt all discovery in this case pending resolution of the motion to dissolve the preliminary injunction—including all interlocutory appeals.

Reports have already emerged that the White House itself participated in crafting the ostensibly independent "recommendations" that Secretary Mattis sent to the President. Chris Johnson, *DoD Appears to Contradict White House on Process for Trans Military Ban*, Washington Blade (Mar. 29, 2018), http://www.washingtonblade.com/2018/03/29/dod-appears-to-contradict-white-house-on-process-for-trans-military-ban/. Additional reports have indicated that the Panel's findings were further tainted by the outside influence of anti-transgender lobbyists and activists operating under the aegis of Vice President Mike Pence. *See, e.g.,* Zack Ford, *Pence Secretly Drafted Trump's Latest Transgender Military Ban*, Think Progress (Mar. 25, 2018), https://thinkprogress.org/pence-responsible-for-trump-transgender-military-ban-f4d3b67bde47/; Mark Joseph Stern, *Trump's Trans Troops Ban Will Never Take Effect*, Slate (Mar. 24 2018), https://slate.com/news-and-politics/2018/03/trumps-new-trans-troops-ban-is-still-unconstitutional.html (reporting that an anti-transgender activist and the head of an anti-LGBTQ lobbying group played leading roles in the creation of the Implementation Plan).

On April 20, 2018, Defendants produced in this case a collection of documents they characterize as an "administrative record" for the Implementation Plan. ECF 133-1. According to the certification included with the "administrative record," it "comprises all non-privileged material directly or indirectly considered by the Department in preparing these

recommendations. ***Privileged documents, including those reflecting internal agency deliberations, are not part of this administrative record***." *Id.* (emphasis added). Although the "administrative record" contains some documents relating to the three categories of decision making addressed in this motion, such as minutes from some of the meetings of the Panel, many of these documents contain extensive redactions for anything deemed a "deliberative document." *E.g.*, ECF 133-14 at 458–89. Based on the accompanying certification, it appears likely that Defendants have withheld many more documents in their entirety based on the deliberative process privilege. ECF 133-1. Defendants did not produce a privilege log with the "administrative record."

Defendants have recently attempted to "claw back" several inadvertently produced documents on the ground that they are allegedly protected by the deliberative process privilege. Kies Decl., Ex. 19. Plaintiffs intend to dispute these claims of privilege for the same reasons set forth here. At a small number of depositions that the *Doe* plaintiffs have been able to schedule to date, Defendants' counsel has asserted the deliberative process privilege to prevent the witness from responding to a number of questions. *See, e.g., id.*, Ex. 21.

ARGUMENT

I. In The Circumstances Of This Case, The Deliberative Process Privilege Does Not Shield Deliberative Materials Concerning The Issuance Of The Ban, The "Panel of Experts," Or The Implementation Plan And The President's Acceptance Of That Plan.

Litigants are entitled to discovery of any relevant, nonprivileged matter that is proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1). Where a party fails to make a disclosure required by Rule 26, a "party . . . may move for an order compelling" an answer and production. Fed. R. Civ. P. 37(a)(3)(B). "[T]he party or person resisting discovery, not the party

moving to compel discovery, bears the burden of persuasion." *Kinetic Concepts, Inc. v. ConvaTec Inc.*, 268 F.R.D. 226, 243 (M.D.N.C. 2010) (collecting cases).

Here, Defendants have refused to produce most information sought by Plaintiffs' interrogatories—and thousands of responsive documents—largely on the basis of the deliberative process privilege. Given the matters at issue in this case, however, that privilege does not apply to many of the categories of documents for which Defendants have asserted it. For several reasons the deliberative process privilege, as defined by federal courts, does not shield: (1) deliberative materials relating to the President's original July 2017 Tweets and August 2017 Memorandum; (2) deliberative materials relating to the activities of the DoD's so-called "panel of experts" and its working groups tasked with developing a plan to study and implement that decision; and (3) deliberative materials relating to DoD's Implementation Plan and the President's acceptance of that Plan in his March 23 memorandum, including any participation or interference in that process by anti-transgender activists and lobbyists. The Court should issue an order (1) declaring that such materials are outside the protection of the deliberative process privilege, (2) requiring Defendants to supplement their prior interrogatory responses and document production to provide such material, and (3) requiring Defendants to update their interrogatory responses and document production through the present, as required by Rule 26(e).

A. Deliberative Process Privilege Does Not Apply To These Categories Of Deliberative Materials Because Plaintiffs' Claims Turn On Governmental Intent.

The deliberative process privilege protects government documents that are both predecisional and deliberative. *City of Va. Beach v. U.S. Dep't of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993). However, this privilege does not apply at all when "a plaintiff's cause of action turns on the government's intent." *See In re Subpoena Duces Tecum Served on the*

Comptroller of the Currency, 145 F.3d 1422, 1424 (D.C. Cir. 1998) ("[I]f either the Constitution or a statute makes the nature of governmental officials' deliberations *the* issue, the privilege is a nonsequitur."), *clarified on rehearing in part*, 156 F.3d 1279 (D.C. Cir. 1998); *see also, e.g.*, *Jones v. City of Coll. Park, Ga.*, 237 F.R.D. 517, 521 (N.D. Ga. 2006) (the deliberative process privilege is "simply inapplicable" where 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, 526 (N.D. Ind. 2005) ("[T]he deliberative process privilege simply does not apply in civil rights cases in which the defendant's intent to discriminate is at issue."); *McPeek v. Ashcroft*, 202 F.R.D. 332, 335 (D.D.C. 2001) ("It is certainly true that this privilege yields when the lawsuit is directed at the government's subjective motivation in taking a particular action.").

Plaintiffs' claims here turn on Defendants' intent. Plaintiffs assert that the Ban violates the equal protection guarantee of the United States Constitution, and that the discrimination it effectuates cannot withstand any level of review. ECF 40-2 at 20–21. This Court has already held that discrimination against transgender people is subject to heightened scrutiny. ECF 85 at 43–44. Under that demanding standard, the asserted justifications for the policy must be "genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). As another federal court held in the parallel *Karnoski v. Trump* case, whether President Trump's Ban and DoD's implementation of it were "sincerely motivated by compelling state interests, rather than by prejudice or stereotype[,]" *necessarily* "turns on facts related to Defendants' deliberative process." *Karnoski v. Trump*, 2018 WL 1784464, at *13 (W.D. Wash. Apr. 13, 2018).

In addition, even under rational basis review, unequal treatment "motived by an improper animus or purpose" is unconstitutional. *Windsor v. United States*, 570 U.S. 744, 770 (2013). In

analyzing a challenged policy under rational basis review, "the disadvantage imposed" on a discrete group of individuals may not be "born of animosity toward the class of persons affected." *Romer v. Evans*, 517 U.S. 620, 634 (1996). As this Court wrote in holding that Plaintiffs were likely to succeed on their equal protection claims, "Plaintiffs must demonstrate that they have been treated differently from others who are similarly situated ***and also show that the unequal treatment was the result of 'intentional or purposeful discrimination***.'" ECF 85 (quoting *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001) (emphasis added)). Making this showing necessarily requires Plaintiffs to take discovery directed to Defendants' intent in crafting and implementing the policies here at issue.

Each of the three categories of deliberative materials that are the subject of this motion is likely to contain evidence reflecting Defendants' intent. The July 2017 Tweets and August 2017 Memorandum were issued without any supporting evidence, to the surprise of senior DoD leadership, and abruptly reversed course on the DoD's own evaluation of transgender service in 2015 and 2016. *See* ECF 40-13; ECF 40-11. As this Court has already observed, "President Trump's tweets did not emerge from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest." ECF 85 at 43. Based on those circumstances "and the departure from normal procedure," this Court held that there is "sufficient support" for Plaintiffs' claims that this decision was motivated by something other than "genuine concerns regarding military efficacy." *Id.* (internal quotation marks omitted). The deliberative materials generated by Defendants in the months leading up to the July 2017 Tweets and August 2017 Memorandum should help reveal exactly what those true motivations were.

The deliberative materials generated by the "panel of experts" will, in turn, demonstrate whether the Panel ever considered—or had authority to consider—retaining the Open Service policy or whether the Panel was intentionally constructed with a presupposed result in mind, in order to add a veneer of legitimacy to support the President's already-issued policy. Deliberative materials related to the final issuance of the Implementation Plan and the President's acceptance of that plan will similarly reveal whether DoD's drafting of the Implementation Memo was a neutral assessment of genuine military interests, or whether DoD simply sought to provide justifications for the directives President Trump had ordered it to implement.

B. Deliberative Process Privilege Is Inapplicable To The Deliberative Materials Sought By Plaintiffs, Which May Shed Light On Government Misconduct.

The deliberative process privilege also "disappears altogether when there is any reason to believe government misconduct occurred." *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997).[5] Politically and ideologically motivated discrimination of the kind alleged by Plaintiffs here is sufficient reason to suspect that government misconduct has occurred. *See Waters v. U.S. Capitol Police Bd.*, 216 F.R.D. 153, 162–63 (D.D.C. 2003) ("it is inconceivable" that Congress intended deliberative process privilege to apply to information bearing on alleged agency discrimination); *see also Dominion Cogen, D.C., Inc. v. District of Columbia*, 878 F. Supp. 258, 268 (D.D.C. 1995) (holding that allegations of decision-making based on "illegitimate political motives" raised questions of governmental misconduct sufficient to place deliberative processes

[5] Where the deliberative materials sought may shed light on government malfeasance, "the privilege is routinely denied. *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995). This is because, where there is "any reason" to believe such material "may shed light on" government misconduct, "public policy (as embodied by the law) demands that the misconduct not be shielded merely because it happens to be predecisional and deliberative." *Alexander v. FBI*, 186 F.R.D. 170, 177–78 (D.D.C. 1999).

in issue); *Chaplaincy of Full Gospel Churches v. Johnson*, 217 F.R.D. 250 (D.D.C. 2003) (finding documents alleged to show unlawful "discrimination against non-liturgical chaplains" implicated misconduct exception and could not be withheld under deliberative process privilege), *rev'd in part, vacated in part on other grounds sub nom., In re England*, 375 F.3d 1169 (D.C. Cir. 2004).

Here, Plaintiffs have alleged that the Ban was driven not by legitimate military considerations, but by political and discriminatory animus. ECF 39 ¶¶ 112-19, 150-52. The "judgment" reflected in President Trump's decision to issue the Ban reflected nothing more than a desire to cater to "negative attitudes," "fear," and "irrational prejudice" for political gain. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448, 450 (1985); *cf. Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 592 (4th Cir. 2017) (en banc) ("*IRAP*") (stated national security interest was provided in bad faith, as pretext for discriminating on the basis of religion). As this Court has held, "The lack of any justification for the abrupt policy change, combined with the discriminatory impact to a group of our military service members who have served our country capably and honorably, cannot possibly constitute a legitimate governmental interest." ECF 85 at 44. The illegitimate motivation animating the July 2017 Tweets and August 2017 Memorandum—a species of "command influence"—inevitably flows down to the work done by the Panel to study how to implement the President's stated goal, the Implementation Plan that was the end result of that study, and the President's acceptance of that plan. Deliberative materials related to each of these topics are thus sufficiently likely to "shed light" on governmental malfeasance that no deliberative process privilege is applicable.

C. If Deliberative Process Privilege Did Apply To The Panel's Findings, Defendants Have Waived That Privilege By Selectively Disclosing Those Findings Publicly In The Implementation Report.

Any protection offered by the deliberative process privilege is waived "through voluntary, authorized release of the material to a nongovernmental recipient." *City of Va. Beach, Va. v. U.S. Dep't of Commerce*, 995 F.2d at 1253. This protection may also be lost when material is adopted as an official position or "used by the agency in its dealings with the public." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Under Exemption 5 to the Freedom of Information Act, which incorporates the deliberative process privilege, "[w]here an authorized disclosure is voluntarily made to a non-federal party . . . the government waives any claim that the information is exempt from disclosure under the deliberative process privilege." *Shell Oil Co. v. IRS*, 772 F. Supp. 202, 209 (D. Del. 1991). "If an agency chooses expressly to adopt or incorporate by reference" deliberative material in a public disclosure, no deliberative process privilege should attach to that material. *See N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975). It also is fundamentally unfair—and therefore impermissible—for a party to wield his claims of privilege as both a "shield and a sword." *See, e.g., HSH Nordbank AG N.Y. Branch v. Swerdlow*, 259 F.R.D. 64, 74 (S.D.N.Y. 2009) (explaining that the "at issue" doctrine "precludes a party from disclosing only self-serving communications, while barring discovery of other communications that an adversary could use to challenge the truth of the claim" (internal citation and quotation marks omitted)). Impermissible "[s]elective disclosure occurs not only when a party reveals part of one privileged communication, but also when a party reveals one beneficial communication but fails to reveal another, less helpful, communication on the same matter." *U.S. ex rel. Mayman v. Martin Marietta Corp.*, 886 F. Supp. 1243, 1252 (D. Md. 1995).

Here, even if deliberative process privilege did attach to any deliberative materials generated by the Panel—and it does not—Defendants have waived that privilege to the extent they have publicly relied on those materials to support the Implementation Plan. The Implementation Memo cites the Implementation Report as its basis for adhering to a policy disqualifying transgender persons from military service (ECF 120-1); President Trump, in adopting the Plan, described its findings as reflecting an "exercise" of Secretary Mattis's "independent judgment" (ECF 120-3). The Implementation Memo states that it is "[b]ased on the work of the Panel [of Experts] and the Department's best military judgment." ECF 120-1 at 2. The Implementation Report itself extensively references certain findings and conclusions made by the Panel, yet it is rife with reference to anecdotal incidents or factual circumstances for which little or no meaningful underlying data are provided. *See, e.g.*, ECF 120-2 at 33–34 (citing reports made to the Panel "that, from the time of diagnosis to the completion of a transition plan, the transitioning Service members would be non-deployable for two to two-and-a-half years"); *id.* at 37 (citing incidents reported to the Panel concerning transgender access to bathroom facilities as evidence of the threat transgender service poses to unit cohesion); *id.* at 41 (citing Panel data as evidence that "medical costs for Service members with gender dysphoria have increased nearly three times—or 300%—compared to Service members without gender dysphoria"). The reliability of these findings, the existence of any contradictory findings, the manner in which the findings were developed, and the way in which the Panel of Experts considered and presented them all represent critical evidence bearing on Plaintiffs' claims that implementation of the Ban merely constitutes a repackaging of the original Ban and reflects the same animus-driven discrimination.

Through this selective citation to Panel findings, Defendants have cherry picked the portions of the Panel's findings they believe support President Trump's chosen policy, while withholding all other (potentially contradictory) findings. This puts the Panel's findings squarely at issue and ripe for discovery. Equity does not permit Defendants to rely upon the published findings of the Panel while frustrating Plaintiffs' attempts to take discovery on other aspects of the Panel's work that may support Plaintiffs' position. This is a classic case of the government disclosing only self-serving communications while blocking discovery of other communications that could be used against it. *See United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (holding "[s]elective disclosure for tactical purposes waives" attorney-client privilege); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 46 (D. Md. 1974) ("A party cannot choose to disclose only so much of allegedly privileged matter as is helpful to his case.").[6]

D. Even Were Deliberative Process Privilege Applicable, The Operative Balancing Test Still Compels Production Of These Documents.

Even if the deliberative process privilege were applicable to the three categories of documents sought by this motion, and it is not, operation of the balancing test used to test such privilege claims in this Circuit would still favor their production. Deliberative process privilege is both qualified and narrowly construed, and courts use a balancing test to determine whether protection is warranted in a particular case. *FDIC v. Hatziyannis*, 180 F.R.D. 292, 293 (D. Md. 1998). The balancing test requires courts to consider: "(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government's

[6] Plaintiffs' need for access to the full complement of documents considered and developed by the Panel is particularly pressing in light of reports that the White House was directly involved in creating the Implementation Memo (Johnson, *supra*) and that the Panel's findings were further tainted by the outside influences of anti-transgender lobbyists and activists operating under the imprimatur of Vice President Mike Pence (Ford, *supra*; Stern, *supra*).

role (if any) in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Cipollone v. Liggett Grp. Inc.*, 812 F.2d 1400 (Table), 1987 WL 36515, at *2 (4th Cir. 1987) (internal quotation marks omitted). 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)); *Children First Found., Inc. v. Martinez*, 2007 WL 4344915, at *7 (N.D.N.Y. Dec. 10, 2007) ("[W]hen the decision-making process itself is the subject of the litigation, the deliberative process privilege cannot be a bar to discovery."); *United States v. Bd. of Educ. of the City of Chi.*, 610 F. Supp. 695, 699−700 (N.D. Ill. 1985) (a party "make[s] a very powerful showing of necessity" where "the decisionmaking process . . . *is* the case").

Here, as explained above, there is no question that Defendants' decision-making "*is* the case." *Bd. of Educ. of the City of Chi.*, 610 F. Supp. at 700. And all four of the balancing factors set forth in *Cipollone* favor disclosure. First, the government's decision-making processes are critical to determining whether the Ban and the implementation policies stemming from it violate Plaintiffs' equal protection and substantive due process rights. Second, the requested evidence relevant to Defendants' intent and rationale is available *only* from Defendants. Third, the government's role is central to this case; Defendants are government officials sued in their official capacities based on their issuance and implementation of a government policy. Fourth, it is unlikely that disclosure of the evidence Plaintiffs seek concerning the decision-making that went into the initial Ban, the Implementation Plan, and the President's acceptance of that Plan

would hinder future policy discussions. The decision to ban transgender persons from the military has already been made, and disclosure will not chill that deliberative process. Prospectively, the specific circumstances of these deliberations are so unique that disclosure should not chill future legitimate policy discussion.

Defendants have recently filed a purported "administrative record" in this case (ECF 133) and have taken the position that additional information about the decision making process leading to the Implementation Plan is not relevant and that review in this case should be confined to this "administrative record." ECF 121 at 5-6. As discussed above, in view of the extensive redactions and omission of "[p]rivileged documents, including those reflecting internal agency deliberations," this "administrative record" is far from adequate. This Court should reject any attempt to limit discovery to the administrative record, consistent with recent rulings by the courts in the parallel *Doe* and *Karnoski* cases. *See Doe v. Trump*, No. 1:17-cv-01597-CKK, ECF 114 at 2 (D.D.C. Apr. 18, 2018) (explaining that because "Plaintiffs assert claims under the Fifth Amendment to the United States Constitution," the APA's limitations on discovery do not apply); *Karnoski v. Trump*, No. 2:17-cv-01297-MJP, ECF 235 at 2 (W.D. Wa. Apr. 19, 2018) ("[T]here is no reason for discovery to be confined to the administrative record" because Plaintiffs "raise direct constitutional claims.").

II. Defendants Have Withheld Deliberative Materials That Bear On Their Challenged Intent, Rationale, And Potential Misconduct.

As demonstrated below, Defendants have withheld documents responsive to a number of Plaintiffs' discovery requests, and objected to responding to interrogatories that seek materials and information directly relevant to Defendants' intent and rationale (or lack thereof) in developing and implementing the Transgender Service Member Ban. Defendants' objections to

these and other document requests and interrogatories on grounds of deliberative process privilege are inappropriate for the reasons described above. Defendants' privilege logs demonstrate that the documents Defendants have withheld contain information that should be disclosed.

A. Defendants' Written Discovery Objections Show That They Have Improperly Invoked Deliberative Process Privilege To Withhold Information And Documents Responsive To Plaintiffs' Requests Regarding The Decisions At Issue In This Case.

Plaintiffs' first set of discovery requests—served on January 3, 2018, nearly four months ago—requested information and documents directly related to the three categories of materials described above. Plaintiffs sought information and documents concerning the "panel of experts," requesting, *inter alia*:

- "All Documents and Communications Concerning the purpose, composition, structure, research, analysis, findings, and conclusions of the Panel of Experts" (Kies Decl., Ex. 2, RFP No. 15);

- "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" (Kies Decl., Ex. 2, RFP No. 16); and

- "[Identification of] all Documents and Communications Concerning military service by transgender individuals that were requested, received, considered directly or indirectly, or consulted by Defendants—Including the Panel of Experts—since January 20, 2017, and, for each such Document, Identify the Person who transmitted it to You and state the Date(s) of transmission and receipt" (Kies Decl., Ex. 1, Interrog. No. 15).

Plaintiffs also sought information and documents relevant to governmental decision-making relating to the announcement of the Transgender Service Member Ban in the July 2017 Tweets and the August 25, 2017 Presidential Memorandum, and up through the subsequent

deliberations that resulted in the Implementation Plan, and the President's acceptance of the Plan, by requesting:

- "All Documents and Communications that You conceived, authored, drafted, created, selected, compiled, received, published, relied upon directly or indirectly, or distributed that embody, constitute, comprise, or reflect the reaction of the Department of Defense or any of its components (including Military Services), or any individuals within the Department of Defense or its components, to the Tweets" (Kies Decl., Ex. 2, RFP No. 14);

- "[Identification of] all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of, Defendants between June 30, 2016 and August 25, 2017, concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion" (Kies Decl., Ex. 1, Interrog. No. 18); and

- "[Identification of] all Documents that comprise or embody assessments, reports, evaluations, studies, or other research published, conducted, performed by, or at the request of Defendants from August 25, 2017 through the present Concerning transgender individuals serving in the military, Including (a) the effect of transgender individuals serving in the military on military readiness; (b) medical costs associated with transgender individuals serving in the military; or (c) the impact of transgender individuals serving in the military on unit cohesion" (Kies Decl., Ex. 1, Interrog. No. 19).

Finally, in addition to the above requests related to the development of the original Ban and the Implementation Plan, which should capture evidence of any outside political or ideological influences on the decision making process, Plaintiffs specifically requested any deliberative materials shared with several of the very outside groups reported to have been involved in the development of the Implementation Plan. Plaintiffs requested:

- "All Documents and Communications Concerning military service by transgender individuals shared between or amongst Defendants and organizations opposed to military service by transgender individuals, Including but not limited to representatives and agents of the "Alliance Defending Freedom," "Focus on the Family," the "Family Research Council," "Heritage Action for America," and

"Breitbart News," from January 2017 to the present" (Kies Decl., Ex. 2, RFP No. 13).

All of these requests seek materials directly relevant to Defendants' intent and rationale underlying the key policy decisions Plaintiffs challenge in this case. Defendants have objected to each and every one of these discovery requests "to the extent" that they seek material protected by the deliberative process privilege. *E.g.*, Kies Decl., Ex. 3. These objections should be overruled as a matter of law in light of the nature of Plaintiffs' claims in this case. *See In re Subpoena*, 145 F.3d at 1424.

B. Defendants' Privilege Log Entries Demonstrate They Have Withheld Documents Not Subject To The Deliberative Process Privilege.

Review of Defendants' redactions and privilege logs confirms that Defendants are withholding numerous documents based on their improper assertions of the deliberative process privilege. Rather than analyzing all redactions or providing a line-by-line review of the logs, Plaintiffs provide here a handful of examples to demonstrate the types of documents Defendants are withholding based on the deliberative process privilege. Because Defendants' intent and rationale underlying the development and implementation of the Transgender Service Member Ban are at the heart of Plaintiffs' constitutional claims, the privilege should "not enter the picture at all" *(In re Subpoena*, 145 F.3d at 1425) for these documents.

For example, Defendants are withholding numerous documents (or portions of documents) that relate to the work of the Panel, but that are not reflected in the "administrative record" Defendants recently produced. Review of the documents produced to date has only reinforced the need for Defendants to produce the allegedly "privileged" documents "reflecting internal agency deliberations" that they continue to withhold. For example, a redacted document dated December 14, 2017, is a "memorandum for the record" from Acting Under Secretary of

the Navy Thomas Dee, recording his "dissenting opinion" to conclusions of the Panel. Kies Decl., Ex. 12. The few unredacted portions of the document state that the Panel's recommendations "are not supported by the data provided to the panel in terms of military effectiveness, lethality, or budget constraints, and are likely not consistent with applicable law." *Id.* The further description of the dissenting opinion is redacted, apparently based on a claim of deliberative process privilege. Kies Decl., Ex. 18. This dissenting opinion is not mentioned in the February 22 Implementation Plan, nor is it included in the "administrative record" recently produced by Defendants.

Several privilege log entries provide other examples of documents Defendants have withheld solely on the basis of deliberative process privilege:

- The Army is withholding documents bearing the Bates range ARMY_352-383, described as "Presentation to the panel of experts summarizing health and readiness data of Active Duty members with gender dysphoria." Kies Decl., Ex. 13.

- The Joint Chiefs of Staff privilege log alone contains approximately 65 different entries reflecting documents being withheld that were received by the "Panel of Experts." *Id.*, Ex. 14.

- The Air Force is withholding documents bearing the Bates range AF_00000446-448, described as "UPDATE & DECISION: Transgender Working Group Meeting in Prep for Panel of Experts Prep Session (Read: HTML).msg," and numerous other documents described as "RE: REQUEST -- Support to the Panel of Experts Reviewing DoD Policy on Service by Transgender Persons.msg," see, e.g., AF_000010454-10456. *Id.*, Ex. 15.

- The Department of Defense is withholding documents bearing the Bates range SOPER DEP RFP_21 01268-01271, described as "E-mail re: Transgender Panel of Experts Question (with Attachments)." *Id.*, Ex. 5.

- The Navy is withholding a document bearing the Bates number Navy_00042147, described as "Request for information for panel of experts," as well as a document bearing the Bates range Navy_000004460, described as "Request for Military Medical Providers to Brief Medical Personnel Services (MEDPERS) and the Secretary of Defense (SECDEF) Panel of Experts." *Id.*, Ex. 16.

Based on the information provided, these documents appear to be deliberative materials related to work done by the Panel to evaluate the fitness of transgender service members and data or reports submitted to the Panel. These materials are likely to contain evidence bearing on Defendants' intent in forming the policies at issue in this case, the process by which Defendants developed their recommendations, and potentially illegitimate political motivations suggesting misconduct. In view of the central role of Defendants' intent and rationale in this case, the deliberative process privilege does not apply at all to such documents. In addition, Defendants have waived privilege to the extent they have disclosed or incorporated these materials by reference into the Implementation Report. Materials of this type should be produced.

Defendants have also withheld numerous documents created during the time period when the original Transgender Service Member Ban was being considered and formulated. For example:

- The Navy is withholding a document bearing the Bates number NAVY_000003363, described as "Transgender Policy Status Briefing Card" and dated July 26, 2017, the same day the July 2017 tweets were sent. *Id.*, Ex. 16.

- The Defense Health Agency is withholding numerous documents generated between July 24 and 26, 2017 identified as "Intradepartment email concerning implementation of transgender policy." *Id.*, Ex. 17.

- The Army is withholding documents dated August 10, 2017 bearing the Bates range Army_722-724, and described as "Execution matrix used in preparation for the release of the Presidential Memorandum;" documents dated August 17, 2017 bearing the Bates range ARMY_1300-04, described as "Presentation discussing the impact of transgender service on readiness;" and documents dated August 17, 2017 bearing the Bates range ARMY_725-728, described as "Presentation showing timeline of events in preparation for release of the Presidential Memorandum." *Id.*, Ex. 13.

These are but a handful of illustrative examples; there are many more similar log entries. The examples demonstrate that Defendants are withholding materials likely to contain evidence

of their subjective intent and rationale in developing the original policy at issue in this case—the policy Defendants subsequently worked to implement at the President's direction. Materials of this type are not protected by the deliberative process privilege and should be produced.

Because Defendants last produced a privilege log to Plaintiffs on March 20, Plaintiffs are unable to determine exactly what other materials related to the Implementation Plan and President Trump's acceptance of the Plan Defendants may be withholding, and it is unclear when Defendants will produce further documents. As discussed above, however, the "administrative record" Defendants produced makes clear that they continue to withhold deliberative materials related to the Panel's work to develop and support the Implementation Plan. Such deliberative materials bear directly on Defendants' subjective intent and rationale in formulating the policies challenged in this lawsuit, and the deliberative process privilege therefore does not apply. And having publicly relied on such materials in preparing the Implementation Plan—and by citing liberally to Panel findings and materials throughout the Implementation Report—Defendants have put such material at issue. To the extent any deliberative materials have been disclosed or incorporated by reference into the Implementation Report, whatever privilege may have existed has been waived. Accordingly, the Court should declare that the deliberative process privilege does not protect information and documents relating to the decisions at issue in this case, and order Defendants to make a supplemental production consistent with that declaration.

III. Requested Relief

For the reasons explained in Part I above, the deliberative process privilege does not attach to: (1) deliberative materials relating to the President's original July 2017 Tweets and August 2017 Memorandum; (2) deliberative materials relating to the activities of DoD's so-called "panel of experts" and its working groups tasked with developing a plan to study and

implement the President's decision; and (3) deliberative materials relating to the DoD's February 2018 Implementation Plan and the President's acceptance of that Plan in his March 23, 2018 memorandum, including materials reflecting any participation or interference in that process by anti-transgender activists and lobbyists. Plaintiffs request that the Court make findings and issue a declaration to this effect.

Plaintiffs further request that the Court order Defendants, no later than May 15, 2018, to: (1) supplement their interrogatory responses and document production to include deliberative information and documents relating to these decisions that they have improperly withheld based on the deliberative process privilege; and (2) comply with their obligation under Rule 26(e) to timely supplement their discovery responses to take account of developments since they served their initial responses. Plaintiffs also request that the order state that, to the extent that Defendants respond to interrogatories by reference to their document production, they must adhere to Federal Rule of Civil Procedure 33(d)(1), by specifying documents "in sufficient detail to enable [Plaintiffs] to locate and identify them as readily as [Defendants] could."

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion to compel. A proposed order is submitted herewith.

CERTIFICATE OF GOOD-FAITH CONFERENCE OF COUNSEL

Pursuant to Federal Rule of Civil Procedure 37(a)(1) and Local Rule 104.7, Plaintiffs' counsel hereby certify that they have conferred in good faith regarding the subject of this motion, as described in more detail in the accompanying Declaration of Marianne F. Kies.

On February 21, 2018, Plaintiffs' counsel Augustus Golden sent a letter to Defendants' counsel Ryan Parker outlining numerous deficiencies in Defendants' discovery objections and privilege logs. Kies Decl., Ex. 8. In this letter, Plaintiffs explained that the deliberative process privilege does not apply where, as here, "a plaintiff's cause of action turns on the government's intent." *Id.* (quoting *In re Subpoena*, 145 F.3d at 1424). Defendants did not substantively respond to Plaintiffs' letter; instead, they attempted to shift the burden back to Plaintiffs to challenge specific log entries for Defendants' re-consideration—a highly burdensome and in some cases virtually impossible task given the inadequate descriptions in the log entries. Kies Decl. ¶¶ 16–17.

On March 13, 2018, Plaintiffs' counsel visited the offices of Defendants' counsel for a meet and confer session that lasted from approximately 3:00 p.m. to 4:00 p.m. EST. *Id.* ¶ 18. In attendance were Mark Lynch, Marianne Kies, and Mark Neuman-Lee, for Plaintiffs, and Ryan Parker and other Department of Justice attorneys, for Defendants. *Id.* That meeting did not resolve the parties' dispute, and following that conversation, Plaintiffs provided a further written description of the deficiencies in Defendants' production by letter dated March 16, 2018, requesting a response on several issues by no later than March 23, 2018. *Id.*, Ex. 10. No response has been provided. Kies Decl. ¶ 19.

On April 9, 2018, Ms. Kies wrote to Mr. Parker, repeating Plaintiffs' request for a response to the March 16 letter, and further explaining why Defendants' assertions of the

deliberative process privilege fail as to documents related to the decision-making at issue in this case and the Panel study. Kies Decl., Ex. 11. No response has been provided to this letter, either. Kies Decl. ¶ 20.

The matters addressed in this motion thus require resolution by the Court.

Dated: April 23, 2018

Respectfully submitted,

/s/ Marianne F. Kies

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