No. 18-72159

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re DONALD J. TRUMP, *et al.*,
Petitioners.

DONALD J. TRUMP, President of the United States, *et al.*,
Petitioners-Defendants,

v.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent,

RYAN KARNOSKI, *et al.*,
Real Parties in Interest-Plaintiffs,

STATE OF WASHINGTON,
Real Party in Interest-Plaintiff-Intervenor.

REAL PARTIES IN INTEREST-PLAINTIFFS' ANSWER TO PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, Real Party in Interest-Plaintiff Human Rights Campaign hereby files its corporate disclosure statement and certifies that Human Rights Campaign does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1, Real Party in Interest-Plaintiff Gender Justice League hereby files its corporate disclosure statement and certifies that Gender Justice League does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock. Gender Justice League further certifies that Gay City Health Project serves as the fiscal sponsor for Gender Justice League.

Pursuant to Federal Rule of Appellate Procedure 26.1, Real Party in Interest-Plaintiff American Military Partner Association hereby files its corporate disclosure statement and certifies that American Military Partner Association does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Neither of the privilege issues raised in Defendants' petition warrants mandamus. First, as to executive privilege, Defendants dress their petition in the trappings of a showdown between the judiciary and the executive, claiming that mandamus is necessary "to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities" and a "substantial intrusion on the Executive Branch." Pet. 17. But, at this point, all the district court has ordered is for Defendants' *counsel* to provide the privilege log-type information required by Federal Rule of Civil Procedure 26(b)(5) and its previous orders. The order at issue did not "substantially intrude" on the Executive Branch or "interfere" with the President's "ability to discharge [his] constitutional responsibilities." It simply reflected the court's exercise of discretion to resolve a discovery-related dispute over a privilege log. This is not even remotely the type of case warranting this Court's extraordinary intervention by way of mandamus.

Nor did the district court err—much less clearly err, as required for mandamus—in requiring Defendants to supplement their privilege log. There is no legal basis for Defendants' argument that Plaintiffs must first bear some initial, heightened burden under the circumstances here. And, even if such a burden existed, Plaintiffs amply satisfy it: the log information at issue is necessary to ascertain whether executive privilege applies; the required supplementation is

tailored to that need; and there is no other source from which that log information can be obtained. There also is no support for Defendants' remarkable contention that this routine log information is itself privileged, which would effectively immunize assertions of executive privilege from judicial review.

Second, as to the deliberative process privilege, the district court likewise did not clearly err in applying the relevant balancing test to the facts here and finding that Plaintiffs' need for the documents outweighed Defendants' interest in withholding them. Defendants' decision-making process and deliberations that led to the Ban sit at the heart of multiple issues in the case. Discovery concerning that process and those deliberations is necessary to test: the actual motivations for the Ban at the time it was adopted, which is critical for heightened scrutiny; Defendants' assertions that the Ban resulted from "the professional judgment of military authorities," Pet. 20 (quoting *Winter v. NRDC*, 555 U.S. 7, 24 (2008)), which is a factual prerequisite for the deference they urge; and Defendants' claim that Secretary Mattis's February 22, 2018 Memorandum represented "a new policy" that was initiated by the military independent of the White House, Pet. 3. As the district court found, this evidence cannot be obtained from other sources.

The district court also carefully considered Defendants' asserted interest in frank policy deliberation, but it found that Defendants' claimed chill was based on speculation, lacked specificity, and, in any event, could not outweigh Plaintiffs'

need for the discovery sought. As many other courts have recognized, the deliberative process privilege cannot justify withholding information where, as here, the government's decision-making process and deliberations are precisely what is at issue in the litigation. No clear error lies in the district court's finding that the scales tipped in favor of requiring production of the documents withheld.

RELEVANT BACKGROUND[1]

In 2016, the United States Department of Defense ("DoD") concluded a comprehensive review of its policy towards military service by transgender individuals, including consultation with military and medical experts. DoD's unanimous conclusion, announced on June 30, 2016, was that there was no legitimate reason to exclude transgender individuals from military service.

But just 13 months later, President Trump abruptly decreed via Twitter that, after purportedly consulting "Generals and military experts," he would "not accept or allow" transgender individuals to serve in the military. Add.77. In fact, these tweets caught the Joint Chiefs by surprise. As the Chairman admitted to the Service Chiefs, the announcement was "unexpected" and he "was not consulted." *See* SER.136. President Trump then directed Secretary of Defense James Mattis to

[1] Because the mandamus petition has been assigned to the same panel deciding the related preliminary injunction appeal (No. 18-35347), this brief presumes familiarity with briefing in that appeal. References to "ER" and "SER" refer to the Excerpts of Record and Supplemental Excerpts of Record in the related appeal. References to "SA" refer to the Supplemental Addendum submitted herewith.

develop a plan to implement the Ban.[2] Plaintiffs filed suit challenging the Ban's constitutionality and obtained a preliminary injunction to maintain the status quo that existed before the Ban. Add.47-69.

I. Defendants' Motion to Dissolve the Preliminary Injunction

On February 22, 2018, Secretary Mattis delivered the Implementation Plan President Trump had ordered. On March 23, 2018, Defendants publicly released that plan. ER.158. Defendants then filed a motion to dissolve the preliminary injunction. On April 13, 2018, the district court denied that motion after finding that the Implementation Plan did not "substantively rescind or revoke the Ban, but instead threaten[ed] the very same violations that caused it and other courts to enjoin the Ban in the first place." Add.27, 46.

II. Defendants' Motion to Stay Discovery

At the same time Defendants moved to dissolve the preliminary injunction, they also asked the district court to stay all discovery, citing separation-of-powers concerns allegedly raised by Plaintiffs' requests for discovery that Defendants claimed was subject to executive privilege. Dkt. 217. In opposition, Plaintiffs noted that the President had not yet even invoked the privilege or provided the log-type information required by Federal Rule of Civil Procedure 26(b)(5). Dkt. 230 at

[2] The "Ban" refers to Defendants' policy generally prohibiting military service by openly transgender people, as announced and ordered by President Trump and detailed in Secretary Mattis's implementation plan (the "Implementation Plan").

5-7. On April 19, 2018, the district court denied the motion to stay, and ordered that "to the extent that Defendants intend to claim Executive privilege, they must 'expressly make the claim' and provide a privilege log" that complied with Rule 26(b)(5). Add.15. Defendants did not appeal that ruling. Defendants have thus been aware of their obligation to submit an adequate privilege log for several months. Although responsive documents have been collected and reviewed, the only log provided to date groups large numbers of documents by category, omitting any information concerning the individual documents withheld. Add.90-97.

III. The District Court's Summary Judgment Opinion

On April 13, 2018, the district court denied the government's partial motion for summary judgment on all claims against the President, finding that "not only does it have jurisdiction to issue declaratory relief against the President, but that this case presents a 'most appropriate instance' for such relief." Add.44 (quote omitted). The court also granted in part and denied in part Plaintiffs' motion for summary judgment, ruling that the Ban is subject to strict scrutiny because discrimination against transgender people constitutes a suspect classification. Add.35-39. But the court denied complete relief, holding that it needed factual information concerning the "deliberative process" and actual reasons for the Ban, and the military's involvement in that process, in order to evaluate Defendants'

claim that the Ban is entitled to military deference and to analyze the Ban under heightened scrutiny. Add.41-43, 46.

IV. The Parties' Discovery Disputes

In December 2017 and January 2018, Plaintiffs served discovery requests targeting these and other key issues at the core of their constitutional claims, such as the purported government interests supporting the Ban and the "deliberative process" preceding its announcement, including who the President consulted before ordering the Ban. SA.38-62. The government's responses broadly invoked the presidential communications privilege (hereafter, "executive privilege") and the deliberative process privilege, culminating in the two discovery motions that were the subject of the challenged district court order.

A. Plaintiffs' Motion to Compel Documents Withheld Under the Deliberative Process Privilege

In their discovery responses, the government objected to any discovery concerning "communications or information protected by the deliberative process privilege." SA.64-165. In total, Defendants have withheld or redacted approximately 44,000 documents based on deliberative process privilege, or approximately 58% of all documents they have identified as responsive. Dkt. 310 at 24. After attempts to resolve these claims failed, and in light of the Court's summary judgment opinion highlighting the importance of deliberative materials, Plaintiffs moved to compel on May 10, 2018. Dkt. 245.

B. Defendants' Motion for a Protective Order

The government took an even more extreme position as to discovery from the President, refusing to provide any substantive responses whatsoever to written discovery or to produce a single document. Instead, the President provided only a "general objection" that he was immune from civil discovery and that "virtually all of the specific discovery sought is subject to executive privilege, and in particular, the presidential communications privilege." SA.15-32, 112-165. The government thereafter moved for a protective order to prevent any substantive discovery from the President and to preclude any discovery from sources touching on presidential communications and deliberations. Dkt. 268 at 1.

C. The District Court's July 27, 2018 Discovery Order

The district court heard argument on both motions, and on July 27, 2018 issued a decision granting Plaintiffs' motion to compel and denying Defendants' motion for a protective order. First, the court found that Plaintiffs had overcome the deliberative process privilege under the relevant balancing test. Add.6-7. Second, the court rejected the notion that the President is immune from civil discovery and found "no support" for the government's claim that Plaintiffs must first exhaust all non-privileged discovery, meet a heavy burden of need, and substantially narrow all discovery requests before the President must invoke the privilege and provide an adequate privilege log. Add.10. Third, the court found

that the government's privilege logs failed to comply with Rule 26(b)(5) because they omitted document-specific information, such as authors, recipients, and adequate privilege descriptions. Add.11. The court ordered the government to produce the documents withheld solely under the deliberative process privilege within ten days and, noting that it had already ordered the President to produce an adequate privilege log in its April 19, 2018 order denying a stay, again ordered him to produce an adequate log, this time within ten days. Add.10-11.

On August 20, 2018, the district court denied Defendants' motion to stay the discovery order, but extended the deadline for compliance until a ruling on their mandamus petition. SA.1-2. The district court directed Defendants to certify by October 10, 2018 that they had prepared legally sufficient privilege logs and taken steps to prepare to produce materials withheld under the deliberative process privilege. SA.10. However, the court held that Defendants need not provide these logs and materials to Plaintiffs until further order of the court. *Id.*

STANDARD OF REVIEW

"The writ of mandamus is an 'extraordinary' remedy limited to 'extraordinary' causes." *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court*, 408 F.3d 1142, 1146 (9th Cir. 2005). "[O]nly exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify the invocation of" mandamus. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542

U.S. 367, 380 (2004) (internal quotes and citations omitted). Limits on mandamus are especially "salient" in the discovery context because "the courts of appeals cannot afford to become involved with the daily details of discovery." *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) (internal quotes omitted).

This Court examines multiple factors in evaluating a mandamus petition, but consideration of only one factor—whether the district court's order is clearly erroneous as a matter of law—requires denial of the petition here. *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977). Its absence "is dispositive." *Online Speakers*, 661 F.3d at 1177. Mandamus will not issue for mere legal error; clear error is required. *Will v. United States*, 389 U.S. 90, 104 (1967) ("Mandamus, it must be remembered, does not 'run the gauntlet of reversible errors.'"). And, "'[c]lear error' is a highly deferential standard of review" requiring "a definite and firm conviction that the district court's interpretation . . . was incorrect." *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011) (internal quotes omitted).

ARGUMENT

I. The Required Supplementation of Defendants' Privilege Log Does Not Warrant the Extraordinary Remedy of Mandamus.

A. The District Court Did Not Clearly Err in Declining to Impose an Initial, Heightened Burden on Plaintiffs.

There is no general requirement that Plaintiffs must satisfy some initial heightened burden before Defendants are required to invoke executive privilege and provide a legally adequate privilege log. That is particularly true under the circumstances here, where Defendants have already collected, reviewed, and even logged responsive documents, and the challenged order simply required that they supplement the existing log to comply with Rule 26(b)(5). Defendants' arguments conflate the legal analysis for determining whether the privilege has been overcome by Plaintiffs—an issue not yet decided in this litigation—with their threshold obligation to invoke the privilege and provide an adequate log.

The controlling case on executive privilege is *United States v. Nixon*, 418 U.S. 683 (1974). In upholding a subpoena for discovery from President Nixon for use in a criminal prosecution, the Supreme Court held that executive privilege is qualified rather than absolute. While recognizing the need for an appropriate level of protection for presidential communications, *Nixon* held that executive privilege must be narrowly construed, because it is "in derogation of the search for truth" and can "cut deeply into the guarantee of due process of law and gravely impair the

basic function of the courts." *Id.* at 710, 712. Of particular relevance here, the Supreme Court approved the approach adopted by the district court there: the President must first properly invoke the privilege, which may then be overcome by an adequate showing of need for the discovery sought. *Id.* at 713.

Defendants misread *Cheney*, 542 U.S. at 367, as purportedly overruling that approach and assigning the initial burden on the party seeking discovery. But *Cheney* was a narrow, fact-bound decision that did not establish a general rule for all cases where discovery is sought from the President. There, the district court had ordered the government to produce the discovery sought, even though the requests were overbroad. Indeed, because the relief requested there was simply to obtain information about an advisory group, the discovery sought would provide the plaintiffs with everything they had hoped to gain if they succeeded on the merits "and much more besides." *Id.* at 388.

The Supreme Court recognized that *Nixon* requires that the President must "first assert privilege to resist disclosure," *id.* at 384, but concluded that in the unique circumstances presented by *Cheney*, the government was not required to "bear the onus of critiquing the unacceptable discovery requests line by line," *id.* at 388. *Accord* SA.4-5. Unlike in *Nixon*, withholding the information sought did not implicate any issue of "constitutional dimension[]," nor did it interfere with a "court's ability to fulfill its constitutional responsibility to resolve cases and

controversies." *Cheney*, 542 U.S. at 384, 385; *accord* SA.4.

As with *Nixon*, this case is "vastly different" in every relevant respect. SA.5. First, there is no conceivable argument of overbreadth as to the only information required at this juncture: privilege-log information. *Cf. Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 532 F.3d 860, 867 (D.C. Cir. 2008) (finding *Cheney*'s concern about overbroad discovery requests inapplicable to basic information on a visitor log). Indeed, even the deficient log produced to date confirms that this information is directly relevant, contrary to Defendants' assertions of overbreadth. For example, the log identifies fourteen categories of responsive documents withheld primarily based on executive privilege—and all of the documents relate to policymaking concerning military service by transgender people, which perfectly mirrors the scope of what is at issue in this case. Add.94-96.

Second, as the district court explained, "this case involves a concern of 'constitutional dimension,' and indeed, one of the most critical that a court can be called upon to resolve—state-sponsored discrimination against a suspect class." SA.5. Third, as in *Nixon*, Defendants' refusal to provide the requested information interferes with the court's ability to perform its constitutional duties under Article III, including determining whether the privilege properly applies and has been overcome. SA.5. At a minimum, the district court did not commit "clear error" in

declining to interpret *Cheney* as purporting to require the universal rule that Defendants claim.

B. Even If a Heightened Showing Was Required for Production of an Adequate Log, Plaintiffs Have Satisfied It.

Even if Plaintiffs were required to make a heightened showing before Defendants were obligated to provide an adequate log, that requirement has been amply satisfied here. There is a particularized need for an adequate privilege log; requiring log supplementation is not overbroad; and the omitted information is unavailable through other sources. Any burden in complying with the district court's order is also reduced here, given that Defendants have already collected and logged the documents at issue, and must merely supplement that log with further detail.

Particularized Need. First, there is a particularized need for an adequate privilege log because it is necessary to adjudicating Defendants' executive privilege claims. The district court found that the existing log was deficient because it failed to provide sufficient information to assess the claimed privilege, including "*specific, non-boilerplate* privilege descriptions *on a document-by-document basis*." Add.11. The current log groups together documents under general descriptions that prevent analysis of whether the privilege has been properly claimed, in violation of Federal Rule of Civil Procedure 26(b)(5) . *See Wiener v. FBI*, 943 F.2d 972, 979 (9th Cir. 1991) (boilerplate language without

"tailor[ing] the explanation to the specific document withheld" is insufficient); *Burlington N.*, 408 F.3d at 1149. The district court was within its right to insist on a log that complied with these settled legal requirements.

Because the district court did not order production of the underlying documents, there is no basis for challenging whether there is a particularized need for the documents themselves (as opposed to an adequate privilege log) at this stage. But even if such an analysis were required, the underlying documents are essential to multiple issues at the core of this constitutional challenge. For example, they bear on Defendants' claims regarding President Trump's decision-making process for the Ban—including the claim that it was adopted after consultation with "Generals and military experts." Add.7. Negating those claims would not merely vitiate any basis for deference; it would also undermine the government's credibility across-the-board. The documents are also essential to determining the actual reasons and motivations for the Ban, including whether impermissible political considerations, or "prejudice or stereotype," were at play.[3] Add.18. And they bear on Defendants' assertion that the Implementation Plan was a "new" policy, formulated independent of the White House. *See, e.g.*, Add.95 (logging communications with unidentified "DOD Staffers").

Moreover, an adequate privilege log is both necessary and legally required

[3] *Compare* Add.94 (logging documents relating to interactions with Congress) *with* SA.172-77 (describing political motivations for Ban).

regardless of whether President Trump is subject to declaratory relief or properly a party (which he is), even if that issue were before this Court (which it is not). Even as a non-party, President Trump would be subject to third-party discovery, s*ee Doe 2 v. Trump*, -- F. Supp. 3d --, 2018 WL 3736435, at *3 (D.D.C. Aug. 6, 2018), and assessing his claims of privilege would still require an adequate log.

Scope of Information Sought. Second, the district court tailored the required supplementation of the log to the specific need here: assessing whether Defendants have appropriately claimed executive privilege. Defendants assert that Plaintiffs' underlying discovery requests are overbroad but, as explained above, the only disclosure at issue in the challenged order concerns legally required log information. In any event, the district court also found that the underlying discovery is "narrowly focused and indispensable to resolving this case on the merits," SA.5, and Defendants do not even purport to show otherwise.

Nor did the district court clearly err in requiring a log that complied with Rule 26(b)(5). Adequate detail about the documents withheld is essential to determine whether the privilege even applies. *See, e.g., Nixon*, 418 U.S. at 701, 706 (holding that the privilege is limited to "high-level" communications, such as those between the President and his "close" advisors). This is precisely the type of day-to-day discovery question that is committed to the district court's discretion. Conversely, it is plainly inappropriate for a writ of mandamus, "one of the most

potent weapons in the judicial arsenal." *Cheney*, 542 U.S. at 380 (internal quotes omitted).

Alternate Sources. Third, there are no alternate sources from which an adequate privilege log can be obtained. The log concerns *presidential* communications, which are within Defendants' sole possession. And even if such information *were* available from other sources, Defendants' position is that the privilege would apply to those sources as well. Dkt. 268 at 1.

Defendants also argue that Plaintiffs must first exhaust other sources of non-privileged discovery, but there are no other sources from which information on the issues identified above—Defendants' process and deliberations in creating and implementing the Ban—can be obtained. For instance, information unrelated to President Trump's communications will not establish whether President Trump actually consulted with anyone in the military before announcing the Ban.

Burden of Compliance. Finally, any purported burden associated with supplementing Defendants' existing privilege log cannot justify withholding the information at issue. Defendants have already identified, reviewed, and even logged (albeit inadequately) the responsive documents that they claim are privileged. Accordingly, the burden of providing additional log information for this known universe of already collected and reviewed documents is greatly reduced and not remotely the type of "harm" warranting mandamus. And even if

Defendants had not already taken these steps, they would be required in any event, both because they are part and parcel of any privilege invocation, and because of they are a function of Defendants' expansive invocation of executive privilege here. The purported burden of compliance does not excuse Defendants from their discovery obligations. Even where, unlike here, "a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive," that "is not sufficient to establish a violation of the Constitution" and separation of powers. *Clinton v. Jones*, 520 U.S. 681, 703 (1997).

Defendants also cannot claim that *Cheney*'s concern about "insubstantial legal claims" advanced in "vexatious litigation that might distract [the Executive Branch] from the energetic performance of its constitutional duties" applies here. 542 U.S. at 382, 386. Plaintiffs' defense of their constitutional rights is hardly "vexatious." Indeed, like every other federal court to consider a challenge to the Ban, the district court found that Plaintiffs are likely to succeed on the merits.

C. The Information Required for an Adequate Privilege Log Is Not Itself Protected by Executive Privilege.

Defendants' remarkable contention that supplementation of their existing log would itself disclose information covered by executive privilege is wrong and unsupported. *See* SA.6 n.2 ("Defendants do not cite any authority—and the Court is aware of none—that supports [this] claim"). The basic, non-substantive

information required to evaluate whether a party has appropriately claimed privilege is not itself privileged. Defendants' position would prevent meaningful judicial review of such privilege claims and convert the qualified executive privilege into an absolute one, contrary to the Supreme Court's holding in *Nixon.*

Executive privilege applies to the *substance* of communications—not to basic information such as who was involved in a communication or when it occurred. *See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 592 F. Supp. 2d 127, 132 (D.D.C. 2009) ("[T]he presidential communications privilege protects only *communications*; the bits of information contained in the sought records—names of visitors, dates of visits, and in some case who was visited—do not rise to the level of protection"). Indeed, the government routinely provides such information when claiming executive privilege. *See, e.g.*, *In re Sealed Case*, 121 F.3d 729, 735 (D.C. Cir. 1997) ("[T]he White House produced a privilege log identifying the date, author, and recipient of each document withheld as well as a general statement of the nature of each document and the basis for the privilege on which the document was withheld.").

None of what is required on a traditional privilege log, such as author and recipient information, discloses the substance of any presidential advice. The same is true for the date of a communication, which Defendants' current privilege log obscures through wide date ranges spanning several months.

For that reason, Defendants' objection to supplementation of the privilege log also cannot be justified by the purpose of the privilege, which is to facilitate candid advice. *Nixon*, 418 U.S. at 708. Mere disclosure of the participants to a communication, or its date, does not disclose what was advised and thereby chill the willingness of advisors to provide candid advice.

In any event, even if supplementation of the privilege log did implicate executive privilege (which it does not), the privilege is "overcome by an adequate showing of need." *In re Sealed Case*, 121 F.3d at 745. For the reasons discussed above, both the district court and Plaintiffs have a clear need for this information to assess whether the privilege properly applies.

II. The District Court Did Not Commit Clear Legal Error in Ordering Production of Documents Withheld Under the Deliberative Process Privilege.

Defendants likewise fail to show any clear legal error in the district court's decision to compel documents withheld solely on grounds of the deliberative process privilege. As Defendants had urged, the court analyzed Defendants' privilege claims by applying the balancing test in *FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984), which requires a discretionary weighing of four factors designed to test the relative need for and alternative availability of the information sought. A court's discretionary performance of that balancing test is subject to highly deferential review even on direct appeal. *See, e.g., Texaco P.R.,*

Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 885 (1st Cir. 1995) (explaining "the deliberative process privilege is 'a discretionary one'" and therefore refusing "to tinker with the [district] court's determination that the [plaintiff's] interest in due process and fairness outweighed [the government's] interest in shielding its deliberations from public view"). Defendants have not satisfied their even heavier burden here of showing that the district court's application of the correct legal test to the facts of this case gives rise to the exceptional circumstances and clear error required for mandamus.

In fact, other courts considering challenges to the Ban have similarly rejected Defendants' claims regarding the deliberative process privilege and ordered production of the exact same documents on the exact same grounds. *See Stone v. Trump*, No. GLR-17-2459, 2018 WL 3866676, at *3 (D. Md. Aug. 14, 2018); *Doe 2 v. Mattis*, -- F. Supp. 3d --, 2018 WL 4053380, at *7 (D.D.C. Aug. 24, 2018) ("[D]espite the fact that one of Defendants' *main defenses* in this action is that their decisions regarding transgender military service are owed great deference because they are the product of reasoned deliberation, study and review by the military, Defendants have withheld nearly all information concerning this alleged deliberation. This is not how civil litigation works.")

Defendants concede, as they must, that "the privilege is qualified" and may be overcome if a party's "need for the materials and the need for accurate fact-

finding override the government's interest in non-disclosure." Pet. 29 (quoting *Warner*, 742 F.2d at 1161). Here, the district court found exactly that, and did so after conscientiously examining the *Warner* factors, including (1) the relevance of the evidence sought; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion of contemplated policies. *Warner*, 742 F.2d at 1161. As explained below, Defendants cannot demonstrate clear error in the court's analysis of any factor, let alone in its discretionary balancing of all of them.

A. The District Court Committed No Error, Let Alone Clear Error, in Applying the *Warner* Balancing Test to the Facts Here.

1. Relevance of the Evidence Sought.

Defendants dismiss the district court's conclusion that Plaintiffs seek relevant information as "cursory" and premised on an "all-inclusive assumption" of Plaintiffs' need for the information. Pet. 30-31. But this characterization is unfair and inaccurate, as the court explained the relevance of this information at length, over a series of orders. Defendants' deliberations and the actual reasons for the Ban lie at the core of this case for at least two reasons: (1) under settled law, they are not only highly relevant but potentially dispositive in determining whether the Ban survives heightened scrutiny; and (2) Defendants themselves placed the deliberative process at issue by insisting—against all current evidence—that the Ban is entitled to military deference because it was independently "decided by the

appropriate military officials" in "their considered professional judgment." Pet. 21 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986)).

Constitutional scrutiny requires examination of Defendants' actual motivations for enacting the Ban. In accordance with settled law, the district court has ruled that heightened scrutiny applies to Plaintiffs' constitutional claims. Add.39, 61-62. Heightened scrutiny requires that Defendants' purported justifications are "genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). In its partial summary judgment ruling, the court found that, in order to apply heightened scrutiny, it needed additional information as to whether "the Ban was sincerely motivated by compelling state interests, rather than by prejudice or stereotype," which "necessarily turns on facts related to Defendants' deliberative process." Add.43. Accordingly, the withheld documents are "highly relevant" so that the court can "consider the actual intent behind" the Ban "when it considers the merits." *See Ariz. Dream Act Coalition v. Brewer*, No. CV-12-02546, 2014 WL 171923, at *3 (D. Ariz. Jan. 15, 2014).

Defendants have put their deliberative process at issue by urging military deference. The district court also directed the parties to "proceed with discovery" on the defense that Defendants have placed squarely at the center of this case: "whether, and to what extent, deference is owed to the Ban," Add.45-46, because it

reflects "the Department [of Defense]'s best military judgment." Add.73.[4]. As multiple courts have found, deference is not warranted to the extent that the Ban is not the product of an independent, military-driven process. *See, e.g.*, *Stone*, 2018 WL 3866676, at *3 (record indicates "that the decision [about the Ban] was made and the panel was formed to justify and enforce that decision" afterward); *Doe 2 v. Trump*, -- F. Supp. 3d --, 2018 WL 3717071, at *13 (D.D.C. Aug. 6, 2018) (plan to implement the Ban was crafted "clearly with assistance from lawyers and an eye to pending litigation").

For that reason, the district court found that "Defendants may not simultaneously claim that deference is owed to the Ban because it is the product of 'considered reason [and] deliberation,' 'exhaustive study,' and 'comprehensive review' by the military," while "also withholding access to information concerning these deliberations, including whether the military was even involved." Add.7. Where deliberative materials may shed light on government discrimination or other misconduct, "the privilege is routinely denied." *Texaco P.R.*, 60 F.3d at 885. This is because, where there is "any reason" to believe such material "may shed light on" on such matters, "public policy (as embodied by the law) demands that the

[4] Defendants claimed below that deference is required simply because the Ban involves the military. But no limiting principle would exist if mere subject matter alone warranted deference, and it is unthinkable that the courts would be required to defer to an exclusion of African-American service members, for example. Even Defendants' authorities indicate that deference is appropriate only when the policy at issue actually reflects the "professional judgment of military authorities." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

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 such cases, "the decisionmaking process is not 'swept up into' the case, it *is* the case." *United States v. Bd. of Educ. of City of Chicago*, 610 F. Supp. 695, 700 (N.D. Ill. 1985); *accord In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998), *on reh'g in part*, 156 F.3d 1279 (D.C. Cir. 1998) ("If the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the privilege as a shield.").[5]

Accordingly, there is no clear error in the district court's finding that the relevance of the withheld documents weighed in favor of disclosure. Such documents are not only relevant but indispensable to test Defendants' claims that the Ban represents an appropriate exercise of military judgment, rather than a repackaging of the reflexive desire to discriminate reflected in President Trump's tweets. *See Stone*, 2018 WL 3866676, at *3 ("It also could not be more clear that the Defendants' intent—whether it was for military purposes or whether it was

[5] Defendants half-heartedly argue that documents regarding the Carter policy are irrelevant because that policy pre-dated the Ban. Pet. 32. But demonstrating that the same issues Defendants now cite to support the Ban were previously rejected by military leaders is directly relevant to Plaintiffs' rebuttal. Defendants also complain that they must produce "every document remotely connected to the deliberative process." Pet. 30-31. But "Defendants themselves identified these documents as responsive," and each is relevant to "deliberations concerning military service by transgender people." SA.7. Defendants cannot now complain about their own decision to make sweeping assertions of privilege.

purely for political and discriminatory purposes—is at the very heart of this litigation."; finding that the withheld documents are likely to contain evidence of Defendants' intent).

2. Availability of Other Evidence.

Defendants claim that the district court erred because it "never asked [P]laintiffs to show why the discovery they have already obtained is inadequate." Pet. 33. But it matters not how many zeros one adds to the number of pages produced if they are not responsive to Plaintiffs' need and the central issues in dispute; and apart from citing the size of Defendants' document production, Defendants do not explain how those documents allow Plaintiffs the rigorous testing of the deliberative process and rationales for the Ban that the Constitution requires.

Warner illustrates the proper analysis of this factor, and the district court followed that reasoning faithfully. The parties in *Warner* sought memoranda containing "material regarding various aspects of market structure and the merger's effect on competition." 742 F.2d at 1161. *Warner* noted that information about market structure and competitive effects was available to the parties through other sources, which would allow the parties to "obtain and introduce evidence on these issues" without the privileged memoranda. *Id.* at 1161-62. This case could not be more different. Here, Plaintiffs cannot divine Defendants' process

and motivations through any source other than Defendants themselves.

Additionally, the suggestion that the need for discovery is somehow obviated because other plaintiffs in different litigation have deposed "numerous military officials" is, at best, disingenuous. Pet. 33. In fact, only a handful of depositions have been taken of officials with peripheral roles, precisely because Defendants refuse to produce the documents necessary to allow meaningful discovery to proceed. *Doe 2*, 2018 WL 3717071, at *3 ("Defendants [have] strenuously resisted engaging in discovery" which "remains unfinished" because Defendants have asserted privilege for "a substantial portion of the documents and information sought by Plaintiffs"). And in the depositions that have occurred, Defendants have repeatedly invoked the deliberative process privilege to block testimony as to any deliberations concerning the Ban. *See*, *e.g.*, SA.185-197 (deliberative process privilege objection asserted 11 times during the deposition of Martie Soper).

As the district court found, "Defendants possess all of the evidence concerning their deliberations over the Ban, and there is no suggestion that this evidence can be obtained from other sources." Add.8. Nor can any such suggestion be found in Defendants' petition. Instead, Defendants speak generically about information produced in response to other requests on other topics. But "Defendants' production of non-privileged documents and an

administrative record do not obviate Plaintiffs' need for responsive documents concerning the deliberative process." *Id.* Accordingly, the district court did not clearly err in finding that "[t]his factor weighs in favor of disclosure." Add.8.

3. The Government's Role in the Litigation.

As the district court noted, "[t]here is no dispute that the government is a party to this litigation." Add.8. Additionally, where allegations of government "misconduct" are at issue, *Warner*, 742 F.2d at 1162—specifically, Plaintiffs' allegations of unlawful discrimination against transgender individuals—this factor particularly "weighs in favor of disclosure." Add.8.

4. The Extent to Which Disclosure Would Hinder Frank Discussion.

Although Defendants characterize the district court's analysis of the fourth *Warner* factor—the extent to which disclosure would hinder frank and independent discussions—as a "radical discounting of the government's interest in confidentiality," Pet. 31, the district court closely examined the government's arguments but found that they relied upon generalized speculation. SA.8. Disclosure of Defendants' decision-making process here is unlikely to have a chilling effect on frank and independent discussion, because the government has already unveiled its conclusions and does not seek to study them further, but rather only to implement them as quickly as it can. In any event, to the extent disclosure discourages government officials from recommending or adopting unconstitutional

policies, that would be a constructive result. *See Newport Pac., Inc. v. Cty. of San Diego*, 200 F.R.D. 628, 640 (S.D. Cal. 2001) ("[I]f because of this case, members of government agencies acting on behalf of the public at large are reminded that they are subject to scrutiny, a useful purpose will have been served.").

The district court also observed that the protective order it had previously entered would mitigate concerns with respect to disclosure. Add.8. Far from reflecting a "misunderstanding of the importance of the privilege," Pet. 31, this is precisely how other courts have addressed this factor. *See, e.g.*, *Del Socorro Quintero Perez v. United States*, No. 13CV1417-WQH-BGS, 2016 WL 499025, at *7 (S.D. Cal. Feb. 9, 2016) ("concerns regarding the frankness of agency discussion . . . can be mitigated through the use of the protective order"); *Price v. Cty. of San Diego*, 165 F.R.D. 614, 620 (S.D. Cal. 1996) (finding that infringement on frank discussion "can be alleviated through the use of a strict protective order"). Defendants do not cite any contrary authority, and *Perry v. Schwarzenegger*, 591 F.3d 1147, 1164 (9th Cir. 2010)—which did not even involve the deliberative process privilege—recognized that, while a protective order may not entirely eliminate concerns about disclosing confidential information, it "will ameliorate" such concerns.

In sum, Defendants cannot point to any error in the district court's balancing of this factor, let alone clear error. Disclosure will not chill any deliberative

process with respect to the decision to ban transgender persons from the military, which has already been made. Nor will disclosure of such deliberations chill any future, lawful policy deliberations. And if Defendants' hypothetical and generic arguments about chilling future discussion were sufficient, the deliberative process privilege could never be overcome in any case.

B. The District Court Correctly Declined to Require the Privilege to Be Tested Individually for the Thousands of Documents at Issue.

Finally, Defendants complain about the district court's application of the *Warner* balancing test to the documents collectively, as opposed to individually for each of the thousands of documents withheld—or at a minimum, category-by-category. Pet. 29-30. But no authority establishes that the district court committed any error—let alone *clear* error—by declining to allow Defendants to impose that unnecessary burden on the court.

Defendants claim that the "*Warner* factors reflect the need for granular consideration" and application of the balancing test "from document to document" or by "categories of documents." Pet. 29-30. *Warner*, however, held no such thing, and courts routinely apply the balancing analysis on a categorical basis. *See, e.g.*, *Ariz. Dream Act Coal.*, 2014 WL 171923, at *3 (granting motion to compel on all documents withheld solely under deliberative process privilege); *Ferrell v. U.S. Dep't of Hous. & Urban Dev.*, 177 F.R.D. 425, 430-31 (N.D. Ill. 1998) (ordering disclosure of all documents withheld pursuant to the deliberative process privilege

because "the government's decisionmaking process in this matter . . . [was] 'the case' and [was] directly relevant and crucial" to the plaintiffs' motion). In contrast to executive privilege—where document-by-document log details can expose situations where the privilege has been improperly invoked—the district court assumed that Defendants *had* properly invoked the deliberative process privilege for all the documents at issue, but nonetheless found that the privilege had been overcome for reasons applicable and common to all of them.

The district court in *Stone*, ruling on a motion to compel the same documents at issue here, took the same approach as the district court here. *Compare Stone*, 2018 WL 3866676, at *2-3 (describing three categories of Plaintiffs' requests for documents; ordering production of all documents withheld) *with* Add.3 (describing seven categories of Plaintiffs' requests; ordering production of all documents withheld).[6] And other courts have recognized that the privilege does not apply at all in cases where government intent or misconduct is at issue.

[6] Defendants also relied below on *New York v. Dep't of Commerce*, No. 18-cv-2921 (S.D.N.Y. Aug. 14, 2018), but the court there simply found that the balancing test applied and denied plaintiffs' motion to compel without prejudice to renewal "as to specific documents *or categories of documents*" (emphasis added) after the parties had briefed the issue "using the balancing approach." Contrary to Defendants' suggestion, it did *not* hold that the balancing approach must be applied on a document-by-document basis.

Indeed, the same court previously recognized that "whether the privilege is categorically inapplicable or dependent on a balancing of factors is more stylistic than substantive" when "the deliberative or decisionmaking process is the 'central issue' in the case." *In re Delphi Corp.*, 276 F.R.D. 81, 85 (S.D.N.Y. 2011) (observing that, under those circumstances, "the need for the deliberative documents *will outweigh* the possibility that disclosure could inhibit future candid debate among agency decision-makers") (emphasis added).

Add.6, SA.7 (collecting cases).

Finally, Defendants' reliance on *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980), does not help them. Pet. 29. Defendants point to *Coastal*'s observation that the deliberative process privilege is "dependent upon the individual document and the role it plays in the administrative process." 617 F.2d at 867. But the court made this observation in weighing whether the privilege applied at all to a type of government memo it had not previously considered. *Id.* The court observed that "[t]he cases in this area are of limited help" in deciding whether the privilege applies at all because it is context-specific—not that courts must apply the balancing test document-by-document when considering whether the privilege has been *overcome* by the plaintiff's need, as Defendants suggest. *Id.* In fact, that same court subsequently held that the deliberative process privilege is *categorically* inapplicable when, as here, the plaintiff's claim turns on the government's intent. *In re Subpoena Duces Tecum*, 145 F.3d at 1424 ("[I]t seems rather obvious to us that the privilege has no place . . . in a constitutional claim for discrimination.").

CONCLUSION

For all these reasons, the Court should deny Defendants' petition in full.

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Respectfully submitted,

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STATEMENT OF RELATED CASES

Plaintiffs are aware of one related appeal, *Karnoski v. Trump*, No. 18-35347 (9th Cir.), which arises from the same underlying district court action.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rules 21-2(c) and 32-3(2), because it totals 7,234 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 27, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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