IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

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

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO LIFT THE STAY OF COMPLIANCE WITH THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER

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INTRODUCTION

Plaintiffs' Motion to Lift the Stay of Compliance with the Magistrate Judge's Memorandum Opinion and Order, Dkt. 239, seeks to overturn the Court's well-reasoned decision to stay the effect of the Magistrate Judge's Order pending the Ninth Circuit's decision in the related case, *In re Donald J. Trump*, No. 18-72159 (9th Cir. argued Oct. 10. 2018). The Court has already concluded that a stay could avoid duplicative litigation and obviate the need for Defendants to produce thousands of deliberative documents, *see* Mem. Op., Dkt. 227, and denied as moot Plaintiffs' Motion to Set a Date Certain for Compliance with Discovery Order, Dkt. 222. Yet Plaintiffs now insist that the Court should require Defendants to begin complying with the Order in a mere 10 days. Because the Court has already concluded that there are sound reasons to consider the Ninth Circuit decision before further action here, and circumstances have not changed in a way that materially affects the Court's previous reasoning, the Court should decline to lift the stay.

BACKGROUND

In June 2018, Plaintiffs filed a motion to compel three broad categories of documents withheld under the deliberative process privilege. Dkt. 177. On August 14, 2018, the Magistrate Judge granted Plaintiffs' motion and issued a sweeping order compelling the Department of Defense ("DoD") and the Military Services to disclose thousands of deliberative documents concerning military policies. Specifically, the Magistrate Judge ordered DoD and the Services to disclose "(1) Deliberative materials regarding the President's July 2017 tweets and August 2017 Memorandum; (2) Deliberative materials regarding the activities of the 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 the DoD's implementation Plan and the President's acceptance of that

Plan in his March 23[, 2018] memorandum, including any participation or interference in that process by anti-transgender activists and lobbyists." Mem. Op. 3, Dkt. 227. The Magistrate Judge ordered disclosure even though numerous motions currently pending before the district court could obviate the need for any discovery in this case, including Defendants' motion to dissolve the preliminary injunction in light of the President's revocation of the memorandum that this Court had enjoined and the Secretary of Defense's approval of a new policy in its place, *see* Dkt. 120. At a minimum, Defendants' contention that the military's 2018 policy is the only relevant policy at issue in this case warranted resolution before the sweeping discovery ordered by the Magistrate Judge. The Order did not set a deadline for compliance.

Three days later, Defendants filed a motion to stay compliance with the Magistrate Judge's Memorandum Opinion and Order. Dkt. 208. In that motion, Defendants argued that Defendants will be irreparably harmed absent a stay because complying with the Order will result in the irretrievable disclosure of thousands of privileged documents covering multiple military policies, and that Plaintiffs will not be harmed by a stay because Plaintiffs have moved for summary judgment, *see* Pls.' Mot. for Summ. J., Dkt. 163, thus effectively asserting that, even absent further evidentiary development, "there is no genuine dispute as to any material fact" in this case, Fed. R. Civ. P. 56 (a). Defs.' Mot. to Stay 8–10, Dkt. 208. Defendants further argued that Defendants are likely to prevail on the merits of their then-forthcoming objections to the Order and that a stay is in the public interest because of the chilling effect from disclosure. *Id.* at 10–16.

In addition to demonstrating that the four factors weigh in favor of a stay, Defendants argued that a stay of the Order would be consistent with, and avoid the protracted discovery litigation ongoing in, the related case *Karnoski v. Trump*. *Id.* at 16–17. As Defendants explained:

> In *Karnoski*, . . . the plaintiffs filed a similar motion to compel documents withheld under the deliberative process privilege. The *Karnoski* Court . . .

> granted Plaintiffs' motion to compel, and ordered the President and the Department of Defense to, among other things, disclose "documents that have been withheld solely under the deliberative process privilege." Order at 11, *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. July 27, 2018), Dkt. 299. Defendants filed a petition for a writ of mandamus in the Ninth Circuit and moved to stay compliance with the *Karnoski* Court's Order pending appellate review. *See* Defs.' Mot., *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. July 31, 2018), Dkt. 300.

Id. The Court of Appeals for the Ninth Circuit granted an emergency motion to stay the production of the same kind of discovery at issue here pending its consideration of Defendants' petition for a writ of mandamus. Order, *In re Donald J. Trump*, No. 18-72159 (9th Cir. Sept. 17, 2018), Dkt. 36. The stay precludes the disclosure of documents protected by the deliberative process privilege in that case. *See id.* The Ninth Circuit then heard oral argument on the Defendants' petition for writ of mandamus on October 10, 2018.

While the emergency motion concerning the *Karnoski* Order was pending in the Ninth Circuit, Defendants in this case timely filed Objections to the Court's Order pursuant to Rule 72(a) of the Federal Rules of Civil Procedure. *See* Defs.' Objs., Dkt. 209. In those Objections, Defendants reiterated and expanded upon their merits arguments first raised in their Motion to Stay. *See id.* at 8–28. In addition, Defendants filed a notice of the Ninth Circuit's stay in *Karnoski*, arguing that because the Order directs "Defendants to disclose many of those same deliberative documents, a stay of the Magistrate Judge's Memorandum Opinion and Order pending further review would be consistent with the current posture of proceedings in the Ninth Circuit." Defs.' Notice 1, Dkt. 217; *see also* Defs.' Reply, Dkt. 220.

After Defendants filed the Motion to Stay and Objections to the Order, the parties filed a Joint Motion to Suspend Certain Deadlines, requesting that the District Court suspend the discovery deadline "in the interest of judicial economy" because the parties' cross-motions for summary judgment, Defendants' Motion to Stay Compliance with the Order, and Defendants' Objections to the Order were all pending before the Court. Jt. Mot. 1–2, Dkt.

210. The Court granted the parties' motion, and the discovery deadline is suspended. Order, Dkt. 213.

On October 22, 2018, Plaintiffs moved to set a date certain for compliance with the Magistrate Judge's discovery order. Dkt. 222.

On November 30, 2018, the Court overruled Defendants' Objections to the Magistrate Judge's Memorandum Opinion and Order, Dkt. 209, but granted Defendants' Motion to Stay, Dkt. 208, and ordered that "the effect of the USMJ's Memorandum Opinion and Order (ECF Nos. 204, 205) is STAYED pending the Ninth Circuit's decision in *In re Donald J. Trump*, No. 18-72159 (9th Cir. argued Oct. 10, 2018)." Dkt. 228. The Court reasoned that "all four factors weigh in favor of staying the USMJ's Order." Mem. Op. 21, Dkt. 227. The Court also denied as moot Plaintiffs' Motion to Set a Date Certain for Compliance with Discovery Order and ordered the parties to submit a joint status report by January 31, 2019, "addressing whether the Ninth Circuit has issued a decision in *In re Donald J. Trump*, No. 18-72159." Order, Dkt. 228.

Defendants then filed a notice of the D.C. Circuit's decision in the related case *Doe v. Shanahan*, No. 18-cv-5257, which reversed the district court's denial of Defendants' motion to dissolve the preliminary injunction and vacated the preliminary injunction. Dkt. 230. Defendants explained that the *Doe* opinion supports Defendants' arguments in their Motion to Dissolve the Preliminary Injunction, Dkt. 120. *See* Dkt. 230 at 1. Defendants also provided notice that the Supreme Court granted the Government's applications to stay the district courts' preliminary injunctions in the related cases of *Trump v. Karnoski* and *Trump v. Stockman*, Dkt. 232, and moved to stay this Court's preliminary injunction, pending the resolution of Defendants' Motion to Dissolve the Preliminary Injunction, Dkt. 120, and if the Court denies that motion, pending an appeal to the Court of Appeals for the Fourth Circuit and any further

proceedings before the Supreme Court, Dkt. 234.

On January 31, 2019, the parties filed a joint status report informing the Court that "the Ninth Circuit has not yet issued a decision in *In re Donald J. Trump*, No. 18-72159," Dkt. 238, and Plaintiffs filed the instant motion to lift the stay of compliance with the Magistrate Judge's Order, Dkt. 239. The following day, the Court issued a marginal order approving the status report, Dkt. 240, and ordered the parties to file a further status report no later than June 3, 2019. Dkt. 241.

ARGUMENT

"The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Donnelly v. Branch Banking & Trust Co.*, 971 F.Supp.2d 495, 501 (D. Md. 2013) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). "[P]roper use of this authority calls for the exercise of judgment which must weigh competing interests and maintain an even balance." *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983) (internal quotation omitted). Along with balancing the harms to the parties as a result of a stay, certain courts in the Fourth Circuit also consider whether a stay is in the public interest. *See, e.g.*, *GTSI Corp. v. Wildflower Int'l, Inc.,* No. 1:09cv123 (JCC), 2009 WL 3245396, at *1 (E.D. Va. Sept. 29, 2009); *Digital-Vending Servs. Int'l, LLC v. Univ. of Phoenix Inc.*, No. 2:09cv555, 2010 WL 11450510, at *3 (E.D. Va. Apr. 22, 2010) (applying all four factors even after finding that, upon review of *GTSI*, there is "a lack of clarity regarding whether this court is required to apply such test, or whether . . . the court simply has the broad discretion to consider the propriety of a stay based on whatever factors the court deems appropriate").

I. The Court Should Maintain The Stay Of The Magistrate Judge's Order Because The Relevant Factors Continue To Weigh In Defendants' Favor.

The Court should decline to lift the stay of the Magistrate Judge's Order until the

Ninth Circuit rules on related issues in *In re Donald J. Trump*, No. 18-72159. The Court has already concluded that waiting for the Ninth Circuit's decision is the appropriate path forward in this case, Mem. Op., Dkt. 227, and the reasoning in the Court's decision still applies. *See Vasvari v. Rite Aid Corp.*, No. 09-cv-2069, 2010 WL 3328210, at *2 (M.D. Pa. Aug. 23, 2010) (granting a stay pending a related appeal and taking into account the Court's "previously-articulated interest in the outcome of that appeal"). For the reasons set forth below, the relevant factors continue to weigh in favor of maintaining the stay.

A. The Stay Promotes Judicial Economy.

First, in granting Defendants' motion to stay compliance with the Magistrate Judge's Order, the Court correctly concluded that "[a] stay would promote judicial economy because the *Karnoski* defendants have appealed a similar motion to compel discovery of documents claiming deliberative process privilege" and "[t]here is significant overlap between the documents the *Karnoski* plaintiffs seek and the deliberative documents Plaintiffs seek in this case." Mem. Op. 21, Dkt. 227. The Court reasoned that staying the Magistrate Judge's Order until the resolution of the appeal in *Karnoski* could "avoid duplicative litigation." *Id.* The Court also noted that the Ninth Circuit stayed the district court's order compelling discovery of the documents at issue until it issues a decision. *Id.*

All of these justifications for the stay still apply with equal force. Maintaining the stay of the Magistrate Judge's Order would not only be consistent with the current posture of proceedings in the related case, but would avoid the same kind of expansive litigation here over the same deliberative process materials at issue in the ongoing dispute in *Karnoski*, including the potential for appellate review.

Plaintiffs' argument that the Ninth Circuit is considering "a meaningfully different discovery order" is unavailing. *See* Pls.' Mot. 6, Dkt. 239. As the Court already noted in

granting Defendants' stay motion, even though the Ninth Circuit is also considering issues related to the presidential communications privilege, "one of the issues on appeal is the applicability of deliberative process privilege to documents that are similar to documents Plaintiffs seek in the instant case." Mem. Op. 20 n.12, Dkt. 227; *see also In re Mut. Funds Inv. Litig.*, No. MDL 1586, 2011 WL 3819608, at *3 (D. Md. Aug. 25, 2011) (granting a stay of where "at least some of the issues [on appeal] would bear directly on" the issues before the district court). Indeed, the deliberative documents at issue in *Karnoski* are not only "similar" to the deliberative documents at issue in this case; many of the deliberative documents are exactly the same. *See* Mem. Op. 21, Dkt. 227 ("There is significant overlap between the documents the *Karnoski* plaintiffs seek and the deliberative documents Plaintiffs seek in this case.").

B. Defendants Will Suffer Immediate, Irreparable Harm Absent The Stay.

Second, the Court concluded that "[d]enying the stay would impose a burden on Defendants by requiring them to disclose deliberative documents that are currently being withheld under a stay in the Ninth Circuit." *Id.* at 21–22. This is still abundantly true. Compliance with the Magistrate Judge's Order will result in the irretrievable disclosure of thousands of privileged documents covering multiple military policies. Because the disclosure of documents and information cannot be undone, courts routinely grant stays in such contexts. *See HHS v. Alley*, 556 U.S. 1149 (2009) (in a FOIA case, ordering stay of district court's order directing agency to disclose records to plaintiff, pending final disposition of appeal, following denial of stay by court of appeals); *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) ("Once the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time. The status quo could never be restored."); *In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008) ("[O]nce information is published, it cannot be made secret again.");

United States v. Fei Ye, 436 F.3d 1117, 1123 (9th Cir. 2006) (recognizing that an order directing the disclosure of trade secrets would cause irreparable harm to the Government); *see also* Defs.' Mot. to Stay 8–9, Dkt. 208 (collecting cases).

Plaintiffs argue that Defendants would not be burdened if the Court lifts the stay because Defendants have had time to "collect and identify the documents subject to [the Magistrate Judge's] order." Pls.' Mot. 4, Dkt. 239. But this misses the point. The Magistrate Judge's Order requires disclosure of information that would reveal DoD's internal deliberations concerning military policy, something that could never be undone, thus causing irreparable harm to Defendants. *See* Defs.' Mot. to Stay 8–9, Dkt. 208.

C. Plaintiffs Are Not Harmed By The Stay.

Third, the Court concluded that "[w]hile granting a stay may burden Plaintiffs by delaying the litigation, the Court has a strong interest in consistency with the parallel proceeding in the Ninth Circuit." Mem. Op. 22, Dkt. 227 (citing *White v. Ally Fin. Inc.*, 969 F.Supp.2d 451, 461–62 (S.D. W. Va. 2013)). Indeed, there is no meaningful harm to Plaintiffs by continuing to stay compliance with the discovery order. Plaintiffs themselves have moved for summary judgment, *see* Pls.' Mot. for Summ. J., Dkt. 163, arguing that there is no genuine dispute of material fact that DoD's new policy violates the Equal Protection Clause. *See* Pls.' Mot. 26–44, Dkt. 163-2. If Plaintiffs' assertion is credited, then a delay in Defendants' disclosure obligations could in no way prejudice Plaintiffs.

Plaintiffs argue that "the burden the Stay imposes on Plaintiffs" has "intensified" since the stay was entered because Defendants have now moved to stay this Court's preliminary injunction following the Supreme Court's order staying the district courts' preliminary injunctions in *Trump v. Karnoski* and *Trump v. Stockman*. Pls.' Mot. 4–5, Dkt. 239. However, Defendant's motion to stay the preliminary injunction does not change the balancing test in

the way Plaintiffs claim. As an initial matter, Plaintiffs appear to assume that the Court relied on the preliminary injunction in analyzing the burden on Plaintiffs and in granting Defendants' motion to stay the Magistrate Judge's Order. But the Court's analysis of the burden on Plaintiffs and reasoning for granting Defendants' stay motion makes no mention of the preliminary injunction. *See* Mem. Op. 19–22, Dkt. 227.

Moreover, when the Court originally granted Defendants' motion to stay the Magistrate Judge's Order, Defendants had *already* moved to dissolve the preliminary injunction, Dkt. 120, and in fact, the motion had been pending before the Court for eight months at that time. Accordingly, the possibility that Plaintiffs would lose the protection of the preliminary injunction was already before the Court. And even if Plaintiffs could be said to incur some harm from the continuation of the stay, it would pale in comparison to the Government's immediate and irreparable harm of being required to produce the underlying privileged documents that are currently being withheld under a stay in the Ninth Circuit, and the Court's "strong interest in consistency with the parallel proceeding in the Ninth Circuit." Mem. Op. 22, Dkt. 227.

D. The Length Of The Stay Does Not Warrant Lifting The Stay.

Fourth, although the Court noted that "the length of the stay should be brief, given that the Ninth Circuit heard oral argument on the issue on October 10, 2018," Mem. Op. 21, Dkt. 227, the passage of time since the Court's decision to enter the stay is not enough to justify lifting the stay where the stay has not been in place for an unreasonable amount of time. *See In re Mut. Funds Inv. Litig.*, 2011 WL 3819608, at *2 (granting a stay pending the outcome of a case that was ready to be argued on appeal, noting that "the length of the stay should not be inordinate," and maintaining the stay four months later, explaining that "[t]he same reasoning applies with even greater force to the instant case, as we are now less than one

month from the date of [the appellate] argument" and that "the duration of the requested stay here will be even shorter [than when the Court originally stayed proceedings]"); *Weidert v. Grounds*, No. 11-cv-00564, 2014 WL 555166, at *3 (N.D. Cal. Feb. 10, 2014) (granting a stay pending a decision by the Ninth Circuit where the Ninth Circuit heard argument six months ago and thus "an order is imminent"); *Vasvari*, 2010 WL 3328210, at *2 (staying proceedings where the related case was argued to the Third Circuit two months ago and "thus, a decision could be expected in the near future"); *Bais Yaakov of Spring Valley v. Peterson's Nelnet, LLC*, Civ. No. 11-0011, 2011 WL 4056318, at *2 (D.N.J. Sept. 12, 2011) (granting a stay for "a substantial period of time," where the Third Circuit postponed the en banc rehearing of the related appeal pending the Supreme Court's decision in another case and explaining that "the Court does not find [the length of the stay] excessive considering the likelihood that the Third Circuit's decision will resolve . . . issues presently in dispute"); *cf. In re Mut. Funds Inv. Litig.*, 2011 WL 3819608, at *4 n.6 (distinguishing *Doe v. Bayer Corp.*, 367 F .Supp. 2d 904, 916 (M.D.N.C. 2005), and explaining that the *Doe* court denied a requested stay when the lead case had not even published a schedule of proceedings and resolution of the case "could go on for years"). This is particularly true where, as here, the other factors weigh strongly in favor of maintaining the stay.

Plaintiffs argue that the Court should lift the stay because there is "no indication of when it will end" and "no party to this litigation is in a position to know the answer." Pls.' Mot. 4, Dkt. 239. Although it is true that neither the Court nor the parties can know when the Ninth Circuit will rule, this was also the case when the Court decided to enter the stay in the first instance.

E. The Stay Is In The Public Interest.

The Court should decline to lift the stay because the stay is in the public interest. "The

deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001). Disclosure of thousands of deliberative documents from DoD and the Services covering multiple military policies risks chilling future policy discussions on sensitive personnel and security matters that require free and frank communication within the highest ranks of DoD and the military. *See* Declaration of Robert Easton ("Easton Decl.") ¶ 17 (Nov. 5, 2018), Dkt. 225-1 (averring that "release of DoD information protected by the deliberative process privilege would have a substantial and immediate chilling effect on policy deliberation and development within DoD"); *see also* Declaration of Stephanie Miller (June 29, 2018), Dkt. 186-1. That is particularly so because DoD made a "commitment" to those involved in "deliberations regarding the sensitive topic of transgender service" that it would keep their opinions "confidential[]." Easton Decl. ¶ 20. If DoD were forced to "breach" that commitment, it "would irreparably harm DoD's ability to obtain candid and honest input on any subject in the future." *Id.* If subordinates are chilled from providing their candid views on future policy matters to the Secretary of Defense and military leaders, the overall quality of the decision-making process will be affected, potentially leading to a direct negative impact to national security. Such harm to the public interest should carry overwhelming weight. *Cf. GTSI Corp.*, 2009 WL 3245396, at *1; *Digital-Vending Servs. Int'l, LLC*, 2010 WL 11450510, at *3.

II. The Stay Is Appropriate Because Discovery Should Not Continue Until The Court Rules On Pending Motions Directly Affecting The Scope of Discovery.

Additionally, discovery should not continue until the Court rules on pending motions that raise threshold issues directly affecting the extent and scope of discovery in this case. Specifically, Defendants' Motion to Dissolve the Preliminary Injunction, Dkt. 120, and Motion

to Dismiss, or, in the Alternative, for Summary Judgment, Dkt. 158, argue that Plaintiffs' challenge to the President's August 2017 Memorandum is moot and address the merits of the new policy, explaining the proper standard of review and demonstrating that the new policy withstands scrutiny. Even a partial ruling in Defendants' favor on either motion could impact whether or to what extent any discovery should proceed and obviate the need to reach the motion to compel regarding the deliberative process privilege. Indeed, in the related case *Doe v. Shanahan*, No. 17-cv-1597 (D.D.C.), the district court denied without prejudice all pending discovery motions in light of the D.C. Circuit's ruling vacating the preliminary injunction and the Supreme Court's order staying the district courts' preliminary injunctions in *Trump v. Karnoski* and *Trump v. Stockman*. *See* Order, *Doe v. Shanahan*, No 17-cv-1597 (D.D.C. Jan. 30, 2019), Dkt. 188. The *Doe* Court explained that the D.C. Circuit's ruling "made statements potentially affecting the subjects for which discovery is permissible" and that the Supreme Court's order could also affect the scope of discovery. *Id.* at 1–2. Similarly, rulings on Defendants' motions pending before this Court could significantly alter the permissible scope of discovery in this case, or obviate the need for it entirely.

CONCLUSION

For these reasons, Defendants respectfully request that the Court deny Plaintiffs' Motion to Lift the Stay of Compliance with the Magistrate Judge's Memorandum Opinion and Order. If the Court is inclined to grant Plaintiffs' motion, Defendants respectfully request a stay of such an order for 14 days to allow the Government to consider appellate options and, if the Government seeks appellate relief, a continued stay pending the resolution of any appellate proceedings, including proceedings in the Supreme Court.

February 14, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2019, I served the foregoing Defendants' Response to Plaintiffs' Motion to Lift the Stay of Compliance with the Magistrate Judge's Memorandum Opinion and Order using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record. I further certify that I have arranged for a paper copy of this filing to be sent to the Court.

Dated: February 14, 2019

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