

compelled the Department of Defense (“DoD”), the Air Force, the Army, the Navy, and the Marines to disclose 330 deliberative documents concerning military personnel policies.¹

The Government is moving as expeditiously as possible to seek review by the District Court and, in compliance with Federal Rule of Civil Procedure 72(a), will file objections to the March 14 Order no later than March 28, 2019. In light of this schedule, Defendants and the Departments of the Air Force and Navy now move to stay the order pending resolution of the objections. Unless stayed, the March 14 Order will require the Department of Defense and the Military Services to disclose hundreds of privileged documents at the same time the Government is seeking meaningful review of the order. Absent a stay, the Government’s objections to disclosure of the deliberative materials will become moot. Because Defendants and the Departments of the Air Force and Navy would suffer irreparable harm absent a stay, and other relevant factors weigh in the Government’s favor, the Court should grant this motion for a stay of the March 14 Order pending the District Court’s review.

STANDARD FOR GRANTING A STAY

Pursuant to Local Rule 37(C), unless otherwise ordered, after the Court has ruled on a discovery motion, any production required by the Court shall be completed within eleven days after the entry of the order. Although the Local Rules do not set forth the standard for granting a stay of a Magistrate Judge’s order, the Court has broad discretion to stay proceedings as an incident to its power to control its own docket. *Clinton v. Jones*, 520 U.S. 681, 706–07 (1997)

¹ After the filing of Plaintiffs’ motion, the parties narrowed the number of documents sought by Plaintiffs to 335. *See* Dkt. 126. Thereafter, and before the March 14 Order issued, the Department of the Navy withdrew its claim of deliberative process privilege over five documents because those documents concerned a Navy Instruction that had issued during the pendency of this case.

(citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)); *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983). “[P]roper use of this authority calls for the exercise of judgment which must weigh competing interests and maintain an even balance.” *Williford*, 715 F.2d at 127 (quotation omitted). “The party seeking the stay must demonstrate a clear case of hardship or inequity, if there is even a fair possibility that the stay would work damage on another party.” *Weirton Steel Corp. Liquidating Tr. v. Zurich Specialties London, Ltd.*, No. 5:07CV122, 2009 WL 357888, at *1 (N.D.W. Va. Feb. 12, 2009) (quotation omitted). Along with balancing the harms to the parties, some courts in the Fourth Circuit have also considered the remaining factors applicable to injunctions, namely whether the party seeking the stay has made a showing of success on the merits and 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 Phx. 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”).

ARGUMENT

The Court should stay compliance with the March 14 Order because the four factors weigh in the Government’s favor.

A. The Government Will Suffer Immediate, Irreparable Harm Absent A Stay.

Compliance with the March 14 Order will result in the irreversible disclosure of hundreds of privileged documents covering multiple military policies. Because the disclosure

of documents and information cannot be undone, courts routinely grant stays in such contexts. For example, the Supreme Court regularly grants stays of disclosure orders in FOIA cases pending appeal. *See, e.g., HHS v. Alley*, 556 U.S. 1149 (2009); *DOJ v. Rosenfeld*, 501 U.S. 1227 (1991); *Dep't of Commerce v. Assembly of Cal.*, 501 U.S. 1272 (1991); *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1308–09 (1989) (Marshall, J., in chambers) (issuing stay in FOIA action and observing that disclosure of documents would moot defendant's ability to appeal, thereby resulting in irreparable injury). Lower courts do the same. *See, e.g., Hiken v. DoD*, No. C 06-02812 JW, 2012 WL 1030091, at *2 (N.D. Cal. Mar. 27, 2012); *People for the Am. Way Found. v. Dep't of Educ.*, 518 F. Supp. 2d 174, 177 (D.D.C. 2007) (collecting cases); *Center for Int'l Env'tl. Law v. Office of the U.S. Trade Representative*, 240 F. Supp. 2d 21, 22 (D.D.C. 2003); *Center for Nat'l Sec. Studies v. DOJ*, 217 F. Supp. 2d 58 (D.D.C. 2002). Courts also regularly grant stays of disclosures of materials covered by the attorney-client privilege. *See In re BankAmerica Corp. Secs. Litig.*, 270 F.3d 639, 641 (8th Cir. 2001) (after granting an emergency stay of the district court's order that directed disclosure of material covered by the attorney-client privilege, issuing a writ of mandamus that directed the court to vacate its disclosure order); *Herbalife Int'l, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 5:05CV41, 2006 WL 2560271, at *4 (N.D. W. Va. Sept. 5, 2006) (staying a magistrate judge's order compelling production of documents pending review of that order because "the documents may be found to be protected by the attorney-client privilege and/or the work product doctrine"). As courts have found, the Government's right to secure meaningful review is undermined if disclosure is required prior to a final decision:

Meaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable. Appellants' right of

appeal here will become moot unless the stay is continued pending determination of the appeals. 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.

Providence Journal Co. v. FBI, 595 F.2d 889, 890 (1st Cir. 1979); *see also In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008) (“Once 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). The March 14 Order requires disclosure of information that would reveal DoD's and the Service's internal deliberations concerning military policy, something that could never be undone, thus causing irreparable harm to Defendants and the Departments of the Air Force and the Navy. *See* Dkt. 111-1 (Bahdi Decl. ¶¶ 3-6); 111-2 (Beland Decl. ¶¶ 7-9); 111-3 (Ciminera Decl. ¶¶ 8-12); 111-4 (Huibregtse Decl. ¶¶ 8-10); 111-5 (Melillo Decl. ¶¶ 8-18); 111-6 (Shell Decl. ¶¶ 8-12); 116-2 (Ausprung Decl. ¶¶ 3-7).

B. Plaintiffs Will Not Be Harmed By A Stay.

Plaintiffs will not be harmed by a stay pending resolution of an appeal of the Magistrate Judge's production order. However, even if Plaintiffs could allege some harm from a stay, it would pale in comparison to the immediate and irreparable harm to the Government of producing the underlying privileged documents without the opportunity for further review. The First Circuit has previously considered the balance of harms within this specific context, reasoning that “[f]ailure to grant a stay will entirely destroy appellants' rights to secure meaningful review” while “the granting of a stay will be detrimental . . . only to the extent that it postpones the moment of disclosure assuming the [plaintiff] prevails by whatever period of time may be required for us to hear and decide the appeals.” *Providence Journal Co.*, 595 F.2d at

890. As a result, the First Circuit held that “[w]eighing this latter hardship against the total and immediate divestiture of appellants’ rights to have effective review in this court, we find the balance of hardship to favor the issuance of a stay.” *Id.*, see also *Hiken*, 2012 WL 1030091, at *2 (holding that the balance of harms “tips sharply” for defendants because their right to appeal would be moot if they had to disclose information, while a stay would only briefly postpone Plaintiffs’ access to that information). Accordingly, the balance of harms weighs heavily in the Government’s favor.

C. The Government Is Likely To Prevail On The Merits Of Its Objections.

Pursuant to Federal Rule of Civil Procedure 72(a), the district court “must . . . modify or set aside any part of the [Magistrate Judge’s] order that is clearly erroneous or contrary to law.” See also 28 U.S.C. § 636(b)(1)(A). “A court’s ‘finding is “clearly erroneous” when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Bruce v. Hartford*, 21 F. Supp. 3d 590, 593–94 (E.D. Va. 2014) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)) (citing *Harman v. Levin*, 772 F.2d 1150, 1152 (4th Cir. 1985)). “The standard of review for ‘contrary to law,’ however, is different.” *Perez v. Figi’s Cos., Inc.*, No. 5:15-CV-13559, 2016 WL 10100742, at *2 (S.D.W. Va. Feb. 26, 2016). “For questions of law, there is no practical difference between review under Rule 72(a)’s ‘contrary to law’ standard and a de novo standard.” *Id.* (quotation and alterations omitted); *Bruce*, 21 F. Supp. 3d at 594 (quotation omitted). The Court therefore “review[s] the factual portions of the Magistrate Judge’s order under the clearly erroneous standard, but . . . review[s] legal conclusions to determine if they are contrary to law.” *Bruce*, 21 F. Supp. 3d at 594 (citations omitted). “An order is contrary to law

‘when it fails to apply or misapplies relevant statutes, case law or rules of procedure.’” *S.E.C. v. Kramer*, 778 F. Supp. 2d 1320, 1327 (M.D. Fla. 2011) (quoting *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F.Supp.2d 70, 74 (N.D.N.Y. 2000)).

Respectfully, the Government is likely to succeed in its argument that the March 14 Order directing disclosure of hundreds of documents protected by the deliberative process privilege is contrary to law. The deliberative process privilege is a subset of executive privilege and protects from disclosure documents “reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). “[I]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny.” *National Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988) (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)).

The privilege is qualified and may be overcome if a litigant’s “need for the materials and the need for accurate fact-finding override the government’s interest in non-disclosure.” *FTC v. Warner Communc’ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); *Cipollone v. Liggett Grp. Inc.*, 812 F.2d 1400 (4th Cir. 1987) (table) (per curiam). In assessing a claim under the privilege, a court considers “1) the relevance of the evidence; 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 regarding contemplated policies and decisions.” *Warner Commc’ns*, 742 F.2d at 1161. The March 14 Order applied these factors to hundreds of documents, declaring that these considerations required disclosure of all documents withheld under the deliberative process privilege alone because such documents “may be admissible concerning the

government's intent and/or whether the expressed intent is pretextual. . . ." Order at 2–3.

Respectfully, this approach was contrary to law. Just as application of "the deliberative process privilege is . . . dependent upon the individual document and the role it plays in the administrative process," *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980), so too is the analysis undertaken in determining whether the privilege is overcome. The factors reflect the need for granular consideration of documents, as the precise balancing of those factors varies from document to document depending on their degree of relevance to plaintiffs' claims, the availability of other sources of evidence, and the chilling effect of disclosure on government deliberations. The decision to conduct the balancing *en masse*, rather than assessing specific documents or categories of documents, is contrary to law.

Respectfully, the March 14 Order contained further legal error in its holding that draft documents are not protected by the deliberative process privilege. Such drafts are the prototypical example of a document that is protected by the deliberative process privilege. *See, e.g., Nat'l Sec. Archive v. C.I.A.*, 752 F.3d 460, 463 (D.C. Cir. 2014) (noting that "a *draft* of an agency's official history is pre-decisional and deliberative, and thus protected under the deliberative process privilege." (emphasis in original)); *City of Virginia Beach, Va. v. U.S. Dep't of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993) ("[T]he deliberative process exemption protects 'recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.'" (citation omitted)).

Respectfully, the March 14 Order contained further error in the holding that the Government put its intent at issue merely by arguing there is a rational basis for its actions. The

Government's subjective intent cannot be put at issue in this way. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018). In *Hawaii*, the Supreme Court held that when the Government acts in the areas of national security or foreign affairs, its subjective intent is irrelevant so long as the Government's action "can reasonably be understood to result from a justification independent of unconstitutional grounds" based on the face of the challenged policy. 138 S. Ct. at 2420. To be sure, the Supreme Court applied a form of "rational basis review" in *Hawaii*, stressing that judicial "inquiry into matters of . . . national security is highly constrained." *Id.* at 2420 (citing *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976)). The Court explained that the central consideration in applying this deferential form of review is whether the policy at issue is "plausibly related to the Government's stated objective." *Id.* at 2420. Indeed, the Court stated that it would "uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.*

Here, DoD policy concerning the composition and the medical readiness of the fighting force is unquestionably related to national security, and DoD has released two Reports to Congress that set out in detail the legitimate military justifications supporting its policy. *See* Dkt. 53-2. The proper application of *Hawaii* requires the conclusion that discovery into Defendants' deliberative process for the purpose of determining intent is neither necessary nor appropriate in this case. Respectfully, because the March 14 Order did not follow the Supreme Court's holding in *Hawaii*, it is clearly contrary to law.

Moreover, even under rational basis review outside the military context, the Government's intent is irrelevant to Plaintiffs' claims, and so Plaintiffs' discovery of deliberative materials is not relevant to the inquiry into their causes of action. It is beyond dispute that, under

rational basis review, it is “constitutionally irrelevant [what] reasoning in fact underlay the legislative decision. . . .” U.S. *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (internal citation omitted). Indeed, when rational basis review applies, “a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation *unsupported by evidence* or empirical data.” *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)(emphasis added). The Court’s review only “require[s] that a purpose may conceivably or may reasonably have been the purpose and policy of the relevant governmental decisionmaker.” *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (quotation omitted); *see also, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2420-21 (2018) (stating that rational basis review is satisfied in the national security context unless “it is impossible to discern a relationship to legitimate state interests or...the policy is inexplicable by anything but animus.”); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (holding that under rational basis review a government classification “must be sustained if there is any reasonably conceivable state of facts that could provide a rational basis,” and “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.” (internal citations omitted)). Because evidence of the Government’s subjective intent in promulgating the challenged regulations is not relevant to any of Plaintiffs’ claims, intent is not at issue here, and it cannot outweigh the Defendants’ interest in frank and independent discussions regarding contemplated policies and decisions. *See Cipollone*, 812 F.2d at 1400 (quoting *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)).

D. A Stay Is In The Public Interest.

Disclosure of hundreds of deliberative documents from the DoD and the Military Services covering multiple policies plainly risks chilling ongoing and future policy discussions

on sensitive personnel matters that require free and frank communication within DoD and the Military Services. The deliberative process privilege exists because disclosure of deliberative documents chills the willingness of government officials to engage in “open, frank discussion between subordinate and chief concerning administrative action.” *Mink*, 410 U.S. at 87. Those risks are heightened where, as here, the challenged actions relate to military readiness and implicate sensitive and controversial issues. And the risks are exacerbated by the sweeping March 14 Order, which will indiscriminately expose every document remotely connected to the deliberative process.

Respectfully, the March 14 Order’s reference to the protective order illustrates the Court’s misunderstanding of the importance of the privilege to government deliberations. Privileges, including the deliberative process privilege, are not considered adequately protected by limiting disclosure to only adversaries in litigation. A protective order neither eliminates the chilling effect caused by disclosures of deliberative materials, nor does a protective order justify disregarding the Government’s interest in maintaining the documents’ confidentiality. *Cf. Perry v. Schwarzenegger*, 591 F.3d 1147, 1163–64 (9th Cir. 2010) (granting defendants’ mandamus petition and overruling a district court’s order compelling the defendants to produce documents whose disclosure threatened to “inhibit[] internal campaign communications that are essential to effective association and expression,” while emphasizing that “[a] protective order limiting dissemination of this information will ameliorate but cannot eliminate these threatened harms”). The privilege exists to shield deliberative discussions from discovery. *See Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1226 (10th Cir. 2007) (“Recognizing that officials will not communicate candidly among themselves if each remark is a potential item of discovery, the deliberative

process privilege is primarily designed to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government.” (quotations omitted)).

In particular, disclosure of deliberative material related to decisions of DoD and the Military Departments could diminish officials’ willingness to present their candid views in the future. If military officials are chilled from providing their candid views on future policy matters to the Secretary of Defense and Secretaries of the Military Departments—or as here, their views on policy matters *currently* under review and still under development—the overall quality of the decision-making process will be affected, potentially leading to a direct negative impact to national security. *See See* Dkt. 111-1 (Bahdi Decl. ¶¶ 3-6); 111-2 (Beland Decl. ¶¶ 7-9); 111-3 (Ciminera Decl. ¶¶ 8-12); 111-4 (Huibregtse Decl. ¶¶ 8-10); 111-5 (Melillo Decl. ¶¶ 8-18); 111-6 (Shell Decl. ¶¶ 8-12); 116-2 (Ausprung Decl. ¶¶ 3-7). Such harm to the public interest should carry overwhelming weight.

CONCLUSION

For the foregoing reasons, Defendants and the Departments of the Air Force and Navy respectfully request that the Court stay the March 14 Order pending the Court’s resolution of Defendants’ forthcoming Objections.

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