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' MOTION FOR RECONSIDERATION, MOTION TO CONTINUE TO STAY COMPLIANCE WITH THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER, AND REQUEST FOR AN ADMINISTRATIVE STAY

Pursuant to Federal Rule of Civil Procedure 54(b), Defendants respectfully request that the Court reconsider its Memorandum Opinion, Dkt. 227, and Order, Dkt. 228, overruling Defendants' Objections to the Magistrate Judge's Memorandum Opinion and Order, Dkt. 209. This motion is based upon the Ninth Circuit Court of Appeals' decision in *Karnoski v. Trump*, No. 18-35347, and *In re Donald J. Trump*, No. 18-72159, and the D.C. Circuit's decision and concurring opinions in *Doe v. Shanahan*, No. 18-5257. Defendants also respectfully request that the Court continue to stay the effect of the August 14, 2018 Magistrate Judge's Memorandum Opinion, Dkt. 204, and Order, Dkt. 205 (collectively, the "Discovery Order"), pending the Court's resolution of Defendants' Motion for Reconsideration, and appellate review, if any, of the Court's ruling on that motion. Finally, Defendants respectfully request that the Court grant an administrative stay of the effect of the Magistrate Judge's Discovery Order pending resolution of Defendants' motion to continue the stay. In support of this motion, Defendants rely on the below memorandum of points and authorities.

Defense counsel conferred with Plaintiffs' counsel regarding this motion, and Plaintiffs oppose this motion.

Date: June 27, 2019

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION, MOTION TO CONTINUE TO STAY COMPLIANCE WITH THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER, AND REQUEST FOR AN ADMINISTRATIVE STAY

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INTRODUCTION

Recent rulings in the related *Karnoski* and *Doe* litigation warrant this Court's reconsideration of its Memorandum Opinion and Order directing the disclosure of thousands of deliberative documents by the Department of Defense ("DoD") and the Military Services. These decisions make clear that principles of military deference apply in this case and that the Court may not undertake a singular analysis to overcome the deliberative process privilege, but must instead conduct the balancing test on a category-by-category basis. Because the Court's Memorandum Opinion and Order failed to apply deference to DoD's policy and erroneously conducted the balancing test *en masse* to determine that the deliberative process privilege had been overcome for thousands of Defendants' deliberative documents, the Court should reconsider its rulings in light of the recent decisions from the Ninth and D.C. Circuits in related challenges.

BACKGROUND

I. The Magistrate Judge's Discovery Order

On August 14, 2018, the Magistrate Judge granted Plaintiffs' Motion to Compel, Dkt. 177, granted in part and denied in part Defendants' Motion for a Protective Order, Dkt. 179, and dismissed as moot Plaintiffs' Motion for Judicial Determination of Privilege, Dkt. 178. *See* Mem. Op., Dkt. 204; Order, Dkt. 205. That sweeping order compelled the Department of Defense 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 the 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. 204. Based on this ruling, the Magistrate Judge also dismissed as moot Plaintiffs'

challenge of Defendants' clawback of an inadvertently produced document protected by the deliberative process privilege. *Id.* at 11. Finally, although the Magistrate Judge stayed discovery directed to the President pending the Court's resolution of Defendants' motion to dismiss the President as a party to the case, the Magistrate Judge appeared to permit Plaintiffs to seek discovery from other sources concerning presidential communications and deliberations. *Id.* at 10–11. The Discovery Order did not set a deadline for compliance. *See generally* Mem. Op., Dkt. 204; Order, Dkt. 205.

II. Litigation Following the Magistrate Judge's Discovery Order

Three days after the Magistrate Judge issued the Discovery Order, Defendants filed a Motion to Stay Compliance with the Magistrate Judge's Discovery Order pending the Court's resolution of Defendants' then-forthcoming Objections. Defs.' Mot., Dkt. 208. In the Motion to Stay, Defendants argued, among other things, that because the district court in the related *Karnoski* litigation had granted the plaintiffs' motion to compel many of the same deliberative documents, the Government had sought a writ of mandamus from the Ninth Circuit to prevent their disclosure, and the Ninth Circuit stayed the effect of the district court's order pending its consideration of the Government's petition, the Court should stay the Magistrate Judge's Discovery Order lest the majority of the Government's petition for a writ of mandamus in the Ninth Circuit be rendered effectively moot. *Id.* at 16–17; *see also* Defs.' Notice of Decision, Dkt. 217.

Defendants then filed Objections to the Magistrate Judge's Discovery Order. Dkt. 209. In the Objections, Defendants argued, among other things, that the Magistrate Judge's ruling is contrary to law because "the Magistrate Judge entirely ignored the Fourth Circuit's directive that this privilege should be evaluated under a balancing test on a document-by-document, or at least category by category, basis." Defs.' Objs. 1, Dkt. 209 (citing *Cipollone v. Liggett Grp. Inc.*, 812 F.2d 1400 (4th Cir. 1987) (table)); *see also id.* at 15–22. Defendants also argued that the Magistrate Judge failed to apply

the principles of military deference established by the Supreme Court. *Id.* at 2, 11–15. Defendants contended that the Magistrate Judge "compounded these errors by dismissing as moot the parties' dispute over one inadvertently produced and subsequently clawed back deliberative document, rather than conducting the appropriate balancing test to determine whether Plaintiffs had shown that their need for the document outweighed the harm of production." *Id.* at 1. Defendants also argued that the Magistrate Judge's decision permitting Plaintiffs to seek presidential materials from Defendants other than the President violated constitutional separation-of-powers principles. *Id.* at 1, 23–24. Finally, Defendants argued that several of the Magistrate Judge's factual findings were clearly erroneous, including the finding that DoD's policy is a "ban" on military service by transgender individuals. *Id.* at 24–28.

After Defendants filed the Motion to Stay and Objections to the Discovery Order, the parties filed a Joint Motion to Suspend Certain Deadlines, requesting that the Court suspend the discovery deadline "in the interest of judicial economy" because, at that time, the parties' cross-motions for summary judgment, Defendants' Motion to Stay Compliance with the Discovery 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 suspended the discovery deadline.[1] Order, Dkt. 213.

After the Court entered the order suspending discovery deadlines, and while Defendants' Motion to Stay and Objections to the Magistrate Judge's Discovery Order were pending before the Court, Plaintiffs filed a Motion to Set a Date Certain for Compliance with the Discovery Order. Pls.' Mot., Dkt. 222. Plaintiffs sought an order from the Court directing Defendants to produce deliberative documents subject to the Discovery Order within seven days. *Id.* at 4. In response, Defendants argued, among other things, that the Magistrate Judge should not set a date certain for

[1] The parties' cross-motions for summary judgment remain pending before the Court.

compliance with the Discovery Order because doing so would render Defendants' then-pending Motion to Stay moot. *See* Defs.' Resp. 1, 8, Dkt. 225.

III. The Court's Order

On November 30, 2018, the Court overruled Defendants' Objections to the Discovery Order. Mem. Op., Dkt. 227; Order, Dkt. 228. The Court determined that the Magistrate Judge did not act contrary to law when he failed to apply the *Cipollone* balancing test and instead applied *In re Subpoena Duces Tecum Served on Office of Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998), to conclude "that deliberative process privilege does not apply given that government intent 'is at the very heart of this litigation.'" Mem. Op. 6, 15–16, Dkt. 227. The Court then applied the *Cipollone* balancing test *en masse* to the thousands of deliberative documents and concluded that had the Magistrate Judge applied the *Cipollone* balancing test, "he would have reached the same conclusion." *Id.* at 16. Citing to a now-vacated ruling in the related *Karnoski* litigation, the Court further found that because *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), involved a facially neutral policy, the principles of deference outlined in *Hawaii* do not apply in this case. *Id.* at 16–17. Based on these findings, the Court also determined that the Magistrate Judge correctly concluded that the clawback dispute is moot. *Id.* at 17–18. And the Court found that the Magistrate Judge "did not err in granting the Protective Order only as to the President," but concluded that the Protective Order "encompass[es] communications both to and from the President."[2] *Id.* at 19. Finally, relying in part on the now-vacated district court opinion in *Karnoski*, the Court determined that the Magistrate Judge's factual findings were not clearly erroneous. *Id.* at 8–11.

In that same Order, the Court granted Defendants' Motion to Stay Compliance with the

[2] Because the Magistrate Judge granted Defendants' Motion for a Protective Order as to the President and because the Court "construes the Protective Order to encompass communications both to and from the President," Mem. Op. 19, Dkt. 227, Defendants do not seek reconsideration of the Court's Opinion as it relates to documents and information protected by the presidential communications privilege.

Discovery Order and denied as moot Plaintiffs' Motion to Set a Date Certain for Compliance with the Discovery Order. Mem. Op. 19–22, Dkt. 227; Order, Dkt. 228. In granting a stay of the Discovery Order pending the Ninth Circuit's resolution of the Government's mandamus petition, the Court recognized that "a higher court will issue a decision that may affect the outcome of the pending case" and exercised its "discretion to delay proceedings." Mem. Op. 20, Dkt. 227 (quoting *White v. Ally Fin. Inc.*, 969 F. Supp. 2d 451, 461–62 (S.D.W. Va. 2013)). The Court noted that the *Karnoski* case "raise[s] similar discovery issues," *id.* at 5 n.9, and found 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. The Court emphasized that it "has a strong interest in consistency with the parallel proceeding in the Ninth Circuit." *Id.* at 22.

IV. Recent Rulings by the D.C. Circuit and the Ninth Circuit

Since the Court entered its Order overruling Defendants' objections to the Magistrate Judge's Discovery Order, two circuit courts in related cases have ruled on issues either underlying or directly related to the discovery dispute here. In *Karnoski*, the Ninth Circuit found that the district court erred by conducting the balancing test *en masse* to overcome the deliberative process privilege—the same approach taken by the Court in this case. *Karnoski v. Trump*, No. 18-35347, 2019 WL 2479442, at *18–19 (9th Cir. June 14, 2019). In addition, the Ninth Circuit, along with the D.C. Circuit in the related *Doe* litigation, determined that principles of military deference as outlined in Supreme Court precedent apply in these cases. *Id.* at *15, 20; *Doe v. Shanahan*, 755 F. App'x 19, 24–25 (D.C. Cir. 2019) (per curiam).

A. The D.C. Circuit's Decision in the Related *Doe* Litigation

On January 4, 2019, the D.C. Circuit Court of Appeals reversed the district court's denial of Defendants' motion to dissolve the preliminary injunction in the related *Doe* case. *Doe*, 755 F. App'x at 22. The D.C. Circuit determined that any review of DoD's policy "must be 'appropriately

deferential' in recognition of the fact that the Mattis Plan concerned the composition and internal administration of the military." *Id.* at 25 (citing *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981)). Citing to *Hawaii* and *Rostker*, the D.C. Circuit further found that "the Executive's evaluation of the underlying facts is entitled to appropriate weight" and cautioned that "[c]ourts 'must be particularly careful not to substitute [their] judgment of what is desirable for that of [the executive and legislative branches], or [their] own evaluation of evidence for [their] reasonable evaluation' because '[i]t is difficult to conceive of an area of governmental activity in which the courts have less competence.'" *Id.* at 24–25 (quoting *Hawaii*, 138 S. Ct. at 2421–22; *Rostker*, 453 U.S. at 65, 68) (third, fifth, and sixth alterations in original).

In addition, the D.C. Circuit found that the district court "clear[ly] err[ed]" by making two erroneous factual findings: (1) "that the Mattis Plan was the equivalent of a blanket ban on transgender service"; and (2) "that the Mattis Plan was not a new policy but rather an implementation of the policy directives enjoined in October 2017." *Id.* at 23. With regard to the second point, the D.C. Circuit noted that the "government took substantial steps to cure the procedural deficiencies the court identified in the enjoined 2017 Presidential Memorandum." *Id.*

On March 8, 2019, two judges from the D.C. Circuit Panel, Judges Wilkins and Williams, issued separate opinions concurring with the Panel's January 4, 2019 judgment. Both concurring opinions expressed views as to whether and to what extent discovery should proceed in the underlying litigation. *See Doe v. Shanahan*, 917 F.3d 694, 704–05 (D.C. Cir. 2019) (Wilkins, J., concurring); *id.* at 736–37 (Williams, J., concurring in the result). Specifically, Judge Williams doubted "any evidence uncovered by those trial courts' explorations" into executive decision making would "be necessary—or even pertinent—to its disposition of the cases," *id.* at 736–37 (Williams, J., concurring in the result), and Judge Wilkins would limit discovery to an inquiry "about how military policies operated or what interests they served," *id.* at 706 (Wilkins, J., concurring).

When the D.C. Circuit issued its judgment, the *Doe* plaintiffs' motion to compel all documents withheld under the deliberative process privilege—similar to the motion filed by Plaintiffs in this case—had been pending before the *Doe* district court. *See* Pls.' Mot. to Compel, *Doe v. Esper*, No. 17-cv-1597 (D.D.C. Oct. 9, 2018), Dkt. 169. After the D.C. Circuit's judgment but before the issuance of the concurring opinions, the district court in *Doe* denied plaintiffs' motion without prejudice. Order 2, *Doe v. Esper*, No. 17-cv-1597 (D.D.C. Jan 30, 2019), Dkt. 188. The district court found that the D.C. Circuit "made statements potentially affecting the subjects for which discovery is permissible." *Id.* at 1. In light of the D.C. Circuit's judgment, the district court ordered the parties to confer about the "how the scope and breadth of permissible discovery is affected by the D.C. Circuit's determination that the Mattis Plan is not a continuation of the 2017 Presidential Memorandum but is instead a new plan." *Id.* at 2. Following the parties' conference and joint submission to the *Doe* court, the district court entered an order for further proceedings to resolve substantially narrower discovery disputes. *See* Minute Order, *Doe v. Esper*, No. 17-cv-1597 (D.D.C. Apr. 9, 2019).

B. The Ninth Circuit's Ruling in the Related *Karnoski* Litigation

On June 14, 2019, the Ninth Circuit Court of Appeals granted Defendants' petition for a writ of mandamus and vacated a district court order on a motion to compel similar to the motion Plaintiffs filed in this case.[3] There, the district court had ordered the Department of Defense to disclose "documents that have been withheld solely under the deliberative process privilege." *Karnoski v. Trump*, 328 F. Supp. 3d 1156, 1163 (W.D. Wash. 2018), *mandamus granted, order vacated*, No. 18-35347, 2019 WL 2479442 (9th Cir. June 14, 2019). And the Ninth Circuit vacated the district court's discovery order "so that the district court may reconsider Plaintiffs' discovery requests giving full consideration to the Executive's Article II prerogatives." *Karnoski*, 2019 WL 2479442, at *20. The Ninth Circuit

[3] As this Court recognized, "one of the issues on appeal [was] the applicability of [the] deliberative process privilege to documents that are similar to documents Plaintiffs seek in the instant case." Mem. Op. 20 n.12, Dkt. 227.

cautioned that the "deliberative process privilege[,] although not absolute, require[s] careful consideration by the judiciary." *Id.*

The Ninth Circuit held that "the district court did not adequately consider the weighty issues implicated by Plaintiffs' discovery requests" in two key ways. *Id.* at *19. First, the Ninth Circuit reiterated that to overcome the deliberative process privilege, the balancing test outlined in *FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984), must weigh in favor of the plaintiffs. *Id.* at *18–19. The Ninth Circuit found that "the existing record is not adequate to evaluate the relevance of all of the requested information, at least in terms of balancing production of materials against the military's countervailing confidentiality interest." *Id.* at *19. Noting that in *Hawaii*, the 12-page Proclamation "was sufficient to allow for judicial review," *id.* at *19 n.22, the Ninth Circuit questioned whether information concerning the basis of the August 2017 Presidential Memorandum was still relevant now that the 2018 DoD policy has been adopted, *id.* at *19. The Ninth Circuit found that appropriate course may be for the district court "to authorize discovery in stages when the current record is insufficient to establish relevance." *Id.* at *19. The Ninth Circuit further directed the district court to give "careful consideration" of the "military's interest in full and frank communication about policymaking" because that interest "raises serious—although not insurmountable—national defense interests." *Id.*

Second, the Ninth Circuit found that "the district court appears to have conducted a single deliberative process privilege analysis covering all withheld documents, rather than considering whether the analysis should apply differently to certain categories." *Id.* The Ninth Circuit directed that "in balancing the *Warner* factors, the district court should consider classes of documents separately when appropriate." *Id.*

In the same opinion, the Ninth Circuit also concluded that the district court erred in striking Defendants' motion to dissolve the preliminary injunction because the district court "failed to give

the 2018 Policy the thorough consideration due." *Id.* at *20. Similar to the D.C. Circuit's finding in *Doe*, the Ninth Circuit found that "the reasonableness of the 2018 Policy must be evaluated on the record supporting that decision and with the appropriate deference due to a proffered military decision." *Id.* Finally, even though the Ninth Circuit (incorrectly) concluded that "the 2018 Policy discriminates on the basis of transgender status on its face," *id.* at *14 n.18, the Ninth Circuit unequivocally stated that "the district court *must* apply appropriate military deference to its evaluation of the 2018 Policy," *id.* at *15 (emphasis added).

LEGAL STANDARDS

I. Reconsideration

Under Federal Rule of Civil Procedure 54(b), a district court may reconsider its decisions "at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). District courts grant reconsideration under Rule 54(b) "as justice requires." *Rybas v. Riverview Hotel Corp.*, No. ELH-12-03103, 2015 WL 11027598, at *2 (D. Md. Feb. 4, 2015) (quoting *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 227 (D.C. Cir. 2011)). "[A] court may revise an interlocutory order under the same circumstances in which it may depart from the law of the case: (1) a subsequent trial producing substantially different evidence; (2) a change in applicable law; or (3) clear error causing manifest injustice." *Carlson v. Boston Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017) (quoting *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003)). "Resolution of a motion to reconsider an interlocutory order is 'committed to the discretion of the district court,' with 'the goal . . . to reach the correct judgment under law.'" *Rybas*, 2015 WL 11027598, at *2 (quoting *Am. Canoe Ass'n*, 326 F.3d at 515; *Netscape Commc'n Corp. v. ValueClick, Inc.*, 704 F. Supp. 2d 544, 547 (E.D. Va. 2010)).[4]

[4] While Local Rule 105.10 provides that a motion for reconsideration of an order be filed within 14 days after entry of that order, this Court expressly stayed compliance of its Order of November 30, 2018 pending the outcome in *Karnoski* and thus contemplated further consideration of that order once

II. Stay

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 (1997) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)); *see also Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983); *Donnelly v. Branch Banking & Trust Co.*, 971 F. Supp. 2d 495, 501 (D. Md. 2013) (quoting *Landis*, 299 U.S. at 254). The Court considers the following factors when determining whether to grant a stay: "the length of the requested stay, the hardship that the movant would face if the motion were denied, the burden a stay would impose on the nonmovant, and whether the stay would promote judicial economy by avoiding duplicative litigation." *Donnelly*, 971 F. Supp. 2d at 501–02 (quoting *In re Mut. Funds Inv. Litig.*, No. MDL 1586, 2011 WL 3819608, at *1 (D. Md. Aug. 25, 2011)).

ARGUMENT

Based on the Ninth Circuit's and the D.C. Circuit's recent rulings, Defendants respectfully request that Court reconsider its Memorandum Opinion and Order overruling Defendants' Objections to the Discovery Order, and continue the stay of the Discovery Order pending final resolution of the Motion for Reconsideration. The Court plainly contemplated consideration of the Ninth Circuit's decision in *Karnoski* and thus should now take that decision into account. In addition, unless the Court continues the current stay in this case pending this Court's review of Defendants' Motion for Reconsideration, compliance with the Magistrate Judge's Discovery Order would require the Department of Defense and the Services to disclose thousands of privileged documents at the same time Defendants seek further review of the Discovery Order. An administrative stay of the Discovery Order pending resolution of Defendants' motion to continue the stay is also warranted to

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the *Karnoski* decision was issued. Because Defendants seek reconsideration based on that decision, which was issued more than 14 days after the Court's Memorandum Opinion and Order, Defendants could not have filed this motion within the 14 days contemplated by the Local Rule. Accordingly, that requirement should not apply here.

avoid potential litigation concerning the production of documents subject to the Magistrate Judge's Discovery Order while this motion is pending.

I. The Court Should Reconsider Its Memorandum Opinion and Order Based on the Ninth Circuit's and the D.C. Circuit's Opinions in the Related Litigation.

The Court should reconsider its Order overruling Defendants' Objections to the Magistrate Judge's Discovery Order based on the Ninth Circuit's decision in *Karnoski* and the D.C. Circuit's decision and concurring opinions in *Doe*. *See Carlson*, 856 F.3d at 325 (reconsideration may be based on change in the applicable law). The Ninth Circuit's opinion in *Karnoski* holds that the deliberative process privilege cannot be overcome *en masse*, and that opinion, as well as the D.C. Circuit's decision and concurring opinions in *Doe*, make clear that the Court should apply principles of military deference when evaluating DoD's policy. "Although these precedents are not binding upon this Court, the thorough analyses of analogous questions provided by the rulings proves persuasive" and are sufficient for the Court to find a change in applicable law warranting reconsideration. *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 741 (E.D. Va. 2018).

A. The Court Should Reconsider its Rulings Concerning the Deliberative Process Privilege.

1. Military Deference Principles Apply in this Case.

The Court should reconsider its prior finding that the deliberative process privilege does not apply as a matter of law on the ground that "intent" is at issue in this case. Mem. Op. 15–16, Dkt. 227. In making this finding, the Court primarily relied on *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998). *See id.* But the Ninth Circuit implicitly rejected that argument in *Karnoski*. The court of appeals acknowledged that the *Karnoski* plaintiffs had argued that under *In re Subpoena*, "the deliberative process privilege . . . does not apply where, as here, 'plaintiffs challenge the constitutionality of a government decision and allege animus or discriminatory intent,'" *Karnoski*, 2019 WL 2479442, at *9 (citation omitted), but nevertheless

instructed the district court to apply the privilege, subject to the balancing-test exception under *Warner*, *id.* at *18–19. And because the balancing test set forth in *Warner* is identical to and provided the basis for the balancing test set forth in *Cipollone*, the Ninth Circuit's conclusion should inform this Court's application of the *Cipollone* factors. *See Cipollone*, 812 F.2d at 1400 (quoting *Warner*, 742 F.2d at 1161). Thus, the Court should reconsider its Memorandum Opinion to apply the *Cipollone* (or *Warner*) balancing test as set forth below. *See infra* Part I.A.2.

That is particularly true because *In re Subpoena* did not involve a military policy concerning the composition of the fighting force, and thus that court did not apply the applicable deferential standard required to review challenges to military policies. *See Hawaii*, 138 S. Ct. at 2420 n.5; *see also Rostker*, 453 U.S. at 72–74. *Hawaii* illustrates that when the Governmental action concerns a national security or military matter, 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, 2420 n.5. Here, DoD's policy and its accompanying 44-page Report provide the justifications for the policy.

Relying on the district court's now-vacated decision in *Karnoski*, the Court previously concluded that "the deference afforded to the government's military policy in *Hawaii* does not apply in this case" because the policy in *Hawaii* was "facially neutral," whereas DoD's policy is not. Mem. Op. 16–17, Dkt. 227. But both the D.C. Circuit and the Ninth Circuit have now rejected this conclusion. The D.C. Circuit cited to *Hawaii* and held that any review of DoD's policy "must be 'appropriately deferential.'" *Doe*, 755 F. App'x at 24–25. Indeed, the D.C. Circuit noted that this deferential review of military policies is appropriate even in cases involving a "facially discriminatory" policy, such as the "sex-based draft-registration statute" at issue in *Rostker*. *Id.* at 25 (quoting *Rostker*, 453 U.S. at 79). The D.C. Circuit never concluded that DoD's policy was facially discriminatory and held that the district court "erred in finding that the Mattis Plan was a blanket transgender ban." *Id.*

at 24.

Concurring in the result, Judge Williams explained that because the military deference "standard of review reflects . . . separation of powers principles," "it is 'quite wrong' and 'palpably exceeds' [the court's] authority to 'undertake an independent evaluation of evidence, rather than adopting an appropriately deferential examination' of the political branches' 'evaluation of that evidence'"—"even when reviewing a facially discriminatory, gender-based classification." *Doe*, 917 F.3d at 719–20 (Williams, J., concurring in the result) (quoting *Rostker*, 453 U.S. at 81, 82–83) (alterations omitted) (citing *Hawaii*, 138 S. Ct. at 2421–22). "[F]acts—about the process leading up to the development of the Mattis policy—are irrelevant to the judicial analysis of military personnel policy dictated by Supreme Court authority." *Id.* at 736 (quotations, citation, and alterations omitted). Although Judge Wilkins disagreed with a categorical bar on further discovery, he would have carefully limited any discovery to inquiring "about how military policies operated or what interests they served." *Id.* at 706 (Wilkins, J., concurring). In his view, "[c]ompelling military or executive officials to explain the operation and purpose of [parts of the new policy] would not improperly intrude upon [the Executive Branch's] mental processes," because "[i]t is the decision-making process that requires shielding from public scrutiny, not the decision itself once it has been acted on." *Id.* at 705 (quotation omitted).

The Ninth Circuit likewise concluded that principles of military deference and *Hawaii* apply in this case. Even though the Ninth Circuit incorrectly concluded that "the 2018 Policy discriminates on the basis of transgender status on its face," *Karnoski*, 2019 WL 2479442, at *14 n.18—as opposed to the medical condition of gender dysphoria and the medical treatment of gender transition—that court still held that "the district court *must* apply appropriate military deference to its evaluation of the 2018 Policy," *id.* at *15 (emphasis added).

Accordingly, where both the D.C. Circuit and the Ninth Circuit have found that the deference

afforded to military policies under Supreme Court precedent applies in this case, the Court should reconsider its conclusion that *Hawaii* is inapplicable. In so doing, the Court should apply the deference afforded to the policy in *Hawaii* to DoD's policy, rule that the Government's subjective intent is not at issue, and review the policy based on the policy itself and its supporting 44-page Report rather than compel the Department of Defense and the Services to disclose thousands of deliberative documents.

2. The Deliberative Process Privilege Cannot Be Overcome *En Masse*.

The Court also should reconsider its finding that the *Cipollone* balancing test weighs in favor of disclosing thousands of deliberative documents from the Department of Defense and the Services. Mem. Op. 16, Dkt. 227. The four-factor balancing test outlined in *Cipollone* requires weighing "(1) the relevance of the evidence to the lawsuit; (2) the availability of alternative evidence on the same matters; (3) the government's role (if any) in the litigation, and (4) 'the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.'" 812 F.2d at 1400 (quoting *Warner*, 742 F.2d at 1161). In finding that the deliberative process privilege has been overcome, the Court conducted a single analysis covering thousands of documents withheld under the deliberative process privilege, rather than conducting the balancing test for specific documents or categories of documents. *See id.* But this singular analysis covering all of the deliberative materials is the same flawed analysis conducted by the district court in *Karnoski*. *See Karnoski*, 328 F. Supp. 3d at 1161–62.

As the Ninth Circuit held, this singular analysis fails to properly apply the *Warner* balancing test and is insufficient to give "adequate[] consider[ation] [to] the weighty issues implicated by Plaintiffs' discovery requests." *Karnoski*, 2019 WL 2479442, at *19. The balancing test set forth in *Warner* is identical to and provided the basis for the balancing test set forth in *Cipollone*, which the Court previously sought to apply. *See Cipollone*, 812 F.2d at 1400 (quoting *Warner*, 742 F.2d at 1161). But following *Karnoski* in conducting the balancing test, the "[C]ourt should consider classes of

documents separately when appropriate." *Karnoski*, 2019 WL 2479442, at *19. This is because "the analysis should apply differently to certain categories." *Id.* 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. Because the Court erred by conducting the *Cipollone* balancing test *en masse* rather than on a document-by-document or a category-by-category basis, the Court should reconsider its Memorandum Opinion based upon the guidance from the Ninth Circuit.

In reconsidering its Memorandum Opinion, the Court should likewise reconsider its findings on the first and fourth factors of the *Cipollone* balancing test. With regard to the first factor, the relevance of the information, *Cipollone*, 812 F.2d at 1400, the Court found that "the deliberative evidence Plaintiffs seek on government intent is highly relevant to the lawsuit because it may explain why the Government changed its policy on transgender service members and whether that policy change was motivated by a legitimate government interest," Mem. Op. 16, Dkt. 227. But as set forth above, the Government's subjective intent is not relevant in this case. *See supra* Part I.A.1; *Hawaii*, 138 S. Ct. at 2409. And even if the Government's intent were at issue, Plaintiffs have not met their burden to show that the thousands of deliberative documents they seek are relevant to the Government's intent. *See Heyer v. U.S. Bureau of Prisons*, No. 5:11-CT-03118-D, 2014 WL 4545946, at *3 (E.D.N.C. Sept. 12, 2014) ("The burden of showing an overriding need for the information rests with the party seeking it." (citation omitted)). For example, with regard to Plaintiffs' motion to compel deliberative material related to the August 2017 Presidential Memorandum, the Ninth Circuit questioned whether "information concerning the basis for the 2017 Memorandum [is] still relevant now that the 2018 Policy has been adopted." *Karnoski*, 2019 WL 2479442, at *19. In doing so, the Ninth Circuit noted that in *Hawaii*, the 12-page Proclamation at issue there—"'which thoroughly describes the process,

agency evaluations, and recommendations underlying the President's chosen restrictions'—was sufficient to allow for judicial review." *Id.* at *19 n.22 (quoting *Hawaii*, 138 S. Ct. at 2409). So too, here, the Department of Defense's 44-page Report accompanying Secretary Mattis's February 2018 Memorandum that thoroughly describes the basis for DoD's policy is sufficient to allow for judicial review of that policy.

More broadly, Plaintiffs' motion to compel implicates thousands of deliberative documents from across the Department of Defense and the Services involving communications among officials at different levels at different times with respect to different decisions. And the documents include not only communications involving the Secretary of Defense and his closest aides, but a host of lower-level communications throughout the Department and the Services, as well as other types of deliberative materials, including draft memoranda and PowerPoint presentations concerning potential courses of action. These documents are not susceptible to a one-size-fits-all analysis, like the analysis the Court undertook. *See id.* at *19 (directing the district court to undertake a "more granular analysis"); *Coastal States Gas Corp.*, 617 F.2d at 867; *In re United States*, 678 F. App'x 981, 987 (Fed. Cir. 2017) (noting "document-by-document" analysis required in assessing claims that the deliberative process privilege has been overcome).

Plaintiffs cannot credibly argue that all of these documents are relevant to their claims even under this Court's previous analysis. As just one example, emails among members of the working groups supporting the Panel of Experts would not "explain why the Government changed its policy on transgender service members and whether that policy change was motivated by a legitimate government interest," Mem. Op. 16, Dkt. 227, because these individuals did not serve on the Panel of Experts and did not create DoD's 2018 policy. Thus, even under the Court's prior analysis, the relevance of these documents, if any, is minimal.

In sum, Plaintiffs have not identified any particular category of documents over which they

have a substantial need, let alone provided any specific information regarding why their need for such a category of documents outweighs Defendants' interest in non-disclosure. Their failure to do so should preclude disclosure of any of Defendants' deliberative documents.

With regard to the fourth factor—"the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions,'" *Cipollone*, 812 F.2d at 1400 (quoting *Warner*, 742 F.2d at 1161)—the Court found that Defendants did not explain "why the chilling effect is particularly great in this case or why it is great enough to outweigh the other three *Cipollone* factors." Mem. Op. 16 n.10, Dkt. 227. Respectfully, however, Defendants did argue that Plaintiffs' motion "encompass[es], for instance, any candid advice given to Secretary Mattis by the Deputy Secretary of Defense on the topic of the transgender military service—plainly the sort of extremely sensitive advice the disclosure of which could diminish his subordinates' willingness to present their candid views to the Secretary in the future." Defs.' Objs. 19, Dkt. 209. Defendants further explained that "senior leaders of the Department of Defense and the military rely upon open and candid conversations between leadership, advisors, and policy analysts to advise and inform DoD policymakers across the military services on various courses of action for any decision, and that wholesale disclosure of deliberative materials would have a chilling effect on future deliberations regarding DoD personnel and other policies." Defs.' Reply 12, Dkt. 221; *see also* Decl. of Robert Easton, ¶¶ 17–21, Dkt. 225-1 (describing the chilling effect of disclosure of thousands of deliberative documents). "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 decisionmaking process will be affected, potentially leading to a direct negative impact to national security." Defs.' Objs. 19, Dkt. 209. In addition, Defendants cited to the declaration of DoD official Stephanie Miller, who explained the chilling effect of disclosing a deliberative document. *See* Defs.' Reply 12, Dkt. 221 (citing Miller Decl., Dkt. 186-1). As the Ninth Circuit found, these concerns "deserve[] careful consideration,

because the military's interest in full and frank communication about policymaking raises serious—although not insurmountable—national defense interests." *Karnoski*, 2019 WL 2479442, at *19. In accordance with the reasoning of the Ninth Circuit, this Court should reconsider its Memorandum Opinion to give "careful consideration" of the military's interest in non-disclosure. *Id.*

In their response to Defendants' Notice of Supplemental Authority, Plaintiffs argue that reconsideration is unnecessary because their motion to compel is distinguishable from the motion filed in *Karnoski*. *See* Pls.' Notice 1–2, Dkt. 256. Plaintiffs attempt to distinguish their motion to compel from the *Karnoski* motion to compel in two ways. *See id.* First, Plaintiffs contend that "[u]nlike the requests at issue in *Karnoski*, the requests at issue in this case are limited to the agency defendants (not the President)." *Id.* at 1. This is a distinction without a difference. The Ninth Circuit's analysis of the deliberative process privilege did not turn on whether the *Karnoski* plaintiffs sought deliberative materials from the President or the Department of Defense. *See Karnoski*, 2019 WL 2479442, at *18–19. Rather, that analysis turned on whether the district court properly conducted the balancing test. *See id.* As explained above, because the *Karnoski* district court conducted the balancing test *en masse* and failed to give "careful consideration" to the fourth factor (*i.e.*, "the military's interest in full and frank communication about policymaking"), the Ninth Circuit found that the district court's analysis was insufficient. *See id.* That analysis is plainly persuasive support for the Defendants' position in this case.

Second, Plaintiffs contend that "[u]nlike the requests at issue in *Karnoski*, . . . [their] requests have already been narrowed to three discrete categories of documents that are central to Plaintiffs' claims." Pls.' Notice 1-2, Dkt. 256. But the three categories of documents Plaintiffs moved to compel cannot remotely be characterized as "discrete." Plaintiffs moved to compel deliberative documents regarding: (1) the President's statements on Twitter in July 2017 and the August 2017 Presidential Memorandum; (2) the activities of the DoD's Panel of Experts and its working groups; and (3) the

February 2018 Memorandum issued by Secretary Mattis and the March 2018 Presidential Memorandum. Pls.' Mem. 2, Dkt. 177-3. These categories encompass thousands—if not tens of thousands—of documents pertaining to multiple military policies over a nine-month span. The only difference between Plaintiffs' broad categories and the *Karnoski* plaintiffs' demand for all deliberative documents is that Plaintiffs do not seek documents related to the Carter policy or Secretary Mattis's June 2017 decision to delay accessions under the Carter policy. But the remaining categories are simply too broad for the Court to conduct the necessary balancing test under *Cipollone*, especially because Plaintiffs failed to meet their burden to establish the relevance of all of these documents.

Plaintiffs further contend that that "[t]his Court already applied the four-factor balancing test and found that they favor disclosure of all of the three discrete categories of documents identified in Plaintiffs' Motion to Compel." Pls.' Notice 2, Dkt. 256. But the Court did not conduct the balancing test on a category-by-category basis even for the three broad categories Plaintiffs now seek. *See* Mem. Op. 16, Dkt. 227. Rather, the Court found that "the deliberative evidence Plaintiffs seek on government intent is highly relevant to the lawsuit because it may explain why the Government changed its policy on transgender service members and whether that policy change was motivated by a legitimate government interest." *Id.* Because the Court did not conduct the *Cipollone* balancing test even for Plaintiffs' three broad categories, reconsideration is appropriate under the reasoning set forth by the Ninth Circuit.

B. The Court Should Reconsider Its Finding That the Clawback Dispute Is Moot.

The Court found that "Plaintiffs' Motion for a Judicial Determination of Privilege Claims on the PowerPoint that Defendants seek to clawback is moot." Mem. Op. 17, Dkt. 227. This ruling is based upon the Court's finding the "deliberative process privilege does not apply to Plaintiffs' requested discovery." *Id.* at 17-18. But, for the reasons set forth above, the deliberative process privilege does apply as a matter of law in this case. *See supra* Part I.A. Therefore, the Court should

reconsider its conclusion that the clawback dispute is moot and conduct the *Cipollone* balancing test to determine whether Plaintiffs have overcome the deliberative process privilege for the PowerPoint.

As set forth fully in Defendants' sealed response to Plaintiffs' Motion, Plaintiffs fail to establish the relevance of the PowerPoint presentation (especially given that the PowerPoint was never presented or provided to the Panel of Experts or decisionmakers), there is ample other available evidence, and Ms. Miller's declaration explains why release of this document would risk chilling future policy discussions on sensitive personnel and security matters that require free and frank communication within DoD and the military. *See* Defs.' Resp. 10–15, Dkt. 186; Miller Decl. ¶ 12, Dkt. 186-1. Accordingly, the Court should reconsider its prior ruling and find that the PowerPoint is subject to the deliberative process privilege and that Plaintiffs are required to comply with Defendants' request for return of the PowerPoint, pursuant to the Court's Federal Rule of Evidence 502(d) Order, Dkt. 110.

C. The Court Should Reconsider Factual Findings Underlying Its Memorandum Opinion.

The Court should reconsider three factual findings underlying its Memorandum Opinion based on the rulings from the D.C. Circuit and the Ninth Circuit.

First, the Court found that DoD's policy "bans transgender persons from military service." Mem. Op. 10, Dkt. 227. But, as the D.C. Circuit found, DoD's policy is not "the equivalent of a blanket ban on transgender service" because it "allows some transgender persons barred under the military's standards prior to the Carter policy to join and serve in the military." *Doe*, 755 F. App'x at 23–24; *see also Doe*, 917 F.3d at 721–23 (Williams, J., concurring in the result) (explaining why the plaintiffs' assertion that DoD's policy is a transgender ban "is wrong"). In addition, although the Ninth Circuit noted that DoD's policy "bars many transgender persons from military service," *Karnoski*, 2019 WL 2479442, at *12 n.15, it noted that "there are significant substantive differences between the 2017 Memorandum and the 2018 Policy," *id.* at *13. For example, the "reliance

exemption . . . allow[s] at least some transgender service members to continue to serve and receive gender transition-related medical care." *Doe*, 755 F. App'x at 24; *see also Karnoski*, 2019 WL 2479442, at *13 (noting the inclusion of the reliance exemption in DoD's policy). In addition, "there are transgender persons who 'have served, and are serving, with distinction under the standards for their biological sex,'" and they may continue to do so under the new DoD policy. *Doe*, 755 F. App'x at 24.

Relying on the now-vacated *Karnoski* district court opinion, the Court also found that "requiring transgender persons who have not undergone transition to serve in their biological sex forces them to 'suppress the very characteristic that defines them as transgender in the first place.'" Mem. Op 11, Dkt. 227 (quoting *Karnoski*, 328 F. Supp. 3d at 1160 n.1). But "all of the reports supporting both the Carter Policy and the Mattis Plan . . . repeatedly state that not all transgender persons seek to transition to their preferred gender . . . and the Panel of Experts convened by Secretary Mattis observed that there are transgender persons who have served, and are serving, with distinction under the standards for their biological sex." *Doe*, 755 F. App'x at 24 (citation omitted). Indeed, as Judge Williams recognized, there is "no doubt that many transgender individuals can, do, and wish to serve in their biological sex," and the implementation handbook for the Carter policy and the RAND Report both acknowledge this fact. *Doe*, 917 F.3d at 722 (Williams, J., concurring in the result) (emphasis omitted).

Second, the Court found that "the circumstances regarding military readiness and deployability could not have changed so dramatically between 2016 and 2018 to warrant the creation of a new policy." Mem. Op. 9, 10, Dkt. 227. But as the D.C. Circuit recognized, DoD's policy resulted from the "creation of a panel of military and medical experts, the consideration of new evidence gleaned from the implementation of the [Carter] policy[,] . . . and a reassessment of the priorities of the group that produced the Carter Policy." *Doe*, 755 F. App'x at 23.

Finally, the Court found that the "Panel of Experts would not exist but for President Trump's

[July 2017] Tweets." Mem. Op. 9, Dkt. 227. But as Judge Williams recognized, "President Trump's July-August 2017 directives came a month *after*, and were *consistent with*, Secretary Mattis's *prior* memorandum" in June 2017 to delay accessions under the Carter policy. *Doe*, 917 F.3d at 729 (Williams, J., concurring in the result). Indeed, Secretary Mattis delayed accessions under the Carter policy in order to have "additional time to evaluate more carefully the impact" of that policy. *Id.* (quotation omitted).

Accordingly, based on these rulings by the D.C. Circuit and the Ninth Circuit, the Court should reconsider the factual findings underpinning its Memorandum Opinion.

II. The Court Should Continue to Stay Compliance with the Magistrate Judge's Memorandum Opinion and Order Because the Factors Weigh in Defendants' Favor.

A. Defendants Will Suffer Irreparable Harm Absent a Stay.

The Court should continue the stay of compliance with the Magistrate Judge's Discovery Order. Because the disclosure of documents and information cannot be undone, both this Court and the Ninth Circuit in the related *Karnoski* litigation have entered stays of discovery orders to preclude disclosure in the meantime. *See* Order, Dkt. 228; Order, *In re Donald J. Trump*, No. 18-72159 (9th Cir. Sept. 17, 2018), Dkt. 36 (granting stay of the *Karnoski* Court's order compelling discovery of thousands of deliberative documents). Indeed, courts routinely grant stays in such contexts.[5] *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);

[5] The Supreme Court regularly grants stays of disclosure orders in FOIA cases pending appeal. *See, e.g.*, *DOJ v. Rosenfeld*, 111 S. Ct. 2846 (1991); *Dep't of Commerce v. Assembly of the State of Cal.*, 112 S. Ct. 19 (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. Dep't of Def.*, 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); *Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Rep.*, 240 F. Supp. 2d 21, 22 (D.D.C. 2003); *Ctr. for Nat'l Security Studies v. DOJ*, 217 F. Supp. 2d 58 (D.D.C. 2002).

see also In re BankAmerica Corp. Sec. 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); *Weirton Steel Corp. Liquidating Tr. v. Zurich Specialties London, LTD.,* No. 5:07cv122, 2009 WL 357888, at *3 (N.D.W. Va. Feb. 12, 2009) (staying a magistrate judge's order requiring disclosure of privileged documents "until such time as Magistrate Judge Seibert conducts the *in camera* review and submits a report and recommendation to this Court, and this Court considers the matter further"); *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 would be undermined if disclosure were 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) ("[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). The Discovery 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* Easton Decl. ¶¶ 17–21, Dkt. 225-1 (describing the chilling effect of disclosure of thousands of deliberative documents); Miller Decl. ¶ 12, Dkt. 186-1 (explaining the chilling effect of the disclosure of one document) (filed under seal). Thus, until review of this document dispute is completed, the current

stay should remain in place.

B. Plaintiffs Will Not Be Harmed by a Stay.

On the other side of the balance, there is no meaningful harm to Plaintiffs simply by staying compliance pending review of Defendants' Motion for Reconsideration. The discovery deadlines are suspended in this case. Order, Dkt. 213. And Plaintiffs have moved for summary judgment, *see* 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). If Plaintiffs' assertion is credited, then a delay in Defendants' disclosure obligations could in no way prejudice Plaintiffs. Even assuming these materials are needed to litigate the merits of this case, if Plaintiffs ultimately prevail in this dispute, they would obtain the documents at issue.

And even if Plaintiffs could be said to incur some harm from a continued stay of the Discovery Order, it would pale in comparison to the Government's immediate and irreparable harm by being required to produce the underlying privileged documents before review is completed. As another court found in a similar situation:

> The granting of a stay will be detrimental to the Journal (and to the public's interest in disclosure) only to the extent that it postpones the moment of disclosure assuming the Journal 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; *see also Hiken v. Dep't of Def.*, 2012 WL 1030091, at *2 (N.D. Cal. Mar. 27, 2012) (finding that a stay would only briefly postpone Plaintiffs' access to that information pending completion of review). Accordingly, the balance of harms weighs heavily in Defendants' favor.

C. The Duration of the Stay is Appropriate.

Defendants seek a stay pending this Court's review of the Motion for Reconsideration and appellate review, if any. The stay will be of a reasonable length. *See Landis*, 299 U.S. at 256. Under the Local Rules, this motion will be fully briefed and pending before the Court within 28 days. *See*

L.R. 105.2. At that point, the stay will last only the period the Court requires to rule on the motion, as well as any further appellate review, if necessary.

D. A Stay Would Promote Judicial Economy.

A stay would promote judicial economy because it would avoid further litigation regarding the date of compliance with the Magistrate Judge's Discovery Order pending further review. A stay would avoid the same kind of expansive litigation here that occurred over the same deliberative process materials at issue in *Karnoski*. When the *Karnoski* district court denied Defendants' motion for a stay pending the Ninth Circuit's resolution of Defendants' petition for a writ of mandamus, Defendants filed an emergency stay motion in the Ninth Circuit. Emerg. Mot. for Stay, *In re Donald J. Trump*, No. 18-72159 (9th Cir. Aug. 23, 2018), Dkt. 20. After expedited briefing, the Ninth Circuit granted Defendants' motion and stayed the effect of the district court's order directing disclosure of all of Defendants' deliberative documents within ten days. Order, *In re Donald J. Trump*, No. 18-72159 (9th Cir. Aug. 27, 2018), Dkt. 24; Order, *In re Donald J. Trump*, No. 18-72159 (9th Cir. Sept. 17, 2018), Dkt. 36. The Court's entry of a stay would preclude the possibility of similar proceedings in this case.

III. The Court Should Enter an Administrative Stay.

The Court also should enter an administrative stay as needed, pending the Court's consideration of Defendants' Motion for Reconsideration and Motion to Continue the Stay. Otherwise, while this very motion to reconsider is pending, Plaintiffs may seek to file another motion to compel compliance while Defendants seek meaningful review of the Discovery Order. Such a course obviously would result in a significant waste of the parties' and the Court's resources while the Court considers the impact of the *Karnoski* and *Doe* decisions on its prior disclosure order.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court (1) reconsider its Memorandum Opinion and Order overruling Defendants' Objections, sustain Defendants'

Objections, and overrule the Magistrate Judge's Discovery Order; (2) continue to stay the effect of the Magistrate Judge's Discovery Order, pending the Court's resolution of Defendants' Motion for Reconsideration, and appellate review, if any, of the Court's ruling on that motion; and (3) grant an administrative stay of the effect of the Magistrate Judge's Discovery Order pending resolution of Defendants' Motion to Continue the Stay.

Date: June 27, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2019, I electronically transmitted the foregoing to the parties and the clerk of court for the United States District Court for the District of Maryland using the CM/ECF filing system. I further certify that I have arranged for a paper courtesy copy to be delivered to chambers.

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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

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION FOR RECONSIDERATION, MOTION TO CONTINUE TO STAY COMPLIANCE WITH THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER, AND REQUEST FOR AN ADMINISTRATIVE STAY

Upon consideration of Defendants' Motion for Reconsideration, Motion to Continue to Stay Compliance with the Magistrate Judge's Memorandum Opinion and Order, and Request for an Administrative Stay, it is ORDERED that Defendants' Motion is GRANTED.

DATED this _____ day of _____, 2019

_____
Hon. George L. Russell, III
United States District Judge