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' REPLY IN SUPPORT OF 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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In granting the extraordinary remedy of a writ of mandamus and vacating the district court's discovery order, the Ninth Circuit in the related *Karnoski v. Trump* litigation made clear both that the deliberative process privilege cannot be swept aside *en masse* over thousands of documents and that principles of military deference apply in these cases. Plaintiffs nevertheless argue that the Ninth Circuit's opinion somehow *supports* their case. But this Court undertook the same analysis that the Ninth Circuit rejected in *Karnoski*—namely, compelling disclosure of thousands of deliberative documents without conducting the balancing test for discrete categories of documents and without considering principles of military deference. Reconsideration of this ruling is therefore warranted.

In addition, the stay that was in effect during the pendency of the *Karnoski* mandamus petition should be extended to allow for "adequate[] consider[ation] [of] the weighty issues implicated by Plaintiffs' discovery requests." *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019). To do otherwise would result in disclosure of the privileged internal deliberations of the Department of Defense, the Department of Homeland Security, and the Military Services concerning military policy before resolution of the parties' dispute over privilege. Such disclosures cannot be undone.

ARGUMENT

I. The Court Should Reconsider Its Prior Order Directing Disclosure.

A. Reconsideration of the Order Directing Disclosure of All Deliberative Documents is Warranted Based on *Karnoski*.

Plaintiffs contend that "[t]he Court already applied the same balancing test Defendant argue the *Karnoski* decision mandates." Pls.' Opp. to Defs.' Mot. for Reconsideration 10, Dkt. 260 ("Pls.' Opp."); *see also id.* at 13–24. To the contrary, the Court applied the same balancing test that the *Karnoski* district court applied and that the Ninth Circuit squarely rejected. Both this Court and the *Karnoski* district court applied the balancing test set forth in *Cipollone v. Liggett Group, Inc.*, 812 F.2d 1400 (4th Cir. 1987) (table), and *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156 (9th Cir. 1984), *en masse* to the thousands of deliberative documents sought by the plaintiffs. *Compare* Mem. Op. 16, Dkt. 227, *with*

Karnoski v. Trump, 328 F. Supp. 3d 1156, 1161–62 (W.D. Wash. 2018), *mandamus granted*, *order vacated*, 926 F.3d 1180 (9th Cir. 2019). The Ninth Circuit concluded that the *Karnoski* district court erred in conducting this wholesale analysis, "hold[ing] that the district court did not adequately consider the weighty issues implicated by Plaintiffs' discovery requests." *Karnoski*, 926 F.3d at 1206. Specifically, the Ninth Circuit stated that "in balancing the *Warner* factors, the district court should consider classes of documents separately when appropriate." *Id.* Because this Court conducted the same wholesale analysis as the *Karnoski* district court, the Court should reconsider its opinion in light of the Ninth Circuit's opinion.

Implicitly acknowledging that the Court conducted one analysis for all of the deliberative documents, Plaintiffs now urge the Court to adopt their balancing of the *Cipollone* factors for their three broadly defined categories of documents. *See* Pls.' Opp. 13–24. A much more granular analysis is warranted here. *See Karnoski*, 926 F.3d at 1206. Although Plaintiffs purport to seek just "three" categories of deliberative materials "regarding the President's original July 2017 Tweets and August 2017 Memorandum," the "Panel of Experts and its working groups," and the so-called "Implementation Plan and the President's acceptance of the Plan,"[1] Pls.' Opp. 14, 16, 18, these enumerated categories are far too broadly defined for the Court to properly apply the *Cipollone* balancing test. Each of these categories comprises thousands of documents and communications generated and transmitted over the span of months by officials at varying levels in the Department of Defense, Department of Homeland Security, Army, Navy, Air Force, Coast Guard, Defense Health Agency, the National Guard Bureau, and the Office of the Chairman of the Joint Chiefs of Staff.

[1] A category of documents "regarding" a certain subject (or multiple subjects, as Plaintiffs have lumped two subjects even within their broad categories) is inherently broad. Indeed, courts similarly have recognized that a request for documents "relating to" a subject "is usually subject to criticism as overbroad since life, like law, is 'a seamless web,' and all documents 'relate' to all others in some remote fashion." *See Massachusetts v. HHS*, 727 F. Supp. 35, 36 n.2 (D. Mass. 1989).

These categories would include, for example, communications by lower-level officials who were not a part of the Panel of Experts, communications among Panel members, and communications to and from the ultimate decision-maker, the Secretary of Defense. And these communications span various topics, including analyses of the policy's effectiveness, development of key aspects of the policy such as the months of stability requirement, the personal experiences of commanders and transgender individuals regarding challenges faced by the policy, and discussions about how to address the practical logistics of gender transition when it comes to berthing, showers, and bathrooms. Moreover, each category of documents comprises various types of materials, including, for example, emails, calendars, thousands of pages of draft memoranda, briefs, meeting notes, spreadsheets, and PowerPoint presentations.

Because the categories contain various types of documents generated by officials at all different levels, the Court cannot conduct the *Cipollone* balancing test for even these three broad categories. Indeed, as the Ninth Circuit recognized, "[d]ocuments involving the most senior executive branch officials . . . may require greater deference" and may "also be the most relevant." *Karnoski*, 926 F.3d at 1206. Plaintiffs also seem to concede that the relevance of individual documents differs depending on the type of document at issue by listing various documents within their three broad categories in their opposition brief and for the first time make individualized arguments as to why those specific documents are relevant.[2] *See* Pls.' Opp. 14–15, 17, 18–21. In sum, because these documents simply

[2] Plaintiffs also attempt to argue the relevance of Interrogatories Nos. 31 and 32 and assert that Defendants refused to provide responses on the basis of the deliberative process privilege. Pls.' Opp. 4 n.1, 22. Defendants did object on that basis. Plaintiffs fail to mention that Defendants did not provide responses to these two interrogatories because Plaintiffs exceeded the number of interrogatories, inclusive of discrete subparts, that they may serve under Rule 33 of the Federal Rules of Civil Procedure. Plaintiffs did not timely challenge Defendants' objection. *See* L.R. 104.8(a) ("If a party who has propounded interrogatories or requests for production is dissatisfied with the response to them and has been unable to resolve informally (by oral or written communications) any disputes with the responding party, that party shall serve a motion to compel within thirty (30) days of the party's receipt of the response."). Thus, even if the deliberative process privilege could be overcome

are not susceptible to a one-size-fits-all analysis, the Court's prior balancing of the *Cipollone* factors is insufficient to overcome the deliberative process privilege for each and every document that falls within Plaintiffs' three broad categories. *See id.* And those categories are simply too broadly defined to properly conduct the *Cipollone* analysis.

Plaintiffs have not, however, moved to compel any particular document with their motion and indeed disclaimed any such intention to the Court. *See* Defs.' Opp. Exh. 4 (Email from Mitchell Kamin to Chambers of Judge Garbis (May 2, 2018)), Dkt. 177-32 (stating that "this is not a dispute about whether particular documents are privileged" but "whether the deliberative process privilege applies as a matter of law"). In fact, Defendants urged Plaintiffs on more than one occasion to identify specific documents or discovery responses to which Plaintiffs contest Defendants' privilege assertions, *see* Decl. of Courtney Enlow ¶ 2, Dkt. 177-28. But Plaintiffs refused to do so and instead filed a motion arguing that the deliberative process privilege does not apply in this case *as a matter of law*. *See* Pls.' Mot. to Compel 2, 10–14, Dkt. 177. Plaintiffs cannot effectively modify their original motion now to compel to seek *specific* documents. If Plaintiffs wish to seek to compel certain documents, they should file a motion pertaining to those documents. In the meantime, the prior motion to compel fails on its own terms and should be denied.

If the Court were nonetheless to consider Plaintiffs' *Cipollone* analyses regarding specific documents or their three broad categories of documents, that revised demand should be rejected. As to relevance, Plaintiffs argue that "the Ninth Circuit determined that 'the litigation may require the district court to consider the basis of the President's initial decision, as well as the 2018 policy,'" Pls.' Opp. 11–12. But they ignore that, in evaluating the relevance of requested information, the Ninth Circuit specifically queried whether "information concerning the basis for the 2017 Memorandum [is]

for those interrogatory responses, Defendants nevertheless would not be required to provide responses to these interrogatories.

still relevant now that the 2018 Policy has been adopted." *Karnoski*, 926 F.3d at 1206.[3] And the Ninth Circuit then "note[d] that in *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018), the [Supreme] Court held that '[t]he 12-page Proclamation—which thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions'—*was sufficient to allow for judicial review*." *Karnoski*, 926 F.3d at 1206 n.22 (emphasis added); *see also See* Defs.' Mot. for Reconsideration 8, 15, Dkt. 257-1 ("Defs.' Mot."). Plaintiffs attempt to brush aside this observation by arguing that *Hawaii* was not about discovery and that the Supreme Court considered extrinsic evidence. Pls.' Opp. 12–13. But as the Ninth Circuit noted, the Proclamation at issue in that case itself was sufficient to allow for judicial review. *Karnoski*, 926 F.3d at 1206 n.22. So too here, the Department of Defense's 44-page Report and Recommendations accompanying the 2018 policy is sufficient to allow for judicial review. *See* Defs.' Mot. 12–14.

Plaintiffs also provide no serious response to the chilling effect of the disclosure of tens of thousands of deliberative documents, a key factor in the balancing test. *See* Decl. of Robert Easton ¶¶ 11, 17–21, Dkt. 225-1 (describing the chilling effect of disclosure of thousands of deliberative documents); Decl. of Stephanie Miller ¶ 12, Dkt. 186-1 (explaining the chilling effect of the disclosure of just one document) (filed under seal). As the Ninth Circuit instructed, this "factor deserves careful consideration, because the military's interest in full and frank communication about policymaking raises serious—although not insurmountable—national defense interests." *Karnoski*, 926 F.3d at 1206. Instead of giving careful consideration to this factor, Plaintiffs again argue that "the deliberative process privilege is not available" in this case. Pls.' Opp. 22. But the Ninth Circuit rejected that argument in directing the *Karnoski* district court to apply the *Warner* balancing test to weigh plaintiffs'

[3] The Ninth Circuit noted that rather than consider whether the deliberative process privilege has been overcome for all deliberative documents, "the district court may wish to authorize discovery in stages when the current record is insufficient to establish relevance." *Karnoski*, 926 F.3d at 1206 n. 22.

need for the information against the chilling effect of disclosure. *See Karnoski*, 926 F.3d at 1206.

Plaintiffs also argue that Defendants should have specifically shown that some documents implicate a higher standard of sensitivity. Pls.' Opp. 24. DoD's declarant, however, *did* provide specific examples of documents that "reflect deliberations at the most senior levels of the Department." Easton Decl. ¶ 11 (stating that the privileged documents include "a draft letter to the President, reflecting the Secretary of Defense's thoughts and handwritten notes on the developing transgender policy" and "a memorandum that the Secretary received prior to his briefing from the Under Secretary of Defense for Personnel and Readiness and the Deputy Secretary of Defense on the recommendations from the Panel of Experts"). And, in any event, the disclosure of all the deliberative documents plainly would have a substantial and immediate chilling effect across the Department of Defense in future deliberations. As DoD's declarant explained:

> Decision-making within the Department of Defense relies on open and candid conversations between leadership, advisors, and policy analysts to advise and inform DoD policy makers across the military services on various courses of action for any decision. Due to the geographically dispersed nature of DoD activities and the high operational tempo with which many of the Department's activities are conducted, deliberative and pre-decisional conversations frequently occur over email. The compelled disclosure of such communications would directly and immediately impair the open and candid discussions occurring at both the operational and strategic level if participants knew that their thoughts, impressions, and opinions on various topics, both related to DoD transgender policy and other non-transgender policies, could be open to scrutiny, regardless of any judicial protective order or order permitting Defendants to claw back the deliberative documents.

Easton Decl. ¶ 17. Moreover, with regard to the policy concerning transgender individuals, DoD assured the members of the Panel of Experts and individuals who presented at the Panel meetings, including transgender service members, commanders of transgender service members, military medical professionals, and civilian medical providers that their input would be confidential and encouraged them to speak candidly. *Id.* ¶¶ 18–19. As DoD's declarant explained:

> Without assurance that their opinions on aspects of transgender policy would be protected from disclosure, individuals will be much more likely to withhold their participation and candid views in the future. This is especially true given the high-

> profile and controversial nature of this issue, as well as the allegations of discriminatory treatment made by Plaintiffs against DoD. Subject matter experts, including those with battlefield experience, will decline to lend their unique expertise for fear that they would be subject to unfair accusations and opprobrium. As a result, DoD's decision-making process would suffer because it would not benefit from the practical firsthand experiences of those most qualified to opine on unique aspects of military experience.

Id. ¶ 21. These weighty concerns deserve "careful consideration" before determining that the privilege has been overcome. *Karnoski*, 926 F.3d at 1207.

Plaintiffs argue that they cannot identify more discrete categories of documents because of alleged deficiencies in Defendants' privilege logs. *See* Pls.' Opp. 3, 24–27. But because Plaintiffs have not moved to compel more detailed privilege logs, the adequacy of Defendants' logs is not before the Court in this dispute.[4] In any event, Plaintiffs' brief belies this argument. Plaintiffs can, and did, identify specific documents in their opposition brief that they claim are relevant to their case. *See id.* at 14–15, 17, 18–21. In doing so, Plaintiffs quote from Defendants' privilege logs. *See id.* Thus, Plaintiffs plainly are able to identify specific documents and more discrete categories of documents than the three broad categories of documents they sought to compel.

Plaintiffs' ability to identify discrete categories of documents becomes even more apparent when the Court considers the procedure undertaken in the related case *Doe v. Esper*, No. 17-cv-1597 (D.D.C.), to address challenges to Defendants' privilege claims. In *Doe*, the plaintiffs identified four discrete categories of documents withheld under the deliberative process privilege and requested that Defendants waive their assertions of the privilege over those documents.[5] In response to that request

[4] Accordingly, this brief does not address the sufficiency of the privilege logs, aside from noting that to the extent there may be defects in the logs, it is a result of the broad discovery requests issued by Plaintiffs. *See Rein v. PTO*, 553 F.3d 353, 370 n.24 (4th Cir. 2009) ("Parties who frame massive and all-inclusive requests for documents should expect some fall-off from perfection when the agency responds.").

[5] This is the exact procedure that Defendants urged Plaintiffs here to undertake before they filed their motion to compel, but Plaintiffs refused to do so. *See* Enlow Decl. ¶ 2, Dkt. 177-28. Defendants "explained that if Plaintiffs identified specific documents, Defendants could review the documents to determine whether to perfect the deliberative process privilege over those documents or whether to

and in an effort to narrow the remaining discovery disputes in *Doe*, Defendants agreed to waive the deliberative process privilege over three categories of documents: (1) the official recommendations from the Military Services and the Surgeons General to then-Secretary Mattis related to the delay of the Carter accessions policy in June 2017; (2) emails between then-Secretary Mattis and third parties; and (3) the final versions of the briefing presentations given by the Panel of Experts to the Deputy Secretary of Defense, the Vice Chairman of the Joint Chiefs of Staff, and the Secretary of Defense.[6] *See* Minute Order, *Doe v. Esper*, No. 17-cv-1597 (D.D.C. Apr. 9, 2019); Tr. of Telephone Conf., *Doe v. Esper*, No. 17-cv-1597 (D.D.C. Apr. 9, 2019), Dkt. 202. This demonstrates that the identification of specific documents can lead to a narrowing of the overall dispute.

The *Doe* plaintiffs also requested that Defendants waive the deliberative process privilege over documents considered or generated by the Panel of Experts, as well as communications to or from members of the Panel regarding their work, drafts of the Panel's report communicated to any third parties, and communications that followed the submission of the Panel's report but predated the publication of the implementation plan. *See* Minute Order, *Doe v. Esper*, No. 17-cv-1597 (D.D.C. Apr. 9, 2019); *see also* Tr. of Telephone Conf., *Doe v. Esper*, No. 17-cv-1597 (D.D.C. Apr. 9, 2019), Dkt. 202. Although Defendants declined to waive the deliberative process privilege over this fourth category of documents, Defendants produced "*Vaughn* Indexes" to the *Doe* plaintiffs encompassing the documents in that fourth category so that the plaintiffs could review the indexes to determine which of those documents to move to compel. *See* Minute Order, *Doe v. Esper*, No. 17-cv-1597 (D.D.C. Apr. 9, 2019); *see also* Tr. of Telephone Conf., *Doe v. Esper*, No. 17-cv-1597 (D.D.C. Apr. 9, 2019), Dkt. 202.

withdraw the assertion of privilege over the documents with the goal of narrowing the dispute." *Id.* Thus, Plaintiffs' argument that "Defendants fail[ed] to propose an alternative categorical analysis" is unfounded. *See* Pls.' Opp. 24.

[6] Indeed, because of the cross-use agreement, Defendants produced these documents to Plaintiffs in this case as well.

The *Doe* plaintiffs then filed a motion to compel documents listed on the "*Vaughn* Index," which is pending before that Court. Pls.' Mot. to Compel, *Doe v. Esper*, No. 17-cv-1597 (D.D.C. June 6, 2019), Dkt. 216. This procedure in *Doe* also makes plain that Plaintiffs in this case had the ability to identify specific documents or discrete categories of documents to dispute, but simply chose not to do so.

For the first time in their opposition brief, Plaintiffs argue that Defendants' motion is undermined by a purported failure to submit a categorical privilege log. *See* Pls.' Opp. 24–27. Plaintiffs apparently believe that it is *Defendants'* burden to identify categories of privileged documents that should be subject to their motion to compel. Citing to *Karnoski*, Plaintiffs contend that it is Defendants' burden to "persuasively argue that a more granular analysis would be proper." Pls.' Opp. 26 (emphasis omitted). Plaintiffs misconstrue *Karnoski* and basic principles of civil discovery. The *Karnoski* court merely directed Defendants to explain why the balancing test "should apply differently to certain categories." *Karnoski*, 926 F.3d at 1206. Defendants have done so. As explained above, Plaintiffs' three broad categories encompass various types of documents generated by officials at varying levels of seniority in numerous agencies across a large time span and accordingly implicate different analyses that must be considered separately in the kind of analysis contemplated by *Karnoski*, *Cipollone*, and *Warner*. Plaintiffs' specific contention regarding Defendants' privilege logs lacks merit for similar reasons. Had Plaintiffs identified discrete categories, Defendants could have provided narrowed privilege logs for such discrete categories. As stated above, Defendants provided a "*Vaughn* Index" in *Doe* after the *Doe* plaintiffs identified a discrete category of documents in dispute. But in this case, despite repeated requests from Defendants that Plaintiffs identify discrete categories of documents, Plaintiffs refused to do so. *See* Enlow Decl. ¶ 2, Dkt. 177-28.

More fundamentally, it is *Plaintiffs'* motion to compel, and they bear the burden of identifying any specific documents or discrete categories of documents they seek to compel. Obligating Defendants to identify the categories of documents that Plaintiffs should seek to compel to support

their claims is backwards and not contemplated by the Ninth Circuit in *Karnoski*. Plaintiffs' failure to adequately support their motion to compel prevents the Court from being able to undertake the required balancing test under *Cipollone* and warrants reconsideration in favor of Defendants.

B. The Court Should Now Consider the Merits of the Clawback Dispute in Light of the *Karnoski* Decision.

In a footnote, Plaintiffs argue that the Court should not reconsider the clawback dispute because the Court should not reconsider its decision directing DoD to disclose all of its deliberative documents. *See* Pls.' Opp. 10 n.2. As an initial matter, the Court should decline to consider any argument raised only in a footnote and find that Plaintiffs have waived this argument. *See Sanders v. Callender*, 2018 WL 337756, at *7 n.5 (D. Md. Jan. 9, 2018).

If the Court does consider Plaintiffs' argument, it should be rejected. Consistent with the Ninth Circuit's ruling in *Karnoski*, the deliberative process privilege applies as a matter of law in this case, and the clawback dispute over a deliberative PowerPoint briefing is not moot. Thus, the Court must conduct the *Cipollone* balancing test to determine whether Plaintiffs have overcome the deliberative process privilege for the PowerPoint briefing at issue.

Plaintiffs criticize Defendants for restating the merits of the clawback dispute in Defendants' opening brief, arguing that referring to evidence previously presented to the Court does not warrant reconsideration. Pls.' Opp. 10 n.2. Again this contention is meritless. By finding that the clawback dispute was moot because the "deliberative process privilege does not apply to Plaintiffs' requested discovery," neither the Court nor the Magistrate Judge ever considered the merits of the dispute. *See* Mem. Op. 17–18, Dkt. 227; Mem. Op. 11, Dkt. 204. The Ninth Circuit's decision in *Karnoski* warrants reconsideration of that mootness decision, and because the Court did not previously undertake any analysis on the merits of the clawback dispute, it was appropriate for Defendants to restate the merits of the clawback dispute in the opening brief on reconsideration.

Plaintiffs provide no contrary argument on the merits of the clawback dispute. *See* Pls.' Opp.

10 n.2. Accordingly, Plaintiffs have waived this argument and the Court should find that the PowerPoint briefing is protected from disclosure under the deliberative process privilege. *See Belk, Inc. v. Meyer Corp.*, 679 F.3d 146, 152 n. 4 (4th Cir. 2012), *as amended* (May 9, 2012) (finding that a party had waived an issue by "fail[ing] to develop th[e] argument to any extent in its brief").

C. Plaintiffs Fail to Dispute that the Court Should Reconsider Factual Findings Underlying its Memorandum Opinion.

In Defendants' opening brief, Defendants also explained why the Court should reconsider three factual findings underlying its Memorandum Opinion based on the rulings from the D.C. Circuit and the Ninth Circuit. *See* Defs.' Mot. 20–22. Plaintiffs provide no argument to the contrary. Accordingly, Plaintiffs have waived the argument and the Court should reconsider its factual findings as set forth in Defendants' opening brief. *See Belk*, 679 F.3d at 152-53.

II. The Factors Weigh in Favor of Continuing the Stay of Compliance with the Magistrate Judge's Memorandum Opinion and Order.

A. Defendants Will Suffer Irreparable Harm Absent a Stay.

The Court should continue the stay of compliance with the Magistrate Judge's Discovery Order. As set forth in Defendants' opening brief, Defendants will suffer irreparable harm absent a stay because the disclosure of DoD's privileged internal deliberations concerning military policy cannot be undone. *See* Defs.' Mot. 22–23; *see also 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).

Plaintiffs' arguments that Defendants could simply claw back the documents later determined to be privileged, and that Defendants will not be harmed because the protective order bars Plaintiffs

from disclosing confidential information to the public, illustrate a fundamental misunderstanding of the importance of the deliberative process privilege. Privileges, including the deliberative process privilege, are not adequately protected by limiting disclosure to adversaries in litigation or by providing an opportunity to claw back inadvertently produced documents. A protective order and a 502(d) order neither eliminate the chilling effect created by disclosure of deliberative materials, nor justify disregarding the government's interest in maintaining the documents' confidentiality. *Cf. Perry v. Schwarzenegger*, 591 F.3d 1147, 1163–64 (9th Cir. 2009) (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").

Finally, Plaintiffs' argument that Defendants are not harmed simply because documents subject to the presidential communications privilege are not at issue is also quite wrong. The fact that another category of sensitive, privileged materials – presidential communications – is not presently at issue obviously does not justify immediate disclosure of other privileged materials. The documents presently at issue are DoD's privileged internal deliberations concerning military policy and are protected by the deliberative process privilege. As the Supreme Court has explained, 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." *EPA v. Mink*, 410 U.S. 73, 87 (1973). Those risks are heightened where, as here, the challenged action relates to military readiness and national security as well as implicates sensitive and controversial issues. Indeed, many of the documents at issue involve high-level discussions within DoD—documents where the government's interest in confidentiality and the risk of chilling future deliberations are at their highest. *See* Easton Decl. ¶¶ 11, 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); *see also Karnoski*, 926 F.3d at 1206 (noting that "[d]ocuments involving the most senior executive branch officials . . . may require greater deference").

B. Plaintiffs Will Not Be Harmed By a Stay.

There is no meaningful harm to Plaintiffs by staying compliance pending review of Defendants' Motion for Reconsideration. The discovery deadlines are suspended in this case, and Plaintiffs have moved for summary judgment, arguing that there is no genuine dispute of material fact in this case. *See* Defs.' Mot. 24. Indeed, Plaintiffs acknowledge that the documents are important to their case "*in the event* their pending motion for summary judgment is not granted." Pls.' Opp. 29 (emphasis added). Accordingly, it is clear that Plaintiffs do not have an immediate need for the documents at issue, since the Court has not yet ruled on Plaintiffs' motion for summary judgment.

Plaintiffs also argue that they are harmed because the preliminary injunction has now been stayed. As an initial matter, in granting Defendants' motion to stay the Magistrate Judge's Order in the first instance, the Court's reasoning makes no mention of the preliminary injunction. *See* Mem. Op. 19–22, Dkt. 227. Indeed, the possibility that Plaintiffs would lose the protection of the preliminary injunction was before the Court when the Court originally granted Defendants' motion to stay the Magistrate Judge's Order. At that point, Defendants had already moved to dissolve the preliminary injunction, Dkt. 120, and the motion had been fully briefed and pending before the Court for months. Despite this possibility, the Court granted Defendants' stay motion, concluding 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. Accordingly, the Court made clear that it intended to take the Ninth Circuit's decision into consideration before ordering Defendants to comply with the Magistrate Judge's Order. Until review

of this discovery dispute is completed, the current stay should remain in place. 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 privileged documents and the Court's "strong interest in consistency with the parallel proceeding in the Ninth Circuit." *Id.* at 22.

C. The Duration of the Stay is Appropriate.

Defendants seek a stay pending this Court's review of the Motion for Reconsideration, which is now fully briefed, and appellate review, if any. Plaintiffs argue that a stay is inappropriate because Defendants may seek mandamus review. Pls.' Opp. 30. But granting a stay to allow for any further review (if necessary) is plainly reasonable, *Landis v. N. Am. Co.*, 299 U.S. 256 (1936), particularly where Defendants face irreparable harm absent a stay for any appeal. *See supra* Section II.A; *cf. Karnoski*, 926 F.3d at 1207 (granting Defendants' petition for a writ of mandamus and vacating the district court's discovery order). Accordingly, possible delay caused by further appellate review, if any, would be outweighed by the harm to Defendants.

Plaintiffs also make much of the fact that several months have passed since this Court initially granted Defendants' motion for a stay. However, the Court made clear that it intended to take the Ninth Circuit's decision into consideration. *See* Mem. Op. 22, Dkt. 227 (explaining that "the Court has a strong interest in consistency with the parallel proceeding in the Ninth Circuit"). The Court has not yet had the opportunity to do so, given that (1) the Ninth Circuit only ruled several weeks ago; (2) the Ninth Circuit's mandate only issued nine days ago, *see Karnoski v. Trump*, No. 17-cv-01297 (W.D. Wash), Dkt. 352, confirming that the *Karnoski* plaintiffs would not seek further review; and (3) the instant motion for reconsideration, which Defendants filed less than two weeks after the Ninth Circuit ruled, was not fully briefed until now. Accordingly, the duration of the stay that Defendants now seek is appropriate.

D. A Stay Would Promote Judicial Economy.

Plaintiffs' argument that a stay would not promote judicial economy because "the *Karnoski* and *Doe* decisions have been issued" and there is thus no duplicative litigation is unavailing. Pls.' Opp. 31. Plaintiffs acknowledge that mandamus review is a possibility here—essentially replicating the proceedings that occurred in *Karnoski*. It makes little sense to risk going down that path in this case. And as Defendants previously explained, 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, which the Ninth Circuit granted. *See* Defs.' Mot. 25. Maintaining the stay of the Magistrate Judge's Order would avoid the need for the same kind of expansive litigation here.

III. The Court Should Enter an Administrative Stay.

For the reasons discussed in Section II, *supra*, the Court should enter an administrative stay as needed, pending the Court's consideration of Defendants' Motion for Reconsideration and Motion to Continue the Stay.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Defendants' motion, 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: August 16, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 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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