

**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 TO STAY COMPLIANCE  
WITH THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER**

Defendants respectfully request that the district court stay the effect of the Magistrate Judge's April 9, 2020 Memorandum Opinion, ECF No. 299, and Order, ECF No. 300, pending the Court's resolution of Defendants' forthcoming Objections to the Opinion and Order, which will be filed no later than April 23, 2020. Defendants further request that the stay extend for a reasonable period following the Court's decision on the Objections to allow the Solicitor General the opportunity to consider whether to seek appellate relief if the Court upholds the Opinion and Order in whole or in part. Defense counsel conferred with Plaintiffs' counsel regarding this motion, and Plaintiffs oppose a stay.

**INTRODUCTION**

On April 9, 2020, the Magistrate Judge granted Plaintiffs' Motion to Compel Supplemental Interrogatory Answers and Production, ECF No. 177. That order compelled the Department of Defense ("DoD") and the Military Services to disclose thousands of deliberative documents concerning military policies related to military service by transgender individuals and individuals diagnosed with gender dysphoria. Specifically, the Magistrate Judge ordered DoD and the

Services to disclose all documents from three sweeping categories: (1) deliberative materials regarding the President's July 2017 tweets and August 2017 memorandum on this topic; (2) deliberative materials regarding the activities of the DoD's Panel of Experts and related working groups studying this issue, and (3) deliberative materials regarding Secretary Mattis's February 2018 Memorandum to the President, DoD's Report and Recommendation accompanying it, and the President's March 2018 memorandum accepting those policies. Mem. Op. at 2, 7, 8 (Apr. 9, 2020), ECF No. 299.

The categories to be released under this Order are identical to those at issue in the Magistrate Judge's prior opinion and order of August 14, 2018. *See* ECF Nos. 204, 205. This Court stayed that opinion and order on Defendants' motion. *See* Order at 22 (Nov. 30, 2018), ECF No. 227 ("Stay Order"). A stay is also warranted here because, otherwise, the Magistrate Judge's Memorandum Opinion and Order would require the Department of Defense and the Services to disclose thousands of privileged documents at the same time Defendants seek meaningful review of the Memorandum Opinion and Order in this Court. That would result in irreparable harm to Defendants far exceeding any harm to Plaintiffs from a stay.

A stay is particularly warranted here because the categories of documents to be disclosed under the Opinion and Order overlap with an ongoing mandamus proceeding in the Ninth Circuit in *Karnoski v. Trump*. In issuing its prior Stay Order, the Court explained that a stay was warranted in light of ongoing mandamus proceedings in *Karnoski v. Trump* at the Ninth Circuit involving the same defendants and the same documents. *See* Stay Order at 19–22. After Defendants prevailed in that proceeding—with the Ninth Circuit issuing a writ of mandamus and vacating the district court's order disclosing deliberative documents *en masse*, *Karnoski v. Trump*, 926 F.3d 1180, 1208 (9th Cir. 2019)—this Court similarly vacated the Magistrate Judge's prior order, requiring the

Magistrate Judge to more carefully consider the deliberative process balancing test articulated in *Cipollone v. Liggett Group, Inc.*, 812 F.2d 1400 (table), 1987 WL 36515 (4th Cir. 1987) (per curiam). Mem. Op. at 10–11 (Sept. 3, 2019), ECF No. 267.

The same sequence of events has played out once again. The district court in *Karnoski* recently issued another overbroad order for the disclosure of thousands of deliberative documents, thousands of which are also encompassed by the Magistrate Judge’s Opinion and Order here. And once again, the Ninth Circuit has issued an administrative stay of the *Karnoski* district court’s order (although the court has not yet acted on the Government’s request for a stay pending disposition of the petition). *See* Order, *In re Trump*, No. 20-70365 (9th Cir. Feb. 13, 2020), ECF No. 3 (granting administrative stay). Absent a stay in this case, however, the Government would need to produce privileged documents at issue in the parallel Ninth Circuit mandamus proceeding encompassing deliberations at all levels of the DoD and Services, including the handwritten notes and mental impressions of the then-Secretary of Defense. Decl. of Robert Easton ¶ 11, ECF No. 225-1 (“Nov. 2018 Easton Decl.”). Disclosure pursuant to the Magistrate Judge’s order of large swaths of sensitive documents at issue in the Government’s pending mandamus petition at the Ninth Circuit, despite that court’s issuance of an administrative stay governing those documents, would be anomalous.

Defendants ask that the Court simply take the same approach it did previously in granting a stay while considering a production order concerning identical categories of information. Therefore, in the interest of consistency with prior proceedings in this case and in a sister circuit, because Defendants would suffer irreparable harm absent a stay, and because all other factors weigh in favor of a stay, the Court should grant Defendants’ motion for a stay of the Magistrate Judge’s Memorandum Opinion and Order pending this Court’s review and pending the Solicitor

General's consideration of whether to seek further relief in the Court of Appeals.

### **STANDARD FOR GRANTING A STAY**

Pursuant to Local Rule 301(5)(a), the effect of a magistrate judge's order is not automatically stayed upon the filing of Objections by one of the parties. Although the Local Rules do not set forth the standard for granting a stay of a magistrate judge's order, this Court has broad discretion to stay proceedings as an incident to its power to control its own docket. *Clinton v. Jones*, 520 U.S. 681, 706–07 (1997) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)); *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983). “[P]roper use of this authority calls for the exercise of judgment which must weigh competing interests and maintain an even balance.” *Williford*, 715 F.2d at 127 (internal quotation omitted).

The Court's consideration of whether to grant a stay is guided by the following factors: “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.” Stay Order at 20 (quoting *Donnelly v. Branch Banking & Trust Co.*, 971 F. Supp. 2d 495, 501–02 (D. Md. 2013)). Courts also consider whether the party seeking the stay has made a strong showing of success on the merits and whether a stay is in the public interest. *See, e.g., GTSI Corp. v. Wildflower Int'l, Inc.*, No. 1:09CV123 (JCC), 2009 WL 3245396, at \*1 (E.D. Va. Sept. 29, 2009).

### **ARGUMENT**

#### **I. The Court Should Stay Compliance For the Reasons It Previously Stayed a Substantially Similar Order from the Magistrate Judge.**

Consistent with its reasoning in staying a substantially similar prior deliberative process order from the Magistrate Judge, the Court should stay the Opinion and Order pending further review, particularly in light of the posture of the related case of *Karnoski v. Trump*.

The Magistrate Judge previously ordered production of the same three categories of documents at issue here, reasoning the deliberative process privilege did not apply in this litigation. Mem. Op. at 5–6 (Aug. 14, 2018), ECF No. 204. A similarly broad ruling was entered by the district court in *Karnoski*, following a similar motion to compel documents withheld under the deliberative process privilege. See Order at 11, *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. July 27, 2018), ECF No. 299 (ordering Defendants to disclose “documents that have been withheld solely under the deliberative process privilege”). Defendants filed a petition for a writ of mandamus in the Ninth Circuit and moved to stay compliance with the *Karnoski* court’s order pending appellate review, a stay the Ninth Circuit then granted. See Order, *In re Trump*, No. 18-72159 (9th Cir. Sept. 17, 2018), ECF No. 36.

This Court then stayed the Magistrate Judge’s prior deliberative process order in light of *Karnoski*. The Court reasoned that a stay would “promote judicial economy because the *Karnoski* defendants have appealed a similar motion to compel” and there was “significant overlap between the documents the *Karnoski* plaintiffs seek and the deliberative documents Plaintiffs seek in this case.” Stay Order at 21. The Court also recognized a “strong interest in consistency with the parallel proceeding in the Ninth Circuit.” *Id.* at 22. The Court further stated that the “length of the stay should be brief” given the pendency of Ninth Circuit proceedings. *Id.* at 21. And in balancing the harms of a stay, the Court recognized the burden on the Government of forcing disclosure of “deliberative documents that are currently being withheld under a stay in the Ninth Circuit.” *Id.* at 21–22.

The same sequence of events has played out again. As relevant here, the *Karnoski* district court recently ordered the disclosure of all deliberative documents responsive to a request for production seeking documents “relating or referring to the February 2018 Department of Defense

Report and Recommendations on Military Service by Transgender Persons.” *See* Order at 5–7, *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. Dec. 18, 2019), ECF No. 401; Order at 5–6, *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. Feb. 7, 2020), ECF No. 413. That request is so broad that it encompasses all deliberative documents from September 14, 2017 (the date the Panel of Experts was established) to February 22, 2018 (the date of DoD’s Report and Recommendation). Following the Government’s petition for a writ of mandamus, the Ninth Circuit has stayed that order pending further proceedings. Order, *In re Trump*, No. 20-70365 (9th Cir. Feb. 13, 2020), ECF No. 3. The Ninth Circuit has requested and received additional briefing from the parties but has not scheduled argument. *See* Order, *In re Trump*, No. 20-70365 (9th Cir. Feb. 13, 2020), ECF No. 4.<sup>1</sup>

Since that stay was issued, the Magistrate Judge issued an order covering large swaths of the same documents. Categories 2 and 3 of the Magistrate Judge’s Order—which encompass the activities of DoD’s Panel of Experts and related working groups, and Secretary Mattis’s Memorandum to the President dated February 22, 2018, along with the DoD’s Report and Recommendation accompanying it—together cover all documents responsive to the relevant request for production in *Karnoski* now at issue on appeal in that case. Thus, absent a stay, the Government’s mandamus petition could be effectively mooted as to that request.<sup>2</sup>

The Court should therefore stay the Magistrate Judge’s Opinion and Order in light of the *Karnoski* proceedings. Doing so would “promote judicial economy” because of the “significant overlap between the documents the *Karnoski* plaintiffs seek and the deliberative documents

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<sup>1</sup> Defendants provided the Magistrate Judge notice of the status of *Karnoski*. *See* Defs.’ Notice of Production of Documents and Notice of Supplemental Authority at 3–4, ECF No. 294.

<sup>2</sup> The current *Karnoski* mandamus petition also concerns an order regarding disclosure of deliberations on the prior administration’s policy on transgender military service, an order that is not relevant here.

Plaintiffs seek in this case.” *See* Stay Order at 21. It would also ensure this Court continues to respect the “strong interest in consistency with the parallel proceeding in the Ninth Circuit.” *See id.* at 21–22. And the same burden on the Government that previously warranted a stay, namely the forced disclosure of “deliberative documents that are currently being withheld under a stay in the Ninth Circuit,” *id.* at 21–22, also applies again here.

## **II. The Court Should Stay Compliance Because All Relevant Factors Weigh in Defendants’ Favor.**

The status of *Karnoski* and this Court’s prior treatment of a parallel circumstance militates in favor of a stay (and demonstrates that a stay would promote judicial economy). But even setting aside the status of that related litigation, a stay is warranted under all of the relevant factors.

### **A. The Balance of Harms Favors a Stay.**

First, the harm to Defendants of denying a stay far exceeds any harm to Plaintiffs of granting it.

As to Defendants, compliance with the Magistrate Judge’s Memorandum Opinion and Order would result in the irretrievable disclosure of thousands of privileged documents. Because the disclosure of documents and information cannot be undone, courts routinely grant stays in such contexts.<sup>3</sup> *See HHS v. Alley*, 129 S. Ct. 1667 (2009) (in a FOIA case, ordering stay of district court’s order directing agency to disclose records to plaintiff, pending final disposition of appeal,

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<sup>3</sup> 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); *Center for Int’l Env’tl. Law v. Office of the U.S. Trade Representative*, 240 F. Supp. 2d 21, 22 (D.D.C. 2003); *Center for National Security Studies v. DOJ*, 217 F. Supp. 2d 58 (D.D.C. 2002).

following denial of stay by court of appeals); *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); *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).

Unless stayed, the Magistrate Judge’s Memorandum Opinion and Order would require 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. Indeed, the Ninth Circuit has cautioned in the related *Karnoski* litigation that concerns about the deliberative process privilege are heightened in this case, because “the military’s interest in full and frank communication about policymaking raises serious . . . national defense interests.” *Karnoski*, 926 F.3d at 1206. Evidence before this Court supports that conclusion. *See Decl. of Robert Easton* ¶ 34, ECF No. 281-1 (“Oct. 2019 Easton Decl.”) (“If DoD personnel knew that their

thoughts, impressions, and opinions on various topics . . . would be open to scrutiny, they may hesitate to provide their true positions on potential courses of action,” an outcome that “would degrade DoD’s decision-making process and could expose the nation to greater overall risk”).

In contrast, there is no meaningful harm to Plaintiffs from staying compliance pending review of the Order. 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 stay of the Order, it would pale in comparison to the Government’s immediate and irreparable harm of sacrificing meaningful review by producing the underlying privileged documents. As another court found in a similar situation:

Failure to grant a stay will entirely destroy appellants’ rights to secure meaningful review. On the other hand, 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. Weighing this latter hardship against the total and immediate divestiture of appellants’ rights to have effective review in this court, we find the balance of hardship to favor the issuance of a stay.

*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 the balance of harms “tips sharply” for Defendants because their right to appeal would be moot if they had to disclose information, while a stay would only briefly postpone Plaintiffs’ access to that information).

Accordingly, the balance of harms weighs heavily in Defendants’ favor.<sup>4</sup>

**B. Defendants Are Likely To Prevail on the Merits of Their Objections.**

A stay is also warranted because Defendants are likely to prevail on the merits of their

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<sup>4</sup> This analysis also shows that a stay is in the public interest because the balance of harms analysis merges with analysis of the public interest when the Government is a party. *Cf. Nken v. Holder*, 556 U.S. 418, 435 (2009) (factor regarding harm to the opposing party and assessment of the public interest “merge” when the government is opposing a stay).

objections to the Magistrate Judge's Opinion and Order.

Pursuant to Federal Rule of Civil Procedure 72(a), the district court "must . . . modify or set aside any part of the [Magistrate Judge's] order that is clearly erroneous or contrary to law." *See also* 28 U.S.C. § 636(b)(1)(A); Local Civil Rule 301(5)(a). "A court's 'finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Bruce v. Hartford*, 21 F. Supp. 3d 590, 593–94 (E.D. Va. 2014) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)) (citing *Harman v. Levin*, 772 F.2d 1150, 1152 (4th Cir. 1985)). "The standard of review for 'contrary to law,' however, is different." *Perez v. Figi's Companies, Inc.*, No. 5:15-CV-13559, 2016 WL 10100742, at \*2 (S.D.W. Va. Feb. 26, 2016) (quotation omitted). "For questions of law, there is no practical difference between review under Rule 72(a)'s 'contrary to law' standard and a de novo standard." *Id.* (quotation omitted); *Bruce*, 21 F. Supp. 3d at 594 (quotation omitted). "An order is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *S.E.C. v. Kramer*, 778 F. Supp. 2d 1320, 1327 (M.D. Fla. 2011) (quoting *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F.Supp.2d 70, 74 (N.D.N.Y. 2000)).

Defendants are likely to succeed in their argument that the Magistrate Judge's Memorandum Opinion and Order directing disclosure of thousands of documents protected by the deliberative process privilege is clearly erroneous and contrary to law because, *inter alia*, the Magistrate Judge failed to adequately consider Plaintiffs' need for the information they seek, failed to give sufficient weight to the Government's interest in confidentiality, failed to follow this Court's express instructions, and based its ruling on clearly erroneous findings of fact.

In previously issuing the writ of mandamus in *Karnoski*, the Ninth Circuit emphasized that to establish the availability of an “exception” to the deliberative process privilege, plaintiffs must demonstrate that their “need for the materials and the need for accurate fact-finding override the government’s interest in non-disclosure.” *Karnoski*, 926 F.3d at 1206 (quoting *Federal Trade Commission v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (per curiam)). That interest in non-disclosure is particularly heightened in the context of this case because “the military’s interest in full and frank communication about policymaking raises serious . . . national defense interests.” *Id.* at 1206; *accord id.* at 1207. This Court found the Ninth Circuit’s analysis of the privilege “persuasive,” and directed that the Magistrate Judge “shall give due consideration to whether a document or category of documents require greater deference depending on who is involved.” Mem. Op. at 10–11 (Sept. 3, 2019), ECF No. 267.

The Magistrate Judge failed to conduct the requisite analysis.

First, the Magistrate Judge failed to evaluate the current record in determining whether Plaintiffs have established a sufficient need for additional disclosures. At the time of this Court’s opinion vacating the Magistrate Judge’s prior deliberative process order, Plaintiffs had obtained no documents revealing the deliberations of the Panel of Experts that recommended the policy at issue in this litigation. Since that time, as Defendants informed the Magistrate Judge, the Government has produced every deliberative document sent from, received by, generated by, presented to, or considered by the Panel. *See* Defs.’ Notice of Production, ECF No. 294. The Government produced the deliberative documents of the voting members of the Panel pursuant to an order by the court in the related *Doe v. Esper* litigation. Even though the government disagrees with that order, that court concluded that the plaintiffs there had overcome the deliberative process privilege for documents that were used or considered by the Panel in the development of the Mattis

policy. *Doe 2 v. Esper*, No. 17-1597, 2019 WL 4394842, at \*8–10 (D.D.C. Sept. 13, 2019). The Government also produced the deliberative documents of the sole non-voting member of the Panel pursuant to an order in *Karnoski*, despite disagreeing with the court’s conclusion.

Whatever the asserted need for privileged documents may have been before, it has been radically diminished by the disclosure of every aspect of the Panel’s deliberations. Under the Fourth Circuit’s *Cipollone* factors, as well as the Ninth Circuit’s decision in *Karnoski*, it was, at a minimum, incumbent on the Magistrate Judge to evaluate the current record and determine whether there is any aspect of it that fails to furnish an adequate basis for judicial review. Even then, if the record were found deficient in some respect, discovery would be properly tailored to that identified need.

The Magistrate Judge instead made no attempt to evaluate the new disclosures—it barely mentioned them in its analysis of the *Cipollone* factors. Defendants will demonstrate this was clear error and contrary to law. Indeed, in *Karnoski*, the Ninth Circuit observed that in *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018), the Supreme Court had “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. Plaintiffs here have received not merely 12 pages, but *nearly 50 thousand documents*, including all deliberations of the Panel of Experts that recommended the policy at issue and an unredacted copy of the 3,000-plus page certified Administrative Record. *See* Defs.’ Notice of Production, ECF No. 294; Oct. 2019 Easton Decl. ¶¶ 22. In denying a request for the same deliberative documents at issue here in Categories 2 and 3 of Plaintiffs’ motion, the court in the related *Doe* case stated that the *Doe* plaintiffs’ request for additional materials that were not provided to the Panel indicated that the plaintiffs were

impermissibly “fishing around.” Tr. of Telephone Conference, *Doe 2 v. Esper*, at 20:1–13 (D.D.C. Jan. 14, 2020), ECF No. 293-5. And the *Doe* court also denied the plaintiffs’ request for documents pre-dating the Panel of Experts (the same deliberative documents at issue here in Category 1 of Plaintiffs’ motion), finding that the “the relevant time-period for discovery is the development of the Mattis Plan.” *Doe 2*, 2019 WL 4394842, at \*1; *see also id.* at \*4 (“conclud[ing] that Plaintiffs’ discovery requests should focus on the development of the Mattis Plan, not on the development or delay of policies which came before”). Yet the Magistrate Judge made no mention of these findings.

Second, the Magistrate Judge’s disregard for DoD and the Services’ confidentiality interests is also contrary to law and clearly erroneous. As the Supreme Court has explained, 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). The existence of the privilege rests on “the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8–9 (2001). In providing direction to the district court, the Ninth Circuit in *Karnoski* stressed that “the military’s interest in full and frank communication about policymaking raises serious . . . national defense interests.” 926 F.3d at 1206.

Consistent with the foregoing, Defendants submitted a declaration to the Court establishing the relevance of these concerns in this case. *See, e.g.*, Oct. 2019 Easton Decl. ¶ 31 (“The release of these documents would have an immediate chilling effect on future deliberations across the Department. The DoD decision-making apparatus relies on open and candid conversations among leadership, advisors, and policy analysts to advise and inform DoD policy makers across the

Military Services on various courses of action for any decision.”); *id.* ¶ 34 (“The forced release of these types of delicate and candid communications would directly and immediately impair open and frank conversations at both the operational and strategic levels.”); *id.* ¶ 35 (in light of “DoD’s commitment to maintain the confidentiality of participants’ honest deliberations regarding the sensitive topic of transgender service,” disclosure would “irreparably harm DoD’s ability to obtain candid and open input on any subject in the future”). And Defendants have submitted declarations specifically identifying numerous documents subject to disclosure under Plaintiffs’ three categories that implicate these concerns, including the former Secretary of Defense’s own handwritten notes on a draft letter to the President. Nov. 2018 Easton Decl. ¶ 11; Oct. 2019 Easton Decl. ¶¶ 25, 26, 28 (citing examples in each category by Bates number and description).

Nonetheless, the Magistrate Judge summarily dismissed the Government’s concerns as “far-fetched.” Mem. Op. at 9–10 (Apr. 9, 2020), ECF No. 299. Defendants will establish that this conclusion cannot be squared with the foregoing authorities and evidence in the record.

Third, the Magistrate Judge failed to follow this Court’s instruction to “give due consideration to whether a document or category of documents requires greater deference depending on who is involved.” Mem. Op. at 10–11 (Sept. 3, 2019), ECF No. 267. To the contrary, the Magistrate Judge directed disclosure *en masse* while holding open the possibility that it might consider a motion for protective order if Defendants “have specific and well-defined objections based upon the *level* at which the documents were issued.” Mem. Op. at 11 (Apr. 9, 2020), ECF No. 299. It is unclear what scope of relief the Magistrate Judge intends with this procedure but it certainly does not accord with this Court’s express instruction to consider whether different categories of documents should receive greater deference before ordering disclosure. And it is inconsistent with relevant authorities indicating that the possibility of protective orders

is no solution to the chilling effects that can result from breach of the deliberative process privilege. *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1164 (9th Cir. 2009) (finding that “[a] protective order limiting dissemination” may “ameliorate but cannot eliminate” the chilling effects of disclosure).

Finally, Defendants will show that the Magistrate Judge’s Opinion and Order are based on clearly erroneous factual findings. The Magistrate Judge adopted the facts found in his prior opinion and order entered August 2018. Mem. Op. at 5 (Apr. 9, 2020), ECF No. 299. Those factual findings are clearly erroneous in light of the discovery produced in the intervening 18 months. For example, the Magistrate Judge found that a review of DoD’s policy on military service by transgender individuals and individuals diagnosed with gender dysphoria would not have occurred absent the President’s tweets and that “circumstances regarding readiness and deployability [could not] have changed so dramatically” between 2016 and 2018 to warrant the creation of a new policy. Mem. Op. at 6 (Aug. 14, 2018), ECF No. 204. But as Defendants informed the Magistrate Judge last fall, documents produced in discovery show that “senior military and civilian leaders in each of the Services, as well as the Surgeons General of the Services, had expressed concerns regarding aspects of the 2016 policy weeks before the President’s social media posts.” Oct. 2019 Easton Decl. ¶ 21 (citing documents by Bates number, including a May 2017 memorandum from the Secretary of the Air Force raising concern that “currently serving transgender members have had some significant readiness and deployment issues”). Defendants are likely to succeed in demonstrating it was clear error for the Magistrate Judge to rely on factual findings that have long since been overtaken by subsequent disclosures and events.

In sum, because the Magistrate Judge’s Memorandum Opinion and Order overlooks or

misapplies precedent and the law of this case, and is based on clearly erroneous factual findings, Defendants are likely to prevail on the argument that the Memorandum Opinion and Order should be vacated. This factor thus weighs in favor of granting a stay.

**CONCLUSION**

For the foregoing reasons, Defendants respectfully request that the Court stay the Magistrate Judge's Memorandum Opinion and Order pending the Court's resolution of Defendants' forthcoming Objections to the Opinion and Order. Defendants also ask that the stay extend for a reasonable period following the Court's decision on the Objections to allow the Solicitor General the opportunity to consider whether to seek appellate relief if the Court upholds the Opinion and Order in whole or in part.

Date: April 14, 2020

Respectfully submitted,

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Hon. George L. Russell, III

**[PROPOSED] ORDER GRANTING**  
**DEFENDANTS' MOTION TO STAY COMPLIANCE**  
**WITH THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND ORDER**

Upon consideration of Defendants' Motion to Stay Compliance with the Magistrate Judge's Memorandum Opinion and Order, it is ORDERED that Defendants' Motion is GRANTED and the effect of the Magistrate Judge's Memorandum Opinion and Order, ECF Nos. 299 and 300, is STAYED for no less than two weeks after the Court's resolution of Defendants' forthcoming Objections to the Magistrate Judge's Memorandum Opinion and Order.

DATED this \_\_\_\_ day of \_\_\_\_, 2020

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