

1 Defendants respectfully give notice to the Court of their compliance with the Court's
2 August 24, 2020 order regarding documents from the Department of Defense, Department of
3 Homeland Security, Department of the Army, Department of the Navy, Department of the Air
4 Force, and Coast Guard from the time period between January 11, 2018 and February 22, 2018
5 withheld pursuant to the deliberative process privilege. *See* Order of Aug. 24, 2020, Dkt. 569 at
6 1. As with the documents submitted for *in camera* review on August 28, 2020, *see* Dkt. 573, in
7 an attempt to narrow the dispute before the Court, and in light of this Court's instruction that
8 Defendants' submissions should be more limited and "more circumspect," 8/24/2020 Hr'g Tr.
9 10:22, and the short period of time the Court has afforded Defendants to formally assert the
10 deliberative process privilege over documents during this time period, Defendants have focused
11 their assertion of the deliberative process privilege over only the most sensitive documents at the
12 highest levels of the relevant agencies. Accordingly, Defendants have chosen to formally assert
13 the deliberative process privilege over 409 documents from the time period between January 11,
14 2018 and February 22, 2018. These documents are being provided to the Court for *in camera*
15 review accompanied by declarations from the relevant agencies formally asserting the
16 deliberative process privilege. The remaining documents from the period between January 11,
17 2018 and February 22, 2018 that were previously withheld exclusively pursuant to the
18 deliberative process privilege are being separately produced to Plaintiffs.

19 The Court's recent order required that the *in camera* submission "be accompanied by a
20 certification" by one of Defendants' counsel that attorneys of record have "personally reviewed
21 the documents" submitted. Order of Aug. 24, 2020, Dkt. 569. Insofar as this Order is intended
22 to require a formal assertion of the deliberative process privilege, Defendants are submitting
23 declarations from the relevant agencies formally asserting the privilege, consistent with the
24 principle that litigation counsel do not make formal assertions of the privilege on behalf of an
25 agency. *See* Declaration of Platte B. Moring, III, on behalf of the Department of Defense¹, Ex A

26 ¹ Two DoD documents—DoD00122597 and DoD00127103—appear twice in the Moring
27 Declaration because they fall into two of the categories identified in that declaration. For ease
28 of reference they also appear in the *in camera* submission twice in the order they appear in the
Moring Declaration.

1 of Carmichael Decl.; Declaration of Rear Admiral Brendan C. McPherson, U.S. Coast Guard, on
2 behalf of the Department of Homeland Security, Ex B of Carmichael Decl.; Declaration of
3 Colonel Jacqueline Emanuel, U.S. Army, on behalf of the Department of the Army, Ex C of
4 Carmichael Decl.; Declaration of Lieutenant Colonel Jacqueline M. Stingl, U.S. Air Force, on
5 behalf of the Department of the Air Force, Ex D of Carmichael Decl.; Declaration of Brian Judge,
6 on behalf of the Coast Guard, Ex E of Carmichael Decl.; *see Landry v. FDIC*, 204 F.3d 1125,
7 1135–36 (D.C. Cir. 2000) (requiring that a formal assertion of the privilege be made by a
8 sufficiently high official at the agency). These agency declarations specifically address each
9 document submitted to the Court and provide information necessary for the Court’s review.
10 Because the formal assertion of privilege in these declarations supersedes any prior privilege log,
11 Defendants have not submitted a further log today. Documents are described in the declarations
12 in the order they have been submitted for review. As required by the Court’s order, Defendants
13 are also submitting a separate declaration from undersigned counsel certifying that attorneys of
14 record in this case for the Department of Justice reviewed the documents submitted. *See*
15 Declaration of Andrew E. Carmichael; Order of Aug. 24, 2020.²

16 In light of Defendants’ efforts to narrow the dispute at issue discussed above, and the
17 short period of time the Court afforded Defendants to formally assert the deliberative process
18 privilege over documents in the relevant time period, Defendants will not formally assert the
19 deliberative process privilege over the remaining documents between January 11, 2018 and
20 February 22, 2018. Accordingly, these remaining documents are being separately produced to
21 Plaintiffs. This disclosure of documents is consistent with the approach Defendants have
22 routinely applied in this case and others, insofar as Defendants have attempted to focus their
23 assertions of the deliberative process privilege when limited categories of documents are at issue.
24 *See, e.g.*, 7/21/2020 Hr’g Tr. 16:5–6 (explaining that in the related *Doe* case, the plaintiffs sought

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26 ² A portion of the documents produced *in camera* to the Court as well as a portion of
27 documents produced to the Plaintiffs contain redactions to preserve the attorney client and
28 attorney work product privileges and Defendants’ ability to formally assert the presidential
communications privilege. *See, e.g.*, Moring Decl. ¶¶ 11, 17, 30.

1 narrow categories of documents, and the Government “waive[d] the privilege” over certain
2 deliberative documents “in order to narrow the scope of the dispute”). Rather than consider
3 sweeping categories of deliberative documents wholesale, Defendants have repeatedly urged that
4 the parties should negotiate and litigate over individual documents (or narrow categories) for
5 which Plaintiffs have identified a particular need related to their claims. Those documents should
6 be the focus of any privilege disputes.

7 Although Defendants make further disclosures today as discussed above, they
8 nonetheless maintain their continued objection that Plaintiffs have not established the relevance
9 of the documents at issue—let alone that those documents would further their claims—which
10 should be a basic requirement before Defendants are required to formally invoke the deliberative
11 process privilege or otherwise disclose documents.

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13 Dated: September 4, 2020

Respectfully submitted,

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