



1 Defendants respectfully give notice to the Court of their compliance with the Court's  
2 September 29, 2020 Order regarding documents from the Department of Defense, Department  
3 of Homeland Security, Department of the Army, Department of the Navy, Department of the Air  
4 Force, and Coast Guard from the time period between July 26, 2017 and September 14, 2017  
5 withheld solely pursuant to the deliberative process privilege. See Order of Sep. 29, 2020, Dkt.  
6 617 at 2. As with the documents submitted for *in camera* review on August 28, 2020, see Dkt.  
7 573, and September 4, 2020, see Dkt. 597, in an attempt to narrow the dispute before the Court,  
8 and in light of this Court's instruction that Defendants' submissions should be more limited and  
9 "more circumspect," 8/24/2020 Hr'g Tr. 10:22, and the short period of time the Court has  
10 afforded Defendants to formally assert the deliberative process privilege over documents during  
11 this time period, Defendants have focused their assertion of the deliberative process privilege  
12 over only the most sensitive documents at the highest levels of the relevant agencies.  
13 Accordingly, Defendants have chosen to formally assert the deliberative process privilege over  
14 137 documents from the time period between July 26, 2017 and September 14, 2017. These  
15 documents are being provided to the Court for *in camera* review accompanied by declarations  
16 from the relevant agencies formally asserting the deliberative process privilege. The remaining  
17 documents from the period between July 26, 2017 and September 14, 2017 that were previously  
18 withheld exclusively pursuant to the deliberative process privilege are being separately produced  
19 to Plaintiffs.

20 The Court's recent order required that the *in camera* submission "be accompanied by a  
21 certification" by one of Defendants' counsel that attorneys of record have "personally reviewed  
22 the documents" submitted. Order of Aug. 24, 2020, Dkt. 569; see also Order of Sep. 29, 2020,  
23 Dkt. 617. Insofar as this Order intended to require a formal assertion of the deliberative process  
24 privilege, Defendants are submitting declarations from the relevant agencies formally asserting  
25 the privilege, consistent with the principle that litigation counsel do not make formal assertions  
26 of the privilege on behalf of an agency. See Declaration of Robert Easton, on behalf of the  
27 Department of Defense, Ex. A of Carmichael Decl.; Declaration of Brian Judge, on behalf of the  
28 Coast Guard, Ex. B of Carmichael Decl.; see *Landry v. FDIC*, 204 F.3d 1125, 1135–36 (D.C.

1 Cir. 2000) (requiring that a formal assertion of the privilege be made by a sufficiently high  
2 official at the agency). These agency declarations specifically address each document submitted  
3 to the Court and provide information necessary for the Court’s review. This formal assertion of  
4 privilege in these declarations supersedes any prior privilege log. However, Defendants have  
5 still provided a privilege log to accompany this declaration as required by the Court. *See* Ex. C  
6 of Carmichael Decl.; Order of Sep. 29, 2020 at 2-3. Documents are described in the declarations  
7 in the order they have been submitted for review. As required by the Court’s order, Defendants  
8 are also submitting a separate declaration certifying that attorneys of record in this case for the  
9 Department of Justice reviewed the documents submitted. *See* Declaration of Andrew E.  
10 Carmichael; Order of Aug. 24, 2020; Order of Sep. 29, 2020.<sup>1</sup>

11 In light of Defendants’ efforts to narrow the dispute at issue discussed above, and the  
12 short period of time the Court afforded Defendants to formally assert the deliberative process  
13 privilege over documents in the relevant time period, Defendants will not formally assert the  
14 deliberative process privilege over the remaining documents between July 26, 2017 and  
15 September 14, 2017. Accordingly, these remaining documents have been separately produced  
16 to Plaintiffs on October 7, 2020 (with a small remainder that will be produced today). This  
17 disclosure of documents is consistent with the approach Defendants have routinely applied in  
18 this case and others, insofar as Defendants have attempted to focus their assertions of the  
19 deliberative process privilege when limited categories of documents are at issue. *See, e.g.*,  
20 7/21/2020 Hr’g Tr. 16:5–6 (explaining that in the related *Doe* case, the plaintiffs sought narrow  
21 categories of documents, and the Government “waive[d] the privilege” over certain deliberative  
22 documents “in order to narrow the scope of the dispute”). Rather than consider sweeping  
23 categories of deliberative documents wholesale, Defendants have repeatedly urged that the  
24 parties should negotiate and litigate over individual documents (or narrow categories) for which

25 <sup>1</sup> A portion of the documents produced *in camera* to the Court as well as a portion of  
26 documents produced to the Plaintiffs contain redactions to preserve the attorney client and  
27 attorney work product privileges and Defendants’ ability to formally assert the presidential  
28 communications privilege. *See, e.g.*, Easton Decl. ¶ 8. Additionally, documents wholly subject  
to any of these other privileges have been withheld in full.

1 Plaintiffs have identified a particular need related to their claims. Those documents should be  
2 the focus of any privilege disputes.

3 Although Defendants have made further disclosures this week as discussed above, they  
4 nonetheless maintain their continued objection that Plaintiffs have not established the relevance  
5 of the documents at issue—let alone that those documents would further their claims—which  
6 should be a basic requirement before Defendants are required to formally invoke the deliberative  
7 process privilege or otherwise disclose privileged documents, particularly where the Ninth  
8 Circuit has specifically questioned the relevance of documents pre-dating the Panel of Experts.  
9 *Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019) (“For example, is information  
10 concerning the basis for the 2017 Memorandum still relevant now that the 2018 Policy has been  
11 adopted?”).

12 Dated: October 9, 2020

Respectfully submitted,

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