

1 Defendants respectfully give notice to the Court of their compliance with the Court's
2 October 28, 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 November 18, 2017 and January 11, 2018
5 withheld solely pursuant to the deliberative process privilege. See Order of Oct. 28, 2020, Dkt.
6 629 at 2. As with the documents submitted for *in camera* review on August 28, 2020, see Dkt.
7 573, September 4, 2020, see Dkt. 597, October 9, 2020, see Dkt. 622, October 30, 2020, see Dkt.
8 631, and November 13, 2020, see Dkt. 637, in an attempt to narrow the dispute before the Court,
9 and in light of this Court's instruction that Defendants' submissions should be more limited and
10 "more circumspect," 8/24/2020 Hr'g Tr. 10:22, and the short period of time the Court has
11 afforded Defendants to formally assert the deliberative process privilege over documents during
12 this time period, Defendants have focused their assertion of the deliberative process privilege
13 over only the most sensitive documents at the highest levels of the relevant agencies.
14 Accordingly, Defendants have chosen to formally assert the deliberative process privilege over
15 34 documents from the time period between November 18, 2017 and January 11, 2018. These
16 documents are being provided to the Court for *in camera* review accompanied by a declaration
17 from the Department of Defense formally asserting the deliberative process privilege. The
18 remaining documents from the period between November 18, 2017 and January 11, 2018 that
19 were previously withheld exclusively pursuant to the deliberative process privilege are being
20 separately produced to Plaintiffs.

21 The Court's recent orders have required that the *in camera* submission "be accompanied
22 by a certification" by one of Defendants' counsel that attorneys of record have "personally
23 reviewed the documents" submitted. Order of Aug. 24, 2020, Dkt. 569; Order of Sep. 29, 2020,
24 Dkt. 617; Order of Oct. 28, 2020, Dkt. 629. Insofar as this Order intended to require a formal
25 assertion of the deliberative process privilege, Defendants are submitting a declaration from the
26 Department of Defense formally asserting the privilege, consistent with the principle that
27 litigation counsel do not make formal assertions of the privilege on behalf of an agency. See
28 Declaration of Robert Easton, on behalf of the Department of Defense, Ex. A of Carmichael

1 Decl.; *see Landry v. FDIC*, 204 F.3d 1125, 1135–36 (D.C. Cir. 2000) (requiring that a formal
2 assertion of the privilege be made by a sufficiently high official at the agency). The Department
3 of Defense declaration specifically addresses each document submitted to the Court and provides
4 information necessary for the Court’s review. The formal assertion of privilege in this
5 declaration supersedes any prior privilege log. However, Defendants have still provided a
6 privilege log to accompany this declaration as required by the Court. *See* Ex. B of Carmichael
7 Decl.; Order of Oct. 28, 2020 at 2. Documents are described in the declaration in the order they
8 have been submitted for review. As required by the Court’s order, Defendants are also submitting
9 a separate declaration certifying that attorneys of record in this case for the Department of Justice
10 reviewed the documents submitted. *See* Declaration of Andrew E. Carmichael; Order of Aug.
11 24, 2020; Order of Sep. 29, 2020; Order of Oct. 28, 2020¹

12 In light of Defendants’ efforts to narrow the dispute at issue discussed above, and the
13 short period of time the Court afforded Defendants to formally assert the deliberative process
14 privilege over documents in the relevant time period, Defendants will not formally assert the
15 deliberative process privilege over the remaining documents November 18, 2017 and January
16 11, 2018. Accordingly, these remaining documents have been separately produced to Plaintiffs
17 on November 20, 2020 (with a small remainder that will be produced today). This disclosure of
18 documents is consistent with the approach Defendants have routinely applied in this case and
19 others, insofar as Defendants have attempted to focus their assertions of the deliberative process
20 privilege when limited categories of documents are at issue. *See, e.g.*, 7/21/2020 Hr’g Tr. 16:5–
21 6 (explaining that in the related *Doe* case, the plaintiffs sought narrow categories of documents,
22 and the Government “waive[d] the privilege” over certain deliberative documents “in order to
23 narrow the scope of the dispute”). Rather than consider sweeping categories of deliberative
24 documents wholesale, Defendants have repeatedly urged that the parties should negotiate and

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26 ¹ A portion of the documents produced to the Plaintiffs contain redactions to preserve the attorney
27 client and attorney work product privileges and Defendants’ ability to formally assert the
28 presidential communications privilege. Additionally, documents wholly subject to any of these
other privileges have been withheld in full.

1 litigate over individual documents (or narrow categories) for which Plaintiffs have identified a
2 particular need related to their claims. Those documents should be the focus of any privilege
3 disputes.

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

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10 Dated: December 1, 2020

Respectfully submitted,

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