

The Honorable Marsha J. Pechman

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

**DEFENDANTS' NOTICE OF FILING
OF REPLY IN SUPPORT OF
PETITION FOR WRIT OF
MANDAMUS**

Pursuant to Federal Rule of Appellate Procedure 21(a)(1), Defendants respectfully provide to this Court its reply in support of its petition for writ of mandamus that Defendants filed in the United States Court of Appeals for the Ninth Circuit on March 10, 2020. A copy of Defendants' reply is attached.

Dated: March 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I hereby certify that on March 10, 2020, I electronically filed Defendants’ Notice of Filing Petition for Writ of Mandamus using the Court’s CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: March 10, 2020

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In re DONALD J. TRUMP, *et al.*,
Petitioners.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES OF AMERICA; MARK T. ESPER, in his official capacity as Secretary of Defense; U.S. DEPARTMENT OF DEFENSE; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, in his official capacity as Acting Secretary of Homeland Security,

Petitioners–Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON,

Respondent,

RYAN KARNOSKI; CATHRINE SCHMID; D.L.; LAURA GARZA; HUMAN RIGHTS
CAMPAIGN; GENDER JUSTICE LEAGUE; LINDSEY MULLER; TERECE LEWIS;
PHILLIP STEPHENS; MEGAN WINTERS; JANE DOE; CONNER CALLAHAN;
AMERICAN MILITARY PARTNER ASSOCIATION,

Real-Parties-in-Interest–Plaintiffs,

STATE OF WASHINGTON,

Real-Party-in-Interest–Intervenor-Plaintiff.

**REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS TO THE
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON AND EMERGENCY MOTION FOR STAY PENDING
CONSIDERATION OF THE PETITION**

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INTRODUCTION

Notwithstanding plaintiffs’ rhetoric that the government is “attempt[ing] to stonewall discovery,” Ans. 1, they do not dispute that, since this Court’s mandamus order in 2019, the government has produced every deliberative document sent from, received by, generated by, presented to, or considered by the Panel of Experts that formulated the now-challenged Mattis policy. As plaintiffs also concede, the Panel’s recommendations were adopted in the Department of Defense’s Report, further recommended by then-Secretary of Defense James Mattis to the President, and then implemented as the Mattis policy. Plaintiffs thus possess the entire deliberative history of the Panel that developed the challenged military policy.

Plaintiffs point to nothing in that history that supports their demand for additional privileged documents. They urge that they need not demonstrate any such need. Instead, in their view, the district court implausibly had no obligation to consider the deliberative disclosures and existing record before ordering vast swaths of additional discovery. And to the extent plaintiffs identify documents that supposedly support their theories of need, *see* Ans. 7-12, 25-37, those materials were never submitted to or considered by the court before it issued its orders. Plaintiffs’ attempt to manufacture a post hoc record only underscores that the court made no effort to account for the materials already disclosed before intruding further into military deliberations.

Plaintiffs wrongly insist that this course follows from this Court’s mandamus order. In fact, this Court did not find that discovery was permissible here. Rather, it indicated that in considering whether to authorize discovery, the district court should carefully consider “the relevance of all of the requested information,” observing that in *Trump v. Hawaii*, 138 S. Ct. 2392 (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 v. Trump*, 926 F.3d 1180, 1206 & n.22 (9th Cir. 2019) (quotation omitted). And if there were additional discovery, this Court suggested that “the district court may wish to authorize discovery in stages” to assess plaintiffs’ *need* (not desire) for privileged materials and to weigh that need against “the military’s interest in full and frank communication about policymaking [which] raises serious—although not insurmountable—national defense interests.” *Id.* at 1206.

The extensive disclosure of privileged materials that has ensued is extraordinary, particularly in the context of a military determination. Plaintiffs already possess everything they reasonably need—and much more—to pursue their legal challenges to the Mattis policy. Before ordering further broad intrusions into military deliberations, it was incumbent on the district court to evaluate carefully whether the disclosed materials provide any basis for plaintiffs’ claim of intentional, impermissible discrimination, and whether any aspect of the record justifies additional, targeted discovery. Instead, by fashioning discovery orders without regard to the existing

record, the district court in effect reinstated the same discovery ruling that this Court vacated.

Plaintiffs focus on the district court’s purportedly “granular” process, Ans. 18, which they do not dispute resulted in orders reaching nearly all deliberative documents still withheld. Plaintiffs and the district court nonetheless fault the government’s supposed procedural errors in consistently objecting to the court’s misguided approach—from allegedly failing to comply with court orders to pressing “changing arguments” and “inconsistent positions,” D.Ct.Resp. 11-12. There is nothing of that sort. As explained below, each of those characterizations hinges on misapprehending the record and, often, on lifting the government’s statements out of context. *See infra* pp. 7, 12-13.

Finally, the need for this Court’s correction has only grown since the government filed its petition. Remarkably, the district court chose to file a response but did not defend its orders; to the contrary, it professed a need for further “guidance” and “more direction” from this Court. D.Ct.Resp. 13. Yet even more remarkably, the district court in the interim has nonetheless plowed ahead and issued no fewer than three additional discovery orders, requiring even further intrusions into military deliberations, with unreasonably burdensome ten-day deadlines. *See* Docs. 454, 455, 458. And plaintiffs’ own demands have continued to escalate, as they have indicated their intent to depose former and current cabinet officials, including Secretary Mattis and then-Under Secretary of Defense for Personnel and Readiness

(now-Secretary of Veterans Affairs) Robert Wilkie, and to take a Rule 30(b)(6) deposition of the Defense Department while this mandamus petition is pending. This Court's intervention is needed to address plaintiffs' and the district court's continuing disregard for the military's "serious . . . national defense interests." *Karnoski*, 926 F.3d at 1206.

ARGUMENT

A. Mandamus Relief Is Warranted.

1. This Court has emphasized that an order requiring disclosure of privileged materials could not precede a close evaluation of whether plaintiffs' "need for the materials and the need for accurate fact-finding override[s] the government's interest in non-disclosure," *Karnoski*, 926 F.3d at 1206 (quoting *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)), and "direct[ed] the district court to . . . giv[e] careful consideration to executive branch privileges," *id.* at 1187. To that end, the Court suggested that if discovery were warranted at all, it would be appropriate "to authorize discovery in stages." *Id.* at 1206.

Plaintiffs do not explain how the district court could, consistent with this Court's order, compel vast additional disclosures of privileged material without considering the deliberative materials already produced. Instead, they declare that the government's prior productions are "completely irrelevant to Plaintiffs' need for the entirely separate and discrete categories at issue here." Ans. 24. This assertion is difficult to comprehend. Plaintiffs' claims are premised on allegations that the Mattis

policy is the result of intentional, impermissible discrimination. They now have every deliberative document used or considered by the Panel that formulated the policy, which the government produced pursuant to the order in *Doe 2 v. Esper*, No. 17-cv-1597, 2019 WL 4394842 (D.D.C. Sept. 13, 2019). Without evaluating that record, the court could not properly determine if it could compel further privileged disclosures. The court's mode of proceeding would constitute clear error in any context. It is particularly extraordinary here, given this Court's recognition that "the military's interest in full and frank communication about policymaking raises serious . . . national defense interests." *Karnoski*, 926 F.3d at 1206.

Plaintiffs do not contend that the district court actually evaluated the Panel documents. And the court's own response nowhere indicates that it reviewed these unredacted materials (or the 38,000 pages of non-privileged materials produced in discovery) before issuing the orders under review. *See* D.Ct.Resp. 4-11. Plaintiffs note that the court was aware that those disclosures happened. *See* Ans. 23. That the court was aware yet did not review the disclosures, however, underscores that it irresponsibly compelled additional productions. And the court's sweeping assumption that documents *not* considered by the Panel "fall into the same category and under the same analysis as the analysis done in *Doe*" for documents considered by the Panel, Add. 90, only illustrates that it did not evaluate the current document requests in light of what had already been produced.

2. Plaintiffs nevertheless suggest that the district court conducted a “granular, category-specific analysis.” Ans. 18. There is nothing remotely “granular” about an order that overcomes the deliberative process privilege as to nearly every deliberative document relating to two military policies. And neither plaintiffs nor the court dispute that the orders reach almost all the deliberative documents still withheld. *See* Pet. 13-14.

Plaintiffs nonetheless suggest that the district court’s orders were, in fact, the product of a careful category-by-category analysis. They suggest that the court divided RFP 29 into several categories and considered each separately. Ans. 19-20. That assertion is mistaken. As an initial matter, the disclosure order is not limited to documents in those categories, which do not constitute the universe of all documents “relating or referring to” the Report requested in RFP 29. Doc. 269-2 at 2. The order thus sweeps in all requested documents without regard to whether they were in any individual category. *See, e.g.*, Doc. 365-14 (describing privileged documents outside the categories, such as documents related to draft briefings for senior leaders). In any event, the court’s privilege analysis improperly treated the categories “exactly the same”, without considering plaintiffs’ need for each additional category or the confidentiality interest implicated by its disclosure. Add. 119.

Plaintiffs urge that the several motions, hearings, and orders in the past year reflect careful evaluation of privilege issues. But the district court has effectively reinstated its prior order with no fuller consideration of the relevant concerns

underscored in this Court's opinion. The principal difference now is that, in reinstating the order, the court also failed to evaluate the impact of the disclosure of all deliberative documents used or considered by the Panel that formulated the challenged policy.

Nor can the district court excuse the deficiencies in its approach by incorrectly accusing the government of "fail[ing] to comply with Court orders." D.Ct.Resp. 11. The court faulted the government for producing documents in "the ordinary course of business" instead of by RFP, Add. 136-37, notwithstanding that the Rules explicitly permit (and plaintiffs themselves requested) the government to "produce documents as they are kept in the usual course of business," Fed. R. Civ. P. 34(b)(2)(E)(i); *see* Docs. 246-2, 269-2, 381-9 (requesting "all documents in the order in which they appear in your files"). The court then permitted plaintiffs to provide prioritized RFPs and ordered the government to "begin responding to each Request" with request-by-request "privilege assertions." Add. 137. The government complied: we determined which privileged documents were responsive to each of plaintiffs' prioritized RFPs. *See* Doc. 408 at 16-21. Contrary to the court's characterization, the government's reference in a later status report to having "reviewed and produced documents as they were kept in the ordinary course of business" was an account of how we had asserted privilege *prior to* the court's order. *Id.* at 21-22.

3. In compelling disclosure, the district court also failed to evaluate "the military's interest in full and frank communication about policymaking," which

“deserves careful consideration.” *Karnoski*, 926 F.3d at 1206. The court declared that there was no chilling effect solely because of the existence of a protective order limiting further disclosure. *See* Add. 117. Plaintiffs endorse this premise. Ans. 33, 37.

But as plaintiffs surely recognize, the district court had articulated the same reasoning in the discovery order previously vacated by this Court. This Court noted the district court’s conclusion that any chilling effect could “be mitigated by the existing protective order,” and, in granting mandamus, it instead required “careful consideration to executive branch privileges.” *Karnoski*, 926 F.3d at 1187, 1197. And neither plaintiffs nor the district court have addressed this Court’s precedent that a protective order does not eliminate the chilling effect. *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1164 (9th Cir. 2009).

Plaintiffs contend that the government must provide “specifics on the potential chilling effect.” Ans. 32. As this Court previously noted, the district court originally discounted the chilling effect in the absence of “specific, credible risks.” *Karnoski*, 926 F.3d at 1197. That proposition is mistaken now, as it was then. The deliberative process privilege does not depend on specific future decisions for which discussion will be chilled. It instead rests on “the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery.” *Department of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8-9 (2001).

Plaintiffs' attempts to dismiss the chilling effect ultimately depend on curious logic. Plaintiffs argue that senior officials are "the least likely to be chilled" because they are senior, while lower-level servicemembers will suffer "minimal" chilling because they are not senior. Ans. 26, 33. This Court should decline plaintiffs' invitation to engage in circular reasoning.

B. Plaintiffs Have Not Shown A Need For Any Category Of Documents That Overcomes The Military's Interests.

1. Because the district court's errors replicate those in its prior discovery order and are exacerbated by its failure to address the disclosure of Panel deliberations, this Court need not reach plaintiffs' arguments for further compelled disclosure. Those arguments are, in any event, without merit.

Plaintiffs incorrectly contend that the district court targeted "the most highly relevant documents." Ans. 2. But plaintiffs do not dispute that the government has produced every deliberative document sent from, received by, generated by, presented to, or considered by the Panel. *See* Ans. 8. Plaintiffs further acknowledge that Under Secretary Wilkie "then repeated the *same* recommendation" to Secretary Mattis (Ans. 9; Add. 31-32, 224-25); that "Secretary Mattis provided [these] recommendations to the President" along with a Report that details "the factors and considerations forming the basis" of his proposed policy (Ans. 9-10 (quoting Add. 178)); and that the President authorized him to adopt the Panel's proposal as the Mattis policy. Yet despite possessing the entire deliberative history of the Panel that developed the

challenged military policy, plaintiffs’ answer requests more. And they have continuously sought even more in district court, including by recently demanding the depositions of high-level officials as Secretary Mattis and Under Secretary Wilkie.¹

Federal courts routinely adjudicate the lawfulness of federal policies on far less extensive a record. *See Karnoski*, 926 F.3d at 1206 n.22 (citing *Hawaii*, 138 S. Ct. at 2392). Plaintiffs’ purported need for additional deliberative documents is particularly tenuous given this Court’s admonition that the focus of the district court’s inquiry should be on the military’s “reasonable evaluation” of the evidence rather than the judiciary’s “own evaluation of the evidence.” *Id.* at 1202 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981)); *see Goldman v. Weinberger*, 475 U.S. 503, 509 (1986) (rejecting argument that military’s determination that Jewish Air Force psychologist’s “practice of wearing an unobtrusive yarmulke” would “threaten discipline” was a “mere *ipse dixit*, with no support from actual experience or a scientific study”).

Plaintiffs cursorily argue that they do not have all documents reflecting the Panel’s deliberations. Plaintiffs assert that they have no “documents reflecting what occurred at [Panel] meetings” in December and January and that they lack “documents related to the DoD Report, or the period . . . during which it was prepared,” Ans. 8, 10. This is false. Plaintiffs have every document used or

¹ Problematically, the district court’s February 3, 2020 order that this Court stayed also preemptively ruled that all government witnesses must disclose privileged information during depositions, and that such privileged information could be disclosed to the public subject to the court’s further review. *See* Add. 70-71.

considered by the Panel (as the *Doe* district court ordered), which include agendas and briefing slides from the December and January meetings. *See* Doc. 389, at 1. And they have every document referenced in the Report (and its footnotes), in addition to, by their own admission, various communications between the Defense Department and third parties during the time the Report was prepared. *See* Ans. 11 (describing third-party discovery).

2. Plaintiffs' specific arguments as to three broad categories of documents addressed by the district court further underscore its errors. As an initial matter, each argument hinges on documents in their supplemental addendum, *see* Ans. 7-12, 25-37, which plaintiffs submitted to the district court on February 25, 2020—weeks after the relevant orders—for the explicit purpose of manufacturing a post hoc record for the “Ninth Circuit panel reviewing the Government’s recent mandamus petition.” Doc. 434, at 2; *see* SA.88-151, 273-86, 320-417. Plaintiffs’ efforts to backfill a justification for the court’s reasoning based on documents it could not have considered confirms that it did not engage in the “careful consideration” that this Court required. *Karnoski*, 926 F.3d at 1187.

a. Plaintiffs declare that documents that the Panel “*did not* consider” go to “the heart” of the case. Ans. 26. Plaintiffs’ apparent hypothesis has been that lower-level servicemembers deliberately withheld “relevant information” from the Panel. Ans. 26. But plaintiffs and the district court cite nothing to support this speculation that individuals across the military were concealing information. *See Citizens to Preserve*

Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971) (providing that agency officials are “entitled to a presumption of regularity”). Nor do plaintiffs identify relevant data in the government’s privilege logs that they claim they are missing. *See* Pet. 27 n.1.

Plaintiffs’ related theory that the working groups were “constrained” by the President’s statements on Twitter or 2017 memorandum, Ans. 26, hinges on a further premise this Court has rejected. Plaintiffs assert that the President’s 2017 memorandum set forth the same policy directives that the Mattis policy adopted. *See* Ans. 4-5. But as this Court explained, there are “significant substantive differences between the 2017 Memorandum and the 2018 [Mattis] Policy”; the 2017 memorandum provided that “transgender individuals would not be allowed to serve in the military,” while the Mattis policy does not prohibit transgender service and the Panel’s mission was not “limited to th[e] purpose” of implementing the 2017 memorandum. *Karnoski*, 926 F.3d at 1186, 1192, 1199, 1202. Plaintiffs’ baseless conjecture that somebody somewhere in the military hid documents is not enough to overcome the government’s serious confidentiality interests.

Neither plaintiffs nor the district court can seriously take issue with the fact that documents “relating” to the Report but not considered by the Panel also necessarily include documents from higher-level officials, including Secretary Mattis. The court wrongly accuses the government of taking “inconsistent positions” by supposedly “never rais[ing] this issue or describ[ing] these documents” from Secretary Mattis. D.Ct.Resp. 12. But the government informed the court that the withheld

deliberative materials encompassed “communications to and from the ultimate decision-maker, the Secretary of Defense.” Add. 150. And the prospect of disclosing Secretary Mattis’s “handwritten notes” and other drafts has been raised in district court since before the prior mandamus petition. *See* Pet. 32, *In re Trump*, No. 18-72159 (9th Cir. Aug. 1, 2018) (quoting Doc. 301, at 28 (describing “handwritten notes by the Secretary” and his “draft letter to the President”)). That the court failed to recognize the breadth of its own orders reflects its cursory analysis of the serious privilege issues at stake.

b. Plaintiffs’ arguments relating to drafts of the Report and deliberative documents relating to Secretary Mattis’s memorandum to the President are similarly unavailing.

Plaintiffs and the district court mistakenly urge that the government conceded that the drafts are post-decisional. But as we explained, Secretary Mattis himself “did not accept” early drafts of the Report and required further iterations. Add. 116-17. That the Secretary was considering the adequacy of drafts of the Report confirms that plaintiffs’ characterization of the drafts as “mere wordsmithing” is unfounded. Ans. 28-29 (quotation omitted). The court’s baseless accusation that the government is now “changing arguments,” D.Ct.Resp. 12 (citing Add. 112), neglects to mention that, immediately after the hearing statement it cites, we reiterated that there were

“deliberations that go into” the drafts and “still deliberations . . . involved” during the Report’s drafting. Add. 113.

Plaintiffs contend that the Report cites “new documents” that “were not part of the Panel’s work,” and that they therefore need the iterative drafts “to understand the extent to which [it] is truly ‘based’ on the Panel’s work.” Ans. 31. This contention is difficult to understand, because they acknowledge that the Report adopted the Panel’s recommendations and they have every document cited in the Report. Plaintiffs’ contention that “[o]nly 4 of those 166 footnotes [in the Report] reference[] information presented to or considered by the Panel” is false. Ans. 11. Even a cursory review reveals that myriad footnotes repeatedly cite materials that were plainly before the Panel: prior military policies and government reports (*e.g.*, the Carter policy); the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders and official materials on gender dysphoria; the principal study supporting the Carter policy (the RAND report); not to mention the Panel’s own meeting minutes, federal statutes, and Supreme Court decisions. *E.g.*, Add. 181-223 nn.1-4, 8, 10-26, 28-59, 67-68, 73, 75, 77-84, 97-104, 106-13, 118, 123, 125-28, 130-38, 143-49, 151, 153-55, 159-60, 164-66. Plaintiffs then point to a few footnotes that purportedly originated from third-party sources. *See* Ans. 30-32. That the Report’s authors confirmed that the Panel’s recommendations were appropriate by considering additional published research articles, and through a consultative process,

only confirms that the military engaged in careful consideration of the issues—not that the privilege should be overcome. And plaintiffs appropriately do not dispute that only government officials and attorneys reviewed the drafts (even if they inexplicably find it untoward that attorneys consult on matters in ongoing litigation). *See* Ans. 11-12.

c. Plaintiffs’ arguments for needing deliberative documents concerning the Carter policy are even further afield. Plaintiffs cannot square their desire “to compare and contrast” the relative merits of the Carter and Mattis policies with this Court’s instruction that the district court cannot “substitute its ‘own evaluation of evidence for a reasonable evaluation’ by the military” in the first place. *Karnoski*, 926 F.3d at 1202 (quoting *Rostker*, 453 U.S. at 68); *see* Ans. 34-35. Plaintiffs, moreover, cannot logically explain how privileged deliberations from the development of a prior policy could inform whether a later policy is constitutional.

In insisting that discovery could reveal how the military could reach “different results,” Ans. 34, plaintiffs further disregard Secretary Mattis’s reasoning on precisely this point in the documents already produced. Secretary Mattis stated that the Carter policy was based on a study containing “significant shortcomings”—including its reliance on “limited and heavily caveated data” and “selective experiences of foreign militaries with different operational requirements than our own”—and that “the Department’s own data obtained since the [Carter] policy began to take effect” confirmed his reasons for changing the policy. Add. 177. The Report went on to

explain the flaws in the Carter policy, *see* Add. 205, 207, 209, and instances where the proposed Mattis policy was “consistent with” or “a necessary departure” from the prior approach. Add. 211; *see* Add. 211-20.

Unable to provide a basis for compelling deliberative materials related to the Carter policy, plaintiffs accuse the government of “gamesmanship” by questioning their experts (individuals involved in the Carter policy) in depositions based on certain documents. *See* Ans. 35-36; SA.273-84. Yet the government had disclosed the documents used in the depositions, before those depositions took place. And in any event, plaintiffs’ retention of those experts confirms that they already have access to information regarding the Carter policy deliberations, not that more is necessary.

C. This Court Should Grant A Stay.

Plaintiffs do not dispute that this Court previously stayed the district court’s discovery order pending disposition of the government’s first mandamus petition. *See* Order, *In re Trump*, No. 18-72159 (9th Cir. Sept. 17, 2018). A stay is warranted here for the same reasons. As explained, the government has a strong likelihood of success on the merits, the chilling effect of having deliberations disclosed in litigation cannot be undone (even if documents can be returned), and the military interests and the public interest “merge.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). That the district court has recognized the need for “guidance” and “more direction” highlights that this Court should decide the proper scope of discovery before deliberative discovery is permitted to proceed further. *See* D.Ct.Resp. 13.

Plaintiffs’ assertion that a stay “would delay the ultimate relief sought in this case,” Stay Opp’n 15, is premised on the same basic error as the district court’s orders. Plaintiffs have tens of thousands of documents—including everything generated or considered by the Panel. Moreover, the court has issued three burdensome discovery orders since the government filed its petition, making clear that a stay would not prevent them from obtaining even further discovery. Docs. 454, 455, 458. These March 4 and March 5, 2020 orders require the military to produce thousands of additional documents—including documents marked non-responsive—and to provide additional responses to plaintiffs’ interrogatories requesting deliberative information, all in the span of ten days. Even if those orders could be consistent with this Court’s stay, they at a minimum demonstrate that discovery will continue apace, regardless of a stay.

If plaintiffs believe that they have a substantial case, they should be prepared to move for summary judgment. If they do not have a substantial case, they must explain, on the basis of the discovery that they have already obtained, why specific categories of additional privileged documents may remedy its deficiencies. But they have not done so. None of the information plaintiffs identify would inform the court’s resolution of whether the military has provided a reasoned explanation for its policy choice, and any delay that results from their fishing expedition is a harm of their own making.

Last, plaintiffs are incorrect that the government’s filings signify a failure to cooperate with “the district court’s clear orders to produce” deliberative materials. Ans. 21; *see* Stay Opp’n 15, 17. The government has provided the court with multiple opportunities to avoid sweeping discovery orders into deliberative materials, repeatedly encouraging the court to narrow its orders on the privilege. That we exhausted every avenue before requesting a stay and petitioning for mandamus relief—over the course of numerous filings—only signifies that this Court’s intervention is necessary to prevent the very harms that the orders would cause.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of mandamus and reverse or vacate the orders of December 18, 2019, February 3, 2020, and February 7, 2020, and should grant a stay pending resolution of the petition or at the very least for a reasonable period for the Solicitor General to seek relief from the Supreme Court if necessary.

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MARCH 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply brief complies with the limit of Ninth Circuit Rules 21-2(c), 32-1(b), and 32-3(2) because it totals 4,200 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this petition complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using Microsoft Word 2013 in a proportionally spaced typeface, 14-point Garamond font.

s/ Ashley A. Cheung

ASHLEY A. CHEUNG

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2020, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system. The district court has been provided with a copy of this filing pursuant Federal Rule of Appellate Procedure 21(a).

s/ Ashley A. Cheung

ASHLEY A. CHEUNG