

No. 20-70365

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

DONALD J. TRUMP, President of the United States, *et al.*,
Petitioners-Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON,
Respondent,

RYAN KARNOSKI, *et al.*,
Real Parties in Interest-Plaintiffs,

STATE OF WASHINGTON,
Real Party in Interest-Plaintiff-Intervenor.

**REAL PARTIES IN INTEREST-PLAINTIFFS' AND PLAINTIFF-
INTERVENOR WASHINGTON'S OPPOSITION TO DEFENDANTS'
EMERGENCY MOTION FOR STAY**

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INTRODUCTION

Defendants seek a stay of the district court's repeated orders to produce documents withheld under the deliberative process privilege that are responsive to two of Plaintiffs' document requests. Those orders, the latest of which came after nearly two months of noncompliance and continuous "delaying and stalling," Add. 10,¹ compel the production of documents related to some of the central issues at the heart of this constitutional challenge to the administration's exclusion of transgender individuals from military service: What information or policy options were known to Defendants but withheld from the so-called Panel of Experts' consideration? How was the February 2018, 44-page report actually assembled and crafted, given that it contains the only support Secretary Mattis provided for the policy when he submitted it to the President and Defendants' counsel has represented to the district court that it was the sole source of the purported justifications for the policy and sole support for Defendants' claims that the policy satisfies heightened scrutiny? What sources, information, and alternatives were considered in its preparation? How did a group of military experts consider the same issues two years before the Panel and come to

¹ Citations to "Add." refer to the addendum filed with Defendants' mandamus petition (Dkt. 1-2) and citations to "SA" refer to the supplemental addendum Plaintiffs filed with their Answer to the mandamus petition (Dkt. 11-2).

a diametrically opposite conclusion that rejected the justifications Defendants now offer?

Answering these questions is critical to Plaintiffs' constitutional claims and the district court's ability to assess whether the government's discriminatory policy survives heightened scrutiny. For that reason, the district court denied Defendants' request for a stay, highlighting that the deliberative process privilege disputes have "been pending for nearly two years" and it would be "wasteful" to permit Defendants to knock discovery off track again with its piecemeal appeals. Add. 5.

Defendants nevertheless ask this Court to assist them in derailing the case once again by staying the court's discovery orders while their latest mandamus petition is heard. But in seeking a stay, Defendants make no effort to meet their legal burden and do not even address any of the four factors they must meet to obtain a stay pending appeal.

First, Defendants have not made any showing, let alone the necessary "strong showing," of likelihood of success on their mandamus petition. *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017). Given the district court's close adherence to the guidance this Court provided in its June 2019 opinion on conducting the *Warner* balancing test, Defendants will be unable to show any error, let alone that the district court's "order is clearly erroneous as a matter of law."

Karnoski v. Trump, 926 F.3d 1180, 1203 (9th Cir. 2019) (citing *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654–55 (9th Cir. 1977)).

Second, Defendants do not claim any threat of irreparable harm, which alone defeats their stay request. *See Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (affirming “the bedrock requirement that stays must be denied to all petitioners who did not meet the applicable irreparable harm threshold, regardless of their showing on the other stay factors”). In any event, there can be no credible claim of irreparable harm from compliance here. The district court adopted strict protective measures, including designating all produced documents attorneys’ eyes only, presumptively sealing documents produced under its orders, and permitting Defendants to claw back documents in the event the mandamus petition is resolved in their favor. Add. 25, 70, 85, 117, 127. These steps mitigate—if not obviate—any threat of harm while the mandamus petition is pending.

Third, a stay will substantially injure Plaintiffs, particularly because there is no longer a preliminary injunction maintaining the status quo. Entering a stay would only further delay discovery and prolong Plaintiffs’ harm from continued enforcement of the government’s discriminatory policy.

Fourth, a stay will also disserve the public interest, which lies in seeing Plaintiffs’ claims expeditiously litigated and advanced to trial for final judgment on the merits.

Because Defendants have not carried their burden of showing a stay is warranted, their motion should be denied.

RELEVANT PROCEDURAL BACKGROUND²

On December 10, 2019, the district court held a discovery conference to discuss Plaintiffs' motion to compel documents withheld under the deliberative process privilege that were responsive to its five highest priority document requests—requests for production (RFPs) 15, 29, 33, 36 and 44. During the course of the hearing, the court repeatedly addressed Defendants' chilling concerns, noting that it would apply a strict protective order to any documents ordered produced, designating them attorneys' eyes only and even requiring sealing of materials reflecting their contents. Add. 70–71, 117.

Following the hearing, the district court issued a written order on December 18, 2019, requiring production of documents responsive to RFPs 29 and 15, specifying that based on Defendants' confidentiality concerns they would be produced attorneys' eyes only. Add. 82–84. More than a month later, and after failing to comply with the court's order, Defendants filed a motion for clarification

² The relevant factual and procedural background for the present discovery disputes are set forth in full in Plaintiffs' Answer to Defendants' Petition For Writ of Mandamus, which is filed concurrent with this opposition. Because the same panel will hear Defendants' petition and motion to stay, Plaintiffs hereby incorporate by reference the background section of its Answer to avoid repetition.

and motion to stay. SA. 261. At a conference on February 3, 2020, the district court raised serious concerns that “the government is delaying and stalling,” particularly because during the previous conference on December 10, 2019, Defendants’ counsel “never indicated that he did not understand” the court’s instructions. Add. 10. On February 7, 2020, the court issued an order confirming that Defendants were obligated to produce responsive documents from Panel working groups relating to the DoD Report—exactly what the parties had discussed with the district court at length on December 10, 2019. Add. 4. The district court noted that Defendants had already delayed production for more than a month after the December 10, 2019 discovery conference—during which time they should have been preparing these already collected documents for production—yet the district court nevertheless gave Defendants an additional week to comply. Add. 31.

The district court also denied Defendants’ motion to stay, noting that Plaintiffs had overcome the deliberative process privilege with respect to the documents at issue, that this dispute had been pending for nearly two years, and that Defendants sought an undefined stay while deciding whether to seek appellate review. Add. 5. The court emphasized: “[T]his is a very important case for many, many people. So to keep slowing it down every time doesn’t do the public any good.” Add. 29. The court also stressed, “[t]his is an ongoing process and until the process is complete it is wasteful to appeal one segment at a time.” Add. 5.

The court also observed that Defendants would not suffer any harm from complying with discovery obligations in the meantime. First, it pointed out that there are clawback provisions, even in the event that a reviewing court were to subsequently hold that the deliberative process privilege justifies withholding the documents at issue. Add. 25, 30. Second, it noted that all of the documents at issue would receive protection under the protective order governing the case. Add. 30, 84. The court thus gave robust consideration of potential harm from compliance in the event Defendants appealed its order. Add. 25–26.

ARGUMENT

A stay pending appeal is an exceptional remedy—it is “not a matter of right, even if irreparable injury might otherwise result.” *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) (citation omitted). When assessing a stay request, this Court considers (1) whether Defendants have “made a strong showing that [it] is likely to succeed on the merits; (2) whether [Defendants] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* (citation omitted). A stay should be denied where a movant fails to satisfy either of the first two factors, which are the “most critical.” *Id.* (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). The latter two factors “merge when the Government is the opposing party.” *Nken*, 556 U.S. at 435.

Defendants' motion should be denied because they do not satisfy the two most critical factors for evaluating a stay request: they have not demonstrated any showing of likelihood of success on the merits (let alone the "strong showing" the law requires), and do not and cannot claim any threat of irreparable harm from complying with the district court's order. Each independently requires this Court to deny Defendants' stay request. *Washington*, 847 F.3d at 1164 (denying emergency motion to stay where government "failed to clear each of the first two critical steps"). Nor do the remaining factors weigh in Defendants' favor. A stay would harm Plaintiffs by imposing yet another delay of important discovery and would disserve the public interest by permitting Defendants' discriminatory acts to continue. Defendants have not come close to establishing their entitlement to the extraordinary relief they seek, and their request for a stay should be denied.

I. Defendants Have Not Made Any Showing Of Likelihood Of Success On The Merits, Let Alone A "Strong Showing."

Defendants' burden on the first stay factor is a heavy one. Mandamus is a "drastic and extraordinary remedy" that will only be granted in "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (internal quotation marks and citations omitted). Defendants must prove their "right to the writ is clear and indisputable." *Karnoski*, 926 F.3d at 1203.

At a minimum, this requires showing that “the district court’s order is clearly erroneous as a matter of law.” *Id.* (citing *Bauman v. U.S. District Court*, 557 F.2d 650, 654–55 (9th Cir. 1977)). And this heavy burden is amplified in the discovery context where the district court “has wide latitude” because “decisions governing discovery are highly fact-intensive.” *In re Anonymous Online Speakers*, 661 F.3d 1168, 1176 (9th Cir. 2011).

As set forth more fully in Plaintiffs’ Answer to Defendants’ Petition for Writ of Mandamus, filed concurrently with this opposition, Defendants do not meet their heavy burden.³ Far from it. Their petition is premised on a series of mischaracterizations of the district court’s orders and the record below.

First, Defendants claim the district court openly defied this Court’s guidance when just the opposite is true. The district court followed that guidance to a tee, staging discovery and isolating granular categories of documents for individualized analysis under the two remaining *Warner* factors. Answer to Pet. at 17-25.

Second, Defendants claim Plaintiffs do not need the three discrete categories of documents at issue and that disclosure might chill future governmental deliberations. But the district court provided fulsome explanation for why Plaintiffs’ need outweighed the possibility of a chilling effect as to each narrow category of

³ Plaintiffs incorporate those arguments by reference here.

documents. Plaintiffs need the documents and communications that the working groups and service members withheld from the Panel to test whether the Panel considered the relevant evidence under heightened scrutiny. Answer to Pet. at 25-27. As for communications regarding the DoD Report, Defendants have conceded that they are non-deliberative and post-decisional, and therefore the privilege does not apply. *Id.* at 27-29. Even if it did, Plaintiffs need to understand basic facts about the Report that forms Defendants’ central defense to the entire case. *Id.* at 29-33. Finally, documents relating to the Carter Policy are necessary to allow the court to compare the decisionmaking process that led to the open service policy with the decisionmaking process that produced the exact opposite policy only two years later. *Id.* at 34-36. Defendants have only amplified that need by engaging in waiver gamesmanship with respect to these documents. *Id.* at 36.

These three categories isolate some of the most relevant topics in the case. On the other hand, the district court carefully considered Defendants’ speculative invocation of a chilling effect, and provided specific reasons why it was outweighed by Plaintiffs’ need for each category of documents—including, but not limited to, the protective order already in place and the Court’s order that all of these documents will be produced “attorneys’ eyes only.” *Id.* at 33, 37.

Plaintiffs’ Answer to the mandamus petition lays out in full all of these reasons why Defendants are unlikely to succeed on the merits. The Court should

deny Defendants’ motion to stay based on failure to satisfy this factor alone. *See Anonymous Online Speakers*, 661 F.3d at 1177 (holding failure to identify any clear error of law “is dispositive” on mandamus petition).

II. Defendants Will Not Suffer Irreparable Harm By Complying With The District Court’s Order.

At no point in their request for a stay do Defendants claim irreparable harm will occur if they are required to comply with the district court’s order while their mandamus petition is pending. At most, they include a single conclusory assertion that compliance will result in disclosure of “privileged communications regarding the military’s deliberative process.” Pet. 32.⁴ Not only would that argument, even if developed, fail to establish irreparable harm as a matter of law—the Supreme Court has squarely rejected the notion that a privileged relationship will be “irreparably destroyed absent immediate appeal of adverse privilege rulings,” *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108–09 (2009)—but Defendants’ vague and unspecified claim fails to satisfy their burden of showing that “irreparable

⁴ Any claim of irreparable harm relating to disclosures associated with RFP 15 is especially weak: these documents are unlikely to have any kind of chilling effect on future decisionmaking since the Carter working group deliberations were transparent and supported open transgender military service. Tellingly, Defendants cannot show that any irreparable harm has resulted from the documents relating to the Carter working group that they have already disclosed and that they had previously withheld based on the deliberative process privilege. A stay of these documents would thus be particularly inappropriate.

harm is probable,” not just possible. *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011); *see also Nken*, 556 U.S. at 434–35 (“[S]imply showing some possibility of irreparable injury fails to satisfy the second factor.”) (internal quotation marks and citation omitted). This failure is dispositive of their stay request because showing the probability of irreparable harm is a *necessary* (though not sufficient) requirement to obtain a stay. *Leiva-Perez*, 640 F.3d at 965 (“[S]tays must be denied to all petitioners who did not meet the applicable irreparable harm threshold, regardless of their showing on the other stay factors.”). Defendants’ failure even to try to meet this burden is fatal to their motion.

Nor can Defendants try to reframe as irreparable harm their repeated speculation elsewhere in their petition about a purported chilling effect these disclosures could have on future Department of Defense decisionmaking. This *possibility* of harm would not be irreparable and ignores the prophylactic measures in place that already eliminate the risk of any harm at all.

First, the district court emphasized that Defendants would be able to claw back any documents in the event that this Court later determined they were protected by the deliberative process privilege: “[I]f something gets turned over that has to be clawed back, we’ll claw it back, if the Ninth Circuit says that’s what we’re going to do.” Add. 25. There is also an existing “clawback” agreement between the parties that sets forth procedures in the event that documents, which are protected from

disclosure, are nonetheless produced—including the destruction of such documents by the receiving party. SA. 292-93, 302-03. Indeed, during the course of the litigation, Defendants have sent several clawback notices, and Plaintiffs have readily complied with each of them.

Courts routinely find that the protection of a “clawback” addresses the purported harms associated with disclosure. *See, e.g., Ahmed v. HSBC Bank USA*, 2018 WL 504672 (C.D. Cal. Jan. 12, 2018) (finding that “clawback” procedures addressed defendant’s concerns regarding attorney-client privileged information); *Great-W. Life & Annuity Ins. Co. v. Am. Econ. Ins. Co.*, 2013 WL 5954470, at *4 (D. Nev. Nov. 6, 2013) (denying stay in light of clawback procedures and confidentiality agreement, which “removes virtually any possibility of irreparable injury”); *In re Ingram*, 2012 WL 6840538 (E.D. La. Apr. 30, 2012) (denying stay because disclosure of any privileged documents could be returned or destroyed).

Second, there is also a protective order in place that affords substantial protection to documents designated as confidential, SA. 287-95, and indeed, the district court amplified those protections even further with respect to the documents at issue by presumptively designating all of them “attorneys’ eyes only.” Add. 30. Thus, for example, any speculation that government officials might be hesitant to express candid views for fear that their views might somehow later subject them to public embarrassment has no footing here. The protective order is a safeguard

designed to mitigate the risks associated with confidential documents. *E.g.*, *Anonymous Online Speakers*, 661 F.3d at 1178 (describing protective orders as a “tool[] available to the district court” to “ameliorate the harms of disclosure”).

Because Defendants have made no effort even to claim a risk of irreparable harm, have not shown that irreparable harm is probable to occur, and because the district court proactively mitigated the risk of harm through protective measures, Defendants’ stay request should be denied. *See Washington*, 847 F.3d at 1164 (denying emergency stay where government “failed to clear each of the first two critical steps”); *Leiva-Perez*, 640 F.3d at 965.

III. A Stay Would Substantially Harm Plaintiffs And Unnecessarily Delay This Proceeding.

Defendants assert that Plaintiffs will suffer no harm from a stay because they have supposedly already provided a “trove” of documents and Plaintiffs have not demonstrated a need for the documents at issue. Pet. 32–33. Not so. The only documents Defendants have produced concerning the Panel are (1) a carefully curated “administrative record” prepared by government lawyers after the fact, and (2) the *Doe* production limited to documents actually provided to Panel members, neither of which includes the information withheld from the Panel. As to the drafting of the DoD Report, Defendants have withheld everything but the Report itself. And as to the Carter Working Group, Defendants have refused to produce even the minimal categories of documents they produced with respect to the Panel, while

selectively “waiving” the deliberative process privilege over a few documents they deem helpful to their attack on the Carter open service policy. As explained in Plaintiffs’ Answer to the mandamus petition, Plaintiffs have amply demonstrated their need for the three discrete categories of documents at issue here. Answer to Pet. 25-37.

Moreover, Defendants’ argument fails to recognize the serious and irreparable harm that a stay would inflict on Plaintiffs and transgender people, whose constitutional rights are violated—and irretrievably lost—with each day that the government’s discriminatory policy is enforced against them. A stay in this case would extend the ongoing harms experienced by those transgender service members who are only permitted to serve under a severable “grandfather” clause, which imposes unequal terms and conditions on their retention in service as compared to their peers. They must serve with the dangerous stigma of being labeled as second-rate colleagues and under a cloud of uncertainty as commanders demonstrate hesitancy to promote them or invest in their futures. A stay would also prolong the harm experienced by those serving in silence from fear of losing their livelihoods and careers. *See* SA. 309 (Plaintiff Jane Doe noting that because of the government’s discriminatory policy, “I have not come out to anyone in my chain of command.”). And, those who wish to serve their country must continue to make costly and gut-wrenching personal decisions over whether to pursue a military career while

awaiting the outcome of this litigation. Indeed, one Plaintiff recently withdrew from the case because he could wait no longer for this case to lift the bar on him accessing into the military, and was forced to abandon his lifelong dream of serving this country to pursue a different career. SA. 312 ¶ 14 (“As a 29-year-old man, I have a finite amount of time left to enlist in the military.”); SA. 316.

Thus, a stay would cause substantial harm to Plaintiffs because it would delay the ultimate relief sought in this case. A stay would allow Defendants to continue to delay compliance with the district court’s orders until after its mandamus petition is resolved, and would thus further delay district court proceedings—which have already been serially delayed by Defendants—for potentially several additional months. The last mandamus petition to this Court resulted in a 10-month delay before reaching a resolution. Such a delay would prejudice Plaintiffs’ ability to identify evidence relevant to proving their claims and essential to the district court’s resolution of this case on the merits. And, as described above, a stay would protract Plaintiffs’ harm from continued enforcement of the government’s discriminatory policy that is inflicting serious and irreparable harm to Plaintiffs and transgender people. This Court has repeatedly confirmed that the deprivation of constitutional rights constitutes irreparable injury and that “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Melendres v. Arpaio*, 695

F.3d 990, 1002 (9th Cir. 2012) (citation omitted). These harms have proliferated now that there is no longer a preliminary injunction maintaining the status quo.

IV. The Public Interest Favors Deference To The District Court's Discovery Orders Absent Clear Abuse Of Discretion.

Defendants bear the burden of demonstrating the public interest lies with ordering a stay. *Nken*, 556 U.S. at 435–36. But Defendants made no attempt to articulate why a stay would serve the public interest, and the balance of interests favors deference to district courts' attempts to ready cases for trial and to adjudicate important constitutional claims in a timely manner. The public has a compelling interest in the expeditious adjudication of every action, as prompt resolution "is of great importance to the rule of law," and that interest applies with particular force here given the constitutional claims at stake. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1227 (9th Cir. 2006) (citing FED. R. CIV. P. 1). Allowing Defendants to repeatedly ignore and delay discovery obligations harms the public interest by preventing the parties from litigating the case and hampers the district court's ability to do its job and enforce the law.

There is also a public interest in ensuring there is a timely remedy for government wrongdoing. *See Jones v. Clinton*, 72 F.3d 1354, 1365 (8th Cir. 1996) ("Surely, if civil rights actions are of such importance that they may not be impeded or delayed by a person's incarceration, there must be at least an equal public interest in an ordinary citizen's timely vindication of his or her most fundamental right

against alleged abuse of power by governmental officials.”), *aff’d*, 520 U.S. 681 (1997). As the district court recognized, “this is a very important case for many, many people...to keep slowing it down...doesn’t do the public any good.” Add. 10. Indeed, Washington’s intervention signifies the public’s interest.

Finally, this Court has an interest in avoiding entanglement in pre-trial disputes, which inures to the benefit of all litigants, the public, and the judiciary itself. The “courts of appeals cannot afford to become involved with the daily details of discovery.” *In re United States*, 884 F.3d 830, 835 (9th Cir. 2018) (quoting *Anonymous Online Speakers*, 661 F.3d at 1173). Here, this Court and the public have an interest in not allowing litigants to burden appellate courts with interlocutory review of trial court discovery and case management decisions, or to use mandamus as a means of delaying their discovery obligations. Defendants have repeatedly failed to comply with the district court’s orders. And even where the Defendants’ mandamus petition proves meritless, they gain a tactical advantage from merely filing the petition in order to obtain a stay pending its resolution—a practice that has become seemingly routine in litigation involving the government, despite the “extraordinary” nature of mandamus.

Defendants failed to assert what public interest would suffer as a result of a denial of their motion for stay, but to the extent it is based on a hypothetical chilling effect on future decisionmaking, which is unavailing for the reasons explained

above, that speculative concern is far outweighed by the public interest in obtaining an expeditious resolution of important constitutional claims, in remedying government wrongdoing in a timely manner, and in avoiding excessive entanglement in pre-trial disputes.

CONCLUSION

Defendants fail to carry their burden for the extraordinary relief of a stay pending appeal. Their mandamus petition lacks merit, and thus is unlikely to succeed, and Defendants make absolutely no claim of any risk of irreparable harm. Conversely, a stay would harm Plaintiffs and disserve the public interest. For these reasons, the Court should deny Defendants' motion for a stay.

Dated: February 27, 2020

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 27(d)(2), because it does not exceed 5,200 words or 20 pages, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Jordan M. Heinz
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 27, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Jordan M. Heinz
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