

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' MOTION TO FILE UNDER
SEAL THEIR ANSWER TO DEFENDANTS' PETITION FOR A WRIT OF
MANDAMUS AND SUPPLEMENTAL ADDENDUM (VOLUME II)**

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I. Introduction

Pursuant to Federal Rule of Appellate Procedure 27 and Interim Circuit Rule 27-13, Real Parties In Interest-Plaintiffs (“Plaintiffs”) hereby respectfully move to file under seal Volume II of Plaintiffs’ Supplemental Addendum to their Answer to Defendants’ Petition for a Writ of Mandamus, as well as the identified portions of Plaintiffs’ Answer, which quote from the sealed exhibits contained in Volume II of their Supplemental Addendum. These are materials Plaintiffs received through discovery and that Defendants have designated confidential pursuant to the protective order issued by the lower court. *See* Ex. A (index of supplemental addendum filed under seal); Ex. B (protective order); Ex. C (district court order sealing these documents).

II. Legal Standard

This Court’s Rules require motions to seal to “explain the specific reasons for this relief and describe the potential for irreparable injury in the absence of such relief.” Circuit Rule 27-13(e). Such motions must also “request the least restrictive scope of sealing.” *Id.*

This Court recognizes an “exception” to “the usual presumption of the public’s right of access” to judicial records. *In re Midland Nat. Life Ins. Co. Annuity Sales Practices Litig.*, 686 F.3d 1115, 1119 (9th Cir. 2012) (quotations and citations

omitted). That presumption “is rebutted” when “judicial records filed under seal ... [are] attached to a *non-dispositive* motion.” *Id.* (emphasis in original).

III. Argument

As noted, the identified exhibits to Plaintiffs’ Answer have been designated as confidential under a protective order in this case and sealed by the lower court. Plaintiffs submit them here under seal in order to comply with the protective order and the district court’s recent order sealing these documents. Moreover, the Answer is not a dispositive motion, but rather an opposition to a petition for mandamus as to non-final discovery orders below. These circumstances constitute good cause for sealing and grounds for finding irreparable injury to Plaintiffs from the absence of sealing. *See In re Midland Nat. Life Ins.*, 686 F.3d at 1119.

The requested relief also represents the least restrictive scope of sealing necessary to avoid violation of the protective order. Plaintiffs do not move to file the entire excerpts of record under seal, but rather submit a separate volume containing only those documents that should be sealed because they are subject to the protective order below. And Plaintiffs have only redacted those portions of their Answer that quote from the sealed documents or otherwise reveal their content in detail.

IV. Conclusion

For these reasons, Plaintiffs respectfully request that the Court permit the filing under seal of Supplemental Addendum (Volume II) to their Answer to Defendants' Petition for a Writ of Mandamus, permit the filing under seal of Plaintiffs' Answer, and the public filing of the redacted version of Plaintiffs' Answer.

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

Jordan M. Heinz

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
Jordan M. Heinz

EXHIBIT A

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.*,
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v.

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WASHINGTON,
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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'S SUPPLEMENTAL ADDENDUM
FILED UNDER SEAL
VOLUME II**

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FILED UNDER SEAL

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EXHIBIT B

1 WHEREAS, there exists substantial overlap between the subject matter of the Named
2 Actions, making it efficient and appropriate to permit discovery produced by parties and non-
3 parties in any of the Named Actions to be used in *Karnoski v. Trump*;

4 THEREFORE, IT IS HEREBY ORDERED that the following provisions of this Uniform
5 Protective Order and Cross-Use Agreement (hereafter the “Order”) shall control the disclosure,
6 dissemination, and use of material produced in discovery in *Karnoski v. Trump*:

7 1. **Scope of Order:** This Order shall govern the production, use, and disclosure of
8 all information and materials produced by any party or non-party in response to any discovery
9 request in *Karnoski v. Trump* (including, but not limited to, documents, interrogatory answers,
10 responses to requests to admit, and deposition transcripts and exhibits), all information contained
11 in those materials, and all copies, excerpts, or summaries of those materials (collectively,
12 “Discovery Material”).

13 2. **Designation of Protected Material:** A party or non-party may, in good faith,
14 designate as CONFIDENTIAL and therefore subject to the protections and requirements of this
15 Order, any Discovery Material that the designating party reasonably believes contains
16 confidential information, including personal, proprietary, or sensitive information not generally
17 disclosed to the public. Subject to the exceptions set forth in Paragraph 6, Discovery Material
18 designated CONFIDENTIAL (“Protected Material”) shall be used by the receiving parties solely
19 for the prosecution or defense of the Named Actions and shall not be disclosed to any person or
20 entity unless specifically authorized by the terms of this Order or by further order of the Court.
21 Consistent with the requirements of this paragraph, a party may, within fifteen (15) business days
22 of receipt of the Discovery Materials, by written notice to the other parties, designate as
23 CONFIDENTIAL any Discovery Materials produced or given by the other parties or by a non-
24 party but not designated CONFIDENTIAL by that other party or non-party.

25 3. **Limitations on Use:** Subject to the exceptions set forth in Paragraph 6, Protected
26 Material and its contents, as well as copies, summaries, notes, memoranda, and computer
27 databases relating thereto, shall be used solely for the purpose of the Named Actions, shall be
28 and remain confidential, and shall not be disclosed in any fashion, nor be used for any purpose

1 other than litigating the Named Actions.

2 4. **Limited Disclosure of Protected Material:** Except as stated in paragraphs 5 and
3 6 below, Protected Material may be disclosed, subject to the specific procedures and provisions
4 contained in this Order, to the following persons and/or entities only:

5 a) This Court and the officers, employees, and any stenographic reporters of such
6 courts;

7 b) Counsel representing the parties in the Named Actions and their support
8 personnel whose functions require access to Protected Material (collectively “Attorney
9 Professionals”);

10 c) Outside vendors who perform scanning, photocopying, computer classification,
11 translation, or similar clerical functions, retained by the parties or their counsel in the Named
12 Actions, but only for the purposes of performing such services and only so long as necessary to
13 perform those services;

14 d) Independent experts consulted or retained by counsel for assistance in the
15 preparation or prosecution of claims or defenses in the Named Actions, to the extent reasonably
16 necessary for such experts to prepare a written opinion or to prepare to testify or to assist counsel
17 in the Named Actions;

18 e) A witness who has been noticed or subpoenaed for deposition or a court
19 appearance in the Named Actions to the extent reasonably necessary for the preparation or giving
20 of his or her testimony about Protected Material;

21 f) Any other person who is so designated by order of this Court or by written
22 agreement of the producing party.

23 No Protected Material may be disclosed to persons identified in subparagraphs (d), (e) or
24 (f) until they have reviewed this Order and have executed a written agreement in the form
25 attached hereto as Exhibit A, which executed agreements shall be maintained by counsel of
26 record for the party making the disclosure to such persons (provided that Counsel who makes
27 such disclosure shall retain the written agreement but shall not be required to produce it to
28 opposing counsel until the deposition of the person or without order of the Court).

1 5. **Order Affecting Pseudonym Plaintiff:** Use and disclosure of the Pseudonym
2 Plaintiff's identity in *Stone v. Trump* remain governed by the protective order entered by the
3 *Stone* Court on September 29, 2017 ("*Stone* Pseudonym Order"). Use and disclosure of the
4 Pseudonym Plaintiffs' identities in *Doe v. Trump* remain governed by the September 13, 2017
5 protective order entered in *Doe v. Trump* ("*Doe* Pseudonym Order"). Use and disclosure of the
6 Pseudonym Plaintiff's identity in *Karnoski v. Trump* remain governed by the Order Granting
7 Motion to Proceed Under Pseudonym entered by the Court on October 10, 2017 ("*Karnoski*
8 Pseudonym Order"). Insofar as there is any conflict between this Order and the *Stone*,
9 *Karnoski* and *Doe* Pseudonym Orders, the Pseudonym Orders shall prevail.

10 6. **Cross-Use of Discovery Material:** Any Discovery Material produced or
11 provided by any party or non-party in any of the Named Actions shall be deemed produced in the
12 other Named Actions and shall be treated consistently with the terms of this Order, with the
13 exception of any Discovery Materials that include personally identifying information in the
14 Named Actions, including information that would lead to the discovery of the identities of
15 plaintiffs proceeding anonymously or other information protected by the Pseudonym Orders.

16 7. **Effect of Designation:** The designation of Protected Material pursuant to the
17 Order shall not be construed as a waiver of any objection or a concession by any party that such
18 Protected Material is relevant or material to any issue. Nor shall a failure to object to the
19 designation of any such Protected Material be construed as a concession by the receiving parties
20 that such Protected Material is, in fact, confidential or otherwise entitled to protection under the
21 terms of this Order. All parties maintain their respective rights to object to production of any
22 requested documents on the grounds that they are otherwise not discoverable, including, but not
23 limited to, objections based on any applicable privilege, undue burden, overbreadth, relevance,
24 and proportionality to the needs of the case. Any party may seek an order from the Court
25 determining that specified Protected Material is not entitled to be treated as CONFIDENTIAL.

26 8. **Mechanics of Designation:** No designation of CONFIDENTIAL shall be
27 effective as to a particular page of Protected Material unless there is placed on or affixed to each
28 page of such Protected Material a marking of "CONFIDENTIAL." In the case of electronic

1 documents produced in native format, such designation may be made on the physical media (e.g.,
2 disk, flash drive) containing such electronic documents and on a slipsheet accompanying the
3 native file if the file is served electronically. Testimony may be designated CONFIDENTIAL
4 within ten (10) business days after receipt of a transcript of said testimony by furnishing to
5 counsel for the other parties a detailed statement of the specific portions of any such information,
6 by page and line number or exhibit number, by designating lines and pages as confidential by
7 highlighting or digital marking, or by a statement on the record at the time the testimony is
8 given. Pending the expiration of said ten (10) business days, all parties shall presumptively treat
9 the entire deposition transcript as CONFIDENTIAL. In addition to the requirements of this
10 Order, the court reporter before whom a deposition or other testimony relating to Protected
11 Material is taken shall, at the request of any party, designate a portion of the deposition or any
12 exhibits containing Protected Material as CONFIDENTIAL.

13 **9. No Waiver; Late Designation:** The failure of a party to designate information or
14 documents as CONFIDENTIAL in accordance with this Order, and the failure to object to such a
15 designation, is not a waiver of the right to do so and shall not preclude a party at a later time
16 from subsequently designating or objecting to the designation of such information or documents
17 as CONFIDENTIAL. The parties understand and acknowledge that a party's failure to designate
18 information or documents as CONFIDENTIAL relieves the other parties of any obligation of
19 confidentiality until such a designation is made. Promptly after written notice to the receiving
20 parties of any such subsequent designation by the producing party, which notice shall
21 specifically identify the documents or information to be designated, the parties shall confer and
22 agree upon a method to mark as CONFIDENTIAL any such subsequently designated documents.
23 All documents containing any such subsequently designated information will be thereafter
24 treated in accordance with this Order.

25 **10. Objections to Designations:** A party may, at any time, make a good faith
26 challenge to the propriety of a Confidential Information designation. In the event a party objects
27 in writing to the designation of any material under this Order, the objecting party shall consult
28 with the designating party to attempt to resolve their differences. If the parties are unable to

1 reach an accord as to the proper designation of the material, after giving notice to the designating
2 party, either party may apply to the Court for a ruling regarding the designation. If such a motion
3 is made, the designating party has the burden of establishing that the designation is proper. If a
4 timely motion is made, any documents or other materials that have been designated
5 CONFIDENTIAL that are the subject of the motion shall be treated as Confidential until such
6 time as the Court rules that such materials should not be treated as Confidential.

7 11. **Control of Protected Material:** All Protected Material shall be maintained under
8 the direct control of counsel of record of the Named Actions, who shall be responsible for
9 preventing any disclosure thereof, except as permitted by the terms of this Order. Attorney
10 Professionals may review and make working copies, abstracts, and digests of Protected Material
11 for use in connection with the Named Actions, and such working copies, abstracts, and digests
12 shall be deemed Protected Material under the terms of this Order provided that access to
13 Protected Material, in whatever form stored or reproduced, shall be limited to those persons
14 entitled to receive such information pursuant to the terms of this Order and shall be appropriately
15 marked in accordance with the terms of this Order.

16 12. **Return:** Unless otherwise instructed by the Court, and subject to any applicable
17 document retention requirements, at the conclusion of this action, including any appeals, all
18 Protected Material, in whatever form stored or reproduced, shall be returned to counsel of record
19 for the party who produced said Protected Material, or the receiving parties shall certify that all
20 such information has been destroyed, except that the attorneys for the parties shall be entitled to
21 retain all litigation documents, including exhibits and their own memoranda, containing
22 Protected Material. Such litigation documents and memoranda shall be used only for the purpose
23 of preserving files this action, and shall not, without the written permission of the designating
24 party or an order of this Court, be disclosed to anyone other than those to whom such
25 information was actually disclosed, in accordance with this Order, during the course of the
26 Named Actions.

27
28 13. **Filing under Seal:** Any party seeking to file documents containing Protected

1 Material shall file a motion to file under seal pursuant to all applicable Federal Rules of Civil
2 Procedure and the Local Rules of this Court.

3 14. **Subpoena of Protected Material:** If a person in possession of Protected Material
4 who is not the producing party with respect to that Protected Material receives a subpoena or
5 other request that would require production or other disclosure of Protected Material, that person
6 shall immediately give written notice to counsel for the producing party, identifying the
7 Protected Material sought and the date and time that production or other disclosure is required. In
8 no event should production or disclosure be made without written approval by counsel for the
9 producing party or by further order of the Court or another court of competent jurisdiction.

10 15. **Inadvertent Disclosure:** Should any Protected Material be disclosed, through
11 inadvertence or otherwise, to any person and/or entity not entitled to access or review same, then
12 such person and/or entity:

13 (a) Shall be informed promptly of all provisions of this Order by the responsible party;

14 (b) Shall immediately be identified to all counsel of record in all Named Actions by the
15 responsible party; and

16 (c) Shall be requested, in writing by the responsible party, to return the material to the
17 responsible party.

18 Inadvertent disclosure by the disclosing party of any Protected Material, regardless of
19 whether said Protected Material was so designated at the time of disclosure, shall not be deemed
20 a waiver in whole or in part of the protectability of the Protected Material in accordance with the
21 terms of this Order, either as to the specific Protected Material disclosed, or as to any other
22 information relating thereto or relating to the same or related subject matter.

23 16. **Modification:** This Order is without prejudice to the right of any party to apply at
24 any time for additional protection, or to amend, modify, or rescind the restrictions of this Order.
25 The party must provide written notice to counsel of record for all parties in the Named Actions
26 specifying the portion(s) of this Order it seeks to amend, modify, or rescind and any additional
27 provisions it may seek to add to the Order. The written notice must be served five (5) business
28 days in advance of filing any such motion. The parties expressly reserve the right to seek

1 modification, amendment, or rescission of this Order by mutual agreement in writing.

2 17. **Enforcement:** All persons to whom Protected Material is disclosed shall be
3 subject to the jurisdiction of this Court, for the purpose of enforcing this Order. This Order shall
4 continue in full force and effect, and shall be binding upon the parties and all persons to whom
5 Protected Material has been disclosed, both during and after the pendency of this case.

6 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD:

7
8 Respectfully submitted February 12, 2018.

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10 s/Samantha Everett

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28 Scott Lerner (admitted pro hac vice)
Vanessa Barsanti (admitted pro hac vice)
Daniel Siegfried (admitted pro hac vice)
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*Counsel for Intervenor Plaintiff State of
Washington*

ORDER

PURSUANT TO STIPULATION, IT IS SO ORDERED

IT IS FURTHER ORDERED that pursuant to Fed. R. Evid. 502(d), the production of any documents in this proceeding shall not, for the purposes of this proceeding or any other proceeding in any other court, constitute a waiver by the producing party of any privilege applicable to those documents, including the attorney-client privilege, attorney work-product protection, or any other privilege or protection recognized by law.

DATED this 14th day of February, 2018.


Marsha J. Pechman
United States District Judge

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EXHIBIT A

ACKNOWLEDGEMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
 _____ [print or type full address], declare under penalty of
 perjury that I have read in its entirety and understand the Stipulated Uniform Protective Order
 and Cross-Use Agreement that was issued by the United States District Court for the Western
 District of Washington on _____ in the case of *Karnoski, et al. v. Trump, et al.*, Case Number
 2:17-CV-1297-MJP. I agree to comply with and to be bound by all the terms of this Stipulated
 Uniform Protective Order and Cross-Use Agreement and I understand and acknowledge that
 failure to so comply could expose me to sanctions and punishment in the nature of contempt. I
 solemnly promise that I will not disclose in any manner any information or item that is subject to
 this Stipulated Uniform Protective Order and Cross-Use Agreement to any person or entity
 except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the
 Western District of Washington for the purpose of enforcing the terms of this Stipulated Uniform
 Protective Order and Cross-Use Agreement, even if such enforcement proceedings occur after
 termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature _____

EXHIBIT C

The Honorable Marsha J. Pechman

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

RYAN KARNOSKI, et al.,

Plaintiffs, and

STATE OF WASHINGTON,

Plaintiff-Intervenor,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, et al.,

Defendants.

Case No. 2:17-cv-01297-MJP

**ORDER GRANTING PLAINTIFFS’
MOTION TO SEAL**

NOTE ON MOTION CALENDAR:
March 6, 2020

This matter comes before the Court on Plaintiffs’ Motion Seal. The Court having considered the Motion, Defendants’ Response, and all pleadings and papers on file herein, IT IS HEREBY ORDERED:

1. Plaintiffs’ Motion to Seal is hereby GRANTED.
2. Defendants’ Response to the Court’s February 7, 2020 Order shall remain redacted and Exhibits 4–7, 9–12, and 19–22 thereto will remain filed under seal.

1 IT IS SO ORDERED

2 Dated this 26th day of February, 2020.

3
4 

5
6 Marsha J. Pechman
7 Senior United States District Judge

8 Presented by:

9 **NEWMAN DU WORS LLP**

10 s/ Rachel Horvitz

11

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