No. 20-70365

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.

RESPONSE TO PLAINTIFFS' MOTION TO CLARIFY THIS COURT'S ADMINISTRATIVE STAY

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INTRODUCTION

The Court should deny plaintiffs' motion for "clarification" of its stay order, which is in no respect unclear. The Court has before it the government's petition for a writ of mandamus, which explains that the district court committed clear error in ordering the indiscriminate disclosure of deliberative documents and communications of the Department of Defense without either (i) requiring plaintiffs to explain, in light of the extensive discovery already obtained, what more they need to litigate their claims, or (ii) meaningfully considering whether that need outweighed the military's significant confidentiality interests protected by the deliberative process privilege. The Court granted a temporary stay of the relevant disclosure orders pending its consideration of the arguments presented in the government's petition, and it recently ordered supplemental briefing and set the matter for oral argument on October 14, 2020. *See* July 31 Order 1-2.

Plaintiffs' motion for "clarification" does not seek clarification at all. Rather, plaintiffs address orders that the district court entered during the pendency of these mandamus proceedings, in which the district court refused to accede to plaintiffs' demands for immediate disclosure of the very deliberative information that is now before this Court. Plaintiffs want the district court to require such disclosure, and, in the process, to moot much of the Court's consideration of the pending petition. Plaintiffs thus acknowledge (at 15-16) that they ask this Court to hold that the district court can order disclosure of many of the documents at issue in the mandamus

petition, even while a stay is in place and the petition is pending. The district court has rightly refused to allow plaintiffs to proceed in this fashion so as not to undermine this Court's review.

Plaintiffs repeatedly complain that the government has over-applied the privilege, but these complaints largely rest on a fundamentally erroneous view of the privilege and its manifestation in the district court's July 15 disclosure order, which is currently stayed pending the district court's ruling on the government's stay motion. And plaintiffs ask this Court to set aside the ordinary procedure under the civil rules and overrule the district court's conclusion that the government may instruct witnesses not to answer deposition questions that call for privileged information.

These requests do not seek—and thus do not warrant—"clarification" of this Court's stay. Insofar as plaintiffs ask this Court to provide further instruction to the district court, that instruction can await any decision in these mandamus proceedings, in which the district court itself has requested "guidance" and "more direction" about how to proceed. D. Ct. Resp. 13.

STATEMENT

On July 31, 2020, the panel issued an order directing the parties to file supplemental briefs addressing "any legal or factual developments since February that might bear on the issues to be argued in October." July 31 Order 1-2. The government will describe the course of the litigation since February in its forthcoming

supplemental brief in response to that order. We summarize below only the limited background relevant to plaintiffs' motion.

A. In 2019, this Court issued a writ of mandamus vacating a discovery order encompassing virtually every deliberative document in this litigation. In doing so, the Court reminded the district court of its obligation to assess plaintiffs' alleged need for each additional disclosure of deliberative materials, and made clear that the court should not rule on a blanket basis. *See Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019) (per curiam). The Court also emphasized that the district court should give "careful consideration" to the fact that "the military's interest in full and frank communication about policymaking raises serious—although not insurmountable—national defense interests." *Id.*

Notwithstanding that direction, plaintiffs have continued to seek, and the district court has continued to issue, broad discovery orders compelling the disclosure of deliberative documents. The present mandamus petition addresses three of those orders, which require disclosure of privileged documents responsive to requests for production (RFPs) Nos. 15 and 29. Those RFPs seek all documents related to the formulation of the Carter policy and all documents referring or relating to the Department's Report that encapsulates the Panel of Experts' recommendations, which Secretary Mattis adopted as the Mattis policy. As the petition explained, the district court issued these additional orders without ever explaining why plaintiffs cannot litigate their constitutional claims on the basis of the voluminous discovery

they have already obtained, and without giving any meaningful consideration to the military's interest in full and frank communication.

This Court granted the government's request for a temporary stay pending disposition of the petition, ordering that "[t]he district court's December 18, 2019, February 3, 2020, and February 7, 2020 orders challenged in this petition are temporarily stayed pending further court order." Stay Order 1. In responding to the government's mandamus petition, the district court specifically asked this Court to provide additional "guidance" and "more direction" to aid its handling of disputes over the deliberative process privilege. D. Ct. Resp. 13.

B. Following those events, the district court has not awaited further guidance or direction from this Court. The district court has continued to order disclosure of deliberative documents, including many documents at issue in these mandamus proceedings, but it has, in several instances, provided an exception from immediate disclosure for documents before this Court.

1. The district court appointed a special master to assist the court "in reviewing Defendants' privilege assertions over documents the Defendants have submitted for *in camera* review." Doc. 479, at 3. Plaintiffs asked that the special master review a "random sample" of 350 documents among the roughly 25,000 documents still withheld in this case solely on the basis of the deliberative process privilege, asserting both that the government had over-applied the privilege and that the privilege had been overcome. App. 86; *see* Doc. 547, at 1 n.1 (current figures for withheld

documents). The government opposed that request, explaining that the documents were properly withheld, and that no basis existed for random sampling as a method of resolving the privilege. App. 87-94. And the government explained that the sampling plaintiffs sought would implicate documents that the district court had already ordered disclosed in the orders subject to the pending mandamus petition; that for those documents, "the question whether the *Warner* factors permit such disclosure is now pending before the Ninth Circuit"; and that the court "should refrain from further action with respect to the same documents at issue" in light of this Court's pending review. App. 95.

The district court granted plaintiffs' request for *in camera* review, but allowed the government to exclude from the sampling "documents responsive to RFP Nos. 15 and 29 and implicated by the Ninth Circuit's stay." App. 156. The special master ultimately conducted *in camera* review of a "random sample" of 850 documents. App. 684. Despite its objections to aspects of that process, the government anticipated that this review might at last indicate that the district court was prepared to undertake the weighing of plaintiffs' need against the government's confidentiality interests that this Court's decision required.

2. On July 15, 2020, however, the district court again ordered the indiscriminate disclosure of thousands of privileged deliberative documents and communications from the Department of Defense. The July 15 order, in conjunction with the orders subject to this mandamus petition, in effect require disclosure of

virtually every document withheld solely on the basis of the deliberative process privilege in this case—thus reconstructing the original order that this Court vacated in 2019.

This time, the district court did not purport to find the deliberative process privilege overcome, but instead simply asserted that the privilege was not applicable at all. The court declared that, in its view, there are two "specific policies at issue in this litigation," *i.e.*, the Carter and Mattis policies, and not any "spin-off plans" or other "secondary" policies. App. 686. The court further declared that the documents relevant to those policies could be identified by what the court viewed as the time periods in which they were created. In its view, the Carter policy deliberations began with former Secretary of Defense Ashton Carter's commencement of a study to revise military policy, and ended with the announcement of the resulting policy (from July 2015 to June 2016)—ignoring that the military deliberated long afterward about how to move forward with that policy and whether to delay it. *See* App. 688-89. And the court declared that the formulation of the Mattis policy began and ended with the Panel of Experts' deliberations (from September 2017 to January 2018)—even though Secretary Mattis did not adopt the policy until February 22, 2018. *See* App. 689-90.

The district court concluded that "[a]ll documents falling outside of these two timeframes" for the Carter and Mattis policies are not subject to the deliberative process privilege at all. App. 683. It reached this conclusion despite receiving a detailed timeline from the government explaining the many military policies and

decisions in development during the time periods the court deemed not pre-decisional. App. 438-39. In the district court's view, even highly sensitive, plainly deliberative military documents and communications—for example, Secretary Mattis's own deliberations with his staff and advisors, resulting in his decisions to delay the Carter policy (in June 2017) and to adopt the Panel's recommendation (in February 2018)—are not protected by the deliberative process privilege because they are not "pre-decisional" with respect to the particular agency actions "at issue in this litigation." *See* App. 686-88. In one stroke, the district court thereby removed a host of quintessentially privileged military deliberations, including deliberations leading up to important decisions already noted by this Court, from the ambit of the privilege altogether, and declared them fair game for routine discovery in this case.

The district court initially required that many of the documents subject to its July 15 order be released within one week, and some within two weeks. *See* App. 692. Recognizing that some of the documents encompassed by its order were also under this Court's review, however, the district court provided an "exception" from immediate disclosure as to those documents. App. 683. The overlapping documents subject to the exception include documents post-dating the conclusion of the Panel's deliberations, but preceding Secretary Mattis's adoption of the Panel's recommendation, including all drafts of the final Report and a number of Secretary Mattis's handwritten notes.

3. The July 15 order has not gone into immediate effect, because the government asked the district court to stay the order and indicated that it may request relief from this Court absent a stay. Doc. 547.

As the government explained, the district court's conclusion that the privilege protects only those documents that are (in the court's view) immediately pre-decisional to the adoption of the Carter and Mattis policies rests on a fundamental misunderstanding of the deliberative process privilege. Rather, "the 'emphasis on the need to protect pre-*decisional* documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared.'" *Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 981 (9th Cir. 2009) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975)). And the district court's error on that score is all the more apparent because the government *did* identify numerous decisions made outside the timeframes set by the district court—decisions this Court's prior opinion recognized. *See* App. 438-39 (timeline of military decisions through March 2020); *Karnoski*, 926 F.3d at 1188-92 (recounting numerous military decisions between August 2014 and March 2018). Thus, the government explained, even if certain documents are not immediately pre-decisional as to the Carter and Mattis policies in particular, it does not follow that they are not protected by the deliberative process privilege.

The district court has temporarily stayed compliance with its July 15 order pending briefing and ruling on the government's stay motion. App. 853-56. That motion is fully briefed and pending before the district court. *See* Doc. 553; Doc. 560.

C. Plaintiffs have also continued to depose government witnesses. In the district court's February 3 order, which is addressed in the government's mandamus petition, the court had preemptively ruled that government witnesses cannot refuse to answer deposition questions based on the deliberative process privilege, and that the court would then rule on the government's privilege assertions after disclosure to plaintiffs' counsel. *See* Gov't Reply 10 n.1. This Court stayed the February 3 order, along with the two other orders addressed in the government's mandamus petition.

In March, plaintiffs indicated their intent to take a Rule 30(b)(6) deposition on a wide range of topics, including topics that seek privileged information implicated in the pending petition, such as information related to the drafting of the Department of Defense Report and Secretary Mattis's memorandum presenting the policy to the President. The government moved for a protective order, requesting that the district court limit the scope of the 30(b)(6) deposition, and indicating its intent to instruct its witnesses not to answer questions that seek privileged information. *See* Fed. R. Civ. P. 30(c)(2) ("A person may instruct a deponent not to answer . . . when necessary to preserve a privilege."). The court declined to limit the scope of the 30(b)(6) deposition but agreed that the government could instruct its witnesses not to answer where the response would involve privileged information implicated by this Court's

stay. App. 162. The court later clarified that the government could instruct its witnesses not to answer any questions that would elicit testimony protected by the deliberative process privilege—*i.e.*, that the standard procedures under Federal Rule of Civil Procedure 30(c)(2) would apply to all privileged information. App. 429. The court ordered, however, if it later rules that plaintiffs have overcome the deliberative process privilege or the government has misapplied the privilege, the government will be required to bear the cost of additional depositions, including travel costs and expenses for plaintiffs' counsel. *Id.*

Plaintiffs have also taken the extraordinary step of subpoenaing the testimony of current and former Cabinet Secretaries and senior military leadership. Plaintiffs have noticed the depositions of current Secretary of Veterans Affairs Robert Wilkie Jr.; former Secretary of Defense James Mattis; former Vice Chairman of the Joint Chiefs of Staff Paul Selva; and former Vice Chief of Naval Operations William Moran. The government has moved to quash these depositions, and those motions remain pending before the district court.

ARGUMENT

THERE IS NO BASIS TO "CLARIFY" THIS COURT'S STAY.

I. Plaintiffs Improperly Seek Relief from District Court Orders and Attempt to Undermine this Court's Consideration of the Mandamus Petition.

A. Plaintiffs nominally seek to "clarify" the stay as it relates to the district court's document review in two related ways. They say that this Court should clarify

that the district court is permitted to undertake an "*in camera* review of individual documents Defendants withheld" under the privilege "to determine whether the privilege has been overcome." Mot. 2. And they say that this Court should clarify that the district court can undertake an *in camera* review to determine "whether documents withheld by Defendants are subject to the privilege in the first place." Mot. 1. But the district court is already taking those steps (albeit applying the wrong test for privilege, as discussed below). Plaintiffs' real complaint is that, in doing so, the district court has acted to preserve this Court's ability to decide the pending mandamus petition—a proceeding in which the district court itself has requested "guidance" from this Court about "how a 'granular' review should be conducted in this matter." D. Ct. Resp. 13.

Taking the first of plaintiffs' points, to the extent that additional deliberative discovery is appropriate at all in light of the government's voluminous productions to date, the government agrees, as a general matter, that the district court should engage in a granular review of materials in compliance with its obligations under *Warner* and this Court's prior mandamus ruling. Indeed, the government participated in a process of *in camera* review of documents in the district court.

Plaintiffs' primary complaint on this score appears to be that the government has opposed—and that the district court has not permitted—plaintiffs' efforts to compel disclosure of the very documents subject to the orders at issue in the pending mandamus petition. They complain, for example, that the district court excluded

from *in camera* review documents responsive to RFPs 15 and 29—the RFPs at issue in the mandamus petition. Mot. 15; *see* App. 156 (allowing the government to exclude from the sampling "documents responsive to RFP Nos. 15 and 29 and implicated by the Ninth Circuit's stay"). Plaintiffs cite nothing for the remarkable proposition that a district court should require disclosure of the very documents subject to this Court's stay. Those complaints are not properly matters for "clarification," and in any event, those exclusions reasonably protect this Court's ability to decide the mandamus petition and to provide the district court the guidance it has requested.

Nor would further litigation over those documents make sense in advance of this Court's guidance. The mandamus petition was occasioned by plaintiffs' and the district court's adoption of fundamentally mistaken views of how the *Warner* balancing test—and the deliberative process privilege in general—operate. Plaintiffs and the district court have consistently expressed the view that the government has no legitimate countervailing interest in preserving the confidentiality of military deliberations in light of the protective order limiting disclosure to plaintiffs. They have adhered to that view notwithstanding this Court's rejection of that reasoning in the last mandamus petition, *see Karnoski v. Trump*, 926 F.3d 1180, 1197, 1206 (9th Cir. 2019) (per curiam), and notwithstanding circuit precedent making clear that protective orders "cannot eliminate" the chilling effects of disclosure, *Perry v. Schwarzenegger*, 591 F.3d 1147, 1164 (9th Cir. 2010). And plaintiffs and the district court continue to insist that plaintiffs have no obligation to explain their need for further deliberative

disclosures in this case, despite plaintiffs' receipt of vast swathes of deliberative material from the Department of Defense in the time since this Court's previous decision—including every deliberative document sent from, received by, generated by, presented to, or considered by the Panel of Experts. Even now, plaintiffs offer only vague assertions that these documents "go to the heart" of their case, Mot. 15, rather than explaining why further deliberative disclosures are needed to litigate their claim that the Mattis policy is the result of unconstitutional animus. Indeed, as our petition explains (Pet. 22-23), there is no reason to believe that further deliberative discovery in this case is warranted *at all*, given the voluminous discovery already in plaintiffs' possession and the recognition from this Court and the Supreme Court that discovery in military cases is generally quite constrained. *See Karnoski*, 926 F.3d at 1206 n.22; *see also Goldman v. Weinberger*, 475 U.S. 503, 509 (1986); *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981).

Plaintiffs' proposal boils down to the assertion that, even while the government's mandamus petition remains pending, the district court should be free to review and perhaps order disclosure of the very documents responsive to RFPs 15 and 29 at issue in the mandamus petition. Plaintiffs' approach threatens to undermine this Court's ability to decide the mandamus petition and to render its stay of those earlier orders ineffectual. And that procedure is especially inappropriate where the district court itself has specifically requested substantive "guidance" and "more direction" from this Court. D. Ct. Resp. 13. At the very minimum, it would risk

needlessly wasting the time and resources of the parties and the Court. That plaintiffs disagree with the district court's decision to avoid undermining this Court's review of the mandamus petition in this way is not a basis for "clarification."

B. Plaintiffs take a similar tack in seeking to "clarify" that the district court could issue an order requiring the disclosure of the very documents at issue in the mandamus petition on the district court's new theory that those documents are not subject to the deliberative process privilege at all. Mot. 14-16; App. 682. Plaintiffs are, on this score, referring to the district court's July 15 order. Their objective is to secure disclosure of many of the most sensitive (and plainly deliberative) documents at issue in this mandamus petition—specifically, all documents post-dating the conclusion of the Panel's deliberations, but preceding Secretary Mattis's adoption of the Panel's recommendation, including all drafts of the final Report and Secretary Mattis's handwritten notes. To that end, they ask this Court to rule that the district court's July 15 order should not have provided an exception from immediate production for documents "specifically subject to" this mandamus petition. Mot. 16 (quoting App. 683).

This Court should reject that request. As explained in greater detail below, the district court's July 15 order is premised on a fundamental legal error, and thus would not justify disclosure in any event. Regardless, what plaintiffs seek is not "clarification" at all; rather, they seek to challenge the district court's decision to protect this Court's ability to decide the pending mandamus petition.

Plaintiffs portray the district court's consideration of the pre-decisional nature of these documents as distinct from this mandamus proceeding. But it is *plaintiffs* who put the pre-decisional nature of these exact documents at issue before this Court in the pending mandamus proceedings. They argued in their answer to the government's petition that drafts of the Report are not privileged on the theory that "the final decision was made" by the Panel, not Secretary Mattis—an unorthodox view of decision-making authority in the Department of Defense. Ans. 28 (quoting Pet. Add. 113); *see also* Pet. 25-26; Reply 13-14. The district court relied on that same faulty logic in its July 15 order, declaring that all documents postdating the Panel's recommendation, including advice to and drafts of documents prepared for Secretary Mattis, are outside the scope of the privilege, but the court did not order immediate disclosure. *See* App. 689. Because the issue of the pre-decisional nature of these exact documents is pending before this Court in the mandamus proceedings, there was every reason for the district court to avoid interference with those proceedings by exempting from immediate disclosure documents at issue in the petition.

In any event, "clarification" in this Court is unwarranted because the district court is currently considering the government's motion to stay its July 15 order. In doing so, it could revisit that order and correct its prior error, rendering this Court's consideration of those issues unnecessary. Even plaintiffs have requested that the district court alter its July 15 order to require *in camera* review instead of immediate disclosure for numerous documents. *See* Doc. 553, at 12. If the district court refuses

to revisit or stay its July 15 disclosure order, however, further review of that manifestly erroneous order by this Court may be necessary, and that order would be ripe for this Court's review at that time.

If the Court were to address the July 15 order now, it would have to confront the serious legal error on which that order rests. As we have explained, the district court orders at issue in the pending mandamus petition recreated much of the original discovery order vacated by this Court. The July 15 order completes that project of re-creation. The orders under review in the pending mandamus petition require the disclosure of virtually all documents related to the Carter and Mattis policies. The July 15 order holds that the deliberative process privilege is categorically inapplicable to virtually every remaining document in the case, no matter how deliberative in nature, based on the district court's view that the privilege only protects documents that are pre-decisional with respect to the policies "at issue in this litigation." App. 686. That is clear error. Confidential internal military decisionmaking records and communications do not cease to be deliberative merely because (in the court's view) they are not relevant to "the specific policies at issue in this litigation." *Id.* Indeed, the district court has it backward: the less relevant that privileged Department of Defense documents are to plaintiffs' claims, the *less* basis there is for abrogating the privilege. And, of course, if the privileged materials at issue in the July 15 order are not relevant to plaintiffs' claims at all, as the court has seemed at times to suggest, there is no basis whatsoever for allowing discovery into them.

The district court ignored the admonitions of this Court and the Supreme Court that "the 'emphasis on the need to protect pre-*decisional* documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared.'" *Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 981 (9th Cir. 2009) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975)). Documents are "pre-decisional" if they are "prepared in order to assist an agency decisionmaker in arriving at his decision," and do not depend on courts "identify[ing] the actual decision that was made." *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1094 (9th Cir. 1997) (quotation marks omitted).

The district court nevertheless concluded that every document created between the adoption of the Carter policy in June 2016 and the appointment of the Panel in September 2017 was "post-decisional," as if no one in the Department of Defense during that period considered the best means of moving forward or the role the Panel was to play. *See* App. 688-89. This reasoning led the court to absurd ends. The court apparently concluded, for example, that Secretary Mattis's handwritten notes on a memorandum advising him on recommended courses of action were not pre-decisional. *See* Doc. 547, at 7. Similarly, the court appears to have believed that draft interim guidance on military policy was not pre-decisional. *Id.* at 8. That the court had those documents before it for review when it reached these absurd results only makes its misapprehension of the privilege more manifest. *Compare id.* at 7-8

(describing documents), *with* App. 699, 741, 807 (listing those documents as available for review). As our mandamus petition explained, such deliberative notes and drafts pertaining to agency decisional documents have always been at the core of the privilege. Indeed, the logic of the district court's decision would mean that every document not within its specific timeframes for the Carter and Mattis policies would have to be disclosed in response to a routine Freedom of Information Act request. *See Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001) (explaining that FOIA's exemptions incorporate the deliberative process privilege).

It should have been plain that personal notes kept by Secretary Mattis, and the drafts and communications generated in preparing the Department of Defense's Report, were not "post-decisional" merely because they came after the Panel's recommendation. *See* App. 689-90; *see also* Pet. 25-26. The authority to adopt the Panel's recommendation as the view of the Department of Defense was vested in Secretary Mattis, not in the Panel. *See Department of Commerce v. New York*, 139 S. Ct. 2551, 2571 (2019) (observing that authority is vested in the cabinet "Secretary, not the [agency component], to make policy choices within the range of reasonable options"). The culmination of the military's decisionmaking process was not the Panel's recommendation, but instead flowed from the Department's final Report and Secretary Mattis's memorandum conveying his proposed policy to the President. As we explained in our petition, Secretary Mattis ultimately accepted the Panel's recommendation, and thus plaintiffs have no need to evaluate the deliberative process

that occurred after the Panel concluded its work to understand whether the Mattis policy reflects the independent recommendations of the Panel. But that does not mean that the Panel *itself* adopted the challenged policy or that no deliberations occurred after its recommendation. And as we explained in our reply, the district court's continued belief that the government has agreed that "the final decision was made" by the Panel, *see* App. 689 (quoting Pet. Add. 113), ignores our explanation that the Secretary in fact "did not accept" early drafts of the Report adopting the Panel's approach, Add. 117; *see* Reply 13-14.

The district court's casual dismissal of the government's assertion of privilege in such documents is particularly anomalous in light of this Court's 2019 decision, which made clear that several deliberative processes within the Department of Defense resulted in numerous decisions between 2014 and 2018—all outside of the artificial timeframes now announced by the district court. *See Karnoski*, 926 F.3d at 1188-92; App. 435-441 (timeline of decisions).

C. Plaintiffs do not grapple with the anomalous nature of their own motion, requesting that this Court predetermine that actions of the district court designed to protect this Court mandamus review are unnecessary, even before this Court decides the pending petition. Plaintiffs' repeated complaints that the government has over-applied the privilege largely rest on a fundamentally erroneous view of the privilege and its manifestation in the July 15 order. And the other discovery disputes plaintiffs allude to (Mot. 4-6), which the government will address in greater detail in its

forthcoming supplemental brief, are of little relevance here. The government disagrees with the district court's rulings on those questions, but did not believe that those errors warranted this Court's exercise of its extraordinary mandamus powers, and thus did not seek relief from this Court.

In sum, the "clarification" plaintiffs seek is not warranted. The district court has requested guidance from this Court about how to handle disputes over the privilege, and there is no basis for plaintiffs' desire to relitigate disputes over RFPs 15 and 29 without the benefit of that guidance. And with respect to the July 15 order, the appropriate course is to allow the district court to consider whether to stay or revisit that order. If it refuses to do so, then further review of that manifestly erroneous order by this Court may be necessary. But there is no basis for plaintiffs to demand consideration by this Court now in the guise of "clarifying" a stay order issued months ago.

II. Plaintiffs Seek to Contravene Black-Letter Civil Discovery Rules.

Finally, black-letter civil discovery rules permit the government to instruct its witnesses not to answer deposition questions where the response would reveal privileged information. *See* Fed. R. Civ. P. 30(c)(2) ("A person may instruct a deponent not to answer . . . when necessary to preserve a privilege[.]"). Contrary to these standard procedures, the district court's February 3 order initially barred government counsel from giving such instructions based on the deliberative process privilege. After this Court issued a temporary stay of the February 3 order and two

other orders requiring the disclosure of privileged information, however, the district court concluded that the government could instruct its witnesses not to answer any questions that would elicit testimony protected by the deliberative process privilege, *i.e.*, that the standard procedures under Federal Rule of Civil Procedure 30(c)(2) would apply to all privileged information. App. 429.

Plaintiffs' request for "clarification" now asks this Court, in effect, to reinstate the district court's original erroneous order—that is, to specify that plaintiffs may ask government witnesses about privileged information and that the government *cannot* instruct its witnesses not to answer such questions. That request does not seek to "clarify" anything about this Court's stay. It is an appeal of the district court's ruling in disguise. And it would leave the government without any mechanism to protect the privilege—a concern underscored by plaintiffs' ongoing attempts to depose current and former Cabinet Secretaries and senior military leadership, and plaintiffs' intent to take a Rule 30(b)(6) deposition on topics that specifically target privileged information implicated in the pending petition.

CONCLUSION

For the foregoing reasons, this Court should deny plaintiffs' motion for clarification. In the event the Court does not deny the motion outright, it should carry the motion over for oral argument in conjunction with the mandamus petition.

Respectfully submitted,

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AUGUST 2020

[1] The Acting Assistant Attorney General is recused in this matter.

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the limits of Ninth Circuit Rules 27-1(1)(d) and 32-3 because it totals 5,314 words. I further certify that this motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (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 August 14, 2020, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service has been accomplished via appellate CM/ECF.

s/ Ashley A. Cheung
ASHLEY A. CHEUNG