**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' REPLY IN SUPPORT OF MOTION TO CLARIFY THIS COURT'S ADMINISTRATIVE STAY

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Plaintiffs' motion explained in detail the need for this Court to clarify that its administrative stay does not prevent discovery unrelated to the three orders identified in the stay. Defendants' opposition does not dispute any of the reasons for this relief. Defendants concede that they have invoked the stay to prevent discovery in each of the ways Plaintiffs described. And, most importantly, they have no answer to Plaintiffs' arguments demonstrating the inapplicability of the stay to each of those examples.

Rather than grapple with Plaintiffs' motion, Defendants invent a strawman. They mischaracterize the motion as "an appeal" seeking to overturn the District Court's efforts "to protect this Court['s] mandamus review." Opp. 21, 19. But that is doubly false. Plaintiffs are not appealing the orders *granting* their motions; they are requesting *prospective* clarification of the scope of the stay given Defendants' pattern of abusing that order. And, the District Court did not accede to Defendants' demands in order to "protect this Court's ability to decide the pending mandamus petition." Opp. 14. It did so "out of an abundance of caution" while recommending Plaintiffs "seek clarification from the Ninth Circuit regarding the scope of its stay." App. 162.

Equally baseless is Defendants' principal response to the motion—the assertion that granting the motion would "undermine" and "moot much of the Court's consideration of the pending petition." Opp. 13, 1; *see also id.* at

11. Tellingly, Defendants never explain why this is so. For good reason. The three issues raised in Plaintiffs' motion are distinct from the issues pending in Defendants' petition and the orders stayed by this Court.

Rather than address Plaintiffs' motion, Defendants devote much of their brief to contesting the merits of a July 15, 2020 discovery order that they admit is not ripe for review. This appears to be an effort to preview arguments Defendants threaten to raise in yet ***another*** filing in this Court. *See* Opp. 16, 20. Defendants' objections are premised on factual misstatements. They are also wrong on the law. But regardless, they are irrelevant to Plaintiffs' request for clarification of this Court's administrative stay.

## ARGUMENT

### I. Defendants Fail to Rebut Any of Plaintiffs' Arguments Supporting Clarification of the Stay.

Defendants do not dispute any of the reasons Plaintiffs detailed for clarifying the administrative stay. Defendants concede they invoked the stay in opposing every District Court decision described in Plaintiffs' motion. That includes as a basis for (1) withholding what are likely some of the most relevant documents in this case from the District Court's efforts to determine on a document-by-document basis whether the privilege even applies (an issue not raised in their petition), (2) opposing the District Court's review on a document-by-document basis of whether the privilege has been overcome (despite that being the very relief they seek in their

petition), and (3) refusing to allow deposition testimony relating to their central defenses in this case based on *the stay* and *not* "black-letter civil discovery" rules. Mot. 7–9; Opp. 20.

Nor can Defendants avoid the results of the *in camera* reviews to date, which demonstrate that approximately 90% of the documents reviewed are not privileged. Defendants suggest this conclusion was based on the District Court's July 15 findings as to certain time periods that would be *presumptively* pre- and post-decisional. Opp. 14, 19. But that presumption is a "discovery management tool that would speed the Court's review *going forward*." Ex. A at 7 (emphasis added); App. 688. The Court's determination that approximately 90% of the documents it reviewed were not privileged was based on its "review of each of the 850 documents" in the random samples it reviewed. Ex. A at 6. Moreover, Plaintiffs' motion also described the results of the District Court's prior *in camera* reviews of individual documents on May 12, May 29, and June 24 (App. 143–52, 164–69, 423–30), and Defendants' decisions to preemptively withdraw from the samples almost 20% of the documents initially selected that even they conceded were clearly not privileged. *See* Mot. 4–8, 11. Defendants have no response to any of those determinations.

Instead, Defendants repeatedly assert that granting the motion would "undermine this Court's ability to decide the mandamus petition." Opp. 13; *see also*

*id.* at 11, 14. But they completely fail to address any of the reasons Plaintiffs set forth in their initial brief as to why that is not so. Nor could they. As explained below, granting Plaintiffs' motion would not affect the Court's ability to decide the issues raised in Defendants' petition or award the relief Defendants seek.

### A. *In Camera* Review of Whether the Privilege Applies Does Not Affect This Court's Review of the Separate Issue of the District Court's Application of *Warner*.

First, allowing the District Court to review individual documents to determine whether the privilege applies would not affect this Court's consideration of the separate question whether the privilege has been overcome under *Warner*. Defendants concede that their petition does not address the threshold issue whether the privilege was properly asserted, and is limited to the separate question whether the privilege has been overcome under *Warner*. *See* Opp. 14, 15. They claim the stay nonetheless forecloses any further evaluation by the District Court of whether the privilege applies because Plaintiffs' *Answer* argued that this Court can affirm the order to disclose ***one*** category of documents—documents regarding the DoD Report—on the alternate ground that "Defendants conceded below that the privilege does not apply." Pls.' Answer 27–29 (capitalization altered).

But it cannot be that the stay prevents the District Court from conducting further proceedings on this separate issue in order to preserve a dispute that this Court need not decide. Defendants' argument rests on a perverse premise: that the

stay prevents proceedings *because* they would *narrow* issues before this Court. Not so. An administrative stay prevents the challenged *harm* from occurring before appellate decision, not the resolution of disputes. Here, the District Court has agreed to review *in camera* all documents Defendants withheld related to the DoD Report—including any drafts—to determine whether they are *not* pre-decisional or deliberative as to the "Mattis Policy" (as Defendants originally admitted) or are (as they now argue). Ex. A at 11.[1] That review should eliminate any basis for mandamus relief as to those documents. If the District Court determines the drafts are not privileged, there will be no reason to reach the issues in Defendants' petition concerning *Warner* balancing. And, even if it does not, but finds the privilege has been overcome, the Court will have conducted the most "granular" review possible.

Rather than show interference with the relief their petition seeks, Defendants instead object to the possibility that the District Court would "review and perhaps order disclosure of ***the very documents*** responsive to RFPs 15 and 29 at issue in the mandamus petition." Opp. 13 (emphasis added); *see also id.* at 11–12, 14 (same).

[1] Defendants misleadingly imply that Plaintiffs originated "the theory that 'the final decision was made' by the Panel, not Secretary Mattis." Opp. 15. But Plaintiffs were quoting *Defendants*. Pls.' Answer 28; *see also, e.g.*, Defs.' Reply, Dkt. 18, at 1 (claiming the Panel "formulated the now-challenged Mattis policy"); *see also, e.g.*, Pet. 2 (similar). Regardless, according to Defendants, Secretary Mattis "accepted the decision" of the Panel *prior* to "ask[ing] for" the preparation of the DoD's February 2018 Report. Pet. Add. 112–13.

In other words, Defendants treat the stay as if it applies to the *documents* at issue in the challenged orders—no matter the reason for their production—not to the orders themselves. There is no support for this position, which is contrary to the stay itself. The stay applies to the three *orders* challenged by Defendants' petition. It does not forbid the production of the *documents* at issue for reasons unrelated to those orders. Such misinterpretations of the stay are precisely why clarification from this Court is needed.

### B. Providing Defendants the "More Granular" Review They Seek Would Not Interfere With This Court's Review of the Petition.

Nor would *in camera* review of whether the privilege has been overcome as to particular documents moot consideration of whether the District Court's analysis on a category-by-category basis was sufficiently granular. Once again, that such *in camera* reviews might result in an order to disclose some of the same documents that are subject to Defendants' petition on ***other grounds*** does not have any effect on, let alone "undermine," this Court's ability to decide the category-specific issues raised by Defendants' petition and order the relief Defendants seek (a more "granular" review). Relatedly, providing Defendants the relief their petition seeks is not a basis for *preventing* that review, but allowing it.

Likewise baseless is Defendants' argument that even though the District Court's *in camera* application of *Warner* to individual documents is not before the Court on their petition, this Court might provide "guidance" on three issues

supposedly affecting that review. Opp. 12. The first concerns a purported finding the District Court did not make—"that the government has ***no*** legitimate countervailing interest in preserving the confidentiality of military deliberations in light of the protective order." *Id.* (emphasis added). Rather, the District Court determined that the protective order "***mitigate[s]***" those interests (a position that even Defendants do not dispute). *E.g.*, Pet. Add. 83–84 (emphasis added); *id.* at 6–7; Pls.' Answer 32, 37. Defendants do not, and cannot, explain how rejection of a position the District Court has not taken will "guide" its application of *Warner* in future *in camera* reviews. The remaining issues concern arguments this Court has already rejected and which, in any event, would not "guide" further review but prevent it entirely. Thus, Defendants argue that Plaintiffs cannot show a need for ***any*** further documents in view of those already ordered produced and that ***any*** further document discovery should be barred because the discriminatory policy challenged here involves the military. Opp. 12–13. This Court has already rejected both of these extreme and unsupported arguments. *See Karnoski v. Trump*, 926 F.3d 1180, 1206 (9th Cir. 2019) (making clear that need is established by *Warner*'s first three factors, two of which "favor Plaintiffs," leaving only "relevance," which Defendants do not dispute here); *id.* at 1194–95 (acknowledging, but declining to accept, Defendants' argument that further discovery should be barred because the challenged policy involves the military).

### C. The Stay Provides No Basis For Limiting Deposition Testimony.

Finally, an order clarifying that ***the stay*** does not provide a basis for instructing witnesses not to answer questions at ***depositions*** would not undermine this Court's review of whether the privilege had been overcome as to certain categories of ***documents*** under *Warner*. Defendants do not, and cannot, argue otherwise. Incredibly, they instead accuse Plaintiffs of attempting to violate "black-letter civil discovery rules." Opp. 20–21. But Plaintiffs' motion expressly acknowledges Defendants' right to object to "a particular question that reasonably calls for the disclosure" of privileged information. Mot. 20. That was Plaintiffs' point, which Defendants tacitly concede: "[A]ny such objection would arise from the law concerning privilege and not this Court's stay." *Id.* For that reason, Defendants cannot invoke the stay to refuse to produce Rule 30(b)(6) deponents or allow *any* testimony concerning the three broad subject matters addressed in their petition. App. 124. It is *Defendants* who must rely on black-letter discovery rules to object to particular questions that call for privileged information.

In short, Defendants' opposition only confirms the need for Plaintiffs' requested relief. Absent clarification, Plaintiffs' prosecution of their constitutional claims will continue to be undermined by the delay of critically important discovery and *in camera* review of Defendants' privilege claims that are not properly subject to the stay.

## II. Defendants' Objections to the July 15 Order Are Both Irrelevant and Meritless.

Defendants primarily use their response as a pretext to argue the ***merits*** of a July 15 discovery order, which are completely irrelevant to Plaintiffs' motion, not challenged in Defendants' petition, and not properly before this Court. Plaintiffs referenced Defendants' invocation of the stay to limit the scope of that order as a further example of Defendants' misuse of the stay and need for clarification. Mot. 12, 18. Plaintiffs did not argue the ***merits*** of that order.

Defendants' attack on the July 15 order is not only irrelevant, it is also wrong as a matter of fact and law. First, Defendants grossly mischaracterize the order, which did *not* "order[] the indiscriminate disclosure of thousands of privileged deliberative documents." Opp. 5. Rather, it established time periods during which documents "are ***presumptively*** predecisional and entitled to possible DPP protection" based on the parties' input as to when the Carter and Mattis Policies were being deliberated. App. 690 (emphasis added). The order expressly allowed Defendants to assert the privilege over specific documents falling outside the presumptive periods by motion should Defendants maintain that those documents were nevertheless privileged. App. 687–88. Defendants omit any reference to this procedure.

Defendants' objections are even further undermined by two subsequent modifications to the order. On August 17, 2020, the Court ordered that Defendants

could submit for *in camera* review any document from the presumptively non-decisional time periods that they claim is nevertheless privileged, without filing a motion or producing the document to Plaintiffs. Ex. A at 11–12.

The Court also granted *in camera* review as to all withheld documents during the period from January 11, 2018 through February 22, 2018, which had been the principal focus of Defendants' objections to the order. *Id*. This includes all drafts of the DoD Report, about which Defendants have taken contradictory positions. Defendants' counsel initially claimed these drafts were created "after 'the final decision was made'" and were only "tweaking how you're going to do a particular sentence or how you're going to write a particular paragraph" before changing course and arguing "these drafts are not only predecisional but 'some of the most sensitive documents in this case.'" *Id.* at 11. The Court ordered *in camera* review to resolve these contradictory factual assertions. It did not "casual[ly] dismiss[]" Defendants' "assertion of privilege in such documents." Opp. 19. Just the opposite, it implemented a procedure that directly resolves those concerns.

Defendants' attack on the July 15 order is also wrong on the law. Defendants claim they can withhold documents based on general assertions that they *relate to unidentified* governmental decisions. Opp. 8, 17. The case Defendants cite in support of this argument, *Lahr v. National Transportation Safety Board*, 569 F.3d 964 (9th Cir. 2009), in fact refutes it. There, the Court made clear that to be

privileged, "documents must be prepared to assist an agency decision-maker in arriving at ***a future particular decision***." *Id.* at 981 (emphasis added). "Otherwise, the privilege would be boundless, as '[a]ny memorandum will always be 'predecisional' if referenced to a decision that possibly may be made at some undisclosed time in the future.'" *Id.* (citation omitted).

## CONCLUSION

What is "absurd" here is not the July 15 order, Opp. 17, but the lengths to which Defendants have gone to avoid disclosure of documents that would allow Plaintiffs (and the Court) to test the truth of their assertions that the "Mattis Policy" was developed (1) independent from and unconstrained by the President's August 25, 2017 "directives," and (2) because of important military interests, not unsupported stereotypes and prejudice. This includes: blanket invocation of the DPP as to tens of thousands of documents; insistence that the DPP can only be overcome by review so "granular" as to be impossible given the volume of documents withheld; and opposition to the District Court's efforts to provide the very "granular" review they have demanded.

What is equally extraordinary are the District Court's herculean efforts to timely and fairly assess Defendants' privilege claims notwithstanding Defendants' massive over-application of the privilege, repeated misstatements of law and fact, and use of every possible procedural device to thwart that assessment. *See, e.g.*,

Dist. Ct. Mandamus Resp., Dkt. 15, at 11. This Court should support those efforts by clarifying that the administrative stay is limited to the three orders challenged in Defendants' petition and reject Defendants' misuse of the stay to foreclose other discovery and discovery-related proceedings.

Dated: August 21, 2020

Respectfully submitted,

By: */s/ Stephen R. Patton*

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 27-1(1)(d) and 32-3(2), and Fed. R. App. P. 27(d)(2), because it totals 2,687 words, excluding parts exempted by Federal Rule of Appellate Procedure 27(a)(2)(B) and 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

*/s/ Stephen R. Patton*
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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 August 21, 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/ Stephen R. Patton*
Stephen R. Patton

# EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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|---|---|
| RYAN KARNOSKI, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>DONALD J. TRUMP, et al.,<br><br>Defendants. | CASE NO. C17-1297 MJP<br><br>ORDER DENYING MOTION TO STAY THE COURT'S JULY 15, 2020 ORDER (DKT. NO. 545) |

THIS MATTER comes before the Court on Defendants' Motion to Stay Compliance with the Court's Discovery Order. (Dkt. No. 547.) Having reviewed the Motion, the Response (Dkt. No. 553), the Reply (Dkt. No. 560), and the related record, the Court DENIES the Motion.

**Background**

Once again the Court is required to discuss the Government's assertion of the Deliberative Process Privilege ("DPP") over tens of thousands of documents. This particular discovery dispute is now more than two years old and has been the subject of dozens of previous motions, Orders, and the Government's two petitions for writs of mandamus with the Ninth Circuit. To date, the Government continues to withhold 25,000 documents solely on the basis of

the DPP and over 40,000 documents based on the DPP in combination with other privileges. (See Dkt. No. 547 at 2 n. 1.)

1. Procedural Background

The Court first addressed Defendants' DPP claims on July 27, 2018, when it granted Plaintiffs' first Motion to Compel Discovery Withheld Under the Deliberative Process Privilege. (Dkt. No. 245; Dkt. No. 299). In its Order, the Court noted that while several other courts have recognized that the privilege does not apply to cases involving claims of governmental misconduct or where the government's intent is at issue, the application of the privilege in cases involving these claims "appears to be an open question in the Ninth Circuit." Vietnam Veterans of Am. v. CIA, 2011 WL 4635139, at *10 (N.D. Cal. Oct. 5, 2011). The Court therefore evaluated Defendants' DPP claims under the balancing test set forth in FTC v. Warner Commc'ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984), which determines whether Plaintiffs are able to overcome a properly asserted DPP claim. The Court ordered Defendants to produce the requested documents.

In response, the Government filed a Petition for a Writ of Mandamus with the Ninth Circuit. (See Dkt. No. 302.) Almost eleven months later, the Ninth Circuit issued a Writ of Mandamus, concluding, in part, that the record was insufficient to establish the relevance of the documents as balanced against the possible "chilling effect" of disclosure. Karnoski v. Trump, 926 F.3d 1180 (9th Cir. 2019). The Ninth Circuit suggested that on remand, when evaluating Defendants' DPP claims, this Court should "consider classes of documents separately when appropriate" and, "[i]f Defendants persuasively argue that a more granular analysis would be proper, [the Court] should undertake it." Id.

On remand, Plaintiffs filed a second Motion to Compel Documents Withheld Under the Deliberative Process Privilege. (Dkt. No. 364.) After evaluating groupings of contested documents organized by individual Requests for Production, the Court ordered Defendants to produce documents responsive to Plaintiffs' Request for Production No. 15, which seeks "[a]ll documents or communications relating to Secretary of Defense Ash Carter's Directive Type Memo 16-005," and Request No. 29, which seeks "Documents or Communications relating or referring to the February 2018 Department of Defense Report and Recommendations on Military Service by Transgender Persons." (Dkt. No. 398 at 2-3; Dkt. No. 402 at 34:19-20.)

Following the Court's ruling, Defendants filed their second Petition for a Writ of Mandamus, asking that the Ninth Circuit:

> [R]everse the district court's orders of December 18, 2019, February 3, 2020, and February 7, 2020, and order that plaintiffs are not entitled to any further deliberative documents from the two requests for production (RFPs) at issue in these orders—RFP 29 and RFP 15—given plaintiffs' inadequate showing of need under the proper standard for overcoming the deliberative process privilege.

(Dkt. No. 414, Ex. 1 at 11.) On February 12, 2020, the Ninth Circuit granted Defendants' request for a temporary administrative stay of the Court's December 18, 2019, February 3, 2020, and February 7, 2020 orders challenged in Defendants' petition. (Dkt. No. 415.) That temporary stay remains in effect today—six months after its entry—although Plaintiffs recently asked for clarification of the scope of the stay, noting that it was entered before any briefing had been submitted and can no longer be considered temporary. (Dkt. No. 561, Ex. 1.)

Following the Government's Petition, the Circuit took the unusual step of inviting the Court to address the Petition; the Court filed its response on March 5, 2020. (Dkt. No. 416.) Oral argument on Defendants' Petition was recently set for October 14, 2020. (Dkt. No. 559.)

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2. Problems with the Government's Privilege Assertions

Until March 2020, the Court's process for analyzing Defendants' privilege claims was based on the assumption that the Government properly asserted the DPP over each of the 35,000 withheld documents (now reduced to 25,000) and that the relevant question was therefore whether the Plaintiffs were able to overcome the privilege under the balancing test set forth in Warner.

But in March, upon two motions to compel brought by Plaintiffs, the Court ordered the Government to submit documents for *in camera* review for the first time and these submissions raised serious concerns about the Government's review process and privilege assertions. First, Plaintiffs moved to compel the Government's withheld communications with third parties, asking the Court to conduct an *in camera* review of the Government's DPP and attorney-client privilege claims over communications with 487 third party custodians from the Government's privilege logs. (Dkt. No. 440.) The Government objected on the grounds that its communications with those third parties are shielded by the "consultant corollary" doctrine. (Id. at 20-22.) But when the Court ordered the Government to submit the privilege-claimed documents for *in camera* review, the Government produced communications from only 14 of the 487 persons identified by Plaintiffs, conceding that there was no colorable privilege claim for the remaining 473 custodians. (See Dkt. Nos. 461, 509.) Further, of the 1,500 pages of documents the Government did submit to the Court, only one document was arguably privileged. (Dkt. No. 509 at 9.) One particularly egregious example of the Government's over-assertion was a copy of the publicly available RAND Report indicating it could be purchased for $22.50, but which the Government had marked as subject to the DPP. (Id. at 4.)

Plaintiffs' second motion to compel in March sought documents that are part of an otherwise responsive "family group" of produced material but were withheld on the grounds of "non-responsiveness"; as an example, the Government withheld attachments to emails as "non-responsive" where the email itself was produced. (Dkt. No. 449.) After the Court granted Plaintiffs' Motion, the Government informed the Court that while the Government had not asserted any privilege over these documents or listed them on a privilege log, the Government was now claiming the documents were protected from disclosure by the attorney-client privilege, the attorney work product privilege, the DPP, and the executive privilege. (Dkt. No. 463 at 2.) The Court ordered Defendants to submit the subset of documents that Defendants believed to be privileged to the Court for *in camera* review along with a privilege log. (Dkt. No. 464.) After reviewing the approximately 1,700 pages the Government submitted, the Court found that for most of these documents—which included summaries of press accounts prepared by foreign governments, responses to Congressional questions, and non-privileged communications that were simply sent to attorneys—the Government's privilege assertions strayed far outside the bounds of the claimed privileges. (Dkt. No. 522 at 5.)

Following these rulings, on May 4, 2020 Plaintiffs brought a motion to compel the Government to submit a random sample of 350 documents for *in camera* review, one percent of the total documents the Government was still withholding solely on the basis of the deliberative process privilege. (Dkt. No. 497.) It seemed evident that before the Court could apply the balancing test set out in the Ninth Circuit's decision, as directed by Warner, 742 F.2d at 1161, it first had to determine if the documents at issue even qualified as being subject to the DPP, rather than simply accepting the Government's privilege assertions. To qualify for the DPP, "a document 'must be *both* (1) 'predecisional' or 'antecedent to the adoption of agency policy' and

(2) 'deliberative,' meaning 'it must actually be related to the process by which policies are formulated.'" National Wildlife Federation v. U.S. Forest Service, 861 F. 2d 1114, 1117 (9th Cir. 1988) (citation omitted, emphasis in original). In its *in camera* review of the Government's DPP claims, the Court found that many documents were neither predecisional nor deliberative.

The Court granted Plaintiffs' motion and after reviewing the Government's submission of 350 randomly selected documents withheld as privileged under the DPP, the Court ordered the Government to submit an additional 500 randomly selected documents to the Court for *in camera* review in order to further determine the scope of the Government's privilege claims. (Dkt. No. 545.) Yet before submitting the set of 500 documents, the Government itself determined that 90 of those documents (or 18% of the total) were not subject to a proper DPP claim. (Dkt. No. 542 n. 1.)

After reviewing each of the 850 documents individually and applying the two-step test set out in National Wildlife Federation, the Court concluded that nearly 90% were not privileged. (Dkt. No. 545 at 5.) The Court also noted that the Government failed to segregate portions of documents which may be partially protected by the DPP from those that are not, despite its obligation to do so. See Karnoski, 926 F.3d at 1204 (quoting Army Times Publ'g Co. v. Dep't of Air Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993)) ("Unlike the presidential communications privilege, the deliberative process privilege does not protect documents in their entirety; if the government can segregate disclosed non-privileged factual information within a document, it must.").

In sum, in its four submissions for *in camera* review, the Government has displayed largescale and pervasive failures in its discovery process, leaving the Court with little, if any confidence that the Government is properly asserting the DPP privilege over the remaining

withheld documents. Further, the Government's lawyers recently admitted that although they have been strenuously arguing against the disclosure of these documents for years, they have not personally reviewed the withheld documents, making the Court's "granular" review all the more difficult where arguments about the documents are often made in general, hypothetical terms. (Dkt. No. 548.)

3. July 15, 2020 Order

Based on the Court's growing concerns that the Government has been haphazardly and mistakenly labelling documents as privileged without proper review, the age of this particular discovery dispute, and in light of the enormous task remaining of reviewing the 25,000 to 40,000 withheld documents over which the Government has claimed the DPP, on July 15, 2020 the Court outlined a discovery management tool that would speed the Court's review going forward. (Dkt. No. 545.) Defendants were ordered to review their list of documents withheld solely on the basis of the DPP and apply the temporal filter of July 13, 2015 through June 30, 2016 and September 14, 2017 through January 11, 2018, the timeframes that the Carter and Mattis Policies were being considered, respectively. (Id. at 2.) This timeframe was based on the Court's review of the relevant record, the Ninth Circuit's discussion in Karnoski, 926 at 1188-98, and the Parties' answers to questions posed by the Court about the two Policies. (Dkt. Nos. 536, 540-42).

The Court concluded that going forward, documents outside this timeframe are presumptively not privileged under the DPP because they are not predecisional, "but if it turns out that some documents falling outside the predecisional and post-decisional date ranges are properly the subject of DPP, specific documents can be brought to the Court's attention on subsequent motion." (Dkt. No. 545 at 6-7.) Defendants were also ordered to produce documents

from their 850-document submission that were reviewed *in camera* and determined not to be privileged. (Dkt. No. 545 at 11.) The Order specifically exempted documents subject to the stay in the pending Mandamus Petition.

On July 20, 2020 the Government brought the current Motion to Stay the Court's Jul 15, 2020 Order. (Dkt. No. 547.) In response, Plaintiffs propose that the Court make two modifications to its Order that would allow the Government to submit privileged documents that fall outside the timeframes the Court has adopted for *in camera* review without motion practice. (Dkt. No. 553 at 11.) For the reasons discussed below, the Court DENIES the Government's Motion and adopts Plaintiffs' proposed modifications to the Court's July 15, 2020 Order.

**Discussion**

A stay pending appeal "is an intrusion into the ordinary processes of administration and judicial review." Nken v. Holder, 556 U.S. 418, 427 (2009) (internal quotation marks and citation omitted). As such, it is "not a matter of right, even if irreparable injury might otherwise result." Id. at 433 (citation omitted). "It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." Id. (internal quotation marks and citation omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." Id. at 433-34.

In determining whether to grant a stay, the Court considers: (1) whether Defendants have made a strong showing that they are likely to succeed on the merits of their Mandamus Petition; (2) whether Defendants will be irreparably injured absent a stay; (3) whether a stay will substantially injure Plaintiffs; and (4) whether the public interest supports a stay. Id. at 434.

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**A. Likelihood of Success on the Merits**

The Government first argues that the Court's July 15 Order is likely to be contrary to the Ninth Circuit's ruling on the Governments' pending mandamus petition because: (1) the Order would require the production of a large trove of documents, and is therefore not a "granular" discovery order; (2) the Order misapplies the predecisional requirement; and (3) the Court has selected timeframes that "are not congruent with the facts of this case." (Dkt. No. 547 at 7-8.)

As to the first objection, the Order challenged by the Government specifically carves out the documents subject to the pending Mandamus Petition. Moreover, the pending Mandamus Petition is unrelated to the Court's July 15, 2020 Order. The Government's pending mandamus petition requests that the Ninth Circuit "reverse the district court's orders of December 18, 2019, February 3, 2020, and February 7, 2020 . . . given [P]laintiffs' inadequate showing of need under the proper standard for overcoming the deliberative process privilege." (Dkt. No. 414, Ex. 1 at 11 (emphasis added).) The challenged Orders did not evaluate whether the Government properly asserted the DPP in the first place, but assumed the withheld documents met the threshold of being predecisional and deliberative. (Dkt. No. 545 at 11.) Subsequent *in camera* review showed the error of the Court's assumption. Finally, the Government fails to explain why the Court's *in camera* document-by-document review of the Government's 850-document submission was not "granular," yet the Government resists producing these documents as well.

The Government's second and third objections relate to the time frame chosen as a discovery management tool to deal with the "predecisional requirement." As noted in the Court's Order, one DPP requirement is that it be "predecisional," so that the privilege applies "prior to the time the decision is made" and not to "communications made after the decision and designed to explain it." (Dkt. No. 545 at 4 (quoting NLRB v. Sears, Roebuck & Co., 421 U.S.

132, 151-52 (1975)). In an attempt to get the Parties' views on the issues, the Court submitted written questions to the Parties and received responses. From the Government's perspective, the time frame at issue began in March 2014, when certain individuals began to consider transgender policies, and continues through today. (Dkt. No. 545 at 5.) Although this is in keeping with the way it has handled its DPP designations, this approach reads out of existence the requirement that documents be predecisional.

The Government's objections that the Court's focus on the Carter and Mattis Policies could lead to mass disclosure of deliberative documents relating to other policies, is misplaced. (Dkt. No. 547.) To begin, the policies at issue here are the Carter and Mattis policies and the withheld documents are responsive to Plaintiffs' discovery requests, which were focused on the current litigation over these Policies. (Dkt. No. 547 at 8.) The Government does not explain why thousands of documents related to other policies would be responsive to discovery requests seeking "[a]ll Documents and Communications related to the [Mattis] Policy," for example. (Dkt. No. 365, Ex. 1 at 3.)

More importantly, the Court's timeframes are a discovery management tool, meant to counteract the Government's troubling and apparently prevalent practice of mislabeling documents as privileged, while also aiding the Court's review of the 25,000 to 40,000 documents the Government continues to withhold under the DPP. Should the Government determine that certain deliberative documents fall outside of the Court's proposed timeframes for presumptively privileged documents, the Court's Order makes clear that the Government can bring those individual documents to the Court's attention for an *in camera* review. (Dkt. No. 545 at 11.) This procedure also allows the Government another opportunity to review its privilege claims and to redact documents in accordance with its obligations, as outlined by the Ninth Circuit.

Finally, the Government's concerns about the timeframes chosen by the Court do not warrant a stay, especially when mitigated by Plaintiffs' proposals. The Government is particularly concerned with producing drafts created by officials in the Office of the Undersecretary of Defense, who were tasked with writing the Report and Recommendations after the Panel concluded its work on January 11, 2018. The Government has taken contradictory positions on these documents. On December 10, 2019, the Government's lead attorney, Andrew Carmichael, told the Court that these "[d]rafts aren't deliberative process. [These documents are] little subparts of the decision, tweaking how you're going to do a particular sentence or how you're going to write a particular paragraph," and the documents were created after "the final decision was made." (Dkt. No. 402 at 27:24-25, 28:19, 30:18-19.) But the Government now argues that these drafts are not only predecisional but "some of the most sensitive documents in this case." (Dkt. No. 547 at 9.) The Government's inconsistent position on these documents notwithstanding, the Court finds that the Government's concerns can be addressed by Plaintiffs' proposed modifications to the review process.

Plaintiffs suggest that the Court make clear in its order that the Government can submit any documents it claims are privileged but outside the proposed timeframe for *in camera* review without separate motion practice. (Dkt. No. 553 at 11.) Second, Plaintiffs suggest the Government immediately submit for *in camera* review the documents dated January 11, 2018 to February 22, 2018—representing the period between the Panel of Expert's recommendations and the date the Department of Defense published the 44-page Report and Recommendation—so the Court can assess whether these documents are predecisional and deliberative, as the Government now argues. (Id.) The Court adopts both proposals. The Government will be permitted to bring any privileged document to the Court's attention for *in camera* review, without motion practice,

and shall submit any privileged documents from the timeframe January 11, 2018 to February 22, 2018 for the Court's *in camera* review by **August 28, 2020**.

**B. Likelihood of Irreparable Harm**

The Government has also failed to demonstrate a likelihood of irreparable harm. The Government's assertion that the Court's July 15, 2020 Order "will result in the irretrievable disclosure of thousands of privileged documents relating to multiple military policies" ignores explicit protections in the Order, which allow specific documents to be brought to the Court's attention upon subsequent motion. (Dkt. No. 545 at 6-7; Dkt. No. 547 at 4.) Further, as discussed above, the Court adopts Plaintiffs' proposal that in lieu of production, the Government may submit any privileged document falling outside the Court's proposed timeframes for *in camera* review without motion practice. This procedure allows the Government an additional level of protection while acknowledging that the Government's troubling practice of over-asserting privileges means it is no longer entitled to the benefit of the doubt.

**C. Injury to Plaintiffs and Impact on the Public Interest**

Finally, the Court finds that a stay would harm Plaintiffs and the public interest. While the Government guesses that the Ninth Circuit will issue its ruling on the second petition for a writ of mandamus "in short order," the Circuit recently set oral argument for October 14, 2020, eight months after the Government filed its petition. (Dkt. Nos. 547 at 5; 559.) Given this timing and the 11 months it took the Circuit to adjudicate the Government's first petition, the Court finds it unlikely that the Ninth Circuit will issue a ruling shortly. And as the Plaintiffs recently noted, under the current policy, "hundreds if not thousands of lives [] are directly affected every single day," preventing countless potential servicemembers from "fulfilling a dream they have had their entire lives." (Dkt. No. 565 at 24:14-16, 24:22-23.) "It is

heartbreaking to our plaintiffs every time we have to tell them there is a further delay in the case." (Id. at 25:7-9.)

Because this discovery dispute is years old and has caused numerous delays to the Court's case schedule, and because Plaintiffs and the public have a strong interest in the timely determination of the issues of national and constitutional importance involved in this matter, the Court finds that further delays would cause substantial injury to the Plaintiffs and negatively impact the public interest. (See, e.g., Dkt. No. 347 (Second Amended Complaint), ¶¶ 69, 79, 90; Dkt. No. 130, Declaration of Ryan Karnoski, ¶¶ 22-23.)

**Conclusion**

The Government has failed to demonstrate a likelihood of success on the merits or that irreparable injury will result in the absence of a stay. The Court therefore DENIES the Government's motion. Further, the Court adopts Plaintiffs' proposals, modifying the July 15, 2020 Order as follows:

(1) The Government may bring any privileged documents outside the timeframe of July 13, 2015 through June 30, 2016 and September 14, 2017 through January 11, 2018 to the Court for an *in camera* review without motion practice;

(2) The Government must submit all privileged documents from the time period January 11, 2018 to February 22, 2018 to the Court for *in camera* review by **August 28, 2020**.

The Government is ORDERED to comply with the Court's July 15, 2020 Order (Dkt. No. 545) with these additional modifications by **August 28, 2020**.

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The clerk is ordered to provide copies of this order to all counsel.

Dated August 17, 2020.

Marsha J. Pechman
United States Senior District Judge