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Via ECF

Molly C. Dwyer, Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94103

Re: *In re Donald J. Trump, et al.*, Case No. 20-70365

Dear Ms. Dwyer:

Plaintiffs respectfully submit this supplemental brief detailing "legal or factual developments since February that might bear on the issues to be argued in October." ECF No. 21. Over the last six months, the District Court has undertaken significant and granular efforts to manage discovery and move the case forward despite the government's unwieldy and indiscriminate assertions of deliberative process privilege (DPP) over tens of thousands of documents. This includes reviewing hundreds of documents *in camera* and issuing multiple detailed orders assessing Defendants' privilege claims.

These painstaking efforts have revealed "largescale and pervasive failures in [Defendants'] discovery process," including "haphazardly and mistakenly labelling documents as privileged without proper review." W.D. Wash. Dkt. ("Dkt.") 566 at 6-7 (Supplemental Excerpts of Record ("SER") 006-007). The subsequent developments, and Defendants' continued intransigence and renewed threats to yet again seek relief from this Court, likewise expose Defendants' abuse of mandamus to interfere with the District Court's careful management of discovery, by asking this Court to convert the extraordinary writ into a vehicle for seriatim interlocutory appeal of individual discovery orders.

I. THE DISTRICT COURT'S RECENT ORDERS AND EFFORTS IN DISCOVERY.

A. Defendants' Mandamus Petitions.

This Court decided Defendants' first petition for mandamus in June 2019. The Court did not consider whether Defendants properly invoked the DPP, only whether—assuming they did—Plaintiffs made a sufficient showing of need for those documents to overcome the qualified privilege under *FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984). The Court recognized that Defendants' policy "on its face treats transgender persons differently than other

persons," and that two of the four *Warner* factors "favor Plaintiffs," remanding for the District Court to consider the remaining two—"to evaluate the relevance of all of the requested information, at least in terms of balancing production of materials against the military's countervailing confidentiality interest." *Karnoski v. Trump*, 926 F.3d 1180, 1201, 1206 (9th Cir. 2019). This Court did "not mandate any particular course of action" on remand, instead placing the burden on Defendants to "persuasively argue" for "a more granular analysis" if appropriate for certain categories of documents. *Id.* at 1206.

Heeding this advice, on remand the District Court began analyzing the withheld documents under *Warner* by category, based on Plaintiffs' individual requests for production (RFPs). It started with five RFPs and then focused its *Warner* analysis on the two RFPs and three sub-categories to which Defendants objected—documents relating to (1) the "working groups" that supported the "Panel of Experts" and determined which information the Panel did—and did not—receive; (2) the Department of Defense (DOD) Report, which Defendants rely upon as setting forth the justifications for what Defendants subsequently labelled the "Mattis Policy" on transgender service; and (3) DOD's prior, open service policy. ECF No.

1-2, Add. 80-84 ("Add."). In doing so, the District Court did *not* find "the government ha[d] no legitimate countervailing interest in preserving the confidentiality of military deliberations," as Defendants now argue. ECF No. 24 at 12. Rather, it found any interest was overcome by the clear relevance—and Plaintiffs' need for—this information, which, among other things, is critical to test the truth of Defendants' assertions that the "Mattis Policy" was developed (1) completely independent and separate from the President's August 25, 2017 "directives," and (2) based on military interests as opposed to inaccurate and unsupported stereotypes and prejudices. Add. 82-84. The District Court's 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." SER 009.

Not satisfied with the District Court's category-by-category analysis, Defendants filed their second petition for mandamus on February 11, 2020.

B. Developments Since February 2020 Reveal Defendants' Abuse of the Privilege.

Since that filing, the District Court has conducted a series of *in camera* reviews of individual withheld documents on the separate, threshold question

whether they are predecisional and deliberative and, therefore, whether the privilege even applies. The history—and results—of these reviews are set forth in the District Court's recent order denying Defendants' motion to stay the most recent order on this issue (SER 001-014). These reviews revealed that nearly 90% of the reviewed documents were not privileged and "displayed [Defendants'] largescale and pervasive failures in the discovery process, leaving the Court with little, if any, confidence that the Government is properly asserting the DPP privilege over the remaining withheld documents." *Id.* at 006-007. Even more damning, "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." *Id.* at 007.

On March 4, 2020, the District Court addressed Defendants' attempt to claim privilege over 113 documents previously (and erroneously) deemed non-responsive. ECF No. 23, App. 69 ("App."). The District Court ordered Defendants to produce the documents for *in camera* review, which revealed they had erroneously asserted

privilege over the vast majority—96 out of 113 documents. App. 164-422. The District Court found Defendants "stray[ed] far outside the bounds of the deliberative process privilege." App. 166, 168 ("This blanket assertion of privilege without close analysis or articulated rationale must stop.").

In the same order, the District Court addressed Defendants' attempt to withhold communications with 487 third parties under the "consultant corollary" to the DPP. Dkt. 440. Once again, the District Court ordered *in camera* review and allowed Defendants leave to provide information demonstrating whether these third parties could properly be considered government consultants subject to the privilege. Dkt. 509. When put to their proof, Defendants promptly conceded that over 400 of them were not government consultants after all. SER 004. On March 14, Defendants produced 307 previously-withheld documents, but continued to assert privilege over 1,500 pages of documents containing communications with two outside consultants. Following another document-by-document review, the District Court found only one document had been properly withheld. App. 143-52.

These *in camera* reviews prompted Plaintiffs to request *in camera* review of a statistically-significant, random sample (350) of the remaining 25,000 documents

withheld solely on grounds of DPP to determine the threshold question whether the privilege even applied. Dkt. 497. The District Court agreed, finding there were "significant and legitimate concerns that Defendants are improperly withholding documents where no colorable claim of privilege exists." App. 155.

On June 24, 2020, the District Court issued its preliminary findings based on this review, confirming "Defendants have inappropriately asserted the privilege over many of the submitted documents." App. 425. To further assess Defendants' privilege claims and "provide guidance to Defendants on any patterns of erroneous assertion of the privilege," the Court ordered Defendants to submit for *in camera* review an additional 500 randomly-selected documents withheld solely on grounds of DPP. *Id.* After pulling the random sample, Defendants promptly withdrew their privilege assertions for 90, or nearly one in five, of the 500 documents, recognizing no valid privilege claim existed. App. 432 n.1.

On July 15, 2020, the District Court reported the results of its review of the 850 randomly-selected documents. *See* Dkt. 545 (SER 015-025).[1] It found that ***88%*** did not meet the threshold requirements of being both predecisional and deliberative.

[1] The Order contains a lengthy attachment, omitted here but available at App. 693-852.

Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1117 (9th Cir. 1988); App. 682-852, 980-1054. Many documents "contain[ed] no deliberative process" at all and instead fell only "into the 'factual' arena." App. 690. The District Court also found Defendants "fail[ed] to segregate portions of documents which may be partially protected by the DPP from those that are not . . . instead simply tossing this responsibility to the Court." App. 687; *see Karnoski*, 926 F.3d at 1204 ("[DPP] does not protect documents in their entirety; if the government can segregate and disclose non-privileged factual information within a document, it must.").

The District Court therefore ordered Defendants to (1) produce the specific documents from the 850-document sample it determined were not privileged, and (2) review the remainder of the documents withheld solely on DPP grounds and produce those that fell outside presumptive predecisional time periods the Court identified based on the parties' input (the periods when the Carter and Mattis Policies were being deliberated. SER 007. The District Court described these temporal filters as an efficient "discovery management tool to deal with the 'predecisional requirement,'" the "largescale and pervasive failures in [Defendants'] discovery process," and the Court's lack of "confidence that the Government is properly

asserting the DPP privilege over the remaining withheld documents." *Id.* at 006-007, 009 (describing the process as "a discovery management tool that would speed the Court's review going forward"). The District Court excepted from its order "any documents specifically subject to the pending appeal to the Ninth Circuit." SER 016.

Defendants immediately moved for a stay and threatened to return to this Court if the District Court did not vacate or stay its order. Dkts. 547, 560. On August 17, 2020, the District Court denied a stay in a detailed order, which is attached and speaks for itself. *See* SER 001-014. In doing so, it also modified its order to provide two additional safeguards to assuage Defendants' concerns and ensure an opportunity for *in camera* review before any purportedly deliberative documents are produced. First, 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—ensuring Defendants have an opportunity for the most granular possible review before disclosure. *Id.* at 011-012.

Second, the Court ordered the immediate *in camera* review of all withheld documents during the critical period from January 11, 2018 (when the Panel issued its "final recommendations" and was disbanded) through February 22, 2018 (when Secretary Mattis sent the President his memorandum recommending the President accept the Panel's recommendations and enclosing the February 2018 Report purporting to justify those recommendations), which had been the principal focus of Defendants' objections to the July 15 order. *Id*. This includes all drafts of the Report, about which, the Court noted, Defendants have taken contradictory positions. *Id.* at 011. In December 2019, "the Government's lead attorney . . . told the Court" 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." *Id*. Defendants then changed course in their stay motion, arguing "these drafts are not only predecisional but 'some of the most sensitive documents in this case.'" *Id.* The District Court ordered *in camera* review to resolve, among other things, which of these contradictory factual assertions was correct.

II. THESE DEVELOPMENTS CONFIRM MANDAMUS SHOULD BE DENIED.

The foregoing developments, including the District Court's careful and detailed ongoing review of Defendants' DPP claims and its confirmation through *in camera* review that around 90% of Defendants' privilege claims are baseless, further confirm why mandamus should be denied. "The writ of mandamus is an 'extraordinary' remedy limited to 'extraordinary' causes," *Burlington N. & Santa Fe Ry. v. U.S. Dist. Court*, 408 F.3d 1142, 1146 (9th Cir. 2005), and is justified by "only exceptional circumstances amounting to a judicial 'usurpation of power,' or a 'clear abuse of discretion.'" *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004). As detailed above, the only "abuse" here is Defendants' misuse of the privilege to avoid its discovery obligations. Defendants' approach is now apparent: withhold tens of thousands of documents, then insist the privilege can only be overcome by a "granular" review that they know is impossible given the volume of documents withheld.

First, the District Court's careful and time-consuming review of Defendants' privilege claims and detailed, well-reasoned orders further confirm it is *not* indiscriminately ordering documents produced, as Defendants claim. The discovery

management tools it has ordered, like temporal filters and analyzing documents in categories, have been reasonable and necessitated by Defendants' own over-application of the privilege. Moreover, the Court has carefully tempered those tools by providing Defendants an opportunity to submit any documents they claim are nevertheless privilege for individual, *in camera* review. Recent events reveal it is actually Defendants, not the District Court, making "blanket assertion[s] of privilege without close analysis or articulated rationale," App. 166, and that the District Court is making herculean efforts to timely and fairly assess Defendants' privilege claims notwithstanding their massive and baseless over-assertions of privilege.

Second, these subsequent proceedings have further exposed the flaws in Defendants' legal positions here. As to Plaintiffs' showing of "need" under *Warner*, Defendants' position is that Plaintiffs must establish that "further deliberative disclosures are needed to litigate their claim that the Mattis policy is the result of unconstitutional animus," and that they need to do so on a document-by-document basis. *E.g.*, ECF No. 24 at 13. Defendants do not cite any support for this argument because there is none. Such a standard would be impossible to apply. How can a

court determine in advance how many and which precise documents a party needs for trial? It would also place an impossible burden on Plaintiffs—to "prove" their need for tens of thousands of individual documents they have never seen. Rather, and as this Court made clear in its 2019 decision, "need" for purposes of *Warner* balancing refers to the first three factors—two of which Plaintiffs have already conclusively established; the only remaining consideration is whether the documents are relevant to Plaintiffs' claims. *Karnoski*, 926 F.3d at 1206. Defendants do not and cannot argue this relevance requirement is not met for the three categories of documents challenged in their petition. But even if some further showing were required, it would be satisfied here. Plaintiffs need each of these categories of documents to test the truth of Defendants' assertions that the "Mattis Policy" was developed (1) completely independent and separate from the President's August 25, 2017 "directives," and (2) because of legitimate military interests and not inaccurate and unsupported stereotypes and prejudice.

As to confidentiality and a "chilling effect" on future deliberations, it is now clear Defendants have withheld documents that do not identify or reveal deliberations concerning any identifiable government decision. Indeed, Defendants

argue there is no such requirement, taking the position that documents that simply *relate to* a challenged policy or decision are privileged. ECF No. 24 at 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 government relied on DPP to withhold three documents (not tens of thousands), and this Court found each reflected deliberations concerning a specific decision that was under consideration when the document was prepared. *Id.* at 982-84. To be privileged, "documents must be prepared to assist an agency decision-maker in arriving at a future particular decision." *Id.* at 981. "Otherwise, the privilege would be boundless, as 'any memorandum will always be 'predecisional' if referenced to a decision that possibly may be made at some undisclosed time in the future.'" *Id.* Defendants do not explain how disclosure can have a "chilling effect" where it does not reveal deliberations as to a specific, identifiable decision.

Third, the District Court's recent order that it will review *in camera* all documents Defendants withheld related to the DOD Report—including any drafts—to determine whether they are *not* predecisional or deliberative (as Defendants originally admitted) or are (as they now argue), should eliminate any basis for

mandamus relief as to those documents. If the District Court determines the drafts are not privileged at all, there will be no reason to reach the issues in Defendants' petition, which concern *Warner* balancing. And, even if it does not, but finds that the privilege has been overcome, the District Court will have done so based on the most "granular" review possible.

Finally, and perhaps most important, the proceedings below since February demonstrate why appellate courts should be wary of being drawn into day-to-day discovery supervision and instead support the good-faith efforts of district judges doing their level best to manage a demanding and time-consuming process. The District Court has already personally reviewed hundreds of documents *in camera*, and has issued numerous "granular" discovery orders, in keeping with the guidance this Court recommended and Defendants demanded. *Karnoski*, 926 F.3d at 1206. This Court should support those efforts—which are well within the District Court's broad discretion, and certainly not a judicial usurpation of power—by denying the petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits set forth in this Court's July 31, 2020 Order, ECF No. 21, because the body of the letter totals 2,759 words.

/s/ *Stephen R. Patton*
Stephen R. Patton

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*
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