

The Honorable Marsha J. Pechman

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

RYAN KARNOSKI, et al.,

*Plaintiffs, and*

STATE OF WASHINGTON,

*Plaintiff-Intervenor,*

v.

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

*Defendants.*

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

**PLAINTIFFS’ NOTICE OF RECENT  
FILINGS IN THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH  
CIRCUIT**

1 Plaintiffs respectfully provide to this Court copies of recent briefs related to this case filed  
2 by Plaintiffs and Defendants in the United States Court of Appeals for the Ninth Circuit.

3 Specifically:

- 4 • On August 4, 2020, Plaintiffs provided this Court with a copy of their Motion to  
5 Clarify the Ninth Circuit’s Administrative Stay. (*See* Dkt. No. 561.)
- 6 • On August 14, 2020, Defendants filed a Response to Plaintiffs’ Motion to Clarify the  
7 Ninth Circuit’s Administrative Stay, which is attached hereto as **Exhibit A**.
- 8 • On August 21, 2020, Plaintiffs filed their Reply in Support of Their Motion to Clarify  
9 the Ninth Circuit’s Administrative Stay, which is attached hereto as **Exhibit B**.
- 10 • The Ninth Circuit also recently directed supplemental briefing on “any legal or  
11 factual developments since February that might bear on the issues to be argued in  
12 October.” (No. 20-70365, Dkt. No. 21.) On August 21, 2020, both Plaintiffs and  
13 Defendants filed their requested supplemental briefs, which are attached hereto as  
14 **Exhibits C and D**, respectively.

15  
16 Respectfully submitted August 26, 2020.

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**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the United States of America and the laws of the State of Washington that all participants in the case are registered CM/ECF users and that service of the foregoing documents will be accomplished by the CM/ECF system on August 26, 2020.

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**EXHIBIT A**

No. 20-70365

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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

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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.*

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**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.'" *Labr 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 recreation. 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.’” *Labr 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

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<sup>1</sup> 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*

---

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### **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*  
\_\_\_\_\_  
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**EXHIBIT B**

No. 20-70365

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**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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

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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.<sup>1</sup> 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).

---

<sup>1</sup> 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

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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*

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# **EXHIBIT A**

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RYAN KARNOSKI, et al.,  
  
Plaintiffs,  
  
v.  
  
DONALD J. TRUMP, et al.,  
  
Defendants.

CASE NO. C17-1297 MJP  
  
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

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

3 1. Procedural Background

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

15 In response, the Government filed a Petition for a Writ of Mandamus with the Ninth  
16 Circuit. (See Dkt. No. 302.) Almost eleven months later, the Ninth Circuit issued a Writ of  
17 Mandamus, concluding, in part, that the record was insufficient to establish the relevance of the  
18 documents as balanced against the possible “chilling effect” of disclosure. Karnoski v. Trump,  
19 926 F.3d 1180 (9th Cir. 2019). The Ninth Circuit suggested that on remand, when evaluating  
20 Defendants’ DPP claims, this Court should “consider classes of documents separately when  
21 appropriate” and, “[i]f Defendants persuasively argue that a more granular analysis would be  
22 proper, [the Court] should undertake it.” Id.

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

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

11 [R]everse the district court’s orders of December 18, 2019, February 3, 2020, and  
 12 February 7, 2020, and order that plaintiffs are not entitled to any further  
 13 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.

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

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

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1           2. Problems with the Government's Privilege Assertions

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

7           But in March, upon two motions to compel brought by Plaintiffs, the Court ordered the  
8 Government to submit documents for *in camera* review for the first time and these submissions  
9 raised serious concerns about the Government's review process and privilege assertions. First,  
10 Plaintiffs moved to compel the Government's withheld communications with third parties,  
11 asking the Court to conduct an *in camera* review of the Government's DPP and attorney-client  
12 privilege claims over communications with 487 third party custodians from the Government's  
13 privilege logs. (Dkt. No. 440.) The Government objected on the grounds that its  
14 communications with those third parties are shielded by the "consultant corollary" doctrine. (Id.  
15 at 20-22.) But when the Court ordered the Government to submit the privilege-claimed  
16 documents for *in camera* review, the Government produced communications from only 14 of the  
17 487 persons identified by Plaintiffs, conceding that there was no colorable privilege claim for the  
18 remaining 473 custodians. (See Dkt. Nos. 461, 509.) Further, of the 1,500 pages of documents  
19 the Government did submit to the Court, only one document was arguably privileged. (Dkt. No.  
20 509 at 9.) One particularly egregious example of the Government's over-assertion was a copy of  
21 the publicly available RAND Report indicating it could be purchased for \$22.50, but which the  
22 Government had marked as subject to the DPP. (Id. at 4.)

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

16 Following these rulings, on May 4, 2020 Plaintiffs brought a motion to compel the  
17 Government to submit a random sample of 350 documents for *in camera* review, one percent of  
18 the total documents the Government was still withholding solely on the basis of the deliberative  
19 process privilege. (Dkt. No. 497.) It seemed evident that before the Court could apply the  
20 balancing test set out in the Ninth Circuit’s decision, as directed by Warner, 742 F.2d at 1161, it  
21 first had to determine if the documents at issue even qualified as being subject to the DPP, rather  
22 than simply accepting the Government’s privilege assertions. To qualify for the DPP, “a  
23 document ‘must be *both* (1) ‘predecisional’ or ‘antecedent to the adoption of agency policy’ and  
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1 (2) ‘deliberative,’ meaning ‘it must actually be related to the process by which policies are  
2 formulated.’” National Wildlife Federation v. U.S. Forest Service, 861 F. 2d 1114, 1117 (9th Cir.  
3 1988) (citation omitted, emphasis in original). In its *in camera* review of the Government’s DPP  
4 claims, the Court found that many documents were neither predecisional nor deliberative.

5       The Court granted Plaintiffs’ motion and after reviewing the Government’s submission of  
6 350 randomly selected documents withheld as privileged under the DPP, the Court ordered the  
7 Government to submit an additional 500 randomly selected documents to the Court for *in*  
8 *camera* review in order to further determine the scope of the Government’s privilege claims.  
9 (Dkt. No. 545.) Yet before submitting the set of 500 documents, the Government itself  
10 determined that 90 of those documents (or 18% of the total) were not subject to a proper DPP  
11 claim. (Dkt. No. 542 n. 1.)

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

21       In sum, in its four submissions for *in camera* review, the Government has displayed  
22 largescale and pervasive failures in its discovery process, leaving the Court with little, if any  
23 confidence that the Government is properly asserting the DPP privilege over the remaining  
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1 withheld documents. Further, the Government’s lawyers recently admitted that although they  
2 have been strenuously arguing against the disclosure of these documents for years, they have not  
3 personally reviewed the withheld documents, making the Court’s “granular” review all the more  
4 difficult where arguments about the documents are often made in general, hypothetical terms.  
5 (Dkt. No. 548.)

6 3. July 15, 2020 Order

7 Based on the Court’s growing concerns that the Government has been haphazardly and  
8 mistakenly labelling documents as privileged without proper review, the age of this particular  
9 discovery dispute, and in light of the enormous task remaining of reviewing the 25,000 to 40,000  
10 withheld documents over which the Government has claimed the DPP, on July 15, 2020 the  
11 Court outlined a discovery management tool that would speed the Court’s review going forward.  
12 (Dkt. No. 545.) Defendants were ordered to review their list of documents withheld solely on  
13 the basis of the DPP and apply the temporal filter of July 13, 2015 through June 30, 2016 and  
14 September 14, 2017 through January 11, 2018, the timeframes that the Carter and Mattis Policies  
15 were being considered, respectively. (Id. at 2.) This timeframe was based on the Court’s review  
16 of the relevant record, the Ninth Circuit’s discussion in Karnoski, 926 at 1188-98, and the  
17 Parties’ answers to questions posed by the Court about the two Policies. (Dkt. Nos. 536,  
18 540-42).

19 The Court concluded that going forward, documents outside this timeframe are  
20 presumptively not privileged under the DPP because they are not predecisional, “but if it turns  
21 out that some documents falling outside the predecisional and post-decisional date ranges are  
22 properly the subject of DPP, specific documents can be brought to the Court’s attention on  
23 subsequent motion.” (Dkt. No. 545 at 6-7.) Defendants were also ordered to produce documents  
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1 from their 850-document submission that were reviewed *in camera* and determined not to be  
2 privileged. (Dkt. No. 545 at 11.) The Order specifically exempted documents subject to the stay  
3 in the pending Mandamus Petition.

4 On July 20, 2020 the Government brought the current Motion to Stay the Court’s Jul 15,  
5 2020 Order. (Dkt. No. 547.) In response, Plaintiffs propose that the Court make two  
6 modifications to its Order that would allow the Government to submit privileged documents that  
7 fall outside the timeframes the Court has adopted for *in camera* review without motion practice.  
8 (Dkt. No. 553 at 11.) For the reasons discussed below, the Court DENIES the Government’s  
9 Motion and adopts Plaintiffs’ proposed modifications to the Court’s July 15, 2020 Order.

10 **Discussion**

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

18 In determining whether to grant a stay, the Court considers: (1) whether Defendants have  
19 made a strong showing that they are likely to succeed on the merits of their Mandamus Petition;  
20 (2) whether Defendants will be irreparably injured absent a stay; (3) whether a stay will  
21 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.

1 132, 151-52 (1975)). In an attempt to get the Parties' views on the issues, the Court submitted  
2 written questions to the Parties and received responses. From the Government's perspective, the  
3 time frame at issue began in March 2014, when certain individuals began to consider transgender  
4 policies, and continues through today. (Dkt. No. 545 at 5.) Although this is in keeping with the  
5 way it has handled its DPP designations, this approach reads out of existence the requirement  
6 that documents be predecisional.

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

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

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

15 Plaintiffs suggest that the Court make clear in its order that the Government can submit  
16 any documents it claims are privileged but outside the proposed timeframe for *in camera* review  
17 without separate motion practice. (Dkt. No. 553 at 11.) Second, Plaintiffs suggest the  
18 Government immediately submit for *in camera* review the documents dated January 11, 2018 to  
19 February 22, 2018—representing the period between the Panel of Expert’s recommendations and  
20 the date the Department of Defense published the 44-page Report and Recommendation—so the  
21 Court can assess whether these documents are predecisional and deliberative, as the Government  
22 now argues. (*Id.*) The Court adopts both proposals. The Government will be permitted to bring  
23 any privileged document to the Court’s attention for *in camera* review, without motion practice,  
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1 and shall submit any privileged documents from the timeframe January 11, 2018 to February 22,  
2 2018 for the Court's *in camera* review by **August 28, 2020**.

### 3 **B. Likelihood of Irreparable Harm**

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

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

15 Finally, the Court finds that a stay would harm Plaintiffs and the public interest. While  
16 the Government guesses that the Ninth Circuit will issue its ruling on the second petition for a  
17 writ of mandamus "in short order," the Circuit recently set oral argument for October 14, 2020,  
18 eight months after the Government filed its petition. (Dkt. Nos. 547 at 5; 559.) Given this  
19 timing and the 11 months it took the Circuit to adjudicate the Government's first petition, the  
20 Court finds it unlikely that the Ninth Circuit will issue a ruling shortly. And as the Plaintiffs  
21 recently noted, under the current policy, "hundreds if not thousands of lives [] are directly  
22 affected every single day," preventing countless potential servicemembers from "fulfilling a  
23 dream they have had their entire lives." (Dkt. No. 565 at 24:14-16, 24:22-23.) "It is  
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1 heartbreaking to our plaintiffs every time we have to tell them there is a further delay in the  
2 case.” (Id. at 25:7-9.)

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

9 **Conclusion**

10 The Government has failed to demonstrate a likelihood of success on the merits or that  
11 irreparable injury will result in the absence of a stay. The Court therefore DENIES the  
12 Government’s motion. Further, the Court adopts Plaintiffs’ proposals, modifying the July 15,  
13 2020 Order as follows:

14 (1) The Government may bring any privileged documents outside the timeframe of July  
15 13, 2015 through June 30, 2016 and September 14, 2017 through January 11, 2018 to  
16 the Court for an *in camera* review without motion practice;

17 (2) The Government must submit all privileged documents from the time period January  
18 11, 2018 to February 22, 2018 to the Court for *in camera* review by **August 28, 2020**.

19 The Government is ORDERED to comply with the Court’s July 15, 2020 Order (Dkt. No. 545)  
20 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

# **EXHIBIT C**

## KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

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August 21, 2020

### 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.

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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

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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.

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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

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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

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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

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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).<sup>1</sup> It found that **88%** did not meet the threshold requirements of being both predecisional and deliberative.

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<sup>1</sup> The Order contains a lengthy attachment, omitted here but available at App. 693-852.

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*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

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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.

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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.

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**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

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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

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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

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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

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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,

/s/ Stephen R. Patton

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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*

\_\_\_\_\_  
Stephen R. Patton

No. 20-70365

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**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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

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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.

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Dkt. No. 545	Order re (Dkt. Nos. 497, 514, 536, 540–42); Establishing a Timeframe for Assertion of the Deliberative Process Privilege; Requiring Defendants to Review Their Deliberative Process Privilege Claims and Produce Those That Are Not Predecisional or Deliberative	SER 015 – SER 025

**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 24, 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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Stephen R. Patton

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RYAN KARNOSKI, et al.,  
  
Plaintiffs,  
  
v.  
  
DONALD J. TRUMP, et al.,  
  
Defendants.

CASE NO. C17-1297 MJP  
  
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

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

3 1. Procedural Background

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

15 In response, the Government filed a Petition for a Writ of Mandamus with the Ninth  
16 Circuit. (See Dkt. No. 302.) Almost eleven months later, the Ninth Circuit issued a Writ of  
17 Mandamus, concluding, in part, that the record was insufficient to establish the relevance of the  
18 documents as balanced against the possible “chilling effect” of disclosure. Karnoski v. Trump,  
19 926 F.3d 1180 (9th Cir. 2019). The Ninth Circuit suggested that on remand, when evaluating  
20 Defendants’ DPP claims, this Court should “consider classes of documents separately when  
21 appropriate” and, “[i]f Defendants persuasively argue that a more granular analysis would be  
22 proper, [the Court] should undertake it.” Id.

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

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

11 [R]everse the district court’s orders of December 18, 2019, February 3, 2020, and  
12 February 7, 2020, and order that plaintiffs are not entitled to any further  
13 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.

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

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

23 //

24 //

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.)

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

16 Following these rulings, on May 4, 2020 Plaintiffs brought a motion to compel the  
17 Government to submit a random sample of 350 documents for *in camera* review, one percent of  
18 the total documents the Government was still withholding solely on the basis of the deliberative  
19 process privilege. (Dkt. No. 497.) It seemed evident that before the Court could apply the  
20 balancing test set out in the Ninth Circuit’s decision, as directed by Warner, 742 F.2d at 1161, it  
21 first had to determine if the documents at issue even qualified as being subject to the DPP, rather  
22 than simply accepting the Government’s privilege assertions. To qualify for the DPP, “a  
23 document ‘must be *both* (1) ‘predecisional’ or ‘antecedent to the adoption of agency policy’ and  
24

1 (2) ‘deliberative,’ meaning ‘it must actually be related to the process by which policies are  
2 formulated.’” National Wildlife Federation v. U.S. Forest Service, 861 F. 2d 1114, 1117 (9th Cir.  
3 1988) (citation omitted, emphasis in original). In its *in camera* review of the Government’s DPP  
4 claims, the Court found that many documents were neither predecisional nor deliberative.

5 The Court granted Plaintiffs’ motion and after reviewing the Government’s submission of  
6 350 randomly selected documents withheld as privileged under the DPP, the Court ordered the  
7 Government to submit an additional 500 randomly selected documents to the Court for *in*  
8 *camera* review in order to further determine the scope of the Government’s privilege claims.  
9 (Dkt. No. 545.) Yet before submitting the set of 500 documents, the Government itself  
10 determined that 90 of those documents (or 18% of the total) were not subject to a proper DPP  
11 claim. (Dkt. No. 542 n. 1.)

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

21 In sum, in its four submissions for *in camera* review, the Government has displayed  
22 largescale and pervasive failures in its discovery process, leaving the Court with little, if any  
23 confidence that the Government is properly asserting the DPP privilege over the remaining  
24

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

6 3. July 15, 2020 Order

7 Based on the Court’s growing concerns that the Government has been haphazardly and  
8 mistakenly labelling documents as privileged without proper review, the age of this particular  
9 discovery dispute, and in light of the enormous task remaining of reviewing the 25,000 to 40,000  
10 withheld documents over which the Government has claimed the DPP, on July 15, 2020 the  
11 Court outlined a discovery management tool that would speed the Court’s review going forward.  
12 (Dkt. No. 545.) Defendants were ordered to review their list of documents withheld solely on  
13 the basis of the DPP and apply the temporal filter of July 13, 2015 through June 30, 2016 and  
14 September 14, 2017 through January 11, 2018, the timeframes that the Carter and Mattis Policies  
15 were being considered, respectively. (*Id.* at 2.) This timeframe was based on the Court’s review  
16 of the relevant record, the Ninth Circuit’s discussion in Karnoski, 926 at 1188-98, and the  
17 Parties’ answers to questions posed by the Court about the two Policies. (Dkt. Nos. 536,  
18 540-42).

19 The Court concluded that going forward, documents outside this timeframe are  
20 presumptively not privileged under the DPP because they are not predecisional, “but if it turns  
21 out that some documents falling outside the predecisional and post-decisional date ranges are  
22 properly the subject of DPP, specific documents can be brought to the Court’s attention on  
23 subsequent motion.” (Dkt. No. 545 at 6-7.) Defendants were also ordered to produce documents  
24

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

4 On July 20, 2020 the Government brought the current Motion to Stay the Court’s Jul 15,  
5 2020 Order. (Dkt. No. 547.) In response, Plaintiffs propose that the Court make two  
6 modifications to its Order that would allow the Government to submit privileged documents that  
7 fall outside the timeframes the Court has adopted for *in camera* review without motion practice.  
8 (Dkt. No. 553 at 11.) For the reasons discussed below, the Court DENIES the Government’s  
9 Motion and adopts Plaintiffs’ proposed modifications to the Court’s July 15, 2020 Order.

10 **Discussion**

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

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

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

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

7           As to the first objection, the Order challenged by the Government specifically carves out  
8 the documents subject to the pending Mandamus Petition. Moreover, the pending Mandamus  
9 Petition is unrelated to the Court’s July 15, 2020 Order. The Government’s pending mandamus  
10 petition requests that the Ninth Circuit “reverse the district court’s orders of December 18, 2019,  
11 February 3, 2020, and February 7, 2020 . . . given [P]laintiffs’ inadequate showing of need under  
12 the proper standard for overcoming the deliberative process privilege.” (Dkt. No. 414, Ex. 1 at  
13 11 (emphasis added).) The challenged Orders did not evaluate whether the Government properly  
14 asserted the DPP in the first place, but assumed the withheld documents met the threshold of  
15 being predecisional and deliberative. (Dkt. No. 545 at 11.) Subsequent *in camera* review  
16 showed the error of the Court’s assumption. Finally, the Government fails to explain why the  
17 Court’s *in camera* document-by-document review of the Government’s 850-document  
18 submission was not “granular,” yet the Government resists producing these documents as well.

19           The Government’s second and third objections relate to the time frame chosen as a  
20 discovery management tool to deal with the “predecisional requirement.” As noted in the  
21 Court’s Order, one DPP requirement is that it be “predecisional,” so that the privilege applies  
22 “prior to the time the decision is made” and not to “communications made after the decision and  
23 designed to explain it.” (Dkt. No. 545 at 4 (quoting NLRB v. Sears, Roebuck & Co., 421 U.S.  
24

1 132, 151-52 (1975)). In an attempt to get the Parties’ views on the issues, the Court submitted  
2 written questions to the Parties and received responses. From the Government’s perspective, the  
3 time frame at issue began in March 2014, when certain individuals began to consider transgender  
4 policies, and continues through today. (Dkt. No. 545 at 5.) Although this is in keeping with the  
5 way it has handled its DPP designations, this approach reads out of existence the requirement  
6 that documents be predecisional.

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

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

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

15 Plaintiffs suggest that the Court make clear in its order that the Government can submit  
16 any documents it claims are privileged but outside the proposed timeframe for *in camera* review  
17 without separate motion practice. (Dkt. No. 553 at 11.) Second, Plaintiffs suggest the  
18 Government immediately submit for *in camera* review the documents dated January 11, 2018 to  
19 February 22, 2018—representing the period between the Panel of Expert’s recommendations and  
20 the date the Department of Defense published the 44-page Report and Recommendation—so the  
21 Court can assess whether these documents are predecisional and deliberative, as the Government  
22 now argues. (*Id.*) The Court adopts both proposals. The Government will be permitted to bring  
23 any privileged document to the Court’s attention for *in camera* review, without motion practice,  
24

1 and shall submit any privileged documents from the timeframe January 11, 2018 to February 22,  
2 2018 for the Court’s *in camera* review by **August 28, 2020**.

3 **B. Likelihood of Irreparable Harm**

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

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

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

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

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

### 9 **Conclusion**

10 The Government has failed to demonstrate a likelihood of success on the merits or that  
11 irreparable injury will result in the absence of a stay. The Court therefore DENIES the  
12 Government’s motion. Further, the Court adopts Plaintiffs’ proposals, modifying the July 15,  
13 2020 Order as follows:

14 (1) The Government may bring any privileged documents outside the timeframe of July  
15 13, 2015 through June 30, 2016 and September 14, 2017 through January 11, 2018 to  
16 the Court for an *in camera* review without motion practice;

17 (2) The Government must submit all privileged documents from the time period January  
18 11, 2018 to February 22, 2018 to the Court for *in camera* review by **August 28, 2020**.

19 The Government is ORDERED to comply with the Court’s July 15, 2020 Order (Dkt. No. 545)  
20 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

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RYAN KARNOSKI, et al.,  
  
Plaintiffs,  
  
v.  
  
DONALD J TRUMP, et al.,  
  
Defendants.

CASE NO. C17-1297 MJP  
  
ORDER RE (DKT. NOS. 497, 514,  
536, 540-42);  
  
ESTABLISHING A TIMEFRAME  
FOR ASSERTION OF THE  
DELIBERATIVE PROCESS  
PRIVILEGE;  
  
REQUIRING DEFENDANTS TO  
REVIEW THEIR DELIBERATIVE  
PROCESS PRIVILEGE CLAIMS  
AND PRODUCE THOSE THAT  
ARE NOT PREDECISIONAL OR  
DELIBERATIVE

This matter comes before the Court upon the Parties' Joint Submission Regarding Defendants' Deliberative Process Privilege Claims (Dkt. No. 497). Having reviewed the 850 documents submitted pursuant to the Court's Orders on the Joint Submission (Dkt. No. 514, 536), the Parties' responses to the questions posed by the Court (Dkt. Nos. 540-42), and two earlier *in camera* document reviews, the Court finds and ORDERS:

- 1 (1) Defendants must produce all documents where the privilege category is designated  
2 with “N” in the spreadsheets attached to this Order by **July 22, 2020**. As to those  
3 documents where the privilege category is marked “Y”, the Court is satisfied that a  
4 *prima facie* case of deliberative process privilege (“DPP”) privilege has been  
5 established, subject to a possible further review under the balancing test set out in  
6 FTC v. Warner Commc’ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984);
- 7 (2) Defendants will review their list of approximately 35,000 documents withheld solely  
8 on the basis of DPP and apply the temporal filter of July 13, 2015 through June 30,  
9 2016 (Carter policy) and September 14, 2017 through January 11, 2018 (Mattis  
10 policy). All documents falling outside of these two timeframes and withheld solely  
11 pursuant to the a DPP claim will be produced by **July 29, 2020**. The only exception  
12 shall be any documents specifically subject to the pending appeal to the Ninth Circuit.  
13 The temporal time filter will also apply to the documents withheld on the basis of  
14 other privileges in addition to a DPP claim, and the Defendants shall delete DPP as a  
15 claim for withholding the documents that fall outside of this time frame.
- 16 (3) Not later than **July 29, 2020**, the Defendants will filter the remaining documents  
17 withheld solely under a DPP claim, and file a privilege log of documents relating to  
18 those documents that fall within the designated time frames.
- 19 (4) Not later than **July 22, 2020**, the Defendants will produce paper copies of 500  
20 documents submitted for *in camera* review that are not considered privileged as  
21 indicated in Attachment 2 to this Order, so the Court can review these documents to  
22 satisfy the “deliberative” test. The documents will each bear the “PrivWithhold”  
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1 number on the bottom of the document corresponding to the “PrivWithhold”  
2 designation in the privilege log submitted to the Court.

### 3 **Background**

4 In this ongoing discovery dispute, the Government has withheld approximately 50,000  
5 documents from production claiming they are exempt from disclosure, at least in part, pursuant  
6 to the deliberative process privilege (“DPP”). Within these 50,000 documents, a subset of  
7 approximately 35,000 has been withheld *solely* on the basis of a DPP claim. To test whether the  
8 Government has been properly asserting the DPP privilege, the Parties and the Court devised a  
9 process where 1% (350) of the documents withheld solely on a DPP claim were randomly  
10 selected and sent to the Court for an *in camera* review. (See Dkt. Nos. 497, 514.) After  
11 reviewing the first submission of 350 documents, and due to a problem of overreach in the claim  
12 of DPP privilege, the Court ordered the Government to submit another batch of 500 randomly  
13 selected documents for *in camera* review, in order to test the extent of Defendants’ assertion of  
14 the privilege. (Dkt. No. 536.)

15 The Court has had difficulty with the Government’s over-assertion of the DPP in the past.  
16 On two prior occasions, the Court has reviewed, with the assistance of the Special Master, more  
17 than 3,500 pages of documents, withheld for privilege claims, including the DPP. In very few  
18 instances was the Government’s assertion of the DPP sustained.

19 In light of the enormous task remaining before the Parties and the Court on this issue of  
20 privilege, the Court is setting out discovery standards to be followed relating to the remaining  
21 approximately 48,000 documents to which a DPP claim has been asserted. This Order will  
22 describe the boundaries for documents that are presumptively not entitled to DPP protection.  
23 The Order will deal specifically with the 850 random DPP-claimed documents submitted for *in*  
24

1 camera review. Finally, the Government will be directed to review its DPP claims for the  
2 remaining approximately 48,000 documents, and remove its claim of DPP protection from those  
3 documents that do not reach the *prima facie* threshold described in this Order, and to produce the  
4 documents not reaching this threshold to the Plaintiffs.

### 5 Discussion

6 The DPP applies to protect the decision-making process. To qualify, “a document ‘must  
7 be *both* (1) ‘predecisional’ or ‘antecedent to the adoption of agency policy’ and (2)  
8 ‘deliberative,’ meaning ‘it must actually be related to the process by which policies are  
9 formulated.’” National Wildlife Federation v. U.S. Forest Service, 861 F. 2d 1114, 1117 (9th  
10 Cir. 1988) (citation omitted, emphasis in original). For the reasons that follow, the Court finds  
11 that the Government has asserted the DPP over many documents that do not meet this definition.

#### 12 A. Predecisional

13 Before a document can be withheld pursuant to the DPP, it must be predecisional. See  
14 NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151-52 (1975) (explaining the privilege applies  
15 “prior to the time the decision is made” and not to “communications made after the decision and  
16 designed to explain it”); Lahr v. NTSB, 569 F.3d 964, 981 (9th Cir. 2009) (noting “we have  
17 rejected the argument that a continuing process of agency self-examination is enough to render a  
18 document ‘predecisional,’” instead, “[t]he documents must be prepared to assist an agency  
19 decision-maker in arriving at a future particular decision”) (internal quotations and citations  
20 omitted); Fishermen’s Finest, Inc. v. Gutierrez, No. C07-1574MJP, 2008 WL 2782909, at \*2  
21 (W.D. Wash. July 15, 2008) (“A document that was prepared to support a decision already made  
22 is not predecisional.”). But, what, then, is predecisional in this case?  
23  
24

1           The Government appears to make the claim that because certain individuals began to  
2 consider transgender policies in March 2014, and because policies continue to change even  
3 today, the predecisional date begins in March of 2014, and everything since that date to the  
4 present remains predecisional. The Court rejects this reasoning, because the analysis fails to  
5 focus on the specific policies at issue in this litigation. The Government’s position reads the  
6 DPP “predecisional” requirement out of existence.

7           There are two policies at issue in this case: (1) The Carter policy which permitted  
8 transgender service members to enlist and serve in the U.S. Military; and (2) the Mattis policy  
9 which reversed the Carter policy. While these two decisions resulted in a number of spin-off  
10 plans designed to execute and implement the two underlying policies, the fundamental issue  
11 being challenged by Plaintiffs is the reversal of the Carter policy in favor of the Mattis policy.  
12 The implementation and execution plans are simply secondary to the policy switch. As a result,  
13 for purposes of determining the “predecisional” and “post-decisional” timeframes for *prima facie*  
14 applicability of DPP, the timeframe around these two policy decisions is paramount.

15           For discovery purposes, documents outside the predecisional timeframe for these  
16 decisions are presumptively not subject to the DPP. In National Wildlife, *supra*, the court  
17 recognized that there may be instances in which production of documents after the policy might  
18 provide a roadmap as to the actual decision-making process, which could otherwise protect those  
19 documents. This is because the focus of the DPP is to protect the decision-making process. In  
20 reviewing the 850 documents submitted for DPP examination, the Court could identify but a  
21 handful of documents as to which this could be seriously asserted. However, as explained  
22 below, the handful of these documents will continue to be protected under protective order with  
23 claw back provisions in the process described.

1           The Court is exercising its discretion to manage discovery in this manner, for several  
2 reasons. First, this is consistent with the pleadings in this case, and as analyzed by the Ninth  
3 Circuit in the previous appeal. Second, based upon the Court’s examination of four batches of  
4 documents submitted for *in camera* review (approximately 8,813 pages of documents), the Court  
5 finds that the Government has consistently been overbroad in asserting the DPP.

6           Third, the Government fails to segregate portions of documents which may be partially  
7 protected by the DPP from those that are not, despite its obligation to do so. See Karnoski v.  
8 Trump, 926 F.3d 1180, 1204 (9th Cir. 2019) (quoting Army Times Publ’g Co. v. Dep’t of Air  
9 Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993)) (“Unlike the presidential communications  
10 privilege, the deliberative process privilege does not protect documents in their entirety; if the  
11 government can segregate disclosed non-privileged factual information within a document, it  
12 must.”). Thus far, the Government has not performed any segregation, instead simply tossing  
13 this responsibility to the Court.

14           Fourth, the Government claims that 50,000 documents are covered by the DPP and other  
15 privileges, and of that quantity, 35,000 are subject to the DPP and no other privilege. Yet after  
16 making a random selection of 500 documents for *in camera* inspection, the Government  
17 acknowledged that 90 of the randomly selected documents (or 18% of the total) were not subject  
18 to a proper DPP claim. (Dkt. No. 542 n. 1.) The Government produced these 90 documents to  
19 Plaintiffs and then chose an additional 90 documents to submit to the Court for review. This  
20 does not give the Court much, if any, confidence that the Government is properly asserting the  
21 DPP privilege, a concern that is amplified by the earlier poor showing on its DPP claims.

22           Finally, the Court opts for this arrangement because all documents produced will still be  
23 subject to the protective order in place, and if it turns out that some documents falling outside the  
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1 predecisional and post-decisional date ranges are properly the subject of the DPP, specific  
2 documents can be brought to the Court’s attention on subsequent motion. The Order includes a  
3 claw-back provision for documents produced erroneously. This decision is made for discovery  
4 rather than for trial purposes. Accordingly, as a discovery management tool, the Court sets the  
5 following pre and post-decisional dates to establish a framework for evaluating the  
6 Government’s DPP assertions.

7 1. Carter Policy

8 As to the Carter policy, on July 13, 2015, then-Secretary Carter announced the military  
9 would begin to study the implications of allowing transgender troops to serve in the military.  
10 (Dkt. No. 540, Ex. 14). A working group was formed on July 28, 2015 to formulate a policy  
11 decision on use of transgender troops. (Dkt. No. 540, Ex. 15.) The work of the committee was  
12 completed and on June 30, 2016, Secretary of Defense Carter formally announced the new  
13 policy. (Dkt. No. 540, Ex. 12; Dkt. No. 542 at 7; Dkt. No. 505 at 7.) This Court previously  
14 ordered production of certain earlier Carter-policy documents on the grounds that it appeared  
15 that the Department of Defense (“DOD”) and RAND contemplated that the underlying RAND  
16 studies would be published contemporaneously with the announcement of the Carter policy.  
17 (Dkt. No. 540, Ex. 12; Dkt. No. 542 at 7; Dkt. No. 505 at 7.) The Court found that the policy  
18 was in effect before the public announcement, based on emails from February of that year  
19 between the lead contact for RAND and her DoD counterpart discussing the public  
20 announcement of the new policy. (Dkt. No. 509 at 4 (citing PrivWithhold 1106).) The practical  
21 effect of this is to back up the post-decisional date of the Carter policy to February 6, 2016.  
22 However, for purposes of this discovery management tool, the Court will use the announcement  
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1 date of the Carter policy – June 30, 2016 – to define the end of the predecisional time frame  
2 relating to the Carter policy.

3 Thus, only documents within the date range July 13, 2015 through June 30, 2016 are  
4 presumptively predecisional, and therefore subject to a proper DPP claim regarding the Carter  
5 policy. As a result, documents created prior to July 13, 2015 are presumptively not considered  
6 pre-decisional regarding the Carter policy. Documents created after June 30, 2016 are  
7 presumptively considered post-decisional. Just as the Court previously concluded, the end date  
8 of the “predecisional” time frame may ultimately be backed up by applying the fourth factor of  
9 the Warner test – an issue to be resolved at a later point.

## 10 2. Mattis Policy

11 Secretary Mattis formed his working panel to consider the issues surrounding use of  
12 transgender troops on September 14, 2017. (Dkt. No. 542 at 8.) And the Government has long  
13 taken the position that the Panel’s recommendations, issued on January 11, 2018, “were adopted  
14 in their entirety by then-Secretary of Defense James Mattis.” (Dkt. No. 414-1, Pet. for  
15 Mandamus at 8.) When the Court asked the Government whether “the decision had been made”  
16 once the Panel sent over its recommendations to the Office of the Secretary of Defense, the  
17 Government responded that yes, at that point, “the final decision was made.” (Dkt. No. 402, Tr.  
18 28:16-17, 19.) As a result, documents created before September 14, 2017 are presumptively not  
19 predecisional, and documents created after January 11, 2018 are presumptively post-decisional.

20 Although Plaintiffs have argued that the Government adopted the challenged policy no  
21 later than August 25, 2017, when the President issued a memorandum that formalized his July  
22 26, 2017 Tweets banning transgender military service and ordered the military to implement that  
23 policy (Dkt. No. 540 at 6), because the President’s March 23, 2018 Presidential Memorandum  
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1 revoked his 2017 Memorandum and because the Ninth Circuit determined that “the 2018 Policy  
2 is a significant change from the 2017 Memorandum” Karnoski v. Trump, 926 F.3d 1180,  
3 1189-92, 1202 (9th Cir. 2019), the Court’s focus here is on the adoption of the Mattis policy.

4 Therefore, in the Government’s privilege log, only documents that fall within the date  
5 ranges of July 13, 2015 to June 30, 2016 (Carter policy) and September 14, 2017 to January 11,  
6 2018 (Mattis policy) are presumptively predecisional and entitled to possible DPP protection.

### 7 **B. Deliberative**

8 In the Ninth Circuit, the DPP applies “whenever the unveiling of factual materials would  
9 be tantamount to the ‘publication of the evaluation and analysis of the multitudinous facts’  
10 conducted by the agency.” Nat’l Wildlife, 861 F.2d at 1119 (citations omitted). In National  
11 Wildlife, the court confronted the issue of whether a document was deliberative or merely  
12 factual. The plaintiff argued that because certain information in an Environmental Impact  
13 Statement (“EIS”) was factual, rather than opinion, the document was not subject to a proper  
14 DPP claim. The Ninth Circuit held this distinction was too narrow. Instead, the court held that  
15 the analysis of whether a document was protected or not from disclosure should focus on the  
16 “*deliberative process*.” Id. at 1118 (emphasis in original). Under this approach, nonbinding  
17 recommendations on law or policy would be exempt from disclosure. Factual material would be  
18 exempt from disclosure to the extent that it revealed the mental processes of decisionmakers.  
19 Ultimately, the court held that draft Environmental Impact Statements and “previews” were  
20 subject to the DPP and concluded they were “predecisional” because they were drafts, subject to  
21 change, and that disclosure would reveal the deliberative process of the Forest Service.

22 In this case, many of the documents submitted by the Government for *in camera* review  
23 contain no deliberative process thoughts or opinions. Instead, many fall into the “factual” arena.

1 Moreover, these “factual” documents do not amount to “previews” of the policies or otherwise  
2 reveal the deliberative thought process of the Department of Defense. Even if the documents  
3 could be at least partially so classified, the Government has not sought to segregate any portions  
4 of the documents which express an opinion (potentially protectible) from the facts portion of the  
5 documents (generally not protectible, unless revealing thought processes), as required. In the  
6 attached analysis of DPP-claimed documents, those which fall into this “factual” arena, or which  
7 are not otherwise substantive and thus not subject to DPP protection, are labelled “not  
8 deliberative,” and the privilege category is marked with “N” in the attachment to this Order.<sup>1</sup>

9 In the second batch of 500 documents submitted to the Court for *in camera* review, the  
10 paper documents sent to the Court lacked corresponding identifying Bates numbers  
11 corresponding to the privilege log. The Special Master spent several hours attempting to use or  
12 find certain identifying characteristics on the documents to match up with the privilege log.  
13 Ultimately, the Special Master concluded that the second batch should simply be filtered on the  
14 basis of disqualifying dates as set forth above. For documents falling outside the date range as  
15 described on the privilege log, the document was denied DPP status as being “Not  
16 predecisional.” The Special Master could not conduct a “deliberative” process review. For all  
17 documents that fell within the time frame that defines the DPP in this case, no determination of  
18 privilege could be made. This does not require that all documents be sent to the Court with  
19 appropriate PrivWithhold Bates numbers. It does, however, require that the Government submit

20  
21 \_\_\_\_\_  
22 <sup>1</sup> The Court began its work by declaring some of the documents “not predecisional” and “not deliberative.” As the  
23 review continued, the Court stopped undertaking a dual analysis. The Court only examined whether a document  
24 was “deliberative” or “Not deliberative” after a predecisional determination had been made. The Parties should not  
assume that because a document was determined to be “predecisional” that the absence of comment that the  
document is “not deliberative” is a determination that the document was, in fact “deliberative.” To qualify for DPP  
protection, a document must be both predecisional and deliberative.

1 properly labelled copies of the documents with appropriate Bates labels for those documents as  
2 to which no ruling is reflected on Attachment 2.

### 3 **Conclusion**

4 After conducting an *in camera* review of the randomly selected sample of documents the  
5 Government has withheld solely on the basis of the DPP, the Court finds that Defendants have  
6 broadly over-asserted the privilege. The Court therefore ORDERS Defendants to produce  
7 documents, as indicated in the attachment to this Order. As to those documents where the  
8 privilege category is designated with “N”, the Government is required to produce these  
9 documents not later than **July 22, 2020**. As to those documents where the privilege category is  
10 marked “Y”, the Court is satisfied that a *prima facie* case of DPP privilege has been established.  
11 Further, Defendants must produce all documents that fall outside the date ranges of July 13, 2015  
12 to June 30, 2016 (Carter policy) and September 14, 2017 to January 11, 2018 (Mattis policy) and  
13 all documents or portions of documents that are purely factual by **July 29, 2020**.

14 This Order does not reach the issue of whether Plaintiffs can overcome Defendants’  
15 privilege assertions under the factors described in Warner, 742 F.2d at 1161, but the Court will  
16 entertain future briefing from the Parties as to specific documents the Government continues to  
17 withhold after complying with this Order. The Court will also review additional documents *in*  
18 *camera* if necessary to determine the accuracy of the Government’s privilege claims.

19  
20 The clerk is ordered to provide copies of this order to all counsel.

21 Dated July 15, 2020.

22  
23 

24 Marsha J. Pechman  
United States Senior District Judge

# **EXHIBIT D**



**U.S. Department of Justice**  
Civil Division, Appellate Staff  
950 Pennsylvania Ave. NW, Rm. 7213  
Washington, DC 20530

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Tel: 202-514-2494

August 21, 2020

Ms. Molly C. Dwyer  
Clerk of Court  
United States Court of Appeals  
for the Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103

RE: *In re Trump*, No. 20-70365 (Clifton, Callahan, Friedland, JJ.)

Dear Ms. Dwyer:

Pursuant to the Court's July 31, 2020 order, the government submits this supplemental brief concerning developments following our February 11 petition for a writ of mandamus. Our petition explained that the district court had committed clear and indisputable error in failing (1) to require plaintiffs to justify, in light of the extensive discovery already obtained, what more they need to litigate their claims, and (2) to meaningfully consider if that need outweighs the military's significant confidentiality interests. In response to the petition, the district court itself requested "guidance" and "more direction" on how to proceed. D.Ct.Resp.13.

The district court has not awaited this Court's guidance or direction. As discussed below, it has entered no fewer than a dozen more orders that intrude on the military's serious interests. At no point has it paused to consider whether the trove of

deliberative and non-deliberative discovery that plaintiffs have already obtained is “sufficient to allow for judicial review,” or identified any claims that need additional discovery. *Karnoski v. Trump*, 926 F.3d 1180, 1206 n.22 (9th Cir. 2019) (per curiam). The district court’s recent orders reflect the same errors raised in our petition, and reinforce that this Court’s correction is needed.

At this juncture, this Court should direct the district court to halt further discovery into deliberative materials unless plaintiffs can articulate to the panel what aspect of their claims requires additional discovery, beyond what they already possess.

**A. The District Court Has Continued to Order Intrusive Discovery**

Plaintiffs contend that the Mattis policy is unlawful. They have the policy, the Department’s policy rationales in its Report, and the unredacted Administrative Record supporting those rationales. After more than two years of discovery, the government has also provided around 100 document productions comprising over 50,000 documents—surpassing half a million pages—from over 150 custodians across all levels of the military during a five-year period. Doc.398, at 1; Doc.546, at 11. These include all deliberative materials seen or considered by the Panel of Experts that recommended the challenged policy to Secretary Mattis, which he adopted in full. Plaintiffs have conducted or sought depositions of seven witnesses and have access to the transcripts of five depositions taken in related litigation.

Around 25,000 documents remain withheld solely under the deliberative process privilege. Doc.547, at 1 n.1. The majority of them were addressed in our February 11 petition. Since then, the district court has ordered additional avenues of discovery intruding on the military's significant confidentiality interests, and has addressed the thousands of remaining deliberative documents in the case.

**1. Confidential Information about Transgender Service Members.** The district court has repeatedly ordered disclosure of confidential information about individual, non-party transgender service members. This includes:

- information on “service members’ gender dysphoria medical treatment plans,” and “individual treatment plans,” Doc.455, at 4 (March 4 order);
- for service members who testified to the Panel, “the names of the transgender service members,” which the government had anonymized, Doc.458, at 3 (March 5 order);
- for service members “rendered non-deployable on account of gender dysphoria or transition-related medical care” since 2016, the “duration of and specific reason(s) for such non-deployability” and “specific information about [their] medical status,” Doc.485, at 2, 5 (April 15 order); and
- for service members from the State of Washington, information relating to any disciplinary “complaints arising from the transgender status or a diagnosis of any Washington service member,” Doc.482, at 19; Doc.487 (April 23 order).

The court stated that plaintiffs have a “right to know” such information, Doc.458, at 3, to reassess whether gender dysphoria “negatively impacts readiness,” Doc.485, at 4.

**2. Third-Party Deliberative Documents.** The district court has required all deliberative communications with third parties withheld under the deliberative process privilege’s consultant corollary to be “turned over.” Doc.454, at 5 (March 4 order); *see*

*Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11 (2001) (establishing consultant-corollary doctrine). These include 1500 pages of Department communications with two contractors—RAND Corporation and Kennell and Associates—which both “were hired to provide neutral advice.” Doc.460, at 1. The court declared that, because the final RAND report that supported the Carter policy “was going to be made public,” all deliberations related to the report should be disclosed; and because Kennell just “put together studies” that supported the Mattis policy, there were no deliberations involved. Doc.509, at 4, 8 (May 12 order).

**3. Special Master Review of Deliberative Documents.** The district court has, moreover, ordered *in camera* review of other deliberative documents through appointment of a special master. Doc.479 (April 9 order). Plaintiffs requested review of a random sample of documents; plaintiffs did not assert that a random process bore any relationship to their claims, but rather wanted to “test” the government’s privilege assertions. Doc.497, at 3. The court authorized review of 350 (and then 500 more) random deliberative documents that were not addressed in our petition to assess whether the government was “improperly withholding documents.” Doc.514, at 4 (May 14 order); Doc.536 (June 24 order). Because these documents stretch back as far as March 2014 and do not immediately relate to the Carter and Mattis policies, *see* Doc.545-2, at 48, the government provided a detailed timeline of the military’s policy development since that time to aid review, Doc.542, at 4-10.

**4. All Remaining Deliberative Documents.** The district court has also continued discovery into the remaining deliberative documents in this case.

a. On July 15, the district court in effect set aside the deliberative process privilege as to all remaining documents. Doc.545 (July 15 order). The court did so by defining two narrow timeframes during which, in its view, the Department formulated the Carter policy (July 2015 to June 2016) and Mattis policy (September 2017 to January 2018). *Id.* at 7-9. The court held that all policy deliberations outside of these timeframes were not pre-decisional for purposes of the privilege, because they did not pertain to the two “specific policies at issue in this litigation.” *Id.* at 5. As our clarification opposition explained (at 15-19), that understanding of the privilege and military decisionmaking is manifestly incorrect.

Because the orders addressed in our petition require disclosure of deliberative documents relating to the Carter and Mattis policies, the July 15 order—which focuses on events outside of narrow Carter and Mattis timeframes—in effect required disclosing all remaining deliberative documents. Despite having had such documents available for *in camera* review, the court ruled that Secretary’s Mattis’s handwritten notes on a 2017 “Recommended Transgender Way Ahead” memorandum, for instance, were not privileged based on its artificial timeframes. Doc.547, at 7. Upon the government’s motion, the court temporarily stayed disclosure under its order. Doc.550 (July 23 order).

b. During the stay, the government urged that, if the district court were to proceed with *in camera* review on the remaining deliberative documents not immediately relating to the Carter or Mattis policies, it should ask plaintiffs to “identify the actual or contemplated decisions for which [they] believe they need further information to advance their case,” as many documents bore “a highly attenuated relationship to the military policy [they] challenge.” Doc.560, at 5. The court did not engage in that inquiry.

Instead, on August 17, the district court amended its July 15 order to require *in camera* review of all remaining deliberative documents, regardless of their relationship to plaintiffs’ claims. The court repeated its prior ruling that, for purposes of assessing the privilege, “the policies at issue here are the Carter and Mattis policies.” Doc.566, at 10 (August 17 order). The court concluded that, if “certain deliberative documents fall outside of [its] proposed timeframes,” then the government needed to submit the documents for review. *Id.* The court also demanded review of numerous deliberative documents that are before this Court, including documents that post-dated the Panel recommendation (January 11, 2018) but pre-dated Secretary Mattis’s proposal of that policy to the President (February 22, 2018)—such as the Secretary’s personal notes and drafts of the Department’s Report. *Id.* at 13.

The government intends to submit deliberative documents for *in camera* review no later than the order’s August 28 deadline for those submissions.

## **5. Depositions about Privileged Information and of High-Ranking**

**Officials.** The district court has permitted plaintiffs several seven-hour depositions of Rule 30(b)(6) witnesses, Doc.519 (May 29 order), and plaintiffs have conducted other depositions. Though the court has not required government witnesses to disclose deliberative information during depositions (because of this Court's stay), it has held that if it later overrules government counsel's objections based on the privilege, then the government must bear the costs of additional depositions.

Doc.536 (June 24 order). Plaintiffs have also sought to depose former Secretary Mattis, current Secretary of Veterans Affairs Robert Wilkie Jr., former Vice Chairman of the Joint Chiefs of Staff Paul Selva, and former Vice Chief of Naval Operations William Moran. The government's motions to quash those depositions are pending, and the court may permit the depositions at any time.

### **B. The Court Should Halt Discovery into Materials Unless Plaintiffs Justify that Their Claims Need More Discovery**

The government's pending mandamus petition was occasioned by three orders in which the district court required the disclosure of over ten thousand deliberative documents without assessing whether plaintiffs actually needed more discovery to litigate their claims, and without meaningfully weighing the serious interests protected by the deliberative process privilege. In none of the dozen rulings since our petition

has the district court assessed what additional privileged discovery is needed to resolve this litigation, and plaintiffs have failed to provide that simple explanation.

At this juncture, this Court should direct the district court to halt further discovery into deliberative materials unless, at a minimum, plaintiffs can justify that their claims require more discovery, beyond what they already have.

1. The district court’s rulings in the past six months embody the errors addressed in our petition and underscore the need for this Court’s correction. Challenges to agency policies are regularly resolved based on the administrative record supporting the policy—which plaintiffs possess in full—and this Court has confirmed that the Mattis policy “must be evaluated on the record supporting that decision.” *Karnoski*, 926 F.3d at 1207. This Court has recognized that, in similar challenges, far less discovery (if any) was “sufficient to allow for judicial review.” *Id.* at 1206 n.22 (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018)).

In ignoring these instructions, the district court has continued to assume that the proper scope of discovery does not depend on the nature of plaintiffs’ claims or the substantive legal “standard for evaluating the record.” Doc.485, at 4. But as the Supreme Court has explained, evidence adduced through discovery is “quite beside the point” in challenges to military policies. *Goldman v. Weinberger*, 475 U.S. 503, 509 (1986). The sheer breadth of discovery that has transpired would be remarkable in any challenge to agency action; it is astonishing in a challenge to military policy where

it is “quite wrong” for a federal court as a factfinder to conduct “an independent evaluation of [the] evidence.” *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981).

Even if some discovery were appropriate, this Court has rejected the implausible proposition that plaintiffs should obtain all deliberative documents. *Karnoski*, 926 F.3d at 1206. Rather, plaintiffs need to demonstrate that they need privileged materials, and that they need it in light of what they already have.

The district court’s recent rulings exemplify that the ongoing discovery is untethered from plaintiffs’ remaining need. The August 17 order requires the government to submit for *in camera* review in effect all deliberative documents not addressed in our petition (as well as privileged post-Panel notes and drafts at issue in our petition). The court still assumes that plaintiffs’ requests for those remaining documents are “focused” on “the Carter and Mattis policies.” Doc.566, at 10. This is perplexing. The court already ordered disclosure of all deliberative documents immediately relating to the Carter and Mattis policies; those are the orders addressed in our petition. The August 17 order targets all remaining deliberative documents in the case, and—together with any resulting disclosure orders—is impossible to reconcile with any recognized conception of proper discovery in challenges to military policy.

In considering whether the remaining deliberative documents warrant protection, the district court has itself expressed doubt about “why thousands of documents relating to other policies” would be “responsive” or “related to the

[Mattis] Policy.” Doc.566, at 10 (quotation omitted). These are sensible questions that a court should pose to plaintiffs. Plaintiffs have demanded extensive discovery relating to military service by transgender individuals stretching as far back as 2014, without explaining how it advances this litigation. *See* Doc.365-3, at 55 (from October 2014); Doc.482, at 6 n.4 (from January 2014); *see also* Doc.371-1, at 7 (declaration describing that, based on plaintiffs’ broad requests, discovery sought includes all documents “remotely related to DOD’s transgender policy, past or present”). The court, rather than pause to assess what more plaintiffs need, has declined to even ask them to “identify the actual or contemplated decisions for which [they] believe they need further information to advance their case.” Doc.560, at 5.

2. In addition to the relief requested in our petition, this Court should direct the district court to halt discovery into deliberative materials unless, at a minimum, plaintiffs can justify to the panel, based on the discovery they have, what more they need to litigate their claims.

Any serious inquiry would reveal that plaintiffs’ need for further deliberative documents is non-existent, or close to it. Following this Court’s 2019 decision, plaintiffs asserted that deliberative documents in the Department’s possession “go to the heart of [their] claims.” Doc.364, at 2. Plaintiffs elaborated on a few categories of documents they viewed as particularly probative. The government has since disclosed each category:

- “documents related to the government’s purported justifications,” *id.*, were produced in the unredacted Administrative Record;
- “communications and materials considered by the so-called ‘Panel of Experts,’” *id.*, were produced with the deliberative Panel documents;
- “statistics and data regarding transgender military service” and “objective data” considered by the Panel, *id.*, were disclosed with those Panel documents, and other medical information was disclosed following the orders discussed above; and
- “names of those who contributed” to the Department’s Report that also allegedly go to “the heart” of the case, Doc.445, at 15, were disclosed pursuant to court order, Doc.458.

Having received all the information they once viewed as central to this litigation, and around half a million pages of documents overall, it would be remarkable if plaintiffs needed more.

Plaintiffs’ claimed need for further privileged discovery is elusive. As to the documents addressed in our petition, plaintiffs declare that deliberative information never seen by the Panel “goes to the heart” of the case, Ans.26; that post-Panel drafts and deliberations of Secretary Mattis and others also “go to the heart” of the case, Ans.29; and that Carter-policy deliberations “get to the core issue,” too, Ans.34. Outside of those materials, 850 documents selected at random would also apparently “go to the heart of this dispute,” Clarification Mot. 15, and plaintiffs say all other deliberative documents in the case (those under the August 17 order) are “indispensable,” Doc.553, at 11. There is no credible basis to assert that every document is critical to litigation. As another district court in related litigation has

recognized, these remaining discovery efforts are nothing more than a “fishing” expedition. Doc.405, at 7 (quoting transcript in *Doe* litigation).

Plaintiffs and the district court appear to be treating discovery as an end unto itself. The ongoing process for *in camera* review was not designed to focus on plaintiffs’ needs, but to “test,” Doc.497, at 3, whether the government w “improperly withholding documents” by scrutinizing the remaining materials, Doc.514, at 4, whose relevance even the court doubts. Discovery is “not a punishment.” *In re Clinton*, 2020 WL 4745104, at \*6 (D.C. Cir. Aug. 14, 2020). Insofar as the court has been willing to require additional discovery as a consequence for what it views as incorrect assertions of privilege, that approach could not begin to justify the breadth of discovery here. *E.g.*, Doc.536, at 8 (requiring government to bear costs of depositions if privilege objections are overruled); Doc.566, at 3-7 (criticizing the government’s privilege assertions). In any case, the court’s criticisms of our privilege assertions only reflect its own novel and erroneous understandings of the privilege. *See* Clarification Opp. 16-20.

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If plaintiffs have a theory of the case upon which additional discovery is meaningful, it is incumbent on them to provide it before more disclosures of deliberative information are permitted. It is implausible that every deliberative document goes to “the heart” or “the core” of their case. This Court should direct the district court to halt privileged discovery unless, at a minimum, plaintiffs can

justify (based on the available discovery) what additional information they need to litigate their claims.

Sincerely,

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<sup>1</sup> The Acting Assistant Attorney General is recused from this matter.

## CERTIFICATE OF COMPLIANCE

This supplemental letter brief complies with the type-volume limit of this Court's July 31, 2020 order because it contain 2799 words. This brief also complies with the typeface and type-style requirements of Ninth Circuit Rule 32-3 and Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

*s/ Dennis Fan*  
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DENNIS FAN

### **CERTIFICATE OF SERVICE**

I hereby certify that on August 21, 2020, 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. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

*s/ Dennis Fan*  
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DENNIS FAN