

The Honorable Marsha J. Pechman

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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.

No. 2:17-cv-1297-MJP

**DEFENDANTS' MOTION TO STAY  
DISCOVERY PENDING  
DISPOSITION OF MANDAMUS  
PETITIONS**

**NOTE ON MOTION CALENDAR:  
September 18, 2020**

## INTRODUCTION

On September 2, 2020, this Court denied Defendants' motions to quash deposition subpoenas for current Secretary of Veterans Affairs Robert Wilkie, former Secretary of Defense James Mattis, former Vice Chairman of the Joint Chiefs of Staff General Paul Selva, and former Vice Chief of Naval Operations Admiral William Moran. *See* ECF No. 596 (the "Order"). Permitting the deposition of any one individual who occupied one of the highest military government offices in the United States would be unusual. Permitting all four in the same case is extraordinary, particularly in a challenge to military policy such as this one, a context in which the Supreme Court has indicated judicial review must be "highly constrained." *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018).

The Court's deposition Order reflects the broader errors in its approach to discovery in this case, in which it has repeatedly permitted Plaintiffs to obtain sweeping, intrusive discovery to a degree unprecedented in cases involving military policy. Several of the Court's prior orders implicate documents at issue in Defendants' currently pending petition for a writ of mandamus before the Ninth Circuit, for which oral argument is set for October 14, 2020.

Defendants intend to seek an additional writ of mandamus to reverse the deposition Order and quash the subpoenas. Defendants respectfully request a stay of all discovery in this action, or, at a minimum, the depositions at issue in the Order, pending resolution of both the pending and forthcoming mandamus petitions. Defendants respectfully request that the Court resolve the instant motion by 9 A.M. PDT on September 18, 2020, to afford them time, if necessary, to file an emergency motion in the Ninth Circuit requesting a stay. Pursuant to Federal Rule of Appellate Procedure 8, Defendants are first moving this Court for a stay. Defendants have conferred with opposing counsel, and they oppose a stay.

## LEGAL STANDARD

A district court may stay an order pending resolution of appellate proceedings. Fed. R. App. P. 8. District courts apply a four-factor test to determine whether to issue a stay, considering: (1) the applicant's likelihood of success on the merits; (2) irreparable injury to the applicant absent a stay; (3) substantial injury to the other parties; and (4) the public interest. *Hilton v.*

1 *Braunskill*, 481 U.S. 770, 776 (1987); *see generally In re Dep't of Com.*, 139 S. Ct. 16 (2018)  
2 (staying a deposition of the Secretary of Commerce).

### 3 ARGUMENT

#### 4 I. All Discovery Should Be Stayed Pending Adjudication of Defendants' Petitions.

5 A court's inquiry into matters of "national security is highly constrained," and courts  
6 "will uphold [a government] policy [in this area] so long as it can reasonably be understood to  
7 result from a justification independent of unconstitutional grounds." *Hawaii*, 138 S. Ct. at 2420.  
8 Accordingly, discovery is rarely appropriate in cases involving military policy. *Id.* at 19  
9 ("[W]hen it comes to collecting evidence and drawing inferences' on questions of national  
10 security, 'the lack of competence on the part of the courts is marked.'"). Yet here, Plaintiffs have  
11 already received an extraordinary amount of discovery for a challenge to an agency policy, and  
12 an amount unprecedented in the military context. In addition to both the lengthy report by the  
13 Department of Defense ("DoD") providing the reasons and justifications for the challenged  
14 policy (the "DoD Report") along with then-Secretary Mattis's letter adopting the policy,  
15 Plaintiffs have obtained a 3,075-page unredacted administrative record; every deliberative  
16 document to, from, or by the Panel that formulated the challenged policy; and the deliberative  
17 documents of the sole non-voting member of the Panel.

18 Further, in response to the 236 Requests for Production served in this case and the related  
19 cases, the Government has provided 99 document productions comprising over 60,000  
20 documents—surpassing 410,000 pages—from over 150 custodians across all levels of the  
21 military during a five-year period. *See Carmichael Decl.* ¶ 6; ECF No. 398 at 1; ECF No. 546 at  
22 11; ECF No. 183. The Government has responded to 95 interrogatories, and Plaintiffs have  
23 conducted depositions of three witnesses, ECF No. 546 at 3–4, ECF No. 567 at 1–2, sought the  
24 deposition of eight more witnesses (not including the four high ranking officials subject the  
25 Court's Order), ECF No. 534 at 2, and a Rule 30(b)(6) witness, ECF No. 519, and have access  
26 to the transcripts of five depositions taken in related litigation.

27 Moreover, in addition to the deposition Order, this Court has ordered unusually intrusive  
28 discovery, including:

- 1 • The confidential medical information of individual non-party service members, including: (a) information on “service members’ gender dysphoria medical treatment plans,” ECF No. 455 at 4; (b) “the names of the transgender service members” who testified to the Panel, ECF No. 458, at 3; (c) 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,” ECF No. 485 at 2, 5; and (d) 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,” ECF No. 482 at 19; ECF No. 487.
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- 8 • All deliberative communications with third parties withheld under the deliberative process privilege’s consultant corollary. ECF No. 454 at 5.
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- 10 • All deliberative communications within the government outside the narrow periods of July 2015 to June 2016 and September 2017 to January 2018, with the exception that deliberative documents from two additional narrow periods be submitted for *in camera* review. ECF No. 545; ECF No. 569.
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12 Much of the discovery in this matter has also been extraordinarily burdensome, and  
13 conducted in exceedingly narrow timeframes. To identify just two of many such examples:

- 14 • Defendants were given 11 days to “provide information describing in detail, for each attendee and person supporting the Panel . . . the information or input provided by that person.” ECF No. 458 at 2. To provide this response, the Government was required to interview 27 high ranking Department of Defense officials including eight at the General/Admiral level, the current Under Secretary of Defense (P&R), and the current Chief of Staff of the Army, General McConville, who is the operational head and service chief of the U.S. Army and a member of the Joint Chiefs of Staff. Defendants’ answer to this interrogatory alone is 24 pages. *See* Carmichael Decl. Ex. A.
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- 20 • Defendants were given 18 days to provide information regarding individual non-party Washington transgender service members. *See* ECF No. 486. To do so, Defendants had to use their databases to identify all Washington service members diagnosed with gender dysphoria and interview each of their 125 commanders about whether they were aware of any complaints or unit cohesion issues regarding those service members. The Court required that Defendants identify commanders by name and, where there were complaints, describe those complaints in detail. *See* Carmichael Decl. Ex. B.
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24 Even outside of a military context, challenges to agency policies are regularly resolved  
25 based on the administrative record supporting the policy, which Plaintiffs possess in full here.  
26 Indeed, the Ninth Circuit has confirmed that the Mattis policy “must be evaluated on the record  
27 supporting that decision.” *Karnoski v. Trump*, 926 F.3d 1180, 1207 (9th Cir. 2019). But the sheer  
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1 breadth of discovery in a challenge to a military policy is astonishing, where it is “quite wrong”  
2 for a federal court to conduct “an independent evaluation of [the] evidence.” *Rostker v. Goldberg*,  
3 453 U.S. 57, 83 (1981); *see also Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

4 Further, discovery is particularly improper here given Plaintiffs’ stated purpose to  
5 “[c]halleng[e]” whether the “‘Mattis Policy’ was developed solely by the military, completely  
6 independent from and unrelated to the President’s tweets and directives,” in an attempt to support  
7 their argument that the principles of military deference should not apply to this case. ECF No.  
8 546 at 2; *see also* Order at 10 (“Through this questioning, Plaintiffs seek to rebut ‘Defendants’  
9 claim that the Panel—and not political appointees like Mr. Wilkie—was the driving force behind  
10 the Mattis Policy.’”). But Plaintiffs’ theory that Defendants must prove that a military decision  
11 is entirely divorced from its civilian leadership, such as the Senate-confirmed Under Secretary  
12 of Defense (P&R), in order to obtain constitutionally mandated deference has no support in the  
13 law. Moreover, the Ninth Circuit has already “reject[ed] Plaintiffs’ contention that no deference  
14 is owed here” when presented with similar arguments. *Karnoski*, 926 F.3d at 1201.<sup>1</sup> In short, the  
15 Court’s flawed approach to discovery, exemplified by the deposition Order, has already gone too  
16 far.

## 17 **II. The Court Should at Least Stay the Depositions at Issue in its September 2 Order.**

### 18 **A. The Government Is Likely to Succeed on the Merits.**

19 Since the Ninth Circuit’s June 2019 decision vacating this Court’s July 2018 order, which  
20 erroneously ordered the disclosure of all deliberative documents, this Court has continued to  
21 permit Plaintiffs open access to the files of DoD and other agencies. In so doing, this Court has  
22 consistently declined to apply the well-established Ninth Circuit and Supreme Court precedent  
23 regarding the scope of discovery in the military context despite direction from the Ninth Circuit.  
24 In its most recent rejection of well-established precedent, the deposition Order (1) misapplied  
25 analysis that generally bars depositions of high-ranking government officials; (2) failed to

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26 <sup>1</sup> The Ninth Circuit’s statement that Plaintiffs could submit further evidence on this topic at future  
27 proceedings (if it existed) was not an invitation to turn the entire case into a fishing expedition to  
28 locate such evidence when Plaintiffs have been unable to find any after receiving the  
unprecedented volume of discovery they have already obtained.

1 adequately consider the military context in its analysis; and (3) ignored binding case law  
2 regarding government privileges. In so doing, the Court ordered these four high-ranking officials  
3 to be deposed without identifying any case involving a challenge to a military policy where any  
4 high-ranking official, let alone a four-star general and admiral, or current and former Cabinet  
5 member, was ordered to be deposed.

### 6 **1. The Court Misapplied the Exceptional Circumstances Analysis.**

7 Under the apex doctrine, “[h]eads of government agencies are not normally subject to  
8 deposition.” *Kyle Eng’g Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979). Thus, courts have  
9 routinely held that high-ranking government officials, both current and former, should not—  
10 absent “exceptional circumstances”—be deposed regarding their reasons for taking official  
11 action, and have issued the extraordinary remedy of a writ of mandamus to preclude the  
12 depositions of high-ranking Executive branch officials. *See Mattis Mot.* at 9, ECF No. 585  
13 (collecting cases). This is because, among other reasons, constitutional separation-of-powers  
14 principles are implicated when parties litigating against federal agencies attempt to ascertain the  
15 thoughts and mental processes by which high-ranking agency officials exercise their official  
16 discretion. *See United States v. Morgan*, 313 U.S. 409, 422 (1941). Moreover, subjecting high-  
17 level government officials to depositions in civil actions involving their agency would impede  
18 the exercise of official duties by exerting a chilling effect on official decision-making. *See*  
19 *Lederman v. N.Y.C. Dep’t of Parks & Rec.*, 731 F.3d 199, 203 (2d Cir. 2013). To “demonstrate  
20 exceptional circumstances,” Plaintiffs must show “that the official has unique first-hand  
21 knowledge . . . or that the necessary information cannot be obtained through other, less  
22 burdensome . . . means.” *Id.* This Court failed to preclude the depositions, improperly neglecting  
23 to consider alternative sources of discovery or how a deposition would interfere with the duties  
24 of a sitting Cabinet member.<sup>2</sup>

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26 <sup>2</sup> In finding that *any* discovery into matters pertaining to these four high-ranking officials was  
27 appropriate, the Court also erroneously relied on a theory already rejected by the Ninth Circuit:  
28 that DoD’s current policy was mere “after-the-fact justification” for the President’s initial  
statement on Twitter and memorandum. *See Order* at 2; *but see Karnoski*, 926 F.3d at 1199.

1 **a. The Court Failed to Consider Alternative Discovery Sources.**

2 To begin, the Court disregarded the voluminous amount of discovery provided to date,  
3 finding instead that “Plaintiffs have little insight into the decision to delay implementation of the  
4 Carter policy, the initial rejection of the Panel’s recommendations, the Panel’s final four  
5 meetings, the decision-making process about what data was provided to the Panel, or the process  
6 used in drafting the Report and Recommendation.” Order at 4. None of these reasons supports  
7 permitting the depositions. First, Plaintiffs already have the Service recommendations seeking a  
8 delay of the implementation of the Carter policy in May 2017, including a declaration explaining:

9 Following the start of the Trump Administration, some of the Services sought to  
10 have then-Secretary Mattis reconsider the Carter policy. . . . The Army requested  
11 “a delay . . . until July 1, 2019” . . . . The Air Force recommended a 12- to 36-  
12 month delay. . . . The Navy stated that it . . . was willing to support the delay  
requested by the other Services. And, the Marine Corps requested a 24-month  
delay . . . .

13 Carmichael Decl. Ex. C ¶¶ 21–22 (Decl. of Lernes J. Hebert, ECF No. 542-5). Neither Plaintiffs  
14 nor the Court has explained why these documents, or a deposition of Mr. Hebert, are inadequate.

15 As to the Court’s three remaining categories, which all relate to events occurring between  
16 December 13, 2017 and February 22, 2018, Defendants have already produced in excess of  
17 14,000 documents from this time period. Carmichael Decl. ¶ 7. Further, there is no indication  
18 that any minutes to the last four Panel meetings were ever created. Defendants have produced  
19 the agendas for each, which were previously filed on the docket, *see* ECF Nos. 435-13–435-16,  
20 and have offered the deposition testimony of numerous individuals who attended these meetings.  
21 Defendants have also made available for deposition Mr. Thomas Dee, the individual who raised  
22 concerns about the minutes. And Defendants have answered interrogatories regarding the  
23 drafting of the DoD Report, including the name of each individual who reviewed it. *See, e.g.*,  
24 Carmichael Decl. Ex. A (ROGS 16 & 17).

25 The Court also failed to adequately consider the numerous other officials whom the  
26 Government has made available to testify regarding the development of the challenged policy.  
27 The Court first erred by considering how just three of the eleven alternative witnesses the  
28 Government proposed would be able to offer similar or superior testimony on the subjects on

1 which Plaintiffs seek to depose these four witnesses, without referencing any of the other eight  
 2 individuals in its Order. *See, e.g.*, Mattis Mot. at 18–19. The Court’s deposition Order is also in  
 3 tension with its prior order denying the Government’s motion for a protective order concerning  
 4 a Rule 30(b)(6) deposition of DoD. In that prior order, the Court allowed the deposition to  
 5 proceed on a variety of the same topics, including “drafting the meeting minutes of the Panel of  
 6 Experts[,] . . . details about a [December 13, 2017] meeting involving the Deputy Secretary of  
 7 Defense and Vice Chairman of the Joint Chiefs[,] . . . [and] the process of drafting DoD’s Report  
 8 and Secretary Mattis’s Memorandum.” ECF No. 519 at 3. But the Court has now permitted the  
 9 most senior officials involved in the process to be deposed as to the same topics.

10 The Court also made specific errors as to each of the four high-ranking officials:

- 11 (1) Secretary Wilkie: The Court found that “neither Mr. Kurta nor Mr. Hebert can address  
 12 Mr. Wilkie’s actions in re-convening the Panel . . . , collecting additional support for the  
 13 Panel’s findings, and drafting the DoD Report.”<sup>3</sup> Order at 10. But Mr. Hebert explained  
 14 in a sworn statement that he “facilitate[d] the Panel’s discussions and deliberations” at  
 15 every Panel meeting Secretary Wilkie attended and can knowledgeably testify to what  
 16 occurred at all of those meetings. Decl. of Lernes J. Hebert ¶ 11, ECF No. 580-5. And  
 17 any alleged knowledge Secretary Wilkie might possess about any critique of the Panel’s  
 18 recommendations cannot be unique to Secretary Wilkie, since Plaintiffs’ sole basis for  
 19 this assertion is an email from Mr. Dee to five other individuals, none of whom Plaintiffs  
 20 have deposed. *See Selva Opp., Ex. 2, Karnoski v. Trump*, No. 1:20-mc-00015-LO-TCB,  
 21 ECF No. 18-2. Nor can any personal knowledge Secretary Wilkie may have in drafting  
 22 the DoD Report be unique, as Plaintiffs concede that “53 persons . . . ‘reviewed, revised  
 23 or commented on drafts of’ the DoD report,” and the Court has already ordered DoD to  
 24 provide a 30(b)(6) deponent on this topic. *Selva Opp.* at 24 (citation omitted); *see* ECF  
 25 No. 519 at 3.
- 26 (2) Secretary Mattis: The Court’s Order failed to find that the testimony Plaintiffs seek from  
 27 Secretary Mattis could not be obtained from others. This was error according to this  
 28 Court’s own reading of the law, *see* Order at 8, yet the Court still denied the motion.<sup>4</sup>
- (3) General Selva: The Court found, without further explanation, that “[n]either [of two other  
 witnesses] can address General Selva’s role in delaying the Carter Policy or the role the

<sup>3</sup> Anthony M. Kurta and Lernes Hebert are the former and current Deputy Assistant Secretaries of Defense for Military Personnel Policy, respectively. *See also* Mattis Mot. at 18–19.

<sup>4</sup> The Court also incorrectly claimed that Secretary Mattis was at the December 13, 2017 meeting at which the Panel presented an early version of its report. Order at 3. He was not, and Plaintiffs have not argued otherwise. The Court’s citation for this proposition to ECF No. 19, a summons issued to President Trump, appears to be in error.

1 President's order and directives played in General Selva's decision to reject the Panel's  
 2 'Final Report.'"<sup>5</sup> Order at 9. But Plaintiffs have Mr. Hebert's declaration and appended  
 3 materials, which explain the decision to delay the Carter policy. *See* Carmichael Decl.  
 4 Ex. C ¶¶ 21–22. And General Selva cannot have unique knowledge of his critique of the  
 5 Panel's initial findings in light of the many individuals involved in the discussion. *See*  
 6 *supra* at 7 ("Secretary Wilkie"). The Court also failed to consider that permitting  
 7 Plaintiffs to depose General Selva, prior to deposing Mr. Kurta, would conflict with  
 8 another court's order, and would permit the plaintiffs in that action to circumvent that  
 9 court's order through plaintiffs' cross use of discovery agreement. *See* Selva Mot. at 8–  
 10 9, *Karnoski v. Trump*, No. 1:20-mc-00015-LO-TCB, ECF No. 3; Selva Reply at 4,  
 11 *Karnoski v. Trump*, No. 1:20-mc-00015-LO-TCB, ECF No. 24; *see also* Order in *Doe v.*  
 12 *Esper*, No. 17-cv-1597 (D.D.C.), ECF No. 112.

13 (4) *Admiral Moran*: The Court found that Mr. Kurta and Mr. Dee "were not on the Carter  
 14 working group [as was Admiral Moran] and therefore cannot compare the development  
 15 of the Carter and Mattis Policies" and "cannot speak to Admiral Moran's concerns about  
 16 the data underlying the Mattis Policy." Order at 13. But Mr. Hebert *was* on the Carter  
 17 working group and therefore could "compare the development of the Carter and Mattis  
 18 Policies." *See generally* Carmichael Decl. Ex. C. Further, Mr. Kurta held a leadership  
 19 role on both the Carter working group and the Panel of Experts and Mr. Hebert's  
 20 declaration compares the groups' processes. *See id.* As to Admiral Moran's alleged  
 21 concerns regarding data, he asked those questions in an email that he sent to twenty other  
 22 Panel members, including Mr. Kurta. *See* Moran Opp., Ex. 30, ECF No. 593-30.

23 The Ninth Circuit is therefore likely to find that it was error for this Court to order that  
 24 these four officials be deposed or, at a minimum, that the Court not first require that Plaintiffs  
 25 depose other witnesses prior to seeking the testimony of these high-ranking individuals, as the  
 26 *Doe* court held in one of the related matters.

27 **b. The Court Failed to Consider How Subjecting a Cabinet  
 28 Secretary to a Deposition Would Interfere with his  
 Government Duties.**

The concerns on which the apex doctrine is based are especially at issue where, as here,  
 Plaintiffs seek to depose a sitting Cabinet Secretary. *See, e.g., Lederman*, 731 F.3d at 203.  
 Permitting Secretary Wilkie's deposition would "substantially interfere" with Secretary Wilkie's

<sup>5</sup> The Court also incorrectly refers to "General Selva's . . . rejection of the Panel's initial  
 recommendations." Order at 10. But Plaintiffs presented no evidence that General Selva ever  
 "rejected" the Panel's findings. *See* Selva Reply at 12 n.8. General Selva recommended that the  
 Panel "collect[] more objective data" for the sake of thoroughness before he would "accept the  
 panel's recommendations." Selva Opp. Ex. 2. Even if General Selva disagreed, nothing requires  
 that a military policy have unanimous support.

1 “exercise of his official duties,” including running the second largest federal government  
 2 department and leading the nation’s response to the deadly COVID-19 pandemic. *See*  
 3 Declaration of Pamela J. Powers, Acting Deputy VA Secretary and Secretary Wilkie’s former  
 4 Chief of Staff, Wilkie Mot., Ex. G ¶¶ 7, 11, 13, ECF No. 580-7. The Court did not address the  
 5 disruption a deposition would cause to Secretary Wilkie’s performance of his official duties.

6 **2. The Court Failed to Prohibit Plaintiffs from Probing the Four**  
 7 **Officials’ Mental Impressions.**

8 The Supreme Court made clear in *Morgan* that there is a strong presumption against  
 9 deposing apex officials in order to obtain their mental impressions on a challenged policy. *See*  
 10 313 U.S. at 422; *see also* Mattis Mot. at 10–12, 16 (collecting cases). Indeed, in order to obtain  
 11 such testimony, Plaintiffs bear the burden to demonstrate “a strong showing of bad faith or  
 12 improper behavior” on the part of the individual they seek to depose. *Dep’t of Comm. v. New*  
 13 *York*, 139 S. Ct. 2551, 2573–74 (2019). As to this factor, the Court made an unsubstantiated  
 14 finding of bad faith as to one witness, while allowing the deposition of three others  
 15 notwithstanding its failure to make any bad faith finding as to them. This is particularly  
 16 problematic given the long line of cases holding that “judicial inquiries into . . . executive  
 17 motivation represent a substantial intrusion into the workings of other branches of government.”  
 18 *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977).<sup>6</sup>

19 **a. The Court Erroneously Found that Sufficient Evidence Exists**  
 20 **to Show that Secretary Mattis Acted in Bad Faith.**

21 With respect to the Mattis deposition, the Court incorrectly found that “Plaintiffs have  
 22 made the required showing of bad faith” on the ground that “Secretary Mattis’s decision-making  
 23 process may have been influenced by animus.” Order at 11. This finding is unsupported and

24 <sup>6</sup> *See also In re Dep’t of Comm.*, 139 S. Ct. at 17 (Gorsuch, J., concurring in stay of district court’s  
 25 order authorizing the deposition of the Secretary of Commerce) (“Leveling an extraordinary  
 26 claim of bad faith against a coordinate branch of government requires an extraordinary  
 27 justification.”); *Prince v. Sec’y of Air Force*, 30 F.3d 130 (4th Cir. 1994) (“It is presumed that  
 28 ‘administrators of the military like other public officers discharge their duties correctly, lawfully,  
 and in good faith.’ . . . [T]he Secretary of the Air Force is ‘presumed to perform fairly and  
 lawfully in absence of clear and persuasive evidence to the contrary.’” (citations omitted)).

1 based solely on unfounded allegations. For example, the Court wrongly credited Plaintiffs’  
 2 meritless argument of animus based on Secretary Mattis’s e-mail correspondence with a former  
 3 Marine colleague, allegedly “discussing the ‘psychological’ problems of transgender persons.”  
 4 Order at 12. In particular, the Court failed to either note that references to high “suicide rates and  
 5 other psychological issues that disrupt cohesion . . . (and make one non-deployable)” were not  
 6 made by Secretary Mattis, or explain how this is evidence of animus by Secretary Mattis.<sup>7</sup> Mattis  
 7 Opp., Ex. 25 at USDOE00134724\_0001.

8 **b. The Court Failed to Make the Requisite Finding of Bad Faith**  
 9 **as to Secretary Wilkie, General Selva, and Admiral Moran.**

10 The Court did not make *any* findings that Secretary Wilkie, General Selva, or Admiral  
 11 Moran acted in bad faith, yet nevertheless declined to limit the testimony regarding their mental  
 12 processes. This also diverges from well-established case law. *See, e.g., Dep’t of Comm.*, 139 S.  
 13 Ct. at 2573–74.

14 **3. The Court Failed to Apply Appropriate Deference to the Decisions of**  
 15 **Current and Former High-Ranking Military Officials.**

16 The Court also continued to disregard the Ninth Circuit’s order that “the district court  
 17 must apply appropriate military deference to its evaluation of the 2018 Policy.” *Karnoski*, 926  
 18 F.3d at 1202 (per curiam) (emphasis added). Rather than engaging with Defendants’ substantial  
 19 arguments that the apex doctrine applies with particular force in the military setting, the Court  
 20 dismissed them outright in a conclusory statement. *See* Order at 7. In so doing, the Court erred  
 21 by failing to consider how military deference applies to the specific types of information sought  
 22 from the officials at issue.<sup>8</sup>

23 \_\_\_\_\_  
 24 <sup>7</sup> The Court also ignored that the Carter working group and many of Plaintiffs’ own experts  
 25 acknowledge that gender dysphoria can be associated with an increased risk of suicide. *See*  
 26 Carmichael Decl., Ex. C ¶ 10; *Doe 2 v. Shanahan*, 917 F.3d 694, 726–27 (D.C. Cir. 2019)  
 27 (Williams, J. concurring in result).

28 <sup>8</sup> Moreover, military deference is based on a subject matter inquiry. *See* Mattis Reply at 16 &  
 n.14, ECF No. 588. The extent to which civilian leadership was involved or not in the process is  
 not relevant to this issue, much less the “central issue in this case.” Order at 11. Indeed, the Ninth  
 Circuit has already resolved this issue, holding that “a presumption of deference is owed, because

1                                   **4. The Court Ignored Rule 45 and Relevant Case Law in Rejecting**  
 2                                   **Defendants’ Privilege Arguments as Premature.**

3           The Court also rejected Defendants’ arguments raising privilege concerns, stating in a  
 4 single conclusory sentence that “Defendants cite no authority allowing a court to quash a  
 5 deposition because some yet-unasked questions may draw a privilege objection.” Order at 7. But  
 6 Defendants cited ample authority requiring exactly that. *See* Mattis Mot. at 20–22, Mattis Reply  
 7 at 18–19. And Rule 45 directs that “the court . . . must quash or modify a subpoena that requires  
 8 disclosure of privileged or other protected matter.” Fed. R. Civ. P. 45(d)(3)(A)(iii).

9           Additionally, the Government has filed a mandamus petition seeking to vacate this  
 10 Court’s orders compelling the release of deliberative records never considered by the Panel, such  
 11 as drafts of the DoD Report and deliberative documents relating to the Mattis memorandum. *See*  
 12 Petition at 24–25, *In re Trump*, No. 20-70365, ECF No. 1-2 (9th Cir. Feb. 11, 2020). That petition  
 13 is still pending, and the Court should not allow Plaintiffs to circumvent the administrative stay  
 14 through the deposition process.

15                                   **B. Defendants Will Suffer Irreparable Harm in the Absence of a Stay.**

16           The Court’s Order will result in the irreversible harm of subjecting the four individuals,  
 17 including a current Cabinet member, to the process of preparing and sitting for depositions, as  
 18 well as the disclosure of dozens of hours of deposition testimony, likely to include privileged  
 19 subject matter relating to multiple military policies. Once Secretary Wilkie and the others take  
 20 the necessary time out of their schedules, the harm can never be undone. *See supra* at 8–9. Also,  
 21 the disclosures of privileged information otherwise likely to result from ongoing discovery will  
 22 have “an immediate chilling effect on future deliberations,” thus “degrad[ing] DoD’s decision-  
 23 making process” and potentially “expos[ing] the nation to greater overall risk.” Declaration of  
 24 Robert E. Easton ¶¶ 24, 27, ECF No. 381-1.<sup>9</sup>

25           \_\_\_\_\_ the 2018 Policy appears to have been the product of independent military judgment.” *Karnoski*,  
 26 926 F.3d at 1202; *see also Hawaii*, 138 S. Ct. at 2420.

27           <sup>9</sup> Indeed, the Ninth Circuit already stayed an order to produce privileged deliberative materials  
 28 pending a mandamus petition, *see* Order, ECF No. 316-1, and granted a temporary stay of  
 subsequent orders pending a second mandamus petition currently before the Ninth Circuit, *see*  
 Order, ECF No. 415.

1                   **C. The Balance of Hardships Justifies a Stay.**

2                   In contrast, Plaintiffs will not be harmed by a stay. Should their arguments prevail on  
 3 appeal, they will be able to depose these four high-ranking officials, as they would do now.  
 4 Indeed, Plaintiffs have already repeatedly delayed numerous depositions of their own accord,  
 5 including those of Mr. Kurta; Mr. Hebert; Mr. Dee; Ms. Stephanie Miller, a senior DoD official  
 6 who participated in both the Carter working group and Panel meetings; and a Rule 30(b)(6)  
 7 deposition of the DoD. Moreover, Plaintiffs do not intend to proceed with depositions remotely,  
 8 as the Government proposed doing to expedite discovery. *See* ECF No. 546 at 4–5. Moreover,  
 9 there currently is no discovery deadline in place, *see* ECF No. 513, as the previous deadline was  
 10 lifted at Plaintiffs’ request, *see* ECF No. 500. And the parties already have agreed to defer certain  
 11 depositions until after the Ninth Circuit resolves related document issues.<sup>10</sup> *See* ECF No. 513.

12                   **D. The Public Interest Favors a Stay.**

13                   The Court’s Order allowing the deposition of the most senior officials involved in  
 14 developing the challenged policy, including a sitting Cabinet official, would have the effect of  
 15 hindering the ability of officials to perform their vital duties to the public, *see, e.g., supra* at 8–  
 16 9, and exerting a chilling effect on official decision-making. *See Lederman*, 731 F.3d at 203. A  
 17 stay of discovery will also prevent the invasion of government privileges—which could harm  
 18 future decision-making—and protect the DoD and military services from the extraordinary  
 19 burdens being imposed by discovery in this case, which diverts resources from DoD’s mission.

20                   **CONCLUSION**

21                   The Court should stay all discovery in this matter, or at a minimum, stay its September 2  
 22 Order, pending resolution of Defendants’ pending and forthcoming petitions for mandamus.

23 Dated: September 10, 2020

Respectfully submitted,

24                   DAVID M. MORRELL

25 \_\_\_\_\_  
 26 <sup>10</sup> Defendants remain prepared to have this case proceed to summary judgment, so that  
 27 Defendants’ policy may be “evaluated on the record supporting that decision and with the  
 28 appropriate deference due to a proffered military decision,” and Defendants intend to request that  
 the Ninth Circuit order the Court to terminate discovery and proceed to summary judgment.  
*Karnoski*, 926 F.3d at 1207.

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Deputy Assistant Attorney General

ALEXANDER K. HAAS  
Branch Director

ANTHONY J. COPPOLINO  
Deputy Director

*/s/ Andrew E. Carmichael*

ANDREW E. CARMICHAEL  
Senior Trial Counsel

JAMES R. POWERS

MATTHEW SKURNIK

Trial Attorneys

United States Department of Justice

Civil Division, Federal Programs Branch

Telephone: (202) 514-3346

Email: [andrew.e.carmichael@usdoj.gov](mailto:andrew.e.carmichael@usdoj.gov)

*Counsel for Defendants*

The Honorable Marsha J. Pechman

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

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

No. 2:17-cv-1297-MJP

**[PROPOSED] ORDER GRANTING  
DEFENDANTS' MOTION TO STAY  
DISCOVERY PENDING  
DISPOSITION OF MANDAMUS  
PETITIONS**

Upon Review of Defendants' Motion to Stay Discovery Pending Disposition of Mandamus Petitions and the materials filed therewith, and having considered the Motion and finding that good cause has been shown, it is HEREBY ORDERED that:

1. Defendants' Motion to Seal is hereby GRANTED, and
2. All discovery in this case is hereby STAYED pending final disposition of Defendants' petitions for writ of mandamus.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2020

\_\_\_\_\_  
The Honorable Marsha J. Pechman  
United States District Court Judge