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September 4, 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:

Defendants' supplemental brief still provides no support for their claim that *Warner* requires a showing that the withheld documents are “needed to resolve this litigation,” because there is none. Defendants have created this “requirement” out of whole cloth. Supp.Br. 8. So too their argument that “chilling” effects are heightened when the military is involved. *Id.* No court has said that, because the final *Warner* factor is about the impact on future agency decision-making—not secrecy or agency deference—and the cases they cite have nothing to do with the deliberative process privilege (DPP).

As for subsequent developments, Defendants have no answer to the District Court's findings—based on exactly the “granular” review Defendants seek in their

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petition—that nearly 90% of the documents it reviewed did not qualify for DPP. Instead, Defendants reverse course, asking for new relief not requested in their petition: “halt privileged discovery” altogether. Supp.Br. 12. In doing so, they misrepresent the developments below, which relate to a different issue not raised in their petition (whether DPP applies at all versus whether Plaintiffs can overcome DPP), and press arguments this Court already rejected. The only consistency in Defendants’ shifting positions is they will raise any argument—no matter how unsupported or inconsistent—to avoid disclosing materials revealing the true motivations for the military’s transgender ban.

I. DEFENDANTS CONTINUE TO MISSTATE WHAT PLAINTIFFS MUST SHOW UNDER WARNER.

1. Defendants continue to claim—without support—that, to establish “need” under *Warner*, Plaintiffs must show “what additional privileged discovery is needed to resolve this litigation.” Supp.Br. 7-8. But “need” under *Warner* refers to (1) relevance, (2) availability of other evidence, and (3) the government’s role in the litigation, all of which are balanced against the government’s interest in non-disclosure. *FTC v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). This Court has already found the second and third factors “favor Plaintiffs” here,

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Karnoski v. Trump, 926 F.3d 1180, 1206 (9th Cir. 2019), and Defendants do not seriously dispute the withheld documents are relevant. Nor could they. *See* Ans. 25-27, 29-32, 34-36. Instead, they invent a “standard” not found in *Warner* or any other case.

Defendants’ “standard” is not only unsupported, but would be impossible for plaintiffs to satisfy and courts to apply. Plaintiffs cannot show they need what they do not know is being withheld, nor can they predict during discovery what evidence it will take to “resolve this litigation.” Nor can a trial court determine, particularly at the discovery stage, before knowing the parties’ proof at trial, how much, or which, evidence is “needed to resolve this litigation.” Moreover, Defendants’ “standard” is illusory. A court does not need *any* evidence to “resolve this litigation”; it must rule based on the evidence before it. The absence of discovery into the events leading to the “Mattis policy” will not prevent resolution of this litigation. It will, however, prevent the searching judicial inquiry heightened scrutiny requires—and that is indispensable to federal courts’ performance of their Article III responsibilities to adjudicate Plaintiffs’ constitutional rights. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 385 (2004) (government withholding evidence

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may impair “court’s ability to fulfill its constitutional responsibility to resolve cases and controversies within its jurisdiction”).

Defendants point to this Court’s observation that a 12-page agency document in *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018), was “sufficient to allow for judicial review.” Supp.Br. 1-2, 8 (citing *Karnoski*, 926 F.3d at 1206 n.22). But that reference did not speak to the *Warner* factors, much less alter them. Nor did *Hawaii* involve the heightened scrutiny applicable here.

Finally, the information Plaintiffs seek *is* necessary for judicial review under heightened scrutiny. Plaintiffs have materials the Panel received, but not documents withheld from it; Plaintiffs received the DoD Report, but no discovery concerning its creation; and Plaintiffs know the Carter Working Group reached the opposite conclusion, but have no discovery into why. *See* Dkt. 596 at 4, 12-13 (District Court finding “Plaintiffs have little insight into ... the decision-making process about what data was provided to the Panel, ... the process used in drafting the Report,” or why the Carter Working Group “only a year before had recommended transgender persons be permitted to serve openly”).

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2. Defendants’ “confidentiality” arguments fare no better. They still offer nothing beyond a generalized claim that because documents relate to the military, disclosure will chill future decision-making. Supp.Br. 8-9. They do not attempt to show *why* or *how* specific categories of documents will do so. And their suggestion that many of these documents relate to military service by transgender persons unrelated to any particular decision or to other, unspecified decisions, Supp.Br. 3-4, 6, undermines their general assertions of chilling effect. How can disclosure chill future decision-making when Defendants do not and cannot identify any specific decision to which a document relates? Indeed, such documents are not privileged to begin with. *See Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1089, 1094 (9th Cir. 1997) (to assert privilege, government must identify “specific decision to which the document is predecisional”).

To maintain the privilege under *Warner*, Defendants must explain how disclosing specific documents or categories of documents will hinder future decision-making. *Karnoski*, 926 F.3d at 1206. There is no legal support for just invoking the military as a talisman. Defendants’ approach would convert the

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qualified privilege into an absolute one precluding any discovery relating to military decisions. That is not the law.

II. DEFENDANTS MISREPRESENT THE DISTRICT COURT'S ORDERS AND IGNORE THIS COURT'S PRIOR OPINION.

Defendants' recitation of recent developments is equally flawed.

First, Defendants mischaracterize the District Court's recent decisions, which were unrelated to *Warner* balancing issues. Defendants argue the "recent rulings exemplify that the ongoing discovery is untethered from plaintiffs' remaining need," Supp.Br. 9, but "need" did not factor into those orders, which were limited to the threshold question whether DPP applies in the first place—*i.e.*, whether documents were deliberative and pre-decisional. Plaintiffs' "need" for the documents does not enter that determination.

Here is what the District Court actually did: After reviewing an 850-document random sample of purportedly privileged documents *in camera* and finding Defendants broadly over-asserted DPP, the court implemented a discovery management tool to identify likely non-privileged documents, while allowing Defendants full opportunity to submit *any* purportedly privileged document for *in camera* review. The District Court did *not* "set aside the deliberative process

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privilege as to all remaining documents,” as Defendants claim. Supp.Br. 5. Tellingly, Defendants offer no response to the *in camera* results, which uncovered “largescale and pervasive failures in [Defendants’] discovery process.” SER 006-009.

Second, Defendants’ supplemental brief confirms this protracted DPP fight is nothing but a game of whack-a-mole this Court should end. In recent months, the District Court has given Defendants exactly what they seek in their petition: the most “granular analysis” possible. *See* Pet. 5. Now that such review has revealed their massive DPP over-designation, Defendants change course and ask this Court to “direct the district court to halt further discovery.” Supp.Br. 8, 10. Not only is this an improper request for *new* mandamus relief in a supplemental brief, but their request also lacks legal support on the merits.

Defendants’ only bases for “halting all further discovery into deliberative materials” are two extreme and completely unsupported arguments this Court has already rejected: (1) discovery should be limited to an “administrative record”; and (2) discovery is barred or limited in “military cases.” Supp.Br. 5-6. But the so-called “administrative record” does not relate to an agency rule-making or

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adjudicatory proceeding—it is not an administrative record at all, and instead is a collection of documents assembled by Defendants’ attorneys after-the-fact. This Court correctly recognized discovery should *not* be confined to that limited record or barred entirely, finding instead that heightened scrutiny is warranted; further discovery is needed to determine the nature and scope of the applicable military deference; and even with a “presumption of deference” to products of independent military judgment—which may or may not be warranted here based on what discovery uncovers—“deference does not mean abdication.” *Karnoski*, 926 F.3d at 1202.

At bottom, Defendants filed a mandamus petition claiming they were entitled to more process in the District Court, yet now that they have received it ask this Court to shut down that process altogether. Their shifting arguments reveal what the government actually wants: dispensation from the truth-seeking process and what it will reveal.

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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 1,396 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 September 4, 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